3. THE HISTORY OF THE COMPLEMENTARITY PRINCIPLE

3.1. INTRODUCTION

Adopting the Rome Statute with 120 votes in favour, 21 abstentions and only 7 negative votes was only possible after extensive discussions between international law experts as well as between governments. This chapter will give an insight in the discussions regarding the issue of admissibility and some key jurisdictional issues. According to the rules on treaty interpretation, preparatory work is a “supplementary means of interpretation” which can be resorted to in order to “confirm the meaning” rendered by a more basic interpretation or in order to “determine the meaning” when an ambiguous, obscure, absurd or unreasonable meaning otherwise is rendered. The ICC negotiations produced a considerable amount of “preparatory work”, including the reports and the Draft Statute of the International Law Commission; the papers, reports and drafts of the Ad Hoc Committee and the Preparatory Committee; as well as the documentation from the Rome Conference.

Referring to the preparatory work of the ICC is not unproblematic. First, there is no authorised collection of preparatory work, and there might be disagreement as to which documents actually qualify. Second, some of the documents reflect the ideas of a limited number of states. Third, an idea referred to in such documents may not always coincide with a state’s final position. Fourth, interpreting the statements in such documents is complex, *inter alia*, because they are often not formulated with great precision. Fifth, not all states participated in the preparatory work, and very few participated in all parts of it. Nevertheless, regardless of the formal interpretational value, the documentation provides a valuable basis for a deeper understanding of the development and nature of the complementarity principle.

The following historical survey will, in addition to the issue of admissibility, have particular focus on how the discussions on the critical issue of conferment (acceptance) of jurisdiction developed. It will also, more briefly, comment on the mechanisms for initiating proceedings and the relationship with the Security Council. After some introductory remarks on the political stakes that were involved in the negotiation (3.2), the survey is linked to what should be considered as key stages of the process leading to the establishment of the ICC, *i.e.* the early ILC discussions, including the report of the 1953 Committee on International Criminal Jurisdiction, the ILC discussions on state responsibility and the ILC discussions on a

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61 Articles 32 and 3(1) (a) and (b) of the Vienna Convention.
62 Save perhaps for a handful of particularly well-staffed states such as France, the United Kingdom and the United States.
draft code of offences against the peace and security of mankind (3.3); the establishment in 1993 and 1994 of the two *ad hoc* Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) (3.4); the ILC discussions on an international criminal court from 1990 to 1994 (3.5); the 1995 Ad Hoc Committee (3.6); the Preparatory Committee from 1996 to 1998 (3.7); and the 1998 Rome Conference (3.8).

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3.2. THE POLITICAL STAKES INVOLVED AND THE CHANGING TIMES

The nature of an appropriate mechanism for allocating cases between the ICC and states was an essential issue in the discussions. With this issue pending, states were not able to fully foresee how the ICC would affect their sovereignty. States were reluctant to compromise on any issue “without having a clear sense of how the total picture would be”. In 1994, ILC member Crawford succinctly noted:

“Law libraries throughout the world were full of schemes for an international criminal court, but none had proved acceptable, for reasons that hinged on the unwillingness of States to establish sweeping new procedures that might have unpredictable effects.”

The discussions on admissibility were complicated by the fact that the issue was intimately intertwined with other issues that all were, each in its own way, crucial to states seeking to retain some control over the ICC’s activity *vis-à-vis* their citizens. First, there was the regime for state consent to the Court’s jurisdiction. Should it be compulsory (only requiring a relevant state’s ratification) or should it be optional (requiring the *ad hoc* acceptance in any given case of at least the suspect’s home state)? The latter would put the suspect’s home state in full control, whereas the former would make the Court far more potent. Second, should the ICC Prosecutor have *proprio motu* power to initiate criminal proceedings on his or her own initiative, or should a referral from a state party or the Security Council be required? And third, should the Security Council’s authorisation be required whenever the ICC activity could potentially interfere with the Council’s operations?

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63 Holmes 1999, p 43.