

# Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals

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[I]n establishing national sovereignties for all national matters, and international sovereignties for all international matters . . . we . . . express the democratic thought that "sovereignty resides in the community."<sup>1</sup>

Emery Reves, 1942

## I. INTRODUCTION

Radovan Karadzic, the Bosnian Serb leader who presided over a brutal war of ethnic cleansing, has twice been indicted for war crimes by a United Nations Tribunal in the Hague.<sup>2</sup> He nonetheless proposed that his case, and those of other indicted Serbs from Bosnia and Herzegovina, be tried locally by the courts of his homeland.<sup>3</sup> The international community immediately dismissed this suggestion as a transparent attempt to circumvent justice.<sup>4</sup> But just why is his proposal unacceptable? Is it because the local Bosnian courts to which he would submit cannot be relied upon to try him fairly,<sup>5</sup> or because the International Tribunal has a prior right to try all the major war crimes cases from the war in Bosnia and Herzegovina?<sup>6</sup> The first explanation assumes the jurisdiction of the International Tribunal to be merely *complementary* to that of national courts, while the second asserts the *primacy* of the International Tribunal over the jurisdiction of *all* national courts.

Until recently, no international court had tried individuals for crimes under international law since the Nuremberg<sup>7</sup> and Tokyo<sup>8</sup> war crimes trials

1. EMERY REVES, A DEMOCRATIC MANIFESTO 60 (1942).

2. See *Prosecutor v. Karadzic*, No. IT-95-18-1 (I.C.T.Y. Nov. 16, 1995) (indictment); *Prosecutor v. Karadzic*, No. IT-95-5-I (I.C.T.Y. July 25, 1995) (indictment).

3. "I propose that the Tribunal transfer my case and those of other Serbs from [Bosnia-Herzegovina] to our judicial system." *France Rejects Bosnia Trial for Karadzic*, AGENCE FRANCE PRESSE, Aug. 7, 1997, available in LEXIS, World Library, Wires File (quoting Karadzic).

4. "What [Karadzic] proposed is unacceptable to the United States and to the international community." "Nowhere to Hide" for War Criminals, *US Says*, AGENCE FRANCE PRESSE, Aug. 8, 1997, available in LEXIS, World Library, Wires File (quoting U.S. envoy Richard Holbrooke).

5. German Foreign Minister Klaus Kinkel accused Radovan Karadzic of trying to seek "à la carte justice" and stressed that "[s]uspected war criminals do not have the possibility of seeking out courts they think are suitable." *German Foreign Minister Says Karadzic Cannot Choose Court*, AGENCE FRANCE PRESSE, Aug. 7, 1997, available in LEXIS, World Library, Wires File.

6. French Foreign Ministry assistant spokesman Yves Doutriaux has said: "The rules have been laid down once and for all. The persons indicted for war crimes, like Radovan Karadzic, must be brought before the ICTY in the Hague and tried by the judges of the ICTY." *France Rejects Bosnia Trial for Karadzic*, *supra* note 3.

7. The International Military Tribunal at Nuremberg was established by an agreement

of the 1940s. The International Criminal Tribunal for the Former Yugoslavia<sup>9</sup> (ICTY) and the International Criminal Tribunal for Rwanda<sup>10</sup> (ICTR) were created ad hoc<sup>11</sup> as responses to crises in the two regions concerned and represented a dramatic step forward for international institutions. These tribunals raised for the first time the question of the appropriate relationship between the jurisdiction of national courts and that of an international criminal court. On its face, the Statute of the ICTY,<sup>12</sup> like that of the ICTR,<sup>13</sup> seems clearly to resolve the jurisdictional conflict in favor of the International Tribunal. While the Statute recognizes that national courts have concurrent jurisdiction<sup>14</sup> over crimes within the competence of these Tribunals, it endows the international bodies with primacy<sup>15</sup> over national courts. This arrangement represents the high-water mark for the priority of international criminal tribunals over national courts.

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between four victorious Allied Powers at the end of World War II. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, reprinted in 39 AM. J. INT'L L. 257 (1945) [hereinafter IMT Charter].

8. The International Military Tribunal for the Far East was established in Tokyo pursuant to the Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Establishment of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20.

9. The International Criminal Tribunal for the Former Yugoslavia was created on May 25, 1993, by U.N. Security Council Resolution 827. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1203 (1993) [hereinafter Resolution 827].

10. The International Criminal Tribunal for Rwanda (ICTR) was created on November 8, 1994, by Security Council Resolution 955. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598 (1994) [hereinafter Resolution 955].

11. The ICTY and ICTR are ad hoc institutions in the sense that each was created by the Security Council as a temporary measure to deal with a specific threat to international peace and security. See Resolution 827, *supra* note 9, ¶ 2 (creating ICTY); Resolution 955, *supra* note 10, ¶ 1 (creating ICTR). The geographic and temporal limits upon the jurisdiction of these two institutions and efforts to create a permanent International Criminal Court (ICC) that would supersede the need for such ad hoc tribunals in the future are discussed *infra* Part III.

12. The Statute of the International Criminal Tribunal for the Former Yugoslavia [hereinafter ICTY Statute], as adopted by the Security Council, is an Annex to the Secretary-General's report on the Tribunal prepared for the Council. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704/Add.1/Corr.1 (1993) [hereinafter *Report of the Secretary-General*]. The Security Council adopted the Secretary-General's draft of the Statute without change in Resolution 827, *supra* note 9.

13. The Statute of the International Tribunal for Rwanda is set out as an Annex to Resolution 955, *supra* note 10 [hereinafter ICTR Statute]. The terms of primacy under article 8 of the ICTR Statute are identical to those applicable to the ICTY under article 9 of the ICTY Statute.

14. "The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991." ICTY Statute, *supra* note 12, art. 9(1).

15. See *id.* art. 9(2). Virginia Morris and Michael Scharf have described primacy as follows:

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

1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 126 n.378 (1995).

The creation of these ad hoc tribunals has advanced the cause of international justice, but it has also raised questions of fairness and political privilege. For example, why have such tribunals been created for the former Yugoslavia and for Rwanda but not for Chechnya, Somalia, Cambodia, or the Persian Gulf War? The answer lies in the process of their creation. The decision to create an ad hoc tribunal falls to the U.N. Security Council and is therefore subject to the full range of considerations that influence that political body. Foremost among these is the possibility of a veto by any of the Security Council's five permanent members. No matter how successful the ad hoc tribunals may be at dealing with specific crisis situations, their selective creation and narrow focus creates an impression of unfairness and unequal treatment.<sup>16</sup>

A permanent International Criminal Court (ICC) might transcend this problem. Such an independent court with global jurisdiction could hold individuals to a worldwide standard of international justice. If not duly prosecuted by the courts of a state, those accused of violating fundamental international norms would be subject to prosecution by the ICC regardless of their nationality or support within U.N. political bodies.<sup>17</sup>

International negotiations concerning the possible creation of such a permanent ICC have been underway since 1994.<sup>18</sup> Many jurisdictional issues remain to be resolved, but it is already clear that the ICC will not have primacy over national courts. Instead, the jurisdiction of the ICC will be based on the vaguely defined concept of "complementarity." While the ultimate form of this complementarity is still being debated, the general notion is that the ICC will only take jurisdiction over a case when there is no credible national court that can and will exercise its national jurisdiction. In effect, complementarity would replace the primacy of international tribunals with priority for national courts.

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,<sup>19</sup> and, more generally, to cooperate with the

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16. M. Cherif Bassiouni, for example, has pointed out the defects of ad hoc tribunals: Because they only try certain offenders in certain conflicts, these tribunals and their laws and penalties raise fundamental questions about compliance with the principles of legality and about general considerations of fairness . . . [A]d hoc tribunals generally do not provide equal treatment to individuals in similar circumstances who commit similar violations. Thus, such tribunals create the appearance of uneven or unfair justice, even when the accused are properly deserving of prosecution.

M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 60 (1997).

17. "A permanent system of international criminal justice based on a preexisting international criminal statute would allow any person from any nation to be held accountable for violations. Equal treatment for violators would be guaranteed." *Id.* at 60.

18. For discussions of recent efforts to create a permanent ICC, see Bassiouni, *supra* note 16, at 59-63; and Leila Sadat Wexler, *The Proposed International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 667-69 (1996).

19. The Statute of the ICTY provides that "[t]he International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present

international court and to obey its orders concerning such matters as the production of evidence and the arrest and detention of persons.<sup>20</sup>

Primacy was authorized by the Security Council decisions that created the ad hoc tribunals in response to specific threats to international peace and security,<sup>21</sup> and it is therefore binding upon all U.N. member states.<sup>22</sup> Creating the ICTY and the ICTR in this way was a shortcut that avoided the need for the negotiation and ratification of a treaty.<sup>23</sup> This approach was acceptable in the case of the ad hoc tribunals because of their limited mandates and jurisdiction, but it would be inappropriate to create a permanent ICC, with general jurisdiction, solely through Security Council decisions.<sup>24</sup> It would also be politically difficult, if not impossible, to do so.

The jurisdiction of a permanent ICC, even one without primacy over national courts, could threaten the sovereignty of more states than does the primacy of the ad hoc Tribunals, whose jurisdiction is strictly limited, both territorially and temporally.<sup>25</sup> The details of a future ICC are still being

Statute and the Rules of Procedure and Evidence of the International Tribunal.” ICTY Statute, *supra* note 12, art. 9(2). States are obliged to comply with these “requests” under article 29 of the Statute, reproduced in full *infra* note 20.

20. A broader manifestation of the primacy of the International Tribunal is the obligation of states to cooperate with it:

*Article 29: Cooperation and judicial assistance*

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
  - (a) the identification and location of persons;
  - (b) the taking of testimony and the production of evidence;
  - (c) the service of documents;
  - (d) the arrest or detention of persons;
  - (e) the surrender or the transfer of the accused to the International Tribunal.

ICTY Statute, *supra* note 12, art. 29.

21. See *Report of the Secretary-General*, *supra* note 12, ¶ 28.

22. See U.N. CHARTER arts. 25, 39–42.

23. See *Report of the Secretary-General*, *supra* note 12, ¶¶ 20, 22–23.

24. The Secretary-General’s Report on the ICTY described the normal approach to creating an international tribunal as follows:

The approach which, in the normal course of events, would be followed in establishing an international tribunal would be the conclusion of a treaty by which the States parties would establish a tribunal and approve its statute. This treaty would be drawn up and adopted by an appropriate international body (e.g., the General Assembly or a specially convened conference), following which it would be opened for signature and ratification. Such an approach would have the advantage of allowing for a detailed examination and elaboration of all the issues pertaining to the establishment of the international tribunal. It also would allow the States participating in the negotiation and conclusion of the treaty fully to exercise their sovereign will, in particular whether they wish to become parties to the treaty or not.

*Id.* ¶ 19.

25. Article 1 of the Statute of the ICTY limits its jurisdiction to the prosecution of “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 . . . .” ICTY Statute, *supra* note 12, art. 1. Thus, the territorial scope of that jurisdiction is limited to the territory of the former Yugoslavia, and the temporal jurisdiction is limited to events occurring since January 1, 1991. The ICTR’s jurisdiction is also limited territorially and temporally to the prosecution of “persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such

negotiated and thus the scope of its subject matter, territorial jurisdiction, and temporal jurisdiction have yet to be conclusively determined. The future jurisdiction of the ICC could potentially extend to international crimes committed in the territory of any state. When an international institution exercises authority over events within a state's territory, the result is often a perception of diminished state sovereignty. When the international institution concerned is a criminal court, the issue is especially sensitive.

The Preparatory Committee negotiations on the ICC have attempted to balance national and international criminal jurisdiction by carefully limiting the latter, and complementarity is not the only device available for this purpose. State consent requirements may effectively limit the number of crimes subject to international jurisdiction. A proposed threshold requirement would constrain the ICC to prosecute only the most serious cases of widespread or systematic criminal activity of concern to the international community as a whole. Finally, the Security Council could help define the ICC's jurisdiction and thereby oversee it directly. Under any scenario of international jurisdiction, the role of the Security Council will be critical. With its Chapter VII powers, it is the only international organ capable of enforcing the authority of international courts. Thus, the terms of the ICC Statute must be acceptable to the five permanent members of the Security Council, who will be in a position to veto decisions essential to support its functions. Those members, who agreed to the creation of the two ad hoc tribunals, face a potentially more threatening institution in the proposed permanent ICC.

Before approving the ICTY and the ICTR, the members of the Security Council were able to assess the probable impact of those tribunals upon their national interests as states. It is much more difficult for these key states, or indeed for states in general, to anticipate the ultimate impact of a permanent ICC upon their interests. Reserving 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. If this role is too great, however, it will compromise the ICC's integrity and credibility. 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.

The experience of the ad hoc tribunals has already shown that the Security Council, a political body, can create a judicial organ in response to a specifically defined threat to international peace and security. That experience has also established that the success of the judicial organ so created depends upon the level of support provided by the Security Council in enforcing its jurisdiction and authority. It remains to be seen whether the key members of the Security Council, including the United States, will agree

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violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 . . . ." ICTR Statute, *supra* note 12, art. 1.

to an ICC with more independence and autonomy than the existing ad hoc tribunals. If not, then the resulting ICC may be little more than a new institutional framework that the Security Council can use instead of new ad hoc international criminal tribunals, and it will do nothing to advance the larger concerns of fairness and equal treatment of all states and violators.

This Article considers the relationship between the jurisdiction of the two ad hoc Tribunals and that of the national courts, and the relevance of their experience with primacy to the scope of the proposed ICC's jurisdiction. It argues that the international community has two options for combining the jurisdiction of international criminal tribunals and national courts into a more effective system for enforcing international criminal law. The first possibility is a "general primacy" for the international tribunal over all national courts such as that provided for in the Statute and the Rules of the ICTY. This approach grants the international tribunal the authority to ensure that the international interest in a fair prosecution will be realized, but in so doing, it compromises the sovereignty of all states. The second option is a "complementary" international criminal jurisdiction that operates only when needed to supplement that of national courts. An international tribunal with this limited jurisdiction can effectively vindicate international interests only if certain essential conditions are met. There must be an impartial, reliable, and depoliticized process for identifying the most important cases of international concern, evaluating the action of national justice systems with regard to those cases, and triggering the jurisdiction of the ICC when it is truly necessary.

Both of these options are difficult for states to accept, but this Article argues that they must adopt one of them if they hope to ensure the prosecution of those who violate fundamental international norms. An ICC based on complementary jurisdiction that lacks a reliable mechanism for evaluating national justice systems and sufficient freedom from jurisdictional restraints would sacrifice the enforcement of international norms on the altar of state sovereignty.

Regardless of the approach taken, the success of international jurisdiction also depends upon the political support of the Security Council, which, at present, is the only international mechanism capable of enforcing the authority of an international court. As a practical matter, this dependency limits both the effectiveness of international criminal tribunals and their independence from political influence. Nonetheless, failing to minimize the institutionalization of this influence in the ICC Statute will needlessly compromise the credibility of the ICC as a fair and impartial institution. If the Security Council can prevent ICC investigations or prosecutions, this will violate the principle of prosecutorial independence. Such a compromise in principle is unnecessary because the role of the Security Council as an essential enforcement mechanism will protect the legitimate interests of states from any potential abuse of international jurisdiction.

This Article begins by discussing the various bases of national court jurisdiction over international crimes and the general problem of concurrent

jurisdiction over those crimes. Part II then examines the primacy of the ad hoc Tribunals over the national courts, drawing out the distinctions between primacy as defined in the Statutes of these Tribunals and primacy as it has developed in practice. First, Part II reviews the scope of primacy as set out in the Statute of the ICTY and in its Rules of Procedure and Evidence, and it discusses the rationale for this principle. It then considers the legal and political implications of certain verbal “reservations” with regard to primacy expressed by four permanent members of the Security Council, focusing in particular upon the implications of these reservations for the enforcement of primacy.

In examining the practical application of primacy and the reluctance of some states to accept it, Part II considers pretrial developments in *Prosecutor v. Tadic*,<sup>26</sup> in which primacy was effectively implemented due to Germany’s willingness to transfer the case from its own jurisdiction to that of the International Tribunal. Once he was in the custody of the ICTY, Tadic attacked the tribunal’s primacy, citing the above-mentioned Security Council reservations as support for his argument that the ICTY’s Statute and its Rules are inconsistent with each other.<sup>27</sup> Although the tribunal rejected Tadic’s legal challenge, it drew attention to the incongruity between the strong primacy established by the Tribunal’s Statute and Rules and the lack of consensus on this issue within the Security Council. Part II concludes that the difficulties some states encounter in accepting the Tribunal’s primacy over national jurisdiction are symptomatic of a general lack of political consensus within the Council concerning the Tribunal. This disagreement has complicated efforts to compel recalcitrant states to cooperate in the Tribunal’s investigations and prosecutions.

Part III focuses on the proposed ICC and the “complementary” relationship it will likely establish between its jurisdiction and that of national courts. It also considers a number of other devices that have been proposed for limiting the ICC’s jurisdiction, including the requirement of state consent to ICC jurisdiction over specific crimes, the possible role of the Security Council in determining the jurisdiction of the ICC, and a proposed threshold requirement that would specifically limit the ICC’s jurisdiction to only the most egregious violations of international law. After concluding that primacy is not a viable alternative for the ICC, this Part examines two alternative approaches to complementarity. One model for the ICC’s complementary jurisdiction would define a set of core crimes as falling within the ICC’s inherent jurisdiction. A second model would allow the ICC to exercise jurisdiction only when national courts are unwilling or unable to do so. This Part argues that only the first of these models would lead to an effective ICC. At the same time, it anticipates that there may be major obstacles to reaching an agreement on the crimes within the ICC’s inherent jurisdiction. This Section concludes that a certain degree of flexibility in the

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26. No. IT-94-1-T (I.C.T.Y. July 7, 1995) (response to defense motion on principle of *non-bis-in-idem*).

27. See *infra* notes 98–111 and accompanying text.



initial definition of complementarity and in the relationship of the Security Council to ICC prosecutions is desirable and even necessary if the ICC is to develop an optimal working balance between national and international criminal jurisdiction.

The Article ends with some general observations about the prospects for an effective ICC based on the experience of the ad hoc Tribunals. The appropriate relationship between national and international jurisdiction depends upon a delicate balance of national interests and international community interests.<sup>28</sup> *Specific* threats to international peace and security in the former Yugoslavia and in Rwanda gave rise to international tribunals appropriately endowed with primacy over national courts. Now, however, as states contemplate a permanent ICC, they must strike a more *general* balance between the traditional state preference for national jurisdiction over crimes, and the need to ensure that fundamental international humanitarian norms will be universally enforced. The Article posits that it will be impossible to create an effective ICC unless those states with the most fair and credible legal systems are willing to accept some compromise in their national criminal jurisdiction, and suggests that compromise is justified by humanitarian interests and the fundamental need to maintain international peace and security.

#### A. *Traditional Bases of National Court Jurisdiction over International Crimes*

International law recognizes a number of distinct principles according to which a state may gain jurisdiction to prosecute criminal acts. Under the territorial principle, one of the most basic aspects of state sovereignty, states have jurisdiction over crimes committed in their territory.<sup>29</sup> Under the nationality principle, which, like the territorial principle, is widely recognized, every state has jurisdiction to prosecute its own nationals for crimes even when committed outside of its own territory.<sup>30</sup> There is little dispute concerning these relatively ordinary<sup>31</sup> bases of state criminal

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28. Branimir Jankovic, for example, argues:

Interest is the subject matter of relations among subjects of public international law. . . . Every international dispute or conflict is a result of clashing interests implicit in the demand by one state for the maintenance of a given situation, or for another state, several states or the international community as a whole, to satisfy its interests. Similarly, several states or the international community may make such a demand upon one state. The world community may consider itself entitled to impose the question of its own, *general interests*, upon a state or several states, and to demand that the common interest be served, which in this instance would appear as an *overriding* interest in terms of general progress or regression in the development of mankind.

BRANIMIR M. JANKOVIC, PUBLIC INTERNATIONAL LAW 2-3 (1984).

29. "The principle that the courts of the place where the crime is committed may exercise jurisdiction has achieved universal recognition, and is but a single application of the essential territoriality of the sovereignty, the sum of legal competences, which a state has." IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 300 (3d ed. 1979).

30. *See id.* at 303.

31. Schwartzberger and Brown distinguish between what they refer to as "the exercise of ordinary personal, territorial and quasi-territorial jurisdiction" and "extraordinary State jurisdiction,"

jurisdiction, but newer and more controversial principles also have gained acceptance. These include the passive personality principle, under which states may claim jurisdiction over crimes committed against their nationals wherever they may occur,<sup>32</sup> and the protective principle, which grants states jurisdiction over aliens for acts committed abroad but that present a threat to the security of the state.<sup>33</sup> Each of these principles is based upon the interests of the particular state concerned in the criminal acts in question.<sup>34</sup>

International law rises above the narrow interests of any state in recognizing the universal jurisdiction of all states to prosecute those believed to be responsible for certain special crimes of concern to the entire international community.<sup>35</sup> This extraordinary jurisdiction was first applied to pirates, who were recognized as *hostes humani generis*, enemies of all humankind,<sup>36</sup> and was extended to slave traders in the nineteenth century when international law forbade that commerce. Today, this universal jurisdiction applies to the serious violations of international humanitarian law that fall under the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>37</sup>

The cumulative effect of these different principles of jurisdiction sometimes is to vest multiple states with concurrent jurisdiction to prosecute a given crime.<sup>38</sup> Thus, if a Croatian citizen (nationality jurisdiction of

such as that over pirates and war criminals of any nationality. GEORG SCHWARTZENBERGER & E.D. BROWN, *A MANUAL OF INTERNATIONAL LAW* 75 (6th ed. 1976).

32. See BROWNIE, *supra* note 29, at 303; Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 297 (1988).

33. See BROWNIE, *supra* note 29, at 303.

34. See JANKOVIC, *supra* note 28, at 2-4 (linking state interests with various principles invoked to confer jurisdiction); see also Sung Teak Kim, *Adjudicating Violations of International Law: Defining the Scope of Jurisdiction Under the Alien Tort Law*, 27 CORNELL INT'L L.J. 387, 415 (1994) (noting that under protective principle, state has jurisdiction to prescribe regarding conduct against its vital interests, and that universal jurisdiction allows all states to punish offenses contrary to international community). On the potentially overbroad scope of the protective principle, Brownlie notes that "[i]nsofar as the protective principle rests on the protection of concrete interests, it is sensible enough: however it is obvious that the interpretation of the concept of protection may vary widely." BROWNIE, *supra* note 29, at 304.

35. Brownlie notes that "[a] considerable number of states have adopted, usually with limitations, a principle allowing jurisdiction over acts of non-nationals where the circumstances, including the nature of the crime, justify the repression of some types of crime as a matter of international public policy." BROWNIE, *supra* note 29, at 304.

36. See J. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 311 (6th ed. 1963).

37. The American Law Institute's Restatement endorses a very long list of crimes subject to universal jurisdiction. "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . . ." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1990). Brownlie distinguishes the generally accepted right of any state to try and punish war criminals from the principle of universality, which in his view is still disputed. He notes that "[i]n so far as the invocation of the principle of universality in cases apart from war crimes and crimes against humanity creates misgivings, it may be important to maintain the distinction." BROWNIE, *supra* note 29, at 305.

38. "Jurisdiction is not based upon a principle of exclusiveness: the same acts may be within the lawful ambit of one or more jurisdictions." BROWNIE, *supra* note 29, at 310.

Croatia) committed war crimes in Bosnia-Herzegovina (territorial jurisdiction of Bosnia-Herzegovina) against prisoners of war who were citizens of the Federal Republic of Yugoslavia (passive personality jurisdiction of the Federal Republic of Yugoslavia), and that Croatian were then to immigrate to Austria (which, like any state, could claim universality jurisdiction), each and every one of these states could legitimately and concurrently could claim jurisdiction to prosecute him for those crimes. The question is how to reconcile or prioritize these competing jurisdictional claims.

Sovereignty over territory and authority over nationals are two of the most basic aspects of statehood, and it therefore could be argued that the territorial and nationality principles are more fundamental than other competing principles of jurisdiction, but international law establishes no definite priority among them. Conflicts between states resulting from this overlapping concurrent jurisdiction are generally resolved through comity and cooperation, with treaties on extradition or judicial assistance providing the legal framework for interstate cooperation. In the absence of an extradition treaty, however, a state has no general legal obligation to extradite a person within its territory to another state for prosecution. But certain multilateral treaties, such as the Geneva Conventions of 1949 and the 1948 Genocide Convention, do create an obligation for states to prevent impunity for certain defined international crimes either by prosecuting those in their territory believed to be responsible for such crimes, or, alternatively, by handing them over to another state for prosecution.<sup>39</sup> This obligation is a pillar of the basic international regime applicable to crimes under international humanitarian law, but nothing in that regime establishes a priority among the competing jurisdictional claims of states over such crimes. Voluntary interstate cooperation cannot resolve what the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has referred to as the “perennial danger of international crimes being characterised as ‘ordinary crimes’ (Statute of the International Tribunal, art. 10, para. 2(a)), or proceedings being ‘designed to shield the accused’, or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b)).”<sup>40</sup>

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39. The High Contracting parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting party concerned, provided such High Contracting party has made out a prima facie case.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287.

40. Prosecutor v. Tadic, No. IT-94-1, ¶ 58 (I.C.T.Y. Oct. 2, 1995) (appeal on jurisdiction) [hereinafter *Appeals Decision on Jurisdiction*].

## B. *An Innovation: The Jurisdiction of International Criminal Tribunals*

The U.N. Security Council created the ICTY<sup>41</sup> to deal with the unique situation in the former Yugoslavia and granted it jurisdiction to investigate, prosecute, and try individuals for serious violations of international humanitarian law<sup>42</sup> as defined in its Statute and by the applicable treaties and customary international law.<sup>43</sup> The Security Council is a political organ responsible for maintaining and restoring international peace and security,<sup>44</sup> but it often must consider rules of international law and evaluate violations of that law as well.<sup>45</sup> Prior to the ICTY, however, the Council had never before created a judicial organ.<sup>46</sup>

In its resolution creating the ICTY, the Security Council explained that it was acting to put an end to the crimes being committed, to bring to justice the persons responsible, and to contribute to the restoration and maintenance of peace.<sup>47</sup> According to article 9 of its Statute, the ICTY and the appropriate national courts have concurrent jurisdiction over crimes within the Tribunal's competence. But the ICTY has the special mission of helping to bring peace to the former Yugoslavia, and, to accomplish this goal, it needs more than simple concurrent jurisdiction. Therefore, the Statute grants it primacy over the jurisdiction of national courts.

## II. THE PRIMACY OF THE AD HOC TRIBUNALS

The creation of ICTY and the ICTR raised questions concerning the appropriate relationship between these international ad hoc institutions and national courts. The Statutes of these Tribunals recognize that national courts

41. The creation of the ICTY was based upon the Security Council's determination that widespread atrocities in the territory of the former Yugoslavia constituted a threat to international peace and security. *See* Resolution 827, *supra* note 9. Another ad hoc tribunal, the ICTR, was created to deal with a similarly disturbing situation in that country. *See* Resolution 955, *supra* note 10; ICTR Statute, *supra* note 13.

42. The ICTY consists of three organs: the judges' Chambers, comprising two three-judge Trial Chambers and a five-judge Appeals Chamber; the Prosecutor and a staff that investigate evidence of crimes, formulate indictments, and prosecute; and a Registry servicing the administrative needs of both the Chambers and the Prosecutor. The eleven judges are elected by the U.N. General Assembly for two-year terms, and no two of them can be nationals of the same state. *See* ICTY Statute, *supra* note 12, arts. 11–12.

43. *See supra* note 25.

44. *See* U.N. CHARTER art. 24(1) (providing that members of United Nations "confer on the Security Council primary responsibility for international peace and security").

45. *See, e.g.,* S.C. Res. 1034, 3612th Meeting, U.N. Doc. S/RES/1034, at 2 (1995) ("[c]ondemning in particular in the strongest possible terms the violations of international humanitarian law and of human rights by Bosnian Serb and paramilitary forces in the areas of Srebrenica, Zepa, Banja Luka and Sanski Most . . . and showing a consistent pattern of summary executions, rape, mass expulsions, arbitrary detentions, forced labour and large-scale disappearances"); S.C. Res. 670, 2943d Meeting, U.N. Doc. S/RES/670, at 1 (1990) ("[c]ondemning . . . the treatment by Iraqi forces of Kuwaiti nationals, including measures to force them to leave their own country and mistreatment of persons and property in Kuwait in violation of international law").

46. The International Military Tribunal at Nuremberg was established by an agreement among the World War II Allies, not by the Council. *See supra* note 7.

47. *See* S.C. Res. 808, U.N. Doc. S/RES/808 preambular ¶¶ 8–9 (1993); Resolution 827, *supra* note 9, preambular ¶¶ 5–6.

have concurrent jurisdiction while clearly asserting the primacy of the International Tribunals.<sup>48</sup> This extraordinary jurisdictional priority is justified by the compelling international humanitarian interests involved and by the Security Council's determination that the situation in the former Yugoslavia, as well as that in Rwanda, constituted a threat to international peace and security. Many questions remain, however, concerning the scope of this primacy and the range of situations where it can appropriately be exercised. The practice and application of primacy, both in the ICTY and the ICTR, foreshadows the political and legal disputes over the creation of a permanent International Criminal Court (ICC) and the possible contours of its jurisdiction.

#### A. *The Role of Primacy in the ICTY*

##### 1. *Primacy Under Article 9 of the Statute*

Under article 9 of the ICTY Statute, the International Tribunal and national courts have concurrent jurisdiction over serious violations of international humanitarian law within the Tribunal's competence.<sup>49</sup> This concurrent jurisdiction, however, is subject to the Tribunal's primacy.<sup>50</sup> According to the Statute, primacy means that "at any stage of the procedure," the International Tribunal may formally request national courts to defer to its competence.<sup>51</sup> Thus, even though a state has both custody of a person accused of war crimes and concurrent jurisdiction to try him, that state is required to yield its jurisdiction once the Tribunal makes a formal "request" for deferral.<sup>52</sup> This deferral process raises a number of delicate political issues,<sup>53</sup> and there has been disagreement from the start on

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48. See ICTY Statute, *supra* note 12, art. 9; ICTR Statute, *supra* note 13, art. 8 (containing identical language). Although the discussion of primacy in this Section refers only to the ICTY Statute, the legal considerations discussed are equally relevant to the ICTR.

49. See ICTY Statute, *supra* note 12, art. 9(1). This article reads as follows:

*Article 9: Concurrent jurisdiction*

1. The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

50. See *id.*

51. See *id.*

52. Deferral is the Prosecutor's formal request made to a Trial Chamber that a state defer to the Tribunal's jurisdiction and pass the results of its inquiries in the matter considered to the Office of the Prosecutor. If such a request is issued, the Office of the Prosecutor incorporates the investigations from the national authorities into its own investigation, and the persons under investigation become subject to prosecution solely before the Tribunal. See *id.*

53. M. Cherif Bassiouni has observed that "[o]f all the provisions of the Statute, those concerning deferral are likely to have the most political significance. They also have the greatest potential for protracted legal and political maneuvers." M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 319 (1996).

fundamental aspects of its operation.<sup>54</sup> The Statute's use of the term "request" may be interpreted as meaning that deferral is not legally required,<sup>55</sup> but the judges of the Tribunal have endorsed a much stronger view of primacy and deferral.<sup>56</sup>

## 2. *Primacy Under the Rules of Procedure and Evidence*

Article 15 of the Statute empowers the Tribunal's judges to adopt rules of procedure and evidence "for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters."<sup>57</sup> Rules 8 through 13 expound upon the primacy of the Tribunal over national courts and set out the process by which it may assert that primacy.

When proceedings that appear to concern crimes within the jurisdiction of the International Tribunal begin in any state, the Prosecutor may request information from that state regarding its national criminal proceedings.<sup>58</sup> Rule 9 sets out three grounds that the Prosecutor may invoke in asking that the Trial Chamber issue a formal request for deferral. Thus, the Prosecutor may initiate the deferral process if the act being investigated by the national court or the subject of the proceeding is being characterized as an ordinary crime, if the national proceedings are a sham, or if what is at issue in the national proceedings is closely related—factually or legally—to investigations or prosecutions before the Tribunal.<sup>59</sup>

The manner in which Rule 9 expands upon the general concept of primacy set out in article 9 of the Statute has generated some controversy. The first two grounds for deferral listed in that Rule reflect extraordinary and somewhat troubling situations specifically mentioned in the Statute under article 10 on *non-bis-in-idem*. *Non-bis-in-idem* is similar to the American

54. See, e.g., *infra* note 69 (quoting statements by members of Security Council upon adoption of ICTY).

55. See Philippe Weckel, *L'institution d'un tribunal internationale pour la répression des crimes de droit humanitaire en Yougoslavie*, 39 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONALE 232, 258-59 (1993), quoted in BASSIOUNI & MANIKAS, *supra* note 53, at 313-14 (suggesting that the obligation to comply with requests and orders of ICTY under article 29 of its Statute does not apply to requests for deferral).

56. "[W]hen an international tribunal such as the present one is created, it must be endowed with primacy over national courts." *Appeals Decision on Jurisdiction*, *supra* note 40, ¶ 58; see also MORRIS & SCHARF, *supra* note 15, at 131 (concluding that compliance with request for deferral is obligation under article 29 of ICTY Statute).

57. ICTY Statute, *supra* note 12, art. 15.

58. See ICTY RULES OF PROCEDURE AND EVIDENCE, Rule 8, U.N. Doc. IT/323/Rev.10 (1996) [hereinafter ICTY RULES]. Rule 8, unlike Rule 9 discussed below, specifically provides that compliance with these requests is to be legally binding under article 29 of the Statute.

Rule 8

Request for Information

Where it appears to the Prosecutor that a crime within the jurisdiction of the Tribunal is or has been the subject of investigations or criminal proceedings instituted in the courts of any State, he may request the State to forward to him all relevant information in that respect, and the State shall transmit to him such information forthwith in accordance with article 29 of the Statute.

59. *Id.* Rule 9. The full text of this rule is set forth below:

concept of double jeopardy; the purpose of article 10 is to prevent subsequent retrials for the same criminal acts except when necessary to promote the interests of justice. Article 10(1) categorically forbids retrial before national courts for acts adjudicated by the International Tribunal,<sup>60</sup> but article 10(2) recognizes two special situations where the *non-bis-in-idem* principle does not apply.<sup>61</sup> These two situations essentially involve inadequate national prosecutions, and they were incorporated into the Tribunal's Rule 9 as grounds for requesting the deferral of national court cases to the Tribunal.<sup>62</sup> The third ground for requesting deferral under Rule 9 does not require that there be any deficiency in the national prosecution, nor does it restate or reflect any specific language included in the Statute. Rather, Rule 9(iii) allows the Prosecutor to request deferral solely because the national proceedings overlap in some way with an investigation or prosecution of the International Tribunal. Thus, the Tribunal can assert its primacy in virtually any situation, not merely when it will remedy specific problems with an ongoing national proceeding. This distinguishes the primacy of the ad hoc Tribunals from the lesser "complementary jurisdiction" that has been proposed for a future permanent ICC.<sup>63</sup>

*Rule 9: Prosecutor's Request for Deferral*

Where it appears to the Prosecutor that in any such investigations or criminal proceedings instituted in the courts of any State:

- (i) the act being investigated or which is the subject of those proceedings is characterized as an ordinary crime;
- (ii) there is a lack of impartiality or independence, or the investigations or proceedings are designed to shield the accused from international criminal responsibility, or the case is not diligently prosecuted; or
- (iii) what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal,

the Prosecutor may propose to the Trial Chamber designated by the President that a formal request be made that such court defer to the competence of the Tribunal.

60. See ICTY Statute, *supra* note 12, art. 10(1). The full text of article 10 follows:

*Article 10: Non-bis-in-idem*

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal.
2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if:
  - (a) the act for which he or she was tried was characterized as an ordinary crime; or
  - (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

61. See *id.* art. 10(2).

62. See *supra* note 59 and accompanying text.

63. At least one analysis of the ICTY Statute and Rules has suggested that the operation of the ICTY's concurrent jurisdiction should be understood as follows:

[I]t is much like the scheme proposed by the ILC in its draft statute for an international criminal court. In the preamble to the draft, the ILC states that an international criminal

One reason for granting the international tribunals such broad primacy over national courts is to prevent multiple courts from simultaneously exercising jurisdiction over an accused. If courts from different nations were allowed contemporaneously to prosecute the same war criminals from the Yugoslav conflict, chaos could ensue. First, simultaneous jurisdiction could cause evidentiary problems resulting from the different investigative procedures employed in each individual system.<sup>64</sup> Second, evidence could be destroyed or damaged if it were in more than one trial.<sup>65</sup> Third, witnesses might be more reluctant to testify in front of the Tribunal for fear of facing physical danger as a result of their cooperation.<sup>66</sup> Fourth, the antagonism among the Croats, Serbs, and Muslims has been so intense that if a court dominated by one of these groups were to try an accused war criminal of its own ethnicity, or even of a rival ethnicity, the national court proceedings would not appear impartial or independent.<sup>67</sup>

In the *Decision on the Defence Motion on Jurisdiction for Dusko Tadic*, the Tribunal observed that allowing concurrent jurisdiction without granting primacy to the Tribunal would, in effect, permit the accused "to select the forum of his choice, contrary to the principles relating to coercive criminal jurisdiction."<sup>68</sup> Forum shopping would entitle the accused to pick a sympathetic court and might result in a biased trial. In a nutshell, primacy fulfills the need for a single court in which to litigate all claims relating to the atrocities committed in the former Yugoslavia.

## B. *Statements by Security Council Members on Primacy*

### 1. *Statements Purporting to Limit Primacy*

The purpose of primacy is to ensure that minimum standards of justice and impartial adjudication will be met in cases of great international concern—a category that includes all cases within the jurisdiction of the ad hoc tribunals because of their link to a "threat to the peace" recognized by the Security Council. But states sometimes will be reluctant to turn over an accused for trial before an international tribunal, and the obligation to do so raises issues of sovereignty. Moreover, doubts about the scope of this primacy arose from the moment that the ICTY Statute was adopted.

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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 . . . ."

BASSIOUNI & MANIKAS, *supra* note 53, at 312 (quoting *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994)) (footnote omitted). The concept of complementary jurisdiction as applied to a future ICC is discussed in greater detail below. *See infra* notes 176–214 and accompanying text.

64. *See* Prosecutor v. Karadzic, No. IT-95-5-D, ¶ 24 (I.C.T.Y. May 15, 1995) (request for deferral).

65. *See id.* ¶ 28.

66. *See id.* ¶ 27.

67. *See Proposal for an International War Crimes Tribunal for the Former Yugoslavia*, U.N. SCOR, 48th Sess., U.N. Doc. S/25307 (1993).

68. Prosecutor v. Tadic, No. IT-94-1-T, ¶ 41 (I.C.T.Y. Aug. 10, 1995) (defense motion on jurisdiction).



Immediately after the Security Council approved that Statute, four permanent members of the Council made statements purporting to limit the scope of the Tribunal's primacy.<sup>69</sup> These statements are significant, because if key members of the Security Council cannot fully accept of the ICTY's primacy, other states will be reluctant to do so as well.

Both the French and American Ambassadors to the United Nations, Jean Bernard Merimée and Madeleine Albright, asserted that the primacy of the Tribunal, as stated in article 9(2), refers only to the situations described in article 10.<sup>70</sup> Similarly, David Hannay, the U.N. Ambassador from the United Kingdom, stated that "the primacy of the Tribunal . . . relates primarily to the courts in the territory of the former Yugoslavia; elsewhere it will only be" applicable to the circumstances outlined in article 10(2).<sup>71</sup> Yuli Vorontsov, the Russian Ambassador to the United Nations, formulated an even more fundamental challenge to primacy by suggesting that the provisions of article 9, paragraph 2 do not in fact require states to defer proceedings to the Tribunal, but merely "denote the duty of a State to give very serious consideration to a request by the Tribunal to refer to it a case that is being considered in a national court."<sup>72</sup>

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69. The relevant parts of the statements made by representatives to the U.N. Security Council immediately after the adoption of Resolution 827, which established the International Tribunal, are reproduced here in their entirety. For the complete transcripts, see *Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting*, U.N. Doc. S/PV.3217 (1993) [hereinafter *Statements from the Provisional Verbatim Record*].

Mr. Merimée (France):

"Thirdly, we believe that, pursuant to Article 9, paragraph 2, the Tribunal may intervene at any stage of the procedure and assert its primacy, including from the stage of investigation where appropriate, in the situations covered under Article 10, paragraph 2."

*Id.* at 11.

Mrs. Albright (United States of America):

"Thirdly, it is understood that the primacy of the International Tribunal referred to in paragraph 2 of Article 9 only refers to the situations described in Article 10."

*Id.* at 16.

Sir Hannay (United Kingdom):

"Articles 9 and 10 of the Statute deal with the relationship between the International Tribunal and national courts. In our view, the primacy of the Tribunal, referred to in Article 9, paragraph 2, relates primarily to the courts in the territory of the former Yugoslavia; elsewhere it will only be in the kinds of exceptional circumstances outlined in Article 10, paragraph 2, that primacy should be applicable."

*Id.* at 18-19.

Mr. Vorontsov (Russian Federation)

"As we understand it, the provisions of Article 9, paragraph 2, denote the duty of a State to give very serious consideration to a request by the Tribunal to refer to it a case that is being considered in a national court. But this is not a duty automatically to refer the proceedings to the Tribunal on such a matter. A refusal to refer the case naturally has to be justified. We take it that this provision will be reflected in the rules of procedure and the rules of evidence of the Tribunal."

*Id.* at 46.

70. *See id.*

71. *Id.* at 18.

72. *Id.* at 45.

## 2. *The Legal Effect of These Statements*

The U.N. Charter sets out in some detail the rules governing the legal effect of decisions by the Security Council. Decisions must win the affirmative votes of seven of the fifteen members of the Council, subject to the veto of any of the permanent members,<sup>73</sup> and the members must accept and carry out decisions made in accordance with the Charter.<sup>74</sup> Nowhere, however, does the Charter address the issue of whether statements by members of the Security Council made subsequent to the adoption of a binding decision can alter the scope of the obligations created by the clear terms of that decision.

The interpretative statements that Merimée, Albright, and Vorontsov read into the record betray the Security Council's concern about the terms of the ICTY Statute.<sup>75</sup> The Council could have insisted upon modifying the draft Statute before approving it but chose instead to approve it without changes, hoping thereby to avoid a prolonged process of negotiation and political compromise detrimental to the success of the Tribunal.<sup>76</sup> How, then, is the Statute to be interpreted in light of the difference between its express terms and the interpretative statements of key members concerning primacy?

The Vienna Convention on the Law of Treaties incorporates a well-developed set of treaty interpretation rules, but these are not directly applicable here because a decision of the Security Council is not a treaty.<sup>77</sup> The Convention dictates that the interpreter consider the ordinary meaning of the terms used, the context of the agreement, and its object and purpose,<sup>78</sup> as well as any subsequent agreement between the parties as to the treaty's interpretation.<sup>79</sup>

73. See U.N. CHARTER art. 27.

74. See *id.* art. 25.

75. The statements made in this way were by no means limited to the issue of primacy. They also addressed questions such as the scope and applicability of articles 2 and 3 of the Statute and whether crimes not committed in the context of armed conflict could be prosecuted by the Tribunal as crimes against humanity under article 5 of the Statute. See generally *Statements from the Provisional Verbatim Record*, *supra* note 69.

76. "While there was some dissension among the members of the Security Council, there was also a strong hesitancy to open the draft statute to modification which could have resulted in lengthy negotiations and undesirable political compromises." 1 MORRIS & SCHARF, *supra* note 15, at 33.

77. The Vienna Convention on the Law of Treaties defines "treaty" as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation . . ." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 2(1)(a), 1155 U.N.T.S. 331, 8 I.L.M. 679, 681. The U.N. Charter is a treaty that gives the decisions of the Security Council their binding force, but these decisions themselves do not fall within the definition of a "treaty."

78. "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *Id.* art. 31(1), 8 I.L.M. at 691-92.

79. "There shall be taken into account, together with the context: . . . (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." *Id.* art. 31(3)(a)-(b), 8 I.L.M. at 692.

There are no "parties" to decisions of the Security Council, and this fact makes them fundamentally different from treaties. While the members of the Security Council are in some ways analogous to parties to the Council's decisions, it must be noted that, unlike treaties, these decisions are binding not only upon a narrowly defined group of parties but upon all the members of the United Nations.<sup>80</sup> This distinction justifies the application of greater limits to the right of these decisionmakers to modify the legal effect of these decisions by their agreements, their practice, or by other evidence of their interpretation.

The International Tribunal has already established that in appropriate cases, it will consider interpretative statements by Security Council members to be "authoritative interpretations" if they were uncontested when made before the Council.<sup>81</sup> But while members' statements provide some evidence of an agreement among Council members on a narrow interpretation of primacy, that evidence is far from conclusive. One problem is that only four of the fifteen members of the Council made statements concerning primacy.

Three other factors minimize the legal effect of these statements. First, there are inherent contradictions among the four statements presented. The statements by the United States and France, on the one hand, proclaim that primacy will be limited to the situations described in article 10(2) of the Statute (i.e., those in which national court proceedings would not lead to an impartial trial for serious international crimes).<sup>82</sup> On the other hand, the British statement asserts that there will be two different standards of primacy: a true and effective primacy over the courts of states within the territory of the former Yugoslavia, and a weaker qualified primacy such as that endorsed by the United States and the United Kingdom applicable to relations with other national courts.<sup>83</sup> The United Kingdom's statement is the only one that endorses this double standard. The statement by the Russian Federation, however, goes even further, asserting that primacy denotes not a duty to defer cases to the International Tribunal but only "the duty of a State to give very serious consideration to a request by the Tribunal to refer to it a case that is being considered in a national court."<sup>84</sup> Statements by Security Council members establish their dissatisfaction with the scope of primacy as set out in article 9 of the Statute, but they do not reveal a consensus on the scope of that primacy that could be accepted by the ICTY as an authoritative

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80. See U.N. CHARTER art. 25.

81. Both the Appeals Chamber and Trial Chamber II have addressed this issue directly, although neither has considered the effect of statements relating to primacy. "Since no delegate contested these declarations, they can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law." *Appeals Decision on Jurisdiction*, *supra* note 40, ¶ 88. Importantly, several permanent members of the Security Council commented that they interpret "when committed in armed conflict" in article 5 of the Statute to mean "during a period of armed conflict." These statements were not challenged and can thus, in line with the Appeals Chamber Decision, be considered authoritative interpretations of this portion of Article 5." *Prosecutor v. Tadic*, No. IT-94-1, ¶ 631 (I.C.T.Y. May 7, 1997) (final judgment).

82. See *Statements from the Provisional Verbatim Record*, *supra* note 69, at 11, 16.

83. See *id.* at 18-19.

84. *Id.* at 46.

interpretation of that article.

A second factor mitigating the effect of the aforementioned statements is the caveat at the end of article 9 that primacy will be in accordance "with the present Statute and the Rules of Procedure and Evidence of the International Tribunal,"<sup>85</sup> and the fact that the Statute grants to the judges of the Tribunal the authority to adopt these rules.<sup>86</sup> Thus, the strong form of primacy recognized by Rule 9(iii) is supported not only by the Statute's language on primacy,<sup>87</sup> but also by that part of the Statute that empowers the judges to adopt the rules.<sup>88</sup>

Developments surrounding the creation of the ICTR constitute yet another factor militating against the effect of Security Council statements purporting to limit the scope of primacy. The ICTR was created in 1994 to "prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994."<sup>89</sup> The Statute of the International Criminal Tribunal for Rwanda (ICTR Statute) is quite similar to that of the ICTY, but there is a key difference in its primacy clause. The ICTR Statute accords it "primacy over the national courts of *all States*,"<sup>90</sup> language that is stronger than the more ambiguously worded grant of "primacy over national courts"<sup>91</sup> in the ICTY Statute. This change suggests that a stronger consensus on primacy developed within the Security Council after the initial reactions against it. The change also rejects the view, raised in the Security Council by the United Kingdom, that the primacy of the Tribunal relates primarily to national courts in the region of strife.<sup>92</sup>

The creation of a second international criminal tribunal gave the Security Council<sup>93</sup> the opportunity to make any changes it might have deemed necessary, including any with regard to the controversial issue of primacy. By adopting an ICTR Statute that requires *all states* to defer to the competence of the Tribunal, the Security Council has in effect ratified the broad basis for primacy and deferral endorsed in ICTY Rule 9(iii), an

85. ICTY Statute, *supra* note 12, art. 9(2).

86. The ICTY Statute provides that "[t]he judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters." ICTY Statute, *supra* note 12, art. 15.

87. *See id.* art. 9(2).

88. *See id.* art. 15.

89. ICTR Statute, *supra* note 13, art. 1.

90. *Id.* art. 8(2) (emphasis added).

91. ICTY Statute, *supra* note 12, art. 9(2).

92. *See Prosecutor v. Tadic*, No. IT-94-1-T, ¶¶ 31-33 (I.C.T.Y. Nov. 14, 1995) (motion on principle of *non-bis-in-idem*) [hereinafter *Decision on Non-bis-in-idem*].

93. The Security Council itself drafted neither the Statute of the ICTY nor that of the ICTR. This work was done by specialists working at the U.N. Secretariat. "The Security Council's adoption of the [ICTY] draft statute without change and in a relatively short period of time confirmed the general acceptance of its provisions. While there was some dissension among the members of the Security Council, there was also some hesitancy to open the draft statute to modification which could have resulted in lengthy negotiations and undesirable political compromises." 1 MORRIS & SCHARF, *supra* note 15, at 33.

approach also incorporated into the rules of the ICTR.<sup>94</sup>

### C. *Primacy in Practice*

Primacy has encountered many difficulties in practice, as evidenced by the number of those indicted by the ICTY who are still not in its custody. The case of Dusko Tadic, the first to be indicted, tried, and convicted by the ICTY, also involved its first application of the primacy doctrine. Tadic's attorneys challenged the Tribunal's doctrine of primacy and, in effect, the relationship between the ICTY and national courts. Although the ICTY judges rejected Tadic's challenge, his arguments did reveal some previously hidden problems with the doctrine. These will be discussed below. Ironically, it was in Tadic's case that primacy proved most effective: The defendant had been arrested and was awaiting trial in Germany when the ICTY requested that the German government defer the case to the International Tribunal. Germany willingly complied.

Although many countries, including most of those in the territory of the former Yugoslavia, have been reluctant to acknowledge the primacy of the International Tribunal over their national courts, others have expressed full acceptance. Germany, for example, enacted a law stating that the government would cooperate and comply with all deferral requests by the Tribunal,<sup>95</sup> thus facilitating the transfer of Tadic's case from the Bavarian courts to the ICTY. A number of other states, including the United States,<sup>96</sup> have enacted national implementing legislation similar to Germany's.<sup>97</sup>

#### 1. *Challenges to Primacy in the Tadic Case*

Dusko Tadic was indicted by the Hague Tribunal on multiple counts of crimes within the jurisdiction of the Tribunal.<sup>98</sup> In a request for deferral based upon Rule 9(iii), the Prosecutor, Richard J. Goldstone, argued that the Tribunal was the "only proper forum for trying those accused of playing leading roles in" the ethnic cleansing in Bosnia-Herzegovina.<sup>99</sup> Additionally, Goldstone asserted that the "legal issues which will arise in a trial of Tadic

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94. ICTR RULES OF PROCEDURE AND EVIDENCE, Rule 9(iii), U.N. Doc. ITR/3/Rev.1 (1995).

95. See Decision on *Non-bis-in-idem*, *supra* note 92, ¶ 14.

96. Under U.S. implementing legislation, the provisions of U.S. law "relating to the extradition of persons to a foreign country pursuant to a treaty or convention for extradition between the United States and a foreign government, shall apply in the same manner and extent to the surrender of persons, including United States citizens, to [the ICTY and the ICTR]." See Act of Feb. 10, 1996, Pub. L. No. 104-106, 110 Stat. 486 (codified at 18 U.S.C. § 1342 (1998)).

97. For the text of implementing legislation enacted by Denmark, Finland, Italy, the Netherlands, Norway, Spain, and Sweden, see ICTY YEARBOOK 1994, ch. V, Annex 1, at 155-89.

98. The original indictment and the two amended indictments that followed charged Tadic with grave breaches of the Geneva Conventions of 1949, violations of the laws and customs of war, and crimes against humanity. See Prosecutor v. Tadic, No. IT-94-1-T (I.C.T.Y. Dec. 14, 1995) (Tadic & Borovnica indictments) (amended).

99. *In re Tadic*, No. IT-94-1-D (I.C.T.Y. Nov. 8, 1994) (application for deferral by Federal Republic of Germany).

are central to the jurisdiction of this Tribunal . . . [and that] the investigation by Germany concerns an issue closely related to and involves significant factual and legal questions which will have implications for investigations currently taken by me."<sup>100</sup>

While in Germany, Tadic did not oppose the deferral and transfer of his case to the ICTY, perhaps because he was charged with even more serious crimes (including genocide) under German law than by the Tribunal's indictment. After his transfer to the Hague, however, his lawyers challenged the deferral of his case in two separate motions. The first was a broad-based challenge to the Tribunal's jurisdiction. It argued, among other things, that the primacy of the International Tribunal over domestic courts was unjustified, that it violated the domestic jurisdiction of states and their sovereignty,<sup>101</sup> and that the transfer of Tadic's case from Germany violated the principle of *jus de non evocando*. Both the Trial Chamber and the Appeals Chamber rejected this attack on the Tribunal's primacy. In doing so, the Appeals Chamber asserted that primacy was a functional necessity for an international criminal tribunal:

Indeed, when an international tribunal such as the present one is created, it *must* be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as "ordinary crimes" (Statute of the International Tribunal, art. 10, para. 2(a)), or proceedings being "designed to shield the accused," or cases not being diligently prosecuted (Statute of the International Tribunal, art. 10, para. 2(b)).

If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute.

The principle of primacy of this International Tribunal over national courts must be affirmed; the more so since it is confined within the strict limits of Articles 9 and 10 of the Statute and Rules 9 and 10 of the Rules of Procedure of the International Tribunal.<sup>102</sup>

Tadic filed yet another challenge to primacy in a separate motion on *non-bis-in-idem*, alleging in essence that he was being tried for a second time for the same offenses.<sup>103</sup> He first argued that deferral to the competence of the Tribunal was not appropriate because a prosecution against him already had begun in Germany.<sup>104</sup> But even though the pretrial proceedings had reached the "final stage" (the trial stage of the German criminal proceeding), Tadic had not been "tried"<sup>105</sup> insofar as he had been neither convicted nor acquitted by the German court. The defense admitted that the proceedings had not progressed to the point where Tadic had been "tried" within the

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100. *Id.* (paraphrasing Rule 9(iii)). The relevant text of Rule 9(iii) is reproduced *supra* note 60.

101. "[The International Tribunal's] primacy over domestic courts constitutes an infringement upon the sovereignty of the States directly affected." Prosecutor v. Tadic, No. IT-94-1-T, ¶ 2 (I.C.T.Y. June 23, 1995) (motion on jurisdiction).

102. *Appeals Decision on Jurisdiction*, *supra* note 40, ¶¶ 58-59.

103. *See Decision on Non-bis-in-idem*, *supra* note 92, ¶ 3.

104. *See id.* ¶ 2.

105. *Id.* ¶ 4.

meaning of the Statute;<sup>106</sup> thus, the deferral request was still appropriate. Moreover, while the Prosecutor did not focus on article 9 in refuting Tadic's argument, the request for deferral complied fully with article 9(2), which permits deferral at any stage of the criminal proceedings.<sup>107</sup>

## 2. *Tadic's Use of Security Council Statements to Link Deferral to Double Jeopardy*

The primacy of the International Tribunals over national courts, established by article 9 of the Statute, is not on its face limited by or in any way connected to the provisions of article 10 on *non-bis-in-idem*. Nonetheless, statements by four of the permanent members of the Security Council do recognize such a link between the two articles. In his *non-bis-in-idem* challenge to the Tribunal's jurisdiction, Tadic seized upon statements made by the representatives of Security Council members regarding Rule 9 and article 10 in an attempt to link the principle of primacy and the *non-bis-in-idem* provisions of article 10(2).<sup>108</sup> Tadic argued that the "Statute permits deferral under Article 9 only under the circumstances described in Article 10(2) which are reflected in Rule 9(i) and (ii)."<sup>109</sup> Thus, through a rather convoluted logical process, he maintained that a deferral based solely on the Rule 9(iii) grounds that "[w]hat is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal" was somehow a violation of the principle of *non-bis-in-idem*.<sup>110</sup> The Prosecution, on the other hand, wholly rejected the connection between primacy and *non-bis-in-idem*.

The Tribunal has yet to address the link under the Statute between primacy and *non-bis-in-idem*. The Trial Chamber saw no need to decide whether Rule 9(iii) was a valid application of primacy under the Statute or to determine the possible interpretation or legal effect of the Security Council statements on primacy.<sup>111</sup> The issue before the Trial Chamber at that time was simply one of *non-bis-in-idem*—in essence, double jeopardy—and this matter was easily disposed of because Tadic had never been tried by the German authorities. Without a previous trial in Germany or elsewhere, the principle of *non-bis-in-idem* could not have been violated by the deferral request. But the Trial Chamber's decision did not resolve the confusion over the scope of primacy.

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106. *See id.* ¶ 12.

107. *See* ICTY Statute, *supra* note 12, art. 9.

108. *See Decision on Non-bis-in-idem, supra* note 92, ¶ 31.

109. *Id.* ¶ 26 (citing Rule 9(iii)).

110. *See id.*

111. The Chamber stated:

The Trial Chamber takes no position on the interpretation of these statements nor upon their possible legal effect. What is important is that under no conceivable interpretation of these declarations is there even a hint that deferral of a case to this International Tribunal could violate the principle of *non-bis-in-idem*. This Trial Chamber views the special circumstances set out in Article 10(2) of the Statute as a limited exception to its principle of *non-bis-in-idem*.

*Decision on Non-bis-in-idem, supra* note 92, ¶ 33.

### 3. *What Is the Logical Connection Between Deferral and Double Jeopardy?*

Since the Tribunal has not yet ruled on the matter, the question remains whether the Tribunal's Rule 9(iii), insofar as it extends primacy to situations not addressed by article 10 of the Statute, is somehow *ultra vires* as an extension of primacy beyond what was authorized by the Security Council. The Statute itself, of course, was formally approved and adopted by the Security Council, and it states that "[a]t any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal *in accordance with* the present Statute *and the Rules of Procedure and Evidence of the International Tribunal.*"<sup>112</sup> This statutory language contains no wording that would signal that the primacy of the Tribunal should be restricted to certain situations—such as those enumerated under article 10(2). If the Security Council formally intended that deferral be limited to certain situations, it presumably would have written provisions to this effect into the Statute. Moreover, the judges of the Tribunal are bound by its Statute, not by Security Council members' post-decisional political statements. Indeed, any other rule would compromise the Tribunal's judicial independence. While the Judges of the Tribunal have accepted certain Security Council statements about the Statute as authoritative interpretations,<sup>113</sup> they must also consider the text of the articles in question and the purpose they serve.

In approving the Statute, the Security Council granted the judges complete authority to adopt effective procedures for implementing the Statute.<sup>114</sup> This fact, in and of itself, lends validity to Rule 9(iii) as a basis for deferral, especially since there is no apparent conflict between the scope of primacy under the Statute and under that rule. The Statute sets out an unqualified principle of primacy that allows the International Tribunal to request national courts to defer "[a]t any stage of the procedure."<sup>115</sup> Rule 9(iii) is similarly broad in authorizing the deferral of any national court case with implications for investigations or prosecutions before the Tribunal, but this extends primacy no farther than do the clear terms of the Statute.

But what of the obvious textual parallels between Rule 9 and the *non-bis-in-idem* language of article 10? If article 10 does not indicate that the Tribunal's primacy is limited to situations described in article 10, then why is its language echoed in Rule 9, which deals with primacy? There is indeed a reason why the wording of Rule 9 on deferral reflects that of article 10(2) on *non-bis-in-idem*. Rule 9 describes those situations in which deferral is appropriate, while article 10(2) describes those exceptional circumstances in

112. ICTY Statute, *supra* note 12, art. 9(2) (emphasis added).

113. *See supra* note 81 and accompanying text (discussing legal effect of these statements).

114. The Statute grants the judges the authority to "adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence . . . and other appropriate matters." ICTY Statute, *supra* note 12, art. 15.

115. *Id.* art. 9(2).



which the Tribunal may retry a defendant who already has been tried by national courts. As one might expect, the latter situations are those in which national trials lack credibility in making fair determinations of responsibility for serious international crimes, such as when the alleged wrongful act was characterized as an ordinary crime or when the trial of the accused was not impartial or independent. Logically, deferral to the Tribunal would be appropriate in all such cases in order to ensure the vindication of the interests of international justice. This does not mean, however, that deferral would only be appropriate in such cases. The principle of primacy, as expressed in article 9 of the Statute, goes well beyond merely allowing the retrial of those wrongly acquitted by national courts. For all crimes within the International Tribunal's jurisdiction, primacy entails a general priority for that Tribunal over the jurisdiction of all national courts. Article 9 of the Statute leaves no doubt as to this point in spite of the after-the-fact verbal reservations expressed by certain members of the Security Council.

#### 4. *The Continuing Relevance of Primacy*

On balance, the primacy of the ad hoc tribunals retains the mandatory legal force it was granted in the Statute despite the efforts of a few Security Council members to limit its scope. This conclusion is supported by the text of the ICTY and ICTR Statutes; by the practice of the ICTY's Judges and prosecutors, who have reaffirmed the general primacy of the International Tribunal at every turn; and even by the recent practice of the Security Council itself in approving the Statute of the Rwanda Tribunal. The Security Council members' statements regarding primacy are significant, but they do not have the legal force of a formal decision by the Council. Individual members of the Council make many statements during their debates, but only the formal decisions of the Council taken under Chapter VII of the Charter are binding on the members of the United Nations. The International Tribunal exists to give effect to the formal decisions of the Security Council that created it, not to implement without fail every trend of opinion informally expressed within the Council.

The rationale for this unprecedented jurisdictional priority lies not only in the practical considerations cited by the Tribunal's Prosecutor in requests for deferral,<sup>116</sup> but also in the following legal considerations: Each of the ad hoc tribunals was specially created to protect compelling humanitarian interests in the context of a situation identified as a threat to international peace and security. Extraordinary measures are justified to deal with such a situation, and, in the cases of the former Yugoslavia and Rwanda, they have been formally authorized under the U.N. Charter.

All cases within the jurisdiction of the ad hoc tribunals involve *fundamental humanitarian interests of concern to the international community* as a whole. International humanitarian law has a long history, but

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116. See *supra* text accompanying notes 64–67.

it took on new prominence in the aftermath of the Holocaust. The Nuremberg Tribunal, the U.N. Charter, and the 1948 Universal Declaration of Human Rights began a fundamental transformation of all international law,<sup>117</sup> codifying the principle that individuals as well as sovereign states have rights and obligations under international law.

Each of the ad hoc tribunals was created to address a *threat to international peace and security*—the maintenance of which is the primary purpose of the United Nations.<sup>118</sup> Under the U.N. Charter, it is the Security Council that must identify threats to the peace and decide what measures will be taken in response.<sup>119</sup> The primacy of the International Tribunal is thus justifiable as a necessary response to a threat of this kind and enjoys the same legally binding force as any formal decision of the Security Council.

Primacy is the only way to *ensure uniformity* in the legal process. Where international peace and security are at issue, even minor inconsistencies in prosecution, process, or sentencing could increase tensions. Primacy also subjects the jurisdiction of all states to the same treatment. It does not, on its face, discriminate against any state. Uniformity of obligation is especially appropriate in an institution created by the Security Council. Treaty obligations are based on the consent of states, and the jurisdiction of the International Court of Justice operates according to the same principle. Members of the United Nations are all bound by the Statutes of the ICTY and the ICTR even without their direct consent,<sup>120</sup> and all should be equally subject to their primacy.

#### D. *The Failure to Enforce Primacy: A Lack of Consensus and Political Will*

##### 1. *The Security Council as an Enforcement Mechanism*

The weakest link in all of international law is the lack of effective enforcement mechanisms. This problem affects the International Tribunal just as it does other bodies charged with implementing international law in fields such as international human rights and international environmental

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117. See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 873 (1990).

118. The first purpose of the United Nations, as specified in the Charter, is [t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, the adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

U.N. CHARTER art. 1, para. 1.

119. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." *Id.* art. 39.

120. They have consented, indirectly, by means of their agreement "to accept and carry out the decisions of the Security Council in accordance with the present Charter." *Id.* art. 25.

law. Since the Tribunal lacks the coercive power to enforce its orders or authority against noncomplying states, it must depend upon the Security Council to do so if necessary.<sup>121</sup> Thus, under Rule 11, the Trial Chamber may request the President<sup>122</sup> of the Tribunal to report a refusal to defer to the Security Council.<sup>123</sup> Thereafter, the Security Council may decide what measures to take to achieve compliance by the recalcitrant State. The Security Council response can take a wide variety of forms, ranging from publicly criticizing the offending state to imposing economic sanctions to authorizing the use of force to enforce compliance.<sup>124</sup> The latter two sanctions could be imposed under Chapter VII of the U.N. Charter on the basis of a Security Council finding of a threat to international peace and security.<sup>125</sup>

The ICTY has issued only a handful of requests for deferral, largely because these requests can be made only with respect to investigations or criminal proceedings that have been instituted in a state's courts.<sup>126</sup> Those states unwilling to cooperate are unlikely to arrest or prosecute those under investigation or indictment by the International Tribunal and thus are unlikely to face requests for deferral. As of this writing, the Tribunal has not reported any state to the Security Council for failure to comply with a request for deferral, and it remains to be seen how the Council would react to such a report.

## 2. *The Lack of Enforcement Action by the Security Council*

### The failure to apprehend individuals indicted by the International

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121. In a ruling confirming the right of the ICTY to issue binding orders to states in the investigation and prosecution of its cases, the Appeals Chamber of the ICTY has ruled that the International Tribunal is not vested with any enforcement or sanctionary power *vis-à-vis* States. It is primarily for its parent body, the Security Council, to impose sanctions, if any, against a recalcitrant State, under the conditions provided for in Chapter VII of the United Nations Charter. However, the International Tribunal is endowed with the inherent power to make a judicial finding concerning a State's failure to observe the provisions of the Statute or the Rules. It also has the power to report this judicial finding to the Security Council.

Prosecutor v. Blaskic, No. IT-95-14-AR108 bis, ¶ 33 (I.C.T.Y. Oct. 29, 1997) (judgment on request for review of trial decision of July 18, 1997).

122. The judges of the ICTY elect a President from among their number, and this President, who must be a member of the Appeals Chamber and preside over its proceedings, assigns the judges to the Appeals Chamber and to the Trial Chambers after consulting with the judges of the International Tribunal. The judges of each Trial Chamber elect a Presiding Judge, who conducts all of the proceedings of the Trial Chamber as a whole. See ICTY Statute, *supra* note 12, art. 14.

123. Rule 11 of the ICTY Rules states:

Non-compliance with a Request for Deferral

If, within sixty days after a request for deferral has been notified by the Registrar to the State under whose jurisdiction the investigations or criminal proceedings have been instituted, the State fails to file a response which satisfies the Trial Chamber that the State has taken or is taking adequate steps to comply with the order, the Trial Chamber may request the President to report the matter to the Security Council.

ICTY RULES, *supra* note 58, Rule 11.

124. See ICTY Statute, *supra* note 11, art. 42.

125. See *id.* art. 39.

126. See ICTY Rules, *supra* note 58, Rule 9.

Tribunal threatens its credibility and that of the Security Council, which is responsible for enforcing its mandate and authority. The Tribunal cannot begin proceedings against an indictee who is not in custody.<sup>127</sup> Thus, a State that refuses to arrest and surrender indictees effectively frustrates the Tribunal's process. The Federal Republic of Yugoslavia and the Bosnian-Serb Republika Srpska both have refused to cooperate with or render their citizens for trial at the Tribunal.<sup>128</sup> The Security Council has not taken any affirmative action in response to these refusals.

The Council, however, has issued Presidential Statements deploring<sup>129</sup> or condemning<sup>130</sup> the failure to comply with orders of the Tribunal. But since most of those indicted are still not in the Tribunal's custody, it is obvious that criticizing noncomplying governments has not forced them to turn over the indictees. The "sanction" of condemnation lacks the sting necessary to compel compliance.

On May 8, 1996, a Presidential Statement deplored the Federal Republic of Yugoslavia's lack of cooperation with the Tribunal.<sup>131</sup> On August 8, 1996, in another Presidential Statement, the Security Council condemned the Federal Republic of Yugoslavia a second time, as well as the Republika Srpska, for failing to comply with the Tribunal's orders. In the latter statement, the Council expressed its readiness "to consider the application of economic enforcement measures to ensure compliance by all parties."<sup>132</sup> Although this statement suggests that the Council is contemplating using stronger enforcement measures in the future, the weak language is unlikely to bring about greater compliance. The words lack the strength necessary to demonstrate that states continuing to flout the Tribunal will suffer real repercussions. Instead, they contribute to the perception that the Security Council will not take appropriate measures to enforce the Tribunal's decisions, and the statements made by Security Council members regarding the limited scope of primacy can only reinforce this impression.

### 3. *The Political Effect of the Lack of Security Council Support for the Full Scope of Primacy: Implications for Enforcement*

Regardless of the legal effect, the fact that four of the five permanent members of the Security Council made qualifying statements on article 9 primacy has great practical and political significance. The statements indicate that when the ICTY Statute was adopted, the Council's key powers did not

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127. There has been much debate over whether the Tribunal should conduct trials in the absence of the accused. The current rules of the Tribunal do not provide for trials in absentia, but the fact that only 24 of the over 75 people indicted have been arrested and delivered to the Tribunal for trial presents a serious and frustrating problem.

128. See *Statement by the President of the Security Council*, U.N. SCOR, 3687th mtg., U.N. Doc. S/PRST/1996/34 (1996) [hereinafter Presidential Statement 34].

129. See *Statement by the President of the Security Council*, U.N. SCOR, 3663th mtg., U.N. Doc. S/PRST/1996/23 (1996) [hereinafter Presidential Statement 23].

130. See Presidential Statement 34, *supra* note 128.

131. See Presidential Statement 23, *supra* note 129.

132. Presidential Statement 34, *supra* note 128, at 3.

endorse the full extent of the Tribunal's primacy over national courts, and they suggest its likely response if asked to enforce a request for deferral falling within the scope of article 9 but not within that of the qualifying statements. The ICTY Prosecutors have based all their requests for deferral on Rule 9(iii),<sup>133</sup> which sets out precisely that aspect of article 9 primacy that does not fall within the two enumerated circumstances of article 10(2) of the Statute. Since four permanent members of the Security Council possessed of veto power have indicated that they do not believe that primacy extends so far, it is reasonable to assume that, unless they have a change of heart, the Council is unlikely to act upon the ICTY's requests that this broader primacy principle be enforced.

As of this writing, the Security Council has yet to take any action to enforce requests from either ad hoc tribunal for the enforcement of primacy. It has issued statements deploring the failure of states to cooperate with the tribunals but has taken no binding decisions against any state for failure to do so. This has created a deplorable gap between the theoretically binding nature of the Tribunal's primacy and the de facto limitation of that primacy to cases of voluntary state cooperation. This lack of political support leaves the Tribunal unable to enforce even this most basic aspect of its jurisdiction—a fundamentally weak position by any standard.

The knowledge that states can defy the Tribunal with impunity sends a message that compliance with a deferral request is unnecessary and may embolden other states to refuse to comply with future binding orders from the Tribunal. The negative implications are much more far-reaching, however, as this public humiliation of the international tribunals threatens to undermine the credibility of all international institutions.

#### 4. *Primacy and the ICTR*

A very prominent case involving the primacy of the ICTR has been unfolding in the United States. In 1996, Elizaphan Ntakirutimana, a seventy-one year-old Rwandan Hutu living in Texas, was accused of organizing the 1994 slaughter of 5,000 to 10,000 ethnic Tutsis who had gathered for protection at a church compound in Mugonero, Rwanda.<sup>134</sup> The ICTR made a request for deferral to the United States, which enacted legislation in 1996 stating that the two tribunals would be treated as foreign governments for extradition purposes.<sup>135</sup> This means that before the United States can defer to

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133. The deferral request by the ICTY Prosecutor in the *Tadic* case, like those in subsequent cases, explicitly invoked Rule 9(iii): "In the present case we rely upon the provisions of Rule 9(iii) . . ." Prosecutor v. *Tadic*, No. IT-94-1-D, at 3 (I.C.T.Y. Nov. 8, 1994) (submissions by Prosecutor in application for deferral); see also Prosecutor v. *Karadzic*, No. IT-95-5-D, ¶ 1 (I.C.T.Y. May 16, 1995) (decision on request for deferral to Tribunal) (recalling that "[t]his application [was] made pursuant to Article 9(2) of the Statute of the International Tribunal in accordance with Rule 9(iii) of the Rules").

134. See *Rwandan Genocide: U.S. Must Return Suspect for Trial*, DALLAS MORNING NEWS, Oct. 22, 1996, at A14.

135. Judicial Assistance to the International Tribunal for Yugoslavia and to the International Tribunal for Rwanda Act of Feb. 10, 1996, Pub. L. No. 104-106, 110 Stat. 486 (codified at 18

the ICTR, a U.S. federal judge or magistrate must determine at a formal extradition hearing that there is evidence of criminality sufficient to sustain the charges against the accused and that the crimes alleged also would be crimes under U.S. law.<sup>136</sup>

The U.S. government showed great willingness to cooperate with the ICTR in this case. Ntakirutimana was provisionally arrested on September 26, 1996, and his attorney, Ramsey Clark, argued both to the press and before the court that rendering him to a U.N.-created tribunal would undermine constitutionally guaranteed liberties. The U.S. magistrate in Laredo, Texas who ordered Ntakirutimana held over for a full extradition hearing openly expressed his personal sympathy for this argument.<sup>137</sup> Thirteen months later, the same magistrate denied the U.S. government's request for Ntakirutimana's surrender on two separate grounds.<sup>138</sup> First, he ruled that the federal law requiring U.S. courts to cooperate in the surrender of suspects to the Rwanda Tribunal was unconstitutional in the absence of an extradition treaty.<sup>139</sup> He also concluded that the government had failed to present evidence establishing probable cause that the accused had committed the crimes charged.<sup>140</sup> This decision was an embarrassment for the U.S. government, which publicly has encouraged other states to cooperate with the ICTY and the ICTR. The Clinton Administration immediately announced that it would appeal the decision.

The magistrate's decision was based on a number of questionable legal rulings. Despite clear precedent to the contrary, for example, the magistrate concluded that the U.S. Constitution requires that any extradition must be based on a valid treaty.<sup>141</sup> The magistrate also failed to consider the legal effect of two international agreements that authorize the surrender of suspects to the ICTR. One is the U.N. Charter, which obligates all member states to carry out the decisions of the Security Council.<sup>142</sup> Since each of the ad hoc tribunals was created by a decision of the Council that spells out the

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U.S.C. § 1342 (1998)).

136. See 18 U.S.C. § 3184 (1998) (applicable to cooperation with the ICTY and ICTR under 18 U.S.C. § 1342 (1998)).

137. The magistrate questioned

whether we are acting here to subordinate U.S. sovereignty to the United Nations. I am particularly bothered by the potential harm of depriving this man of his freedom . . . . We are a nation of laws developed from our fundamental belief in the rights of the individual. It is the cornerstone of our government . . . . It would appear we may not adequately address the standards of equality and justice to everyone within these borders and how they apply to our international relationships . . . . Little by little, we are losing the guarantees of those individual freedoms each time we give up a bit of our freedoms. It makes me, as the grandfather of five little girls, worry about their future.

David Mclemore, *Rwandan War Crimes Suspect to Remain Jailed in Laredo*, DALLAS MORNING NEWS, Oct. 12, 1996, at 25A (quoting U.S. Magistrate Marcel Notzen).

138. *In re Surrender of Elizaphan Ntakirutimana*, Misc. No. L-96-5, 1997 U.S. Dist. LEXIS 20714 (S.D. Tex. Dec. 17, 1997).

139. See *id.* at \*6-\*13.

140. See *id.* at \*13-\*20.

141. "Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient." *Grin v. Shine*, 187 U.S. 181, 191 (1902).

142. See *supra* note 120.

“obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under . . . the Statute,”<sup>143</sup> compliance is required under the U.N. Charter. Also applicable are the agreements on the surrender of persons between the government of the United States and each of the Tribunals.<sup>144</sup> These are executive agreements implementing U.S. obligations under the U.N. Charter.<sup>145</sup> Together, they provide a strong legal basis for U.S. cooperation in surrendering indictees to the ad hoc tribunals. These legal arguments should ultimately prevail, whether on appeal or in a subsequent extradition hearing, but the public statements of the U.S. magistrate, as well as his initial ruling, indicate how the primacy of international tribunals can be perceived as a threat to state sovereignty.

##### 5. *The Link Between Primacy and Broader Issues of Compliance with the Orders of the Tribunal*

Closely related to the issue of primacy<sup>146</sup> is the broader obligation of states to comply with requests from the Tribunal for the arrest or detention of persons. The Statute provides that “[s]tates shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to . . . the arrest or detention of persons . . . .”<sup>147</sup> This closely parallels the language of the Security Council decision creating the ICTY, which refers to the “obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.”<sup>148</sup>

While states’ refusal to comply with requests for deferral has not materialized as a problem for the International Tribunal, their failure to execute arrest warrants has emerged as the single greatest obstacle to the Tribunal’s success. There are many cases in which states have failed or refused to comply with warrants from the Tribunal for the arrest of those formally indicted. As of this writing, only twenty-six of the over seventy-five people publicly indicted by the ICTY have been arrested and

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143. See Resolution 955, *supra* note 9, at 2; Resolution 827, *supra* note 8, at 1. Each of these resolutions explicitly states in a preambular paragraph that the decision to create the tribunal was made “under Chapter VII of the Charter of the United Nations.” The Statute of each Tribunal provides in turn that states “shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to . . . the surrender or the transfer of the accused to the International Tribunal.” ICTR Statute, *supra* note 13, art. 28; ICTY Statute, *supra* note 12, art. 29.

144. Agreement on Surrender of Persons, Oct. 5, 1994, U.S.-ICTY; Agreement on Surrender of Persons, Jan. 24, 1995, U.S.-ICTR (currently unpublished) (on file with author).

145. For a discussion of the legal effect of these executive agreements, see Robert Kushen & Kenneth J. Harris, *Surrender of Fugitives by the United States to the War Crimes Tribunals for Yugoslavia and Rwanda*, 90 AM. J. INT’L L. 510 (1996).

146. The issue of primacy, strictly speaking, is raised only when national courts have instituted criminal investigations, prosecutions, or other proceedings that the International Tribunal determines should properly be deferred from the national level to disposition under the Tribunal’s Statute. Cf. ICTY Statute, *supra* note 12, art. 9 (stating that International Tribunal shall have primacy over national courts and that it may at any time request national courts to defer to its competence).

147. ICTY Statute, *supra* note 12, art. 29.

148. Resolution 827, *supra* note 9, ¶ 4.

surrendered to its custody. Most of the indictees still at large are apparently living free in areas where the local authorities have failed to comply with their legal obligation to arrest those indicted. These cases of non-apprehension have severely undermined the effectiveness of the International Tribunal and compromised its ability to fulfill its mandate.

The procedures and rules of the Tribunal depend not only upon the cooperation of states but also upon the support of the Security Council to enforce that cooperation. The Tribunal's Prosecutor, after investigating a case and formulating an indictment, must present that indictment to one of the Tribunal's Judges for review and confirmation.<sup>149</sup> Once the indictment has been confirmed, the Rules create a basic regime applicable to the arrest and apprehension of those indicted. Upon confirming the indictment, the judge issues warrants for the arrest of the accused and an order for his surrender to the Tribunal.<sup>150</sup> These are transmitted to the national authorities of the state where it is believed that the accused can be found.<sup>151</sup> In some cases the Tribunal also has transmitted these warrants to the NATO-led international forces supervising the implementation of the Dayton Peace Accords in Bosnia and Herzegovina.

The formal decision of the Security Council to adopt the ICTY Statute is legally binding upon all members of the United Nations,<sup>152</sup> and thus their obligation to comply with the Tribunal's arrest orders is clear. There is some question, however, as to whether states have a duty to execute these arrest warrants outside their own territory. The governments contributing to the NATO-led forces in Bosnia and Herzegovina consistently have rejected the argument that these international forces, like the local governments, are under a legal *obligation* to arrest those indicted by the ICTY, arguing that their purpose in Bosnia is peacekeeping, not law enforcement.<sup>153</sup> On the other hand, they have claimed the *right* to arrest indictees should they decide to broaden their mission.<sup>154</sup> In July 1997, elements of the NATO force

149. See ICTY RULES, *supra* note 58, Rule 47.

150. The ICTY Rules state:

A warrant for the arrest of the accused and an order for his surrender to the Tribunal shall be transmitted by the Registrar to the national authorities of the State in whose territory or under whose jurisdiction or control the accused resides, or was last known to be, or is believed by the Registrar to be likely to be found, together with instructions that at the time of arrest the indictment and the statement of the rights of the accused be read to him in a language he understands and that he be cautioned in that language.

*Id.* Rule 55(B).

151. See *id.*

152. See U.N. CHARTER art. 25.

153. A U.S. Defense Department official commented:

We will take these people into custody if they surrender to us, preferably with their hands up over their heads, or maybe if they're turned in by someone else . . . I can't imagine it would happen any other way. No matter how much people might want us to arrest war criminals, we have a much bigger mission in Bosnia.

Philip Shenon, *G.I.'s in Bosnia Shun Hunt for War Crime Suspects*, N.Y. TIMES, Mar. 2, 1996, at A3 (quoting Defense Department official involved in Bosnian policy).

154. "IFOR troops have the authority, but not the obligation, to detain indicted war criminals . . . Our primary mission remains the overriding one of seeing that war does not resume and providing military security. We are not engaged in identifying them, searching for them or tracking them down." Chris Hedges, *Bosnia Limits War-Crimes Arrests After NATO Delivers 2 Suspects*, N.Y.



arrested an indicted war crimes suspect for the first time,<sup>155</sup> and this may have signaled a fundamental change in NATO policy.<sup>156</sup> Such a change could compensate for the refusal of the Republika Srpska and other political entities in the former Yugoslavia to cooperate with the ICTY by arresting indicted suspects present in their territory.

In order to prevent the problem of non-apprehension from completely frustrating the efforts of the Tribunal, Rule 61 creates a special public but non-trial procedure applicable when states fail to execute an arrest warrant.<sup>157</sup> Rule 61 proceedings take place before a three-judge Trial Chamber and allow for public presentation of the Prosecutor's evidence against the accused.<sup>158</sup> If the full Trial Chamber finds that there are "reasonable grounds for believing that the accused has committed any or all of the crimes charged," it makes a written determination to this effect, thus reconfirming the original indictment.<sup>159</sup>

Because reconfirmation proceedings are *ex parte* and do not result in a definitive determination of guilt, their legal effect is necessarily quite limited. One result of Rule 61 reconfirmation is the issuance and transmittal to all states of a new "international arrest warrant."<sup>160</sup> In theory, such a document should make life more difficult for those indicted by making it impossible for them to travel internationally without risking arrest. So far, however, the international warrants have had no impact upon apprehension. The second legal result of a Rule 61 hearing is that it can lead to a formal determination by the Trial Chamber that the failure to arrest the accused can be ascribed to the refusal of specific states to cooperate with the International Tribunal.<sup>161</sup>

Rule 61 proceedings generally have identified the state or other political entity responsible for the failure to serve and arrest those indicted. The first Rule 61 hearing, held in October 1995, identified the Bosnian Serb administration in Pale as the entity responsible for failure to cooperate and invited the President of the Tribunal to notify the Security Council of this fact.<sup>162</sup> Other proceedings under this rule have identified the Federal Republic of Yugoslavia,<sup>163</sup> the Republic of Croatia,<sup>164</sup> and the Republic of

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TIMES, Feb. 13, 1996, at A1 (quoting IFOR spokesman Lieut. Col. Mark Rayner).

155. See Chris Hedges, *NATO Troops Kill a Serbian Suspect in War Atrocities*, N.Y. TIMES, July 11, 1997, at A1.

156. According to British officials, the NATO efforts to arrest two indicted suspects on July 11, 1997, "were the first ones, but not the last ones." Steven Erlanger, *NATO Action Reflects Shift in Tactics*, N.Y. TIMES, July 11, 1997, at A5. Further arrests by NATO troops in Bosnia have followed. See Chris Hedges, *Dutch Troops Seize Two War Crimes Suspects, Wounding One*, N.Y. TIMES, Dec. 19, 1997, at A20; Mike O'Connor, *G.I.'s in Bosnia Make Their First Arrest of a War-Crimes Suspect*, N.Y. TIMES, Jan. 23, 1998, at A7.

157. See ICTY RULES, *supra* note 58, Rule 61.

158. See *id.* Rule 61(B).

159. *Id.* Rule 61(C).

160. *Id.* Rule 61(D).

161. See *id.* Rule 61(E).

162. See Prosecutor v. Nikolic, No. IT-94-2-R61, ¶ 36 (I.C.T.Y. Oct. 20, 1995) (review of indictment pursuant to Rule 61).

163. Prosecutor v. Mksic, No. IT-95-13-I-R61, ¶ 41 (I.C.T.Y. Apr. 3, 1996) (review of indictment pursuant to Rule 61).

Bosnia and Herzegovina<sup>165</sup> as responsible for failing to execute warrants of arrest.

Since most of the indictees reside in the former Yugoslavia, it can be successful only to the extent that the successor states and other political entities<sup>166</sup> in control cooperate with it in areas such as the identification and location of individuals, the production of evidence, and the arrest and detention of persons as required by article 29 of the ICTY Statute.<sup>167</sup> While this broader cooperation is distinct from the issue of primacy, it raises the same issues of state sovereignty and the need for Security Council enforcement.

Negotiations concerning the creation of an ICC that would supersede the necessity for ad hoc tribunals are presently ongoing. The ad hoc tribunals' experience with primacy and the related issues of cooperation and apprehension provides a basis for the discussions concerning the future relationship between international courts and national courts. The ICC negotiations have struggled to define a relationship that would be not only effective but also acceptable to the international community.

### III. THE PROPOSED INTERNATIONAL CRIMINAL COURT (ICC)

Both the ICTY<sup>168</sup> and the ICTR<sup>169</sup> are temporary institutions created ad hoc in response to reports of widespread violations of international humanitarian law in the regions concerned. Neither has jurisdiction to deal with any future situation in which similar international crimes may be committed. But the creation of the ad hoc tribunals, and the progress they have made in developing international humanitarian law and applying it as the basis of individual criminal responsibility, have reinvigorated international negotiations concerning the creation of a permanent ICC.

164. See *Prosecutor v. Rajic*, No. IT-95-12-R61, ¶ 70 (I.C.T.Y. Sept. 13, 1996) (review of indictment pursuant to Rule 61).

165. See *id.*

166. Formally, the Bosnian Serb administration in Pale, which has become the Republika Srpska, is merely a constituent part of the Republic of Bosnia and Herzegovina, but the ICTY has recognized that in practice it operates independently of the Sarajevo administration and bears its own responsibility for failure to cooperate with the Tribunal. "[T]he Trial Chamber considers that the failure to execute the warrants of arrest issued against Radovan Karadzic and Ratko Mladic may be ascribed to the refusal of Republika Srpska and to the Federal Republic of Yugoslavia to cooperate with the Tribunal. Accordingly, the Trial Chamber so certifies for purposes of notifying the Security Council." *Prosecutor v. Karadzic & Mladic*, Nos. IT-95-5-R61 & IT-95-18-R61, ¶ 101 (I.C.T.Y. July 11, 1996) (review of indictment pursuant to Rule 61).

167. See ICTY Statute, *supra* note 12, art. 29.

168. According to the Security Council resolution that created it, the ICTY was established "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace . . . ." Resolution 827, *supra* note 9, ¶ 2.

169. As previously noted, the ICTR was established "for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 . . . ." Resolution 955, *supra* note 10, ¶ 1.

### A. U.N. Preparatory Commission Negotiations on an ICC

The ongoing negotiations over a permanent ICC have struggled to define the relationship of that institution with national courts. The International Law Commission (ILC) began considering the issues involved in the creation of an ICC in 1989 at the request of the U.N. General Assembly.<sup>170</sup> During its 1991–94 sessions, it developed a draft statute creating such a court in the form of a treaty that states could ratify.<sup>171</sup> In 1993, the General Assembly requested government comments on the ILC draft,<sup>172</sup> and after creating an Ad Hoc Committee to review the issues involved,<sup>173</sup> the General Assembly created a Preparatory Committee on the Establishment of an International Criminal Court (PrepCom).<sup>174</sup>

The many delegations to the Preparatory Committee have been attempting to work the Draft Statute originally prepared by the ILC into a treaty that the international community could accept. Actively encouraging the progress of the interstate negotiations is the NGO Coalition for an International Criminal Court (CICC).<sup>175</sup> The question of how to reconcile the jurisdiction of an ICC with state sovereignty has been a central issue. The ILC Draft Statute provides that the ICC is intended “to be complementary to national criminal justice systems,”<sup>176</sup> and thus it is said that the relationship between the ICC and national courts should be one of “complementarity.” This complementarity, however, was not well-defined by the ILC Draft Statute, which made no further allusion to the dynamic of this interrelationship. Nonetheless, it is clear that complementarity applies to all aspects of the relationship between the ICC and national courts, including not only jurisdiction to prosecute, but also judicial assistance, extradition, and other forms of state cooperation with the ICC.<sup>177</sup>

170. See G.A. Res. 44/39, U.N. GAOR, 44th Sess., 72nd plen. mtg., Supp. No. 49, at 1, U.N. Doc. A/44/49 (1989).

171. See *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. Int'l Law Comm., 46th Sess., Annex, U.N. Doc. A/49/355 (1994) [hereinafter ILC Draft Statute].

172. See G.A. Res. 48/31, U.N. GAOR, 48th Sess., Annex, Agenda Item 140, ¶ 5, U.N. Doc. A/RES/48/1 (1993).

173. See G.A. Res. 49/53, U.N. GAOR, 49th Sess., ¶¶ 2–3, U.N. Doc. A/RES/49/53 (1994).

174. See G.A. Res. 50/46, U.N. GAOR, 50th Sess., U.N. Doc. A/RES/50/46 (1995).

175. This Coalition has successfully coordinated the work of a broad-based network of more than 300 participating organizations supporting the creation of an effective and just ICC. The Coalition convenes working groups on key issues, arranges meetings between the Coalition and representatives of the governments involved in the ICC negotiations, and promotes awareness of ICC proposals and negotiations through newsletters, a World Wide Web page, and other media. See *CICC Home Page* (visited Mar. 30, 1998) <<http://www.igc.apc.org/fcc/html/coalition.htm>>.

176. The Preamble to the ILC Draft Statute notes that “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.” ILC Draft Statute, *supra* note 171, pmbl. para. 4.

177. According to a United Kingdom discussion paper on complementarity, [t]he intention is that all proper decisions by national authorities in connection with matters of interest to the ICC should be respected by the ICC and that no action should be taken by it in such cases. This principle applies not only to national decisions to

The balance between the jurisdiction of the ICC and that of national courts will be determined not only by the concept of complementarity but also by the agreement reached on three related issues: the requirement of state consent to ICC jurisdiction over specific crimes; the role of the Security Council in triggering and/or blocking the ICC's jurisdiction; and whether the jurisdiction of the ICC should be expressly limited to crimes that meet a certain "threshold" level of seriousness. PrepCom negotiations already have resulted in separate draft articles dealing with each of the aforementioned issues. Although these draft texts do not represent a binding agreement on the issues concerned,<sup>178</sup> they are the best available evidence of the trend in the negotiations on these issues. If all goes well, the final text of an ICC treaty will be approved by a plenipotentiary conference of states scheduled to be held in Rome beginning in June 1998.<sup>179</sup> The texts resulting from past Preparatory Committee sessions, although inconclusive on these key issues, do offer some insight into the issues involved in reconciling the jurisdiction of the ICC with that of national courts.

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prosecute or not to prosecute, and to court decisions of acquittal or conviction, but also to decisions by national authorities to seek assistance, including extradition, from another State and decisions by such another State to cooperate accordingly, particularly where that State is under an international obligation to do so.

*UK Discussion Paper on Complementarity*, ¶ 2 (Mar. 29, 1996) (visited May 2, 1998) <gopher://gopher.igc.apc.org:70/00/orgs/icc/natldocs/prepcom1/complementarity1.uk>.

178. The proposed texts that result from individual sessions of the Preparatory Committee come loaded with disclaimers concerning their status. For example, the August 1997 Report of the Working Group on Complementarity and Trigger Mechanism begins with the following preface: "The Working Group recommends to the Preparatory Committee the texts of the articles shown on the following pages for inclusion in the draft consolidated text of a convention for an international criminal court." DECISIONS TAKEN BY THE PREPARATORY COMMITTEE AT ITS SESSION HELD FROM 4 TO 15 AUGUST 1997 [hereinafter AUGUST 1997 PREPCOM DECISIONS] at 2, U.N. Doc. A/AC.249/1997/L.8/Rev.1 (1997).

Perhaps because of its special sensitivity, the proposed text of article 35 on Admissibility/Complementarity in that same document is preceded by an additional disclaimer:

The following draft text represents the results of informal consultations on article 35 and is intended to facilitate the work towards the elaboration of the Statute of the Court. The content of the text represents a possible way to address the issue of complementarity and is without prejudice to the views of any delegation. The text does not represent agreement on the eventual content or approach to be included in this article.

*Id.* at 10.

Last, but not least, these texts typically contain alternative formulations of language that betray the lack of consensus in favor of any particular choice. One device for incorporating different points of view into a single text is the use of "bracketed" language. The Report of the Working Committee notes that "[s]quare brackets include also the proposal for total deletion of the text within the square brackets." *Id.* at 3.

179. See Barbara Crossette, *World Criminal Court Having a Painful Birth*, N.Y. TIMES, Aug. 13, 1997, at A5.

## B. Proposed Devices for Limiting the Jurisdiction of the ICC

1. *The Requirement of State Consent to ICC Jurisdiction over Individual Crimes*
  - a. *The Opting Procedure*

One factor likely to limit the effective jurisdiction of the ICC is the plan of the Draft Statute, which would allow states to opt into the jurisdiction of the ICC over each separate crime.<sup>180</sup> The consent of all concerned states would be required, potentially including any or all of the following: the state with custody of the accused, the state where the crime was allegedly committed, any state that has requested extradition of the accused pursuant to treaty, the state of which the victim is a national, and the state of which the accused is a national.<sup>181</sup> Failure of any of these states to consent to ICC jurisdiction over a specific crime would prevent it from asserting jurisdiction over a case involving that crime. The one exception to this requirement would be situations where the Security Council, acting under Chapter VII of the U.N. Charter, had decided to grant the ICC extraordinary jurisdiction.<sup>182</sup>

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180. This scheme is set out in article 22, option 2, of the text resulting from the August 1997 session of the Preparatory Committee, "Acceptance of the jurisdiction of the Court." Option 1 of this article will be discussed below with regard to inherent jurisdiction. Option 2, which would exclude the possibility of inherent jurisdiction, reads as follows:

*Article 22: Acceptance of the jurisdiction of the Court*

Option 2

1. A State Party to this Statute may:

- (a) at the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or
- (b) at a later time, by declaration lodged with the Registrar; accept the jurisdiction of the Court with respect to [such of] the crimes referred to in [article 20 (a) to (e) or any combination thereof] as it specifies in the declaration.

2. A declaration may be of general application, or may be limited to [particular conduct or to conduct] [one or more of the crimes referred to in articles 20(a) to 20(e)] committed during a particular period of time.

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

4. If under article 21 *bis* the acceptance of a State that is not a Party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime. [The accepting State will cooperate with the Court without any delay or exception, in accordance with Part 7 of the Statute.]

- [5. A declaration referred to in paragraphs 1 to 3 may not contain other limitations than those mentioned in paragraphs 1 to 3.]

AUGUST 1997 PREPCOM DECISIONS, *supra* note 178, at 5-6.

181. See Proposed Article 21 *bis*, on Preconditions to the Exercise of Jurisdiction, in the AUGUST 1997 PREPCOM DECISIONS, *supra* note 178, at 3-4.

182. Under the heavily bracketed language of proposed article 21(1)(a), the ICC would have jurisdiction with respect to a crime when "the [matter] [situation] is referred to the Court by the Security Council, [in accordance with article 23] [acting under Chapter VII of the Charter]." AUGUST 1997 PREPCOM DECISIONS, *supra* note 178, at 3. This procedure would parallel that used when the

This opting-in procedure is designed to allow states maximum flexibility in accepting the ICC's jurisdiction. This flexibility might maximize the number of states willing to consent to the ICC Statute, but, all things considered, it would be more detrimental than helpful to the creation of an *effective* ICC. The uneven patchwork of jurisdiction that is likely to result would make it difficult for the ICC to assert jurisdiction over any case. William Pace, of the NGO CICC, has cautioned, "[I]f this Court is just an 'opt-in' court . . . it's going to be less effective."<sup>183</sup>

b. *Inherent Jurisdiction over Core Crimes: A Possible Exception to the Opting-In Regime of State Consent*

A crime-specific model of jurisdiction for the ICC would require agreement by states upon a core set of crimes over which the ICC would have "inherent jurisdiction."<sup>184</sup> The initial ratification of the ICC Statute by states would be sufficient to grant it jurisdiction over the core crimes, alleviating any need for states to consent individually to the ICC's jurisdiction over those offenses.<sup>185</sup> A lack of consensus as to which crimes, if any, would be included in this core set presents the greatest obstacle to the realization of this approach. Clearly, the greater the number of core crimes, the fewer the number of states likely to accept the Court's jurisdiction.<sup>186</sup> Genocide is the one crime whose classification as a core crime of the ICC has broad support within the international community. The 1948 Genocide Convention specifically provides for a person accused of genocide to be tried before an international penal tribunal as an alternative to trial before national courts.<sup>187</sup> In recognition of this special status, the ILC Draft Statute singles

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Security Council established the jurisdiction of the ad hoc tribunals. The Security Council's role in determining the jurisdiction of the ICC is discussed further *infra* Subsection III.B.3. See also *infra* note 220 (quoting draft article 23).

183. Farhan Haq, *Human Rights: International Court Focus on Internal Crimes*, INTER PRESS SERVICE, Feb. 19, 1997, at 3, available in 1997 WL 7073787 (quoting William Pace).

184. A Preparatory Committee Report summarized one broad view of the ICC's inherent jurisdiction:

Acceptance of inherent jurisdiction for the core crimes would require significant revision of articles 21 and 22. From this perspective, the Court would not need specific State consent to establish its jurisdiction. States, by virtue of becoming party to the Statute, would be consenting to its jurisdiction. This meaning of inherent jurisdiction, some delegations felt, was fully compatible with respect for State sovereignty, since States would have expressed their consent at the time of ratification of the Statute as opposed to having to express it in respect of every single crime listed in the Statute at different stages. Hence, there would be no need for a selective "opt in" or "opt out" approach.

1 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, ¶ 117, U.N. Doc. A/51/22 (1996) [hereinafter 1 *Preparatory Committee Report*].

185. See *id.*

186. "Some other delegations expressed reservations about the inherent jurisdiction of the Court over any crime, including the core crimes. They believed that the regime of 'opt in' provided for in article 22 was more likely to maximize universal participation." 1 *Preparatory Committee Report*, *supra* note 184, ¶ 119.

187. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. VI, 78 U.N.T.S. 277. This convention provides in article VI that:

out genocide as its only core crime.<sup>188</sup>

The terms “core crime” and “inherent jurisdiction” do not appear in the ILC Draft Statute but are used to refer to the special regime that the ILC proposed for the crime of genocide. Under that regime, the ICC could exercise jurisdiction over cases of genocide<sup>189</sup> even if the states with an interest in the case had not accepted its jurisdiction over that crime.<sup>190</sup> The negotiating states have not yet decided whether to incorporate this special regime into the ICC Statute,<sup>191</sup> but, if they choose to do so, they might also apply it to crimes other than genocide.

Crimes against humanity should also be core crimes under the ICC Statute. This concept developed fairly recently, emerging in the early part of

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

*Id.*

188. See ILC Draft Statute, *supra* note 171, arts. 21(1)(a), 25(1).

189. The ILC Draft Statute provides for this special regime in article 21:

*Article 21: Preconditions to the exercise of jurisdiction*

1. The Court may exercise its jurisdiction over a person with respect to a crime referred to in article 20 if:

- (a) in a case of genocide, a complaint is brought under article 25(1);
- (b) in any other case, a complaint is brought under article 25(2) and the jurisdiction of the Court with respect to the crime is accepted under article 22:
  - (i) by the State which has custody of the suspect with respect to the crime (“the custodial State”); and
  - (ii) by the State on the territory of which the act or omission in question occurred.

2. If, with respect to a crime to which paragraph 1(b) applies, the custodial State has received, under an international agreement, a request from another State to surrender a suspect for the purposes of prosecution, then, unless the request is rejected, the acceptance by the requesting State of the Court’s jurisdiction with respect to the crime is also required.

ILC Draft Statute, *supra* note 171, art. 21.

190. The concerned states mentioned in the Draft Statute included only the state with custody of the accused, the state upon whose territory the crime was alleged to have been committed, the state of the nationality of the accused, and any state requesting extradition pursuant to an international agreement. See ILC Draft Statute, *supra* note 171, art. 21.

191. Only one of the two PrepCom options for article 22 would provide for inherent jurisdiction. (The other option, as quoted *supra* note 182, would create only a simple opting-in regime of state consent.) The option that would provide for inherent jurisdiction reads as follows:

*Article 22: Acceptance of the jurisdiction of the Court*

Option 1

1. A State that becomes a Party to this Statute thereby accepts the [inherent] jurisdiction of the Court with respect to the crimes referred to in article 20, paragraphs [(a) to (d) or any combination thereof].
2. With regard to the crimes referred to in article 20 other than those mentioned in paragraph 1, a State Party to this Statute may declare:
  - (a) at the time it expresses its consent to be bound by the Statute; or
  - (b) at a later time that it accepts the jurisdiction of the Court with respect to such of the crimes as it specifies in the declaration.
3. If under article 21 bis the acceptance of a State that is not a Party to this Statute is required, that State may, by declaration lodged with the Registrar, consent to the exercise of jurisdiction by the Court with respect to the crime. [The accepting State will cooperate with the Court without any delay or exception, in accordance with Part 7 of the Statute.]

AUGUST 1997 PREP COM DECISIONS, *supra* note 178, at 5–6.

the twentieth century.<sup>192</sup> The Nuremberg Charter<sup>193</sup> was the first multilateral legal instrument<sup>194</sup> expressly to provide for the prosecution of crimes against humanity as an offense separate from war crimes,<sup>195</sup> and the ICTY Statute contains a recent formulation.<sup>196</sup> The legal concept of such crimes developed in large part in response to the argument that international law did not apply to criminal acts directed by a government against its own civilian population,<sup>197</sup> a matter traditionally seen as falling exclusively within state sovereignty. This extension of international law into the domestic sphere was thought to be justified only when crimes had been committed on a massive or systematic scale and when their impact threatened the international community.<sup>198</sup> These same factors, which earlier justified the development

192. M. Cherif Bassiouni traces the notion of crimes against humanity to the Preamble of the 1907 Hague Convention, which states that "[t]he inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the laws of humanity, and from the dictates of public conscience." BASSIOUNI & MANIKAS, *supra* note 53, at 589.

193. IMT Charter, *supra* note 7.

194. Crimes against humanity had been mentioned earlier in a diplomatic note by France, Great Britain, and Russia denouncing the 1915 massacre of Armenians in Turkey as "crimes against humanity and civilization for which all members of the Turkish Government will be held responsible together with its agents implicated in the massacres." BASSIOUNI & MANIKAS, *supra* note 53, at 589 (quoting YOUNGINDRA KHUSHALANI, DIGNITY AND HONOUR OF WOMEN AS BASIC AND FUNDAMENTAL HUMAN RIGHTS 3, 14 (1982)).

195. Article 6(c) of the IMT Charter defined crimes against humanity as follows:

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

IMT Charter, *supra* note 7, art. 6(c).

196. See ICTY Statute, *supra* note 12, art. 5. Article 5 of the ICTY Statute defines crimes against humanity as follows:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against a civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial, or religious grounds; (i) other inhumane acts.

*Id.*

197. Bassiouni observes:

The Nuremberg application of 'crimes against humanity' was a response to the shortcoming in international law that many crimes committed during the Second World War could not technically be regarded as war crimes *strictu sensu* on account of one or several elements, which were of a different nature. It was, therefore, conceived to redress crimes of an equally serious character and on a vast scale, organized and systematic, and most ruthlessly carried out.

BASSIOUNI & MANIKAS, *supra* note 53, at 540.

198. The Legal Committee of the United Nations War Crimes Committee explained the basis for international intervention this way:

Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places endangered the international community or shocked the conscience of



and application of the notion of crimes against humanity as part of customary international law, now impel their classification as core crimes under the statute of a future ICC.<sup>199</sup>

While there are compelling reasons to classify genocide and crimes against humanity as crimes within the core jurisdiction of the ICC, the case for including other crimes is weaker. The ILC Draft Statute lists serious violations of the laws and customs applicable in armed conflict and aggression as crimes within the ICC's jurisdiction.<sup>200</sup> The former fall within the jurisdiction of the ad hoc tribunals and also have been suggested as possible core crimes. In addition, the ILC Draft Statute tentatively lists treaty crimes—such as grave breaches of the 1949 Geneva Conventions, hijacking, apartheid, torture, and illicit traffic in drugs—as crimes that might fall within the ICC's jurisdiction.<sup>201</sup> Even if one or more of these crimes are eventually included within the ICC's jurisdiction, none of them, with the exception of grave breaches of the Geneva Conventions, had enough support within the Preparatory Committee to merit serious consideration as a core crime.<sup>202</sup> The Preparatory Committee's slow progress in deciding which crimes merit "core" status does not augur well for the prospects of reaching a consensus on a list of core crimes other than genocide.

## 2. Complementarity

As the early Preparatory Committee negotiations attempted to define complementarity, alternative approaches to this concept emerged. The first, a "simple complementarity," would fully subordinate the jurisdiction of the ICC to that of national courts, in effect granting the latter "primacy" over the former. An alternative "crime-specific" approach would distinguish, for purposes of complementarity, between a core set of crimes over which the ICC would have "inherent" and thus primary jurisdiction and other non-core crimes. The latter would fall within the ICC's jurisdiction only when absolutely required by the interests of justice.

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mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims.

U.N. WAR CRIMES COMM'N, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 179 (1948).

199. The IMT Charter's definition of crimes against humanity in article 6 specifically states that they are to be prosecuted "whether or not in violation of the domestic law of the country where perpetrated." IMT Charter, *supra* note 6, art. 6(c). The fact that international interests prevail over state interests in the definition of these crimes is yet another reason why crimes against humanity should be core crimes of the future ICC.

200. See ILC Draft Statute, *supra* note 171, art. 20 & Annex (listing crimes pursuant to treaties as referred to in article 20(e) of ILC Draft Statute).

201. See *id.*

202. Early in the process, the United States expressed the view that "the discussions in the *Ad Hoc* Committee showed a growing consensus to restrict the jurisdiction of the court to genocide, crimes against humanity and war crimes. . . . We do not believe that there is enough support to sustain aggression, drug crimes, terrorism crimes, or violations of the Apartheid Convention within the court's jurisdiction." U.S.U.N. Press Release No. 182, Nov. 1, 1995 (statement of Jamison S. Borek, Deputy Legal Adviser, U.S. Department of State), available in <gopher://gopher.icg.apc.org/0./orgs/icc/natldocs/usa1195.txt> (visited May 2, 1998).

a. *Simple Complementarity: The Primacy of National Courts over the ICC*

The concept of complementarity is based on the view that the exercise of police power and penal law is a state prerogative and that therefore national courts should have primacy over the ICC.<sup>203</sup> The subsidiary jurisdiction of the ICC would come into play only if no state was willing and able to exercise its jurisdiction over the case, if the state willing to do so did not have a credible national justice system, or if (as in the *non-bis-in-idem* scenario of the ad hoc tribunals) the accused had received a sham trial in a national court.<sup>204</sup> The most recent formulation of these principles is reflected in the draft text of article 35, which resulted from informal consultations of the Preparatory Committee in August 1997.<sup>205</sup>

Under a pure concept of "complementarity," international jurisdiction would always be contingent upon a determination that any national legal system claiming the prior right to investigate or prosecute the case was somehow inadequate.<sup>206</sup> A Chamber of the ICC would make this determination, and the initial decision would be subject to appeal.<sup>207</sup> In

203. "[T]aking into account that under international law, exercise of police power and penal law is a prerogative of States, the jurisdiction of the Court should be viewed only as an exception to such State prerogative." 1 *Preparatory Committee Report*, *supra* note 184, ¶ 155.

204. A summary of Preparatory Committee debates described this view as follows:

[I]t is not a question of the Court having primary or even concurrent jurisdiction. Rather, its jurisdiction should be understood as having an exceptional character. There may be instances where the Court could obtain jurisdiction quickly over a case because no good-faith effort was under way at the national level to investigate or prosecute the case, or no credible national justice system even existed to consider the case. But as long as the relevant national system was investigating or prosecuting a case in good faith, according to this view, the Court's jurisdiction should not come into operation. A view was also expressed that a possible safeguard against sham trials could also be for the Statute to set out certain basic conditions relating to investigations, trials and the handling of requests for extradition and legal assistance.

*Id.* ¶ 154.

205. See AUGUST 1997 PREPCOM DECISIONS, *supra* note 178, art. 35. The core of draft article 35(2)(a) of that text reads as follows:

The Court shall determine that a case is inadmissible where:

- (a) the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under paragraph 2 of article 42;
- (d) the case is not of sufficient gravity to justify further action by the Court.

*Id.* art. 35(2).

206. Under draft article 35(2)(a), any time a case is being investigated or prosecuted by a state with jurisdiction, that case will be inadmissible "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." AUGUST 1997 PREPCOM DECISIONS, *supra* note 178, art. 35(2)(a).

207. The draft text of article 36(4) provides that:

practice, states are likely to perceive this process of external evaluation as a challenge to their sovereign dignity. An ICC with inherent jurisdiction over all *cases* involving certain crimes, as will be discussed below, would not need to assess national legal systems before assuming jurisdiction.

b. *Inherent Jurisdiction Revisited: The Possibility of a Crime-Specific Exception to the Principle of Complementarity*

The principle of complementarity would so dramatically limit the jurisdiction, role, and authority of the ICC that many fear it could become only a meaningless, residual institution.<sup>208</sup> If inherent jurisdiction were recognized as an exception to the general scheme of complementarity, this would enhance the ICC's ability to prevent impunity for serious international crimes.<sup>209</sup> Some states, however, have rejected this expanded notion of inherent jurisdiction, arguing that it is inconsistent with state sovereignty and with the principle of complementarity.<sup>210</sup> The United States, in particular, has argued consistently for a very strict concept of complementarity<sup>211</sup> that

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Prior to the confirmation of the indictment, challenges to the admissibility of a case or challenges to the jurisdiction of the Court, shall be referred to the Pre-Trial Chamber. After confirmation of the indictment, they shall be referred to the Trial Chamber.

Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber.

*Decisions Taken by the Preparatory Committee at its Session Held From 1 to 12 December 1997*, Preparatory Committee on the Establishment of an International Criminal Court, Annex III, U.N. Doc. A/AC.249/1997/L.9/Rev.1 (1997).

208. The report stated:

Some other delegations expressed concern that without specifying clear exceptions to the concept, complementarity would render the Court meaningless by undermining its authority. In their view, a suggestion that in each and every case the Prosecutor had to prove that circumstances required the Court's intervention would reduce it to a mere residual institution, short of necessary status and independence. In this context it was noted that while national authorities and courts had the primary responsibility for prosecuting the perpetrators of the crimes listed in the Statute, the Court was an indispensable asset in enhancing the prevention of impunity, which too often had been the reward for violators of human rights and humanitarian law.

1 *Preparatory Committee Report*, *supra* note 184, ¶ 157.

209. Under the ILC's Draft Statute, only genocide would fall within the inherent jurisdiction of the ICC. *See* ILC Draft Statute, *supra* note 171, art. 21. No agreement has been reached so far on the final list of core crimes, if any, under the ICC Statute. *See* AUGUST 1997 PREPCOM DECISIONS, *supra* note 178, at 5-6 (quoting draft text of article 22).

210. Chinese Ambassador Chen Shiqiu commented in October 1996 that "the draft statute by the International Law Commission has provided inherent jurisdiction for the court without consent of state [sic] in respect of the crime of genocide . . . this goes against both the principle of state sovereignty and the principle of complementarity." *Chinese Ambassador on International Criminal Court*, XINHUA NEWS AGENCY, Item No. 1031027, Oct. 31, 1996, available in LEXIS, News Library, Wires File.

211. Although the United States has expressed support for the ICC, it has argued for very limited jurisdiction. Juan Mendez and Richard Dicker have characterized the U.S. position in Preparatory Committee negotiations as follows:

For the most part . . . the American government's interventions have tended to weaken, if not marginalize, the role of the court. For example, in the discussion of "complementarity"—a notion symbolizing the court's subsidiary role regarding national jurisdiction—the effect of U.S. arguments has been regressive. All states agree that the

would restrict the ICC's jurisdiction.<sup>212</sup> The divergent views of states on this issue echo the tensions raised by the ICTY and the ICTR. Indeed, problems with the practical enforcement of primacy by these ad hoc tribunals make it clear that primacy is not a viable option for the ICC.

Inherent jurisdiction would allow the ICC to assert jurisdiction over cases involving core crimes without deferring to the jurisdiction of any interested state. This approach would promote universal and uniform individual criminal responsibility for the crimes concerned because any person accused of a core crime would normally be tried by the ICC, not by national courts. Concurrent national court jurisdiction over these core crimes would remain, however, and the ICC could decline to exercise its inherent jurisdiction in cases in which deferral to national jurisdiction was for some reason more appropriate.<sup>213</sup>

Granting the ICC inherent jurisdiction over all cases involving a set of core crimes could lead to problems in the long run. Ultimately, there would have to be some enforcement of that jurisdiction if and when a state with custody of an accused refused to surrender that individual. The ICC will eventually confront this problem, however, regardless of the definition and practical application of complementarity. The Security Council is the only authority empowered to police states that refuse to cooperate with the ad hoc tribunals, and it undoubtedly will have the same role in enforcing the ICC's jurisdiction. If the ICC possesses inherent jurisdiction over a set of core crimes, this issue will simply arise more often.

Opposition to the idea of inherent jurisdiction as an exception to the principle of complementarity is largely based on concerns about deferring a sovereign function to an international institution. Some countries are uneasy

ICC should act where domestic jurisdiction is unavailable or ineffective to redress the crimes. But the United States is setting such a high threshold for those cases that the court's role would be an extremely minimal one.

Juan E. Mendez & Richard Dicker, *Creating an International Criminal Court; Lukewarm U.S. Support Hampers Prospect*, *LEGAL TIMES*, Sept. 18, 1995, at 24.

212. As the Deputy Legal Adviser of the State Department stated in 1995:

The proposal, endorsed by some governments but never proposed by the International Law Commission, that the court have "inherent jurisdiction" over violations of humanitarian law (other than possibly the crime of genocide) is ill conceived in our view and will not achieve the broad support necessary for a viable court. We have provided our views on this on a number of occasions, and will continue to do so. . . . As many have noted, it is also important to elaborate further the principle of complementarity. We believe that bona fide national investigations and prosecutions will always be preferable, where possible, for many reasons. We believe that, for a permanent court which will face many possible and unknown cases, national jurisdiction should enjoy a presumption of regularity.

U.S.U.N. Press Release No. 182, *supra* note 202.

213. At the Preparatory Committee, some states argued:

Inherent jurisdiction also did not, in their view, imply that the Court, in all circumstances, had a better claim than national Courts to exercise jurisdiction. It was therefore possible that a case could arise in relation to a crime which was within the Court's inherent jurisdiction but which would none the less be tried by a national jurisdiction, because it was determined that the exercise of national jurisdiction would be more appropriate in that particular case."

1 *Preparatory Committee Report*, *supra* note 184, ¶ 118.

about creating an international body empowered to level criminal charges and return criminal convictions.<sup>214</sup> Because such concerns could deter governments from joining the ICC from the outset, it would be necessary to limit the number of crimes within the ICC's inherent jurisdiction. A core set of crimes, including genocide, war crimes, and crimes against humanity (essentially the same crimes within the competence of the ICTY and ICTR) would endow the ICC with enough jurisdiction to achieve its mission of preventing impunity for the most serious international crimes.

### 3. *The Role of the Security Council in Determining the Jurisdiction of the ICC*

An important matter touching upon the relationship between ICC jurisdiction and that of national courts is the issue of which actors can initiate or "trigger" ICC investigations and other proceedings. Both the effectiveness and the impartiality of the ICC would be maximized if its Prosecutor were free to initiate investigations without the approval of any state or political body. Indeed, many European and Latin American governments favor this position.<sup>215</sup> Militating against this, however, are the views and interests of other states. Some states, including India and China, have argued that national governments should be involved in initiating ICC investigations, allowing states to retain more political control over the process.<sup>216</sup> Others, including the other four permanent Security Council members, generally have maintained that the Council must retain a role in deciding which cases the ICC will pursue.<sup>217</sup> The U.S. government, for example, gives great weight to the role of the Council, insisting that it be able both to prevent the exercise of that jurisdiction and to request its exercise when this serves the interests of international peace and security.<sup>218</sup>

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214. See Haq, *supra* note 183, at 3 (noting that worries about turning sovereignty over to international criminal court may cause some states to opt out of ICC).

215. "Washington wants the Security Council to be the arbiter of what cases would go to the international court, a view at odds with nearly all other countries. Europeans and some Latin American nations would give international prosecutors wide latitude in bringing cases." Crossette, *supra* note 179, at A10.

216. See *International Court Given Boost by U.S.*, CHI. TRIB., Aug. 14, 1997, at 18.

217. As illustrated in the following news report:

[A] number of diplomats at the ongoing talks here say that the Court's jurisdiction should be set as narrowly as possible. The five powerful, veto-holding permanent members of the U.N. Security Council—Britain, China, France, Russia and the United States—are all, to varying degrees, unwilling to allow the Court independence to pursue cases without the Council's specific authorization.

Farhan Haq, *U.N.-Women: Seeking Gender Role in International Court Debate*, INTER PRESS SERVICE, Aug. 12, 1997, available in LEXIS, Nexis Library, Wires File.

218. The United States stated before the Sixth Committee of the General Assembly:

[T]he Security Council exercises primary responsibility for the maintenance of international peace and security . . . .

. . . .

. . . It will be important, therefore, that any situation about which the Security Council is already actively seized not be referred by a state party to the Court until the Council has agreed. This is common sense.

*U.S. Statement on the International Criminal Court*, U.N. GAOR, 6th Comm., 51st Sess. (1996),

The U.S. government shares the reservations of many states concerning the potential intrusion of the ICC into matters of sovereignty, but as a global military power, it has a special set of interests to protect as well. Its concern is that the ICC could investigate and prosecute U.S. military personnel for alleged offenses committed during a conflict abroad.<sup>219</sup> This concern can most easily be addressed by reserving a role for the Security Council in triggering and in preempting the jurisdiction of the ICC. The details of that role are, at present, still a subject of great dispute,<sup>220</sup> but some consensus on these issues has begun to emerge.

The most recent draft articles reflect a clear consensus that the Security Council should have the authority to refer to the ICC a "situation" or "matter" in which crimes appear to have been committed, and thus to vest the ICC with jurisdiction over associated crimes.<sup>221</sup> This process, which largely parallels the practice of the Security Council in establishing the ad hoc tribunals, would obviate the need for state consent to jurisdiction in those referred cases. This draft also recognizes that Security Council determinations should bind the ICC on the special issue of whether an act of aggression has occurred.<sup>222</sup> The most controversial aspect of the Security Council's role concerns possible ICC investigations and/or prosecutions arising from a situation or dispute being dealt with by the Security Council under its Chapter VII powers. One formulation would require the prior consent of the Security Council for such prosecutions; another would simply delay them for a period of twelve months.<sup>223</sup>

The prospects for compromise on this issue received a major boost when the U.S. government proposed that the ICC Prosecutor be given the authority to initiate investigations against individual suspects without the approval of the Security Council or any other organization.<sup>224</sup> This proposal still requires the Council's consent for any prosecution arising from a situation under its review. Thus, in cases involving threats to international peace and security, the Security Council could preserve its special

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available in <gopher://gopher.icg.apc.org:70/00/orgs/icc/natldocs/GA51/us.1096> (visited Jan. 5, 1998).

219. These concerns were summed up in the following terms by David Scheffer, the Clinton Administration's Special Envoy dealing with war crimes:

[T]he reality is that the United States is a global military power and presence . . .

Our military forces are often called upon to engage overseas in conflict situations, for purposes of humanitarian intervention, to rescue hostages, to bring out American citizens from threatening environments, to deal with terrorists. We have to be extremely careful that this proposal does not limit the capacity of our armed forces to legitimately operate internationally.

We have to be careful that it does not open up opportunities for endless frivolous complaints to be lodged against the United States as a global military power. Crossette, *supra* note 179, at A10 (quoting Schelfer).

220. The most current draft article 23 on the role of the Security Council contains several alternative formulations and much bracketed language. See AUGUST 1997 PREPCOM DECISIONS, *supra* note 178, at 6-8.

221. See *id.* at 6-7 (setting forth alternative formulations of draft art. 23(1)).

222. See *id.* at 7 (setting forth alternative formulations of draft art. 23(2)).

223. See *id.* at 8 (setting forth alternative formulations of draft art. 23(3)).

224. See *International Court Given Boost by U.S.*, *supra* note 216, at 18.

prerogatives by excluding the authority of the ICC Prosecutor. An equally significant shift towards consensus on a more limited role for the Security Council came when the British government informally expressed its support<sup>225</sup> for a Singaporean proposal<sup>226</sup> that would require a Security Council decision to block an ICC investigation or prosecution. The final resolution of this critical issue has been left to the plenipotentiary conference to be held in Rome, but the progress already achieved on this issue suggests that an acceptable result may be within reach.

The ICC's dependence upon the support of the Security Council for the enforcement of its arrest warrants and other orders will strongly influence relations between the two bodies. There is therefore no reason for the United States, as a permanent member of the Council, to fear frivolous international prosecutions of U.S. military personnel and other U.S. nationals. It would be both futile and irrational for the ICC to pursue such a course of action. This implicit safeguard ensures that the United States will be able to protect its legitimate interests without compromising the independence of the ICC.

The value of a permanent ICC will lie in its international credibility as an impartial institution capable of promoting equal justice for all. Much of that credibility would be lost if its prosecutions were explicitly made subject to the approval of the Security Council. This would represent a step backwards from the practice of the ad hoc tribunals, which, apart from matters of enforcement, operate independently of the Security Council.

#### 4. *Proposals for a Threshold Requirement*

A new threshold requirement has been proposed as an additional device for limiting the jurisdiction of the ICC to only the most serious cases of concern to the international community as a whole. It would limit ICC jurisdiction over war crimes to cases in which such crimes have been

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225. See William R. Pace, *Initial Summary Reports on December 1-12 Meetings of the United Nations Preparatory Committee on the Establishment of an International Criminal Court*, Dec. 18, 1997, available in <gopher://gopher.icg.apc.org:70/00/orgs/icc/ngodocs/prepcom5/prepcom5.cicc> (visited Feb. 10, 1998). Mr. Pace, the convenor of the ICC, summarized this development as follows:

One of the most important developments during the PrepCom, though not part of the official negotiations, was a dramatic shift in the position of the United Kingdom on the issue of the role of the Security Council. At this PrepCom, the United Kingdom confirmed it's [sic] decision to oppose the provision in the draft Statute of the ILC which would require prior approval by the Security Council before the Court could proceed with investigations and trials. This provision in effect gave the Security Council veto power over the ICC. Instead the UK indicated it will support a modified formulation of the "Singapore proposal" which would require a positive decision to be taken by the Council to prevent or delay or block the ICC, and then only for a limited length of time.

*Id.*

226. The Singapore proposal, in its original form, would replace article 23(3) of the proposed text with the simple rule that "[n]o investigation or prosecution may be commenced or proceeded with under this statute where the Security Council has, acting under Chapter VII of the Charter of the United Nations, given a direction to that effect." See THE SINGAPORE PROPOSAL (Aug. 8, 1997), available in <gopher://gopher.icg.apc.org:70/00/orgs/icc/natldocs/prepcom4/singapore.txt> (visited Jan. 5, 1998).

committed as part of a plan or policy or have taken place on a particularly large scale.<sup>227</sup> Both the requirement of a plan or policy and that of a widespread scope are elements of crimes against humanity under customary international law. Their application to war crimes would be a complete novelty and would lead to unnecessary confusion between these crimes and crimes against humanity. The proposal apparently was designed to ensure that accusations of criminal acts by U.S. military personnel in the course of foreign operations will not subject them to ICC jurisdiction. In light of the safeguards provided by the principle of complementarity and the Security Council role discussed above, however, this threshold requirement seems quite superfluous. Many states at the PrepCom opposed the inclusion of such a threshold clause, but most agreed that they could accept a weaker version that did not explicitly limit the ICC's jurisdiction.<sup>228</sup>

#### IV. CONCLUSION

Whatever new balance may be achieved between the jurisdiction of national courts and that of international criminal tribunals will mark the end of an era when the exercise of criminal jurisdiction fell within the unfettered prerogatives of the sovereign state. The Security Council created each of the two existing international criminal tribunals ad hoc as an extraordinary response to a specific and narrowly defined threat to international peace and security. To enable them to address these threats, it granted them unprecedented primacy over the jurisdiction of all national courts. When this broad concept of primacy is compared to the lesser complementary jurisdiction proposed for a permanent ICC, a trend of decreasing international criminal jurisdiction seems clear. But the de facto jurisdictional gap between primacy and complementarity may not be so broad. Since primacy never has been adequately implemented or enforced even for the ad hoc tribunals, it has not yet been established that it is functionally superior to complementarity. The Security Council approved primacy before it had faced the full scrutiny of the General Assembly, and states never fully accepted it.

The general form of primacy set out in the ICTY Statute and Rules

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227. The most restrictive of three alternative versions of the threshold requirement, which emerged at the December 1997 Preparatory Committee session, read as follows:

Option I

The jurisdiction of the Court shall extend to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) only when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

U.N. GAOR Preparatory Committee on the Establishment of an International Criminal Court, 52d Sess., 54th mtg., Annex I, U.N. Doc. A/AC.249/1997/L.9/Rev.1 (1997).

228. *See id.* This provision reads in part:

Option II

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court shall have jurisdiction in respect of the crimes listed in article X (war crimes) in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.



compromises the criminal jurisdiction of all states in order to establish that of the International Tribunal. Any state might be required to defer a case to the International Tribunal at some point in the future. Accustomed to veto privileges, the permanent members of the Security Council found this change a hard pill to swallow, and it is no surprise that four of these states have advanced narrow interpretations of the principle. The terms of these interpretations are not identical, but they concur in the view that the International Tribunals have jurisdictional priority only over those national criminal proceedings that are somehow deficient. Despite these views, however, the ICTY still claims primacy over all national courts. So far, this claim has not been tested because no state outside of the former Yugoslavia has contested the Tribunal's jurisdictional priority. But the Security Council's lack of political consensus on primacy may have presaged its subsequent failure to support it. An essential aspect of primacy is the concomitant obligation of states to cooperate with the International Tribunal's investigations, arrests, and prosecutions, but the Council has done little to enforce this obligation against recalcitrant states.

These problems with the primacy of the limited-purpose ad hoc tribunals demonstrate that primacy is not at present a politically viable alternative for a permanent ICC. The fact that the primacy of the ICTY and the ICTR has not been well supported by an enforcement mechanism has not made the principle any more palatable to states jealous of their sovereignty, many of whom oppose primacy in principle even if it is not fully implemented in practice.

The narrow interpretation of primacy advanced by Security Council members closely parallels the concept of complementary jurisdiction that has been proposed for a future ICC. Each is essentially an extraordinary form of international jurisdiction to be invoked only when national trial procedures are unavailable or ineffective. Primacy establishes the jurisdiction of an international tribunal by limiting the criminal jurisdiction of all sovereign states. From the states' point of view, the relative advantage of complementarity is that it allows them to avoid such a general concession of previously held criminal jurisdiction. But any international criminal jurisdiction capable of vindicating the interests of the international community necessarily will involve some compromise of state sovereignty.

According to the ICC Draft Statute, the purpose of the ICC is to enhance the effective suppression and prosecution of crimes of international concern. An ICC with complementary jurisdiction can accomplish this objective only if a reliable trigger mechanism allows it to assume jurisdiction whenever necessary to provide a fair and diligent prosecution of those believed responsible for violations of fundamental international norms. The international supervision necessary for the full implementation of complementary jurisdiction could be extremely embarrassing to states, and some of them may eventually conclude that it compromises their sovereignty more than would a general primacy applicable to all states.

There is a choice to be made between primacy and complementarity,

and for the ICC the latter is the only possible alternative. The more fundamental decision for the states of the international community, however, is whether to make the concessions necessary to create an effective international mechanism of any kind. If states insist upon preserving the totality of their sovereign prerogatives, no effective international criminal jurisdiction can be created.

The attitude of the U.S. government provides a good example. The United States supported the creation of the ad hoc tribunals and has helped them succeed. It may do the same for a future ICC but seems determined to do so only at a minimal cost to its prerogatives as a sovereign state and as a superpower. The narrow interpretation of primacy endorsed by the U.S. government reserves for it the right to resist the deferral of pending cases to the jurisdiction of either ad hoc tribunal, but it is unlikely that the United States will ever need to exercise this right. Most of those indicted by the ICTY, like Bosnian Serb leader Dusko Tadic, are presently at large within the territory of the former Yugoslavia in areas controlled by their own ethnic brethren. The U.S. government would like to see these people arrested, believing that this would help the Dayton Peace process to succeed. In the case of Elizaphan Ntakirutimana,<sup>229</sup> a Rwandan national accused by the ICTR of genocide and subsequently arrested and held in Texas, the United States has little interest in retaining him for trial before its own courts. Nevertheless, defense lawyers for Ntakirutimana worked to build a nationalistic reaction, both in the press and inside the courtroom, against the idea of delivering a suspect held in U.S. custody to the jurisdiction of an international court. This strategy succeeded in persuading a U.S. magistrate to order Ntakirutimana's release after a first extradition hearing. While this magistrate's decision faces the prospect of reversal on appeal in a subsequent hearing, his actions demonstrate a psychology of reflexive resistance to international jurisdiction. This does not augur well for the eventual acceptance by the United States of the jurisdiction of a permanent ICC, however it may ultimately be configured.

States can avoid sacrificing sovereignty to the ICC in a number of ways: by imposing burdensome state consent requirements that deny it inherent jurisdiction over crimes, by insisting that states retain an absolute priority over the ICC for the prosecution of international crimes, by requiring the consent of a political body such as the Security Council before ICC cases can proceed, or by refusing to enforce in practice whatever jurisdiction they may decide to grant to the ICC. To be a step forward rather than backward, the ICC must have inherent jurisdiction over at least a short list of core crimes not subject to requirements of state consent. Thus, some type of crime-specific jurisdiction is clearly the best alternative for the ICC. But states must achieve a consensus on a list of core crimes before this approach can be put into effect. The problem also remains of how to apprehend suspects accused of crimes within the ICC's competence. The real

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229. See *supra* notes 134–139 and accompanying text.

jurisdictional problem for the ICTY lies in the reluctance of the Security Council and its key members to take stronger action to arrest indictees and to sanction states that fail or refuse to cooperate with the ICTY. This same problem will plague the ICC, regardless of how complementarity is defined. Experience has shown that even when a strong principle of international cooperation such as primacy has been formally accepted, it cannot be effectively implemented unless and until it is supported by the requisite international consensus.

Each of the ad hoc tribunals was created to protect compelling humanitarian interests in a situation identified by the Security Council as a threat to international peace and security. Upholding their primacy over national courts promotes international peace and security and promises greater uniformity and fairness in the application of international law. The ICC will also promote norms of concern to the entire international community, but as a permanent institution with a more general mandate. Neither the simple primacy of the ad hoc tribunals nor a rule of automatic deferral to national jurisdiction can be appropriate to all of the situations the ICC will encounter. Over time, it will face a variety of situations, each requiring an appropriate balance between national and international criminal jurisdiction. International jurisdiction may at times be preferable to the jurisdiction of national courts for reasons unrelated to the latter's credibility. Any attempt to define the optimal relationship between ICC jurisdiction and national court jurisdiction should take this need for flexibility into account.

How can the international community best hope to reach a consensus on an effective level of jurisdiction for the ICC? This Article argues that the political negotiations of the Preparatory Committee and of the Rome Plenipotentiary Conference can go only so far towards achieving this goal. While these negotiations have helped to identify the key obstacles to the creation of a workable and effective ICC, they are unlikely to resolve them entirely. Only the practical experience of successful cooperation between states and the ICC can cement an international consensus in favor of strong and effective ICC jurisdiction.

The states participating in the Preparatory Committee have agreed, in general terms, that the jurisdiction of the ICC should be based on the principle of complementarity, but so far it has proven difficult to achieve a consensus on how this principle should be applied. If the negotiating states insist now upon defining the minutiae of the ICC's complementary jurisdiction, the underlying disagreements will emerge in starker contrast than ever. The result could be an ICC with the lowest acceptable denominator of jurisdiction, unable to advance the interests of the international community even in cases in which national courts cannot be relied upon to prosecute fairly and effectively. The ICC has a better chance of developing into a functional institution if it retains a degree of flexibility concerning the implementation of complementarity.<sup>230</sup> At present, however,

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230. Judge Gabrielle Kirk McDonald of the ICTY made a similar point in comments before an informal plenary of the Preparatory Committee. She stated that "the Statute should be one of

it does not seem that the negotiating states are inclined to try this approach.

If states can agree for now to grant the ICC inherent, but not exclusive, jurisdiction over a short list of core international crimes, they can establish concurrent national and international jurisdiction over those crimes. The difficult operational details of reconciling these two jurisdictions could be resolved later. The process might begin with the submission of technical proposals to the judges of the ICC by states and NGOs, much as was done when the U.N. Secretariat prepared the ICTY Statute<sup>231</sup> and when the judges adopted its Rules of Procedure and Evidence.<sup>232</sup> But the adoption of an initial set of procedures on concurrent jurisdiction should only be part of a continuing process of dialogue and cooperation between states and the ICC. Over time, this process might reach a more practical and effective balance between national and international criminal jurisdiction than the more overtly political debates of the Preparatory Committee or the Plenipotentiary Conference of states that will finalize the text of the ICC Statute.

Regardless of the approach taken to the creation of the ICC, the success of the resulting institution will depend upon future developments. Even if it is initially saddled with narrow jurisdictional limits that reduce it to near irrelevance, the ICC may nevertheless grow into relevance as "the last major international organization established in this century . . ."<sup>233</sup> If allowed to develop within a more flexible framework of complementary jurisdiction as this Article has suggested, that development will be facilitated. States will in any case retain two important guarantees against any potential abuse of jurisdiction by the ICC. The first is the concurrent jurisdiction that concerned states will keep over crimes within the jurisdiction of the ICC. The second is the Security Council, which, based on the experience of the ad hoc tribunals, is unlikely to enforce state cooperation with the ICC except in the most egregious cases of state failure to enforce fundamental international criminal norms.

The ICC provides an unique opportunity to build upon the successes of past international cooperation in technical areas such as telecommunications, health, and intellectual property by creating the first permanent international institution with jurisdiction over crimes of concern to the entire international community. Such an important objective cannot be achieved without impinging upon the traditional criminal jurisdiction of states, but the values

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principle and not of detail . . . a Statute which does not give the Court flexibility to address unforeseen issues or make changes to improve the administration of justice will in my view lead to an ineffective court." *Judge Kirk McDonald Urges that the International Permanent Court "Must Be Effective"*, Press Release of the ICTY Press and Information Office, Aug. 14, 1997, CC/PIO/236-E, available in <http://www.un.org/icty/> (visited May 6, 1998). She also encouraged the Committee to "ensure that the Statute be a flexible document based on principles which may be developed by the Court as the circumstances require while still providing sufficient guidance to establish an international framework within which the Court can work." *Id.*

231. See ICTY Statute, *supra* note 12, ¶ 17.

232. See SPECIAL TASK FORCE OF THE ABA SECTION OF INT'L LAW & PRACTICE, REPORT ON THE PROPOSED RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA (1995).

233. Crossette, *supra* note 179, at A5 (quoting William Pace).

concerned are important enough to justify this intrusion.

Powerful democratic states such as the United States will play a decisive role in the success of the plenipotentiary conference and in the practical functioning of the ICC. The issue of the Security Council's possible role in blocking ICC jurisdiction is developing into an important test of their moral leadership. If the United States, in particular, can take a more principled stand on this issue, it will send a strong message in support of equal justice and the rule of law. The Constitution and laws of the United States reflect an understanding that these ideals can only be realized when courts are institutionally shielded from direct political influence. The statute of the ICC should do no less.

The U.S. government need not fear the scrutiny of an independent international prosecutor. Justice Louise Arbour, the Prosecutor of the ICTY and the ICTR, recently observed that there is more reason to fear that the international prosecutor will be impotent than there is to fear that she will overreach.<sup>234</sup> The ICC prosecutor, like Justice Arbour, will depend upon the United States and the Security Council for essential political support and enforcement and will have no reason to pursue frivolous prosecutions against the citizens of any state.<sup>235</sup>

The United States already has made a number of useful proposals for compromise that advance the prospects for creating a successful ICC. It should be possible to resolve the remaining issues at the Rome Conference without unduly compromising either the legitimate interests of the United States or the principle of prosecutorial independence. Countries that appreciate the importance of upholding international human rights and humanitarian norms should not approach the creation of an ICC in terms of a

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234. See *NATO: Statement by Justice Louise Arbour on Establishment of an International Criminal Court*, M2 PRESSWIRE, Dec. 10, 1997, available in LEXIS, World Library, Currnws File. In her statement before the ICC PrepCom, Justice Arbour observed:

Turning then to the powers of the Prosecutor of the permanent Court, I would like to expand on my earlier remarks that it may be unwarranted for States to fear the possible overreach, or simply the untrammelled power of the Prosecutor of the permanent Court. Despite the fact that the ad hoc Tribunals' powers originate in Chapter VII of the United Nations Charter, the taxing experience of my Office suggests that it is more likely that the Prosecutor of the permanent Court could be chronically enfeebled by inadequate enforcement powers combined with a persistent and widespread unwillingness of States Parties to co-operate. The existence of jurisdiction will not necessarily correspond to the reality facing the Prosecutor of the permanent Court on a day-to-day basis.

*Id.*

235. Justice Arbour noted:

In my experience, based on the work of the two Tribunals to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones. Our experience to date suggests that we can dispose quickly of even large quantities of unsubstantiated allegations. In any event, an appropriate process of vigorous internal indictment review, such as we presently have in place at the two Tribunals, confirmation by a competent judge, and the inevitable acquittal that would result from an unfounded prosecution, should alleviate any fear that an overzealous or politically-driven Prosecutor could abuse his or her powers.

*Id.*

simple tradeoff between their own national sovereignty and the authority of international institutions. Taking a larger view of the interests concerned, there is much to be gained from global acceptance of international institutions that promote values fundamental to all democratic and peace-loving states.