Chapter 3
The International Criminal Court and Domestic Enforcement in Canada and the United Kingdom

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1) INTRODUCTION

Since the Rome Statute of the International Criminal Court ("Rome Statute")\(^1\) was agreed to in July 1998, the question of the reach of the International Criminal Court (ICC) has frequently arisen. That is to say, when will it exercise jurisdiction over a case, rather than leaving the matter to state courts? A concern that the ICC will pre-empt national justice systems is among those raised by the United States in its staunch refusal to become a member state.\(^2\) Many, however, dismiss this concern as not being realistic given the many checks and


balances in place to ensure the ICC only takes up a matter in limited circumstances. More recently the issue is becoming relevant in those states which have ratified the Rome Statute. At a session of the House of Lords in July 2005, where members of the House sought assurance that British service personnel would not be prosecuted by the ICC, the position of the British government was said to be that it would take “a catastrophic failure of the UK justice system for the ICC to assume jurisdiction.” A senior legal advisor went so far as to invoke the words of the former Foreign Secretary, Robin Cook, in 2001, that British service personnel will “never” be prosecuted by the International Criminal Court.5

In the following discussion I want to consider the question of when, if ever, individuals who have been (or are being) dealt with under the British or the Canadian justice systems might end up before the ICC. I will contest the view that British service personnel may “never” be prosecuted, and discuss the ways in which they, or their Canadian counterparts, might be susceptible to the jurisdiction of the ICC. Key to understanding the ICC’s reach and predicting how it is likely to function is an understanding of the concept of complementarity, one of the Rome Statute’s fundamental principles. Therefore, I will begin by considering the complementary relationship between national judicial systems and the ICC. Next I will consider the legislation in place in Canada and Britain to ensure that the crimes under the ICC’s jurisdiction are prosecuted nationally. And, finally, I will consider when, if ever, the justice systems in either state might be found wanting, with the result that the International Criminal Court would be required to step into the breach.

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4 Official Report, Lords, 14/7/2005; col. 1262.
5 At the Second Reading of the International Criminal Court Bill in the House of Commons, then Foreign Secretary Robin Cook, told the House that “Members on both sides of the House should have a robust confidence that the British legal system has adequate remedies for crimes against humanity and can satisfactorily demonstrate to the International Criminal Court that any such allegations have been properly investigated and, where appropriate, prosecuted. In short, British service personnel will never be prosecuted by the International Criminal Court because any bona fide allegation will be pursued by the British authorities.” Official Report, Commons, 3/4/2001; col. 222. (http://www.publications.parliament.uk/pa/cm200001/cmhansrd/vo010403/debtext/10403–17.htm#10403–17_spnew7).