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COMPLEMENTARITY AS POLITICS

*Laura Clarke**

I. INTRODUCTION

The creation and consolidation of an international human rights regime following the end of World War II was a triumph¹ not least in the apparent bypassing of state sovereignty as an overriding principle of international relations. However, underwriting this new regime is the necessary compromise between the supremacy of the nation state and internationalism that gives momentum to the human rights movement. The international rights regime is predicated on this highly sensitive and volatile balance.² The International Criminal Court (ICC) has made the compromise explicit through codification of the complementarity principle, balancing domestic and international dimensions of norm enforcement.³ Article 17 of the Rome Statute triggers the ICC's complementary jurisdiction in situations where the State is deemed "unwilling or unable genuinely to carry out the investigation or prosecution."⁴ The purpose of complementarity is "to preserve the power of the ICC over irresponsible states that refuse to prosecute nationals who commit heinous international crimes, but *balances that supranational power against the sovereign right of states to*

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¹ HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 115 (3d ed. 2008); see Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L ORG. 599, 614–15 (1986) (discussing the contemporary international human rights regime that developed following World War II).

² See JO STIGEN, THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS: THE PRINCIPLE OF COMPLEMENTARITY 17 (2008) (discussing the proper balance between ensuring effective prosecution of international crimes and safeguarding state sovereignty); see also Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 870 (2002) (noting the tension between state sovereignty and international justice).

³ El Zeidy, *supra* note 2 (explaining the balance between national and international criminal justice).

⁴ *Rome Statute of the International Criminal Court*, art. 17, ¶ 1, Jul. 17, 1998, 2187 U.N.T.S. 90.

prosecute their own nationals without external interference."⁵ The ICC's complementarity doctrine is an attempt to pacify concerns that the Court could exercise unchecked dominance over States parties and be manipulated as a political weapon against opponents.⁶

While the history of the complementarity principle predates the creation of the ICC, the Court's formation has shone a spotlight on the doctrine's theory and practice. The implications of complementarity's practical application are of particular concern, given that States parties "transfer of formal authority has failed to produce meaningful criteria dictating how exactly the ICC should exercise its authority."⁷ As a ground-breaking institution, the ICC acts with little interference in venturing outside the provisions established in the Rome Statute.⁸

It has become increasingly urgent to consider the ICC's approach to complementarity because of the Court's intervention in the conflict between the government of Uganda and the Lord's Resistance Army (LRA). The LRA, formed largely as a response to the rule of President Yoweri Museveni,⁹ has waged war against the government since the mid-1980s.¹⁰ The group is led by Joseph Kony of the northern Acholi tribe and owes its origins largely to the political-religious strategy of the earlier rebel Holy Spirit Movement (HSM).¹¹ With the conflict now in its third decade, the LRA's

⁵ Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 26–27 (2001) (emphasis added).

⁶ See El Zeidy, *supra* note 2, at 890 (describing the institutional tensions between the ICC and state actors); see also Christine Bjork & Juanita Goebertus, Note from the Field, *Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya*, 14 YALE HUM. RTS. & DEV. L.J. 205, 213 (2011) (discussing the implications of complementarity and noting that the ICC can only contribute indirectly by encouraging state actors to take action).

⁷ Alexander K. A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VIR. J. INT'L L. 107, 110 (2009) (arguing that the Uganda crisis has revealed issues regarding complementarity).

⁸ See *id.* (noting that the Rome Statute leaves unanswered questions about how far states should be required to go to pursue criminal justice).

⁹ There remains substantial debate about the specific goals of the LRA. See TIM ALLEN, TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD'S RESISTANCE ARMY 43 (2006) (explaining the origins of the LRA).

¹⁰ Kasaija Phillip Apuuli, *Amnesty and International Law: The Case of the Lord's Resistance Army Insurgents in Northern Uganda*, 5 AFR. J. ON CONFLICT RESOL. 33, 34 (2005) (explaining that the LRA has persisted against the Ugandan government since the mid-1980's).

¹¹ See Ledio Cakaj, *The Lord's Resistance Army of Today*, THE ENOUGH PROJECT, Nov. 2010, 2–3, http://www.enoughproject.org/files/lra_today.pdf.

method of perpetuating its crusade through the use of child soldiers has become notorious.¹² As a consequence, the international narrative is an oversimplification of the complex reality. It relies on the image of “a messianic leader, Joseph Kony, and a rag tag of adult rebels” waging a failing religious crusade against the Ugandan regime.¹³ Following a number of unsuccessful military efforts against the rebel group and its ratification of the Rome Statute, the Ugandan government chose to refer the situation to the ICC.¹⁴ This resulted in the release of arrest warrants for Kony and four of his commanders in July 2005.¹⁵ Since the ICC’s decision to pursue the case, people within Uganda have been questioning the intervention’s implications for a peaceful resolution to the conflict.¹⁶ With the LRA commanders insisting that the warrants be revoked before they consider future peace negotiations, citizens and leaders have been turning to alternative justice mechanisms (AJMs) as viable substitutes for international prosecutions.¹⁷ In the face of growing demands for domestic peace and reconciliation, the Museveni administration has taken up the case of deferral, seeking withdrawal of the ICC’s arrest warrants.¹⁸

The crisis in Uganda gives a new impetus to analyze the ICC’s complementarity doctrine that questions both the role of the Court and its relationship with domestic jurisdictions. However, a widespread failure to examine the principle within its historical context restricts the Court’s ability to look externally for supervision and precedents. This

¹² More than 20,000 abductions are believed to have been carried out by the LRA and eighty percent of its forces are now thought to consist of child abductees. See Alhagi Marong, *Unlocking the Mysteriousness of Complementarity: In Search of a Forum Conveniens for Trial of the Leaders of the Lord’s Resistance Army*, 40 GA. J. INT’L & COMP. L. 67, 73 (2011) (stating that the LRA has enlisted children in armed conflict); see also H. Abigail Moy, Recent Development, *The International Criminal Court’s Arrest Warrants and Uganda’s Lord’s Resistance Army: Renewing the Debate over Amnesty and Complementarity*, 19 HARV. HUM. RTS. J. 267, 268 (2006) (discussing the extent of the abuse endured by child abductees who are used as laborers, sex slaves, and human shields).

¹³ ERROL P. MENDES, PEACE AND JUSTICE AT THE INTERNATIONAL CRIMINAL COURT: A COURT OF LAST RESORT 87 (2010).

¹⁴ Greenawalt, *supra* note 7, at 112–113.

¹⁵ Greenawalt, *supra* note 7, at 112–113.

¹⁶ MENDES, *supra* note 13, at 102.

¹⁷ See ALLEN, *supra* at note 9 (providing a comprehensive account of Ugandan requests for deferral and the use of AJMs); see also Erin K. Baines, *The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda*, 1 INT’L J. TRANSITIONAL JUST. 91, (2007).

¹⁸ See Greenawalt, *supra* note 7, at 108; see also Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT’L L. 209, 217 (2008) (explaining that Uganda would agree to petition the ICC to withdraw the arrest warrants if the LRA agreed to alternative measures of justice).

article will fill the analytical chasm of current analyses. Part II will consider complementarity through the lens of its historical application. It will trace evolution of the principle from World War I through to creation of the ICC's Rome Statute. Part III will examine complementarity as a political concept, introducing the Two-Level Model of Political Responsiveness as a new understanding of the doctrine. Finally, Part IV will consider the need for a reintroduction of a political aspect to the enactment of complementarity. It will conclude that the ICC's attempt to codify complementarity as a legal doctrine has failed and that victims' interests are best served by an approach that is located in contextual, political understanding. Tensions, such as those exhibited in the Ugandan crisis, are a product the failure to recognize complementarity as a historically-contextual, politically-saturated concept.

I. TOWARDS A HISTORY OF COMPLEMENTARITY

Complementarity as a formal legal doctrine did not exist prior to the Rome Statute.¹⁹ It is through attempts to negotiate a compromise between domestic and international war crimes prosecutions that complementarity, as a codified concept, has come to fruition.²⁰ An examination of State prosecutorial practice following armed conflict offers a new framework within which the ICC's approach can be scrutinized. That analysis also contradicts traditional academic acceptance of complementarity as a legal doctrine,²¹ by placing the concept in its historical context.

a. World War I and the Leipzig Trials

¹⁹ See El Zeidy, *supra* note 2, at 890–91 (examining the history of complementarity and its importance in the Rome Statute).

²⁰ See *id.* at 870 (noting that “complementarity” is not a new concept).

²¹ See MENDES, *supra* note 13, at 132 (examining the ICC's difficult role in balancing peace and justice); see also William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice*, 49 HARV. INT'L L.J. 53, 56 (2008) (examining prosecutorial practice after the Rome Statute); see also Federica Gioia, *State Sovereignty, Jurisdiction, and 'Modern' International Law: The Principle of Complementarity in the International Criminal Court*, 19 LEIDEN J. INT'L L. 1095, 1101 (2006) (contrasting complementarity and primacy to determine which should be used going forward); see also Gregory S. Gordon, *Complementarity and Alternative Justice*, 88 OR. L. REV. 621, 623 (2009) (raising the question of whether meaningful, local justice is considered under complementarity); see also Newton, *supra* note 5, at 27 (noting that the complementarity principle would be important to how the ICC acts vis-a-vis States); see also El Zeidy, *supra* note 2 (examining the problems raised by the complementarity principle that are faced by the drafters of the Rome Statute).

World War I was a landmark for state recognition of international law's regulatory potential.²² It represented "the first major combat in which all sides expended significant effort to document legal wrongs of the others during the waging of battle."²³ The Allies' decision to pursue international prosecutions for German aggression may be viewed as a logical step, connecting this new understanding of law as a weapon against normative violations with a fear of war's increasingly destructive scale. The overriding goal was "to establish a new precedent in international law . . . the principle that national leaders might be held criminally responsible for their actions, especially for waging a war of aggression . . . the principle that national leaders might be held criminally responsible for their actions, especially for waging a war of aggression."²⁴ The belief that international prosecutions would deter future aggression, a consideration repeated at the time of the Nuremberg trials, provided substantial momentum for the Allies in deciding how to proceed in the formation of the post-World War I order.²⁵

However, discussions about how to approach the quest for justice were not characterized by unanimous advocacy for international tribunals.²⁶ The Paris Peace Conference of 1919 was plagued by political concerns regarding the consequences of implementing untested legal frameworks with an unprecedented international jurisdiction.²⁷ The final report of

²² See El Zeidy, *supra* note 2, at 871 (stating that after World War I effort was made to try war criminals in Allied Tribunals).

²³ RICHARD J. GOLDSTONE & ADAM M. SMITH, INTERNATIONAL JUDICIAL INSTITUTIONS: THE ARCHITECTURE OF INTERNATIONAL JUSTICE AT HOME AND ABROAD 19 (1st ed., 2009).

²⁴ See JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 80 (1st ed. 1982) (describing British Prime Minister Lloyd George's position that the Kaiser should be held individually responsible); *see also* 1 THE ENCYCLOPEDIA OF WORLD WAR I: A POLITICAL, SOCIAL, AND MILITARY HISTORY A-D (Spencer C. Tucker & Priscilla Roberts eds., 2005) (noting that the nature of World War I spurred action to prevent such atrocities from repeating themselves).

²⁵ See U.S. Secretary-General, *Historical Survey of the Question of International Criminal Jurisdiction: Memorandum Submitted by the Secretary-General*, p. 18 U.N. Doc. A/CN.4/7/Rev.1 (1949).at 2 (recognizing the common goals between the Nuremberg trials and the proposed war tribunals after World War I); *see also* AMOS YODOR, EVOLUTION OF THE UNITED STATES SYSTEM 121 (2d ed. 1993) (pointing out that the lofty goal of the League of Nations was to prevent wars of aggression).

²⁶ See Jackson Maogoto, *Early Efforts to Establish an International Criminal Court*, in THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT 3, 14 (Jose Doria et al. eds., 2009) (discussing the disagreement over the use of war crimes tribunals).

²⁷ See MARK ALAN LEWIS, INTERNATIONAL LEGAL MOVEMENTS AGAINST WAR CRIMES, TERRORISM, AND GENOCIDE 1919–1948 161 (2011) (describing opposition to an international criminal court as late as the mid-

the Conference recommended “the trial by international courts of accused persons of the nationalities of the defeated Powers,” but objections to this broad notion of accountability caused a substantial narrowing in the provisions ultimately applied.²⁸ Rather, the Treaty of Versailles’ focus is on the prosecution of Kaiser Wilhelm II.²⁹ Article 227 outlines the approach taken to the Kaiser’s accountability, proposing a tribunal at which the leader would be tried “for a supreme offence against international morality and the sanctity of treaties.”³⁰ The consequence of prosecuting a head of state was a concern for many of the Allies, particularly the British who “feared that their head of state, the King, could be exposed to similar risks.”³¹ These political concerns came to fruition in the drafting of Article 227:

They define the crime of aggression as the supreme crime against the sanctity of the law of treaties. The question that arises is what is a “crime against the sanctity of the law of treaties?” This inherent vagueness in Article 227 was deliberate and was built into the Article so that, should the Kaiser ever be brought to trial, he would be acquitted based on the fact that his conviction would violate the principles of legality.³²

1920s). The United States was particularly vocal in its opposition to international trials. A memorandum of American objections to the proposals put forward at the Conference confirms that “the American representatives believed that the nations should use the machinery at hand, which has been tried and found competent, with a law and procedure framed and therefore known in advance, rather than to create an international tribunal with a criminal jurisdiction for which there is no precedent, precept, practice, or procedure.” *Historical Survey of the Question of International Criminal Jurisdiction – Memorandum submitted by the Secretary General, supra* note 25, at 55.

²⁸ *Historical Survey of the Question of International Criminal Jurisdiction – Memorandum submitted by the Secretary General, supra* note 25, at 2. (detailing how the accountability of Heads of State was limited after World War I).

²⁹ *Historical Survey of the Question of International Criminal Jurisdiction – Memorandum submitted by the Secretary General, supra* note 25, at 2 (noting that the main focus of the Treaty of Versailles was on prosecution of the German Head of State); I-IV *ENCYCLOPEDIA OF CRIME AND PUNISHMENT 1700* (David Levinson ed., 2002) (discussing the strategy and outcome of the attempted prosecution of the Kaiser).

³⁰ The Treaty of Peace between the Allied and Associated Powers and Germany art. 227, June 28, 1919, 1919 U.S.T. 7, 2 Bevans 43 [hereinafter Treaty of Versailles] (stating that the tribunal will consist of five judges, one from each of the following countries: the U.S., Great Britain, France, Italy, and Japan).

³¹ M. Cherif Bassiouni, *The International Criminal Court in Historical Context*, 99 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 55, 58 (1999).

³² See Bassiouni, *supra* note 31 (citations omitted) (concluding that Article 227 was “artfully drafted” by vaguely defining the crime of aggression).

The Treaty of Versailles therefore pays little credence to the visions of the Paris Conference. Instead, it appears to represent a collision of judicial concerns with political realities. This is further demonstrated by the provisions relating to the trial of suspects other than the Kaiser. Article 228 denotes the envisioned relationship between international tribunals and the German government and is an early embodiment of the primacy of international prosecutions for war crimes:

The German Government recogni[z]es the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. . . . *The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.*³³

The treaty's international prosecutions failed to take place.³⁴ The Allied powers were concerned with maintaining a stable international order and overriding the treaty's intentions were "British and French diplomats reporting that the rickety German government might actually collapse if all of the suspects were forcibly brought before a war crimes court."³⁵ Consequently, "the Allies were shaken and quickly ceded to a compromise floated by Berlin which suggested trying suspects in Germany, before a German court."³⁶ These subsequent domestic trials, conducted at Leipzig, were unsuccessful; convictions were few and the guilty punished with inappropriately lenient sentences.³⁷ Despite this failure, the proceedings at Leipzig were a culmination of vacillating views on the relationship between domestic and international prosecutions.³⁸ The politically expedient shift from primacy in

³³ Treaty of Versailles, *supra* note 30, at art. 228, (emphasis added).

³⁴ See Bassiouni, *supra* note 31, at 58 (indicating that the views on prosecution varied); see also Taylor G. Stout, *The International Military Tribunal at Nuremberg*, INT'L JUD. MONITOR (Winter 2011), http://www.judicialmonitor.org/archive_winter2011/historic.html (illustrating that the quixotical war crimes tribunal never crystallized).

³⁵ GOLDSTONE & SMITH, *supra* note 23, at 37.

³⁶ GOLDSTONE & SMITH, *supra* note 23, at 37.

³⁷ WILLIS, *supra* note 24 (noting that the Allies were disappointed by the German war crime trials in Leipzig); Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 558 (2006) (noting that twelve officers were tried in Leipzig, only six of whom were convicted).

³⁸ See Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321,

the Treaty of Versailles towards complementarity³⁹ represents an early attempt to negotiate a compromise between the demands of domestic versus international justice. The political nature of these decisions, both in terms of power politics and an appreciation for the domestic political context, is reflected in the evolution of the complementarity concept from Nuremberg to Rome.

b. World War II and the Nuremberg Trials

Hailed as laying the groundwork for the international human rights regime, the Nuremberg trials were a triumph for legalism.⁴⁰ However, to suggest that the debate was characterized exclusively by advocacy of international trials is a mistake. Rather, the debate came to represent a conflict between legalism through the pursuit of international war crimes trials and a desire for extrajudicial executions.⁴¹ The Nuremberg discussions were not characterized by indecision regarding international versus domestic proceedings.⁴² Yet the

333 (1999) (explaining that Leipzig's outcome supported the view that domestic courts of conquered nations would not be able to deliver justice through domestic prosecutions). This is a point also demonstrated in Allied handling of the Armenian genocide, in which 600,000 Armenians were killed in Turkey during World War I. The debate over whether to prosecute those responsible within the confines of international law was contentious and again suffered the objections by American representatives. Ultimately, political considerations again won out: "The debate finally ended, not as a result of legal resolution, but as a result of changing political needs. The Bolshevik Revolution in Russia, prompted fear among the Allies that Turkey might suffer a comparable revolution. Subsequently, the Treaty of Lausanne was negotiated, granting clemency to those responsible for the atrocities." Importantly, "this political decision would later haunt the Allies as they attempted to justify the commencement against the Nazis for similar atrocities at the end of the Second World War." Matthew D. Peter, Note, *The Proposed International Criminal Court: A Commentary on the Legal and Political Debates Regarding Jurisdiction that Threaten the Establishment of an Effective Court*, 24 SYRACUSE J. INT'L L. & COM. 177, 181-82 (1997) (maintaining that the debate over whether to prosecute those responsible for the Armenian genocide under international law was controversial and that the U.S. objected to the prosecutions).

³⁹ El Zeidy, *supra* note 2, at 872-73 (noting that although Article 228 supported the use of international tribunals, there was ultimately an "agreement to defer to the German courts").

⁴⁰ STEINER, *supra* note 1 (stating that the Nuremberg trials acted as a liberal *accomplishment* for national and international *human rights*); Gwynne Skinner, *Nuremberg's Legacy Continues: The Nuremberg Trials' Influence on Human Rights Litigation in U.S. Courts Under the Alien Tort Statute*, 71 ALB. L. REV. 321, 326 (2008) (regarding it as well-known that the Nuremberg trials changed the international human rights scheme).

⁴¹ Elizabeth Borgwardt, *Re-examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms*, 23 BERKELEY J. INT'L L. 401, 414-15 (2005) (noting that Roosevelt himself was in favor of summary executions early on).

⁴² For full discussions of the debates preceding the decision to pursue international trials at Nuremberg, *see generally* GARY JONATHAN

question of whether international trials would be appropriate and the implication of Allied domestic politics in the decision represent a significant stage in the historical trajectory of complementarity as a political concept.

The debate regarding post-World War II Germany was highly contentious and was played out most completely within the administration of President Franklin D. Roosevelt.⁴³ Roosevelt was required to decide between two extremes of the legal spectrum. On the one hand, Secretary of War Henry Stimson was advocating a post-war accountability based on the Bill of Rights, and on the other hand, Secretary of the Treasury Henry Morgenthau was constructing a plan based on the extrajudicial execution of Nazi leaders and the pastoralization of Germany.⁴⁴ The Morgenthau Plan, supported initially by Roosevelt,⁴⁵ was predicated on the idea that “the guilt of such [Nazi] individuals is so black that they fall outside and go beyond the scope of any judicial process.”⁴⁶ Indeed, the use of summary executions as a means to deal with Nazi leaders also found widespread support in public opinion.⁴⁷ Despite this, Stimson consistently advocated in favor of legalism.⁴⁸ Writing in direct response to the Morgenthau Plan, he stated that

The method of dealing with these and other criminals requires careful thought and a well-defined procedure. Such procedure must embody, in my judgment, at least the rudimentary aspects of the Bill of Rights, namely, notification to the accused of the charge, the right to be heard and, within reasonable limits, to call witnesses to his defen[c]e.⁴⁹

BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000); *see also* MARRUS, *supra* note 49; *see generally* Borgwardt, *supra* note 41.

⁴³ *See generally* BASS, *supra* note 42; *see also* Borgwardt, *supra* note 41, at 414–20 (presenting various opinions on how to manage Germany).

⁴⁴ Borgwardt, *supra* note 41, at 414–18 (providing a full account of Morgenthau’s plan and Stimson’s response); Nir Eisikovits, *Transitional Justice*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Jan. 26, 2009), <http://plato.stanford.edu/archives/win2011/entries/justice-transitional/> (discussing Morgenthau’s plan for summary executions and Stimson’s plan for fair trials).

⁴⁵ Borgwardt, *supra* note 41, at 415.

⁴⁶ BASS, *supra* note 42, at 13 (citing ANTHONY EDEN, *EDEN WAR MEMORANDUM*, CAB 66/25 (1942)).

⁴⁷ *See* BASS, *supra* note 42, at 147 (commentating that “The British and American publics would have preferred to shoot the Nazis without bothering with a trial”).

⁴⁸ BASS, *supra* note 42, at 115–157.

⁴⁹ MICHAEL R. MARRUS, *THE NUREMBERG WAR CRIMES TRIAL 1945-46: A DOCUMENTARY HISTORY* 27 (Katherine E. Kurzman et al. eds., 1997).

Underpinning this debate was the goal of German denazification – “the re-education and rehabilitation of ordinary Germans and their leaders.”⁵⁰ The use of legalist methods to deal with the Nazi leaders was seen as fundamental to preventing the re-emergence of the Party and eliminating any remaining threads of support from the populace.⁵¹

Despite initial support for the Morgenthau Plan, public disapproval of Germany’s pastoralization forced Roosevelt to shift his support from the Morgenthau Plan to plans advocating for legal proceedings.⁵² It was, in part, a decision based on political expedience: “with the presidential election seven weeks away, an embattled and annoyed Roosevelt withdrew his support for the Treasury proposal, favoring the ‘middle road’ of the short-term War Department approach almost by default.”⁵³ In light of procedural discussions following World War I, many were concerned that the Morgenthau Plan could introduce further instability into the post-war international order.⁵⁴ The fear was that

the Treasury plan would ensure that Germany remained ‘a festering sore . . . in the heart of Europe, and there would be installed a chaos which would assuredly end in war.’ The *Post* further emphasized that Nazi propaganda minister Josef Goebbels was already using the story ‘as a threat to spur Germans to greater resistance against the Allies.’⁵⁵

The decision to reject summary executions as a viable solution and accept international trials was, therefore, both a political and moral decision. The ultimate choice to predicate the trials on charges of illegal war, as opposed to the crimes of the Holocaust,⁵⁶ lends further credence to this conclusion.

⁵⁰ ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD* 204 (2005) (listing additional debate topics such as “individual accountability,” “reparations,” and “disarmament”).

⁵¹ MARRUS, *supra* note 49; see Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT’L L. 529, 539 (2008) (surmising that the act of creating a historical record through a trial is effective in creating an account for future generations to be wary of).

⁵² See BASS, *supra* note 42, at 168–69.

⁵³ Borgwardt, *supra* note 41, at 418.

⁵⁴ Borgwardt, *supra* note 41, at 418 (indicating how newspaper coverage of the Morgenthau Plan focused on how it would bring about more commotion than harmony).

⁵⁵ Borgwardt, *supra* note 41, at 418 (citations omitted).

⁵⁶ MARRUS, *supra* note 49 (quoting ‘Minutes of the London Conference for the Preparation of the Trial’ to affirm the point that: “We have some regrettable circumstances at times in our own country in which minorities are unfairly treated. We think it is justifiable that we interfere or attempt to bring retribution to individuals or states only because the concentration camps and the deportations were in pursuance of a common

Although Nuremberg certainly represents a triumph for international legalism, it must be tempered by an awareness of the role that politics played in determining post-conflict accountability procedures.⁵⁷ Nuremberg was a product of internationalized domestic values, the demands of Allied internal politics, and the desire for a stable post-war order. It was fed by the failure of Leipzig,⁵⁸ and gained momentum from acknowledgement that World War II must represent a turning point towards international cooperation and accountability for human rights atrocities.⁵⁹

c. The International Criminal Tribunals of Yugoslavia and Rwanda

With the onset of the Cold War, efforts to further the project of international criminal justice took a backseat.⁶⁰ During this period, the “decisive political ingredient was absent. . . . The result was that progress was stymied and the desired consensus was beyond reach.”⁶¹ Application of the Nuremberg principles and new international human rights law continued in the post-World War II setting “but other than the brief examples of Nuremberg and Tokyo, [the trials] were all domestic in nature.”⁶² With the end of the Cold War, “the rise of *Pax Americana* and the ‘end of history’ opened new possibilities to return to the international notions of justice that had seemed to permeate, even if ephemerally, in the years after World War II.”⁶³

Viewed within this context, the creation of the International Criminal Tribunal of the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal of Rwanda (ICTR) in 1994 exemplify the post-Cold War resurgence of internationalism. The tribunals further represent the legacy of international criminal law laid out by the

plan or enterprise of making an unjust or illegal war in which we became involved”).

⁵⁷ GOLDSTONE & SMITH, *supra* note 23.

⁵⁸ BASS, *supra* note 42, at 184–185.

⁵⁹ Borgwardt, *supra* note 41 (acknowledging the international pressure to punish war criminals after World War II).

⁶⁰ M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish A Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 38–39 (1997) (illustrating how international criminal courts were silent during the Cold War era).

⁶¹ See Benjamin B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT’L L. REV. 203, 218 (1998).

⁶² GOLDSTONE & SMITH, *supra* note 23, at 95.

⁶³ GOLDSTONE & SMITH, *supra* note 23, at 95.

Nuremberg trials.⁶⁴ However, their creation remains a political action, intended

to ease the world's conscience for not intervening to stop the atrocities in former Yugoslavia and Rwanda. Even some highly placed officials at the ICTY and ICTR suspect the courts were meant as fig-leaves to create the illusion that the international community was doing something about these terrible conflicts, a suspicion fuelled by the often lukewarm support of major powers for the ad hoc tribunals.⁶⁵

These factors culminated in the United Nations (UN) Security Council's decision to award primacy to the tribunals' temporal and geographical jurisdictions. Article 9 of the ICTY Statute⁶⁶ and Article 8 of the ICTR Statute⁶⁷ outline this relationship, awarding the tribunals "primacy over national courts."⁶⁸ This shift away from deference to national procedure,⁶⁹ as seen in the post- World War II context, must again be viewed through a political, as well as a moral lens.

The intersection between politics and the international judicial process is prevalent in the formation of the ICTY and the ICTR. With their creation predicated on the UN Security

⁶⁴ Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 382–83 (2011) (explaining that Nuremberg established the principle of responsibility for certain violations of international law in succeeding Yugoslavian and Rwandan International Criminal Tribunals).

⁶⁵ Beth K. Dougherty, *Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court for Sierra Leone*, 80 ROYAL INST. INT'L AFF. 311, 312 (2004).

⁶⁶ See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute] (stating that the International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991, and the International Tribunal shall have primacy over national courts and may at any stage of the procedure request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal).

⁶⁷ S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (Nov. 8, 1994) (explaining that although the ICTR and the national courts have concurrent jurisdiction, the ICTR has superior authority over national courts with respect to international humanitarian law violations committed within the Rwandan territory).

⁶⁸ S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (May 25, 1993).

⁶⁹ See El Zeidy, *supra* note 2, at 883–84 (noting that in the *Tadic* case, the ICTY Appeals Chamber responded to the States' continuous challenges to primacy by holding that the U.N. Charter fully justifies such a policy).

Council's Chapter VII powers,⁷⁰ the primacy awarded to the tribunals can be viewed as "draw[ing] lifeblood from the political process" of the UN.⁷¹ Indicating the manner in which the tribunals derive their authority from the structure of the UN and its relationship with the member states:

all members of the United Nations, through a binding treaty obligation in the form of the Charter, agree that the Security Council "acts on their behalf" in carrying out its responsibility to maintain and restore international peace and security. The Charter regime is a dominant feature of the normative international legal landscape, and its legal force imbues the ICTY and ICTR with binding authority over established state actors.⁷²

The application of this authority in practice was beset by problems. The UN "envisioned Nuremberg, not a pair of tribunals whose expenses and life-spans seemed to keep increasing."⁷³ While these operational practicalities had far-reaching implications for UN action in future conflicts,⁷⁴ it remains the problematic role of the tribunals in the transitional process that creates most concern. The failure to appreciate the domestic impact of international prosecutions is a failure to understand that "tribunals do not operate in a vacuum, and the ICTY and ICTR actions have clearly had an impact on the situation on the ground in the Balkans and Rwanda."⁷⁵ The ICTY has been plagued by accusations that it has "reinforced ethnic cleavages"⁷⁶ and retarded the development of domestic legal mechanisms.⁷⁷ The ICTR, initially supported by Rwandan

⁷⁰ U.N. Charter, Chapter VII, arts. 39–51 (establishing the Security Council's powers to use military or non-military force to maintain international peace and security).

⁷¹ Newton, *supra* note 5, at 41 (explaining that the ICTY and the ICTR evolved from the U.N. Security Council's political process).

⁷² *Id.*

⁷³ Dougherty, *supra* note 65, at 312.

⁷⁴ See Dougherty, *supra* note 65, at 320 (noting that the Security Council's response to the conflict in Sierra Leone was largely a construct of the failures of the ICTY/ICTR and the lack of funding provided to the Special Court for Sierra Leone).

⁷⁵ GOLDSTONE & SMITH, *supra* note 23, at 102.

⁷⁶ Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SEC. 5, 21 (2004) (opining that the ICTY has supported actions motivated by ethnic considerations); Olivera Simic, *Brining "Justice" Home? Bosnians, War Criminals and the Interaction between the Cosmopolitan and the Local*, 12 GERMAN L.J. 1388, 1407 (2011) (arguing that the ICTY supported ethnonationalism).

⁷⁷ Snyder & Vinjamuri, *supra* note 76, at 22 (2004) (stating that the biased preferences of the ICTY has inhibited the growth of domestic law); Varda Hussain, *Sustaining Judicial Rescues: The Role of Outreach and*

officials,⁷⁸ has also faced attack for its failings. Temporal restrictions on the ICTR's jurisdiction, put in place to "expedite the work of justice and the process of reconciliation,"⁷⁹ have faced particular criticism:

Rwandan representatives have countered that this will severely curtail [the ICTR's] ability to achieve domestic reconciliation: "An international tribunal which refused to consider the causes of genocide . . . cannot be of any use to Rwanda because it will not contribute to eradicating the culture of impunity or creating a climate conducive to national reconciliation."⁸⁰

Despite the internal decision to adopt the Alternative Justice Mechanism (AJM) *gacaca* to impose a broader range of accountability for the genocide and move the country towards reconciliation, the ICTR remains a remote international institution.⁸¹ Deriving its power from the UN structure and essentially the product of international political concerns combined with a post-Cold War liberalism, "the main beneficiary of the ICTR's work arguably has been the international community – whether in terms of assuaging guilt or developing international criminal law – and not Rwandans."⁸² With the ICTY and ICTR plagued by accusations of inadequacy, the movement away from primacy in the creation of the ICC may represent a logical progression (or regression) from the tribunals' problems.

Capacity-Building Efforts in War Crime Tribunals, 45 VA. J. INT'L L. 547, 562 (2005) (discussing the stagnation of domestic law brought from the implementation of international law through the ICTY).

⁷⁸ Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan national Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163, 180 (2000).

⁷⁹ Martii Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. UN L. 1, 10 (2002).

⁸⁰ Christopher Rudolph, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals*, 55 INT'L ORG 655, 667–68 (2001) (quoting a Rwandan representative identifying the temporal restrictions as detracting from a climate conducive to national reconciliation).

⁸¹ See MARK DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 130–31 (1st ed. 2007) (stating that postgenocide Rwanda exemplifies the costs of externalized justice); see also Lillian A. Barria & Steven D. Roper, *How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR*, 9 INT'L J. HUM. RTS. 349, 349 (2005) (conceding that literature has frequently identified the tribunals as ineffective).

⁸² DRUMBL, *supra* note 81, at 132 (identifying the international community as the primary beneficiary of the development of international criminal courts).

d. The Rome Statute of the International Criminal Court

The decision to adopt the Rome Statute on July 17, 1998, the last day of the Rome Conference, was hailed by advocates “as a triumph of international aspiration over the political and pragmatic realities of the international system that have prevented the evolution of an effective and permanent international criminal court since the end of World War I.”⁸³ Movement towards the creation of a permanent international court was indeed a long and drawn-out process, dominated by debates regarding the relationship between national and international criminal jurisdictions.⁸⁴

The earliest debates regarding complementarity are found at the Second Hague Peace Conference of 1907.⁸⁵ This meeting was an attempt to remedy the failings of 1899’s First Conference, at which the Permanent Court of Arbitration was established.⁸⁶ Specifically, “it was hoped that the failure of the First Conference to give the Court of Arbitration compulsory jurisdiction could be corrected and a functional permanent tribunal could be established.”⁸⁷ These efforts, predating the Rome Conference by almost a century, were stymied by political concerns.⁸⁸ The initially supportive American delegation eventually rejected the notion of compulsory jurisdiction.

[T]he rhetoric designed to rally support for an effective court was little more than empty rhetoric. Instead of submitting to compulsory jurisdiction of the proposed Court, the Americans submitted a long list of reservations to jurisdiction based upon a desire to protect America’s “vital interests.” This sentiment in support of state sovereignty was echoed throughout the Conference, and only two of the forty four nations

⁸³ Newton, *supra* note 5, at 23.

⁸⁴ See generally U.N. Secretary-General, *supra* note 25 (discussing the hurdles in establishing an international court).

⁸⁵ PERMANENT COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1044 (last visited Sept. 10, 2012) (stating that the PCA was established at The Hague in 1899 and revised at the second Hague Peace Conference in 1907).

⁸⁶ Peter, *supra* note 38, at 180.

⁸⁷ K. Hubbard Heid, *Separation of Powers Within the United Nations: A Revised Role for the International Court of Justice*, 38 STAN. L. REV. 165, 171 (1985).

present were willing to accept the compulsory jurisdiction of the Court.⁸⁹

However, the question of a permanent international court did not end with the Second Hague Peace Conference. The horrors of World War I ensured that numerous efforts were made to raise the debate throughout the inter-war period.⁹⁰ With little international legal foundation, the issue of complementarity and jurisdiction was sidelined in favor of discussions relating to the Court's proposed legal basis.⁹¹ It was with the violations committed in World War II that a new urgency seized the debate and the question of complementarity was re-introduced.⁹² The London International Assembly, "created in 1941 under the auspices of the League of Nations Union, was not an official body but its members were designated by the Allied Governments established in London"⁹³ The Assembly debated the question of Nazi war crimes prosecutions, with specific focus on the jurisdictions available to conduct trials, and drew the conclusion that "as far as possible, national courts should deal with all war crimes which came within their respective jurisdictions, but that certain categories of war crimes . . . should be remitted to an international criminal court."⁹⁴ The decision to reorient the debate and consider questions of jurisdiction mirrors the speed with which the Allies moved towards the Nuremberg trials. Complementarity is ultimately a functional concept. As such, the lack of commitment to an international court during the inter-war period negated any need to concentrate on questions of the court's function. Instead, the debate was one of foundations. Following World War II, the impetus to proceed with international trials introduced a need to ask questions of procedure and function. It is within this context that the complementarity principle began to dominate discussions of an international criminal court.

The role of complementarity was a question also considered in the codification of human rights following

⁸⁸ Peter, *supra* note 38, at 180 (explaining why the Court of Arbitration was not given compulsory jurisdiction).

⁸⁹ Peter, *supra* note 38, at 180.

⁹⁰ See U.N. Secretary-General, *supra* note 25 (surveying the question of an international court's legal basis); see also Susan Hannah Farbstien, *The Effectiveness of the Exercise of Jurisdiction by the International Criminal Court: The Issue of Complementarity* at 13–14, EUROPEAN CENTRE FOR MINORITY ISSUES (August 2001) available at http://www.ecmi.de/uploads/tx_lfpubdb/working_paper_12.pdf (analyzing the legal bases for past international tribunals).

⁹¹ See Peter, *supra* note 38, at 182 (adverting to the urgency engendered by World War II vis-à-vis the need for an international criminal court).

⁹² See U.N. Secretary-General, *supra* note 25.

⁹³ U.N. Secretary-General, *supra* note 25.

World War II. On December 11, 1946, the UN General Assembly adopted a resolution requesting that the Economic and Social Council (ESC) address the drafting of a Genocide Convention.⁹⁵ Alongside substantive discussions, it was the debate regarding the jurisdiction of a parallel international court that most divided negotiating parties:

Those favoring the granting of jurisdiction to an international court felt that such a provision was essential, as in almost every serious case of genocide it would be impossible to rely on the courts of the State, where the crime has been committed, to exercise effective jurisdiction. The opponents contended that the intervention of an international court would be an infringement of State sovereignty.⁹⁶

This seemingly insurmountable division was eventually resolved as a compromise in Article VI of the Genocide Convention which “provides that the competent courts are those of the state on whose territory the offence is committed or ‘an international criminal court which can dispense justice for those states party to the convention that have recognized its jurisdiction.’”⁹⁷ This debate was mirrored in the creation of the Anti-Apartheid Convention, which is “the only international convention which provides for the establishment of an international criminal court.”⁹⁸ Indeed,

Article V of the Anti-Apartheid Convention kept open the possibility that in the future, in addition to the principle of universal criminal jurisdiction to be applied by all states’ domestic courts, there would be an international criminal court with jurisdiction over crimes of apartheid. In this it went further than the Convention against Genocide, since it set universal criminal jurisdiction and jurisdiction of an international criminal court side by side.⁹⁹

The Rome negotiations were, therefore, a culmination of a century-long debate regarding an international criminal court and its jurisdiction. The political nature of these discussions, reflected most acutely in the State sovereignty and ‘vital interest’ arguments, stymied the Court’s creation. The complementarity debate was one that dominated the Rome

⁹⁴ U.N. Secretary-General, *supra* note 25.

⁹⁵ U.N. Secretary-General, *supra* note 25 (explaining the main argument for and against the creation of an international court for genocide issues).

⁹⁶ Bernard Graefrath, *Universal Criminal Jurisdiction and an International Criminal Court*, 1 EUR. J. INT’L L. 67, 69 (1990).

⁹⁷ Bassiouni, *supra* note 31, at 63.

⁹⁸ Graefrath, *supra* note 96, at 71.

negotiations and “it was clear from the outset that widely divergent views existed on the approach to be taken.”¹⁰⁰ Rome took forward the outline of the International Law Commission’s (ILC) 1993 Draft Statute, initially criticized as too vague.¹⁰¹ The ILC approach centered on judging complementarity, and invoking international jurisdiction, according to the unavailability or ineffectiveness of national courts.¹⁰² Despite objections relating to the subjectivity of determining ‘unavailability’ or ‘ineffectiveness,’ this outline for the complementarity doctrine was one ultimately applied by the Rome Statute.¹⁰³

The decision to include a principle of complementarity in the ICC’s foundational statute was an attempt to resolve a long history of disputes regarding the Court’s jurisdiction. It was a compromise aimed “to safeguard the primacy of national jurisdictions, but also to avoid the jurisdiction of the court becoming merely residual to national jurisdiction.”¹⁰⁴ While the Statute itself does not offer an explicit definition of complementarity, provisions outlined in both the Preamble¹⁰⁵ and Article 1¹⁰⁶ “compels the conclusion that the International

⁹⁹ Graefrath, *supra* note 96, at 71.

¹⁰⁰ ROY S. LEE, *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 45 (1st ed. 1999).

¹⁰¹ See LEE, *supra* note 100, at 45 (explaining the ILC’s main points and the rationale behind them).

¹⁰² See LEE, *supra* note 100, at 45–51 (detailing the resistance of some delegations to aspects of complementarity and the eventual compromise); see also NIDAL NABIL JURDI, *THE INTERNATIONAL CRIMINAL COURT AND NATIONAL COURTS: A CONTENTIOUS RELATIONSHIP* 16 (2011) (stating that complementarity was chosen over primacy, an alternative legal theory).

¹⁰³ See Mohamed El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT’L L. 869, 890 (2001–2002) (suggesting that states would be reluctant to sign the ICC without this balancing approach); see also Bartram S. Brown, *Primacy or Complementarity*, 23 YALE J. INT’L L. 383, 418 (1998) (describing how complementarity and some other key issues would determine the balance of power between the international and national courts).

¹⁰⁴ Ad Hoc Committee on the Establishment of an International Criminal Court, 1995, U.N. Doc. A/50/22; GAOR, 50th Sess., Supp. No. 20 (1995). In paragraph 10 of the Preamble, it is asserted that “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” See Rome Stat. of the Int’l. Crim. Ct., Preamble.

¹⁰⁴ Ad Hoc Committee on the Establishment of an International Criminal Court, 1995, U.N. Doc. A/50/22; GAOR, 50th Sess., Supp. No. 20 (1995). In paragraph 10 of the Preamble, it is asserted that “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” See Rome Stat. of the Int’l. Crim. Ct., Preamble.

¹⁰⁵ Article 1, in language mirroring paragraph 10 of the Preamble, states that the ICC “shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to

Criminal Court was intended to supplement the foundation of domestic punishment for violations of international norms, rather than supplant domestic prosecutions.”¹⁰⁷ The Statute’s attempt to address the relationship between the jurisdiction of the Court and the State therefore envisions a complementary relationship between the two.

Articles 17 and 18 of the Rome Statute detail the specifics of the ICC’s complementarity doctrine.¹⁰⁸ Under the banner of determining the “admissibility” of a case for investigation and prosecution by the Court, Article 17 “establish[es] the critical bulwark that protecting the power of sovereign states to prosecute cases in their national courts, as opposed to relying on the ICC.”¹⁰⁹ Article 17(1)(a) provides that a case being investigated within a national jurisdiction shall be deemed inadmissible “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”¹¹⁰ The language used in this Article, specifically the words ‘unwillingness,’ ‘inability,’ and ‘genuine,’ has been the subject of extensive academic debate.¹¹¹

Mirroring the objections at Rome, critics in academia have viewed the terms as vague and subjective.¹¹² There is an

in this Statute, and shall be complementary to national criminal jurisdictions.” *Rome Statute of the International Criminal Court*, art. 1, Jul. 17, 1998, 2187 U.N.T.S. 90.

¹⁰⁶ See El Zeidy, *supra* note 2, at 896 (explaining that the ICC Statute makes it clear that the goal of the ICC is to support and enhance the prosecution of international crimes rather than take jurisdiction away from any nations involved).

¹⁰⁷ Michael A. Newton, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT’L L. 115, 115 (2010).

¹⁰⁸ El Zeidy, *supra* note 2, at 898 (noting that the admissibility criteria established by Article 17 shelters the jurisdiction of sovereign states to prosecute their own cases).

¹⁰⁹ Newton, *supra* note 5, at 47-48.

¹¹⁰ *Rome Statute of the International Criminal Court*, art. 17, ¶ 1, Jul. 17, 1998, 2187 U.N.T.S. 90.

¹¹¹ See Greenawalt, *supra* note 7 (discussing the various interpretations surrounding the language of Article 17); see also Burke-White, *supra* note 21, at 87-91 (analyzing the Democratic Republic of Congo, specifically the question of whether a blanket amnesty constitutes an unwillingness to prosecute); see also Jennifer J. Llewellyn, *A Comment on the Complementary Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Contexts?*, 24 DALHOUSIE L. J. 192, 198-200 (2001) (giving an analysis of the ability of Truth and Reconciliation Commissions to meet the complementarity criteria); see also Jann Kleffner, *The Impact of Complementarity on National Implementation of Substantive Criminal Law*, 1 J. INT’L CRIM. JUST. 86, 87 (2003) (interpreting the language of the statute).

¹¹² Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT’L CRIM. JUST. 86, 87 (2003) (noting that “unwillingness” and “inability” both involve a subjective assessment of a State’s motives and decisions).

explicit difficulty in understanding how exactly the ICC might determine a State as proving unwilling, unable, or not genuine; Articles 17(2) and 17(3) were intended to eliminate this problem in detailing the criteria by which a State should be judged,¹¹³ but substantial difficulty remains in conducting such appraisals.¹¹⁴ Making determinations in accordance with the Rome Statute's complementarity criteria is inherently "complex and often call[s] for difficult subjective assessments by the court and prosecutor."¹¹⁵ This suggests that the introduction of specific criteria relating to unwillingness or inability has failed to solve the crisis of objectivity facing the ICC's complementarity doctrine.

Despite these allegations of subjectivity, the Rome Statute represents a landmark attempt to codify and legalize its conception of the complementarity doctrine.¹¹⁶ Fundamentally at issue, however, is the manner in which the legalization of complementarity misrepresents this historically political concept. The introduction of admissibility criteria substantially reduces the judicial picture and restricts the responsiveness of complementarity to domestic context.¹¹⁷ The historical fluctuations of the complementarity doctrine indicate that the principle has been traditionally context-dependent. It has been manipulated and adapted according to the political demands of each situation and has been subject to the whims of the political powers. Studying how complementarity has altered over the decades, it is arguable that the concept has manifested a two-level political responsiveness. The first, a reflection of the global balance of power and the demands of a stable world

¹¹³ *Rome Statute of the International Criminal Court*, art. 17, ¶¶ 2–3, Jul. 17, 1998, 2187 U.N.T.S. 90 (providing factors the Court shall consider when determining "unwillingness" and "inability" in a particular case); Ada Sheng, *Analyzing the International Criminal Court Complementarity Principle Through A Federal Courts Lens*, 13 ILSA. J. INT'L & COMP. L. 413, 432 (2007) (describing that Article 17(2) and (3) outline the standards for unwilling and unable).

¹¹⁴ While it goes beyond the scope of this paper to address in detail the debates regarding application of the admissibility criteria, it is important to note the subjectivity of determining whether the conditions outlined in Articles 17(2) and (3) exist. *See generally* El Zeidy, *supra* note 2; *see also* Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUST. 86 (2003); *see also* Llewellyn, *supra* note 111 at 192.

¹¹⁵ Newton, *supra* note 5, at 65.

¹¹⁶ El Zeidy, *supra* note 2, at 969 (describing the history of the complementarity doctrine and commending the Rome Statute's success because it allows the Court itself to apply and interpret the statute); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: an Uneasy Revolution*, 88 GEO. L.J. 381, 385 (2000) (recognizing the Rome Statute's powerful supranationalism principles and its attempt to legalize the complementarity doctrine).

¹¹⁷ DRUMBL, *supra* note 81, at 72.

order, the second, an acknowledgement of the domestic political context towards which the judicial process is directed.

II. THE POLITICS OF COMPLEMENTARITY

An examination of complementarity's historical trajectory has revealed flexibility in both its application and form of outcomes. The conclusion that this flexibility results from political responsiveness suggests that complementarity's historically manipulable nature reflects the fluidity of international and domestic politics. Stemming from this understanding is the formulation of a two-level model of political responsiveness. This section will lay out the fundamentals of this model and suggest that a reintroduction of the political is necessary in order to offer victims true redress following instances of crisis and conflict.

a. The Two-Level Model of Political Responsiveness

To suggest that complementarity exhibits the characteristics of a mere political doctrine fails to consider the nature of the interaction between political forces and the judicial process. The historical analysis of complementarity, while not comprehensive, offers two examples of the political and judicial relationship on international and domestic levels.

i. *The International Level*

Complementarity's responsiveness to international political factors reflects its manipulation by global powers, according to their interests and the demands of maintaining a stable international order. The post-World War I debate illustrated the tensions inherent in navigating the terrain of war crimes trials under the pressures of international politics. The initial advocacy of international tribunals to deter the waging of aggressive war and associated costs to victim states was a manifestation of self-interest and fear for the future of international peace and security.¹¹⁸ It was an overwhelming concern for global stability that won out and the subsequent shift in favor of domestic trials was intended to stave off Germany's potential collapse.¹¹⁹ While it would be inaccurate to suggest that international political forces offer exclusive

¹¹⁸ BETH VAN SCHACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 4 (2d ed. 2010) (asserting that prosecution of international crimes is the best way to promote desirable substantive norms and societal outcomes); WILLIS, *supra* note 24 (discussing the Prime Minister's wishes to set a new legal precedent of holding leaders criminally responsible for leading wars of aggression).

¹¹⁹ WILLIS, *supra* note 24, at 126.

explanation for the outcome of complementarity debates following World War I, the importance of these considerations must not be downplayed.

When viewed in line with the discussions that preceded the Nuremberg trials, a consistent pattern of international political responsiveness emerges. Similar to the reasoning behind the post-World War I debates, the Allies' dominant concern was the deterrence of future aggressive acts and the accompanying drain on resources.¹²⁰ The priority assigned to these interests was nowhere better stated than in Justice Jackson's opening address at the Nuremberg trials:

In the United States, we have tried to build an economy without armament, a system of government without militarism, and a society where men are not regimented for war. This purpose, we know now, can never be realized if the world periodically is to be embroiled in war. *The United States cannot, generation after generation, throw its youth or its resources on to the battlefields of Europe to redress the lack of balance between Germany's strength and that of her enemies, and to keep the battles from our shores.*¹²¹

As this statement indicates, beyond the projection of power interests the Nuremberg trials also represented a culmination of concern for a stable post-conflict Europe. Integral to this conclusion was the belief that the judicial process must be one aspect of a larger attempt to move Germany away from Fascism and the Nazi legacy.¹²² Morgenthau's pastoralization plan was a victim of these priorities, with the public and, subsequently, the administration believing that it would exacerbate tensions and increase the chances of a Nazi resurgence.¹²³ The view that international prosecution of the top Nazi leaders would consolidate denazification and contribute to a stable European future was therefore a major factor in the journey towards Nuremberg.

Preceding the surge of internationalism that accompanied the ICTY and ICTR, the international politics of

¹²⁰ See WILLIS, *supra* note 24, at 80 (showing the reasoning behind the post-World War I debates of deterring future aggressive acts).

¹²¹ Trial of the Major War Criminals Before the International Military (U.S. v. Göring) 98–155 (Nuremberg: Int'l Mil. Trib. 1947) (emphasis added).

¹²² Borgwardt, *supra* note 41, at 411 (stating that some of the broader implications of the Nuremberg trials were those of reparations, disarmament, and "denazification").

¹²³ Borgwardt, *supra* note 41, at 418 (explaining how the Morgenthau plan fell out of favor once American newspapers proposed that it was reinvigorating the German war effort).

the Cold War forced a turn to domestic jurisdictions for human rights trials.¹²⁴ The international standoff between America and Soviet Russia forced the growth of international criminal justice to take a back seat; the maintenance of a delicate diplomatic balance took precedence,¹²⁵ further demonstrating the susceptibility of complementarity to the whims of the political. The end of the Cold War and subsequent creation of the ICTY and ICTR confirms the trend. As described in Section II, the tribunals emerged from the political decision-making process of the UN and the interests of the five permanent members of the Security Council.¹²⁶ They were also, in part, the result of collective guilt at earlier international inaction.¹²⁷ The tribunals, derived from the UN's political structure and interests,¹²⁸ are an unequivocal demonstration of the manner in which the political shapes the application of complementarity.

A consideration of these key moments in the history of international criminal justice effectively substantiates complementarity's international political responsiveness. Complementarity, as traditionally applied, has been subject to the whims of the global powers, both in terms of a desire to further their own domestic interests and an obligation to preserve stability in the international order.

ii. *The Domestic Level*

Complementarity can also be viewed as historically responsive to the domestic political context.¹²⁹ While the complementarity debates that followed World War I were dominated by the interests of the victors, there was also an

¹²⁴ GOLDSTONE & SMITH, *supra* note 23, at 95.

¹²⁵ Daniel Abebe, *Not Just Doctrine: The True Motivation for Federal Incorporation and International Human Rights Litigation*, 29 MICH. J. INT'L L. 1, 41–42 (2007).

¹²⁶ Newton, *supra* note 5, at 41.

¹²⁷ Dougherty, *supra* note 65 (noting the possibility that the tribunals were created to counteract the international community's failure to prevent the atrocities in Yugoslavia and Rwanda).

¹²⁸ U.N. Charter art. 40 (authorizing the UN Security Council to create the provisional measures as it deems necessary to maintain the UN's interest of international peace and security); Newton, *supra* note 5, at 41 (clarifying that the ICTY and ICTR were unprecedented judicial enforcement measures that the Security Council deemed necessary).

¹²⁹ It is important to note that the term 'domestic political context' is intended to extend beyond explicitly political factors such as the system of governance and party politics. Rather, the term represents the implicitly, as well as explicitly, political, including the living situation of the citizenry, the conduct of crisis or conflict, and the exercise of traditions (specifically emphasizing practices relating to transition, reconciliation, and justice). Therefore, as applied in this article 'domestic political context' indicates those factors relating to governance, the relationship between citizens and the government, and post-conflict transitional processes.

implied concern for Germany's internal stability.¹³⁰ Although typically framed by a fear of how Germany's potential collapse would affect the international order, the discussions looked to Germany's domestic situation as indicative of the form that post-conflict prosecutions should take.¹³¹ Similarly, the Allied decision to defer to domestic trials was largely a consequence of extensive public and political opposition within Germany to international war crimes tribunals.¹³² Despite Leipzig's failure in offering rigorous trials for international crimes, the victors' decision to defer to domestic trials can be explained through the lens of the two-level model of complementarity. Shaped by international political concerns and guided by Germany's internal instability, the Leipzig trials were a manifestation of complementarity's responsiveness to the political demands placed on the Allied decision makers.

Again mirroring the trajectory of the post-World War I debates, the Nuremberg discussions were influenced enormously by Germany's domestic situation. While similarly framed by a concern for the European power balance, the Allies' goal of denazification was largely fed by an understanding of the country's post-conflict transition needs.¹³³ Perceiving the impact of the opposing plans for Germany's future within the context of their potential domestic impact was integral to the decision-making process.¹³⁴ Ultimately, the

¹³⁰ GOLDSTONE & SMITH, *supra* note 23, at 37; MOHAMED M. EL ZEIDY, *THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW: ORIGIN, DEVELOPMENT AND PRACTICE* 17–18 (2008) (noting that the deteriorated political conditions in Germany almost resulted in an overthrow of the German government if not for the liberal interpretation of Article 228 and the application of complementarity).

¹³¹ GOLDSTONE & SMITH, *supra* note 23, at 37; see also CLAUD MULLINS, *THE LEIPZIG TRAILS: AN ACCOUNT OF THE WAR CRIMINALS TRIALS AND A STUDY OF GERMAN MENTALITY* 26 (1921) (explaining that the Allies' acceptance of a conditional arrangement for Germany to try a selected number of cases before a German Court resulted from Germany's gravely unsettled political climate).

¹³² WILLIS, *supra* note 24, at 121–22; ZEIDY, *supra* note 130, at 18 (emphasizing the public opposition of the German army to stand trial before a foreign tribunal as incompatible with a German soldier's honor and sense of personal dignity).

¹³³ JAMES MCALLISTER, *NO EXIT: AMERICA AND THE GERMAN PROBLEM, 1943-1954* 50 (2002) (stressing that the U.S. State Department's goal of integrating a disarmed but united Germany into the world economy was based in part on the belief that any post-war order must satisfy the basic needs and desires of the German people); Borgwardt, *supra* note 41, at 418–19 (stating that public opinion in mid-1940's America had shifted away from supporting the Treasury Department's proposed plans intended to destroy Germany as a political entity towards support for plans to rehabilitate the country into a stable economy).

¹³⁴ See BASS, *supra* note 42, at 154 (noting that particular focus was given to the educatory potential of the various plans, "Presumably the element of the Nuremberg trials that would have most appealed to Roosevelt was their educational value: the Germans would be fed soup and truth.");

form of justice applied at Nuremberg was intended as part of a broad programme of denazification, necessary to Germany's transition from a fascist state.¹³⁵ As such, the decision to pursue international trials was a culmination of questions about the structure of post-war Europe, a desire to avoid the costs of total war, and an understanding of Germany's need to escape the clutches of a pervasive Nazi legacy.

The final historical snapshot is that of the ICTY and ICTR. As previously discussed, their formation was fundamentally a product of the UN's political process.¹³⁶ The unique nature of the humanitarian crises in Yugoslavia and Rwanda were major factors in the decision to form the tribunals; the application of primacy may in part be explained as deriving from the character of the "disturbing situation[s]" that emerged in these countries.¹³⁷ The decision to award primacy was also an acknowledgement of the unavailability of comprehensive domestic judicial mechanisms.¹³⁸ However, the issues regarding transition were addressed primarily by domestic actors. As illustrated by the Rwandan situation and the introduction of *gacaca* to broaden the judicial picture, the ICTR was viewed as largely inadequate to achieve

see also STEVEN CASEY, CAUTIOUS CRUSADE: FRANKLIN D. ROOSEVELT, AMERICAN PUBLIC OPINION, AND THE WAR AGAINST NAZI GERMANY 176 (2001) (detailing the U.S. State Department's concern for the German economic system and its position that a revived German economy would be vital to European reconstruction); *see also* Borgwardt, *supra* note 41, at 418–19 (discussing the American government's concern with the consequences of the Morgenthau Plan to post-war Germany).

¹³⁵ The Allies' statement of purpose issued at Yalta that summarizes their post-war objectives: "We are determined to disarm and disband all German armed forces; break up for all time the German General Staff that has repeatedly contrived the resurgence of German militarism; remove or destroy all German military equipment; eliminate or control all German industry that could be used for military production; bring all war criminals to just and swift punishment and exact reparation in kind for the destruction wrought by the Germans; wipe out the Nazi party, Nazi laws, organizations and institutions, remove all Nazi and militarist influences from public office and from the cultural and economic life of the German people; and taken in harmony such other measures in Germany as may be necessary to the future peace and safety of the world." Borgwardt, *supra* note 41, at 420; *See* Donna E. Artz, *Nuremberg, Danzification and Democracy: The Hate Speech Problem at the International Military Tribunal*, 12 N.Y.L. SCH. J. HUM. RTS. 689, 723–24 (explaining that Denazification was aimed at removing active Nazi members from official and private offices within the German government).

¹³⁶ Andrew N. Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at The ICTY and ICTR*, 12 IND. INT'L & COMP. L. REV. 53, 53–54.

¹³⁷ Guénaél Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 HARV. INT'L L.J. 237, 242.

¹³⁸ GOLDSTONE & SMITH, *supra* note 23.

accountability in post-atrocity transition.¹³⁹ While looking to the domestic context in terms of judicial availability, there was a failure to account for the wider political context within which the genocide had occurred.¹⁴⁰ As the first truly institutionalized attempt to apply a version of the complementarity doctrine, this limited appreciation for the domestic context can be seen as paralleled in the legalistic conception of complementarity laid out by the Rome Statute.¹⁴¹

Although drawing much of its focus from the politics of the international realm, the formation of the ICTY and ICTR does substantiate the two-level model of complementarity. The tribunals should be viewed as a stepping-stone from an application of the concept that is more fully embedded in the domestic political context – as seen in the post-World War I and World War II debates – to the codified and legalistic conception of the Rome Statute.

III. CONCLUSION: A REINTRODUCTION OF THE POLITICAL?

The Rome Statute's pursuit of a legalistic conception of complementarity has misunderstood the principle's historically political nature. This misunderstanding stems from an endemic fear of the political and a rejection of politics as the opponent of justice.¹⁴² Indeed, the Court consistently advocates the

¹³⁹ See Abdul Karim Bangura, *The Politics of the Struggle to Resolve the Conflict in Uganda: Westerners Pushing Their Legal Approach versus Ugandans Insisting on Their Mato Oput*, 2 J. PAN AFR. STUD. 142, 163 (2008), available at http://jpanafrican.com/docs/vol2no5/2.5_Politics_of_the_Struggle.pdf (highlighting the reconciliatory model of *gacaca*, which is a traditional African village system that focuses on reconciling the parties and promoting social harmony rather than penalizing the guilty party).

¹⁴⁰ DRUMBL, *supra* note 81, at 130–32.

¹⁴¹ While beyond the scope of this paper to consider, this may serve as some indication of a specific relationship between the institutionalization of international criminal justice and a failure to respond to the broader domestic context of a country in transition. See Kingsley Chiedu Maghalu, *Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecution*, in FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES, 197, 214–15 (Ramesh Thakur & Peter Malcontent eds., 2004) (stating the ICTR and ICTY are less than perfect mechanisms for dealing with mass atrocities since they faced numerous adjudicative challenges); see also, Newton, *supra* note 5, at 67 (noting that the jurisdictional allocation of authority to adjudicate between the ICC and states is a tiered allocation of authority, under which ICC does not have authority to take a case or initiate an investigation until domestic jurisdictional criteria and admissibility standards are resolved).

¹⁴² See Snyder & Vinjamuri, *supra* note 76, at 5 (critiquing the strategy of prosecuting perpetrators of atrocities according to universal standards for failure to pay sufficient attention to political realities such as support from powerful state actors); see also Koskeniemi, *supra* note 79, at

complete removal of political understanding from the international judicial process:

The message conveyed by Court's [sic] officials is unambiguous: it is up to the Court's organs to stay clear of politics, to subordinate politics to law, and to speak law to power. Politics, in other words, is portrayed as external to law, as something that needs to be overcome by independent organs acting on the basis of pre-given rules and principles. In this understanding the Court's fight against impunity is also a struggle with, or even against, politics.¹⁴³

The rejection of power politics and potential manipulation by international political agendas is vital to the judicial process and, in this sense, the ICC's exclusion of politics from its procedure is necessary. However, bringing forward the lessons learned from the historical analysis, true redress for victims is limited by a rejection of the political context on all levels. The ICC's Chief Prosecutor, Luis Moreno-Ocampo, stated in 2008 that "[a]s the Prosecutor, my duty is to apply the law without political considerations. I cannot adjust to political considerations."¹⁴⁴ This inflexibility is problematic. In recognising the true nature of complementarity as a doctrine of two-level political responsiveness and pairing this understanding with an acknowledgement of victims' interests as a priority, the ICC's attitude is in dire need of reform. The removal of power politics from the application of complementarity is paramount – to subject the transitional process to the manipulation of self-interested international powers is a failure to prioritize the victims of atrocity. However, there must be an emphasis placed on the acknowledgement and understanding of the domestic political context. As demonstrated through the situation facing Uganda in its struggle against the LRA and ICC prescriptions, a failure to understand transitional justice as going beyond international Rule of Law prosecutions is also a failure to put the victims at the heart of the judicial process. The ICC's rejection of AJMs as falling outside of its judicial model and failing to meet the

4 (pointing to the trial of Serbian President Slobodan Milošević and the Yugoslavia Tribunal as examples of instruments of truth and memory rather than criminal law's obsessive concentration of the accused).

¹⁴³ Sarah M. H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT'L L. 941, 942 (2010) (noting that former ICC President Philippe Kirsch's reassurance that the Court in the Sudan case was acting purely judicially and not politically).

¹⁴⁴ Luis Moreno-Ocampo, Speech, *The Tenth Anniversary of the ICC and Challenges for the Future: Implementing the Law* 4 (Oct. 8, 2008), available at http://www2.lse.ac.uk/assets/richmedia/channels/publicLecturesAndEvents/transcripts/20081007_LuisMorenoOcampo_tr.pdf.

Rome Statute's complementarity criteria¹⁴⁵ offers Ugandans little control and stymies the transitional process. It restricts the picture of justice to one of retributivism and individualism.¹⁴⁶

Advocating that the ICC reintroduce the political through an acknowledgement of domestic political context – along the vein of post-World War I and II attempts to respond to domestic demands – recognizes that the current legalistic conception of complementarity is inadequate. It understands that post-atrocity accountability and transition requires more than a narrow vision of justice.¹⁴⁷ A fear of the political and belief in individual accountability for mass atrocity has facilitated a situation in which the ICC pursues a tunnel-vision conception of post-conflict justice and accountability.¹⁴⁸ History has demonstrated that complementarity is a fluid concept, able to respond to the vacillating demands of post-conflict situations. This fluidity must be reincorporated into international practice.¹⁴⁹

The struggle facing countries such as Uganda in coming to terms with atrocity cannot be oversimplified. Unfortunately, the ICC's failure to acknowledge the detrimental impact of its narrow conception of complementarity and broaden the judicial picture has exacerbated many of the problems. In moving forward, ICC officials must understand that a conception of complementarity that acknowledges the domestic context and reintroduces a level of responsiveness to the political is necessary in placing victims at the helm. If it fails to do so, the Court will continue to find itself plagued by accusations of warped priorities and institutional self-interest.

¹⁴⁵ See Gordon, *supra* note 21, at 691–93 (proposing that certain AJMs such as *mato oput* and a truth commission can be effective in helping the Ugandan government bring LRA leaders to justice, but nevertheless conflict with the complementarity principle); see also Keller, *supra* note 18, at 278 (arguing that the ICC will preserve its credibility, and further the goals of international criminal justice by using the truth commission and *mato oput* in Uganda).

¹⁴⁶ See DRUMBL, *supra* note 81, at 35–41 (analyzing the effects of the individual in relation with collective violence); see also Michail Wladimiroff, *The Individual Within International Law*, in FROM SOVEREIGN IMPUNITY TO INTERNATIONAL ACCOUNTABILITY: THE SEARCH FOR JUSTICE IN A WORLD OF STATES, 103, 106–07 (Ramesh Thakur & Peter Malcontent eds., 2004) (noting that the ICC punishes the individual for being responsible for large-scale atrocities, and that Art. 25(3) of the ICC Statute represents the acceptable standard for criminal responsibility of individuals).

¹⁴⁷ See DRUMBL, *supra* note 81, at 181.

¹⁴⁸ See DRUMBL, *supra* note 81, at 80.

¹⁴⁹ The question of the ICC's role in the transitional process and the specific mechanisms through which the political might be reintroduced to the complementarity doctrine shall be addressed in an upcoming paper.