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Complementarity and Human Rights: A Litmus Test for the International Criminal Court

JESSICA ALMQVIST*

I. INTRODUCTION

In spite of the establishment of the International Criminal Court (ICC or the Court), national criminal jurisdictions remain the principal actors expected to realize the basic aims of international criminal justice as articulated in the preamble of the Rome Statute (the Statute).¹ The basic aim is to put an end to impunity for the perpetration of “grave crimes,” or “the most serious crimes of concern for the international community as a whole,” and thus, contribute to the prevention of such crime, as well as guarantee lasting respect for and the enforcement of international justice.² In fact, the Statute *reinforces* a central role of national criminal justice institutions in that it does not merely reiterate a general competence of states to exercise criminal jurisdiction over such crimes, but stipulates that it is a *duty* of states to do so.³ The drafters of the Statute took care to emphasize

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1. Rome Statute of the International Criminal Court, Jul. 17, 1998, U.N. Doc. A/CONF. 183/9 [hereinafter Rome Statute]. The Statute entered into force on July 1, 2002. As of February 8, 2007, one hundred and five states are parties to the Statute. Forty-one states have signed, but not ratified the Statute.

2. *See id.* at pmbl, art. 5(1).

3. *See id.* ¶ 6. For a comprehensive account of the specific international legal foundations of this duty, see CHERIF B. BASSIOUNI, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995). Yet, note that the draft Statute for an International Criminal Court, *Yearbook of the International Law Commission* vol. II (Part Two) (1994), does not recognize a general duty of states to exercise criminal jurisdiction, but instead only refers to the principle *aut dedere aut judicare*. U.N. Int'l Law Comm'n, *Draft Statute for an International Criminal Court*, [1994] 2 Y.B. INT'L L. COMM'N 65, art. 54, U.N. Doc. A/49/10.

the central role of national criminal jurisdictions in ensuring that massive crimes do not go unpunished and they recognized a general legal basis for this assertion. Nevertheless, little attention was paid to the question of what states⁴ must and must not do in order to fulfill this duty.⁵ This article discusses the insufficient attention that has been afforded to the issue of human rights standards. In particular, more attention is owed to the very relevant question of how human rights standards should inform or constrain national efforts to bring the perpetrators of the most serious crimes to justice, and the role of the Court in relation to these standards.⁶

4. For the purpose of the article, unless otherwise indicated, the term "state" refers to "state parties" to the Rome Statute. The main focus is on the duty of states on whose territories massive crimes have been committed. Thus, it does not contemplate the duty of so-called extraterritorial states, the doctrine of universal jurisdiction, and its appropriate application. It does, however, consider the duty of non-state parties since such states can become directly affected by ICC decisions as a result of a Security Council referral. Rome Statute, *supra* note 1, at art. 13(b).

5. Until now, the legal debate has centered, for the most part, on whether states are obliged to revise their criminal codes and incorporate the crimes included in the Statute (e.g., genocide, war crimes, and crimes against humanity). See, e.g., Jann Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUSTICE 86 (2003); Goran Sluiter, *Implementation of the ICC Statute in the Dutch Legal Order*, 2 J. INT'L CRIM. JUST. 158 (2004).

6. The state of affairs is reminiscent of a general tendency in the field of international criminal justice devoted to the suppression and punishment of grave or serious crime. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. Treaty Doc. No. 81-15, 78 U.N.T.S. 277 (failing to make any mention of the need to protect the rights of the accused). See also Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 (offering no direct reference to human rights protection); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Jan. 26, 1973, U.S.T. 564, 974 U.N.T.S. 178 (offering no direct reference to human rights protection). Other anti-terrorist conventions make a modest reference to "fair treatment in all stages of the proceedings." See, e.g., International Convention Against the Taking of Hostages art. 8.2, Dec. 18, 1979, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Materials art. 12, Mar. 3, 1980, U.N.T.S. 246; International Convention for the Suppression of Terrorist Bombings, G.A. Res. 52/164, arts. 8, 14, U.N. Doc. A/Res/52/164 (Dec. 15, 1997). *But see* International Convention on the Suppression of Acts of Nuclear Terrorism art. 12, Apr. 13, 2005, U.N. Doc. A/RES/59/766 (stipulating a more elaborate requirement of human rights protection). It should also be note that the International Law Commission is showing an increasing interest in the need for a more integrated approach in its more recent work. See, e.g., U.N. Int'l Law Comm'n, *Draft Code of Crimes against the Peace and Security of Mankind*, [1996] 2 Y.B. INT'L L. COMM'N 26, art. 11, U.N. Doc. A/51/10. See also U.N. Int'l Law Comm'n, *Second Report on the Obligation to Extradite or Prosecute (aut dedere aut judicare)*, ¶ 14, U.N. Doc. A/CN.4/585 (Jun. 11, 2007) (prepared by Zdzislaw Galicki).

II. THE ROME STATUTE

The extent to which the Rome Statute touches on the question of what is expected of states and their courts in terms of criminal justice action, and the relevance of human rights standards in governing such action, lies in the context of the Court's admissibility criteria (article 17 of the Statute). Since the Court's jurisdiction is complementary to national criminal systems,⁷ and thus, exercises its jurisdiction in situations where states are unable or unwilling to genuinely investigate or prosecute a case,⁸ the Office of the Prosecutor (OTP), and ultimately, the Trial Chamber, if the Court's jurisdiction is challenged,⁹ are required to make an assessment as to whether an ICC intervention (or engagement) in a particular case is warranted.¹⁰ Notwithstanding that the Court's jurisdiction is generally limited to "the most serious crimes of international concern" (article 1 of the Statute), other limitations abound. Indeed, the OTP must declare a case *inadmissible* if it 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 the prosecution.*"¹¹ In order to determine a state's unwillingness in a particular case:

7. Rome Statute, *supra* note 1, at arts. 1, 17.

8. *But see* Avril MacDonald & Roelof Haveman, *Prosecutorial Discretion—Some Thoughts on "Objectifying" the Exercise of Prosecutorial Discretion of the Prosecutor of the ICC 2* (Int'l Crim. Ct. Office of the Prosecutor, Apr. 15, 2003) (arguing that the ICC is not merely a "court of last resort," but could develop a range of functions, including consultation, monitoring, advise, and education).

9. According to the Rome Statute, *supra* note 1, at art. 19(2)(b), "[A] State which has jurisdiction over the case [may challenge the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court] on the ground that it is investigating or prosecuting the case or has investigated or prosecuted the case." *See also* Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the Rules of Procedure and Evidence, Nov. 2, 2000, Rule 51 ("Information provided under article 17."), U.N. Doc. PCNICC/200/1/Add.1 (2000) [hereinafter ICC Rules of Procedure and Evidence]. "In considering the matters referred to in article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider, *inter alia*, information that the State referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the Prosecutor has confirmed in writing to the Court that the case is being investigated or prosecuted." *Id.*

10. Rome Statute, *supra* note 1, at art. 15.

11. *Id.* at art. 17(1)(a) (emphasis added). But note that there are other criteria for admissibility as well. Another criterion for admissibility is that the case is of sufficient gravity. *Id.* at art. 17(1)(d) (stating that a case must be declared as inadmissible if it "is not

[T]he Court shall consider, having regard to the principles of *due process* recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an *unjustified delay* in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were or are not being conducted *independently and impartially*, and they were not or are not being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.¹²

In determining state inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to “obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”¹³

Furthermore, while a case must be declared inadmissible if “the person has already been tried for conduct which is the subject of the complaint” (article 17.1.c), according to article 20(3), the principle *ne bis in idem* is not applicable if the national proceeding:

- (b) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (c) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the

of sufficient gravity to justify further action by the Court.”). Furthermore, the OTP must consider the criteria spelled out in article 53 of the Statute for initiating an investigation or starting a prosecution. *See id.* at art. 53.

12. Rome Statute, *supra* note 1, at art. 17 (emphasis added).

13. ICC Rules of Procedure and Evidence, *supra* note 9, Rule 51 (“Information provided under article 17”) (“In considering the matters referred to in article 17, paragraph 2, and in the context of the circumstances of the case, the Court may consider, *inter alia*, information that the State referred to in article 17, paragraph 1, may choose to bring to the attention of the Court showing that its courts meet internationally recognized norms and standards for the independent and impartial prosecution of similar conduct, or that the State has confirmed in writing to the Prosecutor that the case is being investigated or prosecuted.”) (emphasis added).

circumstances, was inconsistent with an intent to bring the person concerned to justice.¹⁴

Thus, in principle, the OTP may declare a case admissible even though some process has occurred and been concluded in a national setting, if that process failed to be impartial, independent, or consistent with the norms of due process as recognized in international law.

Although articles 17 and 20 are meant to govern the actions of the OTP, to some extent, they indicate the existence of limitations on the range of judicial actions that a state may pursue in fulfilling its investigatory and prosecutorial duties under the Statute. In an important sense, the criteria for determining unwillingness in article 17 seem to reveal an international concern over, not only situations reaching a total failure of state judicial action (i.e., *de facto* impunity), but also with situations involving *some* judicial action, however in a manner that fails to conform with fundamental human rights.¹⁵ Arguably, the provision in question informs states that they cannot act however they please in relation to perpetrators of massive crimes, but must respect their fundamental human rights in the process of bringing them to justice.¹⁶

From the standpoint of the Statute, the rights that are most significant are those of the accused and those embodied in international legal standards of “due process.”¹⁷ Respecting such standards entails ensuring that judicial actions do not suffer from “unjustified delays”¹⁸ and are carried out by an independent and

14. Rome Statute, *supra* note 1, at art. 20(3)(a)-(b).

15. Rome Statute, *supra* note 1, at art. 20(3).

16. Compare Rome Statute, *supra* note 1, at art. 20(3) (allowing jurisdiction over persons for the same conduct already tried in another court where the previous trial violated basic norms of international human rights), with U.N. Econ. & Soc. Council [ECOSOC], U.N. Comm'n H.R., *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, Principle 19, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) (“Duties of states with regard to the administration of justice: States shall undertake prompt, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.”).

17. See Rome Statute, *supra* note 1, at art. 17(2).

18. See *id.* at art. 17(2)(b). For a stricter formulation of this right, see International Covenant on Civil and Political Rights art. 9(3), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (“Everyone arrested or detained on a criminal charge . . . shall be entitled to trial within a *reasonable* time or to release.”) (emphasis added).

impartial tribunal.¹⁹ Furthermore, in stipulating that state judicial action must be “genuine” and must in no way be aimed to “shield the accused” from facing criminal responsibility, article 17(2) could also be said to evince a concern with the fate of the victims and their right to justice. Still, the provision in question fails to advance a detailed list of fundamental human rights that a state is obliged to afford an accused person during the adjudication of massive crime.²⁰ In effect, it is unclear whether in addition to the rights made explicit in article 17(2), all the rights of the accused usually incorporated into the notion of due process in international human rights law must be respected. Several procedural rights are left unmentioned, including the right to be presumed innocent; the right to a fair and public hearing; the right to be promptly informed about the charges in a language the accused fully understands and speaks; the right to have adequate time to prepare a defense and examine witnesses against him or her before and during the trial; the right to have the free assistance of an interpreter and necessary translations; the right not to be compelled to confess guilt; and the right to appeal.²¹ Furthermore, the provision is silent on whether the Court would ever tolerate restrictions or derogations of such rights.²²

Moreover, there is no consideration in the Statute for the interests of criminal suspects to be protected from cruel or inhumane treatment in detention.²³ Nor is there any regard to the severity of the penalties that may lie ahead for those who have been judged by national courts or tribunals as responsible for massive crimes.²⁴ In fact, the entire question of acceptable forms of

19. See *id.* at art. 17(2)(c). For a stricter formulation of this right, see ICCPR, *supra* note 18, at art. 14(1) (“In the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”) (emphasis added).

20. See ICCPR, *supra* note 18, at arts. 14-15.

21. *Id.* See also Rome Statute, *supra* note 1, at arts. 63-67 (stating that the ICC itself must respect these rights in conducting its own proceedings).

22. The ICCPR does not list articles 14 and 15 in its provision on non-derogable rights. ICCPR, *supra* note 18, at art. 4.2. For an interpretation of these provisions, including the right of access to court, including fair trial and presumption of innocence as forming part of the category of preemptory norms and thus non-derogable, see U.N. Human Rights Comm. [UNHRC], *General Comment on Article 4: States of Emergency*, ¶¶ 14-15, U.N. Doc. CCPR/C/21/Rev.1/Add 11 (July 24, 2001) [hereinafter *General Comment on Article 4*].

23. ICCPR, *supra* note 18, at arts. 7, 10.

24. *But see* ICCPR, *supra* note 18, at art. 6(2) (not outlawing the death penalty for the most serious crimes in an absolute manner and stipulating that “[i]n countries that have

punishment had to be left aside since supporters of capital punishment objected persistently to the idea of including a provision in the Statute that imposed restrictions on the range of penalties, and which forbade the application of the death penalty in national proceedings.²⁵ On July 17, 1998, the President of the Rome Conference recognized the contentious nature of the issue and the restrictions it placed on the Court at the last meeting of the plenary:

The debate at this conference on the issue of which penalties should be applied by the Court has shown that there is no international consensus on the inclusion or non-inclusion of the death penalty. However, in accordance with the principle of complementarity, national jurisdictions have the primary responsibility for investigating, prosecuting and punishing individuals, in accordance with their national laws, for crimes falling under the jurisdiction of the International Criminal Court. In this regard, the Court would clearly not be able to affect national policies in this field. It should be noted that not including the death penalty in the Statute would not in any way have a legal bearing on national legislation and practice regarding the death penalty. Nor shall it be considered as influencing the development of international customary law or in any other way the legality of penalties imposed by national systems for serious crime.²⁶

Thus, a state's recourse to severe or cruel methods of punishment is outside the judicial purview of the ICC. According to the complementarity principle, from the standpoint of the Statute and the Court, states are free to decide on this question in accordance with their national laws.²⁷

not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.”) *See also* Second Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 44/128, U.N. Doc. A/RES/44/128 (Dec. 15, 1989) (aiming at the abolition of the death penalty). As of February 11, 2008, the Protocol has 65 parties and 35 signatories, indicating that the world's states are still divided on the death penalty.

25. *See* President of the U.N. Security Council, *Statement by the President of the Security Council*, U.N. Doc. S/PRST/2006/28 (Jun. 22, 2006) [hereinafter *Statement by the President of the Security Council*].

26. *Id.* at 317.

27. *See id.*

Aside from the rights of the accused, the Statute affords little attention to other rights-bearers whose interests are affected. This includes the rights of witnesses and their interests to be protected from intimidation or threats to life, to be treated in a dignified manner in the course of interrogations or cross-examination, and so on.²⁸ In OTP decisions about opening an investigation or starting a prosecution, a concern with the fate of witnesses of massive crimes has entered as a consideration in an extremely oblique and “instrumentalized” manner as the OTP may declare a state as unable to carry out investigations or prosecutions if it cannot “obtain . . . the necessary evidence and testimony”²⁹ The absence of effective witness protection can be relevant in this respect.³⁰ Inasmuch as no independent consideration is afforded to the rights of witnesses in national criminal justice settings, it would be odd to perceive this passage as generating a set of rights or as manifesting a human rights concern.

Finally, while the preamble of the Statute reminds us that “during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,” there is no statutory reference to an international obligation of states to secure the right to justice for victims of massive crime.³¹ In fact, even though the Statute and the creation of the Court is often said to evince a growing international commitment to attend to the fate of the victims of massive crime and their right to justice,³² it is not evident that this concern must be the basis for and shape *national* judicial action.³³

28. See, e.g., Christine Chinkin, *Due Process and Witness Anonymity*, 91 AM. J. INT'L LAW 75 (1997) (an account of the controversies surrounding the status of the rights of witnesses and how to balance their rights to protection with due process guarantees).

29. Rome Statute, *supra* note 1, at art. 17(3).

30. *But see* Int'l Crim. Ct., Office of the Prosecutor, *Second Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*, at 6 (Dec. 13, 2005) [hereinafter *Second Report of the ICC*]. See also Int'l Crim. Ct., Office of the Prosecutor, *Third Report of the Prosecutor of the International Criminal Court to the Security Council pursuant to UNSCR 1593 (2005)*, at 7 (June 14, 2006), [hereinafter *Third Report of the ICC*]; *infra* Part III of this article.

31. See Rome Statute, *supra* note 1, at pmb. (“Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State.”).

32. See, e.g., William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53 (2008).

33. See *id.* ¶ 10 (“Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.”).

In fact, to the extent that the interests of victims are of direct relevance to decisions about admissibility and jurisdiction, it is as a *countervailing* consideration that speaks *against* ICC intervention.³⁴ This consideration should not necessarily be understood as revealing a lack of concern with the fate of victims in national contexts. On the contrary, it may be seen as a good faith reflection of a growing realization concerning the complexities in hashing out what victims are owed in terms of justice. This may lead to the question of whether victims' interests are better served through international investigations and prosecutions, or through national alternative dispute resolution mechanisms.³⁵ Still, for the purposes of this article, it is enough to note the absence of recognition of states' international obligations to victims and the victims' right to justice in their own national proceedings.

In more general terms, it cannot be assumed that the extensive human rights protection afforded to all participants in ICC-conducted proceedings must be applied and transposed into national settings. For one thing, article 17(2) entails no reference to this effect, but rather, if anything, seems to articulate a more modest set of international human rights obligations that states must respect in exercising criminal jurisdiction over massive crime. The debate on the death penalty also manifests the prevalence of an important distinction between human rights standards for ICC proceedings and those applicable for its national counterparts. While the Statute imposes an absolute prohibition against the death penalty in relation to persons judged by the ICC as responsible for massive crime,³⁶ it is clear that the complementarity principle is understood to mean that this standard should not be seen as having any bearing at all in national settings.³⁷ Whether

34. See generally Int'l Crim. Ct., Office of the Prosecutor, *Policy Paper on the Interests of Justice* (Sept. 2007) (detailed assessment of article 53 of the Rome Statute and its implications for the admissibility of a case).

35. See, e.g., Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J. INT'L CRIM. JUST. 695 (2005).

36. Rome Statute, *supra* note 1, arts. 23, 77.

37. See generally ICCPR, *supra* note 18. See also Diplomatic Conference of Plenipotentiaries, June 15-July 17, 1998, *Chairman's Working Paper on Article 75: Fines and Assets Collected by the Court*, 314, U.N. Doc. A/CONF.183/C.1/WGP/L.3/Rev.1 (July 6, 1998) ("States have the primary responsibility for prosecuting and punishing individuals for crimes falling under the subject-matter jurisdiction of the Court. *In accordance with the principle of complementarity between the Court and national jurisdictions, the Court would clearly have no say on national policies in this field.*") (emphasis added).

other rights-related matters which have been omitted from the Statute should be understood in the same way—as giving states free choice from the standpoint of the Statute and the Court to handle them in whatever way they please—remains unclear.

In this context, it must also be noted that the question about the possible relevance of human rights standards in an ICC assessment of state inability and unwillingness to genuinely investigate or prosecute was afforded considerable attention by a group of experts which were consulted by the OTP in the initial stages of its work. According to its paper, the term “genuinely” restricts the class of national proceedings that require deference from the ICC.³⁸ At the same time, it recognized the validity of the concern expressed by states that took part in the negotiations preceding the adoption of the Rome Statute that national proceedings should not be found “non-genuine” simply because of a comparative lack of resources or because of a lack of compliance with *all* human rights standards. Nonetheless, its conclusion ended up being very vague.³⁹ On one hand, it noted, “although the ICC is not a ‘human rights court,’ human rights standards may still be of relevance and utility in assessing whether the proceedings are carried out genuinely.”⁴⁰ On the other hand, it held that “the standard for assessing ‘genuineness’ should reflect appropriate deference to national systems as well as the fact that the ICC is not an international court of appeal, nor is it a human rights monitoring body designed to monitor all the imperfections of legal systems.”⁴¹

III. THE ICC PROSECUTORIAL POLICIES

The first policy paper that was published by the OTP in 2003 paid considerable attention to the question about the meaning of the complementarity principle and its appropriate application.⁴² It

38. Int'l Crim. Ct., Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, ¶ 22 at 8 (2003) (prepared by Xabier Agirre, et al.) [hereinafter *ICC Paper—Principle of Complementarity*].

39. *Id.* n.10 at 9-10.

40. *Id.* ¶ 23 at 8-9.

41. *Id.* ¶ 52 at 16. *But see id.* Annexes 6-7 at 34-35 (replete of references to international human rights standards and jurisprudence deemed to be of relevance in assessing issues of admissibility).

42. Int'l Crim. Ct., Office of the Prosecutor, *Paper on Some Policy Issues before the Office of the Prosecutor*, at 4-5 (Sept. 2003) [hereinafter *ICC Policy Paper on Issues before the Office of the Prosecutor*]. *See also id.* at 5 (reaffirming the central role afforded to

notes that “[g]iven the many implications of the principle of complementarity and the lack of court rulings, detailed, exhaustive guidelines for its operation will probably be developed over the years.” Nevertheless, as a general rule, the policy of the OTP “in the initial phase of its operation [is that it will take] action only when there is a *clear case of failure to take national action*.”⁴³ In other words, the OTP would abstain from engaging in situations where states do make an effort and, thus refrain from making a qualitative assessment of those efforts. Instead, the OTP would focus on total failures of state action.

Since the original prosecutorial policy was set out in 2003, the OTP has addressed four situations. Three of those situations, Uganda, the Congo, and the Western African Republic,⁴⁴ are the result of state referrals; that is, straightforward expressions of state interests in having the ICC leading investigations and the prosecution of massive crimes committed in their territories as a result of the mentioned states’ inability to pursue these actions themselves.⁴⁵ In relation to these situations, or the cases that emerge from them, the OTP has not made its own qualitative assessment of state inability.⁴⁶ Instead, it has been content with these states’ own appreciation of their inability to fulfill their

national jurisdictions: “Indeed, the principle underlying the concept of complementarity is that States remain responsible and accountable for investigating and prosecuting crimes committed under their jurisdiction and that national systems are expected to maintain and enforce adherence to international standards.”).

43. *Id.* at 5 (emphasis added). Furthermore, as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the state or organization allegedly responsible for those crimes. *Id.* at 6-7.

44. Press Release, Int’l Crim. Ct., Office of the Prosecutor, Background: The Situation in the Central African Republic, at 1 (May 22 2007). The government of the Central African Republic referred the situation to the OTP. The Cour de Cassation, the country’s highest judicial body, subsequently confirmed that the national justice system was unable to carry out the complex proceedings necessary to investigate and prosecute the alleged crimes, in particular to collect evidence and obtain the accused. *Id.* at 3.

45. For a more in-depth consideration of state-referrals, see Claus Kress, ‘Self-referrals’ and ‘Waivers of Complementarity’, 2 J. INT’L CRIM. JUST. 944 (2004).

46. ICC Policy Paper on Issues before the Office of the Prosecutor, *supra* note 42, at 5 (inaction of state may be the appropriate course of action when the group bitterly divided by conflict may agree to a prosecution by a Court perceived as neutral and impartial; in such cases, there will be no question of unwillingness or inability under Article 17). But note that state voluntarism might not be an appropriate reason for not assessing state inability and unwillingness as it may well be the case that states prefer to transfer some investigative or prosecutorial burdens to international organs even though their own institutions would be able to handle them. See Burke-White, *supra* note 32.

investigative and prosecutorial duties demonstrated by the referral.⁴⁷ The fourth situation now before the ICC—that of Darfur—has required a more careful assessment of what is meant by state unwillingness or inability to genuinely fulfill its investigative or prosecutorial duties. The Darfur situation, which was brought to the Court as a result of a Security Council referral,⁴⁸ has proven problematic in several respects. One trouble is that Sudan, not being a state party, contests the legality of an ICC intervention. In particular, Sudan challenges the jurisdiction of the Court on the basis that it is investigating, or has investigated, the cases concerned, and has also established special tribunals.⁴⁹ Because of the contentious nature of the matter, the OTP has had to travel to Sudan in an attempt to verify the Sudanese assertions. In the course of this process, a more substantive assessment of how states conduct their affairs emerged.⁵⁰

Reporting for the first time in the Summer of 2005 to the UN Security Council, the Chief Prosecutor emphasized that his Office would not limit its review to the question of whether Sudan was investigating or prosecuting the crimes or persons concerned (or had done so), but also “*whether any such proceedings [conducted in Sudan] meet the standards of genuineness as defined by article 17 of the Rome Statute.*”⁵¹ Furthermore, the Chief Prosecutor’s second and third reports to the Security Council note that “the continuing insecurities in Darfur prohibit the establishment of an effective system for the protection of victims and witnesses,” and that “this constitutes a serious impediment to the conduct of effective investigations into alleged serious crimes in Darfur by national judicial bodies.”⁵² In other words, as a result of the UN Security Council referral of the Darfur situation, the initial approach to complementarity (as spelled out in the 2003 policy paper) had to be revised and extended to an appraisal of the nature and spirit of

47. See ICC Rules of Procedure and Evidence, *supra* note 9, Rule 53 (“Deferral provided for in article 18, paragraph 2”).

48. S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (March 31, 2005) (the Prosecutor of the ICC decided to open investigation in the Darfur on June 6, 2005).

49. Situation in Darfur, Situation No. ICC-02/05, Submissions Requesting a Stay of Proceedings *in limine litis*, ¶ 1 (Oct. 25, 2006).

50. *Id.* at 5.

51. Int’l Crim. Ct., Office of the Prosecutor, [First] Report of the Prosecutor of the International Criminal Court to the Security Council pursuant to UNSC 1593 (2005), 4 (June 19, 2005) (emphasis added).

52. Second Report of the ICC, *supra* note 30, at 6. See also Third Report of the ICC, *supra* note 30, at 7.

state action. Nonetheless, once it was clear that Sudan had not investigated or prosecuted the OTP targeted incidents or persons, the Office returned to its initial policy stance.⁵³ Thus, the four subsequent reports to the UN Security Council refrain from elaborating further on the meaning and application of “genuinely,” “unable,” “unwilling,” etc., but only affirm that Sudan has *failed* to investigate and prosecute any of the specific incidents of concern for the OTP.⁵⁴ Still, in the case of new efforts of Sudan to investigate or prosecute some of the incidents, the question of whether the need to assess or evaluate state action will re-emerge as state inability or unwillingness is seen as an *ongoing* assessment.⁵⁵

IV. THE OTP PROMOTION OF NATIONAL PROCEEDINGS

Recent OTP statements indicate a growing interest in the potential role of national criminal jurisdictions in achieving the goals of international criminal justice as spelled out in the Rome Statute; these statements encourage national jurisdictions to not remain disinterested in their potential contributions, but rather to shoulder their responsibilities to the extent possible.⁵⁶ The Prosecutorial Strategy launched in September 2006 invokes as a first principle that states have the “primary responsibility for preventing and punishing atrocities in their own territories”;

53. *Third Report of the ICC*, *supra* note 30, at 7; Int'l Crim. Ct., Office of the Prosecutor, *Fourth Report of the International Criminal Court to the U.N. Security Council Pursuant to UNSCR 1593*, 10 (Dec. 14, 2006) (*prepared by* Louis Moreno Ocampo) [hereinafter *Fourth Report of the ICC*]; Int'l Crim. Ct., Office of the Prosecutor, *Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593*, 12 (June 7, 2007) [hereinafter *Fifth Report of the ICC*]; Int'l Crim. Ct., Office of the Prosecutor, *Sixth Report of the Prosecutor of the International Criminal Court, to the U.N. Security Council Pursuant to UNSC 1593*, 15 (Dec. 5, 2007) [hereinafter *Sixth Report of the ICC*].

54. In response to the Prosecutor's Application to summon the persons concerned, the Trial Chamber held that “it is a *sine qua non* that national proceedings do not encompass both the person and the conduct which are the subject of the case before the Court.” Prosecutor v. Ahmad Muhammad Harun (“Ahmad Harun”) and Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), Case No. ICC-02/05-01/07, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶¶ 23-24, (Apr. 27, 2007).

55. See, e.g., *Third Report of the ICC*, *supra* note 30, at 7.

56. *But see* Int'l Crim. Ct., Office of the Prosecutor, *Draft Regulations of the Office of the Prosecutor*, at 13 (Jun. 3, 2003). Note that the section related to the complementarity principle has so far not been substantiated. It only mentions that issues to be considered in this respect include: standard monitoring activities; open sources evaluation; bilateral agreements, activities, dialogue; assessment of inability, unwillingness; and complementarity in the judicial process.

furthermore, it stresses that ICC intervention is *exceptional* and that the Court will only step in when states “fail to conduct investigations or prosecutions or where they purport to do so when in reality are unwilling or unable genuinely to carry out proceedings.”⁵⁷ Critically, it declares that:

[T]he Office has adopted a positive approach to complementarity, meaning that it encourages national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.⁵⁸

Furthermore, according to the same document, one of its five key objectives in the next three years (2007-2009) will be to foster:

[A] type of international cooperation that will assist states and international organizations to prevent and resolve conflicts producing massive crimes and address impunity for these crimes. Depending on the situation, this may involve international cooperation for the promotion of national proceedings, traditional mechanisms or other tools, with the involvement of a variety of actors.⁵⁹

Thus, the OTP’s commitment to “promote national proceedings where possible” will not be restricted to general declarations, but is supposed to be translated into concrete schemes of international cooperation that serve such promotion and, in fact, assist states in the process of shouldering their responsibilities. Another notable feature of the emerging positive approach is that it is not restricted to “national proceedings,” but would also cover “traditional mechanisms or other tools.” Thus, there is a considerable recognition regarding the need for flexibility in the interpretation of what is required of states to discharge their statutory duty.

The advancement of a positive account of complementarity is best explained as the unequivocal response of the ICC to a series of potentially different challenges that have come to the surface in

57. Int’l Crim. Ct., Office of the Prosecutor, *Report on Prosecutorial Strategy*, at 5 (Sept. 14 2006) [hereinafter *ICC Report on Prosecutorial Strategy*].

58. *Id.* But see *ICC Paper—Principle of Complementarity*, *supra* note 38, at 5 (emphasis added) (idea of a positive account of the complementarity principle already present: “[I]t should be a high priority of the Office of the Prosecutor to actively remind states of their responsibility to adopt and implement effective legislation and to encourage them to carry out effective investigations and prosecutions. Such encouragement could be *general*, for example, in public statements; or *specific*, for example, in bilateral meetings.”).

59. *ICC Report on Prosecutorial Strategy*, *supra* note 57, at 9 (emphasis added).

the course of seeking to make the ICC work in the last four years. For one thing, there is a potential challenge that the ICC will become overburdened with cases and, hence, needs to be able to off-load its burdens of responsibility in ending impunity in massive crime situations to national criminal jurisdictions.⁶⁰ Another potential challenge is the inability of the Court to respond to the so-called “impunity gap.”⁶¹ In spite of the ample fulfillment of its mandate, the ICC cannot be expected to end impunity alone; rather, a collaborative effort that involves a range of criminal jurisdictions, including national ones, will be required. A third potential challenge for the ICC has to do with its own difficulties of *delivering* justice, compared to that of its national counterparts. It is clear that, for years to come, the Court will face several cooperation problems that will stand in the way of efficient evidence collection, protection of witnesses, and transportation of those who are facing charges at the Hague.⁶² Furthermore, being located far away from the crime scene, in both geographical and cultural terms, the ICC also faces an extraordinary task in seeking to ensure that justice not only is done, but is also perceived to be done from the standpoint of the victims and affected populations.⁶³ In light of these considerations, national criminal jurisdictions are not only needed, but are also better situated to bring the perpetrators of the most serious crimes to justice.

Notwithstanding the virtues of a positive complementarity approach, however, the question of acceptable manners of national judicial engagement, the relevance of human rights standards, and the role of the Court in relation to these standards,

60. See, e.g., *ICC Paper—Principle of Complementarity*, *supra* note 38, ¶ 60. See also Prosecutor Luis-Moreno Ocampo, Address to Third Session of the Assembly of States Parties to the Rome Statute on the International Criminal Court 2 (Sept. 6, 2004) [hereinafter Ocampo, Address to Third Session] (positive approach defined as a core policy). According to Prosecutor Ocampo’s statement, a focused prosecutorial strategy is now one of OTP’s core policies. This means that its own efforts will center “on perpetrators bearing the greatest responsibility, with a policy of short investigations, targeted indictments and expeditious trials, and an interdisciplinary investigative approach, adjusted to the peculiarities of each situation.” Ocampo, Address to Third Session, *supra*, at 2.

61. *ICC Policy Paper on Issues before the Office of the Prosecutor*, *supra* note 42, at 7.

62. For a comment on the need for substantial efforts for arrest and surrender, see *ICC Report on Prosecutorial Strategy*, *supra* note 57, at 8.

63. For an argument about the importance of cultural proximity among the participants in criminal proceedings in order to achieve that justice is *seen* to be done, see Jessica Almqvist, *The Impact of Cultural Diversity on International Criminal Proceedings*, 4 J. INT’L CRIM. JUSTICE 745 (2006).

is brought to the forefront of the legal debate. The adoption of a positive complementarity approach means that the Court is no longer neutral towards the nature and spirit of national judicial actions; rather, it endorses them and promotes them "where possible." Then the central question is whether it will promote national proceedings in an *unqualified* manner to the extent that "nearly anything goes" or whether it will stress a number of principles and rules purporting to inform and constrain such proceedings. Though it is correct that "the ICC is not a human rights monitoring body, and its role is not to ensure perfect procedures in compliance with all international standards,"⁶⁴ the adoption of a positive complementarity approach, if translated into concrete actions, requires consideration of the relationship between complementarity and human rights.

V. DEFINING THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND COMPLEMENTARITY

How will the Court react to national proceedings that fail to respect proper defense guarantees (e.g., the right to defense) or proceedings that fail to secure the right of the accused to examine evidence and witnesses? How will it react to national efforts to conduct investigations or trials which fail to protect witnesses with well-founded fears of being intimidated or even assassinated after having provided their information or given their testimonies? How will it respond to a national proceeding against a former dictator that only lasts two hours, culminating in a cold-blooded execution against a wall? How will it approach situations of vastly prolonged detentions of persons suspected of being responsible for the most serious crimes while waiting for trial? What is, in fact, its position on national laws that make massive crimes seem less severe than they really are by making the persons responsible for such crimes lay down their weapons and accept a peace accord that includes only some account of criminal justice?

These questions are already subject to heated legal controversy in light of real-life failures to ensure full respect for human rights in the course of bringing perpetrators of massive crimes to justice. Still, more controversy is to be expected as a result of increasing national efforts to exercise criminal jurisdiction within the framework of the Rome justice system. As noted

64. ICC Paper—Principle of Complementarity, *supra* note 38, at 15, ¶ 49.

earlier,⁶⁵ the Statute affords very modest guidance to the Court on appropriate responses. In principle, there may be several possible approaches to balancing the relationship between complementarity and human rights for the Court to consider. The remainder of this article sheds light on three such accounts. Each of them is inspired and builds upon different positions in ongoing debates about liberal tolerance and its limits.⁶⁶ Thus, the subsequent discussion of these approaches assumes that the toleration debates are useful and relevant as a starting point for a more comprehensive assessment of options available, including their respective advantages and shortcomings from the standpoint of the Court. The utility of these debates, for the purpose of advancing these approaches, stems from their emphasis on the fact of pluralism. In this article, the notion of pluralism refers to the diverse ways of bringing perpetrators of massive crimes to justice as manifested in different national contexts. The basic question is whether the ICC should impose restrictions on this kind of pluralism and, if so, on what grounds.

A. An "Open-Handed" Toleration Approach

The first approach to be considered is the "open-handed" approach, which emphasizes that all national proceedings are to be tolerated by the OTP. Thus, the OTP would refrain, as a matter of principle, from opening an investigation in a particular situation or starting a prosecution of a particular case, if that case is being or has been investigated or prosecuted through a national proceeding, as long as the national effort to discharge the statutory duty does not undermine the basic purpose of ending impunity. With this approach, the OTP would only object to a national proceeding that, in fact, aims to shield the accused.

At first glance, there are several factors that support the adoption of an open-handed toleration approach. These include: the vague mandate of the ICC regarding matters of national human rights protection; the relatively modest attention paid to methods of bringing perpetrators of serious crimes to justice

65. See *supra* Part II.

66. There is a wealth of literature on this topic. See, e.g., SUSAN MENDUS, *JUSTIFYING TOLERATION: CONCEPTUAL AND HISTORICAL PERSPECTIVES* (1988); *TOLERATION AND ITS LIMITS* (Melissa Williams & Jeremy Waldron eds., NYU Press, 2008). See also Chandran Kukathas, *Cultural Toleration*, in 39 *ETHNICITY AND GROUP RIGHTS* 69 (Ian Shapiro & Will Kymlicka eds., 2000).

through other international criminal law instruments;⁶⁷ and the fact that the main problem in the fight against impunity continues to be state inaction rather than action. In addition, the aim of achieving universal acceptance of the Rome Statute's terms may also speak in favor of this approach.⁶⁸ Indeed, it is no coincidence that the states that remain outside the circle of those "fully committed" to the Rome Statute and to the ICC are those known to be particularly wary of cultural variations among states, especially those variations concerning the method of conducting investigations, prosecutions and punishment of serious crimes.⁶⁹ Thus, in light of the universalistic aspirations of the Court, a more rigorous approach towards enforcement of human rights and an insistence on full compliance with human rights standards could undermine the prospects of committing these states to the virtues of sharing a common system of criminal justice.

The open-handed toleration approach is enthused by, what in political theoretical studies is defined as, a "libertarian" stance towards pluralism, although the former is applied to govern the relationship between states and international institutions (in this case, the ICC) and focuses on matters of criminal justice.⁷⁰ Like the libertarian stance, the open-handed approach seriously considers the realities of pluralism and the difficulties of defining a "universal yardstick" for judging which way is right or acceptable in all situations.⁷¹ Indeed, this approach assumes that there is no such common standard. Instead, it emphasizes that each actor has its own mode of dealing with serious crime, each system will develop its response once faced with a situation, taking into account its own particular beliefs of what justice means and requires.⁷² Furthermore, given the absence of a common standard and the fact that a national settlement is not the manifestation of a

67. See generally Kleffner, *supra* note 5; Sluiter, *supra* note 5.

68. Sixth Session of the Assembly of States Parties, Nov. 30-Dec. 14, 2007, *Plan of Action of the Assembly of States Parties for Achieving Universality and Full Implementation of the Rome Statute of the International Criminal Court*, Annex 1(1), ICC-ASP/6/20 (Dec. 14, 2007).

69. See, e.g., Steven C. Roach, *Arab States and the Role of Islam in the International Criminal Court*, 53 *POLITICAL STUD.* 143, 145-47 (2005).

70. For a contemporary libertarian account of toleration, see Kukathas, *supra* note 66, at 72-78. For an understanding of international society as one regime in which the notion of toleration is applicable, see MICHAEL WALZER, *ON TOLERATION* 14-36 (Yale University Press 1997).

71. See WALZER, *supra* note 70.

72. See *id.*

haphazard or coincidental series of events, but rather the upshot of a national understanding of justice, an outside intervention (in this case an international judicial intervention) could be seen as an arbitrary attack on settled national judicial arrangements and an affront to the beliefs that underlie and shape them. In other words, a libertarian stance emphasizes the counterproductive effect that an outside intervention could have in situations where states desire to discharge their statutory duty even though their method of doing so seems offensive or disturbing from the standpoint of outsiders (in this case the ICC).⁷³

Even though an open-handed toleration approach sits uncomfortably with the view that supports imposing more rigorous *moral* restrictions on the range of possible modes of justice, it is not entirely hostile to the idea of imposing some restrictions. The open-handed toleration approach, however, imposes restrictions on the way in which states conduct their criminal justice affairs only if it is necessary to safeguard or restore international security.⁷⁴ In practice, this means that the limitations would be triggered in situations deemed to constitute an international security threat. To the extent that a state is capable of acting against perpetrators of serious crimes by removing them from the public and punishing them for their criminal acts, there is no need for the Court to enforce restrictions on that state's particular course of action. This is by no means a controversial prosecutorial approach in the light of the spirit of emerging OTP policies. For one thing, as noted in Part III of this article, the Office has adopted a stance according to which it will focus on situations involving *total* state failure to prevent impunity. In addition, the OTP has expressed its intent to be attentive to the realities of

73. Yet, note that this approach does not condemn the international recourse to "softer" or "non-coercive" forms of international influence on state judicial action, including criticism, negotiation, communication, or even the creation of incentive schemes. Also notable is the fact that what constitutes "coercive" is a contested notion. Robert Nozick regards as coercive not merely the actual use of force, but also the very threat of force. Furthermore, he also considers the relevance of a dependency relation. See Robert Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL* 440-472 (Sidney Morenbesser and Patrick Suppes eds., 1969). In contrast, John Rawls considers as coercive not merely the institution of law, but also public opinion and social pressure. JOHN RAWLS, *THEORY OF JUSTICE* 117 (Harvard University Press 1999) (1971). This article does not elaborate on the discussion of whether an international judicial intervention, can in fact be said to be coercive, in the light of the requirement of state consent (with the exception of Security Council referrals).

74. See Kukathas, *supra* note 66, at 72-78.

pluralism by affirming that it “will take into consideration the need to respect the diversity of legal systems, traditions and cultures.”⁷⁵ Notably, it recognizes the close nexus between its own mandate and security-oriented concerns. For example, one of the OTP’s stated objectives is to make efforts to “reinforce [its impact to deter] by aligning the strategies of the Office with broader efforts aimed at stabilizing situations of violence and crime.”⁷⁶

Nevertheless, in spite of its initial plausible appeal, the open-handed toleration approach suffers from several problematic assumptions. This article contends that these problems will come to the surface in the course of advancing the Court’s complementarity policies. One such problem with this approach is its constant need to explain why intervention in general is *not* necessary or justified. In particular, the approach makes an unfortunate assumption. By viewing action as solely a manifestation of belief, it does not consider the possibility that action (as well as inaction) may be shaped, at least to some extent, by a number of unfortunate circumstances (e.g., insecurity, violence, conflict, scarcity, etc.). Thus, it does not dwell on the range of reasons *for* international engagement (and the many forms of softer engagement).

Recognition of factors other than a belief that may lead to the development (or lack thereof) of national justice systems, allows international assistance to overcome, or at least, reduce the many obstacles that may stand in the way of progress.⁷⁷ Still, from the

75. *ICC Policy Paper on Issues before the Office of the Prosecutor*, *supra* note 42, at 5.

76. *ICC Report on Prosecutorial Strategy*, *supra* note 57, at 9. Also, see the Chief Prosecutor’s comment on the Darfur situation: “Justice for past and present crimes will contribute to enhancing security and send an important warning to those individuals who might otherwise continue to resort to violence and criminality as a means of achieving their aims.” *Fourth Report of the ICC*, *supra* note 53, at 2. In an address to the General Assembly, Philippe Kirsch noted, “The International Criminal Court was created to break the vicious cycle of crimes, impunity and conflict. It was set up to contribute to justice and the prevention of crimes, and thereby to peace and security.” Philippe Kirsch, Address to the U.N. General Assembly, U.N. Doc # 3 (Nov. 1, 2007). Yet, note that Kirsch also states that the ICC was established to achieve several objectives, including “to put an end to impunity for genocide, crimes against humanity and war crimes, to contribute to the prevention of these crimes which threaten peace and security and to guarantee lasting respect for and the enforcement of international justice. These aims are universal. They are reflected in the Charter of the United Nations, and in the statements and practice of the Member States and of the organization of the United Nations.” *Id.* at 6.

77. Whether a particular agent’s lack of resources can generate obligations on others to assist is a topic of extensive debate in political theoretical studies. For example, Ronald Dworkin makes a distinction between the reason for the lack of resources of an agent as

standpoint of a libertarian account of toleration, recognition of state inability is something of an anomaly. Thus, if we take the claim about state inability seriously (and there is growing international support for the need to take into account this possibility),⁷⁸ it becomes necessary to advance an alternative to the open-handed toleration approach. Specifically, an approach that can house the notion of state inability and can support its attendant claims for international assistance and cooperation in this field of public affairs is needed.

Another problematic assumption underlying the open-handed toleration approach is the supposed absence of a common standard of conduct in the area of public affairs. The fact that most of the world's states have accepted the terms of the International Covenant on Civil and Political Rights, including articles 14 and 15 (concerning the rights to due process and a fair trial), seems to undermine this assumption.⁷⁹ While it is important to recognize that there are cases of blatant disregard for these provisions as well as disagreement on how to interpret their concrete implications, including what counts as legitimate restrictions, and whether derogations are ever justified,⁸⁰ the fact that most states have

being either a matter of circumstance or choice. Only the former case generates a right to assistance. See generally RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (1999).

78. Note that state inability is recognized in the Statute itself. Rome Statute, *supra* note 1, at art. 17.3. But there is also a growing strand of research that focuses on the notion of failed or failing states. The notion of failed or failing state is contested. One indicator of general state failure is inability to “deliver political goods—security, education, health services, economic opportunity, a legal framework of order and a judicial system to administer it” Robert I. Rothberg, *The New Nature of Nation-State Failure*, 25:3 WASH. Q. 85, 87 (2002). Although “only a handful of the world’s 191 states can now be categorized as failed, or collapsed . . . [s]everal dozen more, however, are weak and serious candidates for failure.” *Id.* at 85.

79. As of April 18, 2008, one hundred sixty-one states had ratified the International Covenant on Civil and Political Rights while thirty-one states have not done so. Among those who have not ratified are China, Cuba, Malaysia, Myanmar, Pakistan, Saudi Arabia, Singapore, and the United Arab Emirate. But note that, as of March 5, 2008, fifty of the ratifying states have not ratified the Optional Protocol to the International Covenant on Civil and Political Rights which recognizes the right of an individual to complain about human rights violations allegedly committed by their state to the UN Human Rights Committee. See Office of the High Commissioner for Human Rights Homepage, <http://www.ohchr.org/EN/Pages/WelcomePage.aspx> (last visited Jul. 14, 2008).

80. For a claim about the non-derogable nature of due process and fair trial rights as laid down in articles 14 and 15 of the ICCPR, see *General Comment on Article 4, supra* note 22, ¶¶ 14-15. For a recent account of the meaning of fair trial rights (ICCPR, article 14), see U.N. Human Rights Comm. [UNHRC], *General Comment on Article 14: The*

signed on to these provisions gives them some cross-cultural validity.⁸¹

A third problem with an open-handed toleration approach is its assumption that *any* mode of bringing perpetrators of serious crimes to justice, does in fact succeed in restoring security. A blatant disregard of due process and the right to a fair trial risks blurring the difference between revenge and punishment and fails to break the "vicious cycle of crimes."⁸² If the aim is to improve the security situation, some attention must be paid to the basic conditions for breaking that cycle.⁸³ Thus, even if the Court adopts complementarity policies that place security-oriented concerns at the forefront (whether applied to prosecutions or more supervisory functions), it still cannot remain ignorant of how states go about their criminal justice affairs. Rather, it must insist that states respect some basic principles to govern their conduct in this field in order to realize the aims of international security. The key question then turns on what those principles should be.

B. The Alternative of a Human Rights Engaging Stance

The current absence of a more restrictive approach to toleration, one that delimits the range of acceptable national proceedings, does not mean that such an approach is impossible. One reason for the Court's failure to address the question so far is that it simply has not been confronted with the particular issue. Yet, relevant international experience indicates that once faced with the need to collaborate with national criminal courts, the Court will need to engage in the more thorny questions relating to human rights.

For nearly ten years, the two *ad hoc* international criminal tribunals did not consider a more positive role for national courts in affected states. The primacy of jurisdiction that is attributed to these two tribunals is based on the inability of the affected states to investigate and prosecute the serious crimes that were

Right of Equality Before Courts and Tribunals and to a Fair Trial, U.N. Doc CCPR/C/GC/32 (Aug. 23 2007).

81. But note that it is a different question whether the ICC should be engaged in monitoring or evaluating state performance in relation to these provisions. In this section, the question is left open.

82. Kirsch, *supra* note 76, at 3.

83. See generally U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter U.N. Secretary-General, *Rule of Law*].

committed.⁸⁴ Yet, in the course of an ever-growing pressure to complete their work in addition to some improvements in terms of national judicial capabilities and legal frameworks, the two tribunals have come to develop a closer relationship with national courts.⁸⁵ In the process of this work, neither of the two tribunals have compromised or ignored human rights standards. In fact, they have insisted on full compliance, at least insofar as the rights of the accused are concerned.⁸⁶ Indeed, respect for human rights, including a national prohibition of the death penalty, has been affirmed as a *condition* for allowing affected states and others to take part in bringing persons deemed to be responsible for the most serious crimes to justice.⁸⁷ Thus, in making the decision of whether to refer cases back to national criminal jurisdictions, the ICTY's Office of the Prosecutor must ensure that the "accused will receive a fair trial and that the death penalty will not be imposed or carried out."⁸⁸ In a similar vein, the same language has been incorporated into the ICTR Rules of Procedure and Evidence.⁸⁹

84. For example, see *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 58 (Oct. 2, 1995), noting that: "[w]hen an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as 'ordinary crimes' or proceedings being 'designed to shield the accused,' or cases not being diligently prosecuted."

85. See Int'l Crim. Tribunal for the former Yugo., *Assessments of the President and the Prosecutor of the International Criminal Tribunal for the former Yugoslavia on the Implementation of the Completion Strategy of the Tribunal Pursuant to Security Council Resolution 1534 (2004)* 5 (Nov. 2004) [hereinafter *2004 ICTY Completion Strategy*].

86. At the same time, it must be noted that the two international criminal tribunals focus on fair trial rights and death penalty alone. Thus, their main concern is not with failures to protect the interests of other rights-bearers who are involved in the judicial process, such as victims and witnesses. A substantive toleration approach, on the other hand, would need to afford equal respect and consideration to all participants. In its commitment to ensure, or else promote full compliance with all international human rights standards of all states, it cannot compromise or disregard certain participants in designing a scheme of cooperation.

87. See *2004 ICTY Completion Strategy*, *supra* note 85.

88. In the case of the ICTY, "the Referral Bench may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that *the accused will receive a fair trial and that the death penalty will not be imposed or carried out.*" *Prosecutor v. Savo Todovic*, Case No. IT-97-25/1, Decision on Rule 11 *bis* Referral, ¶ 11 (emphasis added). Even after the transfer of the indicted cases to national criminal jurisdictions, the Office may monitor national proceedings and remains able to revoke the transfer of a case if it finds that a fair trial is not being conducted. *2004 ICTY Completion Strategy*, *supra* note 85.

89. *2004 ICTY Completion Strategy*, *supra* note 85, at 5.

In order to make referrals effective, the ICTY has established partnerships with national organizations in the former Yugoslavia aimed at improving their capabilities to conduct fair trials.⁹⁰ The Court also made repeated calls for international assistance in advancing national judicial capabilities to ensure that all cases that have been referred back are conducted in full compliance with standards of due process.⁹¹

Completion efforts for the ICTR have proven difficult, not in the least, because of human rights concerns. Until recently Rwanda applied the death penalty,⁹² therefore, referrals to Rwandan national courts were seen as out of the question.⁹³ Instead, the tribunal had to consider offers from other national criminal jurisdictions, which claimed to conform to the ICTR's stated conditions.⁹⁴ Yet, Rwanda's recent abolition of the death penalty coupled with its adoption of new laws aimed at guaranteeing fair trials has led the ICTR Prosecutor to file three referral requests back to its courts.⁹⁵ In spite of the challenges resulting from its insistence on full compliance with the rights of the accused, the ICTR recently reaffirmed its commitment to this goal in stating that "it continues to seek new measures to increase efficiency and further expedite its work, whilst at all times

90. Int'l Crim. Tribunal for the former Yugo., *Assessments of the President and the Prosecutor of the International Criminal Tribunal for the former Yugoslavia on the Implementation of the Completion Strategy of the Tribunal Pursuant to Security Council Resolution 1534 (2004)* 35 (Dec. 2007).

91. *Id.* at 39. See also Int'l Crim. Tribunal for the former Yugo., *Assessments of the President and the Prosecutor of the International Criminal Tribunal for the former Yugoslavia on the Implementation of the Completion Strategy of the Tribunal Pursuant to Security Council Resolution 1534 (2004)* 25, 25 & 56 (May 2007). See also 2004 ICTY *Completion Strategy*, *supra* note 85, at 27-30 (mentioning specific problems).

92. *Human Rights Watch World Report 2003*, HUMAN RIGHTS WATCH, 2003, <http://www.hrw.org/legacy/wr2k3/pdf/rwanda.pdf>.

93. *Id.*

94. Int'l Crim. Tribunal for Rwanda, *Completion Strategy of the International Criminal Tribunal for Rwanda*, ¶¶ 38-39 (May 31, 2007) [hereinafter *May 2007 ICTR Completion Strategy*]. In addition, after having rejected Norway on the basis that it lacked jurisdiction under its own laws in relation to the crime of genocide, the ICTR Trial Chamber engaged in a lengthy evaluation of the extent to which the Netherlands, which had received the case, had complied with international standards for a fair trial and in particular the rights of the accused. *Id.* ¶ 37.

95. Int'l Crim. Tribunal for Rwanda, *Assessments of the President and the Prosecutor of the International Criminal Tribunal for Rwanda on the Implementation of the Completion Strategy of the Tribunal*, ¶ 35 (Nov. 16 2007), available at <http://69.94.11.53/ENGLISH/completionstrat/s-2007-676e.pdf>.

continuing to safeguard the fair trial and due process rights of the accused.”⁹⁶

Evidently, insisting on *full* compliance with human rights is not an unproblematic stance for the ICC to adopt. For one thing, as shown in the case of the two *ad hoc* tribunals, it can undermine the prospects of effective national court performance and slow down the entire process aimed at putting an end to impunity. It can also lead to the problematic situation wherein different standards apply in national courts for different perpetrators. For example, the ICTR’s pressure on Rwanda to prohibit the death penalty has led to a situation where the death penalty will not be applied in cases that have been referred by the ICTR while the death penalty can still be applied in other cases. Furthermore, unlike the ICTR and the ICTY whose human rights mandates are limited to safeguard the rights of the accused, the ICC is expected to be more sensitive towards the interests of the victims and, indeed, shape its actions in their favor. In other words, looking only to previous international practice does not offer an accurate account of what a “human rights engaging” stance for the Court should look like. Still, these practices indicate that it will not be possible for the Court to completely avoid them.

From the standpoint of the ICC, as indicated in the Sudan case, a situation of state failure can transform itself into a more complex condition that requires a direct assessment of state action. Furthermore, even in the case of state referrals, human rights concerns will, in all likelihood, arise as a result of attention to the so-called impunity gap and the subsequent interest in making national criminal court systems functional. Yet, if the OTP wishes to develop its agenda in cooperation with states and other international actors in order to fill this gap, it needs to define the relationship between complementarity and human rights. In negotiating the terms for cooperation, questions of acceptable methods and the relevance of human rights standards will rise to the forefront.⁹⁷ A policy of avoidance will not survive this development.

96. *Id.* ¶ 63. Similar to the ICTY, the ICTR conducts programs aimed at capacity-building in Rwanda. See *May 2007 ICTR Completion Strategy*, *supra* note 94, ¶ 38.

97. See, e.g., Agreement Between the International Criminal Court and the European Union on Cooperation and Assistance, Apr. 10, 2006, 2006 O.J. (L 115) 50, pmbl. (stressing the importance of “the administration of justice in accordance with procedural

1. A Liberal Toleration Approach

Against this background, this article considers two possible human rights engaging approaches. The first, is defined as a liberal toleration approach. It is akin to a liberal autonomy-based account of toleration as it has developed in contemporary political theoretical studies in that it articulates a set of liberal ideals. Yet, that account is applied to govern state-individual relations and the extent to which states should seek to shape individual moral aspirations and ideals. In contrast, the liberal toleration approach is centered on international institutions-state relations and focuses on the extent to which international institutions should be involved in seeking to promote certain ideal models of state performance in the field of criminal justice, whether through assistance, cooperation, consultation, education, or even coercion, including pressure and opinion.

The approach assumes that the ideal model of criminal justice is one that respects all fundamental human rights and is the model of aspiration in liberal democratic states and ICC proceedings. It refrains from engaging in debate about alternative models as it regards the liberal democratic model as the uniquely correct one for all places and situations. In other words, it does not ponder the reality of pluralism in the field of criminal justice and the possible relevance of this pluralism in developing criminal justice models. Moreover, as it ignores the possibility of a deeper pluralism (i.e., conflicting claims about the true or correct model), it supposes that all state failures to conform stem from state *inability* rather than unwillingness. According to this approach, the main difficulty lies in finding the most effective measures to overcome the obstacles that stand in the way of allowing states to conform national criminal systems in keeping with the stated ideals. Most often, it attempts to do so through different forms of international assistance or educational programs. States that refuse to change their ways would not qualify for assistance, but would instead, be subject to pressure and/or critical opinion, often being labeled as “deviant,” “radical,” or “outlaw” states.

The autonomy-based approach to toleration has come to be heavily criticized, especially in recent years, for its complete refusal to account for pluralism and for its failure to consider the

fairness with particular reference to the rights of the accused provided in the Rome Statute.”).

“reasonableness” of non-liberal views. It is furthermore criticized for its patronizing attitude and if taken to its extreme, the risk it poses in augmenting longstanding intercultural differences and transforming them into conflicts that are difficult to resolve. In other words, it leaves itself open to accusations of being a grossly intolerant position in an already divided world.⁹⁸ That being said, while these kinds of criticisms are relevant to international legal debates, they are more often raised in the context of legal transplants or in the broader context of peace-building.⁹⁹ Such critiques are becoming less frequent in the field of international criminal justice law where there is an ever-growing recognition of the need for cultural sensitivity and adjustment to realities on the ground.¹⁰⁰

For the Court, the substantive toleration approach might be difficult to adopt. For one thing, it seems to go beyond the Court’s own mandate.¹⁰¹ Moreover, it may be unfortunate for the Court to push for high ideals that are regarded as western in content and spirit while at the same time seeking to advance an all-inclusive or near-inclusive approach in the fight against impunity. It should also be noted that the ideal criminal justice model is itself a topic of extensive debate even in liberal democracies (e.g., whether it must have a jury system, cross-examination, or a criminal process that integrates the civil claims of victims for reparation). Furthermore, even if it were assumed that liberal democracies boast the best range of criminal justice models, there may still be questions about their direct workability in situations of massive crimes without any adjustment to the extreme challenges associated with such situations, such as the vast numbers of

98. See, e.g., U.N. ALLIANCE OF CIVILIZATIONS, REPORT OF THE HIGH-LEVEL GROUP (2006).

99. See, e.g., Michael Barnett, *Illiberal Peacebuilding and Liberal States: Remarks Prepared for the Social Science Research Council’s Roundtable on Humanitarian Action* (Feb. 8, 2005), available at <http://programs.ssrc.org/emergencies/publications/barnett.pdf>.

100. From having favored classical prosecutions with extensive rights protection, the Security Council, argues that: “The Council intends to continue forcefully to fight impunity with appropriate means and draws attention to the full range of justice and reconciliation mechanisms to be considered, including national, international and ‘mixed’ criminal courts and tribunals, and as truth and reconciliation commissions.” *Statement by the President of the Security Council*, *supra* note 25.

101. Although, arguably the Court could align itself with this approach by emphasizing the open- wording of article 17(2) of the Statute, which defines cases of “unwillingness” according to which states can be considered unwilling to prosecute and thereby making the issue admissible to the ICC.

perpetrators and victims.¹⁰² Moreover, the adoption of a full-blown human rights approach makes it look like the ICC is an international human rights court rather than a criminal court. As has been repeated several times, however, the Court's function is not to evaluate and judge general laws and practices of national courts in the field of criminal justice against the backdrop of international human rights standards. Its analysis "is not an assessment of the judicial system as a whole, but an assessment of whether or not [a state] has investigated or prosecuted, or is investigating or prosecuting genuinely the case(s) selected by the Office."¹⁰³ Still, as this article suggests, this task requires a qualitative assessment in order to protect at least a minimum provision of respect for persons who are seriously affected.

2. A Reasonable Toleration Approach

A reasonable toleration approach is similar to a substantive approach in that it recognizes the importance of protecting human rights.¹⁰⁴ Yet, unlike the latter, the former is more sensitive of the limited mandate of the Court and in particular, the many factors that warrant the partial *lacuna* in the Statute. One such factor is the fact that the main concern of the Statute's drafters was to establish an International Criminal Court to counter situations of *de facto* impunity and circumstances of *total* state failure to investigate and prosecute massive crimes.¹⁰⁵ Thus, the reasonable toleration approach does not dwell on the question of the applicable standards for states that do seek to make an effort to discharge their duty to exercise criminal jurisdiction. A second relevant factor is the prevalence of the concern amongst several delegations involved in the negotiations preceding the adoption of the Statute over the need to reinforce respect for their sovereign authority in criminal justice affairs. Those delegations which are

102. For a comprehensive account of these challenges, and how to overcome them, see U.N. Secretary-General, *Rule of Law*, *supra* note 83.

103. *Sixth Report of the ICC*, *supra* note 53, ¶ 10.

104. See JOHN RAWLS, *POLITICAL LIBERALISM* (Columbia University Press 1995).

105. See generally Mahnoush H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22 (1999). The drafters' focus on the jurisdiction of the Court, rather than on several other issues of central concern for its operation, has been explained as the result of an assumption that national legislatures were more concerned with precisely that issue. *Id.* at 24. Furthermore, the international community had an interest in considerable state participation "as national systems are expected to maintain and enforce adherence to international standards." *Id.* at 25.

known to be particularly wary of cultural differences, expressed reservations vis-à-vis the idea of a court with a full blown human rights mandate.¹⁰⁶ Other delegations, however, asserted that there was no point in expanding on human rights, since most states already conduct their criminal justice affairs in accordance with them.¹⁰⁷ A third and more epistemological factor that may play a role is the real difficulties surrounding the question of what the standards actually are, and whether they should be common to all states and govern all situations. The prevailing disagreement may not arise solely from states' interests in reinforcing sovereign rule, but may also stem from a limited understanding of what the appropriate standards are in the light of cultural diversity or reasonable pluralism, the need to balance competing claims, and even the necessity of compromise in the light of the less than ideal conditions that often face affected states.

The reasonable toleration approach is inspired by, what in political theoretical studies has come to be defined as, "political liberalism" or "the law of peoples." This theory recognizes the need for a common set of principles to govern public affairs in the field of criminal justice, but does not assume that such principles should promote a particular state ideal in disregard of non-liberal "reasonable" accounts of criminal justice. Besides taking seriously the possibility of state "unwillingness" to conform to an ideal liberal democratic model of criminal justice, it also houses the notion of state inability. Furthermore, it stresses that international legal deliberation, and the appropriate application of principles to actual situations, is constrained by the "burdens of judgment" or "a limited understanding."¹⁰⁸ These burdens explain continued

106. See U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court, June 15-July 17, 1998, *Summary Records of the Plenary Meetings and of the Meetings of the Committee as a Whole*, U.N. Doc A/CONF.183/13 vol. II (evidencing statements made by states during the negotiations in Rome that preceded the adoption of the Rome Statute, which demonstrate the states' reservations). For example, Cuba stated its concern that the draft article 15 tended to place too much emphasis on evaluating the conduct of national courts. *Id.* at 218. Additionally, Algeria stated that it would be important to clearly define the principle of complementarity in order to ensure that the Court would be accepted by the international community. *Id.* at 219.

107. *Id.* China declared that the criteria for determining "unwillingness" of a state to carry out an investigation should be deleted as they were highly subjective and that, in fact, the judicial systems of most countries were capable of functioning properly. *Id.* at 218.

108. For a full articulation of the burdens of judgment, see RAWLS, *POLITICAL LIBERALISM*, *supra* note 104, at 54-58. For the idea of "limited understanding," see AMY GUTMAN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 73 (1996).

good faith moral disagreement on complex matters. They also give rise to a sense of indeterminacy or inconclusiveness as to what is the right or acceptable course of action in a particular case, or even what is considered bad or wrongful.¹⁰⁹ The practical implications of this claim are not clear. While some argue that moral reasoning on complex matters is best dealt with in courtrooms, others, who take the fact of good moral disagreement to its more extreme, favor a democratic and participatory framework involving all the stakeholders.¹¹⁰

The universalistic aspirations of the Court, the modest wording in the Statute, and the need for some flexibility on complex matters, speak in favor of the adoption of the reasonable toleration approach. Nonetheless, in its acknowledgement of moral complexity, the need for balancing between competing claims and sensitivity towards the real difficulties facing affected states in discharging their duty, this approach risks perpetuating a sense of indeterminacy or inconclusiveness as to what the substantive standards to govern this field of national public affairs should be. Furthermore, in searching for agreement among reasonable actors, it risks being found all too conservative in its outlook. The reasonable toleration approach risks becoming too cautious in its claim about agreeable standards. Moreover, instead of setting out an extensive list of which human rights matter in a policy document, it favors an approach where the human rights question is dealt with, for the most part, on a case-by-case basis. It thereby risks forfeiting the main purpose for which there is a need for a more substantive approach to the relationship between complementarity and human rights in the first place. It does not facilitate a full clarification *a priori* of which human rights deserve full respect, and what states are required to do and not to do in order to conform to them.

Even so, it can be considered a "human rights engaged" approach in the sense that it does not seek to avoid an assessment of human rights compliance altogether. Rather, it is fully committed to considering whether affected states conform to these rights and to defining their meaning in the light of its mandate and of international human rights law. This approach's commitment

109. For a discussion of inconclusiveness as opposed to indeterminacy, see GERALD F. GAUS, JUSTIFICATORY LIBERALISM. AN ESSAY ON EPISTEMOLOGY AND POLITICAL THEORY 154 (1996).

110. See generally JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

would be limited to assessing the notion of due process as recognized in international law (as recognized in the Statute). Nevertheless, the reasonable toleration approach could serve as a starting point for extending this notion and incorporating fair trial guarantees. Additionally, it could form the basis for discussing the role and interests of other participants in criminal proceedings, including witnesses and victims. In adopting this approach, the Court could make full use of its limited human rights mandate. Specifically, it could work towards minimizing the potential moral costs of extensive national judicial engagement, and towards the creation and implementation of common laws to govern the delivery of international justice in situations of massive crime.

