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THE INTERNATIONAL CRIMINAL COURT AND THE QUESTION OF SUBSIDIARITY

Ronald J. Rychlak
John M. Czarnetzky*

I. INTRODUCTION

Before World War II had ended, people started talking about putting war criminals, like Adolf Hitler and his close associates, on trial for war crimes.¹ Despite the risk that it might be seen as the victors taking vengeance on the defeated nations, there was a sense that justice had to be served, and justice meant that these criminals had to be put on trial.² One of the voices demanding justice was Pope Pius XII.

Pius XII outlined an international judicial system based upon traditional Catholic teaching. This calls for punishment of the guilty, but protection for the innocent.³ It also implies a limitation on the authority of the system. In particular, the jurisdiction of the court is limited by the doctrine of subsidiarity. This doctrine teaches that in all cases, problems are best addressed at the level closest to that problem.⁴ In other words, the larger entity (in this case, the international association) should always

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¹ See MICHAEL YOUNG, *THE TRIAL OF ADOLF HITLER* (1944). For a full historical discussion, see HERMAN VON HEBEL, *AN INTERNATIONAL CRIMINAL COURT - A HISTORICAL PERSPECTIVE*, IN *REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT* 13 (1999).

² Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT. L. 38 (1947), reprinted in 2 *INTERNATIONAL CRIMINAL LAW* 239 (Gerhard O.W. Mueller & Edward M. Wise, eds., 1965).

³ Pius XII's papal device was "*Opus Justitiae Pax*" ("the work of justice is peace"). One of the organizations most supportive of adoption of an international criminal court since 1994 is the organization named No Peace Without Justice.

⁴ Pope John Paul II explained the doctrine of subsidiarity:

[A] community of higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good.

Pope John Paul II, *Centissimus Annus* (1991); see also CATECHISM OF THE CATHOLIC CHURCH §§ 1883-1885 (1994) (describing Catholic Church doctrine on subsidiarity).

permit the smaller one (national or even local associations) to handle matters that are within their capabilities. In fact, it is a great evil for the larger association to assert authority over matters that are appropriately within the competence of the smaller one.

The international community is on the verge of establishing an international criminal court. Whether it will actually come into existence, however, is still in doubt. Ratification is in jeopardy, largely because nations (particularly the United States) are concerned about sovereignty are concerned about sovereignty and the ability to maintain jurisdiction over their own subjects. In order to address these concerns, the international community has offered reassurance in the form of a new doctrine named "complementarity."⁵ In this paper, we will argue that while complementarity appears on the surface to offer assurances similar to those provided by the doctrine of subsidiarity, it is not an adequate substitute. Subsidiarity would provide a moral basis for favoring national sovereignty, whereas complementarity offers merely a political one. The practical result in these early years might be negligible or even non-existent. In the long run, however, pressure will mount for the international court to assume greater jurisdiction, and complementarity will offer no logical basis to resist that pressure; on the other hand, subsidiarity would offer a logical, moral basis for resisting such expansion. Such a check on the ICC's power admittedly would be merely a prudential one on the Court's exercise of jurisdiction. Nevertheless, a prudential doctrine grounded in moral reasoning might, in those cases in which it is vital that subsidiarity be invoked, have more weight than a doctrine which reflects a political compromise born of

5 For an excellent discussion of the negotiations which lead to the statutory formulation of "complementarity" and a flavor of the delicate contours of that notion in the minds of its drafters, see John T. Holmes, *The Principle of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS* 41-78 (Roy S. Lee ed. 1999). Though it is, of course, impossible to prove a negative, there seems to have been no discussion of subsidiarity as a substitute for the notion of complementarity which eventually was chosen in the Rome Statute. One commentator has suggested that the two concepts are identical. WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 357, 370-71 (2000). If this is true, it is not made clear in the Rome Statute or in commentaries on the Statute that have come to hand. Indeed, from the legislative history of the Statute it seems evident that the negotiators took great pains to devise a formulation of their own to suit disparate negotiating positions of different states.

expediency. Therefore, if ratification indeed proves to be a significant stumbling block for establishment of the new court, this aspect of the structure should be re-thought.

II. THE HISTORY OF WAR CRIME TRIBUNALS

Several "war crimes" tribunals have been set up over the past fifty years. At the end of the Second World War, the Allies conducted Nuremberg and the Tokyo Tribunals.⁶ More recently, *ad hoc* tribunals were established to deal with abuses in the Former Yugoslavia and Rwanda.⁷ These tribunals led to the doctrines that shape international criminal law today. In particular, the Nuremberg Charter rests on the principle that "individuals have international duties which transcend the national obligations of obedience imposed by individual states."⁸ The

6 Following Nuremberg, soldiers may finally be held accountable for actions which - though prohibited for years in numerous international and domestic treaties - had gone unpunished by law for centuries. The challenged innovation at Nuremberg and Tokyo was not the novelty of the law or the crimes listed in the indictments. Rather, the shocking advancement was that the existing laws were finally being enforced in an international setting.

Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 334 (2000). See BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE 88 (1980) (declaring that neither the validity of judgments nor the fairness of the trial was diminished by the fact that the judges hailed from the victor States).

7 See JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL 442 (1994) (advocating a need to establish an international instrumentality to punish the perpetrators of over one hundred wars who have collectively killed millions of people). Between 1945 and 1992, the world experienced twenty-four wars between nations, costing 6,623,000 civilian and military lives. Ninety-three civil wars, wars of independence, and insurgencies have cost 15,513,000 additional lives. Until 1993, no international instrument had been convened to try any aggressor or any perpetrator of war crimes in any of these 117 conflicts. *Id.*

8 NUREMBERG INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS 223 (1947). Nuremberg was a reactionary body. It was created in reaction to the unspeakable atrocities committed in Europe during World War II against gypsies, Catholics, homosexuals, mentally and physically impaired persons, and Jews. Nuremberg was necessary to demonstrate that if a Third World War occurred, justice in the form of prosecutions and criminal sentences would be swiftly and sternly administered. Penrose, *supra* note 6 at 331.

tribunals established for the former Yugoslavia⁹ and Rwanda,¹⁰ reaffirmed the necessity of affixing individual responsibility to specific individuals.

The events in the former Yugoslavia prompted the United Nations General Assembly in 1992 to instruct the International Law Commission (ILC) to prepare a draft statute for a permanent international criminal court.¹¹ The ILC presented its draft to the General Assembly in 1994. The General Assembly then established an ad hoc committee to refine the provisions of the ILC draft. The ad hoc committee held several sessions in 1995, and at the end of that year requested the General Assembly to convert it into a preparatory committee so that it could begin redrafting the statute.¹²

With the endorsement of the Sixth Committee, the General Assembly formed the Preparatory Committee in 1996 to work on the text of the statute. In 1998, the United Nations convened the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court to negotiate specifics relating to an International Criminal Court (ICC). Despite numerous unresolved issues, the delegates at that conference adopted a draft statute with the requisite number of signatories.¹³

9 The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("ICTY"), S.C. Res. 808, U.N. SCOR, 48th Sess., 3175 mtg., U.N. Doc. S/RES/808 (1993).

10 The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda ("ICTR"), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994).

11 Chapter Seven of the United Nations Charter defines the Security Council's central role in the maintenance of international peace and security. U.N. CHARTER art. 39, Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.

12 See *Lawyers Committee for Human Rights, Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statute*, (introduction), on the Internet at: <http://www.lchr.org/icc/iccpap1.htm>.

13 Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.

The Rome Conference, unlike the Hague Conferences a century before, did not represent an exercise in multilateral treaty-making of a contractual nature, in which unanimity of decision-making is the fundamental feature. Rather, the governments of the world came to Rome to engage in what was, in fact, a quasi-legislative effort. More than a treaty, the Rome Statute changes international law and is binding on non-signatories.¹⁴

As the Preamble to the Rome Statute notes, the purpose of the Court is to end impunity for the perpetrators of "atrocities that deeply shock the conscience of humanity." The Secretary-General of the United Nations, Kofi A. Annan, hailed the statute as "a gift of hope to future generations," as "one of the finest moments in the history of the United Nations," and as "a giant step forward in the march towards universal human rights and the rule of law."¹⁵

The ICC is designed as a treaty-based court with the unique power to prosecute and sentence individuals, and also to impose obligations of cooperation upon states, regardless "of whether they are parties to relevant treaties or have accepted the Court's jurisdiction with respect to

183/9 (1998). The Rome conference left certain issues unresolved, and the General Assembly assigned these issues to the preparatory committee to be finalized. The unresolved issues included the formulation of rules of procedure and evidence, the definition of aggression, and elements of crimes additional to the definition of those crimes in the ICC statute. For a comprehensive history of the events leading up to the Rome Statute, see M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991).

14 See generally TIMOTHY L. DICKINSON, JOINT REPORT WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES: ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, 1998 A.B.A. SEC. INT'L L. & PRAC. 118B [hereinafter 1998 Recommendation] (tracing procedural history of the International Criminal Court); REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION, DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT, 49 U.N. GAOR, 49 Sess., Supp. No. 10, U.N. Doc. A/49/355 (Sept. 1, 1994) [hereinafter 1994 Rome Statute].

15 THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE – ISSUES, NEGOTIATIONS, RESULTS, *supra* note 5, at ix. "The International Criminal Court is the last great international institution of the Twentieth Century. It is no exaggeration to suggest that its creation has the potential to reshape our thinking about international law." Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 385 (2000). "[I]t cannot be denied that the adoption of the ICC statute represented an extraordinary moment for international law." *Id.* at 391.

the crimes in question."¹⁶ One of the core functions of the ICC is to serve as a forum in which individuals suspected of committing certain crimes can be tried when individual states are either unwilling or unable to bring these alleged perpetrators to justice. It was agreed in Rome that the court would have jurisdiction over four core crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.

Sixty States must ratify the Rome Statute before the Court can come into existence. So far, with 27 nations having ratified as of December 31, 2000, backers of the ICC are less than half way toward their goal.¹⁷ The United States, Israel, and the Holy See are among those nations that have not yet even ratified the Statute, though the United States and Israel signed it on the last day for which the statute was open for signature, presumably to preserve their ability to shape the court in future preparatory meetings.¹⁸ (President Clinton previously had proclaimed to the UN General Assembly on September 22, 1997, that "before the century ends, we should establish a permanent international court to prosecute the most serious violations of humanitarian law.")¹⁹ Many more nations are yet to ratify the treaty. There are several reasons that contribute to countries' decisions to ratify or not, but one clear concern is that the nations would be forfeiting their national sovereignty and

16 1998 Recommendation, *supra* note 14 at 13. See also Lara A. Ballard, Comment, *The Recognition and Enforcement of International Criminal Court Judgments in U.S. Courts*, 29 COLUM. HUM. RTS. L. REV. 143, 163 (1997) (noting that "states parties to the ICC treaty that have accepted the ICC's jurisdiction with regard to the crime in question must respond without undue delay to the request, which may be for the disclosure of evidence, the apprehension of suspects, or another form of judicial or police assistance").

17 The conference resulted in adoption of the Rome Statute, with a vote of 120 in favor, 7 against, and 21 abstentions. Rome Statute of the International Criminal Court, (Background Information, U.N. DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT.) U.N. Doc. A/CONF. 183/9* (July 17, 1998), 37 I.L.M. 999.

18 For a complete list of countries' positions on the Rome Statute and their status regarding signature and/or ratification, and their expressed reservations concerning the court, see <http://www.iccnw.org/html/country.html>. This is a website of a non-governmental organization which tracks events concerning the ICC.

19 Book Review and Note: *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations, Results*, (Roy S. Lee, ed. 1999), 94 THE AMER. J. INT'L L. 218 (2000).

putting their people at risk if they were to sign and ratify the Rome Statute.²⁰

III. NATIONAL SOVEREIGNTY AND LIMITS ON JURISDICTION

Article 22 of the Rome Statute provides that "a person shall not be criminally responsible under this statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."²¹ In the case of ambiguity, the definition shall be construed in favor of the person being investigated, prosecuted or convicted."²²

The Court may exercise jurisdiction if (1) a state party refers a crime to the Court's prosecutor; (2) the Security Council, acting under Chapter

20 John Bolton, Senior Vice President of the American Enterprise Institute, has stated:

Let me just start off with a little political reality check here and that is that the United States is not going to ratify the Statute of Rome, the document that created the International Criminal Court, within the lifetime of anybody in this room. There is simply no groundswell of opinion in the United States in favor of this institution, and I think putting that in context is important. . . .

Symposium: Toward an International Criminal Court? A Debate, 14 EMORY INT'L L. REV. 159, 164 (2000) (comments of John Bolton).

Moreover, the idea that the parties signatory to the Statute of Rome, however many it turns out to be, can really supervise the Court is a fantasy. When you are supervised by over 120 or 140 or 160 signatories, whatever it turns out to be, you're not supervised by anybody. The net-net of this is that there really isn't any democratic accountability and no constitutional structures, as we understand those structures. In other words, there's basically no political control. This is something that the proponents of the Court welcomes. They say, "This is just great . . . the Court will be independent. The prosecutor will be independent." Well, indeed. In this country we have had painful, I mean bitterly painful, experience with the institution of an independent counsel. And now, twenty years plus after the independent counsel was first created, due to bi-partisan opposition, it lies in its well-deserved grave, hopefully never to rise again.

Id. at 165. See also Gary T. Dempsey, *Reasonable Doubt: The Case Against the Proposed International Criminal Court*, POLICY ANALYSIS, July 16, 1998 on the internet at www.Cato.org/pubs/pas/pa-311.html ("the court threatens to diminish America's sovereignty").

21 1994 Rome Statute, *supra* note 14, art. 22(1).

22 *Id.* at art. 22(2).

VII of the U.N. Charter, refers a crime to the prosecutor; or (3) the prosecutor initiates an investigation into a crime.²³ Because the Security Council's actions under Chapter VII are mandatory, the Court could exercise jurisdiction even when neither the state territory where the crime was committed nor the state of nationality of the offender is a party.²⁴ If the matter is referred by a State Party or initiated *proprio motu* by the prosecutor, the Court's jurisdiction is more restricted. In such instances, jurisdiction extends to the territory of a non-party State only if that State consents to the jurisdiction of the Court, and either the acts were committed in the territory of the consenting State or the accused is a national of the consenting State.²⁵ The Statute provides for jurisdiction *ratione personae* over natural persons only (thereby excluding organizations or States).²⁶

The United States has expressed its opposition to the Article 15 authorization of the prosecutor "to initiate investigations and prosecutions of crimes falling within the jurisdiction of the court, in the absence of a referral of an overall situation by either a state party to the treaty or the Security Council."²⁷ The Rome Statute contains a complex procedure by which a Pre-Trial Chamber is to supervise cases in which the prosecutor exercises his or her investigatory powers.²⁸ The prosecutor may commence an investigation only if both he or she and the

²³ *Id.* at art. 13.

²⁴ *Id.* at art. 13(b). See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Background Information, on the Internet at: <http://www.un.org/icc/> [hereinafter U.N. Diplomatic Conference of Plenipotentiaries] (discussing authority of Security Council to refer situations to the Court).

²⁵ See 1994 Rome Statute, *supra* note 14, arts. 4(2); *Id.* at art. 12(2) ("The Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute . . . (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; (b) The State of which the person accused of the crime is a national.") (emphasis added); U.N. Diplomatic Conference of Plenipotentiaries. *Id.* Therefore, the Court would still be unable to exercise jurisdiction over crimes committed within the territory of a non-state party by that state's own nationals.

²⁶ See 1994 Rome Statute, *supra* note 14, arts. 1, 25(1). The Statute does not permit trials *in absentia*. Thus, the Court must always have the defendant in its custody to obtain personal jurisdiction, in the sense that U.S. lawyers use the term. See *id.* at art. 63(1).

²⁷ David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. at 12, 13, 18 (1999).

²⁸ See 1994 Rome Statute, *supra* note 14, art. 53(3).

Pre-Trial Chamber have determined that a "reasonable basis"²⁹ exists to initiate the investigation.³⁰ This check on the authority of the prosecutor has been insufficient to persuade the United States that jurisdiction is sufficiently limited.

The United States has cited fears that the Statute would put U.S. soldiers and other military personnel at risk for prosecution as a major reason for voting against it. These fears are not without foundation. Charges of "war crimes" and "genocide" have been leveled in the past against U.S. presidents and high ranking government officials in other countries.³¹

It is, of course, possible to limit the court's jurisdiction in such a way so as to reassure those nations that are concerned about sovereignty issues. An "opt-out" provision already allows a country to remove its citizens from exposure to liability with respect to certain crimes within the jurisdiction of the ICC (except the crime of genocide for which jurisdiction is automatic). Other issues include limiting the type of crimes that may be prosecuted in the ICC.³² Undoubtedly, however, the most

29 Reasonable basis is not defined in the Statute, but article 53 suggests that a finding of reasonable basis has three elements: (a) there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) the case is or would be admissible under article 17; (c) the investigation serves the interests of justice, taking into account the gravity of the crime and the interest of victims. See 1994 Rome Statute, *supra* note 14, at art. 53(1). In addition to considering admissibility of a case under article 17 and the interests of justice, the Prosecutor should consider whether there is "a sufficient legal or factual basis to seek a warrant or summons under article 58." *Id.* at art. 53(2)(a).

30 1994 Rome Statute, *supra* note 14, at art. 15(3), (4). If a State or the Security Council refers a situation, however, the matter is referred to the Court under article 13(a) or under article 13(b), respectively, and the Prosecutor will initiate an investigation pursuant to article 53, unless there is no reasonable basis to proceed under the Statute. See *id.* at art. 53(1). The Statute permits the Pre-Trial Chamber to order an investigation or prosecution to proceed if the Prosecutor's decision is based solely on a determination that the prosecution would not serve the interests of justice. See *id.* art. 53(3)(b). See *id.*, at art. 53(3)(b).

31 *Final Report of American Bar Association Task Force on an International Criminal Court*, 28 INT'L LAW 475, 480 (1994).

32 Whitney R. Harris, a member of the prosecution team for the United States at the Nuremberg Trial, argued:

If the [Nuremberg] Tribunal had assumed jurisdiction to try persons under international law for crimes committed by them which were not

interesting jurisdictional feature of the Rome Statute, and perhaps the most hotly debated, is the doctrine of complementarity.

IV. COMPLEMENTARITY

Complementarity, a new doctrine in international law, is one of the most important underlying principles of the Rome Statute.³³ As used in the ICC, "complementarity" denotes "a secondary role - not in importance but in the sequence of events. In other words, national courts have the first right and obligation to prosecute perpetrators of international crimes, and because ICC jurisdiction is complementary to national courts, ICC jurisdiction can only be invoked if the national court is unwilling or unable to prosecute."³⁴

related to war it would have wholly disregarded the concept of sovereignty and subjected to criminal prosecution under international law individuals whose conduct was lawful under controlling municipal law in times of peace. Such jurisdiction should never be assumed by an ad hoc military tribunal established to adjudicate crimes of war.

WHITNEY R. HARRIS, *TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG* 512 (1954).

33 Mahnouch H. Arsanjani, *Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court*, in *REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT* 67 (von Hebel, Lammers, & Schukking, eds., 1999). The Tenth Preambular Paragraph of the Rome Statute proclaims that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." 1994 Rome Statute, *supra* note 14, pmbl. Article 1 of the ICC Statute mentions the principle of complementarity as one of the cornerstones of the ICC regime.

34 Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 *EMORY INT'L L. REV.* 1, 67-68 (2000) ("Initially, some delegations in the Ad Hoc Committee and Preparatory Committee lamented the fact that complementarity was included in the Preamble, because they believed that it afforded to the principle of complementarity too great a significance.") The International Criminal Tribunals for both the Former Yugoslavia and Rwanda proceeded on the contrary assumption, namely that their jurisdiction enjoys precedence over that of national courts. Statute of the Tribunal for the Former Yugoslavia, art. 9(2), 32 I.L.M.1192, 1194 (1993); Statute of the Tribunal for Rwanda, art. 8(2), 33 I.L.M. 1602, 1605 (1994). See also *Prosecutor v. Tadic*, 105 I.L.R. 420, 440-41, paras. 41-44 (Int'l. Criminal Trib. for Former Yugo., Trial Chamber 1995); *Prosecutor v. Tadic*, 105 I.L.R. 453, 476-85, paras. 50-64 (Int'l. Criminal Trib. for Former Yugo., Appeals Chamber 1995); Jelena Pejic, *The Tribunal and the ICC: Do Precedents Matter?*, 60 *ALB. L. REV.* 841, 854-55 (1997).

"The whole idea of complementarity is that it's better for the national courts to try people."³⁵ Article 17 of the Rome Statute, under the heading of "Issues of Admissibility," provides:

Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that the case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under Article 20, paragraph 3;³⁶

35 *Symposium, supra* note 20, at 186 (comments of Kenneth Roth). See also Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 308-10 (1998).

36 Article 20 deals with double jeopardy. Paragraph 3 stipulates instances where the principle of *ne bis in idem* will not apply. These include, for example, if the purpose of the earlier trial was to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC, or the proceedings were not conducted independently or impartially in accordance with the rules of due process recognized by international law.

(d) The case is not of sufficient gravity to justify further action by the Court.³⁷

The complementarity principle, as it is set forth in the Statute, will generally restrain the exercise of the Court's prescriptive jurisdiction so that it does not exceed what reasonable theories of power distribution and lawmaking authority between "sovereigns" suggest the proper sphere of the Court's authority should be.³⁸ Some commentators, however, noted that it would have been helpful for the Statute to have been more explicit on this point.³⁹

Despite the principle of complementarity, the decision as to whether a State is unwilling or unable to conduct a meaningful trial will ultimately not be made by that State.⁴⁰ It will have to be decided by the ICC, and this raises important issues pertinent to state sovereignty.

The Court will have to consider whether there has been undue delay in the state-initiated prosecution indicative of a lack of a genuine intention to proceed, or whether the domestic case is conducted independently and impartially, consistent with the expressed intention to bring the person to justice. In other words, is the State acting in good faith? This is not a standard issue in

37 1994 Rome Statute, *supra* note 14, at art. 17.

38 Webster's dictionary defines "complementarity" as "the interrelationship or the completion or perfection brought about by the interrelationship of one or more units supplementing, being dependent upon, or standing in polar position to another unit or other units." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (Philip B. Gove ed., 1986).

39 Sadat & Carden, *supra* note 15, at 408. "For, without a doubt, there will be cases in which complementarity will not pose an obstacle to jurisdiction but which the Court should dismiss as inadmissible, because it would be unreasonable for the Court, as an instrument of the international legal order, to exercise jurisdiction over the case." *Id.*

40 "Essentially it will involve a dispute between the Prosecutor and the State Prior then to making much progress on the investigation, the Prosecutor may be embroiled - possibly for a long time - in a complex dispute with one or more States." Louise Arbour & Morten Bergsmo, *Conspicuous Absence of Jurisdictional Overreach*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT, *supra* note 33, at 129, 131.

criminal cases. It is a highly complex and litigious jurisdictional matter that could nearly paralyze the Court, especially in its early years.⁴¹

The ICC will not simply accept the State's assurance that it can handle the case. "The Court is required to examine whether, despite the State's assertion that it can successfully manage the domestic processing, that State is unable to obtain the accused, or the evidence, or otherwise to carry out the proceedings."⁴² The Preparatory Committee's Report of 1996 recorded some concerns in this regard:

It was noted that while the determination of "availability" of national criminal systems was more factual, the determination of whether such a system was "ineffective" was too subjective. Such a determination would place the Court in the position of passing judgement on the penal system of a State. That would impinge on the sovereignty of national legal systems and might be embarrassing to that State to the extent that it might impede its eventual cooperation with the Court.⁴³

The principle of complementarity cannot avoid this problem, but many supporters of the ICC suggest that a court of limited jurisdiction will not pose a threat to national sovereignty.⁴⁴ This is far from certain.

⁴¹ *Id.* at 129, 131.

⁴² *Id.*

⁴³ Report of the Preparatory Committee on the Establishment of an International Criminal Court 38, para. 161.

⁴⁴ "The principle of complementarity says that if a nation is worried about having its people called before the International Criminal Court, it need only investigate them conscientiously itself and if appropriate, prosecute them. That is an absolute defense to any prosecution by the ICC." *Symposium*, *supra* note 20, at 171 (comments of Kenneth Roth, Executive Director of Human Rights Watch). The Treaty also commands that the Court is to exercise its jurisdiction only in cases involving "the most serious crimes of concern to the international community as a whole." 1994 Rome Statute, *supra* note 14, at art.5(1); *see also*

Complementarity may actually force nation states to change their domestic substantive criminal laws.⁴⁵ As one supporter of the ICC has explained, in order to convince the ICC that it is willing and able to prosecute those crimes that are defined in the Rome Statute, a state may need to adopt its own laws prohibiting those crimes.

States may need to introduce new criminal laws, proscribing genocide, crimes against humanity, and war crimes, if they do not have such laws already. The simplest approach is to adopt the definitions of the crimes within the jurisdiction of the ICC. However, States may wish to go beyond these definitions, and give their courts jurisdiction over other international crimes as well.⁴⁶

Moreover, as the ICC decides these cases and begins to develop a common law of what constitutes effective and acceptable national trials, States will be forced to follow those precedents or risk having their defendants re-tried before the ICC. State grants of amnesty or pardons are unlikely to be effective. These issues will, of course, be matters of great concern to nations who see the Rome Statute and the ICC as a threat to national sovereignty.⁴⁷

A different issue relates to the possible creation of a compensation fund for victims. This, of course, will create an incentive for victims to have their case heard by the ICC, at least in those situations where the

comments of Kenneth Roth, *Symposium, supra* note 20, at 171. Other supporters simply think that national sovereignty is not that important.

45 Hans-Peter Kaul of the German Foreign Ministry and head of the German delegation to the Preparatory Commission noted that the ICC might serve to harmonize national criminal laws among the States. Jennifer Schense, *Trends Emerging in Implementation of the ICC Statute*, THE MONITOR, Nov. 2000, at 18.

46 Joanne Lee, *Ratifying and Implementing the Rome Statute*, THE MONITOR, Nov. 2000, at 3: Note the assumption that a state will be unable to prosecute aggression. See also Dempsey, *supra* note 20 (suggesting that in a case of genocide, the national court would be unable to prosecute).

47 The United States, for instance, brought up matters of amnesty and pardons for discussion during ICC deliberations. HUMAN RIGHTS WATCH, JUSTICE IN THE BALANCE: RECOMMENDATIONS FOR AN INDEPENDENT AND EFFECTIVE 72 (1998) (recommending that such matters not be recognized by the ICC).

State has no similar fund. This may force States to adopt new laws and procedures and thereby further influence national legal systems.

Perhaps the greater threat to national sovereignty does not relate to potential changes in substantive law, but to changes that might be necessary to a nation's procedural laws. Article 88 of the Rome Statute requires that State Parties "ensure that there are procedures available under their national laws for all of the forms of cooperation that are specified [elsewhere in the statute]."⁴⁸ This may require adoption of certain procedures, and according to at least one commentator, it may also require deletion of certain features of a nation's procedural laws:

States . . . need to ensure that their . . . criminal laws and procedures will not shield persons from criminal responsibility for these types of crimes While national laws on these matters do not have to be identical to the Rome Statute provisions, States should ensure that their laws do not provide undesirable loopholes for perpetrators.⁴⁹

Presumably all states, regardless of the Rome Statute, try not to provide "undesirable loopholes" for criminal defendants. The question becomes whether a State's "Bill of Rights" might be viewed by the ICC as a loophole.⁵⁰

48 1994 Rome Statute, *supra* note 14, at art. 88.

49 *Id.*

50 Dempsey, *supra* note 20 (noting that many rights taken for granted by Americans would not be available in trials before the ICC); Cathie Adams, *The United Nations, THE HERITAGE FOUNDATION*, Nov. 1998, on the Internet at: www.fni.com/heritage/nov98/AdamsCathie.html; (pointing out that defendants in front of this court will be denied their Sixth Amendment rights). The Rome Statute requires all States Parties to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." 1994 Rome Statute, *supra* note 14, at art. 86.

Americans have seen a federal court system, of supposed limited jurisdiction, grow dramatically over the past forty years. Those who opposed this expansion were left to argue the political points of "federalism" or "states' rights." There is every reason to think that the ICC will receive similar pressure to expand, and nations that are concerned about their sovereignty are likely to be left without persuasive arguments. This is because the complementarity doctrine is based strictly on political will; it does not rest upon a moral basis. Thus, when it seems appropriate, and political will shifts, there will be no principled basis on which to oppose expansion of the ICC's jurisdiction. If, however, the ICC's structure were based upon a principle grounded in moral or philosophical reasoning rather than political compromise, that principle (properly applied) might prove a more successful prudential protection of national sovereignty in appropriate cases. That is the reason we believe that the principle of subsidiarity is superior to the doctrine of complementarity.

V. SUBSIDIARITY

The principle of subsidiarity teaches that "it is an injustice, a grave evil and a disturbance of right order for a larger and higher organization to arrogate to itself functions which can be performed efficiently by smaller and lower bodies."⁵¹ It was first explicitly formulated in 1931 in *Quadragesimo Anno*,⁵² when Pope Pius XI authoritatively proclaimed that:

51 Pope Pius XI, *Quadragesimo Anno* (1931); CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, at §§ 1883-1885 (describing Catholic Church doctrine on subsidiarity).

52 While *Quadragesimo Anno* (1931) is generally considered the first formulation of the doctrine of subsidiarity, the foundational principles were laid in Leo XIII's encyclical *Rerum Novarum*. In *Rerum Novarum*, Leo XIII revealed the priority of the person to society and the natural right of individuals to form associations, which, in turn, formed the origins of community and society. Leo XIII also emphasized in *Rerum Novarum* the importance of intermediate associations, such as the family and unions, in resolving societal ills, and their primacy over government involvement.

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.

The encyclical goes on to note:

the State should leave to these smaller groups the settlement of business of minor importance. It then will perform with greater freedom, power and success the tasks belonging to it, because it alone can effectively accomplish these directing, watching, stimulating and restraining, as circumstances suggest or necessity demands.

Thus, the principle of subsidiarity favors action by the "smaller and lower bodies." Higher levels of government should intercede only when a more local structure cannot or will not do what is necessary to meet the needs of individuals or society.⁵³

Subsidiarity has been characterized as "neither a theological nor even really a philosophical principle, but a piece of congealed historical

53 CATECHISM OF THE CATHOLIC CHURCH, *supra* note 4, at §§ 1883-1885. Catholic teaching is misunderstood if it is argued that it is the duty of those occupying higher office to direct the lower degrees in order to insure that they perform their activities properly. *Id.* at § 1885 ("The principle of subsidiarity is opposed to all forms of collectivism. It aims at harmonizing the relationships between individuals and societies. It tends toward the establishment of true international order.")

wisdom.”⁵⁴ The most fundamental facet of the theory is that it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community. Subsidiarity recognizes that the individual will not always be able to do for himself, but where that is true, the individual should be assisted by an intermediate association, such as the family, the Church, schools, and unions. And assistance should come from the intermediate association closest to the problem, with less- involved, more detached associations only used when absolutely necessary.

VI. THE ADVANTAGE OF SUBSIDIARITY OVER COMPLEMENTARITY IN THE ICC CONTEXT

The concept of an international criminal court, like the United Nations itself, grew out of a perceived moral, not political, imperative. The Holy See has played an important role in shaping that morality. In 1939, Pope Pius XII wrote that “it is of the first importance to erect some juridical institution which shall guarantee the loyal and faithful fulfilment” of treaty obligations.⁵⁵ In the years that followed, he called upon the nations to form an international organization, which grew into the United Nations, and he also wrote of institutional agreements (like the Rome Statute) that were binding on non-signatories.⁵⁶ At the end of World War II, he cooperated with the prosecutors at Nuremberg, cautioning that only the guilty should be punished.

In 1951, the Economic and Social Council, through Resolution 393B (XIII) asked fifteen States, including the Holy See to serve as members of an Advisory Committee on Refugees. In addition, the Holy See was invited to the 1951 Conference of Plenipotentiaries to consider and

54 John S. Coleman, S.J., *Development of Church Social Teaching*, in READINGS IN MORAL THEOLOGY NO. 5: OFFICIAL CATHOLIC SOCIAL TEACHING, 169, 183 (Charles Curran & Richard A. McCormick, S.J., eds., 1986).

55 Pius XII's 1939 Christmas Message, *quoted in* GUIDO GONELLA, THE PAPACY AND WORLD PEACE: A STUDY OF THE CHRISTMAS MESSAGES OF POPE PIUS XII, 165 (1950).

56 *Id.* at 166, 165-88.

debate the Convention Relating to the Status of Refugees and the draft Protocol Relating to the Status of Stateless Persons.⁵⁷ Moreover, the Holy See was admitted to several Charter and Treaty organizations of the United Nations including the Food and Agriculture Organization [1948], the World Health Organization [1951], the United Nations Educational, Scientific, and Cultural Organization [1951], and the International Atomic Energy Agency [1956].⁵⁸ The Holy See was elected as an Observer to the UN's Economic and Social Council [ECOSOC] in 1956.

Pope John XXIII's 1963 encyclical, *Pacem in Terris*, drew attention to the interrelated rights and responsibilities of individuals and nations. One of the most important elements of this encyclical is Pope John's acknowledgment of the role of the United Nations to achieve the common good for all peoples.⁵⁹ The particular role ["right and duty"] of the Holy See in this regard was "not only to safeguard the principles of ethics and religion, but also to intervene authoritatively with Her children in the temporal sphere, when there is a question of judging the application of [principles of the natural law] to concrete cases."⁶⁰ John's immediate successor, Paul VI, proclaimed his version of this same message in 1965. In the first papal address made before the General Assembly, Paul VI commented on his role and the presence of the Holy See in the world community:

He is your brother, and even one of the least among you, representing as you do sovereign States, for he is vested — if it please you so to think of Us — with only a mute and quasi-symbolic temporal sovereignty, only so much as is needed to leave him free to exercise his spiritual mission and to assure all those who treat with him that he is independent of every worldly sovereignty. He has no temporal power, no ambition to compete with you. In

57 See UNITED NATIONS YEARBOOK 520 (1951).

58 See H.E. HYGINUS EUGENE CARDINALE, *THE HOLY SEE AND THE INTERNATIONAL ORDER* 233 (1976).

59 *Pacem in Terris*, at Nos. 142-145.

60 *Id.* at 160.

point of fact, We have nothing to ask for, no question to raise; at most a wish to express and a permission to request: to serve you, within Our competence, disinterestedly, humbly and in love . . . Whatever your opinion of the Roman Pontiff, you know Our mission: We are the bearer of a message for all mankind.⁶¹

The pope continued by stating that, "We have been carrying in Our heart for nearly twenty centuries [a wish]. We have been on the way for a long time and We bear with Us a long history; here We celebrate the end of a laborious pilgrimage in search of a colloquy with the whole world, a pilgrimage which began when We were given the command: 'Go and bring the good news to all nations.' And it is you who represent all nations."⁶² Paul noted that the "moral and solemn ratification" of the UN was founded on the Holy See's position as an "expert in humanity."⁶³ In 1964, Pope Paul took the initiative to send an Observer of the Holy See to the United Nations in order that its "supra-national" voice would become a regular a part of the dialogue in the UN deliberations affecting peace and the common good.

In 1998, at the Diplomatic Conference in Rome, Archbishop Renato Martino, the Holy See's nuncio to the United Nations, quoted Pope John Paul II:

Within the international community the Holy See supports every effort to establish effective juridical structures for safe guarding the dignity and fundamental rights of individuals and communities. Such structures however can never be sufficient in themselves; they are only mechanisms which need to be inspired by a firm and

61 ADDRESS OF POPE PAUL VI TO THE UNITED NATIONS, October 4, 1965.

62 *Id.*

63 *Id.*

persevering moral commitment to the good of the human family as a whole.⁶⁴

The archbishop then went on to highlight several considerations regarding the establishment of the ICC, directing much attention to justice, morality, and the dignity of "human persons."⁶⁵

For the most part, the United Nations has embraced moral positions and merged them with political realities. In so doing, the UN has done much to advance justice and human rights. In this fundamental issue of national sovereignty, however, the UN opted for the political solution instead of the moral position.

John Bolton, Senior Vice President of the American Enterprise Institute, explained his objections to the ICC in terms of structural problems and a huge central administration that will not be accountable to anyone.

[T]his Statute of Rome creates not just a court, but it creates an enormous, potentially enormous, source of executive power: the prosecutor, just kind of out there in the international environment. Beyond control. Certainly beyond control of the United States and not part of any ordered structure of accountability. This is the kind of creation of authority that, I think, a free people should find unacceptable. This is not a passive court, moreover, like the International Court of Justice, but, particularly in the form of the prosecutor, a potentially very powerful actor.⁶⁶

⁶⁴ On the Internet at <http://srch1.un.org/icc/speeches/616hls.htm>.

⁶⁵ *Id.*

⁶⁶ *Symposium, supra* note 20, at 164-65 (comments of John Bolton).

Bolton went on to explain: "This court is just kind of an arm and a leg out there. It's not part of a coherent constitutional structure. It's subject to no popular accountability-the prosecutor isn't. There are no structures that give me faith, as a free person, that it's authority won't be abused."⁶⁷ These are precisely the types of problems that subsidiarity cautions against.

The central argument in support of an International Criminal Court is that it will function as a deterrent by letting war criminals know that they face punishment.⁶⁸ Of course, there have not been many war criminals who have faced trial in the past 50 years. This has caused at least one commentator to say that "the newly created ("ICC" or "Court") is a solution in need of problems."⁶⁹ If more crimes within the jurisdiction of the ICC are not found over the next 50 years,⁷⁰ people will likely begin to question the need for the Court.⁷¹ This will almost certainly lead to pressure on the ICC to expand its jurisdiction (further threatening national sovereignty). Already supporters have advocated expanding

⁶⁷ *Id.*

⁶⁸ This argument, however, is not based on much evidence. The International Criminal Tribunal for the Former Yugoslavia had indicted people, and while those cases were pending Slobodan Milosevic commenced a campaign of ethnic cleansing, killing, and systematic rape in Kosovo. *Symposium, supra* note 20, at 166 (comments of John Bolton). As one commentator has noted: "The idea that the orders of this court are going to be routinely enforced by anybody except when it's in their political interest to do so is just flatly wrong." *Id.* (comments of John Bolton). In fact, if the International Criminal Tribunals at Nuremberg, Tokyo, the former Yugoslavia, and Arusha are used as a gauge for deterring future violence, the international community must admit failure. Penrose, *supra* note 6, at 325. See Tom Gjelten, *Conference on War Crimes Tribunals: Tribunal Justice, the Challenges, the Record, and the Prospects*, 13 AM. U. INT'L L. REV. 1541, 1556 (1998).

⁶⁹ Molly McConville, *Note: A Global War on Drugs: Why the United States Should Support The Prosecution of Drug Traffickers in the _____*, 37 AM. CRIM. L. REV. 75, 76 (2000).

⁷⁰ In theory, after all, "the ICC will operate only in exceptional circumstances." Human Rights Watch, *supra* note 48 at 71.

⁷¹ According to one critic: "I would have no problem if the United Nations wanted to set up a structure of judges and prosecutors on a stand-by basis to be called in on ad hoc situations. That's enough of a threat to me without getting into a big standing organization So you need to have a threat, but the threat should be on a stand-by basis." *Symposium, supra* note 20, at 196 (comments of Judge Griffin Bell). A permanent military or international criminal court, however, may not be necessary. See Grant M. Dawson, *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 413, 431 (2000).

ICC coverage to include human rights violations and violations of other international prohibitions. In fact, Resolution E to the Rome Statute provides that the issues of terrorism and drug crimes should be taken up at a Review Conference, with a view to their ultimate inclusion in the jurisdiction of the Court.⁷² Proposals have also been made to expand jurisdiction to cover "serious threats to the environment" and "committing outrages on personal dignity."⁷³ Blockades, embargos, and even seizing of assets could - depending how on-going negotiations are resolved - constitute the crime of aggression.⁷⁴

If enough States are willing to amend the Statute to cover more crimes and apply to more criminals, nations in opposition to this expansion on national sovereignty grounds would have a much stronger argument if the ICC were based on subsidiarity than they will have with complementarity as the basis. Recognition of this eventuality may be one reason that some States are reluctant when it comes to ratification.⁷⁵

There is no impediment for subsidiarity to serve as the basis for modern international agreements. The Maastricht Treaty adopts the subsidiarity principle without detracting from the primacy of the Treaty of European Union. In fact, subsidiarity lies at the core of the European Community's Social Charter, and it stands as a maxim for arranging the order of all types of social institutions within the Community, including the delimitation of competencies between the European Communities

72 See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an _____, Annex I, Res. F, U.N. Doc. A/CONF.183/10 (1998) [hereinafter Final Act] at Annex I, Res. E. The Statute addresses the need for continuing oversight by the States Parties by establishing an Assembly of States Parties and providing rules for its organization and operation.

73 Dempsey, *supra* note 20.

74 *Id.*

75 The United States, for instance, proposed during negotiations that the principle of complementarity be invoked earlier, prior to the beginning of an investigation. HUMAN RIGHTS WATCH, *supra* note 47, at 69. "While States agreed to the establishment of the Court in principle, and even to its jurisdiction in theory, they may not be willing to make the kinds of concessions to international cooperation necessary to the successful operation of the Court in practice." Sadat & Carden, *supra* note 15, at 392.

and the Member States.⁷⁶ Additionally, subsidiarity is an important part of George W. Bush's "compassionate conservatism" approach to government.⁷⁷

On the surface, subsidiarity and complementarity seem very similar. Each, when applied to the ICC, suggest that primary jurisdiction should rest with the nation state. With complementarity, however, this is a simple political choice. With subsidiarity, the jurisdictional decision flows out of a broader, moral position. That moral position will not change just because political will does. As a coherent theory, subsidiarity supplies a way to organize a society that is consistent with both human nature and human potential. Complementarity offers no similar organizational structure. In fact, it tends to contribute to structural problems that the ICC may create.

VII. CONCLUSION

When the drafters of the Rome Statute abandoned subsidiarity and opted instead for the doctrine of complementarity, they took away the moral basis for arguing that States should have primary jurisdiction in the cases at issue. Instead, the argument against dramatic expansion of the ICC rests on a purely political basis. Perhaps this distinction will make no difference in practice; on the other hand, perhaps in the small number of cases where a great deal is at stake in the Court's exercise of jurisdiction, a prudential doctrine grounded in moral reasoning will make the answers to difficult questions either clearer or more palatable

76 See Treaty Establishing the European Community, as amended art. 3(b) (principle of subsidiarity provides that when the EU does not have exclusive jurisdiction, the EU will act only if the Member States cannot achieve the objectives of the proposed action). See also Larry Cata Backer, *Harmonization, Subsidiarity and Cultural Difference: An Essay on the Dynamics of Opposition Within Federate and International Legal Systems*, 4 TULSA J. COMP. & INT'L L. 185, 211 (1997).

77 George W. Will, *Keeping Faith Behind Initiatives*, WASH. POST, Feb. 4, 2001, at B07 (noting that the doctrine of subsidiarity is an important factor in some of President Bush's initiatives); Andrew Sullivan, *Bush Woos Catholic Conservatives*, THE SUNDAY TIMES (LONDON), June 25, 2000 (noting the importance of Catholic social doctrine, particularly the doctrine of subsidiarity, in the political thinking of then-candidate George W. Bush).

than a prudential doctrine buttressed by political compromise. As such, complementarity offers less to individual nations concerned about sovereignty in the face of a shift in political will that would give primary jurisdiction to the ICC. Once this is recognized, opposition to the ICC by nations such as the United States is easier to understand. A small step, but one which might render the ICC acceptable to hesitant nations, is to explicitly embrace the concept of subsidiarity, and shelve its weaker cousin, complementarity.

