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**AMERICAN BRANCH OF THE  
INTERNATIONAL LAW ASSOCIATION  
INTERNATIONAL CRIMINAL COURT COMMITTEE\***

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**THE DEATH PENALTY UNDER THE INTERNATIONAL CRIMINAL COURT'S  
COMPLEMENTARITY REGIME  
QUESTIONS & ANSWERS**

**HOW DOES COMPLEMENTARITY WORK UNDER THE ICC'S ROME STATUTE?**

In the Rome Statute of the International Criminal Court ("ICC" or the "Court"),<sup>1</sup> Article 17 of the Statute directs the Court to rule a case before it "inadmissible" where the case is being "investigated or prosecuted" or has been investigated by a state which has jurisdiction, unless the national's state is/was "unwilling or unable" genuinely to carry out the investigation or prosecution.<sup>2</sup> National courts that are "willing" and "able" to investigate and/or prosecute thus have first option to do so.

The Statute, in Article 17.2, defines "unwillingness" to occur where (1) the national proceedings were made for the purpose of "shielding" the accused; (2) there was "unjustified delay"; or (3) the proceedings "were not or are not being conducted independently or impartially, and they were or are being conducted in a manner in which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice."<sup>3</sup> Article 17.3 then addresses "inability" where "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."<sup>4</sup>

**WHEN THE ICC DECLINES TO EXERCISE JURISDICTION UNDER  
COMPLEMENTARITY (RULES THE CASE "INADMISSIBLE"), COULD THE  
NATIONAL JURISDICTION STILL IMPOSE THE DEATH PENALTY?**

Yes. While the Rome Statute only permits imposition of penalties that involve a prison term,<sup>5</sup> the Statute does not rule out that the ICC judges could hold a case to be "inadmissible" even though the national court with jurisdiction retains the death sentence as a possible penalty. This

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<sup>1</sup> Rome Statute of the International Criminal Court, July 18, 1998, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90 [hereinafter "Rome Statute"].

<sup>2</sup> Rome Statute, *supra* note 1, Art. 17.1(a)-(b).

<sup>3</sup> Rome Statute, *ibid.*, Art. 17.2.

<sup>4</sup> Rome Statute, *ibid.*, Art. 17.3.

<sup>5</sup> Rome Statute, *ibid.*, Art. 77.1.

could occur, based on State Party referral or *proprio motu* initiation,<sup>6</sup> if a State Party retains the death penalty,<sup>7</sup> or, as to a Security Council referral,<sup>8</sup> in the case of referral of a non-State Party that retains the death penalty.

In the negotiations of the Rome Statute, states appear to have specifically accepted this result. The Working Group on Penalties, that existed leading into the Rome negotiations and during the negotiations, recommended that the President of the Conference make the following statement, which he did, at the last meeting of the plenary on July 17, 1998:

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 principles of complementarity between the Court and national jurisdictions, national justice systems 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 legislations and practices with regard to the death penalty.** Nor shall it be considered as influencing, in the development of customary international law or in any other way, the legality of penalties imposed by national systems for serious crimes.<sup>9</sup>

Rome Statute Article 80 reinforces this by stating: “Nothing in this Part of the Statute affects the application by States of penalties prescribed by their national law . . . .”<sup>10</sup>

### **IS THE ICC SUPPOSED TO ACT CONSISTENTLY WITH INTERNATIONAL HUMAN RIGHTS?**

Yes. The sources of law that the ICC applies are first, the “[Rome] Statute, Elements of Crimes and its Rule of Procedure and Evidence.”<sup>11</sup> It also applies “where appropriate, applicable treaties and the principles and rules of international law.”<sup>12</sup> Article 21.3 specifically requires that the Court interpret the Rome Statute (and this would include Article 17) “consistent with internationally recognized human rights.”<sup>13</sup>

### **IS IT CONSISTENT WITH INTERNATIONAL HUMAN RIGHTS FOR AN ABOLITIONIST COUNTRY TO SEND AN INDIVIDUAL TO A RETENTIONIST COUNTRY?**

An abolitionist state would not send an accused to a country that utilizes the death penalty without first receiving diplomatic assurances of non-use of the death penalty. Indeed, a state that

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<sup>6</sup> Rome Statute, *ibid.*, Arts. 14-15.

<sup>7</sup> See n. 26 *infra*.

<sup>8</sup> Rome Statute, *supra* note 1, Art. 13(b).

<sup>9</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/13 (Vol. III), at 63 (2002) (emphasis added).

<sup>10</sup> Rome Statute, *supra* note 1, Art. 80.

<sup>11</sup> Rome Statute, *ibid.*, Art. 21.1(a).

<sup>12</sup> Rome Statute, *ibid.*, Art. 21.1(b).

<sup>13</sup> Rome Statute, *ibid.*, Art. 21.3.

did so without such assurances would violate human rights obligations such as the “right to life” or the prohibition against “torture and cruel and inhuman or degrading treatment or punishment.”

For example, the prohibition against the arbitrary deprivation of life has been found to be violated when a state without the death penalty (an abolitionist state) extradites an individual to a country with the death penalty (a retentionist state) unless assurances are obtained that death will not be imposed as a punishment.<sup>14</sup> As the Human Rights Committee has explained:

For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.<sup>15</sup>

The European Court of Human Rights has also held extradition to a retentionist country, given certain conditions of detention, violates the European Convention’s prohibition against cruel, inhuman or degrading treatment or punishment.<sup>16</sup>

A variety of national courts have also refused to extradite an individual to a country that retains the death penalty absent diplomatic assurances it would not be used.<sup>17</sup> And, increasingly, abolitionist states provide in extradition treaties with retentionist states that they will not

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<sup>14</sup> *Judge v. Canada*, Hum. Rts. Comm., Communications No. 829/1998, Decision (Aug. 5, 2003).

<sup>15</sup> *Ibid.*, ¶ 10.4.

<sup>16</sup> *Soering v. United Kingdom*, 11 Eur. Hum. Rts. Rep. 439 (1989). “The European Court focused on the confluence of four factors: 1) a delay of 6-8 years on death row, 2) restrictive living conditions, 3) the young age of the defendant at the time of the crime (18 years old) along with some mental disturbance, and 4) the possibility of trying the defendant in German.” L. CARTER, E. KREITZBERG, & S. HOWE, UNDERSTANDING CAPITAL PUNISHMENT LAW 445-447 (LexisNexis 3d ed. 2012) at 452. See also *Al Saadoon and Mufdhi v. United Kingdom*, Appl. No. 61498/08, 2 March 2010 (Eur Ct Human Rights). “The Inter-American Court of Human Rights and InterAmerican Commission on Human Rights have similarly held that prison conditions, together with the anxiety and psychological suffering caused by prolonged periods on death row, constitute a violation of the prohibition of torture and CIDT.” Méndez, *supra* note 16, citing Rep. Inter-Am. Ct. H.R. no. 55/02, Merits, Case 11.765, Paul Lallion, Grenada, October 21, 2002, paras. 86-90; Rep. No. 58/02, Case 12.275, Merits, Denton Aitken, Jamaica, October 21, 2002, paras. 133-34; *Hilaire v. Trinidad and Tobago*, Inter-Am. Ct. H.R., Series C, No. 94, paras. 167-68 (Jun. 21 2002). See also Méndez, *supra* note 16 (The African Commission on Human and Peoples’ Rights has also expressed concerns that executions will violate provisions of the African Charter on Human and Peoples’ Rights, specifically “Article 4, which states that human beings are inviolable, with every human being entitled to respect for his life and the integrity of his person, and Article 5, which guarantees the right to respect of the dignity inherent in a human being.”).

<sup>17</sup> See Understanding Capital Punishment Law, *supra* note 16, at 452-53 (discussing cases from Canada, South Africa, The Netherlands, France, Germany, Spain and Mexico); Council of Europe, Human Dimension Implementation Meeting Warsaw, 22 September – 3 October 2014, Working Session 4: Rule of Law I, Contribution of the Council of Europe, at <http://www.osce.org/odihr/124116?download=true> [viewed 8/22/16] (discussing cases); Juan E. Méndez, “The Death Penalty and the Absolute Prohibition of Torture and Cruel, Inhuman, and Degrading Treatment or Punishment,” at <https://www.wcl.american.edu/hrbrief/20/1Méndez.pdf> (discussing Constitutional Courts of Canada, South Africa, Albania, Hungary, Lithuania, and Ukraine finding that the death penalty violates the prohibition of torture and CIDT).

extradite absent such diplomatic assurances.<sup>18</sup> The most protective approach is that of Italy, where the Italian Constitutional Court held that Italy would not extradite an individual to a country where the death penalty existed, despite diplomatic assurances.<sup>19</sup>

### **IS IT CONSISTENT WITH INTERNATIONAL HUMAN RIGHTS TO IMPLEMENT THE DEATH PENALTY?**

In some circumstances, it appears to still be consistent with international human rights law, although the law appears to be evolving away from that position.

However, there is also extensive case law that imposition of the death penalty can, depending on the circumstances, constitute a form of torture or cruel, inhuman and degrading treatment or punishment (“CIDT”). According to Juan Méndez, while UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment: “Regional and domestic courts have increasingly held that the death penalty, both as a general practice and through the specific methods of implementation and other surrounding circumstances, can amount to CIDT or even torture.”<sup>20</sup> He concludes that “[t]he ability of States to impose the death penalty without violating the prohibition of torture and CIDT is becoming increasingly restricted.”<sup>21</sup> He particularly notes that our understanding of the issue has been *evolving over time*:

The prohibition of corporal punishment offers an example of such an evolving standard. Once considered to be a lawful form of sanction, numerous decisions by treaty bodies and regional and domestic courts have held that various forms of corporal punishment violate Article 1 of the CAT. It is now widely accepted that corporal punishment amounts per se to CIDT or torture, and no longer qualifies as a ‘lawful sanction.’<sup>22</sup>

Méndez concludes: “A customary norm considering the death penalty to be a violation per se, if not already established, is currently in the process of development.”<sup>23</sup> Thus, by 2011, the UN General Assembly called for a moratorium on the use of the death penalty with a view to achieve its abolition.<sup>24</sup> “Several methods of execution have been explicitly deemed violations of the prohibition of torture and CIDT by international or domestic judicial bodies. . . .”<sup>25</sup>

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<sup>18</sup> See, e.g., Extradition Treaty Between the United States of America and the United Mexican States, 31 U.S.T. 5059, T.I.A.S. No. 9656 (1979), Art. 8.

<sup>19</sup> *Venezia v. Ministero di Grazia & Giustizia*, Corte coste, 27 June 1996, 79 *Rivista di Diritto Internazionale* 815 (1996).

<sup>20</sup> Méndez, *supra* note 17.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, quoting Nigel S. Rodley, Integrity of the Person, in *INTERNATIONAL HUMAN RIGHTS LAW* (Oxford University Press ed., 2000). See also Méndez, *supra* note \_\_ (“I firmly believe that a customary norm prohibiting the death penalty under all circumstances is at least in the process of formation.”).

<sup>23</sup> Méndez, *supra* note 17.

<sup>24</sup> U.N. G.A. Res. A/RES/65/206 March 28, 2011 ¶ 3.d.

<sup>25</sup> Méndez, *supra* note 17, citing cases finding stoning and death by gas asphyxiation to be violations, and discussing the “death row phenomenon,” which “refers to a combination of circumstances that produce severe mental trauma and physical suffering in prisoners serving death row sentences, including prolonged periods waiting for uncertain outcomes, solitary confinement, poor prison conditions, and lack of educational and recreational activities.” *Ibid.*

### **HAVE ALL MEMBER STATES OF THE ICC ABOLISHED THE DEATH PENALTY?**

No. Of the 124 States-Parties to the Rome Statute, 73 have abolished the death penalty entirely and another 22 states do not actively impose it; only 24 of 124 States Parties are actively using the death penalty.<sup>26</sup>

### **WOULD IT BE CONSISTENT WITH INTERNATIONAL HUMAN RIGHTS FOR THE ICC TO RULE A CASE “INADMISSIBLE” AND SEND SOMEONE BACK FOR PROSECUTION IN A DEATH PENALTY RETAINING COUNTRY?**

Arguably not. While this appears to be permitted under the Rome Statute—indeed, it was negotiated at the Rome Conference (see above)—this approach now appears out of line with international human rights jurisprudence as it has evolved.

### **IS IT CONSISTENT WITH INTERNATIONAL HUMAN RIGHTS FOR THE ICC TO RULE A CASE “INADMISSIBLE” THEREBY CLEARING THE WAY FOR PROSECUTION IN A DEATH PENALTY RETAINING COUNTRY?**

The situation where an individual would be *sent* back from The Hague to a retentionist state is the clearer situation. Yet, an inadmissibility ruling where the individual never left the retentionist state (for example, the Libyan case against Abdullah al-Senussi) is not that different. There, in finding the national court “willing” and “able” to prosecute,<sup>27</sup> the ICC Appeals Chamber essentially gave a “green light” for the domestic process to proceed in Libya, a country that retains the death penalty. (The ICC’s Libya cases were previously examined in an ABILA document.)<sup>28</sup>

### **IS THE ICC VIOLATING HUMAN RIGHTS TREATIES IF IT SENDS SOMEONE BACK TO A DEATH PENALTY RETAINING COUNTRY ABSENT DIPLOMATIC ASSURANCES?**

No. The ICC is not a party to human rights treaties, so the ICC is not committing a human rights violation when the judges determine a case “inadmissible,” thereby giving a “green light” to a domestic trial in a death penalty country. The ICC is not even violating the treaties if the accused is in ICC custody and he (or she) is then physically *sent* back to a country that imposes the death penalty, because, despite the case law prohibiting an abolitionist state from doing this, again, the ICC is not a party to human rights treaties.

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<sup>26</sup> Of the 124 States-Parties: 24 are retentionist countries (active death penalty including for ordinary crimes); 73 are abolitionist for all crimes; 5 are abolitionist for ordinary crimes (but would still have it for crimes such as treason or military crimes); 22 are “abolitionist in practice,” which means they have the death penalty for ordinary crimes, but “have not executed anyone during the last 10 years and are believed to have a policy or established practice of not carrying out executions.” Only 24 of 124 States Parties (approximately 1/5<sup>th</sup>) are actively using the death penalty. See Death Penalty Information Center, Abolitionist and Retentionist Countries, at <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140> [viewed 10/20/15].

<sup>27</sup> The Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi, ICC-01/11-01/11, Appeals Chamber, Judgment on the Appeal of Mr Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I of 11 October 2013 Entitled ‘Decision on the Admissibility of the Case Against Abdullah Al-Senussi’ (July 24, 2014) (hereinafter, the “Al-Senussi Admissibility Appeals Decision”).

<sup>28</sup> See American Branch of the International Law Association, International Criminal Court Committee, “Libya & The International Criminal Court, Questions & Answers, The Libyan Death Sentences Against Saif Al-Islam Gaddafi and Abdullah Al-Senussi & The ICC’s Admissibility Rulings,” dated Nov. 3, 2015.

Yet, it is troubling for the Court to be doing something that if four-fifths of its States Parties did, would violate their human rights obligations. (If all States Parties opposed the death penalty, yet they created a court that could send people to execution, then those states would surely be operating *ultra vires*. How can they empower an entity to do what they cannot? Is the concept so different if four-fifths purport to empower the Court to do something they cannot do?)

Note also that in the situation where a person is sent from the territory of The Netherlands, that might directly violate the human rights obligations of the Netherlands.<sup>29</sup>

### **SHOULD THE ICC RETAIN THIS LINKAGE TO THE DEATH PENALTY UNDER THE COMPLEMENTARITY REGIME?**

No. This linkage—admittedly retained at Rome—seems inconsistent with internationally recognized human rights jurisprudence, as it has evolved, and the human rights obligations of four-fifths of the States Parties.

### **DO ANY OF THE OTHER INTERNATIONAL OR HYBRID TRIBUNALS RETAIN SUCH LINKAGE TO THE DEATH PENALTY?**

No. All of the other international or hybrid tribunals created through the UN permit imposition of only prison terms, even though they too deal with the most serious atrocity crimes, and none, to the author’s knowledge, have sent cases back to countries that impose the death penalty.

For example, the International Criminal Tribunal for Rwanda (“ICTR”) did not send its “rule 11*bis* transfer cases”<sup>30</sup> back to Rwanda until Rwanda had abolished the death penalty. (As part of the “completion strategy,” certain of the ICTR and ICTY cases were sent back to national jurisdictions.) Thus, the other international and hybrid tribunals created to date, which have all been created through the UN (in contrast to the ICC which was created by its States Parties), have not had similar relationships with domestic processes that could result in imposition of domestic death sentences.

### **COULD DOMESTIC IMPOSITION OF THE DEATH PENALTY BE EVEN MORE PROBLEMATIC WHERE THE NATIONAL TRIALS SUFFER FROM DUE PROCESS VIOLATIONS?**

Yes. In a situation where due process is violated *and* the death penalty is a possible punishment, there is potential for a compound human rights violation.

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<sup>29</sup> See J.D. Ohlin, “Libya & The Death Penalty: Can the ICC Complain About Too Much Punishment?”, *LieberCode*, 28 Nov. 2011, at <http://www.liebercode.org/2011/11/libya-death-penalty-can-icc-complain.html> [viewed 8/2/16] (raising the issue whether the Headquarters Agreement would trump The Netherlands’ obligations under the European Convention). See Headquarters Agreement between the International Criminal Court and the Host State., U.N. Doc. ICC-BD/04-01-08, *entered into force March 1, 2008*, at <https://www.icc-cpi.int/NR/rdonlyres/99A82721-ED93-4088-B84D-7B8ADA4DD062/280775/ICCBD040108ENG1.pdf> [viewed 8/27/16].

<sup>30</sup> Rule 11*bis* (C) of the ICTR’s Rules of Procedure and Evidence provides: “In determining whether to refer the case in accordance with paragraph (A), the Trial Chamber shall satisfy itself that the accused *will receive a fair trial* in the courts of the State concerned *and that the death penalty will not be imposed or carried out.*” (emphasis added). ICTR Rules of Procedure and Evidence, adopted on 29 June 1995, as amended, at <http://unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf>.

For instance, the Inter-American Commission on Human Rights<sup>31</sup> has repeatedly found human rights violations to exist where the death penalty is imposed after a trial with due process violations.<sup>32</sup> Thus, mandatory death sentences without the ability to consider mitigating circumstances have been held to be in violation of treaties and national constitutions.<sup>33</sup> In the United States, death penalty sentences have been overturned for due process violations, such as ineffective assistance of counsel and failure to provide the defense with exculpatory evidence.<sup>34</sup> As Special Rapporteur Juan Méndez explains:

In certain cases, international law expressly considers the death penalty to be a violation per se of the prohibition of torture or CIDT. These standards hold that executions of persons belonging to certain groups, such as juveniles, persons with mental disabilities, pregnant women, elderly persons, and **persons sentenced after an unfair trial**, are considered particularly cruel and inhuman, regardless of the specific methods of implementation or other attendant circumstances.<sup>35</sup>

He concludes that the death penalty may not be imposed, if at all, absent “strict due process guarantees.”<sup>36</sup> This suggests that care as to due process, if anything, must be *more exacting* where there is a possibility of use of the death penalty.

As previously discussed by the ABILA ICC Committee, this compound violation of both imposition of the death sentence and domestic due process violations arguably occurred in the Libyan prosecution of Abdullah al Senussi and Saif al-Islam Gaddafi.<sup>37</sup> While the Appeals Chamber in the Senussi case did state that it could review such violations, it set a very high standard for doing so.<sup>38</sup>

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<sup>31</sup> The Inter-American Commission can hear individual complaints against members of the Organization of American States.

<sup>32</sup> It has held the American Convention on Human Rights violated by imposition of the death penalty where there has been undue delay in bringing the person to trial, failure to provide an impartial tribunal, incompetent counsel, failure to provide notice of consular assistance to foreign nationals, racial bias in the proceedings, or inhuman conditions on death row. See *The Death Penalty in the Inter-American Human Rights System: From Restrictions to Abolition*, Inter-American Commission on Human Rights (2012), at <http://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf>.

<sup>33</sup> See Carter, Kreitzberg and Howe, *supra* note 16, at 445-47 (examining national decisions and decisions from the Human Rights Committee and the Inter-American Court of Human Rights).

<sup>34</sup> See, e.g., *Wiggins v. Smith*, 539 U.S. 510 (2003) (ineffective assistance of counsel in investigating mitigation); *Williams v. Taylor*, 529 U.S. 362 (2000) (ineffective assistance of counsel in investigating and presenting mitigation); *Smith v. Cain*, 132 S. Ct. 627 (2012) (disclosure of exculpatory evidence violation).

<sup>35</sup> Méndez, *supra* note 17 (citing cases).

<sup>36</sup> *Ibid.*

<sup>37</sup> See American Branch of the International Law Association, International Criminal Court Committee, “Libya & The International Criminal Court, Questions & Answers, The Libyan Death Sentences Against Saif Al-Islam Gaddafi and Abdullah Al-Senussi & The ICC’s Admissibility Rulings,” dated Nov. 3, 2015.

<sup>38</sup> The Appeals Chamber stated that the national proceedings would have to be “completely lack[ing in] fairness” such that they fail to provide “any genuine form of justice,” before the ICC can be the proper venue. Al-Senussi Admissibility Appeals Decision, ¶¶ 190 and 229.

## **COULD THE ROME STATUTE BE AMENDED TO ELIMINATE THE ICC'S POTENTIAL LINKAGE TO NATIONAL PROSECUTIONS IN DEATH PENALTY RETAINING COUNTRIES?**

Yes. States Parties could amend the Rome Statute, either (1) not to allow a finding of “inadmissibility” where the country to exercise jurisdiction retains the death penalty (thereby, a retentionist country essentially forfeits its ability to exercise complementarity), or (2) to require diplomatic assurances of non-use of the death penalty in any case found inadmissible, which will be tried in a retentionist country (thereby, permitting the retentionist country to exercise complementarity, but not impose the death penalty).

The advantage of either amendment is that it would de-link the ICC from domestic imposition of the death penalty. This would make the Court’s practice fully consistent with human rights jurisprudence that is increasingly moving away from the death penalty being an acceptable punishment.

The difficulty with either approach is that it is reopening negotiations settled at Rome,<sup>39</sup> and likely would not receive the required political support. A Rome Statute amendment that does not amend Article 5, requires ratification by seven-eighths of States Parties.<sup>40</sup> That is a high threshold. Given that approximately one-fifth of States Parties retain the death penalty,<sup>41</sup> they may not want to alter complementarity in this way. If one-fifth of States Parties were not to ratify the amendment, ratification by seven-eighths of States Parties could not be achieved (since one-fifth is greater than the one-eighth that could refrain from ratifying and still have the amendment enter into force).

Thus, while a Rome Statute amendment would be preferable to de-link the ICC from domestic imposition of the death penalty, at this time, there likely is not enough agreement among States Parties with such an approach.

## **COULD THE ICC'S ASSEMBLY OF STATES PARTIES ADOPT A POLICY THAT DIPLOMATIC ASSURANCES BE REQUESTED IN ANY SITUATION WHERE AN INDIVIDUAL IS SENT BACK TO A DEATH PENALTY RETAINING COUNTRY, OR THE CASE IS RULED “INADMISSIBLE” CLEARING THE WAY FOR PROSECUTION IN A DEATH PENALTY RETAINING COUNTRY?**

Yes. Easier to achieve than a Rome Statute amendment would be for the Assembly of States Parties to adopt a policy that in any case that is before the ICC where the judges rule the case to be inadmissible, and where the national country that will exercise jurisdiction retains the death penalty, that the Court *request* diplomatic assurances of non-use of the death penalty. This could apply both where the accused is *sent* back to the retentionist state, or even where the accused is not in The Hague and no sending is involved.

The advantage of a policy change would be that it could simply be adopted at a meeting of the Assembly of States Parties. It would also express the strong preference of States Parties that

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<sup>39</sup> See text accompanying n. 9 *supra*.

<sup>40</sup> Rome Statute, *supra* note 1, Art. 121 (4).

<sup>41</sup> See n. 26 *supra*.

assurances be obtained, thereby bringing the Court's practice more in line with the human rights jurisprudence that approximately four-fifths of them should be following.

The negative of this approach is that, as a policy change, and not a Rome Statute amendment, it could not *prohibit* the sending of the accused, or the national court from proceeding (even if the national country were to refuse to grant assurances). The policy could only be to "request" assurances; it could not require them. If the policy were to "require" assurances, it would be altering complementarity under the Rome Statute—which can only be done by a statutory amendment. Thus, there are limitations to what a policy can achieve.

### **COULD THE ICC JUDGES ACHIEVE THE SAME RESULT IN RULING ON A CASE-BY-CASE BASIS?**

Arguably. A final approach could be a judicial remedy, with the Court, in future cases, interpreting Article 17 more in line with human rights jurisprudence.

The judges could consider current human rights law, and decide that they will not make a finding of inadmissibility where the national country still imposes the death penalty, without the ICC first receiving diplomatic assurances of its non-use. This would still permit the national country to exercise complementarity, but would ensure the death penalty is not imposed. This would thereby not increase the Court's workload, because it would allow the national proceedings, but it would not link the Court to giving a "green light" to domestic imposition of the death penalty.

The risk of leaving this to ad hoc decisions of the judges is that they could alternatively interpret the jurisprudence differently, and decide that the approach at Rome (discussed above) prevails. An ad hoc jurisprudential solution would also lack the clarity of taking a firm position on this issue, and also risks contradictory results by different chambers.

Diplomatic assurances could also be negotiated quietly, behind the scenes, without the Court acknowledging publicly that it is negotiating them. While this might be effective in the case at hand, it also fails to take a public stand on the death penalty issue, and thus lacks an open acknowledgment as to where the rule of law stands, and thus fails to advance the rule of law in a transparent manner.

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The above analysis suggests the importance of the Court viewing its obligations consistently with internationally recognized human rights, as mandated by Article 21.3 of the Rome Statute.

The US is not a party to the Rome Statute, and is not anticipated to lead any initiative that takes a stand against the death penalty, since it is a retentionist country. Some states within the United States prohibit the death penalty, while other states retain it.

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