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Committee Report on Jurisdiction, Definition of Crimes and Complementarity

Leila Sadat Wexler

Committee Report on Jurisdiction, Definition of Crimes, and Complementarity

LEILA SADAT WEXLER*

1. In November 1996, members of the International Law Association Committee on a Permanent International Criminal Court (ICC) met in conjunction with other members of the human rights community and experts on the proposed ICC over a two day period. Both a feasibility study on the *Organization of the International Criminal Court: Administrative and Financial Issues*, prepared by Thomas Warrick, and the six reports submitted to the Committee by Christopher Blakesley, Jeffrey Bleich, Jordan Paust, Michael Scharf, and Edward Wise contained in this volume were discussed. In addition, M. Cherif Bassiouni summarized the discussions held at the second session of the Preparatory Committee. Subsequently, a report was prepared by the Chair, circulated to the membership of the entire Committee and revised accordingly. The Committee's recommendations and conclusions are set out below.[1]

2. As a preliminary matter, the Committee unanimously endorses the establishment of a permanent international criminal court, and hopes that the Court could be operational in the near future. Such a Court could function both as a forum for the trial of war criminals as well as an institution capable of constructing a framework for the establishment of justice and the international rule of law.

3. The Committee greatly appreciates the serious work accomplished by the Preparatory Committee to date, and urges the Preparatory Committee to adhere to the resolution adopted by the Sixth Committee on November 29, 1996, by which it is proposed that the Committee complete its work by April of 1998.[2] The Committee hopes

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* Associate Professor of Law, Washington University in St. Louis; Chair and General *Rapporteur* of the International Law Association (American Branch) Committee on a Permanent International Criminal Court.

1. The Committee's work program tracked the work of the Preparatory Committee in 1996. Special *Rapporteurs* prepared reports on the issues of general principles of criminal law, jurisdiction, definition of crimes, triggering mechanisms, complementarity, cooperation of the Court with national legal systems, and a critique of the Yugoslavia War Crimes Tribunal. These reports have been submitted and discussed by the Committee, and are annexed to this report. The Committee will address the issues of the Court's relationship with the United Nations, organization and budget, establishment, and remaining procedural issues in its subsequent work. *See infra* text para. 38.

2. On December 17, 1996, the General Assembly of the United Nations adopted the resolution on the Establishment of an International Criminal Court which approved the dates for the preparatory meetings in 1997 and 1998 as well as to hold the Diplomatic Conference in 1998.

that the Preparatory Committee will be able to adopt a work plan that will permit it to arrive at a completed proposed text by this time.

I. JURISDICTION OF THE COURT

4. *War Crimes, Crimes Against Humanity, and Genocide:* The Court should, of course, have jurisdiction over each of these "core crimes." The question remains as to their definition, as discussed below.

5. *Treaty Crimes:* The Committee supports the inclusion within the Court's *initial* jurisdiction of at least some treaty crimes,[3] which might include the unlawful seizure of aircraft (the 1970 Hague Convention), aircraft sabotage (crimes defined in article 1 of the 1971 Montreal Convention), crimes against internationally protected persons (1973 Convention), hostage-taking and related crimes (defined in the 1979 Convention), the torture convention, and crimes against UN personnel.[4]

6. With respect to drug trafficking, the Committee was split. Some members thought that it should be included. Although some States have argued that the prosecutor of the international criminal court would interfere rather than complement and support national investigations, those members of the Committee supporting the inclusion of this crime found this argument unpersuasive, given that the Court would consider only drug offenses of concern to the international community as a whole, in cases in which a State had determined to cede jurisdiction it might otherwise exercise to the Court. Moreover, they did not consider defining this crime to be particularly problematic. Other members of the Committee disagreed, contending that inclusion

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3. As one member noted, however, the term "Treaty Crimes" is potentially misleading because the prohibition of certain war crimes, genocide, and those crimes which the Committee believes the Court's jurisdiction should be inherent, are also found in treaties.

4. In addition to the crimes listed in the text, the ILC proposed the inclusion of the apartheid convention, grave breaches of the Geneva Conventions and Protocol I, and Maritime crimes. Some members of the Committee expressed support for the inclusion of the apartheid convention. A majority of the Committee's members, however, objected to its inclusion, noting that if South Africa had, itself, decided to employ the procedure of a "Truth Commission" rather than criminal prosecutions to deal with the crimes of apartheid, inclusion of the crime within the ICC's jurisdiction would seem to be inappropriate.

Grave breaches and the crimes enumerated in Protocol I raise a different problem. The Committee believes that these crimes should be within the Court's jurisdiction, but not as a result of their status as treaty crimes. Instead, they should fall within the Court's inherent jurisdiction. Indeed, as one member noted, the ILC's "treaty crime" list does not sufficiently distinguish between different types of offenses committed against treaties. A basic distinction may be drawn between crimes committed under color of official authority and those crimes which do not necessarily involve official actors. At least one member of the Committee expressed the view that if the list of treaty offenses over which the Court will have jurisdiction is to be restricted, priority should be given to those offenses, like torture, that involve official actors.

of this crime within the Court's jurisdiction would be too problematic given the strong opposition of certain States.

7. It is true that political objections, voiced by some States, to the inclusion of treaty crimes have posed a potential obstacle to the Statute's ultimate adoption by those States. However, because the Court's jurisdiction over treaty crimes will, presumably, be predicated on the consent of the State (or States) involved, such objections do not appear persuasive. Moreover, many smaller States would like treaty crimes included, and would be more favorably disposed to ratify the Treaty establishing the Court if they are included. In addition, the inclusion of treaty crimes may permit the Court to assume a unifying role in interpreting international criminal law. Finally, the bombing of Pan Am 103 and the resulting international stalemate among several members of the United Nations over prosecution of the alleged perpetrators, presents precisely the kind of case that befits prosecution by an international criminal court. The Court may thus provide a neutral forum that would not otherwise be available to address a politically-charged incident.

8. The objection has been made that the inclusion of certain treaty crimes may trivialize the Court and diminish its moral strength by having individuals on trial for relatively minor offenses at the same time that major war criminals are being prosecuted. One method that might avoid this problem would be to establish a special chamber of the Court for certain treaty crimes. It was also pointed out that a means must be found to filter cases to avoid States' dumping insignificant cases on the Court (such as is now contained to a limited degree in Article 35 on admissibility and the Preamble).

9. Finally, although practical objections to the inclusion of certain treaty crimes are not insubstantial (the need for intelligence sharing,[5] a secure building, and additional security to protect the Court) neither are they insurmountable. Reference may be made to the detailed feasibility study of Thomas Warrick, in this regard.

10. *Aggression:* The Committee is split on the question of aggression. A majority of the Committee's membership believes that aggression should be within the Court's jurisdiction. Although aggression may be difficult to include because there is no clear detailed legal definition, defining it does not seem an insurmountable task. A failure to include it would, in the opinion of many, mark a retreat from the principles laid down by the International Military Tribunal at Nuremberg, which considered aggression to be the "supreme" international crime.

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5. One member suggested that in cases involving treaty crimes, that might otherwise not be brought before the Court because of a State's reluctance to share intelligence information, a mechanism could be established whereby the State in question would provide a substitute prosecutor and thereby control the dissemination of the privileged information. A majority of the Committee's membership were opposed to this suggestion, arguing that the Prosecutor must, at all times, remain independent of State control.

Moreover, the possibility that the Court's establishment could deter criminal behavior would be seriously weakened were aggression omitted, those who started a conflict might be insulated from punishment. It is certainly conceivable that, at least in democratic States, a general or Chief of Staff may, in a particular case, feel that a certain military action violates international law and raise objections before rather than after the fact.

11. Some seconded the International Law Commission's (ILC) view that the Security Council should make an initial determination of aggression in order for the Court's jurisdiction to attach.[6] This would presumably overcome States' political objections to the inclusion of this crime, at least for States that were members of the Security Council.

12. Other members of the Committee do not believe that aggression should be included. They argue that its inclusion, particularly as proposed, will undermine the Court's integrity by subjecting it to the will of the Security Council. In addition, prosecutions for aggression may smack of victor's justice and impair the Court's credibility. As one member of the Committee pointed out, there is no "rule of law" if a general rule does not apply to everyone. Moreover, in most cases in which aggression occurs, it is not the aggression that needs to be punished but the crimes committed against life and property that accompany it — there will always be war crimes and crimes against humanity where there is aggression. It was noted that at Nuremberg, aggression was thought to be the "supreme" crime because it was a world of States' power in which crimes against humanity were peripheral, a situation that is now fundamentally different. Finally, one member noted in detail that, given the relatively unsuccessful history of efforts to define aggression to date, defining it may well be an insurmountable task.

II. DEFINITION OF CRIMES AND GENERAL PRINCIPLES OF LAW

13. The Committee strongly urges the Preparatory Committee to define the crimes within the Court's jurisdiction in the Court's Statute. While the *Rapporteur* for this issue agreed that this was not legally required by international law,[7] it is, nonetheless, desirable. As the *Rapporteur* noted in his report to the Committee, a central reason for insisting that punishment be imposed only by virtue of a law enacted prior to the offense is the sense that fairness requires giving due no-

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6. *Report of the International Law Commission on the Work of its Forty-sixth Session, Draft Statute of an International Criminal Court, May 2-July 22 1994*, at 51, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994) [hereinafter *1994 ILC Draft Statute*].

7. For a thorough analysis of this issue, see Jordan J. Paust, *Nullem Crimen and Related Crimes*, 25 DENV. J. INT'L L. & POL'Y 321 (1997) (demonstrating that enactments and legislators are not required to create international crimes and that several States have incorporated international crimes by reference or with general definitions).

tice of what constitutes prohibited conduct and of what will happen if the line between permissible and prohibited conduct is crossed.[8] In addition, the principle of legality also rests

> in part on the judgment that it is for legislators (or their international equivalent) rather than judges to settle questions about what kinds of conduct will be proscribed . . . that fixed rules are required if we are to realize the ideal of treating like cases alike, and . . . that, especially in criminal cases, it is important to apply impersonal rules articulated beforehand without regard to the particular persons to whom they will be applied.[9]

14. The question then arises as to how detailed the definitions ought to be. While the *Rapporteur* noted that it would be impractical to draft an entire criminal code that would be incorporated into the Court's Statute, offense definitions and certain general principles of criminal law should be set out in the Statute. Several countries, in particular Canada, France, and Japan, have proposed texts to be incorporated into the Court's Statute, and it appears now to be a question of harmonizing their proposals in order to arrive at a text acceptable to States.[10]

15. To assist the Preparatory Committee in its work, members of the Committee will consolidate the governmental proposals annexed to the August Preparatory Committee Session Report and produce a harmonized text. This harmonized text will include the specific elements of the four core crimes to be included in the Statute and a part on general principles of criminal law. These Committee members will consider, among other things, general principles accepted by the major legal systems of the world, as well as principles of legality, vagueness, and overbreadth. Substantive crimes will be defined according to treaty language, case law, the definitions used by those learned in the law, and general interpretations of similar crimes found in the domestic systems around the world.

16. For the same reasons, some members of the Committee feel that, insofar as practical, treaty crimes should be defined in the Court's Statute rather than simply incorporated by reference.[11]

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8. Edward M. Wise, *Report on General Rules of Criminal Law*, 25 DENV. J. INT'L L. & POL'Y 318 (1997)

9. *Id.*

10. One member of the Committee disagrees. In his view, international law should be the starting point for defining international crimes, and harmonization of national proposals is thus inappropriate.

11. As one member noted, if the treaty language is vague, to the extent that the treaty does not have "real" definitions in it, then referring to the treaty is little help in determining an element of a particular treaty crime. On the other hand, it must be clear that the definition in the Court's statute does not substitute its language for what is contained in the treaty.

17. *Aggression:* As noted in paragraph 10, most members of the Committee urge both the inclusion of this crime and its definition in the Court's Statute. In particular, these members of the Committee support the inclusion of jurisdiction over *acts* of aggression, not just *wars* of aggression. Although the International Military Tribunal (IMT) judgment at Nuremberg specifically condemned only *aggressive war*, international law has since evolved and international condemnation of *aggressive acts* is now part of customary international law and should be included as such.

18. *Crimes Against Humanity*: Discussions at the Preparatory Committee meetings apparently now evidence a preference for the Statute's definition of Crime Against Humanity to parallel the International Criminal Tribunal for Rwanda (ICTR) definition rather than the International Criminal Tribunal for the former Yugoslavia (ICTY) definition of this crime by including the words "widespread or systematic" as an element of the crime.[12] This is desired by States as a filter that would implement the principle of complementarity by permitting the International Criminal Court to assume jurisdiction only in cases of widespread or systematic abuses. Certainly, if such language is to be added to the definition of the crime, States should be willing to eliminate the regime of State consent currently envisaged by the 1994 ILC Draft Statute, and replace it with a regime of inherent jurisdiction (not subject to State consent), such as is now envisaged for genocide.

19. Although the Committee understands that murder does not, as a general rule, rise to the level of an international crime, and that some means must be adopted to distinguish crimes against humanity from ordinary crimes, the proposed solution is unfortunate in that it collapses the jurisdictional trigger and *actus reus* into one. One member suggested that rather than including this language in the definition of the crime, the jurisdictional trigger be contained either in the article on admissibility (currently Article 35, which provides the Court may dismiss cases that are "not of such gravity to justify further action by the Court") or in a non-definitional section of the Statute regarding crimes against humanity. Then, it will not be thought of as a limitation on the nature of the crime, but on the Court's jurisdiction.

20. Finally, there is general agreement that the crime should be defined with reference to specific acts,[13] and that no nexus to armed conflict should be required. Although there was some inclination to deviate from the arguably redundant language found in most modern formulations of the crime (i.e., murder, extermination, etc. . . .) it was ultimately agreed that traditional formulations should be retained, even if redundant, to avoid lengthy and fruitless discussions that might result from an attempt to change them.

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12. This phrase is not part of the customary definition. *See infra* text para. 19.

13. *But see also, supra* note 7.

21. *Genocide:* In spite of the objections one might make concerning the definition of Genocide in Article 2 of the Genocide Convention, most notably, the lack of protection for political groups, the Committee believes that the definition of genocide in the International Criminal Court Statute should track Article 2 of the Convention. The current definition already has the status of customary international law, has been agreed to by a significant majority of the world's nations and, thus, has the virtue of being practically universally accepted. One issue that needs to be addressed, however, is the question of intent. It was suggested that the mental state that would subject an upper level policy-maker to responsibility for genocide differs from the standard to be applied to individuals lower down on the chain of command, such as a camp guard. Others, however, consider that genocide as such (with the same general *mens rea* standard for each type of actor, tested circumstantially) can be different than dereliction of duty concerning "policy-maker . . . responsibility" for acts of genocide engaged in by others over whom one has authority or command.

22. *War Crimes*: In the 1994 ILC Draft, an attempt was made to separate war crimes from the grave breaches system of the Geneva Conventions and to adopt a new definition of "serious violations of the laws and customs applicable in armed conflict."[14] Discussions during the Preparatory Committee, while not yet conclusive, evidence a different trend, which would, like the ICTY Statute, retain a two-tier category for war crimes. Grave breaches and Protocol I would be retained as a separate category, and would be within the Court's inherent jurisdiction. Other "violations of the laws and customs applicable in armed conflict," and, in particular, violations of common Article 3 and Protocol II, however, would be prosecutable only if a consistent state policy and practice could be established. Otherwise, consistent with the principle of complementarity, jurisdiction would shift to national criminal justice systems, unless national courts were unwilling or unable to act fairly and effectively.[15] Although understanding the rationale for this proposal, the Committee cannot endorse it. Indeed, several members expressed deep concern about this issue.

23. First, although it is commendable that the Statute, as conceived, would grant the Court inherent jurisdiction over grave breaches, the limitations sought to be placed on all other serious violations of the laws and customs of war are problematic. Proving a state policy to commit war crimes will be difficult and may raise insurmountable obstacles to international prosecution. If, for example, the Prosecutor is asked to investigate a situation by the Security Council, how will he or she conduct this kind of investigation? Presumably the Prosecutor will have the burden of proof, but the evidence will lie in

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14. *1994 ILC Draft Statute*, *supra* note 6, art. 20(c).

15. It would be inappropriate to require State policy or practice addressing war crimes committed by insurgents or other non-state actors.

the hands of the highest State officials. Suppose that the State officials say that there is no such policy and that they are therefore pursuing the investigation. May the Prosecutor, at that point, allege that the national legal system is not "fair and effective" to recover jurisdiction over the offenses? A "minitrial" may thus be required at a very preliminary stage merely to establish the Court's jurisdiction. At the very least, if this kind of definition is to be incorporated into the Statute's provision on war crimes, it must be made clear that it is not an aspect of the crime's definition, but the Court's jurisdiction.

24. Second, the Committee feels that the Court should have jurisdiction over "war crimes" whether they are committed in international or non-international armed conflict and by state or non-state actors. Consistent with its views on other matters, it also feels that the crimes to be covered should be enumerated in the Statute.[16]

25. *Treaty Crimes:* As with the four core crimes to be included in the Statute, the Committee generally feels that, to the extent practicable, treaty crimes should be defined in the Court's Statute, not merely incorporated by reference.

26. At the same time, the Committee also feels crimes defined in new treaties should be able to come within the Court's jurisdiction without the need for convening a diplomatic conference each time. Presumably, this would be accomplished by having the Treaty itself refer to the Court, and have the Conference of States Parties[17] accept the extension of the Court's jurisdiction over the new crimes. This would also apply to amendments to treaties. The Committee recommends that a procedure for this be adopted from the outset.

III. RULES OF PROCEDURE AND EVIDENCE

27. The Statute of the Court should set out general principles of evidence, rules of procedure and rights of the accused, including the due process and the principles contained in Articles 9, 10, and 14 of the International Covenant on Civil and Political Rights. Human rights to due process provide a minimum set of guarantees that must be respected by the Court. At the same time, however, these provisions need not be detailed. Rather, they should be limited in the Court's Statute to the setting out of general principles common to the civil law

16. In this regard, special mention was made of rape which is referred to in some of the proposals made by governments to define war crimes. The Committee agrees that rape should be specifically enumerated as a crime in the Statute. A specific conviction for rape, as opposed to "inflicting bodily injury" or some other vague formulation may have more deterrent effect, or, at least, serve to increase the stigma attached to the crime.

17. The proposed Conference of States Parties is discussed in Thomas Warrick, *Administrative and Financial Issues of the International Criminal Court*, 25 DENV. J. INT'L L. & POL'Y 376-77 (1997).

and common law systems.[18] Detailed rules will be elaborated by the Court (the Judiciary) and submitted to the Conference of States Parties for approval.

28. The Statute, as currently drafted, does not indicate whether the criminal trial procedure to be followed is to be more akin to a common law or civil law trial. As one member noted, depending on which one is chosen, more will follow. Ultimately, the Committee feels that rules will evolve from a mixed system. Merging aspects of both systems will need to be established by the Court on an ongoing basis, with their decisions being guided by the general principles set out in the Statute.

IV. TRIGGERING MECHANISM, STATE CONSENT, AND COMPLEMENTARITY

29. *Who may initiate prosecution?* The Committee supports the general scheme proposed by the ILC to the effect that a State party to the Statute and the Security Council may refer matters to the Court.[19] There is also some support among the Committee's membership for permitting the prosecutor to act on his or her own initiative and for permitting the General Assembly to refer matters to the Court. Treaty crimes, unlike the other four "core" crimes, will be referable only where a Treaty applies[20] and the relevant States[21] consent to the Court's jurisdiction.

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18. To assist the Preparatory Committee in its work, Fellows of the International Human Rights Law Institute at DePaul University will consolidate the proposals on rules of procedure and evidence found in Volume II of the Preparatory Committee Report on the Second Session and distill from them general principles common to both the civil and common law systems.

19. For a discussion of whether a Security Council referral is pursuant to Chapter VI or VII, see *infra* text para. 30.

20. Because genocide is in one sense a Treaty crime, the question arises whether the Court would receive complaints from States that are parties to the Genocide Convention but not the Court's Statute. The ILC opted not to permit this in Article 25(1) of the draft statute, noting that on balance,

> this may encourage States to accept the rights and obligations provided for in the Statute and to share in the financial burden relating to the operating costs of the Court. Moreover in practice the Court could only satisfactorily deal with a prosecution initiated by complaint if the complainant is cooperating with the Court under Part 7 of the Statute in relation to such matters as the provision of evidence, witnesses, etc.

1994 ILC Draft Statute, *supra* note 6, Comment, at 89.

21. The ILC Draft is not completely clear on this, but under the current state consent regime, set out in Article 21, the State having custody of the accused, (the "custodial state"), the territorial state (where the act occurred), and any state having filed an extradition request with the custodial state (unless that request is rejected) must consent to the Court's jurisdiction in a particular case. In addition, the treaty must apply to the conduct under investigation, meaning that the country of which the accused is a national or upon whose territory the crime was committed, is a party. *See* Article 39(b) and comments thereto. Presumably, even if the consent regime drops out for the four core crimes, some version of this consent regime will necessarily remain as regards to treaty crimes.

30. *The Security Council:* The Relationship of the Court to the Security Council is particularly problematic. Although, as noted in paragraph 29, the Committee generally believes that the Security Council should be permitted to refer matters to the Court. The Committee objects to proposed Article 23(3) which permits the Security Council to block prosecutions if it is dealing with a matter under Chapter VII. Preferably, the provision should be deleted. If retained, it should be redrafted.[22]

31. Essentially, the Committee feels that the Court should be independent from the Security Council. In addition, Article 23(3) introduces a substantial inequality between States which are members of the Security Council and other states, as the Committee noted in its comments to Article 23(3).[23]

32. Finally, it was pointed out that the Statute is not clear as to whether the Security Council would be in any way required to use Chapter VII rather than Chapter VI in order to require the Security Council to enforce the jurisdiction of the Court. Indeed, it may be that the Security Council wishes to preserve this ambiguity in order to retain flexibility as well as political leverage in a particular situation.

33. *State Consent and Inherent Jurisdiction:* The Committee strongly opposes the regime of State consent now contained in the ILC draft. It is likely to be complicated and cumbersome at best, and to cripple the proposed Court at worst, at least in cases in which the matter has not been referred by the Security Council under Chapter VII (in which case, the Security Council will presumably use its enforcement powers in aid of the Court's jurisdiction). Instead, States that adhere to the Court's Statute should be deemed to have accepted the Court's jurisdiction in all cases except Treaty Crimes, subject, of course, to the limits of complementarity and other jurisdictional preconditions.

34. The Preparatory Committee discussions have apparently veered away from the ILC proposal to a system of essentially inherent jurisdiction over all crimes, except aggression which would be subject to a preliminary Security Council determination (see *supra* paragraph 10) and war crimes that are not grave breaches. This is a step in the

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22. Should some version of Article 23(3) be retained, one Committee member suggested the following language might render the Security Council more accountable than the present text: "Whenever the Council makes a formal determination that the Court's activity interferes with the Security Council's activities to restore and maintain international peace and security it may request the Court to suspend its activities."

23. It also introduces inequalities between States that are permanent members of the Council and other States, and may thus discourage adherence to the Court's statute by some states. The Comments to the 1994 ILC Draft suggest instead a savings clause in the Treaty to the effect that "Nothing in [this Statute] shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations." *1994 ILC Draft Statute*, *supra* note 6, Comments to art. 23(3).

right direction, *provided that*, as discussed above, the definitions of the crimes that are substituted for the regime of State consent neither complicate nor narrow the Court's jurisdiction. In particular, serious violations of common Article 3 and Protocol II should be within the Court's inherent jurisdiction.

35. *Complementarity*: This still does not resolve the issue of complementarity. It is self-evident that a relationship between State parties and the ICC must be established and that a mechanism must be put in place in order to distribute jurisdiction in particular cases between national tribunals and the Criminal Court.[24] This might be a unitary system in which either the international criminal court or national courts would always have primacy, or it might be a case-by-case system that would link jurisdiction to particular factual situations depending on the crimes charged. The ILC opted for a system in which the Court would assert jurisdiction only where domestic jurisdictions are either unavailable or ineffective.[25] Pursuant to Article 35 of the Statute, any "interested State" may challenge the admissibility of a case prior to the commencement of the trial, if a State (which has or may have jurisdiction) is itself investigating a crime, or has investigated a crime and, upon a decision apparently well-founded, concluded that it will not proceed to prosecution.

36. The Committee generally agrees that the Statute should favor domestic prosecutions, where available and effective.

> To the extent that an ICC prosecution would merely duplicate the efforts of a State (or would only marginally improve the likelihood of successful prosecution), the expense, effort and possible offense to a sovereign's judicial system, is probably not justified. In addition, given that State systems are generally better developed at this point . . . the concept of the ICC as a supplemental court, at

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24. As the Special *Rapporteur* noted:

> [C]omplementarity questions . . . arise . . . in cases where both the Court and a State have not only the capacity, but the *intent* to prosecute the same crime. [C]omplementarity presupposes that there is a subset of "interested states" with an interest in prosecuting these cases. . . . To resolve whether [an interested State] . . . may claim precedence over the prosecution of an international crime, the ILC Draft must address five issues:
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> (1)What factors define an "interested state" for purposes of challenging ICC jurisdiction;
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> (2)As between two competent forums, the ICC and the domestic court of an interested state, which forum has priority;
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> (3)What standard shall apply for determining the competency of a domestic forum;
>
> (4)Who has the burden of proof in determining whether a domestic forum is competent;
>
> (5)What institution will ultimately resolve whether a domestic forum is competent and at what stage of the proceedings.

Jeff Bleich, *Complementarity*, 25 DENV. J. INT'L L. & POL'Y281-82 (1997).

25. *1994 ILC Draft Statute*, *supra* note 6, Preamble, text ¶ 3.

least in theory, seems proper.[26]

However, the Committee strongly feels that it should be the Court, not States, that determines whether a case is admissible.[27] Notwithstanding, it may be that Article 35 requires an amendment in order to more clearly specify the situations in which the Court should find a case inadmissible.[28]

37. The Committee is aware of States' fears that the Court will become a supranational entity and the various efforts made in the ILC Draft to assuage this concern, including the regime of State consent and the principle of complementarity which is understandable in this regard. While at least some members of the Committee believe that this supranationalism is inevitable (and, indeed a positive aspect of the Court), the Committee, as a whole, understands the legitimate concern States may have in preserving the integrity of their criminal justice systems, and indeed, their sovereignty as a whole. Nevertheless, particularly as regards issues such as arrest and transfer, as well as the collection of evidence, if requests from the Court were to be treated as if they were merely requests from any other State, this would pose, potentially, insurmountable problems for the Court's functioning. Evidence could disappear, suspects could vanish — indeed, the very advantage that stems from having a *permanent* Court as opposed to an *ad hoc* tribunal would largely evaporate. Thus, the Committee recommends that requests from the Court, particularly as regards arrest and transfer of the accused and the collection of evidence, should be on a "fast track," treated not like any other State request, but specially and quickly implemented. Indeed, States should be required to implement such legislation as a condition of adhering to the Court's statute.

V. CONCLUSION

38. The Committee is confident in the view that none of the legal issues raised by the Court's creation are intractable in nature. Consistent with its charge, the Committee's report addresses key elements of the proposed Court's Statute as opposed to undertaking an article by article analysis of the 1994 ILC Draft. Subsequent reports will address issues not commented upon here. The Committee hopes its work will prove useful to the members of the Preparatory Committee in their deliberations and urges them to consider this report and the reports annexed thereto in their discussions over the next year.

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26. Bleich, *supra* note 24, at 289-90.

27. Similarly, the Committee feels that a State challenging the jurisdiction of the Court (Art. 34) or the admissibility of a case (Art. 35) should bear the burden of establishing that a case is not admissible. *See* Bleich, *supra* note 24, at 291.

28. In addition, the difference between "jurisdiction" and "admissibility" is not always clear. It would be preferable if the Statute either employed a unitary concept or explicitly defined the relationship between these two ideas.