Denver Journal of International Law & Policy

Volume 25
Number 2 *Winter*

Article 5

May 2020

Complementarity

Jeffrey L. Bleich

Complementarity

JEFFREY L. BLEICH*

This report provides a preliminary analysis of the complementarity provisions of the most recent International Law Committee (ILC) Draft Statute of the International Criminal Court (ICC). This report is intended to stimulate discussion of the treatment of complementarity by the ILC, and is not intended to reflect any formal conclusion of the International Law Association (ILA) Working Group.

I. BACKGROUND

The principle of "complementarity" concerns the allocation of jurisdiction between domestic courts and the ICC. The scope of "complementarity" — i.e., the extent to which a domestic court may claim exclusive jurisdiction over a case implicating the Court's powers and vice-versa — is relevant to any prosecution of a person alleged to have committed an international crime, who is simultaneously subject to the domestic jurisdiction of a state respecting that same crime.

Because complementarity questions can arise only in cases where both the Court and a State have not only the capacity, but the *intent* to prosecute the same crime, complementarity presupposes that there is a subset of "interested States" with an interest in prosecuting these cases. States which may have an interest in applying their own domestic laws and procedures in such cases include: (1) the State in which the crime occurred; (2) the State(s) in which the victim(s) and/or the accused reside; (3) the State(s) in which the victim(s) and/or the accused resided at the time of the crime, and/or; (4) the State(s) of nationality for the victim(s) and/or the accused. To resolve whether any of these States may claim precedence over the prosecution of an international crime, the ILC Draft Statute must address five issues.

1. What factors define an "interested State" for purposes of challenging ICC jurisdiction;

2. As between two competent forums, the ICC and the domestic court of an interested State, which forum has priority;

3. What standard shall apply for determining the competency of a domestic forum;

---

* Lecturer in Human Rights, University of California at Berkeley School of Law; Partner, Munger, Tolles & Olsen, San Francisco; B.A., 1983, Amherst College; MPP, 1986, Harvard University; J.D., 1989, University of California at Berkeley; Law Clerk to Chief Justice William H. Rehnquist 1990-91; Law Clerk to Iran-U.S. Claims Tribunal 1991-92.

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.

These issues are addressed with varying degrees of clarity in the ILC Draft Statute.

II. THE ILC DRAFT STATUTE

The principle of complementarity appears in the preamble of the ILC draft statute, and is implicated by other provisions of the draft.[1] The third paragraph of the preamble of the ILC draft statute provides, essentially, that the ICC may assert jurisdiction only where domestic court jurisdiction is not "available," or domestic court proceedings would be "ineffective." "[The] court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective."[2] The Statute as drafted thus reflects a general consensus that the ICC should not *supplant* national judicial authorities, but may only *complement* these authorities.

As discussed in more detail below, although there is agreement that the ICC Statute should give preference to "effective" domestic forums over the ICC, there is significant disagreement about how this principle will be accomplished.

The Draft Statute provides that the ICC may be seized with a matter or investigation based upon either a State complaint or a referral by Article 25 of the Security Council. Following such an investigation, the ICC prosecutor would have authority to issue an arrest warrant. Under Article 53, a State party served with a warrant for the arrest and transfer of an accused international criminal "shall . . . take immediate steps to arrest and transfer the accused to the Court."[3] Depending upon the circumstances, "a State may have discretion to extradite the accused to a requesting State or refer the case to its competent authorities for the purpose of prosecution."[4] A State party may, within 45 days of receiving such a request, file a written application to set aside the request.[5]

Outside of States challenging requests for arrest and transfer, the Draft Statute does not directly address the issue of which States are "interested" for purposes of challenging the Court's jurisdiction. As a

---

1. *See Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994) [hereinafter *1994 ILC Draft*]. Complementarity principles are, as noted infra, also implicated by Articles 25, 34, 35, 36, 42, 53, 54, and 56.

2. *Id.* pmble., ¶ 3.

3. *Id.* art. 53(2)(a).

4. *Id.* art. 53(2)(b)-(c).

5. *Id.* art. 53(6).

general matter, Article 53 confers jurisdiction to a State in which the accused resides at the time an investigation begins. Article 21 suggests that domestic jurisdiction is based upon traditional international law concepts, and thus a State may assert jurisdiction based either on territoriality (i.e., if the accused is within its borders, or if the act occurred within its borders) or based on nationality (if the accused is a national).

To the extent that a party with jurisdiction wishes to challenge the Court's jurisdiction on the ground that an "effective" and "available" trial procedure exists within its domestic system, that party must proceed under Article 34. Article 34 provides that a State may challenge the ICC's jurisdiction only prior to or at the commencement of the trial.[6]

Article 35 provides that the Court shall decide the ultimate question of whether a domestic forum affords an "effective" and "available" procedure for prosecuting the crime; the Court should refrain from proceeding with the matter if a State has investigated a matter and made an "apparently well-founded" decision not to proceed, or if the matter "is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take further action."[7] The Court must give the State complainant or the accused a hearing on these issues.[8]

Finally, the Act provides that a decision by the Court to exercise jurisdiction will have preclusive effect against domestic proceedings for the same offense.[9] Article 42(1) contains a "non bis in idem" provision, which protects a person tried by the Court from "double jeopardy" by barring subsequent prosecution in domestic fora for the same international crimes.

III. GENERAL CONCERNS REGARDING THE CURRENT DRAFT

The phrasing of the ILC's complementarity provisions has been criticized for failing to clarify: (1) the extent to which the ICC may claim jurisdiction over an action arguably within the competence of a domestic court; (2) the burden of proof, timing, and standard for deciding that a domestic judicial authority is unavailable or ineffective; and (3) the effect of such a determination upon domestic court proceedings. These general concerns are addressed in turn.

---

6. *Id.* art. 34(b). An accused or the Court itself, however, may question its jurisdiction at any time up until the conclusion of the trial. *Id.* arts. 34(b), 35(b).

7. *Id.* art. 35.

8. *Id.* art. 36.

9. *Id.* art. 42.

A. *The Authority of the ICC to Determine the Adequacy of State Forums*

Some States, including the United States, China, and Japan, have expressed concern that — as presently written — the ICC could unilaterally determine that it has a superior capacity to prosecute crimes already being prosecuted by domestic courts.[10] However, the nature of these concerns varies. China, for example, is reluctant to give the ICC authority to decide the issue of its own jurisdiction, and would prefer that this decision be left to domestic courts or possibly the Security Council.[11] The United States does not object to the ICC having the ability to decide its own jurisdiction in principle, but would endorse this power only if the challenges to jurisdiction are available at all stages (including the investigative stage), and the ICC has limited discretion to assert jurisdiction over a State's objection.[12]

The United States proposes that Articles 25-27 be amended to give States standing to object to any investigation by the ICC prosecutor that might interfere with a legitimate national investigation or prosecution. The United States also believes that the universe of interested States with standing to object to ICC jurisdiction may vary depending upon the nature of the crime. The United States appears to favor a regime under which the State of nationality of the victim or accused may be deemed a "more interested State" than the State in which the act occurred or the State in which the accused now resides.[13]

Most other nations appear, however, to prefer that the determination of whether a case is properly subject to domestic jurisdiction be left to the Court itself,[14] and that designation as an "interested State"

---

10. *See, e.g., Comments of United States to Ad Hoc Committee on the Establishment Of An International Criminal Court,* U.N. GAOR, 50th Sess., at 10, U.N. Doc. A/AC.244/1/add.2 (1995) [hereinafter *Comments to the Ad Hoc Committee*]. (". . . [draft statute] frequently fails to uphold [national jurisdiction]"); Statement of H. Owada (Japan) to U.N.G.A. 6th Comm., U.N. GAOR, 50th Sess., at 4, U.N. Doc. A/C.6/50/SR (1995) (urging principal reliance upon national courts pursuant to principle of *aut dedere, aut judicare*); Statement of C. Shiqiu (China) to U.N.G.A. 6th Comm., U.N. GAOR, 50th Sess., U.N. Doc. A/C.6/50/SR (1995) ("Regrettably, [the complementarity principal] has not been fully implemented in the operative part of the Statute and some provisions even appear to be contrary to the principle.").

11. *See* Statement of C. Shiqiu (China) to U.N.G.A. 6th Comm., *supra* note 10, at 3.

12. *See Comments to the Ad Hoc Committee, supra* note 10, at 8-10, ¶ 3.

13. See *id.* at 19, ¶¶ 54-56.

14. The European Union, for example, has endorsed the principle that the Court alone should carry out the principle of "complementarity" and decide whether national forums are available and effective. *See* Statement by J.A. Yanez-Barneuvo (European Union) to U.N.G.A. 6th Comm., U.N. GAOR, 50th Sess., at 3, U.N. Doc. A/C.6/50/SR (1995) ("Resort should be made to [the Court] where the Court has decided that national systems were not available, or were ineffective."). *See* Statement of F. Wong (New Zealand) to U.N.G.A. 6th Comm., U.N. GAOR, 50th Sess., at 2, U.N. Doc. A/C.6/50/SR.27 (1995) ("The decision to pursue individual criminals . . . should reside with the Court itself.").

be based upon traditional notions of territoriality and nationality. This view has been urged particularly by smaller nations, which apparently fear that larger nations will be tempted to use procedural devices to block investigations and prosecutions and thereby avoid exposing international criminal violations to an international forum.[15]

B. *The Standard for Determining the Effectiveness of a State's Domestic Procedures, Timing, and the Burden of Proof*

Although there is a fragile consensus that the ICC should have the capacity to determine whether its jurisdiction survives a concurrent prosecution by a State, there is general dissatisfaction with the Draft's failure to address the implementation of this authority. Specifically, the draft fails to clarify the standard that the ICC must apply in resolving challenges, when such challenges may be heard, and who should bear the burden of proof.

1. Standard for Evaluating Whether a State Forum is Available and Effective

Official United States Comments have requested that the Draft Statute be altered to limit the capacity of the ICC to determine that an interested State's forum is not available and effective. Specifically, the United States believes that a domestic forum should be considered "unavailable" or "ineffective" only if: (1) the crime at issue falls outside of that nation's domestic jurisdiction; (2) the State affirmatively declines to exercise its jurisdiction without a full and adequate investigation, or in an "unreasonable" manner; or (3) the domestic forum's judicial process is not "bona fide."[16] United States officials contend that the preamble should clarify that States have the primary duty to prosecute these crimes, and that if a nation has an operating judicial system and makes a bona fide effort to investigate and/or prosecute an offense that otherwise falls within the ICC's jurisdiction, the ICC may not interfere.[17] Under the United States' position, States with a bona fide judi-

---

15. *See generally Report of the Ad Hoc Committee on the Establishment of an International Criminal Court.* A/50/22 ¶ 49, at 10 (1995) [hereinafter *ICC Committee Report*).

16. *See Comments Received Pursuant to Paragraph 4 Of General Assembly Resolution 49/53 On The Establishment Of An International Criminal Court,* Ad Hoc Committee on The Establishment of an International Criminal Court, U.N. GAOR, 50th Sess., at 9, U.N. Doc. A/AC.244/1/Add. 2 (1995) [hereinafter *United States Comments*]. *See also* Statement of I.E. Ayewah (Nigeria), U.N. GAOR, 50th Sess., at 2, U.N. Doc. A/C.6/50/SR (1995) (Although Nigeria endorses complementarity, "[W]e would have difficulties with the statue if a hierarchy is established in which the ICC would be superior to national courts. Rather, recourse to the court should only be in the absence of national jurisdiction.").

17. *United States Comments, supra* note 16; *See also* Statement by Jamison S. Borek, Deputy Legal Advisor, United States Department of State, to U.N.G.A. 6th Comm., U.N. GAOR, 50th Sess., at 4, U.N. Doc. A/C.6/50/SR.27 (1995) [hereinafter *State Department Comments*] ("The decision to pursue individual criminals . . . should reside

cial process may thus, at any time, preempt an ICC investigation or prosecution of crimes that fall within their domestic jurisdiction.[18]

The United States also appears anxious not to allow the standard for determining whether a judicial process is "bona fide" to create a significant loop-hole that would allow the Court to arrogate jurisdiction from a competent State tribunal. In its comments to the Sixth Committee, the State Department further expressed reluctance to allow the ICC to determine the extent of its own jurisdiction, unless "*bona fide* procedure" is understood very narrowly.[19]

The United States' position that "ineffectiveness" should be read narrowly has some support in the ILC commentary to the Preamble. The commentary States that the ICC "is intended to operate in cases where there is no prospect of those persons being duly tried in national courts." The United States' stance thus would permit ICC jurisdiction only where a State court has no judicial procedure, refuses to employ its procedure, or its procedure is not "bona fide" in that it offers "no prospect" of a person being "duly tried."

Other States as well have "stressed that the standards [for determining "availability" and "effectiveness"] were not intended . . . to allow the international criminal court to pass judgement on the operation of national courts in general."[20] Accordingly, they favor a standard that would limit the Court's discretion to deny the jurisdiction of State tribunal to extraordinary cases where there is no likelihood of a "bona fide" prosecution occurring.

2. The Timing of Challenges to Jurisdiction

As noted, the Statute provides that a State may challenge the jurisdiction of the Tribunal at any time after the prosecutor has initiated an investigation until the time of trial. The United States urges that the question of superior domestic jurisdiction should be addressable at an even earlier stage of the proceedings.[21] Consistent with the United

---

with the Court itself.").

18. The United States Department of State reiterated its official position regarding the principle of complementarity at the 50th Session of the U.N. General Assembly Sixth Committee. *See State Department Comments, supra* note 17, at 4. "It is . . . important to elaborate further the principle of complementarity. We believe that *bona fide* national investigations and prosecutions will always be preferable, where possible. . . . [Accordingly,] national jurisdiction should enjoy a presumption of regularity." *Id.* at 4.

19. *Id.* ("[i]t is a . . . difficult, intrusive and subtle judgment to say that a functioning national system is not *bona fide.*"). Some States would go further than the United States and apparently permit a State's mere representation that it has a *bona fide* judicial process to suffice to block ICC jurisdiction. *See, e.g.,* Statement of H. Golan (Israel) to U.N.G.A. 6th Comm., U.N. GAOR, 50th Sess., at 2, U.N. Doc. A/C.6/50/SR.27 (1995) (where State has prior jurisdiction to try [accused] for some or all of the alleged criminal acts . . . it may reasonably claim priority.).

20. *ICC Committee Report*, supra note 15, at 9, ¶ 43.

21. *Comments to the Ad Hoc Committee, supra* note 10, ¶ 52, at 19 ("It is essential

States' view, States should be allowed to challenge jurisdiction "before the prosecutor of the international criminal court initiated an investigation because even the initiation of an investigation might interfere with the exercise of national jurisdiction."[22] The United States also advocates an automatic stay of jurisdiction while a State conducts a bona fide investigation.[23]

Under the United States' proposal (which to date has not been addressed in other State comments), a State could block any investigative action by the ICC prosecutor, by demonstrating that a "full," "adequate," or "bona fide" investigation is proceeding in that State forum.[24] The United States, although it does not suggest how, maintains that examination of these issues should be allowed to precede any investigation at all, because decisions to investigate should not be "secondary considerations which the court (or Prosecutor) has sole discretion to decide."[25] The United States Comments do not attempt to propose a formal mechanism for accomplishing this right for pre-investigation objection. The Comments fairly suggest, however, adding either some form of restriction on the prosecutor's ability to commence an investigation at all, or some independent limitation by some entity other than the ICC, or prosecutor, to prohibit further investigation.

3. Burden of Proof

The Draft Statute at present is silent on the issue of who should bear the burden of proving whether the ICC properly has jurisdiction: the party supporting State jurisdiction or the party contesting jurisdiction. To the extent that States have addressed the issue, smaller nations appear to support having the burden of proof reside with the nation claiming jurisdiction to prove that its national system is available and effective, and that the Court resolve the issue of its own jurisdiction based upon this evidence.[26]

According to the Ad Hoc Committee Report, however, "some delegations" expressed the view "that the burden of proof as to the appropriateness of an exception to the exercise of national jurisdiction should be on the international criminal court."[27] This view may be consistent with the United States' suggestion that "national jurisdiction

---

to take account of the views of interested States at the earliest stage of investigation, and not wait until there is a prosecution before the court.").

22. *ICC Committee Report*, *supra* note 20, at 10.

23. *Id.*

24. *Id.*

25. *Id.*

26. *See* Statement of F. Wong (New Zealand) to U.N.G.A. 6th Comm., *supra* note 14, at 2 ("the burden of rebutting the Court's superior claim to jurisdiction must lie with the national authorities and not on the Court.").

27. *ICC Committee Report*, *supra* note 15, at 10, ¶ 49.

should enjoy a presumption of regularity."[28]

C. *Effect on State Court Proceedings*

Finally, general concerns have been expressed by the United States and other delegations that the effect of an ICC investigation upon State Court proceedings should be more clearly defined. As noted, consistent with its presumption in favor of State court proceedings, the United States favors amending Articles 26 and 27 to require the prosecutor and Court to take greater consideration of on-going domestic investigations.[29] The Ad Hoc Committee Report notes a suggestion (possibly from the United States) that the Prosecutor should suspend investigation and that the ICC suspend jurisdiction immediately once an interested State informs the Court that it is conducting its own *bona fide* investigation.[30]

Several other States have also expressed reservations about the doctrine of *non bis in idem*, as it would not only foreclose a State from initiating a prosecution where the Court has found that prosecution was ineffective, but it would prevent any other State from proceeding with a prosecution once trial commenced.[31] These States noted that, in most cases, national judicial systems are more highly developed and thus more effective than the ICC. The States thus questioned the wisdom of foreclosing prosecutions in these jurisdictions, simply because the first nation to object to jurisdiction lacked a bona fide system.

IV. ILA SUB-COMMITTEE WORKING GROUP ANALYSIS

To date, the ILA working group on complementarity of the Sub-Committee on the Permanent International Criminal Court has not attempted to form a consensus on the various concerns expressed about the ILC Draft Statute. The following issues, however, may warrant discussion and further consideration.

A. *Court's Power to Decide Its Own Jurisdiction*

As noted, the ILC Draft Statute provides that *the Court* has the capacity to decide whether a domestic forum has exclusive jurisdiction. In general, it may be preferable to retain this portion of the ILC Draft Statute, notwithstanding the United States government's and other nations' concerns about giving the Court this authority.

Granting the Court authority to decide the question of jurisdiction is consistent with the function of the ICC. One key purpose of creating an International Criminal Court is to afford the international commu-

28. *State Department Comments, supra* note 17.
29. *See United States Comments, supra* note 16, at 10, ¶¶ 9-10.
30. *ICC Committee Report, supra* note 15, at 10, ¶ 51.
31. *Id.* at 9, ¶43.

nity as a whole an opportunity to assure that individuals who commit crimes of an international character are brought to justice. To permit domestic courts to assume this responsibility, without an international instrument's ability to examine the effectiveness of those domestic courts, may undermine an important function of creating the ICC.

In addition, reservations about permitting the Court to decide its own jurisdiction may derive less from structural notions about the appropriateness of conferring this power to the ICC, than from a lack of confidence in the Court generally, or in the adequacy of specific rules to limit the ability of the Court to overreach. The better approach to allaying these concerns may be not to assign competence elsewhere, but to tighten up procedures by which the Court may examine its own jurisdiction.

B. *The Factors that Define an "Interested State" for Purposes of Challenging ICC Jurisdiction*

It also may be preferable not to disturb the ILC Draft Statute's current formulation of whether a State qualifies as "interested" for purposes of asserting jurisdiction. Under current international law, there are several theories of jurisdiction that may support a nation's assertion of competence to try an international matter.[32] Although valid concerns may exist about the appropriateness of certain theories of jurisdiction relative to others, the Statute of the ICC appears to be an awkward vehicle for attempting to select among these theories, or to establish a ranking of claims of jurisdiction. Consensus is more likely to develop through practice rather than through theory.

Accordingly, it appears proper to allow the ICC to decide, case-by-case, whether a State's asserted theory of jurisdiction is appropriate, and thus whether the State's judicial system is "available." This allows for a more deliberate evolution of the law of State jurisdiction. At the same time, it may have significant tactical benefits. It may give the ICC flexibility to cede jurisdiction to the State with the "best" theory of jurisdiction where several States wish to claim jurisdiction, i.e., the State with the greatest stake in assuring effective prosecution.

C. *Preference for Domestic Jurisdiction*

In general, the consensus favoring domestic jurisdiction (where available and effective) seems sensible. The function of the ICC is to improve the effectiveness of prosecution of international crimes. 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

---

32. *See, e.g.*, Draft Convention on Jurisdiction with Respect to Crime, *reprinted in* 29 AM. J. INT'L L. 435 (Supp. 1935), (addressing theories of Territorial, Nationality, Protective, Universal, and Passive Personality Jurisdiction).

judicial system, is probably not justified. In addition, given that State systems are generally better developed at this point (and the risk of ICC preemption may spur them to even more effective prosecution in the future), the concept of the ICC as a supplemental court — at least in theory — seems proper.

D. *Standard, Timing, and Burden of Proof*

1. Standard for "Unavailable" or "Ineffective"

As noted, several States have complained that the standard by which the ICC may determine that a State's claim of jurisdiction will not be accepted is presently ambiguous. This criticism appears well-taken. The terms "unavailable" or "ineffective" require greater elaboration to give States comfort that the Court will not overreach in refusing to cede jurisdiction to a State that seeks to proceed with a *bona fide* prosecution. The ILC may wish to address this matter through commentary to the Statute.

The ILC commentary may define "unavailable" as referring to situations in which: (1) the forum does not provide for jurisdiction over the crime; (2) the exercise of jurisdiction would exceed the limits of internationally recognized extra-territorial jurisdiction; or (3) the forum is in a State of unrest such that its judicial system is not operating in a reliable fashion.

The commentary may define "ineffective" as referring to situations in which: (1) the forum provides a standard of guilt, or punishment, which is incompatible with international norms; or (2) the State in question has not demonstrated an actual intention to prosecute, or to conduct, a full and prompt investigation.

Including these clarifications in the commentary to the ILC Draft Statute may go a long way towards alleviating concerns expressed by the United States and other nations about giving the Court too much discretion.

2. Timing

The United States' proposal to permit challenges to jurisdiction *before* an investigation has not, as yet, provoked much interest among other nations, and may not be perceived as particularly compelling. The marginal expense to the Court of a precipitous investigation, or the marginal "interference" with domestic investigations caused by a potentially duplicative ICC inquiry, may not seem sufficient to warrant adding another whole layer of delay and administrative procedure.

To the extent that such a proposal is to be incorporated, the ILC may consider proposing a "stay" procedure. A State, upon learning that an ICC investigation is being considered, and that such an investigation would be unnecessary or inappropriate, may request an order of the Court staying the prosecutor from conducting those portions of the

investigation that the State finds objectionable. The standard for granting such a stay would be that there is a reasonable probability that the State investigation will be adequate, and that further investigation by the prosecutor would cause an undue burden to the State or the Court. This stay application could be addressed on an expedited basis. By setting a relatively high standard of proof, the "stay" procedure may limit State attempts to use challenges to jurisdiction as a means of delaying or compromising investigations. Absent compelling reasons, an investigation could go forward until the Court had an opportunity to consider its jurisdiction.

3. The Burden of Proof

At present the Draft Statute does not allocate the burden of proof for establishing domestic jurisdiction over a case pending before the ICC. The Draft Statute should address this omission, and formally allocate the burden of proof as between the ICC prosecutor and a State asserting primary jurisdiction. Although arguments exist for allocating the burden to either party, three considerations in particular may favor having the burden assigned to the State.

First, the issue of State jurisdiction will generally arise only after a State has determined to initiate or continue a prosecution that will deprive the ICC of further authority to review the matter. Because the State has made the choice to assert its superior jurisdiction, it should be required to demonstrate that it has taken this action in good faith, and not simply as a means of depriving the ICC of jurisdiction.

Second, as a practical matter, the State will possess the best evidence concerning the effectiveness of its own system; thus, requiring it — rather than the prosecutor — to produce this evidence will likely result in a more informed decision.

Third, politically, it may be offensive to require the ICC prosecutor to present affirmative evidence impugning the availability or effectiveness of a State's judicial system. As a matter of decorum and respect to the State, it appears more appropriate to deny State jurisdiction on the basis of a failure to satisfy the burden of proof, as opposed to an affirmative conclusion that the system is inadequate.

To the extent that there are objections to this allocation of the burden of proof, these concerns may be mitigated by the statute in applying a relatively low standard of proof, such as the preponderance of the evidence standard.

V. CONCLUSION

The foregoing is offered as a basis for further discussion among the ILA Working Group and Committee on a Permanent International Criminal Court about the doctrine of complementarity. As noted, despite criticisms that have been directed at the Statute's failure to fully define the principle of complementarity, the general principle appears

sound. It should be encouraged with appropriate refinements, including some or all of those discussed above.