COMPARATIVE COMPLEMENTARITY:

DOMESTIC JURISDICTION CONSISTENT WITH THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

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The crimes you committed, General Blaskic, are extremely serious. The acts of war carried out with disregard for international humanitarian law and in hatred of other people, the villages reduced to rubble, the houses and stables set on fire and destroyed, the people forced to abandon their homes, the lost and broken lives are unacceptable. The international community must not tolerate such crimes, no matter where they may be perpetrated, no matter who the perpetrators are and no matter what the reasons for them may be. If armed conflict is unavoidable, those who have the power to take decisions and those who carry them out must ensure that the most basic rules governing the law of nations are respected. International courts, today this Tribu-

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> *nal, tomorrow the International Criminal Court, must appropriately punish all those, and especially those holding the highest positions, who transgress these principles.*
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> *—Judge Claude Jorda's statement announcing the findings and sentencing of General Tihomir Blaskic*[2]

I. Introduction

The ongoing diplomatic and political efforts to create the International Criminal Court (ICC) are forever altering the landscape of the international community and the face of international law. The Chairman of the Drafting Committee working on the negotiations towards the Rome Statute of the International Criminal Court[3] (Rome Statute) proclaimed that

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2. Prosecutor v. Blaskic, No. IT-95-14, para. 103 (Mar. 3, 2000) (Summary of Judgement), *at* http://www.un.org/icty/judgement.htm. General Blaskic was sentenced to forty-five years for his crimes, which is the longest sentence adjudged by the International Criminal Tribunal for the Former Yugoslavia at the time of this writing. *Id.*

3. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (1998) (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998), *reprinted in* 37 I.L.M. 998 (1998) [hereinafter Rome Statute]. The Chairman of the Drafting Committee was the distinguished professor of law at DePaul University and renowned commentator on international criminal law, M. Cherif Bassiouni. The concept of a "statute," termed as such in international law, is in itself a recent and noteworthy development. During recent testimony to Congress, Ambassador David J. Scheffer, head of the United States delegation to the ICC negotiations and the subsequent Preparatory Commission negotiations on the Rules of Evidence and Procedure and Elements of Crimes, explained the term as follows:

> When one speaks of creating a court on an international level, it has to have to some governing document for the functioning of that court. And as with the Yugoslav tribunal and the Rwanda tribunal, the Security Council adopted statutes or a statute for each tribunal, which is its constitution, basically, the court's own constitution, the basic principles by which the court must function. It is simply a term of art that has arisen in the international sphere, and during the talks for the ICC, it is that basic constitutional document of the court itself which is described as the statute. The treaty itself, when ratified, embodies that statute. And I guess that the best I can say is that it's simply, in U.N. practice, once you have ratified the treaty per se, you are also, of course, adopting as part of that ratification practice or package the statute of the court itself.

Ambassador David J. Scheffer, Statement Before the House International Relations Committee (July 26, 2000), *available at* LEXIS, Federal News Service.

"[t]he world will never be the same after the establishment of an international criminal court."[4] Indeed, as the Rome Conference began, formal adoption of a foundational document was widely considered to be impossible.[5] After five weeks of intense debate, the final text emerged as a take-it-or-leave-it "package" that had been cobbled together behind closed doors during the middle of the night. The leaders of the Rome Conference completed the final text at two o'clock in the morning of the last day of the conference, Friday, 17 July 1998.[6] Far from achieving consensus, the final text postulated solutions to some drafting questions that delegates had been unable to resolve, and went so far as to include a number of provisions that the conference Bureau[7] selected and presented to the floor without open debate on either the text itself or its substantive merits.[8]

Seeking to prevent a collapse of the conference without a completed document, the delegates voted down amendments that the United States and India proposed to the Bureau's textual "package," whereupon the del-

4. Professor M. Cherif Bassiouni, Address to the Ceremony for the Opening of Signature of the Treaty on the Establishment of an International Criminal Court, at *Il Campidoglio*, Rome (July 18, 1988).

5. The starting point for the negotiations was a complex text of 116 articles, 173 pages containing about 1300 bracketed and often-competing texts interspersed throughout, which included numerous options within each article. *See Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/CONF.183/2/ Add.1 (1998) (Draft Statute and Draft Final Act).

6. M. Cherif Bassiouni, *Historical Survey: 1919-1998*, *in* STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 1, 31 (1998) [hereinafter *Historical Survey*].

7. The officers formally responsible for running the Rome Conference were collectively known as the Bureau. The Bureau included the President of the Conference, the Chairman of the Committee of the Whole, the Chairman of the Drafting Committee, and the various vice-presidents responsible for discrete components of the negotiations. The late evening discussions that produced the Bureau text did not include all of the members of the Bureau (as they excluded the United States), but included some participants who were not members of the Bureau. The Bureau proposal emerged as U.N. Doc. A/CONF.183/C.1/L.76 (1998), and was presented to the Committee of the Whole without further meetings of the Drafting Committee. The Committee of the Whole adopted the Bureau-sponsored "package" without modification. For a discussion of some of the inconsistencies and contradictions that this highly unusual process produced in the Rome Statute, see Shabtai Rosenne, *Poor Drafting and Imperfect Organization: Flaws to Overcome in the Rome Statute*, 41 VA. J. INT'L L. 164 (2000), and Michael A. Newton, *The International Criminal Court Preparatory Commission: The Way It Is & The Way Ahead*, 41 VA. J. INT'L L. 204 (2000).

8. William K. Lietzau, *Comments to the Panel on the International Criminal Court: Contemporary Perspectives and Prospects for Ratification*, 16 N.Y.L. SCH. J. HUM. RTS 512, 514 (2000).

egates burst into spontaneous applause, which transitioned into rhythmic applause that continued for some time.[9] By the late evening of 17 July 1998, the delegates in Rome were caught up in a wave of jubilation and euphoria as they adopted the Rome Statute by a vote of 120 to seven, with twenty-one abstentions.[10]

For the proponents of the Rome Statute, the reality that it was adopted only by abandoning the historic diplomatic practice of consensus is immaterial. Many ardent treaty supporters and the non-governmental organizations (NGOs) that pushed for the Rome Statute ignore its structural flaws and view it as a triumph of international aspiration over the political and pragmatic realities of the international system that have prevented the evolution of an effective and permanent international criminal court since the end of World War I.[11] Seen in the best possible light, the Rome Statute represents the hope of governments from all around the world that the force of international law can restrain the evil impulses that have stained history with the blood of millions of innocent victims.[12] Thus, from this perspective, its hasty adoption in the last hours of the Rome Conference was warranted despite the fact that the complex substantive interface of treaty provisions was never wholly debated or analyzed in depth until after the adoption of the Rome Statute.

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9. *Historical Survey*, *supra* note 6, at 31.

10. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381 (2000). For an excellent summary of the negotiating dynamic in Rome that resulted in the current Statute, see Ruth Wedgewood, *Fiddling in Rome: America and the International Criminal Court*, FOREIGN AFF. 20 (Nov.-Dec. 1998).

11. *See generally* 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 (1997); *Historical Survey*, *supra* note 6; Leila Sadat Wexler, *The Proposed International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665 (1996); BENJAMIN B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS (1980).

12. Some observers estimate 170 million dead in 250 conflicts since the end of World War II. Sadat & Carden, *supra* note 10, at 384. *See, e.g.*, RUDOLPH J. RUMMELL, DEATH BY GOVERNMENT (1994); RUDOLPH J. RUMMELL, POWER KILLS: DEMOCRACY AS A METHOD OF NONVIOLENCE (1997); JOHN NORTON MOORE, LAW AND CIVIL WAR IN THE MODERN WORLD (1974).

In a very real sense, the proscriptions against genocide, crimes against humanity, and violations of the laws and customs of war contained in Article 5 of the Rome Statute[13] embody the highest ideal of all legal systems that law can replace raw power as the defining norm of international relations. Nevertheless, the Rome Statute elevates principle above practicality because its adoption was not accompanied by any resolution of the details for establishing an effective supranational judicial forum. For example, in adopting the Rome Statute without the support of the United States, treaty proponents failed to consider a viable formula for funding the ICC. Thus, without an active policy of support to the ICC and funding from both the United States and Japan, one NGO estimates that the European Union could be responsible for funding up to 78.17% of the total cost of the ICC.[14]

Furthermore, the last-minute adoption of the Rome Statute glossed over the inherent tension between an international forum with compulsory criminal jurisdiction over individuals who commit crimes at the express command of national authorities, or at the very least while functioning under the official authority of a sovereign state, and the political necessity for sovereign states to support such a court. Though the concept of an international criminal court can be traced back to the Middle Ages, and evolved through the thinking of the classical international writers and jurists of the seventeenth and eighteenth centuries,[15] the stone walls of sovereign rights and state consent served as "constraining factors," which restricted the "prescribing, invoking, and applying of international norms."[16] Although the delegates to the Rome Conference unanimously agreed that national jurisdictions have primary responsibility for investigating and prosecuting the crimes enumerated in Article 5 of the Rome Statute, they strove to establish an international judicial institution that

13. Rome Statute, *supra* note 3, art. 5.

14. Project on International Courts and Tribunals, Financing of the International Criminal Court, annex III (undated discussion paper distributed at the meeting of the Preparatory Commission in June 2000) (on file with author) (Hypothetical Scale of Assessment for the ICC). It is difficult to envision the day when the governments of the European Union will meet this huge financial obligation, despite their stated fidelity to the goals of the ICC.

15. Quincy Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60 (1952).

16. JUSTICE ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 1 (1994).

would allow supranational justice and accountability to pierce the shield of unconstrained sovereignty.[17]

Indeed, the very impetus for a permanent ICC arose from the numerous instances in which powerful perpetrators[18] ignored established international norms with impunity. The penultimate votes at the Rome Conference came about only as a reaction against the historic practice of tyrants who warped domestic legal mechanisms into tools for imposing their will. Adolf Hitler, for example, imposed the *Fuehrerprinzip* (leadership principle) in order to exercise his will as supreme through the police, the courts, and all other institutions of civilized society.[19] Through the lens of absolute state sovereignty, efforts by one state to establish individual accountability over nationals of another state for violations of international crimes were frequently derided for using the figleaf of justice to legitimize the expressions of raw political power over the perpetrator. Thus, when given a copy of his indictment before the International Military Tribunal at Nuremberg, Herman Göring stroked the phrase "[t]he victor will always be the judge and the vanquished the accused" across its cover.[20]

Logically, an effective supranational court should function as a fallback forum to prosecute individuals who commit crimes while in the service of authoritarian regimes that ignore the binding norms of international law. Those regimes are the most prone to commit the crimes within the jurisdiction of the ICC, and yet those same states could previously invoke principles of sovereignty to protect their nationals from prosecution in their domestic judicial forums. At the conclusion of the Rome Conference, treaty supporters concluded that an effective ICC could not rest the full

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17. Bruce Broomhall, *The International Criminal Court: A Checklist for National Implementation*, *in* ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION 113, 115 (M. Cherif Bassiouni ed., 1999) [hereinafter Broomhall, *Checklist*].

18. After extensive debate over the relative merits of the terms "perpetrator" or "accused," the delegates to the Preparatory Commission (PrepComm) ultimately agreed to use the former in the finalized draft text of the Elements of Crimes, U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000).

19. DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT 1037-38. According to this principle, power resided in Hitler, from whom subordinates derived absolute authority in hierarchical order. This principle required absolute and unconditional obedience to the superior and extended to all areas of public and private life. The oath of the Nazi Party stated: "I owe inviolable fidelity to Adolf Hitler; I vow absolute obedience to him and to the leaders he designates for me." *Id*. at 157.

20. JOSEPH E. PERSICO, INFAMY ON TRIAL 83 (1994). For another articulation of this highly debatable proposition, see RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971).

extent of its judicial power on the consent of a state because regimes that ignore the rule of law would be virtually certain not to submit their nationals to the jurisdiction of the court. Hence, the final "package" that became the Rome Statute bypassed the traditional rule of international law that a treaty "does not create obligations or rights for a third [s]tate without its consent."[21]

To attain the goal of international justice, Article 1 of the Rome Statute promulgates in simple language that the court will "be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern . . . and shall be *complementary* to national criminal jurisdictions."[22] The Rome Statute nowhere defines the term "complementarity," but the plain text of Article 1 compels the conclusion that the International Criminal Court is intended to supplement the foundation of domestic punishment of international violations, rather than supplant domestic enforcement of international norms. Indeed, the principle that states are obligated to use domestic forums to punish violations of international law has roots that run back to the ideas of Hugo Grotius.[23] As early as 1842, Secretary of State Daniel Webster articulated the idea that a nation's sovereignty also entails "the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states, and which have for their object the mitigation of the miseries of war."[24]

The complementarity principle is the fulcrum that prioritizes the authority of domestic forums to prosecute the crimes defined in Article 5 of the Rome Statute. Phrased another way, the complementarity principle is intended to preserve the power of the ICC over irresponsible states that refuse to prosecute nationals who commit heinous international crimes, but balances that supranational power against the sovereign right of states to

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21. *See* Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27, art. 34, *reprinted in* 8 I.L.M. 679 (1969). The logical corollary to this rule (which the Rome Statute disregards) is that a multilateral instrument binds a state that does not ratify the treaty only when the third party "expressly accepts that obligation in writing." *Id.* art. 35.

22. Rome Statute, *supra* note 3, art. 1 (emphasis added). Article 1 echoes the preambular language of the Rome Statute in which the signatories affirm that effective prosecution of international crimes "must be ensured by taking measures at the national level and by enhancing international cooperation."

23. RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT 108, 228 (1999). *See infra* notes 47-49 and accompanying text.

24. JOHN BASSETT MOORE, 1 A DIGEST OF INTERNATIONAL LAW 5-6 (1906).

prosecute their own nationals without external interference. The complementarity principle is therefore the critical node in ascertaining whether the ICC will trample on the sovereign prerogatives of states, or will coexist in a constructive and beneficial relationship with all nations.

The monumental and controversial development in the Rome Statute is that the proponents of international justice established a framework for a supranational court that enshrines the principle that state sovereignty can on occasion be subordinated to the goal of achieving accountability for violations of international humanitarian law.[25] Indeed, one commentator in Rome declared that "outmoded notions of state sovereignty must not derail the forward movement" which seeks to achieve international peace and order.[26] The complex blend of civil law, common law, customary international law, and *sui generis* that combine in the Rome Statute is held together by the notion that the sovereign nations of the world are joined, not as competitors in the pursuit of sovereign self interest, but as interde-

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25. *See* Rome Statute, *supra* note 3, arts. 12-19. The extension of unchecked international prosecutorial and judicial power over sovereign concerns is one of the primary reasons the United States remains unwilling to go forward with the Rome Statute "in its present form." David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 14, 21 (1999). The United States has rejected a policy of benign neglect, and at the time of this writing is engaged in a good faith effort to address its fundamental underlying jurisdictional concerns with the Rome Statute. The United States participated fully in the Preparatory Commissions subsequent to the Rome Conference, and it joined international consensus on the Final Draft Rules of Evidence and Procedure and the Final Draft Elements of Crimes on 30 June 2000. Draft Rules of Evidence, U.N. Doc. PCNICC/20001/Add.1; Draft Elements of Crimes, U.N. Doc. PCNICC/2001/Add.2, *available at* http://www.un.org/law/icc/index.html.

On 31 December 2000, which was the last day permitted by the treaty, Ambassador Scheffer signed the Rome Statute at the direction of President Clinton. *See* Rome Statute, *supra* note 3, art. 125(1) (stipulating that states may accede to the Statute at a later time, but that signatures to the treaty are permitted only until 31 December 2000). The White House statement clarified that President Clinton ordered the signature because the United States seeks to "remain engaged in making the ICC an instrument of impartial and effective justice in the years to come." President William J. Clinton, Statement by the President: Signature of the International Criminal Court Treaty (Dec. 31, 2000), 2001 WL 6008. The President's statement makes clear that the United States signature should not be interpreted as an abandonment of concerns "about significant flaws in the Treaty." *Id*. Rather, the signature reflects a strategic decision that the United States "will be in a position to influence the evolution" of the remaining documents in the treaty regime, while "[w]ithout signature, we will not." *Id*.

26. Benjamin Ferencz, Address to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (June 16, 1998), *at* http:www.un.org/icc/speeches/616ppc.htm.

pendent components of a larger global civil society.[27] In other words, treaty proponents see the creation of a supranational court empowered to override the unfettered discretion of some states as an overdue step towards a uniform system of responsibility designed to "promote values fundamental to all democratic and peace-loving states."[28]

As noted above, the Rome Conference concluded with a rush of momentum towards an international court empowered to impose international law on individual citizens of sovereign nations, even when that state does not consent to the exercise of supranational power over its nationals. The term "complementarity" is a newly minted phrase that builds on the well-established practice of nations enforcing international law. Part II of this article assesses these jurisprudential roots. Part II also examines the practice of the two ad hoc tribunals established by the United Nations Security Council in recent years. These currently functioning international tribunals are built on the foundations laid by domestic legal systems, and their experience helps clarify the implementation of complementarity in a functioning, effective International Criminal Court.

The International Criminal Court is intended to be an autonomous supranational institution that possesses international legal personality.[29] As such, it will be required to work alongside sovereign states in a wide array of investigative, prosecutorial, and administrative activities.[30] Part III of this article highlights the process and dynamic in Rome that undergirds the formulation of Article 1, and will examine the provisions of the Rome Statute designed to make complementarity a viable approach to international justice. Part III concludes with an analysis of the recently completed Final Draft Rules of Evidence and Procedure that impact on the complementarity principle.

Having examined the textual formulations revolving around the concept of complementarity, Part IV discusses the potential gaps and unre-

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27. Sadat & Carden, *supra* note 10, at 386.

28. Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Tribunals*, 23 YALE J. INT'L L. 383, 436 (1998) [hereinafter Brown, *Primacy or Complementarity*].

29. Rome Statute, *supra* note 3, art. 4(1). Formal recognition of international legal personality will allow the ICC as an organization created by states to enter into negotiations on its own behalf, conclude binding international agreements, claim immunity for its officials in the same manner as accredited diplomats, and appear as a plaintiff or defendant before the International Court of Justice. GERHARD VON GLAHN, LAW AMONG NATIONS 86 (4th ed. 1981).

solved procedural issues that could thwart the actual practice of the ICC prosecutor. One of the most important benchmarks in any future prosecution before the International Criminal Court will be the actual decision to transfer responsibility for prosecuting a particular perpetrator to the standing supranational institution from a domestic system that could otherwise exercise jurisdiction over the crime. Despite its simple formulation, the concept of complementarity represents the focal point of tension between the proponents of the Rome Statute and those who regard its provisions as an unjustified and illegal subversion of sovereign rights.

The principle of complementarity is the linchpin for assessing whether the "last major international institution established in this century"[31] will become a functioning reality or an international absurdity. It is plain that the Rome Statute stands for the proposition that accountability for war crimes "cannot be achieved without impinging upon the traditional criminal jurisdiction of states."[32] The principle of complementarity is therefore the bridge that carries the weight of the Rome Statute. The next ten to twenty years will demonstrate whether the International Criminal Court can erode the principles of state sovereignty without itself being swept away by a backlash of indifference and outright opposition from sovereign states. This article concludes that implementation of the complementarity principle will be the decisive factor in either preventing or enhancing the concept of permanent supranational justice that coexists with state sovereignty in the interests of international peace and security.

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30. *See generally* Rome Statute, *supra* note 3, arts. 86-102 (termed Part 9 International Cooperation and Judicial Assistance, this section of the Rome Statute sets out complex procedural and substantive standards for the relations between states and the ICC in such matters as arrests, transfer of suspects, evidentiary matters, and the interface between state obligations pursuant to binding international agreements and the ICC). Complementarity in the ICC Statute is intended to apply beyond the mere allocation of jurisdictional authority by giving effect to this whole range of sovereign choices as a limit to the unchecked power of the ICC and prosecutor. Brown, *Primacy or Complementarity, supra* note 28, at 417 (citing a United Kingdom position paper for the proposition that the "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 in such cases." *Id.* at 417 n.177). *See also* Broomhall, *Checklist*, *supra* note 17.

31. *See* Barbara Crossette, *World Criminal Court Having a Painful Birth*, N.Y. TIMES, Aug. 13, 1997, at A5 (quoting William Pace, Head of the NGO Coalition for an International Criminal Court).

32. Brown, *Primacy or Complementarity, supra* note 28, at 434.

II. Jurisprudential Roots of Complementarity

The discipline of international criminal law[33] springs from the intersection of two legal traditions that are separate yet interrelated. The criminal aspects of international law are historically and juridically intertwined with the international aspects of national criminal law. The criminal aspects of international law can be traced to a variety of sources in which the nations of the world united to criminalize certain conduct under established international norms.[34] Prohibitions against piracy[35] and slavery[36] are two of the earliest substantive international crimes that over time became subject to the universal jurisdiction of all states.[37] Crimes typically evolved as a matter of customary international law, which in turn was codified in binding international conventions.

Since discussions concerning a permanent International Criminal Court began,[38] the challenge to the international community has been to distill a practical formula for reconciling or prioritizing the jurisdictional claims between an emerging supranational institution and the domestic

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33. Though commonly used by scholars and practitioners in this field, the concept of a distinct discipline termed "international criminal law" is not universally accepted across the world. *See, e.g.*, Leslie C. Green, *Is There an International Criminal Law?*, 21 ALBERTA L. REV. 251 (1983). In the context of negotiating the Elements of Crimes required by Article 9 of the Rome Statute, some delegations vehemently argued that the concept of "international criminal law" itself was too ill-defined to warrant inclusion in a document designed to "assist the Court in the interpretation and application" of the norms defined in the Rome Statute. Rome Statute, *supra* note 3, art. 9(1). Despite these concerns, the Final Draft Elements of Crimes, which were adopted by international consensus, includes the reminder in the chapeau language to the Article 7 crimes that the crimes against humanity provisions relate to "international criminal law" and accordingly "should be strictly construed." U.N. Doc. PCNICC/2000/INF/3/Add.2.

34. M. Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, *in* INTERNATIONAL CRIMINAL LAW AND PROCEDURE 27 (John Dugard & Christine van den Wyngaert eds., 1996) (summarizing some twenty different acts and types of conduct criminalized under binding international conventions and discussing the differing approaches to enforcing international criminal norms).

35. *See* ALFRED P. RUBIN, THE LAW OF PIRACY (1988); M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 515 (2d ed. 1999) [hereinafter BASSIOUNI, CRIMES AGAINST HUMANITY].

36. Though piracy had been established as an international crime by the middle of the sixteenth century, the pecuniary advantages that the slave trade provided hindered the development of slavery from a moral prohibition to the status of a binding international crime. M.Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. 445 (1991). The 1890 Convention Relative to the Slave-Trade and Importation into Africa of Firearms, Ammunition, and Spiritous Liquors was the major watershed in formalizing the criminal prohibition of slavery. 27 Stat. 886, 1 BEVANS 134.

forums that would otherwise have jurisdiction. Paradoxically, the substantive norms of international criminal law did not develop as a coexistent component of the early efforts to develop the framework for an international criminal court.[39] The articulation of a defined set of international offenses proceeded in separate negotiations for different reasons than the discussions over the development of an international criminal institution. This lack of synchronization helps explain why the crimes proscribed in the Rome Statute do not replicate every act that is prohibited as a matter of international law. Nevertheless, the judicial authority of domestic forums to impose criminal responsibility for serious violations of international law is an essential underpinning of the jurisprudential framework of the complementarity principle. Similarly, the practice of the two currently functioning ad hoc tribunals empowered to prosecute serious violations of international humanitarian law[40] helps foreshadow the reality of the difficulty that the ICC prosecutor will face in transforming the principle of complementarity into a pragmatic reality.

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37. Universal jurisdiction entails that class of activities that are the result of "universal condemnation" and "general interest in cooperating to suppress them." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a (1986). For a useful discussion of the debates (and ultimate rejection in Rome) over universal jurisdiction as a grounds for ICC authority to adjudicate certain cases, see Sadat & Carden, *supra* note 10, at 410-16. Speaking of piracy, but clearly articulating the ideas underlying the basis for universal jurisdiction, the Permanent Court of International Justice wrote in the *S.S. Lotus* case:

> Piracy, by the law of nations, in its jurisdictional aspects, is *sui generis*. Though statutes may provide for its punishment, it is an offense against the law of nations; and as the scene of the pirate's operations is the high seas, which is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind—*hostis humani generis*—whom any nation may in the interest of all capture and punish . . . ."

1927 P.C.I.J. (series A) No. 10, at 70 (1927).

38. *See, e.g.*, Convention for the Creation of an International Criminal Court,*opened for signature at Geneva*, Nov. 16, 1937, League of Nations O.J. Spec. in Supp. No. 156 (1938), League of Nations Doc. No. C.547(I).M.384(I) (1937) (this early discussion focused on an international court limited to enforcing the crime of terrorism, but this convention was only ratified by Italy and never entered into force). *See also* Finch, *Draft Statute for an International Court*, 46 AM. J. INT'L L. 60 (1952).

39. *Historical Survey*, *supra* note 6, at 15.

A. Domestic Enforcement of International Crimes

1. Legal foundations

The ICC is intended to reinforce rather than overturn the well-established right of sovereign states to enforce international humanitarian law; the principle of complementarity embodies this linkage. The legal authority of domestic states to proscribe and adjudicate cases involving violations of humanitarian law is so firmly rooted in the international legal regime that the Rome Statute makes no distinction between states party and non-states party with respect to complementarity. Put simply, for every single act by every single accused that could theoretically be subject to the jurisdiction of the ICC, there would be one or more sovereign states that have legal authority to investigate and prosecute the case.

On its face, the Rome Statute makes no distinction between states that have ratified the treaty and those that have not with respect to the complementarity principle or the procedures for assessing the proper forum to adjudicate a particular case or perpetrator. In this light, the Preamble categorically states that "it is the duty of every State to exercise its jurisdiction over those responsible for international crimes."[41] Prosecution of every serious violation of humanitarian law in domestic forums could, in theory, be viewed as having attained the goal of ICC supporters who hope that the movement towards a permanent supranational court will help guarantee respect for and enforcement of international justice. Complementarity is therefore a fundamental underpinning of the ICC regime that could also be an important incidental means for achieving the worthy goals of treaty proponents. At the same time, the complementarity principle preserves the

40. The author prefers to use the term "international humanitarian law" merely as a linking phrase to associate the laws of armed conflict with the other substantive bodies of norms that may also apply to a particular conflict. The phrase is quite commonly used as a shorthand reference to the entire corpus of law that governs the conduct of hostilities, in addition to offenses such as genocide and crimes against humanity which carry the weight of international authority by virtue of their clear status as substantive prohibitions recognized under customary international law. The phrase should not imply that the law of armed conflict is indistinct or merged with the field of human rights law. Among many other differences, the laws of armed conflict are *lex specialis* and apply in limited circumstances to reverse the normal patterns of peacetime. In other words, under the laws of armed conflict, conduct that would normally be unlawful by definition is presumed to be lawful unless it contravenes the established norms regulating conflicts. *See, e.g.*, Steven R. Ratner, *Why Only War Crimes? Delinking Human Rights Offenses from Armed Conflict*, 3 HOFSTRA L. & POL'Y SYMP. 75 (1999).

41. Rome Statute, *supra* note 3, pmbl., para. 6.

prosecutorial prerogative of responsible states that are prepared to use domestic forums to enforce international law.

The comprehensive scope of jurisdiction enjoyed by sovereign states in enforcing international humanitarian law arose in part because domestic military codes presaged the body of rules that later ripened into international humanitarian law. Military commanders promulgated the earliest articulations of recognizable formal codes regulating conflict based on pragmatic hopes for reciprocal treatment by the adversary and because they realized that properly disciplined soldiers were more focused on achieving the military objectives of the conflict. In the midst of the Thirty Years' War, for example, Gustavus Adolphus of Sweden promulgated a punitive military code that contained a general warning that "no Colonel or Captain shall command his soldiers to do any unlawful thing; which so does, shall be punished according to the discretion of the Judge."[42] Similarly, in May 1863, the Union Army issued a disciplinary code governing the conduct of hostilities (known worldwide as the Lieber Code) as "General Orders 100: Instructions for the Government of the Armies of the United States in the Field."[43] Military codes of discipline established guidelines for gauging the scope of permissible conduct during conflicts that later evolved into the detailed codifications of international humanitarian law that underlie the proscriptions found in the Rome Statute.

Over time, these military codes and the more thorough military manuals that followed served to communicate the "gravity and importance" of behavioral norms to commanders and soldiers.[44] Because the substantive prohibitions on conduct during conflict became the benchmark for measuring military professionalism, military operations executed outside the established framework brought disgrace to the profession of arms, and

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42. GUSTAVUS ADOLPHUS, ARTICLES OF MILITARY LAWS TO BE OBSERVED IN THE WARS (1621), *cited in* BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 35, at 59. For a succinct yet sweeping description of the role that military practice and doctrine played in the development of the law of armed conflict, see Leslie C. Green, *What Is—Why Is There—The Law of War*, *in* 71 UNITED STATES NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENNIUM 141 (1998).

43. INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (Government Printing Office 1898) (1863), *reprinted in* THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 3-23 (Dietrich Schindler & Jiri Toman eds., 1988). For descriptions of the process leading to General Orders 100 and the legal effect it had on subsequent efforts, see Grant R. Doty, *The United States and the Development of the Laws of Land Warfare*, 156 MIL. L. REV. 224 (1998), and George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, 1 AM. J. INT'L L. 13 (1907).

stained national honor.[45] The widespread international recognition of these norms, in turn, led to frequent international efforts to codify the precise parameters of the law. Since 1854, there have been over sixty international conventions regulating various aspects of armed conflicts and a recognizable body of international humanitarian law has emerged from this complex mesh of conventions and custom.[46]

Not coincidentally, the international conventions describing the legal norms for regulating conflict embody the unquestioned recognition of a legal right of a sovereign to prosecute enemy citizens who violate those norms, as well as its own nationals.[47] With respect to cases of genocide[48] or grave breaches of the 1949 Geneva Conventions,[49] the black letter rules of international law go so far as to require that the perpetrator be prosecuted or extradited to another "concerned" nation.[50]

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44. W. Michael Reisman & William K. Lietzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Laws of Armed Conflict*, *in* 64 UNITED STATES NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, THE LAW OF NAVAL OPERATIONS 1, 5-6 (Horace B. Robertson, Jr. ed., 1991). In the wake of the Lieber Code, other states issued similar manuals: Prussia, 1870; The Netherlands, 1871; France, 1877; Russia, 1877 and 1904; Serbia, 1878; Argentina, 1881; Great Britain, 1883 and 1904; and Spain, 1893. Doty, *supra* note 43, at 230.

45. *See* Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, ARMY LAW., Dec. 1997, at 4.

46. BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 35, at 56.

47. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, arts. 85, 99, 102 (replacing the Geneva Convention Relative to the Protection of Prisoners of War of 27 July 1929). In *Ex Parte Quirin*, 317 U.S. 1 (1942), the Supreme Court stated this principle as follows:

> From the very beginning of its history, this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights, and duties of enemy nations as well as enemy individuals.

Id. at 27-28 & n.5 (noting sixteen such cases applying the law of war). For a discussion of the customary international law regarding the right of military forces occupying foreign soil to prosecute civilians and the subsequent recognition of this right in binding conventions, see Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1 (1996).

48. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. VI, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 179, 181-82 (Roberts & Guelff eds., 3d ed. 2000) [hereinafter Genocide Convention].

Furthermore, as a mirror image of the fact that the complementarity principle applies to all states in the international community and all crimes within the jurisdiction of the ICC, international law today justifies universal jurisdiction for any state to adjudicate the crimes of genocide, crimes against humanity, and serious war crimes.[51] This facet of international law developed despite the practice of some states that used the pretext of war crimes prosecutions for the purpose of political repression or psychological manipulation.[52] Today, every state possesses the juridical ability to proscribe and prosecute the crimes detailed in the Rome Statute. Accordingly, since the end of World War II, there have been a substantial number

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49. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, art. 49, para. 2, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 195 (Roberts & Guelff eds., 3d ed. 2000); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85, art. 50, para. 2, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 221 (Roberts & Guelff eds., 3d ed. 2000); Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 47, art. 129, para. 2, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 243 (Roberts & Guelff eds., 3d ed. 2000); Geneva Convention Relative to the Protection of Civilians in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 146, para. 2, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 299 (Roberts & Guelff eds., 3d ed. 2000).

50. Writing in 1625, Hugo Grotius articulated the classic formulation of this concept as *aut dedere aut punire*, which has been modernized and frequently cited as *aut dedere aut judicare* (based on the general principle of law that the presumption of innocence applies in a criminal trial and subsequent punishment is contingent upon successful prosecution). BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 35, at 218.

51. *See* Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985) (allowing extradition of an accused to Israel on the basis of universal jurisdiction); Regina v. Finta, [1994] 1 S.C.R. 701; Cr. C. (Jm.) 40/61, Attorney General of Israel v. Eichmann, 45P.M. 3 (1961), *aff'd*, 16 P.D. 2033 (1962); SENATE COMM. ON FOREIGN RELATIONS, REPORT ON THE INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE, S. EXEC. REP. NO. 98-50, at 12 (1984); *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935*, U.N. SCOR, 49th Sess., Annex, U.N. Doc. S/1994/1405 (1994) (Rwanda Commission of Experts); BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 35, at 227-41.

52. For example, the Soviet Union enacted Decree Number 270 in 1942 that classified any soldier captured by the enemy *ipso facto* a traitor. The Allies repatriated more than 332,000 Russian prisoners to the Soviet Union, many of whom were summarily executed as soon as they were in Soviet custody. Russians who had been repatriated were held in camps and this period saw the first use of the term "filtration camps" (now used in connection with camps in Chechnya). STEPHANE COURTOIS ET AL., THE BLACK BOOK OF COMMUNISM: CRIMES, TERROR, REPRESSION 319-22 (1999). Similarly, the Indochinese Communist Party considered all French prisoners of war to be war criminals unless they "repented" and took on the values of their captors so that they could be a useful part of propaganda campaigns. *Id.* at 568.

of prosecutions involving the core ICC crimes in nations as diverse as Canada, France, Denmark, Switzerland, Australia, Croatia, Rwanda, the United Kingdom, Israel, and Belgium.[53]

As a logical corollary, domestic prosecutions form the basis for deducing that international law permits individual criminal responsibility for those who commit heinous crimes under the color of state authority. The field of international humanitarian law developed around the notion that the legal norms were not just theoretical matters between states, but actual restraints to guide the conduct of individuals. There can be no remaining doubt that the Rome Statute does not stretch the bounds of established legal principle with the sweeping declaration that a "person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment."[54] As Justice Jackson observed in his oft-quoted opening statement to the International Military Tribunal (IMT) seated in the ruins of Nuremberg, Germany: "[T]he idea that a State, any more than a corporation, commits crimes, is a fiction."[55] Based on the finding that "international law imposes duties and liabilities on individuals as well as upon States has long been recognized," the IMT rejected defense arguments that international law governs only states, as well as the contention that the doctrine of state sovereignty shields perpetrators from personal responsibility for their actions.[56]

In addition, with regard to genocide and crimes against humanity, customary international law permits individual responsibility for crimes

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53. The United States position remains that the "crimes within the court's jurisdiction . . . go beyond those arguably covered by universal jurisdiction, and court decisions or future amendments could effectively create 'new' and unacceptable crimes." Scheffer, *supra* note 25, at 18. For analysis of the proper scope, substance, and rationale behind universal jurisdiction, see *Historical Survey*, *supra* note 6, at 4-14; Douglas Cassel, *The ICC's New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes, and Crimes Against Humanity*, 23 FORDHAM INT'L L.J. 378, 380-81 (1999); Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 577 n.121 (1995); BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 35, at 543-6.

54. Rome Statute, *supra* note 3, art. 25(2). This principle is reinforced by the declaration that the Rome Statute applies "equally to all persons without any distinction based on official capacity." Rome Statute, *supra* note 3, art. 27(1).

55. Opening Statement of Justice Robert Jackson to the International Military Tribunal (Nov. 21, 1945), *in* 1-3 INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF GERMAN MAJOR WAR CRIMINALS 83 (1946). He further admonished the IMT to recognize that any court adjudicating individual criminal cases, rather than imposing collective accountability, must respect the principle that "it is quite intolerable to let such legalism become the basis for personal immunity." *Id.*

committed in times of peace as well as during armed conflict.[57] Article 8 of the Rome Statute accordingly comports with established international law imposing criminal liability for war crimes committed during either international war or internal armed conflict (technically termed armed conflict not of an international character).[58] Therefore, the mesh of customary and conventional international law against which the ICC will operate provides a comprehensive basis for domestic enforcement of the same acts that could otherwise be subject to the jurisdiction of the supranational institution.

2. Crimes Beneath the ICC Threshold

Against this backdrop of international law and practice, the Rome Statute implicitly concedes that states will remain responsible for prosecuting the vast majority of offenses even in a mature ICC regime. History shows that the overwhelming number of prosecutions for violations of

56. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947) (Judgement). The practice of states imposing individual criminal liability for war crimes dates back at least to third century B.C. Greek practice. ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW, WITH A POSTLUDE ON THE EICHMANN CASE 17-18 (1962). In one of the national proceedings following the Nuremberg Trials, the court expressed this principle as follows: "International law operates as a restriction and limitation on the sovereignty of states. It may also limit the obligations which are binding upon them to the extent that they must be carried out even if to do so violates a positive law or directive of the state." United States v. von Leeb, XI TRIALS OF WAR CRIMINALS 462 (1950) (The High Command Case). *See also* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990).

57. Hermann von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUES, NEGOTIATIONS, RESULTS 89, 92 (Roy S. Lee ed. 1999). For a detailed discussion of the evolution of this proposition under the practice of states see BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 35, at 510-56.

58. Rome Statute, *supra* note 3, art. 8(1). Article 8 uses the simple phrase "war crimes" to cover the "whole field of norms applicable to armed conflict." Hebel & Robinson, *supra* note 57, at 103. The substantive war crimes prohibitions are detailed in Article 8(2)(a) (Grave breaches of the Geneva Conventions of 1949), Article 8(2)(b) (Other Serious Violations of the laws and customs applicable in armed conflict, within the established framework of international law), Article 8(2)(c) (Violations of Common Article 3 to the four Geneva Conventions of 1949), and 8(2)(e) (Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law). *See also* Prosecutor v. Tadic, No. IT-94-AR72, ¶ 134 (Oct. 2, 1995) (Appeals Chamber Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) (discussing the range of conduct punishable in both international and non-international armed conflict) [hereinafter Tadic Appeal on Jurisdiction].

international humanitarian law have come in domestic forums as opposed to international tribunals. In contrast to the original twenty-four defendants charged before the International Military Tribunal at Nuremberg,[59] thousands of war criminals were prosecuted in the Allied zones of occupation by courts exercising sovereign power on German soil.[60] Similarly, from 1946 to 1948, Australian, American, Filipino, Dutch, British, French, Chinese, and Australian courts convicted several thousand war criminals in the Pacific theater.[61] The drafters in Rome recognized the reality that the ICC will have limited resources and political capital. Accordingly, the Rome Statute includes a number of subjective thresholds designed to ensure that domestic forums will continue to adjudicate the vast majority of cases, while the ICC itself focuses on a smaller number of more severe or difficult prosecutions.

As a fundamental check on its power, the substantive jurisdiction of the ICC is restricted to only "the most serious crimes of concern to the international community as a whole."[62] Article 5(1) requires that the jurisdiction of the ICC "shall be limited" by the "most serious crimes of concern" threshold.[63] This textual limit on the scope of ICC jurisdiction has both a descriptive and subjective component. Indeed, the myriad of offenses detailed in Articles 6, 7, and 8 are tragic and inherently serious from a humanitarian perspective. In order to fall within the jurisdiction of the ICC, however, the offense must be on the high end of a scale of relative severity, and must have some quality that warrants the subjective assessment that the crime is of "concern to the international community as a whole." This limitation applies to every crime detailed in the substantive provisions of Articles 6, 7, and 8. The bedrock "most serious crimes of

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59. Of the original twenty-four accused, one committed suicide before trial, one was tried in absentia, and one had charges dismissed by the court due to mental incapacity to stand trial. The Tribunal handed down twelve death sentences, seven prison terms, and three acquittals (all of whom were later convicted in German domestic courts). BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 35, at 528-29.

60. Bassiouni, *supra* note 11, at 20. The United States convicted 1814 (with 450 executions); the French convicted 2107 (109 executed); the British convicted 1085 (240 executed); there are no reliable numbers for the thousands tried and executed by the Russians. BASSIOUNI, CRIMES AGAINST HUMANITY, *supra* note 35, at 532.

61. Bassiouni, *supra* note 11, at 36 n.14 (citing R. John Pritchard, *The Quality of Mercy: Appellant Procedures, the Confirmation and Reduction of Sentences and the Exercise of the Royal Prerogative of Clemency towards Convicted War Criminals*, *in* 8 BRITISH WAR CRIMES TRIALS IN THE FAR EAST, 1946-48 (R. John Pritchard ed., 21 vols.) (documenting 2248 trials, involving 5596 accused, which resulted in 4654 convictions)).

62. Rome Statute, *supra* note 3, pmbl., para. 9.

63. *Id*. art. 5(1).

concern" threshold is an up-front textual device that restricts the reach of the ICC, which in turn preserves the de facto latitude of sovereign criminal forums.

The "most serious crimes of concern" threshold is intellectually distinct from the complementarity regime. As discussed below,[64] the complementarity principle (and its accompanying mechanism governing the admissibility of a given case) serves to allocate power between the ICC and domestic forums over cases that could properly be prosecuted either in the ICC or in one or more domestic forums. If a case is sufficiently minor, which is an admittedly subjective inquiry, the "most serious crimes of concern" threshold means that the ICC does not have substantive jurisdiction over the conduct, even if the activity could possibly meet the criteria as one of the detailed offenses proscribed by Articles 6 (Genocide), 7 (Crimes Against Humanity), or 8 (War Crimes).[65] Phrased another way, there will be criminal offenses that could theoretically meet the complementarity test for admissibility, yet remain beyond the scope of permissible ICC jurisdiction because of their minor or isolated nature and scope. Article 15(1) reinforces this limitation, as the prosecutor is empowered to initiate an investigation *proprio motu* only on the basis of information on "crimes within the jurisdiction of the court."[66] Moreover, because Article 19 distinguishes between jurisdiction and admissibility by requiring the court to "satisfy itself that it has jurisdiction in any case brought before it," a judicial assessment of the prosecutor's determination of admissibility remains discretionary.[67]

While representing a substantive check on the court's jurisdiction, the "most serious crimes" threshold also establishes the ICC as a supranational institution working within a system of sovereign states. This precludes the misconception that the Rome Statute enacts some new regime of international federalism where sovereign states are deemed to be subordinate to

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64. *See infra* notes 91-106 and accompanying text.

65. In the case of war crimes, Article 8 contains the additional injunction that the court has jurisdiction of war crimes "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes." Rome Statute, *supra* note 3, art. 8(1). Unlike the mandatory restriction on jurisdiction found in Article 5, this clarification is characterized as an illustrative, advisory caveat.

66. *Id.* art. 15(1). The United States position regarding the power of the prosecutor is best summarized by the official who noted that the *proprio motu* prosecutor cannot become "the independent counsel for the universe." Sadat & Carden, *supra* note 10, at 447 n.407.

67. Rome Statute, *supra* note 3, art. 19(1).

the authority of the ICC. The Rome Statute envisions an enforcement regime based on overlapping power between territorial sovereigns (states) and non-territorial sovereigns (the international community as a whole, represented by the ICC prosecutor).[68] As an initial hurdle to restrict jurisdiction, the "most serious crimes of concern" threshold of Article 5 is a subtle, yet distinct and powerful, limit on the reach of the ICC vis à vis sovereign forums.

B. The Practice of the Ad Hoc Tribunals

The jurisdictional framework for the two currently operating ad hoc international tribunals offers a striking and important contrast to the complementarity regime of the ICC. Building on the moral legacy of Nuremberg,[69] the United Nations Security Council decided to take action in 1993 and 1994 to create the first truly international tribunals since World War II, designed to prosecute individuals responsible for the horrendous acts of genocide, crimes against humanity, and massive war crimes that took place in the territory of the former Yugoslavia[70] and Rwanda.[71]

Because the Security Council has "primary responsibility for the maintenance of international peace and security,"[72] the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) are both grounded on a finding that judicial

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68. Sadat & Carden, *supra* note 10, at 408. *See infra* notes 154-60 and accompanying text (discussing the *ne bis in idem* principle of Article 20 as it relates to complementarity).

69. The first prosecutor for the International Criminal Tribunal for the Former Yugoslavia, Judge Richard Goldstone of South Africa, visited the aging Telford Taylor (former Nuremberg prosecutor and U.S. Army brigadier general who served as the chief prosecutor for the subsequent proceedings in Nuremberg) in New York as a sign of respect and admiration. Benjamin Ferencz, *Telford Taylor: Pioneer of International Law*, 37 COLUM. J. TRANSNT'L L. 661, 663 (1999).

70. *See* S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 1, U.N. Doc. S/RES/808 (1993). The Secretary-General prepared a detailed report on the scope of the crimes, including a draft statute pursuant to Resolution 808. *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc. S/2507 (1993) [hereinafter Secretary General's Report]. The Security Council adopted the draft statute in 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 ICTY Statute].

71. 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 ICTR Statute].

72. U.N. CHARTER art. 24(1).

accountability for crimes facilitates the restoration and maintenance of international peace and security.[73] The Security Council has authority under Chapter VII of the United Nations Charter to decide upon enforcement measures that all members "agree to accept and carry out."[74] The Security Council has additional specific authority to create "such subsidiary organs as it deems necessary for the performance of its functions."[75]

From the perspective of Charter legal authority, the ICTY and ICTR are best understood as enforcement measures of a judicial nature; both the ICTY and ICTR draw their lifeblood from the political process of the Security Council, yet each must perform judicial functions in a non-political manner that is "not subject to the authority and control of the Security Council with respect to those judicial functions."[76] The use of Chapter VII authority in this manner was both unprecedented and ingenious. By virtue of the absolute authority of the Security Council with respect to maintaining international peace and security,[77] the ad hoc tribunals enjoyed legitimacy and authority vis à vis sovereign states immediately upon their inception.

Furthermore, all members of the United Nations, through a binding treaty obligation in the form of the Charter, agree that the Security Council "acts on their behalf" in carrying out its responsibility to maintain and restore international peace and security.[78] The Charter regime is the dominant feature of the normative international legal landscape, and its legal force imbues the ICTY and ICTR with binding authority over established state actors. As a consequence of this relationship with Security Council authority, both the ICTY and ICTR Statutes specify that the national courts and the international tribunals "shall have concurrent jurisdiction."[79] Each

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73. Secretary General's Report, *supra* note 70, ¶ 26.

74. U.N. CHARTER art. 25.

75. *Id*. art. 29.

76. Secretary General's Report, *supra* note 70, ¶ 28.

77. *See, e.g.*, *Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), Advisory Opinion, International Court of Justice*, 1962, I.C.J. REPORTS 151 (1962) (holding in part that the Security Council has plenary authority under the Charter to take decisions and order enforcement measures under the Charter regime),*reprinted in* 56 AM. J. INT'L L. 1053 (1962).

78. U.N. CHARTER art. 24(1).

79. ICTY Statute, *supra* note 70, art. 9(1); ICTR Statute, *supra* note 71, art. 8(1).

international tribunal nevertheless has explicit jurisdictional "primacy over national courts."[80]

The jurisdictional primacy of the ICTY and ICTR springs logically from the preeminent authority granted to the Security Council in pursuit of its plenary role in restoring international peace and security. The legal and common sense of the term "primacy" necessarily conveys a jurisdictional hierarchy in which domestic jurisdictions retain the ability to prosecute perpetrators, but which preserves an "inherent supremacy" for the international tribunal.[81] As a result, if a domestic court is proceeding with a case that is otherwise within the jurisdictional competence of the ICTY and ICTR, the international tribunal has unbounded legal discretion to order the national courts to defer to the international tribunal "at any stage of the proceeding."[82]

Applying this right of primacy, the first case brought to trial before the ICTY involved an accused named Dusko Tadic who had been facing trial in Germany on charges of murder, aiding and abetting genocide and causing grievous bodily harm.[83] Though the ICTY only had one court room at the time, its trial court ordered the pending German case transferred to The Hague despite the fact that the Office of the Prosecutor had not yet indicted Tadic (that indictment was confirmed and issued four months after the transfer).[84] Tadic appealed this transfer on jurisdictional grounds. The ICTY Appeals Chamber upheld the implementation of ICTY primacy that denied Tadic a German trial on the rationale that the Security Council had acted "on behalf of the community of nations" by endowing a judicial organ with authority to address "transboundary matters" which affect international peace and security.[85] This legal reasoning also justifies the principle that—because the ICTY and ICTR enjoy derivative power

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80. ICTY Statute, *supra* note 70, art. 9(2) (the ICTY "shall have primacy over national courts'); ICTR Statute, *supra* note 71, art. 8(2) (containing the slightly stronger text "shall have primacy over the national courts of all states"). For an explanation of contemporary statements made to the Security Council regarding primacy, and a plausible explanation for the textual addition to the ICTR Statute see Brown, *Primacy or Complementarity*, *supra* note 28, at 398-402.

81. 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 126 n.378 (1995).

82. ICTY Statute, *supra* note 70, art. 9(2); ICTR Statute, *supra* note 71, art. 8(2).

83. MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 97 (1997).

84. *Id.* at 100. While investigating other cases, Tadic's name repeatedly surfaced and the ICTY Deputy Prosecutor reported that "our investigators and the German authorities were starting to trip all over each other." *Id.* at 98.

springing from the Article 25 Charter obligation of states to obey Security Council mandates—the tribunal rules require domestic jurisdictions to "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."[86]

As opposed to the Security Council mandates that created the ICTY and ICTR, the Rome Statute, upon its entry into force,[87] will establish a multilateral treaty regime that purports to allow ICC jurisdictional authority even over individuals acting pursuant to the sovereign authority of non-state parties. The complementarity principle is an essential cornerstone of the Rome Statute, which on its face represents a radical retreat from the theoretical primacy of the ICTY and ICTR. A system based on following the complementarity principle ineluctably leads to a system in which domestic courts have primary authority to adjudicate violations of international humanitarian law. In theory, pure primacy for the international tribunal is the diametric opposite of complementarity where primary authority resides with domestic courts. In reality, the gap between primacy and complementarity as organizing jurisdictional principles may not be so expansive; there is to date no clear evidence that either primacy or complementarity claim inherent functional superiority as a core organizing principle.[88]

In point, both ad hoc international tribunals often face "total defiance" from states regarding orders to transfer indictees and to provide evidence,

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85. Tadic Appeal on Jurisdiction, *supra* note 58, ¶¶ 58, 62. The court opined in dicta that:

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

Id.

86. ICTY Statute, *supra* note 70, art. 29 (including an obligation by states to respond to requests for identification and location of persons, take testimony and produce evidence, serve documents, and surrender or transfer the accused to the International Tribunal).

87. The Rome Statute will enter into force on the first day of the month after the sixtieth day following the sixtieth instrument of ratification, acceptance, approval, or accession with the Secretary-General of the United Nations. Rome Statute, *supra* note 3, art. 126(1).

88. Brown, *Primacy or Complementarity*, *supra* note 28, at 430.

thereby undercutting the legal force of the primacy principle.[89] When states have trampled upon the international tribunals' authority by ignoring such orders, the Security Council has not aggressively reinforced the primacy principle by compelling state compliance. Moreover, domestic jurisdictions have maintained their central role in enforcing international humanitarian law in spite of the jurisdictional primacy of the ad hoc international tribunals. Rwanda, for example, is currently holding over 100,000 citizens pending trial in connection with the 1994 genocidal rampages that destroyed approximately eighty percent of the Tutsi population.[90]

In practice, the gap between the primacy approach of the ICTY and ICTR and the diametrically opposed complementarity principle of the ICC will likely be minimal. Nevertheless, the primacy principle has reinforced the procedural and legal impact of Security Council action regarding the relative authority of international and domestic judicial systems. As a result, the ICC prosecutor will confront a conceptual dilemma generated by the interface between the complementarity principle and Security Council actions under its Chapter VII authority.[91] This issue will be analyzed in Part III, in the context of examining the textual formulations that the Rome Statute employs to implement the complementarity principle.

III. Textual Implementation of Complementarity in the Rome Statute

A. Complementarity at the Rome Conference

The balance of penal prerogative between sovereign states in the international community and a permanent supranational criminal court has been a prominent issue of concern since the beginning of serious diplomatic efforts towards creating such an institution.[92] The detailed progres-

89. Remarks to the Security Council by Madame Carla Del Ponte, Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (Nov. 10, 1999) (copy on file with author) (pleading for the "active support" of the Security Council, noting the fact that the Federal Republic of Serbia has become a safe haven for indicted war criminals, and noting the fact that Croatia's unilateral decision to withdraw its support to ongoing investigations erodes the "fundamental power" of the Prosecutor that "must be preserved.").

90. Robert F. Van Lierop, *Report on the International Criminal Tribunal for Rwanda*, 3 HOFSTRA L. & PUB. POL. SYMP. 203 (1999); *see also* Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349 (1997).

91. *See infra* notes 109-15 and accompanying text.

sion of diplomatic negotiations towards the text that eventually became the Rome Statute documents a complex, contentious, and incremental process, which ultimately produced a treaty adopted by an emotional vote rather than by international consensus. The progress was painstaking and, at times, meandering. The negotiating texts are riddled with brackets and often-contradictory proposals for further negotiations.[93]

Nevertheless, the principle of complementarity represents one golden thread of consensus that runs through every documentary step along the road towards the supranational criminal court. This axiom, that the ICC is "neither designed nor intended" to supplant independent and effective domestic judicial systems, served as a guiding principle found throughout the long series of diplomatic interchanges culminating in the Rome Statute.[94]

Complementarity is an intellectually simple principle that cannot be distilled into one snippet of isolated treaty text. Despite widespread agreement over the complementarity principle during the Preparatory Committee meetings prior to the Rome Conference, its textual manifestation was deeply interconnected with the many other highly contentious fundamental issues. Debates in Rome raged over vital issues related to complementarity such as the definitions of crimes, the precise scope of substantive jurisdiction, the conceptual basis for ICC jurisdiction over individuals (whether territorial, national, universal, or some combination thereof), the trigger mechanism for beginning investigation or initiating prosecution of an individual or group of offenses, and the mechanism for preventing prosecutorial abuse of discretion for political purposes.

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92. *See Report of the Committee on International Criminal Jurisdiction*, U.N. GAOR, 7th Sess., Supp. No. 12, at 21, U.N. Doc. A/26645 (1954). This document was redrafted from the earlier 1951 Draft Statute in order to soften the prospect of compulsory jurisdiction of the international court by allowing more flexibility and voluntary participation in an international criminal court, to include the right to withdraw from the court's jurisdiction following one year's notice. *Historical Survey*, *supra* note 6, at 13 n.72. *See generally* Fanny Benedetti & John L. Washburn, *Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterward on the Rome Diplomatic Conference*, *in* 5 GLOBAL GOVERNANCE 1 (1999).

93. *See generally* STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (1998).

94. *Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Subcomm. on International Operations of the S. Comm. on Foreign Relations*, 105th Cong. 76 (1998) (statement for the record submitted by the Lawyer's Committee for Human Rights) [hereinafter *International Criminal Court Hearing*], *available at* http://www.access.gpo.gov/congress/senate/senate11sh105.html.

The overarching debate that touched political nerves and directly affected state sovereignty centered on the degree to which the Security Council would direct or control the preconditions for the exercise of jurisdiction by the ICC.[95] One treaty proponent summarized this difficult dynamic by observing:

> Rome represented a tension between the United States that wanted a Security-Council controlled court, and most of the other countries of the world which felt no country's citizens who are accused of war crimes, crimes against humanity, or genocide should be exempt from the jurisdiction of the international criminal court.[96]

According to this view, Security Council control over ICC investigative and judicial authority would endanger the court's independence and give de facto immunity to citizens of the permanent members (whose nations could exercise the veto to thwart ICC judicial authority).[97]

As noted above,[98] the most controversial issues associated with jurisdiction—state consent as a requirement for ICC jurisdiction over its nationals[99] and the allocation of power between the Security Council and the ICC—were not resolved until the last day of the Rome Conference. These issues were so intertwined that compromises in one area would impact other ongoing debates. Hence, states were reluctant to compromise on each critical point in succession without "having a clear sense of how the total picture would appear."[100] Complementarity, on the other hand,

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95. Elizabeth Wilmshurst, *Jurisdiction of the Court, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUES, NEGOTIATIONS, RESULTS 127 (Roy S. Lee ed., 1999).

96. *International Criminal Court Hearing*, *supra* note 94, at 73 (prepared statement of Professor Michael P. Scharf, New England School of Law). *See also* John F. Murphy, *The Quivering Gulliver: U.S. Views on a Permanent International Criminal Court*, 34 INT'L LAW. 45 (2000) (claiming that U.S. objections are grounded in U.S. provincialism, triumphalism, and exceptionalism). For a more detailed discussion of the relationship between U.S. objections and current treaty provisions, see Sadat & Carden, *supra* note 10, at 447-59.

97. Michael N. Schmitt & Major Peter J. Richards, *Into Uncharted Waters: The International Criminal Court*, NAVAL WAR C. REV. 122 (Winter 2000).

98. *See supra* notes 4-10 and accompanying text.

99. The penultimate vote rejected a United States proposal that the ICC would not have personal jurisdiction over an individual absent the consent of the state in which the crimes were committed *and* the state of nationality of the accused. This proposal was tabled by the United States delegation on 14 July 1998. U.N. Doc. A/CONF.183/C.1/L.70 (1998).

enjoyed a unique role in the negotiating history of the Rome Statute because debate centered not on its merits or appropriateness, but on perfecting the most agreeable textual approach that would gain state consensus.[101] All delegations understood the meaning of complementarity as an organizing principle, but the articulation of its substantive and descriptive parameters required sustained negotiations.

Rather than serving as the point of initial consensus in one isolated text, the complementarity principle became the cornerstone for many other debates, much like the first domino in a series, to begin the process of negotiation and agreement. As a result, the Rome Statute emerged with a complex, layered procedural structure, but one in which the complementarity principle was preserved. To illustrate, once a particular offense rises above the "most serious crimes of concern" threshold,[102] the case must meet the preconditions for jurisdiction outlined in Articles 12 through 16 (which were not finalized until the last day of the Rome Conference).[103] The complementarity principle is further embedded as an additional procedural requirement found in Article 17, which requires the ICC to "determine that a case is inadmissible" where certain criteria are met.[104] Logically, cases failing to meet these admissibility criteria are reserved to the judicial authority of one or more sovereign states.

In order to implement the complementarity principle implemented by the Rome Statute, the ICC prosecutor and judicial chambers must respect and adhere to the statute's admissibility criteria. Article 17 represents the most direct mechanism for allocating responsibility for a certain prosecution between the ICC and one or more domestic sovereigns that may have jurisdictional authority. Where the textual criteria of Article 17 are satisfied such that a case is "inadmissible," the Rome Statute constrains the authority of the ICC prosecutor and judicial chambers. These admissibility criteria, therefore, establish the critical bulwark protecting the power of

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100. John T. Holmes, *The Principle of Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUES, NEGOTIATIONS, RESULTS 41, 43 (Roy S. Lee ed., 1999) [hereinafter Holmes, *The Principle of Complementarity*].

101. *Id.*

102. *See supra* notes 59-68 and accompanying text.

103. Article 16 requires that an investigation or prosecution cannot commence or proceed for a period of twelve months following a request from the Security Council adopted under its Chapter VII authority. Rome Statute, *supra* note 3, art. 16. The United States objects to this approach because it turns the Charter role of the Security Council upside down, and nullifies the effect of a veto since the Security Council only has negative authority to stop a case.

104. *Id.* art. 17(1).

sovereign states to prosecute cases in their national courts as opposed to relying on the ICC. Pursuant to this statutory constraint, the complementarity principle is further preserved through a detailed procedure for states to challenge admissibility.[105] Finally, the entire structure is limited by the *ne bis in idem* principle of Article 20, which protects perpetrators from repetitive trials, with some caveats based on the complementarity principle. Analysis of the potential pitfalls for the ICC prosecutor in implementing the complementarity principle is therefore dependent on a holistic view of the provisions of the Rome Statute that bear its fingerprints.

B. Relevant Treaty Provisions

1. Articles 12-16, Jurisdictional Competence

The jurisdictional patchwork of the ICC represents its most central and controversial component. This series of provisions did not emerge until the final day of the Rome Conference.[106] The concept of ICC jurisdiction involves much more than a simple assessment of whether a particular act fits the definition of a substantive crime within the meaning of the Statute (as defined by Articles 6, 7, and 8 using the interpretive filter of the Elements of Crimes).[107] The Rome Statute is unique in the field of international law because it commingles the jurisdiction to prescribe, the jurisdiction to adjudicate, and the jurisdiction to enforce international norms into one quasi-legislative treaty.[108] This necessarily produces a complex web of provisions, each affecting the complementarity principle. The Trial Chamber is accordingly required to "satisfy itself that it has jurisdiction in any case brought before it."[109]

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105. *Id.* art. 19(2). The additional right to make preliminary challenges to admissibility and jurisdiction originated in a United States proposal made to the March Preparatory Committee, which was subsequently renegotiated and expanded during later deliberations, and became Article 18 of the Rome Statute. *See* U.N. Doc. A/AC.249/1998/WG.3/DP.2 (introduced by the United States on 25 March 1998 to the Working Group on Complementarity and Trigger Mechanism).

106. Wilmshurst, *supra* note 95, at 138.

107. *See* Rome Statute, *supra* note 3, art. 9(1) (requiring elements of crimes that "shall assist the Court in the interpretation and application of Articles 6, 7, and 8").

108. Sadat & Carden, *supra* note 10, at 406.

109. Rome Statute, *supra* note 3, art. 19(1). This mandatory language contrasts with the looser provision that the "Court may, on its own motion, determine the admissibility of a case in accordance with Article 17." *Id.*

The final package that became the Rome Statute is structured around a dual track system of jurisdiction.[110] Article 13 implicitly rejects a simple assertion of universal ICC jurisdiction by limiting the court's jurisdictional authority to cases referred either by the United Nations Security Council or to those referred using carefully described jurisdictional competence. This delegated grant of jurisdictional authority to the ICC and its prosecutor necessarily reserves to states the discretion to prosecute any cases that fall outside the established Article 13 parameters.

As a check on the power of states, and hence a limit to complementarity, Article 13(b) is particularly relevant. Article 13(b) allows the Security Council to refer a case to the ICC prosecutor acting under its Chapter VII authority. This path was embodied in the 1994 Draft Statute prepared by the International Law Commission[111] and represents the simplest and least controversial track towards ICC adjudication of a particular case. The Security Council has absolute authority to define the territorial, temporal, or normative scope of the prosecutor's license to proceed based on its plenary power with regard to actions designed to maintain or restore international peace and security.[112]

With regard to the complementarity principle, a Chapter VII referral would override a state's inherent national authority to insist on using its own judicial processes. Even though jurisdiction under Article 13 is a legal inquiry distinct from admissibility under Article 17 (which implements complementarity via the admissibility regime), a Security Council referral would supersede the state's right to use its own courts as the forum of first resort. While the text of the Rome Statute ostensibly preserves a state's authority to implement complementarity following a Security Council referral, the obligation of all states to "accept and carry out the decisions of the Security Council"[113] effectively nullifies this right of complementarity. Furthermore, all members of the United Nations are obligated to comply with orders of the Security Council, even if the Rome

110. *International Criminal Court Hearing*, *supra* note 94, at 73 (prepared statement of Professor Michael P. Scharf, New England School of Law).

111. *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, art. 23 (1994) [hereinafter *ILC Draft Statute*].

112. *See supra* notes 69-91 and accompanying text. In the context of a case referred to the prosecutor under the Chapter VII authority of the Security Council, the ICC should also benefit from specific enforcement measures designed to enhance state cooperation with the ICC prosecutor and judicial chambers.

113. U.N. CHARTER art. 25.

Statute or any other international agreement would impose conflicting obligations.[114] A Security Council referral, therefore, has the practical effect of creating jurisdictional primacy for the ICC similar to that enjoyed by the ICTY and ICTR.

In contrast, the second jurisdictional track under Article 13 invokes the very principles of state consent and territorial jurisdiction that the complementarity principle was intended to protect. Article 13 allows either a state party[115] or the prosecutor proceeding *proprio motu*[116] to refer a case to the ICC. The *proprio motu* power of the prosecutor was adopted over the opposition of the United States[117] and has significant implications for the complementarity principle that will be discussed in Part IV. For cases referred by either a state party or the prosecutor (that is, cases not dependent on Security Council referral under Chapter VII authority), Article 12 implements a consent regime based on the territory on which the crime was committed[118] *or* the nationality of the perpetrator.[119] Thus, a case is subject to ICC jurisdiction if the crime was committed on territory that belongs to a state party or another state that consents to the jurisdiction of the court. Similarly, a case may be referred to the ICC if the accused is the

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114. *Id.* art. 103

115. Rome Statute, *supra* note 3, art. 13(a). A state becoming a party to the Rome Statute thereby accepts jurisdiction over the crimes contained therein. Rome Statute, *supra* note 3, art. 12(1). A state party may only refer a case purporting to be within the jurisdiction of the ICC to the prosecutor specifying the relevant circumstances and providing available supporting documentation for the crimes. Rome Statute, *supra* note 3, art. 14.

116. Rome Statute, *supra* note 3, art. 15. The prosecutor's *propio motu* power to self-initiate investigations is subject only to the approval of two judges in a Pre-Trial Chamber. *Id.* art. 15(4). This *propio motu* power was a departure from the earlier draft by the International Law Commission. *ILC Draft Statute*, *supra* note 111, art. 25. *See also* Rome Statute, *supra* note 3, art. 53 (specifying factors for the prosecutor to consider in opening or deferring an investigation).

117. Ambassador David J. Scheffer, the head of the United States delegation, summarized the concern over the prosecutor's *proprio motu* power by testifying that it "will encourage overwhelming the Court with complaints and risk diversion of its resources, as well as embroil the Court in controversy, political decisionmaking, and confusion." *International Criminal Court Hearing*, *supra* note 94, at 14 (prepared statement of Ambassador David J. Scheffer, United States Ambassador-at-Large for War Crimes).

118. Rome Statute, *supra* note 3, art. 12(2)(a) (the territoriality principle includes a vessel or aircraft registered to that state).

119. *Id.* art. 12(2)(b). A state exercising its right to opt out of ICC jurisdiction over war crimes committed by its nationals or on its territory for a period of seven years, Rome Statute, *supra* note 3, art. 124, would probably also prevent a referral by a state party on whose territory that national committed a war crime. Wilmshurst, *supra* note 95, at 140.

national of a state party or of a state that consents to the jurisdiction of the court.

The consent regime embodied in Article 12 marks the fault line between the rights of states under the Rome Statute and the residual right of sovereign states to use domestic forums to prosecute violations of international humanitarian law committed by their nationals. The consent regime makes no reference whatsoever to the sovereign prosecutorial rights of non-state parties. The consent regime is also silent regarding the case of the so-called "traveling tyrant,"[120] and would not grant ICC jurisdiction based only on the consent of a state that happens to have custody of the perpetrator.[121] Article 12 on its face permits the anomaly in which a non-state party commits heinous crimes on its own territory, but consents to the exercise of ICC jurisdiction only over the members of other nations, such as a United Nations coalition, that enter its territory to prevent further violations. Despite the right of the non-state party to consent to crimes committed by some but not all persons on its soil, the non-state party retains the primary presumption of jurisdiction under the complementarity principle.[122]

In light of the complementarity principle, the provisions for nationality and territoriality jurisdiction can be considered as a set of "conflicts of jurisdiction rules."[123] For example, in the case of a crime committed by the national of a non-state party on the territory of another non-state party that consents to the jurisdiction of the court, both states would have jurisdiction under the established norms of international law. Although the case could meet the Article 12 preconditions for jurisdiction by the ICC, the complementarity principle operates to delay an assertion of ICC jurisdiction. Furthermore, many states have domestic legislation allowing extraterritorial jurisdiction over violations of international humanitarian law committed against nationals belonging to that state,[124] which could

120. Sadat & Carden, *supra* note 10, at 414 (attributing the source of the term to the head of the Lawyer's Committee for Human Rights delegation to the Rome Conference, Jelena Pejic).

121. Note, *The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute*, 49 DUKE L.J. 825, 836-40 (1999). This limitation actually represents a retreat from the earlier text of the ILC draft that would have allowed the custodial state to consent to ICC jurisdiction. *ILC Draft Statute*, *supra* note 111, art. 21.

122. This statement is true, subject to the caveat that the non-state party can always consent to the exercise of ICC jurisdiction. Rome Statute, *supra* note 3, art. 12(3).

123. Sadat & Carden, *supra* note 10, at 413.

124. *See, e.g.*, 18 U.S.C. § 2441(b) (1999) (War Crimes Act of 1996 as amended).

give a third state (the state of the victim's nationality) a valid legal basis for instigating a prosecution of the perpetrator.

To help remedy the clash of jurisdictional competency, the Rome Statute implements the complementarity principle through a specified regime of admissibility. Applying the complementarity principle to the above hypothetical, all three states "would normally exercise jurisdiction over the crimes concerned," and the admissibility criteria require the prosecutor to notify those three states when commencing an investigation following either a referral by a state party (Article 13(a)) or *proprio motu* (Articles 13(c) and 15).[125] The jurisdictional competence of the three states would be resolved through normal political and legal mechanisms. Accordingly, the admissibility criteria work in conjunction with the circumscribed jurisdictional competence of the ICC to mark the line of authority between the ICC and domestic legal systems.

2. Articles 17-19, Admissibility Criteria

The admissibility mechanism provides the most direct implementation of the complementarity principle in the Rome Statute. Article 17 compels the link between admissibility and complementarity by explicitly referring to the two statutory provisions that articulate the complementarity principle.[126] Following this reference to the complementary nature of ICC practice, Article 17 mandates that the court "shall determine that a case is inadmissible" where the admissibility criteria are not met.[127] This is phrased as a mandatory limitation on the reach of the court. The admissibility criteria implement the complementarity principle by providing the textual basis for evaluating whether domestic authority over a particular case limits ICC authority over that case. Furthermore, the procedures for obtaining preliminary rulings regarding admissibility[128] and challenging the prosecutor's assertion of admissibility[129] provide the mechanism for translating complementarity from a theoretical principle to an enforceable check on the power of the ICC and prosecutor.

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125. Rome Statute, *supra* note 3, art. 18(1).

126. *Id.* art. 17(1) ("Having regard to paragraph 10 of the Preamble and article 1 . . . .").

127. *Id.*

128. *Id.* art. 18.

129. *Id.* art. 19.

The earliest articulation of the admissibility criteria dates to the 1943 Draft Convention for the Creation of an International Criminal Court, which simply stated that, "[as] a rule, no case shall be brought before the Court when a domestic court of any one of the United Nations has jurisdiction to try the accused and it is in a position and willing to exercise such jurisdiction."[130] The 1994 International Law Commission (ILC) Draft Statute preempted ICC authority in cases that were the subject of investigation by a state that produced an "apparently well-founded" decision not to proceed to prosecution.[131] This limited concession to domestic authority was grounded on a statement in the Preamble of the ILC Draft Statute that the ICC was to be complementary to domestic legal systems in cases where trials "may not be available or may be ineffective."[132]

Based on concerns that the ILC formulation was both too narrow (in the sense that even a sham prosecution could render a case inadmissible) and too vague,[133] Article 17 expanded the scope of the earlier text to specify that the court shall determine that a case is inadmissible in the following circumstances: (1) the case is "being investigated or prosecuted by a State that has jurisdiction over it;" (2) the case was the subject of a prior investigation and the state with jurisdiction "decided not to prosecute the person concerned;" (3) the person was already tried for conduct which is the sub-

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130. Draft Convention for the Creation of an International Criminal Court (London International Assembly), art. 3, LONDON INTERNATIONAL ASSEMBLY—REPORTS ON PUNISHMENT OF WAR CRIMES 225-346 (1943), *reprinted in Historical Survey of the Question of International Criminal Jurisdiction, Memorandum Submitted by the Secretary-General*, U.N. Doc. A/CN.4/7Rev.1 (1949).

131. *ILC Draft Statute*, *supra* note 111, art. 35. The ILC Draft also prevented admissibility in cases where "there is no reason for the Court to take further action for the time being" and cases "not of such gravity to justify further action by the Court." *Id.*

132. *Id.* pmbl., para. 3.

133. Holmes, *The Principle of Complementarity*, *supra* note 100, at 45 (helping to explain why the Rome Statute broadens ICC jurisdiction to cases that have already been prosecuted in sham trials and why the text attempts to articulate detailed, relatively objective criteria for the subjective assessments underlying a determination of ICC admissibility).

ject of ICC interest;[134] or (4) the case is "not of sufficient gravity to justify further action by the Court."[135]

The Rome Statute amended the subjective ILC admissibility criteria in two significant ways. A case is admissible before the ICC only where a domestic sovereign is "unwilling or unable to genuinely" carry out the investigation or prosecution.[136] The delegates in Rome rejected a vague concept of effectiveness and agreed upon "genuinely" as the most objective modifier that preserves a large degree of flexibility for the ICC prosecutor and court.[137] The ICC prosecutor and court must make a subjective assessment whether the sovereign state is "genuinely unwilling" or "genuinely unable" to take action on the case. This new standard also allows the supranational institution to review, and potentially reverse, the disposition of the case following prior judicial or investigative action in the domestic system. The potential for direct and deliberate ICC infringement over unchecked state sovereignty resulted in extensive debate about the best articulation of the criteria for determining whether a state is "unwilling"[138] or "unable"[139] to take action on a particular case."[140]

The Rome Statute also includes detailed procedural guidance for implementing the complementarity principle. In order to clearly describe the effect of complementarity when matters are first referred to the ICC, the United States introduced a proposal in March 1998 that was later negotiated and included in the Rome Statute as Article 18.[141] Prior to taking action on a case referred by a state party or initiating a *proprio motu* investigation, the prosecutor is required to "notify all States and those States which, taking into account the information available, would normally exercise jurisdiction over the crimes concerned."[142] The ability of any state party to refer a case to the prosecutor for investigation extends to situations in which "one or more" of the crimes proscribed in the Rome Statute "appears to have been committed."[143] Thus, a state party can ask the

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134. This principle is implemented procedurally in Article 20, *Ne bis in idem*. *See infra* notes 153-59 and accompanying text.

135. Rome Statute, *supra* note 3, art. 17(1). This final ground for inadmissibility always operates as a restriction on the scope of ICC authority in all cases, and its inclusion in the admissibility criteria just reinforces this intentional limitation. *See supra* notes 59-68 and accompanying text.

136. *Id*. *But see* JUSTICE IN THE BALANCE: RECOMMENDATIONS FOR AN INDEPENDENT AND EFFECTIVE INTERNATIONAL CRIMINAL COURT 70 (1998) (Human Rights Watch advocated a return to the "ineffective" or "unwilling" standard on the basis that the agreed language set "an unduly high threshold which may prevent ICC jurisdiction even in cases where there is no effective investigation and prosecution at the national level.").

137. Holmes, *The Principle of Complementarity*, *supra* note 100, at 50.

prosecutor to initiate an investigation over acts committed anywhere in the world, over which several other states could legitimately exercise jurisdiction. The prosecutor's duty to notify any state with a potential jurisdictional basis serves as the cue for that state to elect whether to exercise its jurisdictional rights. The admissibility criteria obligate the ICC prosecutor

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138. Rome Statute, *supra* note 3, art. 17(2). Article 17(2) prescribes the criteria for evaluating "unwilling" as follows:

> (2) In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being
> (d) conducted in a manner which, under the circumstances, is inconsistent with an intent to bring the person concerned to justice.

Id.

139. *Id.* art. 17(3).

> In order to determine inability in a particular case, the Court shall consider whether, due to partial or total collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Id.

140. Holmes, *The Principle of Complementarity*, *supra* note 100, at 50. Some observers believe that this effort was inspired by determined effort to allocate ICC authority based on "neutral and principled" criteria. Sadat & Carden, *supra* note 10, at 415.

141. U.N. Doc. A/AC.249/1998/WG.3/DP.2 (introduced by the United States on March 25, 1998 to the Working Group on Complementarity and Trigger Mechanism). *See also International Criminal Court Hearing*, *supra* note 94, at 143 (providing Ambassador Scheffer's description of the U.S. motivation in introducing the proposal).

142. Rome Statute, *supra* note 3, art. 18(1).

143. *Id.* art. 14(1).

and court to respect that state's right to exercise complementarity, even in cases where the state only took action following a notification.

Notably, the requirement for prosecutorial notification to states—designed to permit the exercise of domestic jurisdiction that would preempt ICC authority—does not include cases referred to the ICC prosecutor by the Security Council acting under its Chapter VII authority. In practice, the process of generating a Chapter VII resolution would almost certainly give notice to the affected states. In theory, a Security Council referral of a situation to the ICC would not prevent state investigation or prosecution of that case. Notwithstanding the normal functioning of the complementarity mechanism, the presumption of state jurisdictional precedence vis à vis the ICC would not trump the Security Council's legal authority to override domestic discretion.

Unless the Security Council has referred the case, the complementarity principle allows any state, including non-state parties, to notify the court that a domestic investigation is underway or has been concluded; in such cases, the prosecutor "shall defer" to a domestic investigation.[144] Despite the obligation to respect a valid invocation of sovereign judicial authority, the ICC prosecutor may still request the state to provide information to the prosecutor on the progress of any investigations or trials.[145] The prosecutor subsequently has the right to review a deferral to domestic investigation of the case after six months, or "at any time when there has been a significant change of circumstances based on the State's unwillingness or inability to genuinely carry out the investigation."[146] These provisions implement complementarity as a procedural mandate for the ICC in its dealings with all states, including those that have not ratified the Rome Statute.

Aside from the effect of complementarity at the onset of an investigation, any state that has jurisdiction over a particular case may challenge admissibility on the ground that it has completed or is pursuing an investigation or prosecution of a particular case.[147] Challenges made before the

144. *Id.* art. 18(2) (the obligation of the prosecutor to defer to the domestic process can be overridden by the Trial Chamber based on the "application of the Prosecutor" or, in the case of a *proprio motu* investigation, on the basis of a prosecutorial request pursuant to Article 15(3). The prosecutor or state concerned may file an expedited appeal against the decision of the Pre-Trial chamber. *Id.* art. 18(4).

145. *Id.* art. 18(5).

146. *Id.* art. 18(3).

147. *Id.* art. 19(2).

confirmation[148] of a case are to be filed with the Pre-Trial Chamber; challenges following confirmation are heard by the Trial Chamber.[149] Complementarity is a right accruing to all states; however, a specified class of individuals may invoke complementarity on behalf of a state with jurisdiction. Article 19 permits an accused or a person "for whom a warrant of arrest or a summons to appear has been issued" to challenge the admissibility or jurisdiction of a case before the ICC.[150] Decisions made by the

148. Within a "reasonable time after the person's surrender or voluntary appearance before the Court," the Rome Statute requires that the Pre-Trial Chamber hold a hearing to "confirm the charges on which the Prosecutor intends to seek trial" *Id.* art. 61(1). The so-called confirmation hearing is closely akin to an investigation under Article 32 of the Uniform Code of Military Justice in that the prosecutor must produce "sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged." *See id.* art. 61(7). After this step, the Pre-Trial Chamber rules on the validity of continuing the case. *Id.* art. 61(7).

149. *Id.* art. 19(6). At the time of this writing, the United States has introduced a proposal to add an additional safeguard into the complementarity mechanism. On 7 December 2000, the United States submitted a formal proposal that would add a requirement to the Relationship Agreement between the ICC and the United Nations. Despite the permissive language of Article 19(1) of the Rome Statute, see *supra* note 109, the United States proposal requires the court to determine the admissibility of a case "when there is a request for surrender of a suspect who is charged with a crime that occurred outside the territory of the suspect's State of nationality." U.N. Doc. PCNICC/2000/WGICC-UN/DP.17. In the words of Ambassador Scheffer, this new proposal "erects a final firewall, meaning that whether or not the admissibility of a case has been reviewed in the past, the Court must, on its own motion, review admissibility at the critical moment when the request for surrender is being framed." Ambassador David J. Scheffer, Address at the Judge Advocate General's School, Waldemar A. Solf Lecture in International Law: A Negotiator's Perspective on the International Criminal Court (Feb. 28, 2001). In his address, Ambassador Scheffer explained the importance of the admissibility proposal in the Relationship Agreement as follows:

> The state of nationality thus will have one more opportunity to demonstrate its performance of the complementarity criteria in an effort to prevent such surrender. Since the Court can review admissibility on its own motion at any time, the U.S. proposal simply articulates a procedural agreement between the United Nations and the Court, binding on the Court, to ensure that a final admissibility review occurs before the suspect arrives in The Hague. The proposal is reasonable and compatible with and in accordance with the treaty itself. We would be foolish not to pursue it vigorously in the on-going talks, although I fear the March of Folly has already begun. Multilateral negotiations are as much about missed opportunities and bad timing as they are about anything else.

Id.

150. Rome Statute, *supra* note 3, art. 19(6).

Trial Chamber or prosecutor regarding admissibility or jurisdiction may be appealed on an interlocutory basis.[151]

As a general rule, a state is permitted only one challenge to a determination of admissibility or jurisdiction, which should be made prior to the start of the trial in the ICC Trial Chamber.[152] The text is vague as to whether this means one appeal as to jurisdiction with an additional appeal regarding admissibility, or whether both grounds for removing the case from ICC authority should be combined in one appeal. However, even after the beginning of the trial, the Rome Statute permits challenges to the admissibility of a case based on the fact that the person concerned has already been tried for the conduct that is the subject of the complaint.[153] As the sole basis for challenging admissibility after the start of a trial, this provision further preserves complementarity by placing a premium on domestic procedures that yield speedy dispositions. This is true because a previously completed trial would logically have prevented admissibility at an earlier stage. The state with jurisdiction could theoretically try the accused in absentia, even if a domestic trial began after the ICC prosecutor started presentation of the case to the Trial Chamber.

The complementarity principle dictates in these circumstances that a completed domestic trial would stop an ongoing ICC prosecution. The right of a state to end an ICC proceeding based on complementarity does not depend on a specified trial verdict or a particular level of punishment. Nevertheless, Article 20 outlines the substantive requirements for sustaining a claim based on a prior prosecution, consequently removing that case from the judicial power of the ICC Trial Chamber.

3. Article 20, Ne Bis in Idem

The principle of *ne bis in idem* reflects basic notions of fairness and judicial economy. The statement that a person "shall not be tried before the [ICC] with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the [ICC]" seems eminently reasonable on its surface.[154] With respect to cases adjudicated by the ICC, this prohibition stands on its own formulation in Article 20.

151. *Id.*
152. *Id.* art. 19(4).
153. *Id.*
154. *Id.* art. 20(1).

Regarding the interface with national courts, the delegates in Rome found that agreement on the *ne bis in idem* principle was much easier than the broader admissibility criteria under Article 17,[155] even though they embedded it as an additional ground for inadmissibility under Article 17.[156]

Article 20 sets out the standards for assessing whether a domestic adjudication of a case makes it inadmissible before the ICC. The discussions over *ne bis in idem* in Rome came in the wake of the hard-fought compromises on the complementarity provisions related to national investigations or ongoing prosecutions.[157] In contrast to the parallel "unwilling or unable genuinely" standard applicable to investigations or ongoing prosecutions by states, the provisions for completed trials only amplify the "unwilling" prong. The appropriate domestic courts were obviously able to handle a trial that was in fact completed. The *ne bis in idem* standards applicable to domestic trials focus on domestic systems that have used the façade of legal proceedings to thwart the ends of justice.

Unless the domestic trial purposefully shielded the accused from ICC authority,[158] or the previous trial was conducted in a manner which was inconsistent with an intent to bring the person to justice,[159] the ICC prosecutor or court have no authority to impose supranational criminal accountability. The blanket protection granted by Article 20 extends over a person for "conduct" that was the subject of the earlier domestic trial. Any state's criminal proceedings shield the accused from further accountability before the ICC for any charges based on the same conduct (which in this context might be better conceived as misconduct).

Even as it preserves the right of domestic state courts to supersede ICC punishment based on complementarity, Article 20 does not erect a rigid or unreasonable barrier to ICC admissibility of a particular case. The *ne bis in idem* provisions of Article 20 are the logical capstone to the entire array of procedural and substantive provisions related to implementing complementarity in the practice of the ICC and prosecutor. The complementarity principle applies to domestic investigations, prosecutions, and completed trials, and the Rome Statute mandates the procedures for states to claim the right of complementarity. The standards and procedural rules for recognizing a state's right to use its domestic forums are complex and

155. Holmes, *The Principle of Complementarity*, *supra* note 100, at 59.
156. Rome Statute, *supra* note 3, art. 17(1)(3).
157. Holmes, *The Principle of Complementarity*, *supra* note 100, at 50.
158. Rome Statute, *supra* note 3, art. 20(3)(a).
159. *Id.* art. 20(3)(b).

interrelated. Taken together, they provide a solid textual basis for nations with competent, functioning legal systems to adjudicate cases within their jurisdiction rather than being shoved aside by the ICC prosecutor or court.

This is the essence of the complementarity principle as it protects the right of sovereign states to resolve criminal cases. Nevertheless, an ICC prosecutor, functioning under the international scrutiny that will be a normal facet of any supranational investigation or prosecution under the provisions of the Rome Statute, bears the burden of translating the provisions of the statute into actual practice. Toward that endeavor, the Final Draft Rules of Procedure and Evidence set forth requirements relating to the realization of complementarity.

C. Complementarity in the Final Draft Rules of Procedure and Evidence

In contrast to the Rome Statute itself, the Final Draft Rules of Procedure and Evidence were adopted by consensus on 30 June 2000. Although the Rules are "subordinate in all cases" to the Rome Statute, they are intended to facilitate the application of the statute in actual practice.[160] The negotiations leading to the Draft Rules were in one sense a microcosm of the Rome Conference. A complex document emerged from the conflicting approaches of lawyers and diplomats arguing from both civil and common law perspectives, flavored with heavy lobbying from non-governmental organizations focused on parochial interests, and spiced with a heavy dose of divergent personalities. The weighty undertones of idealistic aspiration and raw politics that accompanied the Draft Rules discussions added to the intensity of the negotiations. Given the political dimension of these debates, it is unsurprising that the Final Draft Rules include several provisions that may affect the ability of states to invoke the complementarity principle.

One notable clarification in the Final Draft Rules limits the ability of states to selectively misuse the principle of complementarity.[161] Although national jurisdiction should enjoy a "presumption of regularity,"[162] the Rome Statute operates on a presumption that states will not politicize the

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160. *Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence*, U.N. Doc. PCNICC/2000/INF/3/Add.1 (2000) (Explanatory Note) [hereinafter Draft Rules].

161. *See supra* notes 122-24 and accompanying text.

162. Brown, *Primacy or Complementarity, supra* note 28, at 426 n.212 (quoting Jamison Borek, Deputy Legal Advisor, U.S. Department of State).

domestic adjudication of cases within the scope of potential ICC jurisdiction. The text of Article 12(3) allows a non-state party to consent to ICC authority "with respect to the crime in question."[163] In theory, a non-state party could consent to ICC jurisdiction over the conduct of the international forces deployed to its territory, while exempting its own armed forces from ICC authority. Even though such selective consent would accord with the text of the Rome Statute, the state would thereby pervert the complementarity principle into a deliberate shield to deflect accountability for its citizens while using the ICC process as a political weapon against its adversary.

In order to remedy this anomaly and prevent such disparate justice, the Draft Rules provide specific guidance regarding a declaration under Article 12(3). The delegates agreed to clarify the meaning of a state declaration by making an interpretive statement of principle. Under the consensus rule, a state declaration to accept jurisdiction includes "as a consequence the acceptance of jurisdiction with respect to the crimes referred to in Article 5 of relevance to the situation."[164] In other words, a declaration of consent by a non-state party to crimes committed on its territory means that the ICC prosecutor can investigate any acts of genocide, crimes against humanity, or war crimes that were committed by any individual in connection with the "situation."[165] The ICC prosecutor has that broad investigative authority even if the non-state party intended that consent to be directed against a specified set of individuals or a particular criminal violation. As a result, this rule prevents an abuse of the complementarity that could otherwise have discredited the very notion of domestic trials under the supranational ICC umbrella.

The rules also include some notification provisions that could significantly impact on the exercise of state domestic authority to prosecute perpetrators. In order to protect the rights of victims, the rules require that known victims or their legal representatives receive information at several critical procedural junctures. The prosecutor, for instance, "shall inform victims" when submitting a *proprio motu* investigation to the Pre-Trial Chamber for authority to proceed.[166] The victims in turn "may make rep-

163. Rome Statute, *supra* note 3, art. 12(3).

164. Draft Rules, *supra* note 160, R. 44(2).

165. The consent of the non-state party would confer jurisdiction over all of the criminal acts, which would in turn allow the prosecutor to "initiate investigations *proprio motu* on the basis of information within the jurisdiction of the Court." Rome Statute, *supra* note 3, art. 15(1).

166. Draft Rules, *supra* note 160, R. 50(1).

resentations in writing" to the Pre-Trial Chamber that would presumably assist the court in making its determination whether the prosecutor has a reasonable basis to proceed with an investigation.[167] In addition, when the prosecutor seeks a ruling from the court regarding any question of jurisdiction or admissibility, [168] the rules require notification to both the state that referred the case and "victims who have already communicated with the court in relation to that case."[169] As a logical corollary, either the state or interested victims "may make representation to the competent Chamber."[170] The Rules specify that decisions over the commencement of an investigation by the Pre-Trial Chamber shall include the court's underlying reasons, and the ICC "shall give notice of the decision to victims who have made representations."[171]

In the abstract, these rules make sense from the perspective that the ICC is intended to promote values that are fundamental to all the world's citizens. A greater flow of information between the ICC prosecutor, affected states, and concerned victims may facilitate the pursuit of justice. On the other hand, the rules nowhere mention any cross-examination or filtering of the "representations" made to the court. Furthermore, the court itself has complete autonomy and responsibility for determining the applicable procedures for assessing issues of admissibility. Alerting every identified victim will almost certainly result in personal, deeply moving pleas to the court. Such representations are the antithesis of a process that rationally applies the legal norms of the statute to protect the sovereign authority of states to exercise complementarity. An ICC judicial chamber that failed to apply the jurisdictional or admissibility criteria because of the emotional impact of a victim's evidence would subvert the complementarity principle. However, the Draft Rules provide this potential basis for eroding complementarity based on extrinsic victim testimony that is not relevant to the grounds for determining admissibility under the Rome Statute. Conversely, victims may generate intense political pressure against the domestic state that would otherwise have authority to adjudicate the

167. *Id.* R. 50(3).

168. *See* Rome Statute, *supra* note 3, art. 19(3).

169. Draft Rules, *supra* note 160, R. 59(1).

170. *Id.* R. 59(3).

171. *Id.* R. 50(5). The rules provide a parallel provision that a state requesting a deferral of investigation by the ICC prosecutor is also entitled to the "decision and the basis for the decision of the Pre-Trial Chamber." *Id.* R. 55(3).

case, thereby distorting that state's decision whether to defer to the ICC prosecutor or proceed with a domestic investigation or trial.

Finally, the rules contain explicit guidance for the court as it considers whether the state is genuinely unwilling to take action against the perpetrator. This determination is a central element in the decision regarding whether the case is inadmissible before the ICC.[172] In assessing the degree of state unwillingness to prosecute, along with the genuine character of a perceived unwillingness, the court may consider information tendered by the state that is seeking to invoke complementarity. The rules specifically permit the state invoking complementarity to provide information showing that "its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct."[173] The ICC authority to override state jurisdiction is a serious matter. The consensus rule allows the affected state to have the opportunity to present evidence related to its own justice system which may explain procedural or substantive issues that the court could incorrectly assess as manifesting genuine unwillingness or genuine inability sufficient to warrant ICC admissibility. In addition, information provided by a domestic state with jurisdiction will generate international interest in the case that is quite likely to force the ICC to define and articulate the factors that make the case admissible. This rule, in conjunction with the other Rules of Procedure related to admissibility determinations, demonstrates that the principle of complementarity is one of the cornerstones of the ICC investigative and judicial process.

Despite the significant guidance in the Rome Statute and the Rules of Procedure that seek a balance between complementarity and the effectiveness of the ICC, there are outstanding issues that will not be resolved until the court begins to function. Section IV highlights some of the gaps and unresolved questions that could undermine the actual practice of the ICC regarding the principle of complementarity. If the ICC and its prosecutor do not adhere to provisions for respecting the complementarity principle, the political backlash could eviscerate the ICC as a functioning institution with international credibility and support.

IV. Obstacles to Implementing Complementarity

A. The *Proprio Motu* Problem

172. *See supra* notes 123-48 and accompanying text.
173. Draft Rules, *supra* note 160, R. 51.

As shown above, the Rome Statute includes a comprehensive set of provisions and procedures that are designed to insulate sovereign authority to prosecute from unreasonable extension of ICC authority over sovereign judicial systems. Some treaty proponents argue that the web of protections inspired by the complementarity principle gives "ample assurance" that the ICC will minimally curtail sovereign authority only by displacing domestic trials in "exceptional circumstances."[174] At the same time, the Rome Statute contains absolutely no institutional constraints on the power and discretion of the ICC and prosecutor. In fact, a key reason that the complementarity regime is so thorough and detailed in the Rome Statute lies in the recognition by treaty proponents that the "interpretation and application" of those provisions and standards is left solely to the ICC.[175]

Since complementarity is built on the premise that the ICC is not inherently superior to sovereign states, the supranational court is not supreme in theory. The very autonomy that proponents sought for the ICC and its prosecutor, however, prevents external review or resolution of disputes over the court's implementation of the Rome Statute.[176] Arguably, the lack of any external checks and balances limiting the discretion of the ICC manifests a structural flaw creating de facto ICC superiority over sovereign states. From this perspective, the mandatory phrasing of the complementary provisions[177] and their binding nature fail to guarantee realization of the complementarity principle. The prosecutor is account able only to the trial chambers of the ICC itself, and the Rome Statute reinforces this unprecedented reallocation of power by providing that "any dispute concerning the judicial functions of the Court shall be settled by the

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174. JUSTICE IN THE BALANCE: RECOMMENDATIONS FOR AN INDEPENDENT AND EFFECTIVE INTERNATIONAL CRIMINAL COURT 71 (1998).

175. Holmes, *The Principle of Complementarity*, *supra* note 100, at 74.

176. The one slight caveat to this statement that in practice may prove to be very exceptional is the fact that the Security Council can pass a resolution under Chapter VII that requests the ICC to defer an investigation or prosecution for a period of twelve months. Rome Statute, *supra* note 3, art. 16. This grant of authority to the Security Council in the Rome Statute was arguably unnecessary in view of the plenary authority of the Security Council with regard to threats to international peace and security. As noted above, the intense debate over the proper role for the Security Council *vis à vis* the initiation of cases within ICC jurisdiction was a matter of international contention until the final hours of the Rome Conference.

177. *See, e.g.*, *id.* art. 17(1) ("court shall determine that a case is inadmissible where . . . ."), art. 17(2) ("in order to determine unwillingness in a particular case, the court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist . . . .").

decision of the Court."[178] The Rules of Procedure further specify that the ICC chamber reviewing issues of admissibility "shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings."[179]

One of the hallmarks of the complementarity regime is that it protects the prosecutorial and investigative prerogatives of all states without distinction based on membership in the ICC club. While the Rome Statute provides that an unresolved dispute between two or more parties to the Rome Statute will be referred to the Assembly of States Parties,[180] the Rome Statute is strikingly silent regarding any similar right of non-state parties. This discrepancy could be viewed as an incentive to become a party to the Rome Statute. It could also create a strong incentive for the ICC to avoid disputes with states that are represented in the Assembly of States Parties, thus creating the potential for a tiered system of complementarity in which non-state parties are not accorded the same degree of deference. Nevertheless, the prosecutor's unconstrained authority, coupled with the control of the ICC judicial chambers, has the potential to erode complementarity to its vanishing point as a mechanism for allocating prosecutorial power between states and the ICC.

The provisions implementing complementarity are complex and often call for difficult subjective assessments by the court and prosecutor. For instance, in reviewing a state's unwillingness, the prosecutor bears the burden of showing sufficient circumstantial evidence to warrant a finding that a delayed movement towards domestic prosecution "in the circumstances is inconsistent with an intent to bring the person to justice."[181] The Rome Statute is silent on the need for any direct evidence of unwillingness in this case, and there is no provision for review of the court's decisions outside the ICC itself.

Article 17(2)(a) further requires the prosecutor to show that the domestic disposition of the case "was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court."[182] In this endeavor, the Rome Statute is structured

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178. *Id.* art. 119(1). *See generally* Paul D. Marquardt, *Law Without Borders, The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT'L L. 73 (1995) (opining that the lack of checks and balances does not fatally undermine ICC authority).

179. Draft Rules, *supra* note 160, R. 58(2).

180. Rome Statute, *supra* note 3, art. 119(2).

181. *Id.* art. 17(2)(b).

182. *Id.* art. 17(2)(a).

to allow the ICC prosecutor a wide margin of error. If circumstantial evidence fails to establish the improper domestic purpose, a further provision allows admissibility if the ICC prosecutor persuades the ICC chamber to find a lack of independence or impartiality in the domestic court coupled with a manner of conducting the proceedings that was "inconsistent with an intent to bring the person concerned to justice."[183] These grounds for asserting ICC authority despite domestic action are all laced with subjective assessments by the court and prosecutor that are not subject to any external review outside the ICC.

The very criteria that establish the prosecutorial burden of proof and specify the requisite evidentiary standards designed to implement complementarity may hold the seeds of its unchecked erosion. The ICC prosecutor and court always bear the burden of showing that the standards have been met, but there is no external check to monitor adherence to the standards. The ICC prosecutor must assess the admissibility criteria in light of undefined "principles of due process recognized by international law."[184] These standards are themselves defined by the ICC, which allows wide latitude for the ICC prosecutor to meet the "objective" admissibility criteria. Moreover, if an ICC investigation is originally deferred to national jurisdiction, the ICC prosecutor is not restricted from taking later actions, subject to the requirement that "he or she shall notify the State to which deferral of the proceedings has taken place."[185]

Finally, the *propio motu* power of the prosecutor allows abuse of the complementarity principle because the admissibility criteria invite ICC intrusion into the domestic processes of sovereign states. Because the ICC and its prosecutor can reasonably be expected to develop some guidelines and standards for evaluating domestic systems, the Rome Statute sets up an essentially circular paradox. If a state does not meet the standards that the ICC announces through its internal procedures and court decisions, the domestic state may be deemed "genuinely unwilling" to handle the case by the ICC. Furthermore, states with scarce resources may be unable to reshape their entire domestic judicial systems in response to subjective ICC standards, thereby warranting an ICC finding that any trial that the

183. *Id.* art. 17(2)(c). One treaty supporter argues that this is a loophole that will become the most frequently used path to admissibility. Broomhall, *Checklist*, *supra* note 17, at 145.

184. Rome Statute, *supra* note 3, art. 17(2).

185. *Id.* art. 19(11).

ICC prosecutor wants to take over is admissible because the state is unable "genuinely to prosecute."

B. Properly Describing Jurisdiction

Aside from the dispositive power of an unconstrained supranational court and prosecutor, the complementarity principle could be corroded by the very jurisdictional mindset of the ICC. The concept of complementarity does not logically lead to a scheme of national and supranational concurrent jurisdiction. Properly understood and implemented in accordance with the Rome Statute, the jurisdictional allocation of power between the ICC and states is best thought of as a tiered allocation of authority to adjudicate. The ICC does not have authority to take a case or initiate an investigation until the issues associated with domestic jurisdictional criteria and admissibility standards are resolved.

The complementarity principle was the motivating force behind a court built around a limited and defined authority to take jurisdiction that operates when needed to supplement domestic court systems. From the prosecutor's point of view, jurisdiction under the provisions of Article 13 and admissibility under Article 17 are both mandatory prerequisites for ICC authority.[186] This scheme is a significant evolution from earlier drafts that allowed an "inherent" ICC jurisdiction over some crimes.[187] The United States was on record as supporting such an inherent jurisdictional scheme for the genocide offenses.[188] In fact, the 1994 International Law Commission Draft included a provision that allowed the ICC to have automatic jurisdiction over the crime of genocide, which would have created a truly concurrent jurisdiction, at least over these offenses.[189]

A system built on a straight assertion of supranational primacy was not a "politically viable alternative for a permanent ICC."[190] A scheme of concurrent jurisdiction would have almost certainly resulted in jurisdictional clashes between the ICC and one or more states with valid claims based on established principles such as nationality, territoriality, or passive personality.[191] Rather than a flawed system of inherent or explicit concurrent jurisdiction, the Rome Statute's jurisdictional scheme requires the progressive factual inquiries and judicial findings that implement

186. Sadat & Carden, *supra* note 10, at 417.

187. Brown, *Primacy or Complementarity, supra* note 28, at 417-28 (describing the advantages and disadvantages of such an inherent supranational scheme).

complementarity. Over time, the complementarity provisions may chafe an ICC prosecutor that sees them as an overly restrictive manifestation of arcane sovereignty principles. The ICC prosecutor may begin to think of jurisdiction as concurrent rather than tiered, and thereby minimize the complementarity requirements. Because the ICC does not have any external checks and balances, there is no institutional mechanism for controlling a court and prosecutor that seeks to expand supranational power over domestic forums in order to vindicate considerations of international justice.[192]

If the ICC prosecutor begins to view supranational jurisdiction as concurrent with sovereign state jurisdiction, the importance of the complementarity provisions as the trigger mechanism for ICC jurisdiction would obviously begin to erode. This would produce more than just the technical

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188. *International Criminal Court Hearing*, *supra* note 94, at 13 (Ambassador Scheffer referred to a regime of "automatic acceptance" in describing the inherent regime of the ILC Draft.). *See also* Genocide Convention, *supra* note 48, art. VI (persons "shall be tried by a competent tribunal of the State in 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"). In the 1948 debates over the Genocide Convention, the United States actually made a proposal that sounded remarkably close to the modern formulation of complementarity in the ICC context. The proposal would have added an additional paragraph to Article VII of the Genocide Convention to read as follows: "Assumption of jurisdiction by the international tribunal shall be subject to a finding that the State in which the crime was committed has failed to take adequate measures to punish the crime." *Report and Draft Convention Prepared by the Ad Hoc Committee on Genocide*, U.N. Doc. E/794 (1948), *reprinted in Historical Survey of the Question of International Criminal Jurisdiction, Memorandum Submitted by the Secretary-General 142*, U.N. Doc. A/CN.4/7Rev.1 (1949). The proposal was rejected by a vote of five votes to one with one abstention (the USSR) on the basis that such a paragraph would prejudice the question of the court's jurisdiction. *Id.*

189. *ILC Draft Statute, supra* note 111, arts. 21(1)(a), 25(1).

190. Brown, *Primacy or Complementarity*, *supra* note 28, at 431.

191. M. Cherif Bassiouni & Christopher Blakesly, *The Need for an International Criminal Court in the New International World Order*, 25 VAND. J. TRANSAT'L L. 151, 170 (1992).

192. For an indication that this temptation on the part of a constrained ICC prosecutor to seek an expansion of power in relation to states may be inevitable, see the comments of the Chief Prosecutor for the International Criminal Tribunal for the Former Yugoslavia, based on her long experience working within the structure of politics and power in seeking international justice. Justice Louise Arbour, Address to the Preparatory Committee on the Establishment of an International Criminal Court (8 Dec. 1997) (warning that the ICC should not become a "weak and powerless institution that would lack legitimacy," and telling delegates that "there is more to fear from an impotent than from an overreaching prosecutor"), *available at* http://www.un.org/icty/p271-e.html (ICTY Press Release, CC/PIO/271-E).

undermining of abstract treaty provisions; it would minimize the ability of states to exercise their courts as proper forums for prosecuting violations of international humanitarian law. Additionally, the ICC prosecutor might begin to assert jurisdiction in cases where one state with a jurisdictional claim consented to ICC adjudication of a particular case, but other states with equally valid claims were either not consulted or mooted based upon the prosecutor's unilateral assessment of inadmissibility. Though a fair reading of the Rome Statute indicates that admissibility can be waived by a state,[193] no state should be allowed to waive the complementarity right of another state.

Finally, the Rome Statute is silent on the proper allocation of ICC authority in cases involving national amnesties or executive pardons. A supranational court based on concurrent jurisdiction would in theory enjoy absolute authority to prosecute a case without regard for domestic legislative or political action. In the negotiations leading to the Rome Statute, the delegates rejected a proposal that would have allowed ICC authority even in the situation where a state pardoned or paroled an accused following conviction in domestic courts.[194] Similarly, the criteria for assessing whether a state is "genuinely unable" to take action in a particular case revolve around the functioning structure and factual ability of the domestic judicial system to "carry out its proceedings."[195] In contrast, a domestic amnesty or pardon would create a legal "inability" to prosecute in the domestic forums that the ICC should not use as a springboard over the

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193. Sadat & Carden, *supra* note 10, at 417.

194. Holmes, *The Principle of Complementarity*, *supra* note 100, at 76. Human Rights Watch argued against the lacunae in the Rome Statute on the basis that "there can be no legitimate amnesty for these crimes; rather, the application of an amnesty law to these offenses would be a clear contravention of established principles of international law." JUSTICE IN THE BALANCE: RECOMMENDATIONS FOR AN INDEPENDENT AND EFFECTIVE INTERNATIONAL CRIMINAL COURT 72 (1998).

195. Rome Statute, *supra* note 3, art. 17(3).

> In order to determine inability in a particular case, the Court shall consider whether, due to partial or total collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Id.

complementarity principle in the absence of persuasive evidence that it was intended solely to shield the accused from criminal responsibility.[196]

Holding that the potential for ICC jurisdiction over cases that fall within an amnesty or a domestic statute of limitations infringes on the "essential conditions for the exercise of national sovereignty," the French *Conseil Constitutionnel* found that ratification of the Rome Statute would require revision of the French constitution.[197] With respect to complementarity, therefore, it is evident that the Rome Statute is not dispositive over the precise resolution of every situation that the ICC will encounter. Despite this, the ICC prosecutor, operating from the mistaken perspective of concurrent jurisdiction, may seek to exert supranational jurisdiction at will without regard for the defined constraints of complementarity.

C. Character of Crimes

The ICC prosecutor's ultimate position on the concept of "ordinary crimes" may well be the hidden weakness in the complementarity regime as an effective limit to supranational power. If the ICC prosecutor dictates to states the "acceptable" charges for particular conduct, the vitality of complementarity as a functional component of ICC practice will be severely weakened. Put simply, many states have criminal provisions that penalize the same conduct that would fall under one of the substantive definitions of crimes proscribed by the ICC, but which do so under different legal characterizations. The presumption in favor of domestic judicial action does not depend on strict compliance with the crimes articulated in the Rome Statute, or with charging those offenses using the precise terms and conditions outlined therein. The jurisprudence or practice of the ICC should not evolve to the point that domestic prosecutors make charging decisions based on the hope that the ICC will accept the form of the

196. *Id.* art. 20(3)(a).

197. Beate Rufolf, *Statute of the International Criminal Court, Decision No. 98-408 DC, 1999 J.O. 1317*, 94 AM. J. INT'L L. 391, 394 (1999). The French ultimately added a constitutional provision, Article 53-2, which provides that "[t]he Republic may recognize the jurisdiction of the International Criminal Court under the conditions contained in the treaty signed on July 18, 1998." *Id*. at 394 n.8. The original decision is available at www.conseil-constitutionel.fr/decision/1998/9808dc.htm.

charges. Such a practice would turn the principle of complementarity on its head.

In a regime based on concurrent jurisdiction between domestic forums and an international court, the international court would have had preexisting jurisdiction in its own right regardless of the characterization of the crime under domestic law. Under a regime of concurrent jurisdiction, even if the domestic courts decide a particular case, the principle of *ne bis in idem*[198] would not preclude a subsequent trial before the international tribunal if "the characterization of the act by the national court did not correspond to its characterization" in the international forum.[199] In fact, the ICTY wrote in dicta that an international criminal tribunal "*must* be endowed with primacy over national courts" because human nature will create a "perennial danger of international crimes being characterized as ordinary crimes."[200]

In contrast, the Rome Statute does not make any distinction regarding the nature of the charge in the provisions implementing the principle of complementarity. The form of the charge in domestic states does not affect the latitude that the supranational court must accord national processes. The detailed admissibility criteria apply regardless of the form of the charges in the domestic forum or their precise symmetry with the words of the Rome Statute. At the same time, if a state does not have a criminal code that exactly replicates the range of offenses under the Rome Statute, the ICC prosecutor could be at liberty to simply consider that the state is unable to prosecute the crimes. It is conceivable that in egregious cases the ICC itself would informally ask a particular state to fill perceived gaps in its domestic legislation, and then determine that the delay in doing so manifested a "genuine unwillingness" to prosecute or investigate a particular accused.

In this vein, states implementing the Rome Statute through domestic legislation face an additional dilemma. Legislation pending in several national legislatures to implement the Rome Statute makes general reference to the "crimes described in Articles 6 and 7 and paragraph 2 of Article 8 of the Rome Statute."[201] The Rome Statute allows the prosecutor to

198. *See supra* notes 150-56 (describing *ne bis in idem* as it relates to complementarity within the ICC structure).

199. Secretary General's Report, *supra* note 70, ¶ 66 (describing the overlap of domestic prosecutorial authority with the concurrent jurisdiction and presumption of primacy under the International Criminal Tribunal for the FormerYugoslavia).

200. Tadic Appeal on Jurisdiction, *supra* note 58, ¶ 58 (emphasis added).

select from a wide array of criminal charges, and includes some offenses that could be charged under several overlapping provisions. States that duplicate the range of offense in the Rome Statute may very well face pressure to charge an accused in the precise manner that the ICC prosecutor will accept in order to "get credit" for using the domestic judicial system. Again, such a practice would violate the principle of complementarity contained within the Rome Statute.

The distinction between ordinary offenses and ICC crimes is more than simply a terminological exercise. If the ICC and prosecutor begin to base admissibility decisions on the precise articulation of the domestic criminal charge, the principle of respecting national processes would be severely undermined. Indeed, the complementarity principle was designed to preclude such micromanagement by the supranational institution and the accompanying interference with national judicial processes. In theory, complementarity would require the ICC to recognize the discretion of the domestic authorities regarding the scope and form of the domestic charges. In reality, complementarity may be an incomplete restraint on a zealous ICC prosecutor, motivated by a strong awareness of moral and legal obligations to serve the needs of international accountability, who could use the form of domestic charges as a pretext to exert ICC authority.

V. Conclusion

"Complementarity" is an intellectually simple concept that masks the deep philosophical and political difficulties that the International Criminal Court must overcome if it is ever to become a functioning institution. The drafters of the Rome Statute and the delegates who negotiated the Rules of Evidence and Procedure clearly understood that the ICC should not be the court of first resort. One of the Preparatory Committee Reports prior to the Rome Conference noted that, "[t]aking into account that under international law, the exercise of police power and penal law is a prerogative of

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201. *See* Crimes Against Humanity and War Crimes Act, R.S.C., ch. 24, § 4(4) (2000) (Can.). Legislation pending in several other jurisdictions to implement the Rome Statute domestically is available at files.fco.uk/und/draftbill.pdf (applies the criminal provisions of Article 6, 7, and 8(2) to crimes committed in the England, Wales, or Northern Ireland, as well by persons subject to United Kingdom nationals on an extraterritorial basis); www.eda.admin.ch/sub_dipl/g/home/info/trdisc.html (German legislation); www.eda.admin.ch/sub_dipl/f/home/info/trdisc.html (French legislation); and www.eda.admin.ch/sub_dipl/i/home/info/trdisc.html (Italian legislation).

States, the jurisdiction of the Court should be viewed only as an exception to such State prerogative."[202]

If it can function effectively as an apolitical supranational institution with autonomous legal personality, the ICC can fulfill an important function in buttressing domestic justice by serving as an additional forum for dispensing justice when domestic forums are inadequate. Despite the well-intentioned goals of the Rome Statute, the ICC will survive and thrive only if it manages to balance the reality of sovereign political and legal competition between states with the aspiration for international justice. The complementarity provisions are the designated mechanism for balancing enforcement of international norms against protection of state sovereignty.

Complementarity is in theory an impartial, reliable, and de-politicized process for identifying the cases of international concern, and hence international jurisdiction. However, the thicket of subjective provisions designed to implement complementarity allows treaty opponents to argue that national justice systems are threatened with displacement at the hands of an unrestrained international prosecutor. Indeed, one of the fiercest critics of the ICC testified: "Complementarity, like so much else associated with the ICC is simply an assertion, utterly unproven and untested. Since no one has any actual experience with the Court, of course, no one can say with any certainty what will happen."[203]

Complementarity will be an essential component of a functioning ICC within a system of sovereign states, but the new institution will face the difficult challenge of eroding the historic reality of unrestrained state discretion without generating a tidal wave of hostility and outright opposition from the community of states. Complementarity in practice, as distinct from complementarity in principle, will be an essential feature of an ICC that earns a respected role that warrants state support and assistance towards the goal of enhancing the prospects for international accountability and justice. Time will tell how this important principle is implemented through the decisions and opinions of the ICC and its prosecutor.

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202. *1 Report of the Preparatory Committee on the Establishment of the International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, ¶ 155, U.N. Doc. A/51/22 (1996), *reprinted in* STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 385 (1998).

203. *International Criminal Court Hearing*, *supra* note 94, at 63 (testimony of John Bolton before the Senate Foreign Relations Committee).