# Review Essay
# Not Fade Away: The International Criminal Court and the State of Sovereignty

THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (M. CHERIF BASSIOUNI ED., 1998)

THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE; ISSUES, NEGOTIATIONS, RESULTS (ROY S. LEE ED., 1999)

JERRY FOWLER*

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Campaigning for president last year, Pat Buchanan cited the Rome Statute of the International Criminal Court (ICC Statute)[1] as a key

* J.D., Stanford University; A.B., Princeton University; Professorial Lecturer in Law, George Washington University Law School. The author is Staff Director of the Committee on Conscience at the United States Holocaust Memorial Museum. The views expressed are those of the author and not necessarily those of the Committee on Conscience or of the Holocaust Memorial Museum.

1. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, U.N. Doc. A/Conf.183/9 (1998) [hereinafter ICC STATUTE], *reprinted in* THE STATUTE OF THE

battleground in "the millennial struggle . . . of patriots of every nation against a world government where all nations yield up their sovereignty and fade away."[2] Others have sounded similar warnings about infringements on sovereignty.[3] Nor are these concerns limited to the ICC Statute's American critics. China, for example, has objected that the International Criminal Court (ICC) will "directly infringe [] on the judicial sovereignty of States."[4]

President Clinton authorized the United States signing of the ICC Statute on December 31, 2000, while also stating that it should not be considered for ratification at this time because of "significant flaws."[5] This action, along with strong opposition to the ICC Statute among the Republican leadership on Capitol Hill,[6] assures that discussion of the

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INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 39-100 (M. Cherif Bassiouni ed., 1998) [hereinafter DOCUMENTARY HISTORY], *reprinted in* 37 I.L.M. 999 (1998), *available at* http://www.un.org/icc/.

2. Patrick J. Buchanan, The Millennium Conflict: America First or World Government, Speech Delivered to Boston World Affairs Council 9 (Jan. 6, 2000) (on file with author).

3. *See e.g.*, Senator Jesse Helms, "Toward a Compassionate Foreign Policy," Address Before the American Enterprise Institute 9 (Jan. 11, 2001), *available at* http://www.aei.org/past_event/conf010111.htm. ("This brazen assault on the sovereignty of the American people is *without precedent* in the annals of international treaty law."); Hearing before the Senate Subcommittee on International Operations of the Committee on Foreign Relations, *Is a U.N. International Criminal Court in the U.S. National Interest?*, 105th Cong., 2d Sess. 10 (July 23, 1998) (Statement of Sen. John Ashcroft) ("By ceding the authority to define and punish crimes, many nations took an irrevocable step to the loss of national sovereignty and the reality of global government."); *id.* at 3 (Statement of Senator Rod Grams) ("[W]e must affirm that the United States will not cede its sovereignty to an institution which claims to have the power to override the U.S. legal system and to pass judgment on our foreign policy actions."); *id.* at 69 (Statement of Lee A. Casey) (warning that creation of the Court "represents a profound surrender of American sovereignty – the right of self-government"); Gary T. Dempsey, *Reasonable Doubt: The Case Against the Proposed International Criminal Court*, 311 CATO INST. POL'Y ANALYSIS 1 (July 16, 1998) ("[T]he Court threatens to diminish America's sovereignty . . . .").

4. *Views and Comments by Governments*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE STATUTE; ISSUES, NEGOTIATIONS, RESULTS 573, 582 (Roy S. Lee ed., 1999) (summary of views expressed by Chinese government on Oct. 21, 1998) [hereinafter INTERNATIONAL CRIMINAL COURT].

5. *See* Thomas E. Ricks, *U.S. Signs Treaty on War Crimes Tribunal; Pentagon, Republicans Object to Clinton Move*, WASH. POST, Jan. 1, 2001, at A1. President Clinton noted his "concerns about significant flaws in the treaty," but said he signed it in order to demonstrate U.S. "support for international accountability" and to permit the U.S. to continue working to improve the treaty. *Id.* By the terms of the ICC Statute, it was open for signature without ratification only until December 31, 2000. *See* ICC STATUTE, *supra* note 1, art. 125, para. 1.

6. For example, Senator Jesse Helms denounced the signature for being "as outrageous as it is inexplicable," and said that reversing the decision would be "one of my highest priorities in the new Congress." *Helms on Clinton ICC Signature: "This Decision Will Not Stand"* (Helms press release, on file with author) (December 31, 2000). In the 106th Congress, senior Republicans in both houses of Congress sponsored

proposed ICC's effect on sovereignty will continue. Fears of losing sovereignty have a long history in shaping U.S. responses to international agreements, especially those relating to human rights.[7] It is possible, if not likely, that sovereignty concerns will prevent the U.S. ratification of the ICC Statute for a long time to come.

"Sovereignty" is not an easily defined term.[8] For purposes of this essay, "sovereignty" is used in the broad sense of individual States' being at liberty to act without interference from a higher power.[9] The issue, therefore, is the extent to which the ICC Statute prospectively takes from individual States the ability to act as they wish in any given circumstance.

The two volumes under review provide useful insight into the evolution of the ICC Statute and the negotiating dynamics that shaped its final form, including the ways sovereignty concerns were addressed. At its core, the ICC Statute provides for the creation of an international institution that will have the power to assess individual criminal accountability, a function that has traditionally, though not exclusively, been an exercise of the sovereign power of individual States.[10]

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the American Servicemembers Protection Act, S. 2726 and H.R. 4654, both of which were introduced on June 14, 2000. The legislation would prohibit U.S. cooperation with the ICC as long as the U.S. is not a party to the Statute. *See* American Servicemembers, Protection Act, § 4. It also would prohibit U.S. military assistance to any nation that is a party to the Statute, other than NATO countries and specified major non-NATO allies. *See id.* § 7.

7. *See, e.g.*, LAWRENCE J. LEBLANC, THE UNITED STATES AND THE GENOCIDE CONVENTION 130-32 (1991); Samantha Power, *The United States and Genocide Law: A History of Ambivalence*, *in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 165, 169-70 (Sarah B. Sewall & Carl Kaysen eds., 2000); William R. Sprance, *The World Trade Organization and the United States' Sovereignty: The Political and Procedural Realities of the System*, 13 AM. U. INT'L L. REV. 1225, 1227-28 (1998) (describing the public debate about the effect that the World Trade Organization would have on U.S. sovereignty).

8. *See, e.g.*, MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW, POWER, AND THE SOVEREIGN STATE: THE EVOLUTION AND APPLICATION OF THE CONCEPT OF SOVEREIGNTY 6 (1995) "[T]he meaning of sovereignty varies according to the issue that is being addressed or the question that is being asked."); STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 3 (1999) (describing "muddle[d]" uses of the term).

9. *See* Jack Donnelly, *State Sovereignty and International Intervention: The Case of Human Rights*, *in* BEYOND WESTPHALIA? STATE SOVEREIGNTY AND INTERNATIONAL INTERVENTION 115, 116 (Gene M. Lyons & Michael Mastanduno eds., 1995).

10. *See* 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 126 (1995); *see also* GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 5 (2000) (asserting that "[i]nternational war crimes tribunals are a recurring

Nevertheless, the ICC Statutory scheme presupposes a system of sovereign States. In a number of crucial respects, the ICC Statute, which after all was the result of negotiations among sovereign States, defers to concerns of sovereignty. The way in which those concerns were resolved in the negotiations may not be acceptable to the American polity vis-à-vis the United States' sovereignty; that is a different issue. What is clear is that the success or failure of the ICC will ultimately depend upon decisions yet to be made by States acting in their sovereign capacities.

Of particular importance in considering the issue of sovereignty are: 1) the principle of complementarity, 2) the preconditions to the exercise of the ICC's jurisdiction, 3) the treatment of national security information, and 4) the relationship of the Prosecutor's office to national judicial systems when conducting investigations. These four areas define the ICC's relationship to individual States.[11] In each of these areas, the ICC Statute defers in significant ways to State sovereignty concerns. Before dealing with those specific areas, this essay briefly reviews the process that culminated with adoption of the ICC Statute.

## I. BACKGROUND OF THE INTERNATIONAL CRIMINAL COURT (ICC)

Professor Cherif Bassiouni traces the origins of efforts to create a permanent international criminal tribunal, starting from the efforts in 1919 to the end of World War I.[12] These efforts received a boost after World War II with the international military tribunals in Nuremberg and Tokyo.[13] And reflecting some sense of the sentiment in support of a permanent international court that existed after World War II, the United Nations Genocide Convention explicitly contemplated that the crime of genocide could be tried before an international tribunal.[14] A special

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modern phenomenon").

11. *See* ICC STATUTE, *supra* note 1. One way in which the ICC STATUTE will require States to yield sovereignty in a normative sense is through the subject matter jurisdiction of the ICC, which codifies individual criminal responsibility for actions that at one time were considered matters of state responsibility. *See* THEODOR MERON, WAR CRIMES LAW COMES OF AGE 303, 305-09 (1998). Being for the most part derivative of existing international law, this aspect of the ICC STATUTE by itself does not appreciably restrict sovereignty more than already resulted from widely ratified precursors such as: the Genocide Convention, the Geneva Conventions of 1949, and the Convention Against Torture – to all of which the United States is a party. *See* U.N. CONVENTION ON THE PREVENTION AND PUNISHMENT OF GENOCIDE art. 6, 78 U.N.T.S. 277 (1948).

12. *See* M. Cherif Bassiouni, *Historical Survey: 1919-1998*, *in* DOCUMENTARY HISTORY, *supra* note 1, at 1, 3-15. For a discussion of the 19th century roots of 20th century war crimes tribunals, *see* BASS, *supra* note 10, at 37-57.

13. *See* Bassiouni, *supra* note 12, at 9.

14. U.N. CONVENTION ON THE PREVENTION AND PUNISHMENT OF GENOCIDE, *supra* note 11.

committee of the United Nations General Assembly produced drafts of a statute for a permanent court in 1951 and 1953.[15] But the various efforts to promote such a Court in the years after the war were stillborn, in no small part due to skepticism and sovereignty concerns on the part of major powers.[16]

The idea reemerged contemporaneously with the end of the Cold War in 1989 when Trinidad and Tobago urged the United Nations General Assembly to investigate the creation of an international tribunal to deal with drug trafficking.[17] This initiative ultimately resulted in a Draft Statute for an International Criminal Court (ILC Draft Statute), which the International Law Commission (ILC) presented to the General Assembly in 1994.[18] As the fall of the Berlin Wall made it politically feasible for the project to proceed, violence in the former Yugoslavia and Rwanda, which resulted in the creation of the first international criminal tribunals since Nuremberg and Tokyo,[19] added a sense of urgency.[20]

The ILC Draft Statute was revised between 1996 and 1998 by a Preparatory Committee (PrepCom), which met periodically in New York and was open to all member States of the United Nations.[21] The PrepCom completed its work in April 1998 by producing a draft statute (PrepCom Draft Statute), to be considered for adoption by a five-week diplomatic conference scheduled for that June in Rome. A notable feature of the PrepCom's Draft Statute was the number of issues that

15. *See* Bassiouni, *supra* note 12, at 13-14. The relevant UN documents from this period are reprinted in 2 BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 337-459 (1980).

16. *See* Bassiouni, *supra* note 12, at 12-13.

17. *See id.* at 16-17.

18. *See id.* at 17; INTERNATIONAL LAW COMMISSION: DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT (1994), *reprinted in* DOCUMENTARY HISTORY, *supra* note 1, at 657-73 [hereinafter ILC DRAFT STATUTE].

19. *See* ARYEH NEIER, WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE 111-33 (1998) (discussing the background of the Tribunals' creation).

20. *See* Bassiouni, *supra* note 12, at 18-19 ("The events in Yugoslavia and Rwanda shocked the world out of its complacency and the idea of prosecuting those who committed international crimes acquired a broad based support in world public opinion and many governments."). Gary Bass, among others, has underscored the deeply ambiguous nature of the legal response to Yugoslavia and Rwanda: "Law became a euphemism for inaction." BASS, *supra* note 10, at 215.

21. *See* Bassiouni, *supra* note 12, at 20-24. Various reports and other work product of the Preparatory Committee are reprinted in DOCUMENTARY HISTORY, *supra* note 1, at 115-616.

were left unresolved. For every unresolved issue, various options were presented in bracketed text, some 1300 words in 166 proposed articles.[22] The goal of the diplomatic conference was to remove the brackets and obtain agreement on a final Statute; a daunting challenge given the technical complexity of the task, the participation of many diplomats who were not previously involved in the process and, not least, the difficult political issues inherent in the creation of a new international institution.[23] Not surprisingly, the issues that touched most directly on sovereignty concerns, including State consent to court proceedings and the treatment of national security information, were among the last to be resolved.[24]

The diplomatic conference concluded with adoption of the Rome Statute of the ICC on July 17, 1998.[25] By its terms, the Statute will enter into force once 60 nations have ratified it.[26] When the period for nations to sign the Statute ended on December 31, 2000,[27] 139 nations, including the U.S., had signed. Twenty-nine nations have ratified the Statute, with many more actively pursuing their domestic ratification procedures. The Statute's entry into force will result in the creation of a permanent criminal court with subject matter jurisdiction over genocide, crimes against humanity, and serious war crimes.[28] The Court will also have jurisdiction over the crime of aggression, but jurisdiction will be exercised only if the Statute is amended to define that crime and to establish the conditions for exercising jurisdiction.[29]

## II. COMPLEMENTARITY

A foundational issue is the relationship of the ICC's jurisdiction to

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22. *See id.* at 26.
23. *See id.* at 26-27, 27 n.136.
24. *See infra* Parts III and IV.
25. *See* Bassiouni, *supra* note 12, at 32. Lawrence Weschler, a staff writer for *The New Yorker*, has produced a highly readable account of the Rome Conference, focused especially on the issue of state consent. Lawrence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for an ICC*, *in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 7, at 85-111.
26. *See* ICC STATUTE, *supra* note 1, art. 126, para. 1.
27. *Id.* art. 125, para. 1. Although the Statute is no longer open for signature, any State can accede to the Statute by depositing the appropriate instrument with the Secretary General of the United Nations. *Id.* art. 125, para. 3.
28. *Id.* arts. 5-8.
29. *See* ICC STATUTE, *supra* note 1, art. 5, paras. 1(d), 2. Amendment of the Statute to define aggression will not be easily accomplished, as it requires agreement of two-thirds of the parties to the Statute. *Id.* art. 121, para. 3. Even then, the amendment would not apply to the nationals or on the territory of those States Parties that do not ratify or otherwise accept the amendment. *Id.* art. 121, para. 5. The status of signatures and ratifications, as maintained by the United Nations is *available at* http://www.un.org/law/icc/statute/status.htm.

that of national judicial systems. In establishing the ad hoc tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the Security Council accorded them "primacy."[30] Under this arrangement, the tribunal enjoys priority if a national system and a tribunal both seek to exercise jurisdiction over a case.[31] One consequence of the power of primacy is to minimize the extent to which competition between national and international mechanisms of justice can impede the work of the tribunals.[32] A second consequence is that the States' sovereign power to prosecute relevant offenses can be superceded by the international tribunal.

As a legal matter, primacy for the ad hoc tribunals stemmed from the Security Council's plenary power under Chapter VII of the United Nations Charter, to protect international peace and security.[33] Even though the ICTY Statute explicitly gave the ICTY primacy over national courts, key States sought to limit this infringement on a basic element of sovereignty. The U.S., France, the United Kingdom, and Russia offered interpretive statements suggesting that the power of primacy should be exercised only to preempt national proceedings that are not impartial, that are intended to shield the accused from criminal responsibility, or that are not diligently prosecuted.[34] This interpretation of "primacy" was not adopted in the ICTY's Rules of Procedure and Evidence,[35] but it is very similar to complementarity as ultimately embodied in the ICC Statute.

The reasoning that justified primacy for the ad hoc tribunals would also apply to the ICC. Jurisdictional competition would be minimized if the ICC could assert priority over national systems. But in the ICC

30. STATUTE FOR THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA art. 9, para. 2, U.N. Doc. S/RES/827 (1993) (amended 1998), *reprinted in* 32 I.L.M. 1192 (1993), *available at* http://un.org/icty/basic/statut/statute.htm; STATUTE FOR THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA art. 8, para. 2, U.N. Doc. S/RES/955 (1994), *reprinted in* 33 I.L.M. 1598 (1994), *available at* http://www.ictr.org/.

31. *See id.*

32. Although the power of primacy gives the upper hand to the international tribunal, it does not altogether forestall disputes between the national and international systems. *See* MADELINE H. MORRIS, JUSTICE IN THE WAKE OF GENOCIDE, IN WAR CRIMES: THE LEGACY OF NUREMBERG 218-26 (Belinda Cooper ed., 1999) (describing conflicts between the international tribunal for Rwanda and the Rwandan government).

33. U.N. CHARTER ch. VII; *see* MORRIS & SCHARF, *supra* note 10, at 125.

34. *See* MORRIS & SCHARF, *supra* note 10, at 127 n.381.

35. *Id.* at 127 n.381, 130 n.384; INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: RULES OF PROCEDURE AND EVIDENCE R. 9, U.N. Doc. IT/32/REV.18 (1994) (amended 2000).

negotiations, the issue was presented more directly as a matter of principle than it had been in the Security Council, which had been dealing with the particular situations of the former Yugoslavia and Rwanda, where viable national alternatives were not immediately available. As a matter of principle, the issue directly implicated sovereignty concerns, and a number of States were intent on ensuring that primary responsibility for dealing with the crimes in the ICC's jurisdiction remained with national systems.[36] There was not much possibility that the ICC negotiations would result in an international court with primacy over national courts.

Indeed, "complementarity" – the principle that the ICC would complement rather than supersede national systems – was a key feature of the International Law Commission's 1994 draft,[37] and over the course of negotiations leading up to the final ICC Statute, the complementarity regime was progressively strengthened. Under the principle of complementarity, cases being handled by a national system are not "admissible" before the ICC.[38]

The 1994 ILC Draft Statute emphasized in its preamble that the ICC was "intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective."[39] The ILC Draft Statute also provided that a case would not be admissible in the ICC if a State had investigated and made an "apparently well-founded" decision not to prosecute, or if a State was in the process of investigating and there was "no reason for the Court to take any further action for the time being."[40]

The prospect, plain in the ILC Draft Statute, that the ICC could take on cases where a national system was available but "ineffective," proved to be a source of dispute in subsequent negotiations, not the least because of sovereignty concerns.[41] The negotiators ultimately settled on

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36. *See* John T. Holmes, *The Principle of Complementarity*, *in* INTERNATIONAL CRIMINAL COURT, *supra* note 4, at 41. "A fundamental question facing the drafters of the statute of the International Criminal Court (the Court) was the role the institution would play in relation to national courts. The general view was that the International Criminal Court should complement national jurisdiction...; hence the word complementarity was used to describe the relationship between these two institutions." *Id.*

37. *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court* ¶ 29, *in* DOCUMENTARY HISTORY, *supra* note 1, at 620 ("The principle of complementarity was described as an essential element in the establishment of an international criminal court" by many delegations.).

38. *See* ICC STATUTE, *supra* note 1, art. 17.

39. *See* ILC DRAFT STATUTE (preamble), *reprinted in* DOCUMENTARY HISTORY, *supra* note 1, at 657.

40. *Id.*

41. *See, e.g.*, Holmes, *supra* note 36, at 47-48; *Report of the Preparatory Committee on the Establishment of an International Criminal Court* ¶ 161, *in*

the concept of "unwillingness."[42] Where a State is investigating or prosecuting a case, that case is inadmissible before the international court "unless the State is unwilling...genuinely to carry out the investigation or prosecution."[43] Even if a State investigates and decides *not* to prosecute, the case is inadmissible "unless the decision resulted from the unwillingness . . . of the State genuinely to prosecute."[44] In contrast to the 1994 ILC Draft Statute, the final version of the Statute more clearly adopts a presumption in favor of national legal proceedings. It also raises the standard for overcoming that presumption by focusing on the genuine willingness to investigate or prosecute, rather than the vaguer and more elastic standard of effectiveness used in the 1994 ILC Draft Statue.

Although these changes made the complementarity regime more protective of state sovereignty, they did not totally assuage sovereignty concerns. This lead to the inclusion of "criteria," which the ICC will use to determine questions of unwillingness.[45] The ICC is directed to consider whether "the purpose" of the national proceedings is to "shield [] the person concerned from criminal responsibility;" whether delay in the process is "unjustified," such that it is "inconsistent with an intent to bring the person concerned to justice;" or whether there is an absence of either independence or impartiality in the proceedings and their conduct is "inconsistent with an intent to bring the person concerned to justice."[46] These criteria give more substance to the concept of "unwillingness," and point in the direction of requiring an active effort by the State to prevent accountability before national proceedings can be disregarded.

This approach, though protective of sovereignty, does intrude on sovereignty to some degree because it includes exceptions and allows the Court, rather than the State, to be the judge of admissibility. Going into the Rome Conference, the PrepCom Draft Statute included an alternative formulation under which the mere existence of a State investigation or prosecution would be determinative of the

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DOCUMENTARY HISTORY, *supra* note 1, at 410 (noting the view that "the determination of whether such a [national] system was 'ineffective' was too subjective" and by placing "the Court in the position of passing judgment on the penal system of a State . . . would impinge on the sovereignty of national legal systems.").

42. ICC STATUTE, *supra* note 1, art. 17, para. 1(a).
43. *Id.*
44. *Id.* art. 17, para. 1(b).
45. *See* Holmes, *supra* note 36, at 50-51.
46. ICC STATUTE, *supra* note 1, art. 17, para. 2 (a)-(c).

complementarity issue.[47] Under this proposal, the ICC would have been deprived of the ability to act without regard to whether the proceedings were bona fide. Thus, anyone who controlled, or whose allies controlled, levers of State power would have been able to use sovereignty as a shield against ICC proceedings. During the negotiations in Rome, two delegations insisted on this approach,[48] but the consensus supporting the approach of the final ICC Statute was so strong that this rather extreme alternative never received serious consideration. That consensus reflected sensitivity to protecting sovereignty, but a willingness by States to admit limitations.

As the substance of the ultimate complementarity regime became clear during the course of negotiations leading up to the Rome Conference, the U.S. proposed a procedure for "preliminary rulings" on admissibility.[49] The proposal required the Prosecutor to notify States as she began to look into a situation. If a State asserted that it would investigate, the Prosecutor would be required to defer to that State, unless she could convince the ICC of the State's unwillingness genuinely to carry out that investigation.[50] If the *substance* of the complementarity regime is thought of as being protective of State sovereignty, this proposal intended to provide an additional *procedural* mechanism to further that protection.[51]

Non-governmental organizations (NGOs) and those States that favored a stronger ICC criticized the U.S. proposal.[52] They argued that providing another layer of protection for state sovereignty, through the proposed procedure, would hamper the ICC's effectiveness by giving States acting in bad faith the opportunity to delay ICC action, if not thwart it altogether. By the same token, the U.S. offered the proposal,

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47. *See Report of the Preparatory Committee on the Establishment of an International Criminal Court*, (Draft Statute of the International Criminal Court and Draft Final Act art. 15) *in* DOCUMENTARY HISTORY, *supra* note 1, at 136-37; *see also* Holmes, *supra* note 36, at 43-44.

48. *See* Holmes, *supra* note 36, at 52-53.

49. *Id.* at 68-69. This proposal, with modifications, became Article 18 of the ICC STATUTE. ICC STATUTE, *supra* note 1, art. 18, para. 2.

50. *See* ICC STATUTE, *supra* note 1, art. 18, para. 2.

51. *See* David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 13 (1999) (characterizing the U.S. proposal as an "effort to broaden the complementarity regime").

52. *See, e.g., Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court* 78 (Human Rights Watch) (1998) ("Provisions ensuring the rigorous protection of the principle of complementarity are already incorporated into the statute."); *The International Criminal Court: Making the Right Choices, Part V: Recommendations to the Diplomatic Conference* 38 (Amnesty International) (1998) ("There seems to be little in the lengthy, complicated and unfair proceedings required [by the proposal] which would help make the Court an effective complement to national jurisdictions."); *see also* Holmes, *supra* note 36, at 70-71.

and other States supported it, precisely because it added protection for sovereignty, making it easier for them to accept the substance of the complementarity regime.[53]

The U.S. proposal for preliminary challenges to admissibility ultimately became Article 18 of the ICC Statute.[54] Although changes were made in the course of the Rome Conference to address the concern that bad faith use of the procedure could impede the ICC's effectiveness, the essence of the original proposal remains: the Prosecutor is required to notify States when she begins an investigation and must defer to national investigations or prosecutions at a State's request, unless she successfully applies to the ICC for authorization to proceed.[55] Thus, Article 18 represents substantial additional protection for State sovereignty over what would exist in its absence, protection provided at the possible expense of the ICC's ultimate effectiveness.[56]

The inclusion of complementarity as a "cornerstone"[57] of the ICC and its substantive and procedural details reflect strong respect for state sovereignty interests. Although the final result is accurately described as a "delicate balance,"[58] it is a balance that takes significant account of the concerns of those States most focused on protecting national sovereignty. As with other aspects of the ICC Statute, the complementarity provisions reflect a willingness of nations to agree to limitations in principle on state sovereignty, within the context of a structure that recognizes and presupposes the primacy of sovereign States.

## III. PRECONDITIONS TO THE EXERCISE OF JURISDICTION

The most contentious issue in the negotiations, which was only resolved in the final hours of the Conference, was the extent to which – before proceeding in a particular case – the ICC would have to obtain consent of States that might have an interest in that case.[59] The ILC

53. *See* Holmes, *supra* note 36, at 71.
54. ICC STATUTE, *supra* note 1, art. 18.
55. *See id.*
56. *Id.*
57. *See* Holmes, *supra* note 36, at 73.
58. *See id.* at 74.
59. *See* Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 4 (1999) (noting that on the issue of preconditions "the differences proved irreconcilable and consensus eventually broke down, leading to a vote at the end of the conference"); Roy

Draft Statute provided that the ICC would be able to exercise jurisdiction over a genocide "complaint"[60] initiated by any State that is a party to both the ICC Statute and to the United Nations Genocide Convention, without the requirement of obtaining consent from any other State, such as the State on whose territory the alleged genocide occurred or whose nationals perpetrated the alleged genocide.[61] The ILC considered the ICC's jurisdiction over those genocide complaints to be "inherent."[62] In other cases initiated by State complaint, the ICC would be able to exercise jurisdiction only if that jurisdiction was accepted by as many as three different States: the State that had custody of the suspect, the State on the territory of which the conduct occurred, *and* any State that requested surrender of the suspect from the custodial State.[63]

Furthermore, the ILC Draft Statue contemplated that States could become parties to the ICC Statute without accepting the ICC's jurisdiction.[64] Acceptance of the ICC's jurisdiction would not be "automatic," but rather would require that States take the additional step of "opting in," which could be done either generally or in individual cases.[65] States would retain the right to determine, on a case-by-case basis, whether to permit the ICC to exercise jurisdiction in any case where their acceptance was required. This approach, allowing States to have a veto over particular cases and permitting States to reserve the decision whether to accept the ICC's jurisdiction until presented with a particular case, was strongly protective of sovereignty.

By the time the PrepCom completed its draft statute, the range of possible schemes for the ICC's exercise of jurisdiction had expanded. On one end of the range – that most protective of State sovereignty – the ILC approach was supplemented by proposals to add more States whose

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S. Lee, *The Rome Conference and Its Contribution to International Law*, *in* INTERNATIONAL CRIMINAL COURT, *supra* note 4, at 1, 25-26.

60. *See* ILC DRAFT STATUTE art. 25, para. 1, *reprinted in* DOCUMENTARY HISTORY, *supra* note 1, at 663. The ILC's concept that States who are parties would file "complaints," ultimately was dropped in favor of providing that they could refer "situations" to the Court's attention. *See also* ICC STATUTE, *supra* note 1, arts. 13(a), 14.

61. *See* ILC DRAFT STATUTE art. 21, para. 1, *reprinted in* DOCUMENTARY HISTORY, *supra* note 1, at 663. The ICC also would have been able to exercise jurisdiction without State consent over matters referred by the Security Council acting under Chapter VII of the Charter of the United Nations. *Id.* art. 23, para. 1. In the ICC Statute, preconditions do not apply to Security Council referrals, although the complementarity restrictions on admissibility do apply. *See* ICC STATUTE, *supra* note 1, arts. 12, para. 2, 17.

62. *See* Elizabeth Wilmshurst, *Jurisdiction of the international Criminal Court*, *in* INTERNATIONAL CRIMINAL COURT, *supra* note 4, at 127-28.

63. *See* ILC DRAFT STATUTE art. 21, *reprinted in* DOCUMENTARY HISTORY, *supra* note 1, at 662.

64. *Id.* art. 22.

65. *Id.*

acceptance of jurisdiction would be necessary. In addition to the territorial, custodial, and requesting States, it was proposed that consent also be obtained from the State of the victim's nationality and the State of the suspect's nationality.[66] Thus, as many as five States might possess a veto over court proceedings.

On the other end of the range, Germany proposed that the ICC enjoy inherent jurisdiction over crimes against humanity and war crimes as well as over genocide – that is, "preconditions" to the ICC's exercise of jurisdiction over the so-called "core crimes" would be deleted.[67] This proposal reasoned from the premise that these crimes are ones of universal jurisdiction as to which all States have the power to prosecute. Because each of the States that would be parties to the ICC Statute has the power to prosecute individuals without regard to connections of territory, nationality or the like, it was argued that the ICC should have that power as well.[68] Under this proposal, the ICC would have jurisdiction over the relevant crimes, even if the perpetrators and victims were nationals of States not party to the ICC Statute and even if the conduct occurred on the territory of a State not party to the statute. The German proposal eliminated the issue of acceptance of jurisdiction, because acceptance by parties and non-parties alike would be rendered moot. Non-parties, however, would not be obligated to cooperate with the ICC.[69]

There were also proposals that fell between these two. For example, the United Kingdom proposed that a State automatically accepts the ICC's jurisdiction by becoming a party to the ICC Statute and that the ICC could only exercise jurisdiction when accepted by both the custodial and the territorial States.[70] Ad hoc consent would be required

66. *See Report of the Preparatory Committee on the Establishment of an International Criminal Court* (Draft Statute of the International Criminal Court and Draft Final Act art. 7, option 2), *in* DOCUMENTARY HISTORY, *supra* note 1, at 131

67. *The Jurisdiction of the International Criminal Court: An Informal Discussion Paper Submitted by Germany* (1998), A/AC.249/1998/DP.2 at 3 [hereinafter *German Proposal*]. "Only the German proposal gave the Court 'universal jurisdiction.'" Wilmshurst, *supra* note 62, at 132.

68. *Id.*

69. *German Proposal*, *supra* note 67, at 3.

70. *The Jurisdiction of the International Criminal Court: An Informal Discussion Paper Submitted by the United Kingdom* (1998), A/AC.249/1998/WG.3/DP.1 [hereinafter *United Kingdom Proposal*]. The United Kingdom proposal would have given the ICC "automatic jurisdiction." Wilmshurst, *supra* note 62, at 132, 132-33 n.18; *see Report of the Preparatory Committee on the Establishment of an International Criminal Court* (Draft Statute of the International Criminal Court and Draft Final Act art.

if one of those States was a non-party.[71]

By the last week of the Rome Conference, serious divisions on jurisdictional issues remained.[72] The German universal jurisdiction proposal was no longer under consideration. A South Korean compromise proposal enjoyed broad support, including from States that previously supported universal jurisdiction. This proposal required the ICC to obtain acceptance from any one of four States – the territorial State, the custodial State, the State of the victim's nationality, or the State of the suspect's nationality. The Korean proposal was more protective of sovereignty than universal jurisdiction, because it required acceptance of jurisdiction by a State with some connection to a given case. But it was less protective than the UK proposal or the ILC draft because such acceptance would be enough and it had a relatively broad range of States whose acceptance would suffice.

Though support was broad, this proposal also engendered intense opposition.[73] The U.S., in particular, argued that the consent at least of the territorial State *and* the State of the suspect's nationality must be required.[74] Automatic jurisdiction also enjoyed broad support, but those opposed felt strongly about the issue, holding on to the alternative of an opt-in requirement for one or more categories of crimes or an "opt-out" possibility.[75]

The issue was only resolved in the Conference's final hours through the presentation of a "take it or leave it" package by the diplomats coordinating the negotiations.[76] The package, which was adopted as part of the ICC Statute after the Conference voted to take no action on a U.S. proposed amendment,[77] provides for automatic State acceptance of the Court's jurisdiction upon ratification.[78] But it allows States to opt-out of accepting the ICC's jurisdiction over war crimes committed on their territory or by their nationals for a "transitional" period of the first seven years in which they are parties.[79] With regard to preconditions, the ICC can only exercise its jurisdiction if either the territorial State or the State of the suspect's nationality has accepted the ICC's jurisdiction.[80] Non-

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7, further option), *in* DOCUMENTARY HISTORY, *supra* note 1, at 135.

71. *Id. See United Kingdom Proposal, supra* note 70.

72. *See* Wilmshurst, *supra* note 62, at 136.

73. *See id.* at 136-37.

74. *See id.* at 137.

75. *See id.* at 136. "Opt out" meant that ratification would result in automatic acceptance of the ICC's jurisdiction, unless the ratifying State took the affirmative step of declaring that it did not accept the ICC's jurisdiction.

76. *See* DOCUMENTARY HISTORY, at 31; Kirsch & Holmes, *supra* note 59, at 8-11.

77. *See* DOCUMENTARY HISTORY, at 31.

78. *See* ICC STATUTE, *supra* note 1, art. 12, para. 1.

79. *See id.* art. 124.

80. *See id.* art. 12, para. 2. These preconditions do not apply to cases resulting

parties can accept jurisdiction on an ad hoc basis.[81]

Although the final ICC Statute is not as protective of state sovereignty as the ILC Draft Statute, it remains firmly rooted in basic notions of State sovereignty. First and foremost, there is the precondition that a sovereign State with a strong interest in a particular case must accept the jurisdiction of the ICC. Moreover, the two States whose acceptance can satisfy this precondition are those whose sovereign jurisdiction over such matters – the territorial state and the state of nationality of the suspect – are most firmly established under international law.[82] This consideration – and the intense feelings of States opposed to less stringent preconditions – motivated the last minute deletion from the ICC Statute of the other two candidates in the Korean proposal: the custodial State and the State of the victim's nationality.[83] Likewise, acceptance of jurisdiction remains a sovereign decision, which would not have been the case if universal jurisdiction had been adopted, even though automatic jurisdiction attaches greater consequences to the sovereign decision to ratify the ICC Statute than would have an opt-in or opt-out scheme.

The issue of State consent, as resolved by Article 12 of the ICC Statute, has been at the heart of U.S. objections.[84] Throughout the debate in Rome, the U.S. delegation insisted that preconditions at least include acceptance by the State of the suspect's nationality. This concern reflects the U.S. concern that the ICC not be used to pursue U.S. military personnel or policymakers as long as the U.S. is not a party.[85] Near the end of the conference, the U.S. suggested a formulation that would keep the ICC from acting where nationals of non-party States are engaged in

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from a Security Council referral. *See id.*

81. *Id.* art. 12, para. 3.

82. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. a (1997) ("International law recognizes links of territoriality...and nationality...as generally justifying the exercise of jurisdiction to prescribe."); STEPHEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 140 (1997); *see also* Philippe Kirsch, *The Development of the Rome Statute, in* INTERNATIONAL CRIMINAL COURT, *supra* note 4, at 451, 460.

83. *See* Kirsch, *supra* note 82, at 460; *see also* Kirsch & Holmes, *supra* note 59, at 11 n.34 (1999). The eleventh hour move prompted one human rights activist to complain that the Bureau "took the Korean proposal, split it in half, and left us with North Korea." Weschler, *supra* note 25, at 106 (quoting Richard Dicker of Human Rights Watch).

84. *See* Scheffer, *supra* note 50, at 17-20.

85. *See id.*

official action acknowledged as such by the State.[86] In negotiations after the Rome Conference to work out details of the ICC's functioning, the U.S. continued to voice concerns about the exercise of jurisdiction over non-party nationals.[87]

The basis for the U.S. position is plain: U.S. military personnel are deployed worldwide both as a matter of routine and in response to particular situations, and it is loath to see those personnel (and policymakers directing their actions) subject to the jurisdiction of an untested entity.[88] Article 98 of the ICC Statute provides a mechanism for protecting U.S. (or any other nation's) personnel from the ICC's custody when they are in another State's territory with that State's consent through the use of Status of Forces Agreements[89] and other treaties.[90] For hostile or otherwise non-consensual deployments, theoretically, the ICC could exercise jurisdiction. The prospect of an international court trying an American sparks the most emotional response,[91] even though

86. *See id.* at 20 n.17.

87. *See Views and Comments by Governments, in* INTERNATIONAL CRIMINAL COURT, *supra* note 4, at 573, 632-35 (summarizing views of U.S. delivered at a meeting of the Sixth Committee of the U.N. General Assembly on Oct. 21, 1998).

88. *See* Scheffer, *supra* note 50, at 18. The ICC will not, however, present the first instance of an international tribunal's having jurisdiction over U.S. military personnel. After NATO's Kosovo air campaign in 1999, the Prosecutor of the ICTY conducted a legal analysis of whether NATO forces committed war crimes. *See* Steven Lee Myers, *Kosovo Inquiry Confirms U.S. Fears of War Crimes Court*, N.Y. TIMES, Jan. 3, 2000, at 1. The ICTY's jurisdiction over NATO actions stems from the tribunal's statute, which encompasses any conduct on the territory of the former Yugoslavia since 1991. *See* ICTY STATUTE, *supra* note 30, art. 1. Although the U.S. disputed the substantive basis for any investigation, it did not dispute the Prosecutor's assertion of jurisdiction. *See* Myers, *supra*, at 1. The committee appointed by the Prosecutor to review the NATO bombing recommended that no investigation be opened. *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, para. 91 (June 13, 2000).

89. A Status of Forces Agreement (SOFA) governs the issues of jurisdiction over military forces in a foreign country. Under SOFA that the United States negotiated with its NATO allies in 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67, U.S. military courts and host country courts have concurrent jurisdiction over conduct by U.S. military personnel that violates both U.S. military law and host country laws. The U.S. military courts have primary rights to exercise jurisdiction for conduct in the performance of official duty; otherwise, the host country courts have primary jurisdiction. *See* Robinson O. Everett, *American Servicememebers and the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 7, at 137-39.

90. ICC STATUTE, *supra* note 1, art. 98, para. 2. "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender." *Id.*

91. *See, e.g.*, Helms, *supra* note 3, at 9 ("We must take action to make clear that, unless and until the United States ratifies the Rome Treaty, we reject any claim of jurisdiction by the Court over American citizens. Period.").

all Americans abroad are now subject to the jurisdiction of foreign courts absent some explicit arrangement to the contrary, such as the agreements referred to in Article 98.[92]

The political[93] and legal[94] merits of that concern are beyond the scope of this essay. From the perspective of sovereignty, however, this concern illustrates a basic paradox within a system of sovereign states. A system of juridically equal sovereigns subject to no higher authority creates conditions for violations of sovereignty due to inequality of power.[95] Thus, the U.S.' position is predicated not just on preserving its own sovereignty, but also on preserving its ability to violate the sovereignty of other States through intervention, including humanitarian intervention.[96] In this sense, the ICC Statute's jurisdictional provisions actually reinforce the norm of State sovereignty by raising a perceived barrier to actions that would violate that norm.[97] Indeed, that consequence of the preconditions contained in Article 12 has been the

92. *See* Wilson v. Girard, 354 U.S. 524, 529 (1957) (per curium) ("A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction.").

93. *See, e.g., Toward an International Criminal Court?* (1999) (Council on Foreign Relations) (arguments for and against U.S. participation in the ICC).

94. *Compare* Scheffer, *supra* note 50, at 17-19 (questioning the validity of Article 12 of the ICC Statute under international law), *with* Monroe Leigh, *The United States and the Statute of Rome*, 95 AM. J. INT'L L. 124 (2001) (arguing that "[m]ost international lawyers have rejected" the U.S. legal argument); Bartram S. Brown, *U.S. Objections to the Statute of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. Int'l L. & Pol. 855, 868-78 (1999) (defending the legality of Article 12).

95. *See, e.g.*, Donnelly, *supra* note 9, at 118 ("Even many characteristic violations of sovereignty are themselves rooted in state sovereignty, that is, in the absence of political power or legal authority above states."); KRASNER, *supra* note 8, at 20.

96. *See* Scheffer, *supra* note 50, at 19 (jurisdictional provisions of Article 12 will present "significant new legal and political risks in such [humanitarian] interventions").

97. *See id.* at 19 ("The illogical consequence imposed by Article 12...will be to limit severely those lawful, but highly controversial and inherently risky, interventions that the advocates of human rights and world peace so desperately seek from the United States and other military powers."). Until and unless the Statute is amended to define the crime of aggression and establish conditions for the Court's exercise of jurisdiction with respect to that crime, *see* ICC STATUTE, *supra* note 1, art. 5, the Court will not deal with violations of sovereignty as such. ICC STATUTE art. 5, para. 2. The U.S. was deeply concerned with the inclusion of the crime of aggression, without definition, in Article 5 of the ICC Statute. *Id. See* Scheffer, *supra* note 50, at 21 ("The future definition. . .could be without limit and call into question any use of military force or even economic sanctions."). An underlying dynamic of these and similar negotiations that deserves more attention is that States' views of what most threatens their "sovereignty" vary widely based on their relationship to the international system. *Cf.* KRASNER, *supra* note 8, at 21 ("Weaker states have always been the strongest supporters of the rule of nonintervention.").

basis for criticism of the ICC Statute by observers who are not necessarily partisans of preserving State sovereignty per se.[98]

## IV. NATIONAL SECURITY INFORMATION

Perhaps no issue touched more directly on sovereignty concerns, especially those of major powers,[99] than the treatment of information claimed by a State to affect its national security. States obviously felt compelled to maintain control over information in their possession, such as intelligence, that affects national security. By the same token, limitations on the ability of the ICC to obtain relevant information could reduce its effectiveness and may hamper the pursuit of justice. In light of the central importance of the issue both to States and to the functioning of the proposed court, it is interesting that it was only discussed in tangential fashion until relatively late in the processes leading up to the Rome Conference.[100] Once the issue of national security information was focused on, the two key questions were: 1) who would have final authority to decide in the case of conflict between a State and the ICC, and 2) on what standard would such decisions be made.

In the complementarity context, giving the ICC decision-making power, but setting a high standard that was protective of state sovereignty ultimately answered those questions.[101] The United Kingdom proposed a similar solution for national security information. Under the United Kingdom proposal, the ICC would have had ultimate power to order disclosure if cooperative measures failed to resolve a State's claim of prejudice to national security as a ground for withholding information. But disclosure could only be ordered if it was "clear" that the State was "not acting in good faith towards the ICC"; if the information was both "relevant to an issue before the ICC and . . .

98. *See* Fred Hiatt, *The Trouble with the War-Crimes Court*, WASH. POST, July 26, 1998, at C7 (arguing that deterrence of war criminals depends upon "the fear that the world community–meaning, in most cases, the United States–will show the political will and, when necessary, use the military force needed to stop them."); David Rieff, *Court of Dreams*, NEW REPUBLIC, Sept. 7, 1998, at 16; *see also* Theodor Meron, *The Court We Want*, WASH. POST, Oct. 13, 1998, at A15 (arguing that ICC Statute art. 12 "effectively lets off future Saddam Husseins or Pol Pots, who kill their own people on their own territory.").

99. *See* Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 39 (1999) ("The question of protection of national security information was of particular concern to major powers.").

100. *See* Donald K. Piragoff, *Protection of National Security Information*, *in* INTERNATIONAL CRIMINAL COURT, *supra* note 4, at 270, 274 (noting that before March 1998, "national security information was never directly and comprehensively discussed as a separate item").

101. *See supra* Part II.

necessary for the efficient and fair conduct of the proceedings"; *and* if the ICC determined that the State's claim of prejudice to national security was "manifestly without foundation."[102] In making its determination of good faith under the first prong of this proposed test, the ICC would look at factors such as: whether efforts had been made to "secure the State's assistance through cooperative means...without recourse to measures of compulsion," whether the State had "expressly refused to cooperate" in resolving the dispute, or otherwise provided "clear evidence that [it] does not intend to cooperate."[103]

On its face, the standard proposed by the United Kingdom would have empowered States. Relatively minimal efforts to cooperate would result in respect even for assertions of national security that were "manifestly without foundation." But the proposal compromised sovereignty to the extent that it left the decision in the hands of the ICC. In this, the power of the ICC would have been similar to that of the ICTY, which has held that State claims of prejudice to national security do not remove the obligation to comply with an order of the Tribunal to produce information.[104]

France proposed that a State assertion of serious prejudice to its national interest would end the matter without further inquiry.[105] The unadorned bluntness of this proposal reflected what proponents of an independent ICC believed would be the inevitable result of any scheme that left the ultimate decision in the hands of States: Cooperation would be totally at the discretion of States and the provision of standards or procedures for cooperative resolution of disputes would be of little practical significance.[106]

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102. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, (Draft Statute of the International Criminal Court and Draft Final Act art. 71, option 2) *in* DOCUMENTARY HISTORY, *supra* note 1, at 177-78; Piragoff, *supra* note 100, at 275-76.

103. *Report of the Preparatory Committee, supra* note 102, at 178.

104. *See* Prosecutor v. Blaskic, IT-95-14, para. 15 (July 18, 1997) (Decision on the Objections of the Republic of Croatia to the Issuance of the *Subpoenae Duces Tecum.*). No doubt thinking that sauce for the goose should be sauce for the gander, Croatia proposed at Rome that national security claims for withholding information be permitted only if the Court determines the claims to be legitimate. *See* Piragoff, *supra* note 100, at 279 & n.199 (quoting Proposal submitted by Croatia, A/CONF.183/C.1/WGPM/L.32 (June 29, 1998)).

105. *See Report of the Preparatory Committee on the Establishment of an International Criminal Court, supra* note 102, at 177; Piragoff, *supra* note 100, at 275.

106. *See Justice in Balance*, *supra* note 51, at 137; *International Criminal Court*, *supra* note 51, at 88.

The U.S. also proposed that States have the ultimate decision whether to provide national security information.[107] The U.S. proposal, similar to that of the United Kingdom, provided guidelines for resolving disputes. But it differed significantly from the United Kingdom proposal in that the ICC's only recourse, if procedures failed to resolve the issue, would be to refer the matter to the Assembly of States Parties or to the United Nations Security Council. Moreover, referral was allowed only after the ICC concluded that the information was "important to the resolution of a critical issue in the case and that the State has manifestly acted in bad faith" in refusing to provide the information.[108] The U.S. proposal thus set a high standard *and* effectively left the ultimate decision in State hands.

The fundamental gap evident between the United Kingdom and U.S. proposals proved difficult to resolve and final agreement was not obtained until the last week of the Conference.[109] Under the ICC Statute's final terms, the ICC *cannot* direct a State to hand over national security information if cooperative dispute resolution mechanisms have failed.[110] Nor can the ICC direct an individual to provide national security information in that individual's possession, if the individual asserts a State's national security interest and the State confirms that interest.[111] In cases in which requested information is not provided, the ICC's recourse is to refer the matter to the Assembly of States Parties or, where the United Nations Security Council originally referred the matter to the ICC, to the Security Council.[112] The ICC also "may make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances."[113] Elsewhere, the ICC Statute provides that parties to the ICC Statute may refuse a request for assistance from the ICC that "concerns the production of any documents or disclosure of evidence which relates to its national security."[114] Only in very limited circumstances – primarily where the information is in the hands of an individual or entity that does not owe the State a duty of confidentiality and thus is beyond the State's de facto

107. *See Report of the Preparatory Committee on the Establishment of an International Criminal Court, supra* note 102, at 178-79; Piragoff, *supra* note 100, at 276.

108. *See Report of the Preparatory Committee on the Establishment of an International Criminal Court, supra* note 102, at 179.

109. *See* Piragoff, *supra* note 100, at 278-87.

110. *See* ICC STATUTE, *supra* note 1, art. 72, para. 7(a).

111. *See id.*

112. *See id.* art. 72, para. (a)(ii).

113. ICC STATUTE, *supra* note 1, art. 72, para. (a)(iii).

114. *Id.* art. 93, para. 4.

control – can the ICC order disclosure.[115] Consequently, the final result is in line with the original U.S. proposal[116] and thus protective – one might even say fully protective[117] – of sovereignty concerns.

One source of the ultimate resolution of this issue was the realization that, practically speaking, States in possession of information they believe implicates their national security simply will not hand over that information, ICC order or not.[118] In other words, States cannot be expected to act contrary to their perceived interest in an area as vital as national security. Implicit in the Statute's resolution of this issue is the recognition that a necessary coalition of States willing to support the ICC in overcoming a State's assertion of national security as a general matter would be unlikely to emerge. The recognition of these basic realities in the ICC Statute's final treatment of national security information underscores the extent to which the ICC will be operating in a world of sovereign States.

## V. INTERNATIONAL COOPERATION AND JUDICIAL ASSISTANCE

An institutional check on the ICC's power is that it will have to work through States in conducting investigations, obtaining evidence, and apprehending suspects. The extent to which States, by becoming parties to the ICC Statute, take on obligations to assist the ICC in activities on their own territory is very much an issue of sovereignty. As with other areas defining the relationship between the ICC and States, the ICC Statute's final text balances the willingness of States to make commitments necessary for the ICC to function, with a recognition that the ICC will operate in a world of sovereign States.[119]

115. *See id.* art. 72, para. 7(b)(i); *see also* Piragoff, *supra* note 100, at 292 (noting that "there are few situations where paragraph 7(b) of Article 72 would be applicable"); *id.* at 292-93 (giving examples of situations in which Article 72.7(b) would be applicable).

116. *See* Scheffer, *supra* note 50, at 16 (claiming that the U.S. view on protection of national security information "prevailed"); ICC STATUTE, *supra* note 1, art. 93, para. 4.

117. *See, e.g.*, Arsanjani, *supra* note 99, at 39 (noting that ICC Statute art. 72 gives States "wide latitude in deciding on the disclosure of evidence in any form").

118. *See* Piragoff, *supra* note 100, at 281-82 (recounting Canadian intervention that for information in the possession of a State, "the State always had the final word, *de facto*, regardless of what the Statute might say about grounds of refusal").

119. *See* Phakiso Mochochoko, *International Cooperation and Judicial Assistance*, *in* INTERNATIONAL CRIMINAL COURT, *supra* note 4, at 305 (describing the end result as "a balance between the need for perfection on the one hand and States' concern for certain crucial issues on the other").

The accommodation of sovereignty begins with the nature of the general obligation that States undertake by becoming parties to the ICC Statute. Proponents of a strong ICC favored a duty to "comply" with orders, rather than an obligation of "cooperation," which was deemed to be vague and weak.[120] Article 86 of the ICC Statute, "[g]eneral obligation to cooperate," reflects the latter formulation, requiring State Parties to "cooperate fully with the Court."[121] In an art form solution, however, specific articles on surrender of suspects and other forms of cooperation require States to "comply with requests" from the ICC.[122]

Apart from whether the State obligation is cooperation or compliance, a much more practical sovereignty issue is the extent to which that obligation is effected through national legal systems and procedures. If the main criterion were the ICC's independence, cooperation or compliance would be determined solely with reference to the ICC Statute, in particular, and international law in general.[123] Reliance on national systems, on the other hand, is more in line with traditional sovereign prerogatives.[124] The final text of the ICC Statute on the surface appears to be a compromise.[125] But it is a compromise that leans heavily in favor of sovereignty concerns because it predicates the Prosecutor's investigations on working with national authorities.[126] States are required to have national procedures for cooperation with the Prosecutor and ICC,[127] and they have a duty to "consult" in the event of difficulties in cooperation.[128] In the end, though, requests for cooperation must be "executed in accordance with the relevant procedure under law

120. *See id.* at 306.

121. ICC STATUTE, *supra* note 1, art. 86.

122. *Id.* art. 89, para. 1 (Surrender of persons to the Court); art. 93, para. 1 (Other forms of cooperation).

123. *See* Mochochoko, *supra* note 119, at 308.

124. *See id.*

125. *See id.* at 308-09 (explaining that opposition to reliance on national legal procedures continued until "the necessary safeguards were introduced to ensure that even procedural laws could not be used to weaken cooperation with the Court").

126. *See, e.g.*, Testimony of David J. Scheffer, Hearing before the Senate Subcommittee on International Operations of the Committee on Foreign Relations, *Is a U.N. International Criminal Court in the U.S. National Interest?*, 105th Cong., 2d Sess. 27 (July 23, 1998) ("We worked very hard on these provisions, so that national judicial procedures would have to be recognized by the prosecution in the pursuit of his work."); Scheffer, *supra* note 50, at 15 (noting that efforts of U.S. negotiators "to preserve appropriate sovereign decision making in connection with the obligations to cooperate with the Court" ultimately led to the "requirement that the actions of state parties be taken 'in accordance with national procedural law'").

127. *See* ICC STATUTE, *supra* note 1, art. 88.

128. *Id.* art. 97; *see also id.* art. 91, para. 4 (providing for consultations pertaining to request for surrender); *id.* art. 93, para. 3 (requiring consultations where a request for cooperation is "prohibited . . . on the basis of an existing fundamental legal principle of general application").

of the requested State."[129]

States can refuse to cooperate if doing so conflicts with "an existing fundamental legal principle of general application."[130] The assertion of such a principle appears to be in the discretion of the State, the only limitation being that the State must consult with the ICC to resolve the conflict.[131] But if consultations fail, it is the ICC that must concede, by doing what is necessary to modify the request.[132] Furthermore, a State may deny a request for cooperation outright if it calls for the production of information "which *relates* to its national security."[133] Given the nature of the ICC's subject matter jurisdiction, it is predictable that almost any information sought by the ICC will be amenable to an assertion that it "relates" to national security.[134]

As with national security information, the persistence of State sovereignty as an organizing principle is evident from the ICC's recourse in the event that a State fails to cooperate in violation of its obligations under the ICC Statute. In that case, the ICC can find that the State's noncompliance prevents the ICC from exercising its functions and powers and then refer the matter to the Assembly of States Parties or, in matters originally referred to the ICC by the UN Security Council, to the Security Council.[135] The experience of the ICTY demonstrates that the Security Council, even with its plenary authority over matters of international peace and security, is not an effective mechanism for enforcing the obligation to cooperate. Even less can be expected from the Assembly of States Parties, which will consist of at least 60 states and which must, wherever possible, make decisions consensually, or failing that, by a two-thirds majority.[136]

## VI. CONCLUSION

Sovereignty concerns were central to the negotiations over the ICC Statute. To be sure, the future court will relate to individuals and States,

129. *Id.* art. 99, para. 1; *see also id.* art. 89, para. 1 (States' surrender of persons to the Court, "in accordance with . . . the procedure under their national law"); *id.* art. 93, para. 1 (ther forms of cooperation, "under procedures of national law").
130. *Id.* art. 93, para. 3.
131. *See id.*
132. *Id.*
133. *Id.* art. 93, para. 4 (emphasis added).
134. *See supra* Part IV.
135. *See* ICC STATUTE, *supra* note 1, art. 87, para. 7.
136. *Id.* art. 112, para. 7.

as well as inter-governmental and non-governmental organizations, in a way that differs from the international institutions created at mid-century.[137] But by designing an institution that must work through and with sovereign States in crucial aspects of its functioning, the ICC Statute presupposes the continued existence of a system based on sovereign States. The Statute's details reinforce the notion that "[d]irectly or indirectly, the entire edifice of international human-rights law is built on state sovereignty."[138] Seen in this light, there seems little basis for predicting that the ICC will cause the sovereign State to fade away. Moreover, the ICC may actually strengthen individual States by acting both as a judicial model for effective domestic institutions, where they do not now exist, and as a prod for states to deal domestically with crimes within the court's subject matter jurisdiction.[139] To that extent, it is consistent with a growing realization that weak states can be as much of a threat to human rights as strong states.[140]

This does not mean, however, that the relationship between the future ICC and sovereign States is one that will be accepted by the U.S. political system through the process of advice and consent to ratification. That judgment remains to be made.

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137. *See* Abram Chayes & Anne-Marie Slaughter, *The ICC and the Future of the Global Legal System*, *in* THE UNITED STATES AND INTERNATIONAL CRIMINAL COURT, *supra* note 7, at 237, 244-45 (contrasting "supranational" institutions created in the 1990s, such as the ICC and the WTO, with "state-centric" institutions created in the 1940s, such as the United Nations and the International Monetary Fund).

138. Douglass Cassel, *A Framework of Norms*, 22 HARV. INT'L L.J. 60, 63 (2001); *see also* ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 74 (1994) (arguing that sovereign states are the backbone of the international community).

139. *See* David J. Scheffer, *An International Criminal Court: The Challenge of Enforcing International Humanitarian Law* (February 26, 1998) ("[A] core purpose of an international criminal court must be to impose a discipline of law enforcement upon national governments themselves to investigate and prosecute genocide, crimes against humanity, and war crimes..."), *available at* http://www.state.gov/www/policy_remarks/1998/980226_scheffer_hum_law.html.

140. *See, e.g.*, Michael Ignatieff, *Human Rights Culture: The Political and Spiritual Crisis* 12 (Andrei Sakharov Lecture on Human Rights, Brandies University) (January 25, 2000) ("Instead of regarding state sovereignty as an outdated principle, . . . we need to appreciate the extent to which state sovereignty is both the principle of order in the international security system, but also the best guarantee of human rights that there is.") (on file with author); Aryeh Neier, *Rethinking the Relationship Between Sovereignty, States, and Human Rights* 2 (Feb. 10, 2000) ("We used to think of danger to human rights as primarily emanating from very powerful states. . .But we have a phenomenon more recently of states that don't have the capacity to protect the rights of their citizens."), *available at* http://www.bard.edu/hrp/hhrs/neier.htm.