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The Principle of Complementarity in the Origins of Federal Civil Rights Enforcement, 1866-1871

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THE PRINCIPLE OF COMPLEMENTARITY IN THE ORIGINS OF FEDERAL CIVIL RIGHTS ENFORCEMENT, 1866-1871

MATTHEW A. SMITH†

“The law on the side of freedom is of great advantage only when there is power to make that law respected.” –Frederick Douglass, 1881

ABSTRACT

When the Rome Statute of the International Criminal Court was adopted in 1998, it was praised for its potential to ensure the punishment of international crimes without subjecting states to overzealous international prosecution. The Statute’s careful balance of individual security and sovereign autonomy—achieved by employing a legal concept known as complementarity—is credited as one of its core innovations. However, complementarity’s historical roots run deeper than commentators on the Rome Statute have recognized: complementarity also played a central role over a hundred years earlier in the United States Congress’s efforts to enforce the civil rights of United States citizens. This article analyzes the origins of complementarity in the Reconstruction period of United States history and compares its historical role in vindicating federal civil rights with its modern-day function in enforcing international criminal law. After exploring the parallels in both contexts, the article examines the conclusions that can be drawn from complementarity’s history in the international realm and in the founding era of American civil rights.

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TABLE OF CONTENTS

Introduction ...................................................................................................2
II. “Should Certain Crimes Not Be Tried:” The Development and Codification of the Principle of Complementarity in International Law ..............................................................................................................17
   A. The Conflict Between International Jurisdiction and State Consent Flourishes at the Ad Hoc Committee on Genocide, 1948 ..................................................................................................................18
   B. Complementarity, Consent, and Subject Matter Balance Imperfectly at the International Law Commission, 1990-1994 ...........................................................................................................23
   C. Harmonizing Complementarity, Consent, and Subject Matter at the Preparatory Committee on the Establishment of an International Criminal Court, 1995-1998 .........................27
   D. The Rome Conference Trades Consent for Complementarity .................................................................................................................................30
   A. The Civil Rights Act of 1866 ......................................................................36
   B. The Enforcement Acts of 1870 and 1871 .................................................43
IV. Complementarity as Compromise: “The Power to Make That Law Respected” ..........................................................49

INTRODUCTION

In the decade after the Civil War, the United States Congress struggled to enforce the civil rights of emancipated former slaves and pro-Union citizens of the South despite traditional doctrines of state sovereignty that denied the federal courts power to punish crimes defined by state law. Against the backdrop of widespread violence instigated by white supremacist groups such as the Ku Klux Klan, nationalist Republicans grappled with states’ rights Democrats to legally validate their project of enforcing civil rights with federal power. Republicans pointed to the demonstrated unwillingness and inability of the Southern states to vindicate civil rights in order to justify empowering federal courts to punish crimes that previously had been punishable only by state authorities.

The central legal theory used to extend federal authority into areas formerly reserved to the exclusive powers of the states was reflected over a century later in the doctrines developed for the Rome Statute of the
International Criminal Court. In both the international and United States contexts, a legal theory known to modern international law as “complementarity” was used to justify the intervention of an external judicial authority despite traditional doctrines of local sovereignty that entrusted primary adjudicatory and prescriptive power to the local sovereign. The comparison between the United States’ experiment with the principle of complementarity in the Reconstruction period and the emergence of that principle in modern international law examines legislative efforts to establish two newly developed legal orders. In the international context, the framers of the Rome Statute sought to establish a permanent forum for prosecuting international crimes; in the United States, Congressional Republicans crafted a post-Civil War federal system held together by the national government’s authority to enforce civil rights. The comparison reveals that complementarity is well-suited to achieve the purpose for which both the U.S. Congress and international legislators employed it: complementarity permits external judicial intervention on behalf of externally guaranteed norms without disrupting local sovereigns’ adjudicatory authority more than necessary to ensure enforcement.

The principle of complementarity in modern international law is expressed in the Preamble and Article 17 of the Rome Statute of the International Criminal Court. The Preamble confirms that the Court’s power to prosecute crimes within its jurisdiction is “complementary to” national jurisdictions. The reference to the “complementary” nature of the Court’s jurisdiction invokes the rule that national authorities hold the primary responsibility to enforce the prohibition of crimes that fall within the Court’s jurisdiction.

Article 17 elaborates, providing that the Court


5. Rome Statute pmbl.

6. See id. art. 17; see also Otto Triffterer, Preamble, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 13 (Otto Triffterer ed., 2d ed. 2008) (emphasizing that the principle of complementarity is “an essential quality of the Court’s jurisdictional system”); id. at 10 (“The national criminal justice systems of States Parties have jurisdictional primacy vis-à-vis the Court.”)
may admit a case only if it determines that national authorities are “unwilling or unable” to prosecute the case “genuinely” before their domestic courts.\(^7\) Thus, the Court shares jurisdiction with national authorities over crimes enumerated by Article 5 of the Statute,\(^8\) but Article 17 enables national authorities to prevent the Court from acting by carrying out a genuine investigation or prosecution.\(^9\) In so doing, Article 17 preserves states’ power to adjudicate cases involving their nationals or acts committed on their territories while enabling the Court to act where states prove to be unwilling or unable to do so.\(^10\)

After the Civil War and at the beginning of the process of reintegrating the former Confederate States into the national Union known as Reconstruction, the national Congress sought to balance a national interest in enforcing rights that were newly recognized as inherent in United States citizens against the need to retain some aspects of traditional doctrines of local sovereignty.\(^11\) As in the debate over the competence of...
the International Criminal Court to conduct prosecutions that were formerly handled exclusively by national authorities, the post-War federal Congresses struggled to assert jurisdiction in a forum that superseded the traditional understanding of local sovereignty in order to furnish protections for individuals. In both contexts, legislators created a complementary relationship between the new and the traditional forums for adjudication that sought to balance a collective interest in enforcing individual protections against the need to preserve a local sovereign’s adjudicatory authority.

Part I of this essay presents the general historical background for the enactment of the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution and the passage of legislation to enforce those Amendments by the United States Congress. The section emphasizes that the existence of a national union within the territory of the United States was deeply contested during the inception of federal enforcement of civil rights. Viewing the status of the United States from the perspective of the late 1860s is crucial to avoiding the mistake of interpreting the comparison made by this essay in light of the centralization of the United States’ federal system and the concomitant growth of national identity that occurred in later decades. Part II shifts the focus of the essay to examine

possessed primary authority to determine and secure the status and rights of American citizens.”); see also ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877 at 242–43 (1988) (describing split between the Radical and the moderate factions of the Republican Party over the issue of state sovereignty);

12. ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876 at 3 (2005) (“Federalsim was preserved. But, it was a new federalism that required the courts of the United States to redefine the lines of jurisdiction between national and state authority . . . .”).

13. See Jelena Pejic, Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness, 29 COLUM. HUM. RTS L. REV. 291, 310 (1998) (“Without complementarity, the very idea of an International Criminal Court would probably not have overcome the hurdle of state sovereignty concerns.”). While several authors have observed that the relationship between federal and state judicial systems in the United States may inform studies of the ICC’s jurisdiction, none has investigated the parallels between the ICC’s principle of complementarity and the system of criminal jurisdiction advanced by Congress during the Reconstruction period. See generally Ada Sheng, Analyzing the International Criminal Court Complementarity Principle Through a Federal Courts Lens, 13 ILSA J. INT’L & COMP. L. 413, 421-451 (2007) (considering how judicially constructed doctrines of federal jurisdiction relate to the ICC); Ernest A. Young, Institutional Settlement in a Globalizing Judicial System, 54 DUKE L.J. 1143, 1236-43 (2005) (arguing that complementarity embodies key elements of the concept of institutional settlement embraced by the Legal Process School).

14. For a discussion of the evolution of American citizenship up to the period discussed in this essay, see generally JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 (1978). Professor Kettner persuasively argues that the legal settlement achieved after the Civil War “resolved the problems of citizenship that had troubled many Americans since independence.” Id. at
the international debate about the relationship between local sovereignty and international enforcement that gave rise to the principle of complementarity in the Rome Statute. This section surveys the emergence of complementarity over a half-century of international discussion in order to build the framework for comparison with the emergence of an identical principle in the law and politics of the nineteenth-century United States. Part III completes this comparative framework by returning to the late nineteenth century to examine U.S. congressional debates about the enforcement of the post-Civil War constitutional amendments. With the comparison in place, Part IV concludes by discussing the implications of this comparison for the principle of complementary as a valuable instrument for permitting judicial intervention on behalf of individual rights.

I. “Lawlessness Reigns Supreme Here:” Resistance to Reconstruction and the Expansion of Federal Criminal Jurisdiction

In the year 1871, the United States was recovering from a civil war that had plunged the states of the former Confederacy into economic and political disgrace. After President Lincoln issued the Emancipation Proclamation ending slavery in the Confederate States on January 1st, 1863, the outcome of the war would determine whether slavery would continue to exist in the South. As a consequence, the changes wrought by a Union victory would be dramatic. The institution of slavery had a pervasive influence on every element of Southern life and culture, and for none more than the slaves themselves. Equally important was the political doctrine of white supremacy that had grown up alongside slavery and had taken root

345. The relevant point for this discussion is that, as Kettner suggests, the legal content of American citizenship was in the process of being resolved during Reconstruction, thus, it would be incorrect to impose the modern view of the United States as a successfully integrated national community on a time period in which that understanding of the nation was being established for the first time.

15. See Foner, supra note 11, at 124–28 (summarizing the impact of the war on the Southern economy).


as early as the seventeenth century. By the eighteen hundreds, the concept of distinct white and black races and an intrinsic superiority of the white race had become essential to maintaining Southern political institutions. When the Confederate Army’s leading general, Robert E. Lee, surrendered at Appomattox Courthouse in April, 1865, signaling the defeat of the Confederacy, racial slavery was extinguished and the future of a society based on white supremacy in the South was put in question.

After the war’s end, the former Confederate States were brought under the control of the Union Army with the passage of the Reconstruction Act of 1867. The Act provided that the Southern states would remain subject to military rule until they adopted reforms that were prescribed by Congress. Chief among the conditions for bringing an end to the Reconstruction program of military rule were that the states adopt constitutions granting suffrage to black male citizens and that they ratify the Fourteenth Amendment to the United States Constitution.

The requirement that the Southern states ratify the Fourteenth Amendment was central to the success of the Reconstruction program advanced by the Radical Republicans in Congress. The Radicals had been among the first to demand the abolition of slavery before the war; with the war’s end, the Radicals hoped to direct the powers of the national government on behalf of the newly emancipated slaves. With the Thirteenth Amendment, ratified in 1865, and the Fifteenth Amendment,
ratified in 1870, the Fourteenth Amendment stood as one of the three Reconstruction Amendments that provided the legal basis for the Radical Republicans’ efforts to establish a new constitutional order based on racial equality and civil rights enforced by the federal government.23

The Reconstruction Amendments abolished slavery24 and prohibited legal discrimination on the basis of race in general25 and particularly in the right to vote.26 The Amendments struck at the very core of white supremacy by demolishing the legal framework of systematic racial discrimination and enslavement that shaped the development of antebellum Southern society from its origins two hundred years before.27 Most ominous from the perspective of the former Confederacy, each of the Amendments granted power to the United States Congress to enforce the provisions of the Amendments “by appropriate legislation.”28

In cumulative effect, the Reconstruction Amendments provided the legal basis of a new political order in the South that would require Southern whites to accept the equality and citizenship of their former slaves.29 Engineering racial equality through legal reform would have been a difficult task even in the Northern states, where, as in the South, prevailing attitudes about race among the white population relegated black citizens to a secondary status in the eyes of the law.30 But in the South, the assertion of racial equality was a blow aimed at the central elements of the pre-war Southern polity. Members of a society that took slavery and white

23. See FONER, supra note 11, at 256 (“[The Fourteenth Amendment] clothed with constitutional authority the principle Radicals had fought a lonely battle to vindicate: equality before the law, overseen by the national government.”).
25. Id. amend. XIV, § 1 (forbidding the states from denying “due process” and “equal protection” of the laws to “any person within its jurisdiction” and denying them the power to “make or enforce” laws that would “abridge the privileges or immunities of citizens of the United States”).
26. Id. amend. XIV, § 1 (prohibiting the states from denying or abridging the “right of citizens of the United States to vote” on the basis of “race, color, or previous condition of servitude”).
27. See generally BERLIN, supra note 17; see also EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM 293–363 (1975) (describing the convergent growth of racism and republican thought in seventeenth and eighteenth-century Virginia).
28. U.S. CONST. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2.
30. See FONER, supra note 11, at 470 (“The [Republican] party could hardly expect to reap political benefits from efforts to combat racial discrimination, for white voters alienated by such a policy were likely to outnumber the North’s tiny black population. . . . [T]he North’s racial Reconstruction proved in many respects less far-reaching than the South’s.”).
supremacy as its foundational principles were suddenly confronted with laws that required them to accept racial equality as the new paradigm of their political community. A Congressional committee charged with investigating resistance to Reconstruction reflected on the changes wrought in a Southern polity that was composed of those who, a few years since, ruled the State and exacted obedience to their will from their slaves . . . but who are now reduced in influence and in wealth by the events of the war; of the poor white who has found himself, as he supposes, degraded by the elevation of the negro to political equality with him, his vote before having been the chief badge of his superiority; of the negro, not only voting, but ruling the State, in office with or over his former master, or . . . beginning life for himself after the best years of his strength have been spent in the service of others—all these elements beget feelings and result in disorders to which northern communities are strangers.

As related by Professor Eric Foner in his eminent history of Reconstruction, the New York Herald anticipated the commencement of the Reconstruction project with stoic resolve, declaring “we have passed through the fiery ordeal of a mighty revolution, and the pre-existing order of things is gone and can return no more. . . . [A] great work of reconstruction is before us, and we cannot escape it.”

Less than one year after the passage of the Fifteenth Amendment, the project of reconstituting Southern society based on the newly articulated civil rights was on the verge of failure. In almost every state of the former Confederacy, militias operating under different names and with varying degrees of organization had emerged to contest the new political status quo imposed by Reconstruction through a campaign of political terrorism.

Their main targets were black citizens who sought to avail themselves of their newly recognized civil rights and the officers and supporters of

31. See id. at 281–307 (describing the political mobilization of the black community and the formation of a Republican coalition in the South at the beginning of Congressional Reconstruction); see also BERLIN, supra note 17.

32. Report of the Joint Select Comm. to Inquire Into the Condition of Affairs in the Late Insurrectionary States, 42nd Cong., 98 (1872).

33. FONER, supra note 11, at 271–72.

34. See id. at 425 (“[T]he wave of counterrevolutionary terror that swept over large parts of the South between 1868 and 1871 lacks a counterpart either in the American experience or in that of the other Western Hemisphere societies that abolished slavery in the nineteenth century.”); Robert J. Kaczorowski, Federal Enforcement of Civil Rights During the First Reconstruction, 23 FORDHAM URBAN L.J. 155, 155 (1995) (“The First Ku Klux Klan was just as ruthless as its twentieth-century counterpart, but even more pervasive.”).
Reconstruction governments throughout the South.\textsuperscript{35} The most prominent of these groups was the Ku Klux Klan, which, by 1870, had emerged with a network of like-minded organizations in nearly every Southern state.\textsuperscript{36} As will be discussed further,\textsuperscript{37} the Klan and other violent white supremacist organizations represent a nineteenth-century analogue to the paramilitary and militia organizations that have become the targets of present-day international prosecution. As Professor Allen W. Trelease has recounted, the March 26, 1868 edition of the Richmond \textit{Enquirer & Examiner} described the Klan, in terms that appealed to the paper’s white readership, as “an organization which is thoroughly loyal to the Federal constitution, but which will not permit the people of the South to become the victims of negro rule.”\textsuperscript{38} The two halves of the description were contradictory, as the mantra of “negro rule” was a euphemism justifying acts of violence against black citizens attempting to assert their rights under the amended Constitution,\textsuperscript{39} and efforts to deprive them of these rights could not be an act of loyalty to the new Constitution that guaranteed civil rights equally to black and white citizens. Whether ignorant of the new constitutional provisions or reading them selectively, the newspaper continued in its praise of the Klan, which was “rapidly organizing wherever the insolent negro, the malignant white traitor to his race and the infamous squatter [Northern Republican] are plotting to make the South utterly unfit for the residence of the decent white man.”\textsuperscript{40} The paper’s author called for nothing less than for the Klan “to bring into the field . . . hundreds of thousands of those heroic men who have been tried and indurated by the perils, dangers, and sufferings of military service” to defend the pre-war status of Southern whites.\textsuperscript{41}

When the more genteel segment of conservative Southern society for which the \textit{Examiner} spoke became better acquainted with the Klan’s “heroism,” many of its newspapers declined to endorse the organization’s

\textsuperscript{35} See \textsc{Foner}, supra note 11, at 430 (“Ultimately, as a former Confederate officer put it, the Klan aimed to regulate blacks’ ‘status in society.’”); id. at 427 (“Nor did white Republicans escape the violence.”).

\textsuperscript{36} See id., at 425 (describing the spread of Klan and related organizations throughout the South).

\textsuperscript{37} See infra notes 281–283 and accompanying text.

\textsuperscript{38} \textsc{Trelease}, supra note 19, at 66.

\textsuperscript{39} See id. at 49 (“[The Klan] sprang up in opposition to every aspect of Radical Reconstruction: the whole idea of racial equality or “Negro domination,” as white Southerners chose to regard it, economic and social as well as narrowly political.”).

\textsuperscript{40} Id. at 66.

\textsuperscript{41} Id.; see also \textsc{Kaczorowski}, supra note 35, at 164–65 (summarizing the perception of the Klan held by its supporters).
brutal tactics and opted instead to deny its existence.\textsuperscript{42} But for the officers of the Reconstruction governments and black citizens seeking to assert their rights under the amended Constitution, the existence of the Klan was undeniable. Klan uprisings in Tennessee\textsuperscript{43} and Arkansas\textsuperscript{44} in 1868 and in North Carolina in 1869\textsuperscript{45} led to the imposition of martial law in those states. James E. Boyd, a former Klansman, testified to a Congressional panel investigating Klan violence that the organization aimed to achieve “the overthrow of the reconstruction policy of Congress and the disenfranchisement of the negro.”\textsuperscript{46} Caswell Holt, a black man who was shot by the Klan in his home in North Carolina, responded when asked by the same panel whether black citizens were safe in his community, “[t]hey don’t feel safe there at all . . . . [The Klan] tried to turn me from voting the Republican ticket: but I didn’t turn, and that is what they shot me for I reckon.”\textsuperscript{47} In Arkansas, the Klan’s brutal tactics vividly expressed its program of resistance to the new constitutional order. During the fall of 1868, as elections drew near, Republican Congressman James M. Hinds was shot and killed in an ambush in Monroe County.\textsuperscript{48} Near Monticello, a band of fifteen men took Deputy Sheriff William Dollar from his home and tied him by a rope to Fred Reeves, a black man, and shot them to death.\textsuperscript{49} The bodies were then tied together in an embrace and left in the road to be observed by passersby.\textsuperscript{50} The Klan’s grisly methods evidenced their total rejection of the political vision of racial equality.

\textsuperscript{42} See TRELEASE, supra note 19, at 67 (describing a “change in tone” at the Enquirer after news of the Klans’ activities spread to one of denial of its existence, which as a “common editorial position” at the time). In North Carolina, the editors of the conservative Raleigh Sentinel ran pious editorials purporting to decry “all secret societies” once federal authorities began arresting Klansmen and rumors spread that the editors themselves were members of the “Invisible Empire.” Editorial, Secret Societies, RALEIGH SENTINEL, Aug. 26, 1871 (on file with the author); see Editorial, KuKlux, RALEIGH SENTINEL, Sept. 4, 1871 (on file with the author) (reporting the accusations of a moderate Democratic newspaper and denying their membership in cryptically evasive language: “We need not say we never belonged to any secret society of any kind . . . nor can any man, with truth, say that we do.”).

\textsuperscript{43} See TRELEASE, supra note 19, at 181 (describing the declaration of martial law in nine Tennessee counties).

\textsuperscript{44} See id. at 159 (reporting the declaration of martial law in ten counties in Arkansas).

\textsuperscript{45} See id. at 203 (reporting the passage of the Shoffner Act, authorizing the governor to impose martial law).

\textsuperscript{46} CONG. GLOBE, 42nd Cong., 1st Sess. 320 (1871) (statement of Rep. Soughton reporting findings of Congressional investigations into Ku Klux Klan activity in North Carolina).

\textsuperscript{47} Id. at 321.

\textsuperscript{48} TRELEASE, supra note 19, at 154.

\textsuperscript{49} Id. at 150.

\textsuperscript{50} Id.
Nor was the Klan’s activity merely local in scope. Throughout large portions of the South, the Klan succeeded in undermining the rule of law. In Louisiana, Major George Forsyth of the U.S. Army reported hundreds of documented cases of politically motivated violence in every parish of the State.\textsuperscript{51} He attributed this massive violence primarily to “[t]he attempt of the colored citizens to exercise the right of suffrage” and “[t]he failure of the State and National Governments to afford adequate protection to its citizens from lawless men.”\textsuperscript{52} Under the category of “Casualty,” crimes such as “killed”, “hung”, “drowned,” and “badly whipped” appeared on every page of his report.\textsuperscript{53} The Klan demonstrated its power to threaten the stability of the Reconstruction government in Arkansas when it intercepted a steamship intended to resupply the Arkansas militia and confiscated four-thousand rifles.\textsuperscript{54} The incident corroborated Governor Powell Clayton’s belief that the Klan’s campaign of violence was intended not to influence upcoming elections, but to overthrow the government of the state.\textsuperscript{55} The governor declared martial law on November 1 and divided the state into four districts, each under the control of a militia commander leading segregated companies of black and white union sympathizers.\textsuperscript{56} The militia conducted an organized campaign to root out the Klan that lasted up to five months in several counties and that witnessed the Klan burning much of the town of Lewisburg to the ground.\textsuperscript{57} A local justice of the peace addressed a desperate letter to Governor Clayton, warning that “[l]awlessness, with all its horrors, reigns supreme here. . . . I do not try to maintain the authority and majesty of the law, for I am well convinced that at least half of the people here are of the Ku-Klux order.”\textsuperscript{58}

Part of Governor Clayton’s motivation in declaring martial law was to ensure that Klansmen would be convicted once apprehended.\textsuperscript{59} As the local justice’s letter indicates, the Arkansas judicial authorities were so


\textsuperscript{52}. Id. at 457.

\textsuperscript{53}. See id. at 458–511 (reporting crimes).

\textsuperscript{54}. See \textit{TRELEASE}, supra note 19, at 156–58 (narrating the successful effort to seize of the rifle shipment).

\textsuperscript{55}. See id. at 155 (“[Republican governor Powell] Clayton believed . . . that the terror . . . represented a concerted effort to overthrow the state government by threats and assassination . . . .”).

\textsuperscript{56}. See id. at 161.

\textsuperscript{57}. See id. at 161–74 (narrating the Arkansas militia’s offensive against the Klan).

\textsuperscript{58}. \textit{TRELEASE}, supra note 19, at 165.

\textsuperscript{59}. See id. at 159 (“Clayton believed . . . that the terror . . . represented a concerted effort to overthrow the state government by threat and assassination . . . .”).
intimidated by the Klan’s power that bringing prosecutions in state court would be nearly impossible, let alone obtaining a conviction from a jury composed of local residents. Arkansas exemplifies the extent to which state courts became unavailable during the peak of Klan terror due to the collapse of the local judiciary.

The breakdown of law and order in Arkansas was far from unique in the Reconstruction South. In communities throughout the Southern states, white vigilantes could rely on the tacit approbation, if not the active support, of local authorities as they inflicted a reign of terror upon communities of black and white Republicans who sought to exercise their rights of political expression or to improve their economic standing. As the Republican state primary elections of 1871 approached in New Orleans, local Republicans were unable to assemble without risking physical assault by armed gangs. On the eve of the Republican primary, Oscar James Dunn, the African-American Lieutenant Governor of Louisiana, dispatched a frantic telegram to President Ulysses S. Grant warning that “the worst element of New Orleans . . . are organized to intimidate and prevent free expression of my people at [the] primary election on Monday next. Am further satisfied that police are aiding instead of preventing inauguration of such riotous proceedings . . . [and are] causing innocent men thus assaulted to be arrested while assaulters were let go free.” As a result of the local peace officers’ complicity in this political violence, “[o]ur citizens are denied equal protection of laws for which there is redress from United States authorities only.” The Lieutenant Governor further warned the President that “unless United States Marshals at New Orleans have authority to preserve peace and afford protection”—police powers traditionally entrusted to the exclusive domain of local authorities—Dunn was “confidently certain that there will be [a] riot at primary election on Monday next and many of my people will be slaughtered.” Nor was the Southern violence limited to elections: it was also used to preserve white

60. See id. at 160 (“The civil authorities would do little if anything to punish the terrorists . . . Clayston’s purpose was to break up the Ku Klux Klan and halt the terror permanently; martial law, involving military arrests and military trials, seemed the only answer.”).
61. See Letter from Benjamin F. Flanders, Mayor of New Orleans, to Ulysses S. Grant, July 29, 1871 (warning the President of rampant political violence); Telegram from Oliver J. Dunn to Ulysses S. Grant, August 8, 1871 (same); Letter from Oliver J. Dunn to Ulysses S. Grant, July 12, 1871 (same). For a blow-by-blow account of the ubiquitous political violence that plagued New Orleans throughout Reconstruction, see generally JAMES K. HOGUE, UNCIVIL WAR: FIVE NEW ORLEANS STREET BATTLES AND THE RISE AND FALL OF RADICAL RECONSTRUCTION (2006).
62. Telegram from Oliver J. Dunn to Ulysses S. Grant, Aug. 3 1871.
63. Id.
64. Id.
landowners’ economic dominance after the abolition of the slave system. Thus, when Amos Lassiter of Montgomery, Alabama, declined to work for his wife’s former owner and chose instead to work for a black man, he was taken from his bed by the former owner and several other whites and severely whipped, an assault that was intended to “learn him to work for a white man.” The beating was but one in a trend of ritualized whippings that were inflicted against black citizens in retribution for their refusal to reenact the economy of slavery by working only for whites. Unable to obtain protection from local authorities, black citizens and Republicans increasingly relied upon federal intervention to secure their constitutional rights and physical security.

In addition to the threat of Klan violence, racially discriminatory laws in force throughout the South rendered state courts inappropriate as instruments to punish offenses committed by the Klan and like organizations. As federal attorney Benjamin Bristow observed in Kentucky, the state courts could not be relied on “to furnish protection to the colored race. To deliver these people over to the State Courts now would be equivalent to a national decree authorizing a general destruction of the race.” While the crimes of murder, rape, assault, arson, and other forms of violence typically used by the Klan to oppress black citizens and local Republicans fell within the jurisdiction of local courts under the criminal laws of each state, racial discrimination in state courts foreclosed the possibility of securing a conviction.

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66. Lassiter was told a few days after the whipping by a brother of one of his assailants that, having been beaten once, Lassiter could now “remain and go just as he had been doing and he would not be whipped anymore [because when] a colored man would do something, to displease white men, they would give him a whipping [and] after that they would go on as before, and they would never interfere with him again.” Id.
67. See KACZOROWSKI, supra note 12, at 39 (“In some places, statutes that discriminated against blacks were enforced by local judges in defiance of the [federal] Civil Rights Act [of 1866]. In other areas, statutes were impartial on their face, but local judges and juries acted in such a prejudicial manner that blacks and unpopular whites could not receive justice.”);
68. Id. at 11; see DANIEL J. FLANIGAN, THE CRIMINAL LAW OF SLAVERY AND FREEDOM, 309 (1987) (“[M]agistrates and juries discriminated against blacks, often enforcing provisions of the black codes and even the old slave laws.”).
69. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 320 (1871) (reporting finding of Congressional investigation into Klan violence in North Carolina that not a single conviction had been rendered by state authorities); FLANIGAN, supra note 68, at 374 (“[E]ven at their best civil authorities were often helpless in the face of white violence. Much more often, however, they were in complete sympathy with white assailants.”).
Party was predominant in state politics, state judicial authorities often refused to bring cases against Klansmen, and in some cases were actually complicit in the commission of the crimes. In many instances, state courts were used to frustrate the enforcement of federal law, as federal officers attempting to arrest suspects would be charged by local prosecutors and convicted in state court. Given the impossibility of obtaining convictions of Klan offenders before state courts, Governor Clayton’s conclusion that cases against the Klan would have to be prosecuted in another forum was undoubtedly correct and was shared by governors in other states. In the absence of an alternative to the state courts, the Klan was able to carry out its terrorist activities with impunity.

As Klan violence threatened black citizens and Republicans across the South in defiance of Reconstruction, Republican legislators in the United States Congress concluded that the Klan’s crimes could be prosecuted successfully only under expanded federal powers. The problem remained, however, of crafting a legal doctrine that would enable the federal courts to intervene on behalf of the black citizens of the South in spite of traditional notions of state sovereignty that entrusted state courts with exclusive jurisdiction over crimes such as murder, arson, and assault—the very methods of white supremacist intimidation that federal prosecutors sought to punish.

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70. See, e.g., CONG. GLOBE, supra note 46 (statement of Rep. Stoughton); see also Kazcorowski, supra note 70, at 156 (describing the emergence of the Ku Klux Klan as the “paramilitary wing of the Democratic Party” amid the 1866 presidential election).

71. See FLANIGAN, supra note 68, at 366 (“More important than discrimination against criminally accused blacks was the almost universal reluctance to take cognizance of blacks’ complaints against whites. In one Virginia county justices of the peace absolutely refused to act in cases of assault against blacks. Magistrates in the rest of the South made similar refusals for similar reasons.”).

72. See id. at 374–75 (recounting instances where judicial authorities in Virginia and Georgia participated in white mob violence against black citizens).

73. See, e.g., TRELEASE, supra note 19, at 223 (relating state court indictment of Union Army Colonel George W. Kirk and North Carolina Republican Governor William W. Holden for their attempts to have suspected Klansmen arrested and tried before military tribunals); KACZOROWSKI, supra note 12, at 47 (describing indictments of federal law enforcement officers in state courts).

74. See TRELEASE, supra note 19, at 210, 221–22 (describing North Carolina governor William W. Holden’s appeals to Congress and President Grant to enact federal laws that would allow prosecution of state law crimes in federal court and his ultimate reliance on military trials).

75. See KACZOROWSKI, supra note 12, at 43 (“Terrorism became a concern of the federal government because local law enforcement agencies and officers were utterly unable or unwilling to deal with it.”).

76. See FONER, supra note 11 (describing the disagreement among Republicans as to how to justify federal intervention without completely eliminating state sovereignty); see generally Steven J. Heyman, The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment, 41 DUKE L.J. 507, 524–526 (1991) (outlining the unamended Constitution’s original model, according to which
The decision of the United States Circuit Court for Kentucky in United States v. Rhodes marked the beginning of a doctrinal shift that would enable federal courts to claim jurisdiction over crimes that were formerly the exclusive domain of the states. United States Supreme Court Justice Noah H. Swayne, sitting as a circuit judge, dismissed an appeal from the prosecution in federal court of white defendants for the charges of burglary and robbery committed against a black woman. The indictment was brought in federal court under the Civil Rights Act of 1866, which gave federal courts jurisdiction over criminal cases arising under state law in which state courts would not enforce federally guaranteed civil rights.

In sustaining the lower court’s jurisdiction over the prosecution, the court upheld the Civil Rights Act against the defendants’ constitutional challenge, ruling that the Act’s provisions vesting federal courts with jurisdiction over state law crimes fell within the powers granted by the Thirteenth Amendment. Although the Civil Rights Act radically altered the relationship between state and federal courts, Justice Swayne’s decision confirmed that the Thirteenth Amendment adequately supported Congress’s effort to bring state law crimes into federal courts when state courts refused to uphold emancipated black citizens’ newly recognized rights.

The decision in Rhodes, rendered by a Supreme Court justice riding circuit, appeared to give the legal imprimatur necessary to make federal courts the primary jurisdiction for criminal prosecutions when state courts would not honor the rights of United States citizens. The majority of lower federal courts and state courts hearing cases arising under the Civil Rights Act after Rhodes reached the same outcome as Justice Swayne and sustained the Act’s constitutionality under the Thirteenth Amendment. However, because the Supreme Court of the United States had not yet decided the exact scope of authority granted to Congress by the

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77. 27 F. Cas. 785 (C.C.D. Ky. 1866) (No. 16,151).
78. See id. at 794 (dismissing the defendants’ motion in arrest of judgment).
79. 14 Stat. 27 (1866).
80. See id. § 3 (granting federal district courts jurisdiction in “all causes, civil and criminal, affecting persons” who are “denied or cannot enforce” their federal civil rights in state court).
81. See Rhodes, 27 F. Cas. at 788–94 (upholding the Act on constitutional grounds).
82. See id. at 784 (“Blot out this act and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow. It would be a virtual abrogation of the amendment.”).
83. See Kaczorowski, supra note 3, at pt. IV (analyzing Justice Swayne’s ruling in Rhodes and surveying similar rulings among lower federal and state courts).
Reconstruction Amendments, the question of Congress’s power to authorize federal jurisdiction over acts that traditionally fell within the exclusive jurisdiction of states remained open. Disagreements between Republican nationalists favoring an expansive view of Congressional authority and Democrats who defended the traditional understanding of state sovereignty culminated in the debates surrounding the Civil Rights Act of 1866 and the Enforcement Acts of 1870 and 1871, which would prove to be the high-water mark of the Republican Party’s efforts to guarantee a forum for the prosecution of crimes against citizens who defied white supremacy.

II. “SHOULD CERTAIN CRIMES NOT BE TRIED:” THE DEVELOPMENT AND CODIFICATION OF THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL LAW

Like the controversy between Republicans and Democrats over the federal enforcement of civil rights in the United States, the participants in the international debate confronted the tension between local sovereignty and superseding criminal jurisdiction. On one side of the debates lay the interest in punishing crimes that would not be effectively prosecuted by national authorities, while on the other lay the need to avoid investing the international court with such broad authority that it would engulf the role traditionally played by states in enforcing international criminal law. 84 This Part demonstrates that, as international lawmakers constructed a system for the prohibition and punishment of “unimaginable atrocities that deeply shock the conscience of humanity,” 85 the principle of complementarity enabled a centralized law enforcement authority to coexist with a continuing distribution of sovereignty among a collection of states. 86 An examination of the emergence of complementarity in the international context provides the basis for comparison with its development during

84. See, e.g., El Zeidy, supra note 9, at 110 (noting that, addressing the question of international criminal jurisdiction in the 1980s, the International Law Commission “demanded a solution that reconciled States’ concerns on the one hand and the right of the international community to repress those crimes covered by the code on the other hand”); id. at 70 (“[W]ork on a draft statute by the ILC was postponed in 1954, chiefly because States considered an international criminal court to infringe their national sovereignty and to interfere in their domestic affairs.”).
86. See generally JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 311 (2008) (proposing several explanations as to how the principle of complementarity catalyzes actions by states to punish crimes within the jurisdiction of the ICC).
Reconstruction, when the United States created a centralized system for suppressing its own legacy of horrors.

In the discussions leading to the establishment of the International Criminal Court, complementarity furnished a key instrument for ordering the relationship between national and international jurisdictions. It appeared in tandem with two other theoretical problems that were implied by the effort to create an international criminal forum. The first of these was the project of defining international crimes in a manner that would distinguish them from offenses governed exclusively by national legal systems, a problem that was exemplified by the struggle to arrive at a substantive definition of the crime of genocide that would be distinguishable from other crimes punished by domestic law. The other was the effort to achieve a balance between the role of state consent to the exercise of international jurisdiction with the need to ensure that uncooperative states could not shield offenders and fugitives from the reach of the international court. These problems of complementarity, subject matter, and state consent were ultimately resolved and coordinated with each other in the Rome Statute to ensure prosecution of crimes prohibited by the Statute while preserving the primary role of national tribunals in adjudicating international crimes. As will be discussed in the next Part, these three problems of jurisdiction—complementarity, subject matter, and consent—were also the centerpiece of the Reconstruction-era debates over the relationship between state and federal criminal jurisdictions. In both the international and Reconstruction contexts, complementarity resolved the conflict between local sovereignty and effective prosecution of crimes that threatened the rights and security of individuals.

A. The Conflict Between International Jurisdiction and State Consent

Flourishes at the Ad Hoc Committee on Genocide, 1948

The end of the Second World War galvanized the project of creating an international court with competence to try individuals accused of criminal violations of international law. In the discussions leading to the establishment of the International Military Tribunal at Nuremberg, the Allied governments taking part in the planning confronted the problem of resolving competing claims to jurisdiction over crimes committed by the

87. See EL ZEIDY, supra note 9, ch. 2 (discussing the evolution of the principle of complementarity from World War II through the Rome Conference).

88. See KLEFFNER, supra note 86, at 70 (“[T]he Second World War, and the establishment of the Nuremberg Tribunal, created considerable momentum for the creation of a permanent international criminal jurisdiction within the United Nations . . . .” (citations omitted)).
most prominent Nazi war criminals.\footnote{See id., supra note 86.} The problem arose that multiple states had valid claims under their domestic laws to try the perpetrators in their national courts.\footnote{See El Zeidy, supra note 9, at 67, 69, 72 (noting concerns expressed at the United Nations War Crimes Commission and International Commission for Penal Reconstruction and Development regarding the assertion of national jurisdiction based on territoriality).} Moreover, some crimes were committed outside of the territories of any Allied state, in which case their courts were restrained from exercising jurisdiction by domestic legislation.\footnote{See id. at 67 ("[S]everal States were already occupied in meeting a serious objection relating to the punishment of war crimes committed outside their territories." (internal quotation marks omitted)).} Thus, some form of compromise was necessary to prosecute crimes committed by Axis forces.

The various proposals to solve this problem attempted to do so by enabling the international court to claim jurisdiction where the states concerned gave their consent to trial before the international forum.\footnote{See id. at 61–64, 68–71 (describing the role of states’ consent in the major discussions surrounding the establishment of the International Military Tribunal).} The system ultimately adopted in the Nuremberg Tribunal functioned on this basis, as it provided for trial of most crimes in the national courts of states and vested jurisdiction in the Tribunal only in the case of designated Nazi officials whose crimes were committed in several Allied jurisdictions.\footnote{See id. at 76 (discussing the limitation on the jurisdiction of the Tribunal to trial of the “major war criminals”).} Although this method embodied a form of “complementarity” in its division of responsibilities between national and international forums, it did so in a manner that posed little problem for the doctrine of state sovereignty because it made the consent of the states concerned a precondition for the exercise of international jurisdiction.\footnote{See id. at 60–76 (describing the meetings of the London International Assembly and other bodies that led to the establishment of the International Military Tribunal).}

As discussions at the United Nations turned away from the need to try crimes committed by the Axis powers during World War II and toward the possibility of creating an international forum to try future cases, the conflict between international jurisdiction and the doctrine of sovereignty proved to be inevitable.\footnote{See Sharon A. Williams & William A. Schabas, Article 12: Preconditions to the Exercise of Jurisdiction, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 547, 548 (Otto Triffterer, ed. 2008) ("[F]rom the ILC Draft Statute, to the Draft Statute prepared by the Preparatory Committee and finally to the negotiations at the Rome Conference, a fundamental issue in all stages of the debate was whether ... the ICC would have ... inherent jurisdiction to prosecute the crimes listed in article 5 on account of ratification or acceptance of the Statute.")} The preparatory discussions of the Nuremberg Tribunal allowed states to tailor the parameters of the Tribunal’s jurisdiction.
retrospectively to fit only those crimes committed by their wartime enemies, but creating a court with prospective competence involved the possibility that such a court might someday claim jurisdiction over their nationals or over crimes committed exclusively on their territories.\textsuperscript{96} In view of these dangers, the need to define a principle that would enable effective prosecution of international crimes while sufficiently limiting the reach of the international forum demanded urgent attention.

The problem of balancing the proposed court’s efficacy with the need to restrain its jurisdiction consumed the negotiations of the Convention on the Prevention and Punishment of the Crime of Genocide.\textsuperscript{97} Representatives of seven states gathered in April, 1948 as an \textit{Ad Hoc} Committee on Genocide (“Committee”) under the mandate of the UN General Assembly to formulate a draft of what would become the Genocide Convention. The Venezuelan representative’s opening comments reflected the Committee’s general ambivalence toward this problem. While he “deplored the delay” in adopting effective measures for “the protection of mankind from the horrors of genocide,”\textsuperscript{98} Mr. Pérez-Perozo acknowledged that “[t]he convention on genocide would create a new crime and new jurisdiction of a mandatory nature for its prevention and punishment.”\textsuperscript{99} Thus, the Committee’s draft “involved the risk of serious conflict between national and international jurisdictions.”\textsuperscript{100} He therefore urged the Committee to “strive to avoid such cases of friction by making the national jurisdiction mainly responsible for the punishment of genocide” and to produce a draft that “respected the national sovereignty of the States.”\textsuperscript{101} From the outset of the Committee’s discussions, the interest in preventing the horrors of the recent war from recurring clashed with predominating notions of states’ entitlements as sovereigns.

As the Committee’s discussions deepened, opposing views quickly emerged among the delegates. The hard-line position defending the doctrine of sovereignty was expressed by the Soviet representative, who “stressed that no exception should be made in the case of genocide to the

\textsuperscript{96} See \textit{id.} at 553 (summarizing the position of the United States at the Rome Conference, advocating that the jurisdiction of the Court be limited to crimes committed by national of states parties to the Statute).
\textsuperscript{99} \textit{Id.} at 6.
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} \textit{Id.}
principle of the territorial jurisdiction of states, which alone was compatible with the principle of national sovereignty." The Soviet Union advocated that the Committee draft a convention that would require states parties to prosecute perpetrators of genocide and other international crimes in their national courts. If the state failed to discharge its obligation to prosecute, other parties to the convention could appeal to the Security Council to demand action by the state.

Paradoxically, the Soviet representative argued in favor of exclusive national jurisdiction on the assumption that states would not be willing to submit their agents to an international tribunal. The French representative, advocating for international jurisdiction, seized on the flaw in this assumption by pointing out that no state that was involved in genocide "would commit its governing authorities to its own courts." Countering the Soviet position, Mr. Ordonneau maintained that "[i]t was inconceivable . . . that an international crime should be dealt with by national judicial bodies" because genocide and other international crimes were often "committed with the complicity of the State, or made possible as a result of the default of the State."

The French and Soviet representatives had reached opposite conclusions based on the same assumptions about states’ unwillingness to tolerate prosecution of their officials, even in cases of genocide. The United States representative proposed a compromise between vesting exclusive jurisdiction in either a national or an international forum. Insisting that "the crime of genocide, which implied the complicity of the State, belonged to the domain of international law," and intending to address states’ concerns about infringements of their sovereignty, Chairman Maktos proposed that the international court be seized with jurisdiction subject to the court’s determination that the state in which the crime was committed "had not taken adequate measures for its punishment." The principle governing

103. See id. at 5 (proposing that national courts be given exclusive jurisdiction over genocide and other international crimes).
104. See id. ("Should one of the contracting parties violate their obligations . . . the other parties should inform the Security Council . . . ").
105. Id. at 9 (statement of Mr. Ordonneau of France).
106. Id. at 8–9.
108. Id. at 13.
the court’s determination of whether it was empowered to intervene would be “denial of justice.” 109 This competence would exist “not only in cases where States could not, but also had failed to, take appropriate measures to enforce justice.” 110 The United States’ proposal was adopted by the Committee by a vote of four to zero, with three abstentions. 111

The proposal by the United States before the Ad Hoc Committee mirrors the effect of the model of complementarity used to determine the admissibility of cases under Article 17 of the Rome Statute. Like Article 17, the United States’ proposal gave determination of whether the state had discharged its obligation to prosecute the crime in question to the court itself rather than leaving that determination to the state. 112 The proposal advanced by Mr. Maktos went even further in augmenting the court’s discretion than the corresponding provision of the Rome Statute by enabling the court to claim jurisdiction in light of any “failure” of the state to act. 113 In contrast, Article 17 of the Rome Statute requires the Court to find specifically that the state was either “unwilling” or “unable” “genuinely” to prosecute the crime in question, and directs the Court to consider specific criteria that guide its analysis in determining whether the requisite condition of “unwillingness” or “inability” exists. 114

The model of complementarity advanced by the United States was one of several methods of distinguishing national and international jurisdictions considered by the Ad Hoc Committee. The subject matter of the crime of genocide also generated extensive debate as an element of the distinction between national jurisdiction and international requirements to be imposed by a convention. The French representative admonished that problems in defining genocide were due in part to the fact that genocide “arose from a series of individual crimes which were envisaged as such in national laws. . . . [I]t thus became necessary to distinguish genocide from simple homicide.” 115 Mr. Ordonneau’s observation reveals that the drafting of the

109. Id.
110. Id. at 15.
111. Id.
112. See U.N. Doc. E/AC.25/SR.8 (1948), supra note 107, at 13 (“[I]n each case it would be for the international penal court, at the request of the parties concerned, to determine . . . whether there had been denial of justice.”).
113. See id. at 15 (“[The United States’ proposal] provided that punishment should be in the hands of an international court, not only in cases where States could not, but also had failed to, take appropriate measures to enforce justice.”).
114. See Rome Statute, art. 17 paras. 2, 3 (governing the determination of whether a case is admissible under the criteria of “unwillingness” or “inability”).
genocide convention involved a second potential form of interference with national criminal jurisdictions. The first, raised by the Soviet representative, was the threat posed by the creation of an international forum vested with authority to try crimes committed on the territory of a state or by one of its nationals without receiving the state’s consent. The second was the danger that too broad a definition of the new crime of genocide would threaten to displace the traditional domestic-law crimes such as the crime of murder. Thus, the Ad Hoc Committee was compelled to devise definitional boundaries that would constrain the subject matter of the new international crime along with limitations on the circumstances under which the international forum’s jurisdiction could be applied to a specific instance of the crime.

The Committee found its solution to the second of these problems by adopting the complementary mechanism proposed by the United States and dealt with the first by relying on the element of specific intent to destroy a discrete ethnic, racial, or religious group to distinguish genocide from murder. While the final Convention codifies the element of specific intent, the proposal for complementary national and international jurisdiction was put aside by the Sixth Committee in its consideration of the Convention, leaving development of the notion of complementarity for future debates over the creation of an international criminal court.

B. Complementarity, Consent, and Subject Matter Balance Imperfectly at the International Law Commission, 1990-1994

The International Law Commission ("Commission") confronted the problem of defining international crimes and the jurisdiction of a permanent international criminal court through its efforts to compose a Draft Code of Offences against the Peace and Security of Mankind and its

118. See supra note 111 (noting acceptance of the proposal made by Chairman Maktos).
119. See id. at 15 (statement of Mr. Rudzinski of Poland) ("[I]n considering the crime of genocide, the Committee naturally did not wish to leave aside the concept of murder. The two things were, however, not exactly the same, and the difference was that of intention. Not only murder but also the extinction of a group . . . might constitute a case of genocide.").
120. See Convention for the Prevention and Punishment of the Crime of Genocide art. 2 Dec. 9, 1948, 78 U.N.T.S. 277 (requiring "intent to destroy, in whole or in part, a national, racial, ethnical, or religious group").
121. U.N. Sixth Comm., 98th mtg. at 6–9 (Nov. 10, 1948).
discussions on the question of international criminal jurisdiction. These efforts began in 1949 and continued in 1954, but further discussions of both topics were postponed thereafter pending progress on defining the crime of aggression.

The Commission’s discussions returned to the question of international jurisdiction during its sessions in the early 1990s, when the Commission confronted the apparent conflict between international criminal jurisdiction and states’ authority to adjudicate cases before their national tribunals. Like the members of the Ad Hoc Committee on Genocide of forty-two years before, the members of the Commission sought to craft a relationship between national and international jurisdictions that balanced the danger of “contradiction and hence difficulty at both the legal and the political level” against “the risk of a denial of justice should certain crimes not be tried either by the international court or by a domestic court.” Speaking at the Commission’s meeting of May 9, 1990, Mr. Bernhard Graefrath, a member of the Commission, urged his fellow members to consider “a question which was often raised but rarely elaborated upon, namely the legal implications for State sovereignty of establishing an international criminal jurisdiction.” He encouraged the Commission to consider different models of international jurisdiction by emphasizing that “the extent to which national sovereignty was affected by the establishment of a court would very much depend on whether the court was intended to replace, compete with or complement national jurisdiction.” His comments also suggested that the subject matter of the crimes over which the court would have jurisdiction could function as a boundary between international jurisdiction by locating some crimes within the exclusive jurisdiction of either the international or the national forum.

122. See El Zeidy, supra note 9, at 83–92 (describing the work of the Commission on both international jurisdiction and the Draft Code of Offences through 1954).
123. See id., at 102 (“[B]oth the 1953 revised draft statute and the 1954 draft Code were laid on the table until the General Assembly received the report of the Special Committee on the definition of aggression.”).
124. See id. at 110 (“One of the main obstacles in the face of accepting the involvement of an international jurisdiction . . . was the question of sovereignty.”).
126. Id. at para. 36 (statement of Mr. Graefrath).
127. Id.
128. See id. at para. 37 (“Another important question was the kind of crimes to be dealt with by the court and whether States should be allowed to exclude the competence of the court for certain crimes.”); see also id. at para. 39 (opposing any proposal to allow the court’s competence to include crimes under customary international law and the domestic laws of states).
In any case, he emphasized that the Commission should not adopt a requirement of consent by both the territorial state and the state of nationality, as had been considered by the Commission in its previous work.\(^{129}\) In Mr. Graefrath’s view, the element of subject matter and the issue of whether the exercise of the court’s jurisdiction to hear individual cases should depend on the consent of states to each case remained open, but the highly deferential court proposed by the Commission’s earlier report was out of the question. Other members of the Commission shared Mr. Graefrath’s attention to subject matter,\(^{130}\) complementary, concurrent or exclusive models of jurisdiction,\(^{131}\) and the question of state consent to individual cases.\(^{132}\)

A model of complementarity that closely resembled the formulation that appeared in the Rome Statute emerged from the Commission’s discussion as a formal proposal in 1994, when the commission adopted a draft Article 35, which allowed the court to admit a case only if it was unable to conclude that the crime had been “duly investigated” by a State with jurisdiction, or if it found that the crime was under investigation by the State and there was “no other reason for the court to take any further action.”\(^{133}\) As noted in the commentary to the draft statute, the principle of complementarity embodied in draft Article 35 served to regulate the exercise of the court’s jurisdiction, rather than to determine whether jurisdiction existed in regard to a particular case.\(^{134}\)

The adoption of Article 35 of the draft statute marked a turning point in the use of the principle of complementarity to resolve the conflict between preserving state sovereignty and creating an independent forum.

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\(^{129}\) See id. at para. 42 (describing the consent requirement envisioned in the 1953 report as “an unacceptably restrictive clause.”).

\(^{130}\) See, e.g., id. at para. 50 (statement of Mr. Calero Rodrigues); id. at para. 60 (statement of Mr. Mahiou); id. at para. 68 (statement of Mr. Bennouna); Summary Records of the 2155th Meeting, [1990] 1 Y.B. Int’l L. Comm’n para. 58, U.N. Doc. A/CN.4/5/ER.A/1990 [hereinafter YILC 2155th Meeting] (statement of Mr. Ogiso).

\(^{131}\) See, e.g., YILC 2154th Meeting, supra note 125, at para. 71 (statement of Mr. Bennouna); YILC 2155th Meeting, supra note 130, at para.14 (statement of Mr. Ogiso).

\(^{132}\) See, e.g., YILC 2154th Meeting, supra note 125, at para. 51 (statement of Mr. Calero Rodrigues); id. at para. 71 (statement of Mr. Bennouna); YILC 2155th Meeting, supra note 130, at para. 5 (statement of Mr. Thiam); id. at para. 13 (statement of Mr. Ogiso).


\(^{134}\) See 1994 Draft Statute, supra note 133, art. 35 cmt. 1 (noting that Article 35 “goes to the exercise, as distinct from the existence, of jurisdiction.”).
for the prosecution of international crimes; however, the draft statute’s provisions regarding subject matter and the role of states’ consent diminished the importance of the complementarity principle in performing this function. Contrary to the Commission’s earlier proposals granting the court fluid jurisdiction over all crimes defined by customary international law, the draft statute proposed a court of limited subject matter jurisdiction, with power to try only those crimes that were enumerated by the statute. More importantly, the draft statute predicated the jurisdiction of the court on the consent of both the state having custody over an accused individual and the state on whose territory the crime had been committed. This provision tended to undermine the purpose of providing punishment for international crimes, as it would allow accused persons to be insulated from prosecution in politically sympathetic states. The consent requirement also allowed little hope of prosecution in cases where state agents perpetrated an international crime within their own territories on behalf of the state, a problem with which the members of the Ad Hoc Committee were centrally concerned in 1948. As Mr. Ordonneau had observed during the Ad Hoc Committee discussions, a state in those circumstances would be unlikely to consent to international jurisdiction.

Notwithstanding these shortcomings, the Commission’s 1994 draft statute advanced the discussion of the establishment of an international court by drawing together the three instruments that would ultimately be

135. See El Zeidy, supra note 9 at 126 (“The 1994 complementarity model was taken as the basis for future work, which led to the adoption of the complementarity principle found in the 1998 Rome Statute.”).

136. See 1994 Draft Statute, supra note 133 pt. 3 cmt. 5 (noting that the current draft statute departs from the Commission’s approach in the 1993 draft statute, which granted the court jurisdiction over general international law).

137. See id., art. 20 (conferring jurisdiction to try crimes of genocide, aggression, war crimes, crimes against humanity, and crimes defined by designated treaties); see generally James Crawford, The Work of the International Law Commission, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 23, 31–33 (Antonio Cassese et al. eds., 2002) (discussing reasons for abandoning general customary international law as the definition for the proposed court’s subject matter jurisdiction).

138. See 1994 Draft Statute, supra note 133, art. 21 (listing preconditions for the exercise of jurisdiction).


used in the Rome Statute to balance the interest in prosecution of international crimes against states’ claims under the principle of sovereignty. As the commentary to the draft statute recognized, the draft statute implemented the concept of complementarity as embodied in the Rome Statute together with limitations on the subject matter of the court’s jurisdiction and the question of the role of states’ consent. The draft statute demonstrated that consent, complementarity, and subject matter could be addressed in the context of a single statutory instrument to distinguish national and international jurisdictions. While the Commission’s draft tipped the balance too far in favor of deference to sovereignty by predating the court’s jurisdiction on the consent of the custodial and territorial states, the draft statute paved the way for the consensus on the scope and preconditions for the exercise of the international court’s jurisdiction that would be reached at Rome.

C. Harmonizing Complementarity, Consent, and Subject Matter at the Preparatory Committee on the Establishment of an International Criminal Court, 1995-1998

The consultations among the state delegations of the Preparatory Committee on the Establishment of an International Criminal Court led directly to the final draft that was considered by the conferees/plenipotentiaries at Rome. The Committee based its discussions on a range of sources, including proposals submitted by delegations, consultations with the officers of the Ad Hoc Tribunal for the Former Yugoslavia and the draft articles produced by the International Law Commission. Through their deliberations on the International Law Commission’s draft articles, the delegations developed

141. See 1994 Draft Statute, supra note 133, cmt. 1 (noting that Part Three of the draft statute, dealing with jurisdiction, should be “[r]ead in conjunction with” Article 35, dealing with complementarity, to define “the range of cases which the court may deal with”).

142. See id.


145. See id. para. 12 (noting consultations with the Office of the Prosecutor of the ICTY).

146. See id. para. 16 (noting the Committee’s decision to incorporate the draft articles prepared by the International Law Commission into its report).
their views regarding the role of state consent, subject matter, and complementarity as means of distinguishing national and international criminal jurisdictions.\textsuperscript{147}

The role of subject matter in differentiating national and international jurisdictions proved to be the least problematic of the three possible instruments for making this distinction. The Committee implicitly accepted the conclusions reached by the International Law Commission during its 1994 sessions that the international court’s subject matter jurisdiction should be limited to international crimes enumerated in the statute rather than defined by a general reference to customary international law.\textsuperscript{148} As noted in the Committee’s report, the delegates agreed that limiting the court’s subject matter jurisdiction was necessary both to preserve the integrity of the court and to safeguard the jurisdiction of national courts.\textsuperscript{149}

The discussions regarding the role of state consent and complementarity proved to be more problematic.\textsuperscript{150} Some delegations favored extending the concept of the court’s “inherent jurisdiction” over the crime of genocide as adopted by the International Law Commission’s 1994 draft articles to encompass all of the “core crimes” defined by international law.\textsuperscript{151} According to this position, the court would not be required to receive the consent of states in order to exercise its jurisdiction over individual cases if the states in question had already given their consent by ratifying the court’s statute.\textsuperscript{152} The delegates who favored this position insisted that it was consistent with the principle of sovereignty because states that ratified the statute would have consented in advance to the exercise of jurisdiction over individual crimes “as opposed to having to express [their consent] in respect of every single crime listed in the Statute at different stages.”\textsuperscript{153} In contrast, other delegations disputed the notion of

\begin{itemize}
  \item \textsuperscript{147} See id. para. 7 (noting the materials that served as the basis of the Committee’s work).
  \item \textsuperscript{148} See supra note 137 and accompanying text.
  \item \textsuperscript{149} See 1 Preparatory Committee Report 1996, supra note 144, para. 16 (noting that limiting the court’s subject matter jurisdiction was necessary “to avoid trivializing the role and functions of the Court and interfering with the jurisdiction of national courts.”).
  \item \textsuperscript{150} See Williams & Schabas, supra note 95, at 547 (“The views of States were wide ranging and until the proverbial eleventh hour on 17 July, 1998, in Rome . . . article 12 was still a make or break provision.”); Williams & Schabas, supra note 6, at 610 (“Inability was not controversial in principle . . . . The issue of unwillingness was more difficult to negotiate as some delegations had concerns concerning State sovereignty and also constitutional guarantees . . . .”).
  \item \textsuperscript{151} See 1 Preparatory Committee Report 1996, supra note 144, at para. 117 (“[T]he inherent jurisdiction of the Court should not be limited to genocide, but should extend to all the core crimes.”).
  \item \textsuperscript{152} See id. (“States, by virtue of becoming party to the statute, would be consenting to its jurisdiction.”).
  \item \textsuperscript{153} Id.
\end{itemize}
“inherent jurisdiction” and believed that sovereignty could be preserved only if concerned states gave their consent to the exercise of the court’s jurisdiction on a case-by-case basis. Ultimately, the position favoring the court’s ability to exercise jurisdiction without the consent of states parties to each individual case was codified in the Rome Statute.

The differing views on the requirement of state consent made clear that additional protections for national jurisdictions would be necessary if the new court were to be given power to try cases without state consent in each individual case. According to the “wide degree of consensus” that emerged among States present during the Preparatory Committee discussions in spite of their initially disparate viewpoints, the principle of complementarity provided a crucial element of this protection. In adopting this principle in combination with the Statute’s provisions omitting a requirement of consent to individual cases, states exchanged one precondition to the exercise of the court’s jurisdiction for another. States agreed to forgo the requirement that the concerned states give consent in each case in return for a requirement that the Court satisfy itself that the national authorities had proven to be “unwilling” or “unable” “genuinely” to prosecute the matter. While this exchange transferred the decision about the exercise of the court’s jurisdiction over individual cases from

154. See id. at para. 119 (“[B]y becoming party to the Statute of the Court, States did not automatically accept the jurisdiction of the Court in a particular case.”).

155. See Rome Statute, art. 12 (“A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.”).

156. See Williams & Schabas, supra note 6 at 610 (“Although some States . . . were of the view that the ICC should not . . . engage in judicial review of national decisions, whereas others were committed to giving the ICC a role to take jurisdiction where national proceedings were ineffective, a wide degree of consensus began to emerge. The Court would not take jurisdiction unless the State with criminal jurisdiction over the offence was unable or unwilling to carry out the investigation or prosecution. To obtain this consensus concessions were made on all sides.”).

157. See id. at 613 (“The complementarity principle strikes a balance between state sovereignty and an effective and credible ICC. Without it there would have been no agreement.”); Williams & Schabas, supra note 95, at 548 (observing that Article 17 is “intimately related” to the articles governing subject matter (Article 5) and complementarity (Article 17) and that these articles were adopted as part of a “package deal”).

158. The addition of Article 18 during the Rome Conference implies States’ recognition of the connection between complementarity and consent. Article 18 provides that a State with jurisdiction over a crime prohibited by the Statute may defer an investigation by the Prosecutor for six months by informing the Court that the State is investigating or has investigated the crime in question. Rome Statute, art. 18 § 2. Thus, while Article 17 enables States to preempt the Court’s exercise of jurisdiction to try a case by initiating a genuine investigation or prosecution, Article 18 allows States to preempt an investigation by the Court into the crime by initiating an investigation of its own.

159. See Rome Statute, art. 17 §§ 1(a)–(b) (requiring the use of criteria “unwillingness” and “inability” to determine the admissibility of a case).
states to the court, states retained the power to preempt the international court by genuinely prosecuting the cases in their own courts.\textsuperscript{160} They also limited the court’s decision to exercise jurisdiction by imposing objective criteria on the court to guide its determination of national authorities’ “inability” or “unwillingness.”\textsuperscript{161} In doing so, states addressed the objection voiced by one delegation that the “exercise of police power and penal law is a prerogative of States”\textsuperscript{162} by establishing a court that would be, in the words of another delegation, “an indispensable asset in enhancing the prevention of impunity,”\textsuperscript{163} while respecting the principle that national authorities retained primary responsibility for prosecuting crimes prohibited by the Rome Statute.\textsuperscript{164}

D. The Rome Conference Trades Consent for Complementarity

The final draft statute submitted by the Preparatory Committee to the delegates at Rome reoriented the debate over the relationship between national sovereignty and international jurisdiction. Whereas the 1994 draft produced by the International Law Commission had required the consent of both the territorial and the custodial states to the exercise of international jurisdiction in individual cases,\textsuperscript{165} the draft submitted by the delegates to the Preparatory Committee abandoned this condition in view of the limitation on the exercise of the court’s jurisdiction requiring the court to defer to a prosecution by national authorities.\textsuperscript{166} Thus, states ceased to rely

\textsuperscript{160} See Holmes, supra note 9 (noting that if states discharge their obligations to prosecute, the Rome Statute denies the International Criminal Court the authority to try the case).

\textsuperscript{161} See U.N. Gen. Assembly, Preparatory Committee on the Establishment of an International Criminal Court, Decisions Taken by the Preparatory Committee at its Session Held From 4 to 15 August, 1997, Annex I, Report of the Working Group on Complementarity and Trigger Mechanism, art. 35 paras. 3, 4, U.N. Doc. A/AC.249/1997/L.8/Rev.1 (Aug. 14, 1997) (providing criteria for determining, respectively, whether states are “unwilling” or “unable” to prosecute in individual cases); see also Rome Statute, art. 17 §§2, 3 (same); Holmes, supra note 9, at 674 (noting that the term “genuine” in Article 17 §§ 1(a), (b) was meant by state delegations to encompass an objective standard to be used in combination with the factors listed in sections 2 and 3); see also Williams & Schabas, supra note 6, at 617 (“The term ‘genuinely’ would seem to be an implied reference to the tests set out in paragraph 2 of article 17.”).

\textsuperscript{162} 1 Preparatory Committee Report 1996, supra note 144 at para. 155.

\textsuperscript{163} Id. at para. 157.

\textsuperscript{164} See id. (“National authorities and courts [have] the primary responsibility for prosecuting the perpetrators of the crimes listed in the Statute”).

\textsuperscript{165} See supra note 138 and accompanying text.

\textsuperscript{166} See Rome Statute art. 12 (omitting any requirement that States give consent to the Court’s jurisdiction on a case-by-case basis); see also Holmes, supra note 160; Williams & Schabas, supra note 95, at 548 (noting article 17 as one of several articles that counterbalances the absence of a requirement of state consent to individual cases).
on the mechanism of providing consent on a case-by-case basis in the interest of establishing a court with the “necessary status and independence”\textsuperscript{167} to fulfill its mission.\textsuperscript{168}

Achieving this dramatic advance in states’ attitudes toward the relationship between national sovereignty and international criminal jurisdiction required considerable compromise and innovation.\textsuperscript{169} Only when the theoretical tools of subject matter, consent, and complementarity were applied together to differentiate the two forms of jurisdiction could states reconcile their interest in maintaining the integrity of their national jurisdictions with the need to create an independent international court for punishing grave crimes.\textsuperscript{170} Among these tools, the concept of complementarity was the most innovative, as it enabled the international court to maintain an “inherent jurisdiction”\textsuperscript{171} to prosecute certain crimes co-extensively with national courts by introducing preconditions for activating the court’s jurisdiction.

III. “LAW ON THE SIDE OF FREEDOM:” THE PRINCIPLE OF COMPLEMENTARITY IN THE ENFORCEMENT OF CIVIL RIGHTS, 1866-1871

The problems of complementarity, consent, and subject matter that figured centrally in the international legal discussions giving rise to the International Criminal Court were equally central to the project of enforcing civil rights in the Reconstruction era of United States history. In the United States, as in the international context, the instruments of complementarity and subject matter proved to be crucial in legitimating the authority of a central power to enforce protections of individuals against depredations committed with the tolerance or support of local sovereigns, irrespective of their consent to the exercise of this power in each case. The

\textsuperscript{167} Id.

\textsuperscript{168} See Williams & Schabas, supra note 95, at 548 (“From the ILC Draft Statute, to the Draft Statute prepared by the Preparatory Committee, and finally to the negotiations at the Rome Conference, a fundamental issue in all stages of the debate was . . . the ICC would have vested in it an inherent jurisdiction to prosecute the crimes listed in Article 5 on account of ratification or acceptance of the Statute. Alternatively, would State consent be a precondition . . . .”).

\textsuperscript{169} See Holmes, supra note 9, at 668 (“The solutions developed [regarding jurisdiction and complementarity] were both complex and politically sensitive, reflecting the concerns of States over national sovereignty and the potentially intrusive powers of an international institution.”).

\textsuperscript{170} See Williams & Schabas, supra note 95, at 548 (noting that article 12 is “intimately related to” article 5 on subject matter and article 17 on complementarity and that these articles together constitute “intertwined aspects of jurisdiction”).

\textsuperscript{171} See supra text accompanying note 151; see also supra note 168.
United States Congress adopted the principle of complementarity to vest the federal government with power to assert the civil rights of individuals just as the Rome Statute applied this principle to allow an international jurisdiction for international crimes to co-exist with domestic jurisdictions by deferring to national courts when they took action to punish crimes proscribed by the Statute.

The post-Civil War Congresses upended the traditional Constitutional order of the antebellum Union by asserting the authority of Congress to enforce the civil rights of individuals within the territorial boundaries of the sovereign states. The enforcement policies adopted by the Republican Party in Congress rested on the basis of two independent legal hypotheses, both of which were derived from the recent addition of the Thirteenth and Fourteenth Amendments to the national Constitution. The first of these was the proposition that the Thirteenth and Fourteenth Amendments created new rights that drew a relationship of citizenship between individuals and the national government. Republicans asserted that the North’s victory in the Civil War and the post-war amendments augmented the bonds of citizenship between the individual and the national government. Thus, Republicans maintained that the first clause of Section 1 of the Fourteenth Amendment, which declared that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside,” established a relationship between individuals and the national government that was not recognized previously by the Constitution.

172. See KAZCOROWSKI, supra note 12, at 42 (describing Congress’s assertion of power to enforce civil rights as a “fundamental and profound reordering of the constitutional structure of the federal Union”); see generally Daniel A. Farber & John E. Muench, The Ideological Origins of the Fourteenth Amendment, 1 CONST. COMMENT. 235, 263–69 (1984) (tracing the development of the concept of national citizenship from pre-civil war obscurity to its predominant position in Republican political theory).

173. See EPPS, supra note 21, at 232–33 (“The first section [of the Fourteenth Amendment] . . . was designed to make every state live by the basic rules of republicanism.”); Kaczorowski, supra note 3, pt. III.A (describing the Reconstruction Amendments and civil rights legislation as an embodiment of the Republicans’ nationalist political ideology).

174. See United States v. Rhodes, 27 F. Cas. 785, 787 (C.C.D. Ky. 1866) (“The amendment reversed and annulled the original policy of the constitution, which left it to each state to decide exclusively for itself whether slavery should or should not exist . . . and what disabilities should attach to those of the servile race within its limits.”).

175. U.S. CONST. amend. XIV, § 1.

176. See CONG. GLOBE, 42d Cong., 1st Sess. 69 (1871) (Statement of Rep. Shellabarger asserting that the Fourteenth Amendment established a relationship of citizenship between the federal government and persons “born or naturalized” in the United States).
The second major departure from the pre-war understanding of the relationship between the federal government and the states was the concept that the Thirteenth and Fourteenth Amendments recognized new rights belonging to citizens that could be enforced by Congress. The first eight amendments to the United States Constitution recognizing individual rights were conventionally understood as limiting the power of the federal government but not of the states. After the war, Republicans asserted that the rights conferred by the post-war Amendments could be enforced by the federal Congress in any circumstances where these recognized rights were threatened. Each of the post-war amendments provided for such a power in their final clauses, which conferred on Congress the power to “enforce” their provisions “by appropriate legislation.”

The federal powers asserted by the Republican Party in Congress left open difficult questions about their scope and, in particular, about the relationship between these new federal powers and the prerogatives of the sovereign states. Both of the central tenets of Republican political

177. See EPS, supra note 21, at 233 (“[T]he fifth section of the Fourteenth Amendment permitted Congress to enforce its view of free and equal government.”).

178. See Barron v. Mayor & City of Baltimore, 32 U.S. (7 Pet.) 243, 237 (1833) (“The constitution [sic.] was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states.”).

179. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 69 (1871) (“If, after all this transcendent profusion of enactment in restraint of the States and affirmative conferment of power on Congress, the States still remain unrestrained, the complete, sole arbiters of power, to defend or deny national citizenship . . . the not only is the profusion of guards put by the fourteenth amendment around our rights a miserable waste of words, but the Government is itself a miserable sham, its citizenship a curse, and the Union not fit to be.” (Statement of Rep. Shellabarger)).


181. Cf. KACZOROWSKI, supra note 12, at 45 (“Congress somehow had to authorize the federal courts to punish offenses against personal rights without at the same time supplanting local criminal jurisdiction over ordinary crimes. Congress resolved this dilemma by defining as federal crimes offenses that were peculiar to the Klan and similar organizations.”). In another work, Professor Kaczorowski convincingly argues that the Reconstruction Amendments and accompanying civil rights legislation established the primacy of rights recognized by the amended federal Constitution over state laws abridging these rights. See Kaczorowski, supra note 3, at pt. IV; see also id. at 912 (“[T]he Fourteenth Amendment defines United States citizenship as primary and state citizenship as derivative.”). Understanding the jurisdictional system created by Congressional Republicans, and their interpretation of their constitutional power to enact civil rights legislation generally, as an expression of the principle of complementarity suggests a refinement of Professor Kaczorowski’s thesis. Although Congressional Republicans undoubtedly perceived the rights secured by the amended Constitution as primary and therefore immune from state infringement, they did not attribute the same primacy to federal courts as the forum for vindicating these rights. Instead, as argued below, their interpretation of their authority to enact legislation enforcing federally guaranteed rights, and the extent of the power vested in federal courts to hear cases where these rights were threatened, depended on the failure of the state judicial and law enforcement authorities to vindicate these rights. Thus, while the rights secured by
ideology—the existence of a new bond of citizenship between individuals and the federal government and the power of the federal government to enforce civil rights—were resisted bitterly by the Democratic Party, which defended the pre-war Constitutional order based on the concept of states’ exclusive power to recognize and secure the rights of citizens. For Democrats from the states of the former Confederacy, the legal doctrine that states alone had the power to regulate the conduct of individuals within their territory afforded a legal justification for their efforts to restore the white supremacist order that had reigned in these states before the Civil War. According to this view, the states alone had the power to define the rights belonging to citizens of each state and the concomitant power to enforce these rights. The only existing check on that power, the “Privileges and Immunities” clause of the federal Constitution, prohibited the states from conferring rights unevenly on individuals based on their status as citizens of different states, but did not limit states’ power to recognize and enforce rights selectively among their

the federal Constitution were indeed primary, the instruments chosen by Congressional Republicans remained contingent upon the failure of state authorities to secure them.

182. See Kaczorowski, supra note 3, at 879 (“The Republican Party’s liberal ideology . . . ironically provided the moral imperative to secure individual liberty through the active intervention of the national government.”); see generally Farber & Muench, supra note ?, at 264–69 (surveying Congressional Republicans’ arguments in favor of the Civil Rights Act based on the existence of national citizenship).

183. The theory of states’ exclusive power to determine and vindicate individual rights served as a constant motif in Democratic leaders’ opposition to Reconstruction civil rights legislation. See, e.g., CONG. GLOBE, 42d Cong., 1st Sess. 46 (1871) (“The protection of their own citizens, of public morals in the respective States, of all the rights of persons and property, of all the domestic relations, belongs to the States alone.” (Statement of Rep. Kerr)). This theory was so influential that even federal attorneys who unequivocally affirmed Congress’s power to legislate on behalf of civil rights could not help but acknowledge its practical effects. Attorney General Amos T. Akerman affirmed in a letter to U.S. Attorney John A. Minnis that Congress “has great powers over the State governments under the Fourteenth Amendment,” but lamented the difficulties in mobilizing limited federal resources to suppress widespread crime given that “the state governments are designed to be the regular and usual protectors of person and property” in the pre-War constitutional plan. Letter from Amos T. Akerman, Attorney General, to John A. Minnis, U.S. Attorney (Feb. 11, 1871).

184. See Foner, supra note 11, at 424 (quoting comment by Georgia’s Democratic Governor that his state would “hold inviolate every law of the United States and still so legislate upon our labor system as to retain our old plantation system”).

185. See, e.g., CONG. GLOBE, supra note 183 (Statement of Rep. Kerr). The view of the states as the primary enforcers of legal rights was undoubtedly the traditional view that characterized the pre-War federal system. See THE FEDERALIST NO. 17, at 80 (Alexander Hamilton) (invoking the predominant role of the states in “the ordinary administration of civil and criminal justice” as “the great cement of our society”).

186. U.S. CONST. art IV, § 2 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).
own citizens.\textsuperscript{187} Thus, while the Constitution prohibited the State of South Carolina from enacting legislation that would deny a citizen of Massachusetts the ability to enforce a contract in state court on the sole grounds that he was not a citizen of South Carolina, that state’s power to enact legislation denying this same entitlement on the basis of race was beyond the prohibitions of the pre-war federal Constitution.\textsuperscript{188} Consequently, Democrats interpreted the post-war amendments as doing no more than declaring the limited pre-war powers of the federal government and asserted that the principle of state sovereignty remained unaltered by the amendments.\textsuperscript{189}

In seeking to justify their project of enforcing individual rights in the Southern states, Congressional Republicans were required to develop innovative legal theories that explained the scope and content of the newly asserted rights. Republicans were faced with the problem of reconciling their assertions of Congress’s authority to enforce civil rights with the need to preserve an independent sphere of authority for the sovereign states.\textsuperscript{190} As Republicans enacted legislation that vested power in the federal courts to hear cases that traditionally had been within the exclusive province of state courts, they adopted distinctions based on subject matter and on the principle of complementarity known to present-day international lawyers to grapple with the problem of the states’ refusal to give their consent to federal jurisdiction over cases arising out of state law. In particular, Republican legislators relied on the concepts of “inherent authority” and “unwillingness or inability” as recognized in the Rome Statute to distinguish between the jurisdiction and the competence of federal courts to hear cases. They did so through three legislative acts that expanded the

\textsuperscript{187} See Paul v. Virginia, 75 U.S. 168, 180 (1868) (“It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.”); see also The Slaughter-House Cases, 83 U.S. 36, 77 (1872) (summarizing contemporary jurisprudence of Article I, Section 2.)

\textsuperscript{188} See Barron v. Mayor & City of Baltimore, 32 U.S. (7 Pet.) 243, 250–51 (1833) (ruling that the Bill of Rights does not apply to actions by state governments); CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION (1864–1888) 334 (1971) (describing the interpretation of Article IV, section 2 that prevailed before Reconstruction).

\textsuperscript{189} See CONG. GLOBE, 42d Cong., 1st Sess. 48 (1871) (“These words [of the Fourteenth Amendment] give no power to Congress or to the United States to supersede State laws, or prescribe new codes for States, or in any way to tamper or interfere with the States in the administration of their own systems to the utmost extent of their local and reserved jurisdiction . . . .”) (statement of Rep. Kerr).

\textsuperscript{190} See supra note 181; see also Kermit L. Hall, Political Power and Constitutional Legitimacy: The South Carolina Ku Klux Klan Trials, 1871–1872 at 33 EMORY L.J. 921, 930 (1984) (Noting that one of the “profound problems” raised by the post-war Amendments was “the extent to which the Bill of Rights . . . could be invoked against states and individuals.”).
jurisdiction of federal courts: the Civil Rights Act of 1866191 and the Enforcement Acts of 1870192 and 1871. 193

A. The Civil Rights Act of 1866

The Republicans’ first attempt to establish the power of the federal government to enforce civil rights occurred during the Thirty-Ninth Congress, which sat from March of 1865 until the same month in 1867.194 All of the states of the Confederacy, with the exception of Kentucky, were unrepresented in the Thirty-Ninth Congress and a Republican majority controlled both houses of the federal legislature.195 Although the former rebel states had not yet regained their seats in Congress, they had begun to establish governments based on state constitutions that denied black citizens the right to vote and, while unable to reestablish slavery due to the Thirteenth Amendment, enacted laws that systematically denied a full spectrum of civil rights to black citizens,196 ranging from laws that denied them the ability to serve on juries to laws that prohibited them from becoming ministers of churches.197

Appalled by the system of racial subordination that was quickly emerging in place of slavery throughout the South, Congressional Republicans adopted the Civil Rights Act of 1866 to enforce their concept of national citizenship under the authority of the Thirteenth Amendment198 and cases favoring a nationalist interpretation of the “Privileges and Immunities” embedded in Article IV, Section 2 of the Constitution.199 The

191. 14 Stat. 27 (1866).
192. 16 Stat. 141 (1870).
195. Id. at 170–73
196. See FLANKAN, supra note 68, at 272–82 (describing the content of the “black codes” that emerged in Southern states in 1865, enacting discriminatory civil and criminal laws against blacks).
197. See CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866) (Statement of Senator Trumbull, quoting statutes of Mississippi); FONER, supra note 11, 204–05 (describing content of black codes and administration of justice immediately after the Civil War).
198. See CONG. GLOBE, 39th Cong., 1st Sess. 475 (“[The Thirteenth Amendment] declared that all persons in the United States should be free. This measure [the Civil Rights Act of 1866] is intended to give effect to that declaration and secure to all free persons within the United States practical freedom.”); see generally Farber & Muench, supra note 172, at 260–61 (describing Congressional Republicans’ response to the advent of the “black codes” and adoption of the Civil Rights Act).
199. See CONG. GLOBE, 42d Cong., 1st Sess. 69 (1871) (statement of Rep. Shellabarger (quoting Corfield v. Coryell 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230) (interpreting the privileges and immunities clause of Article IV, Section 2 as conferring individual rights “which belong, of right, to citizens of all free governments”)); see also Kaczorowski, supra note 3, at 885 (“The Republican
Act, declaring its purpose “to protect all persons in the United States in their civil rights, and furnish the means of their vindication,” articulated the Republicans’ conception of the civil rights belonging to “citizens of the United States,” which included the right to sue and testify in court, and to receive the same treatment under law “as is enjoyed by white citizens.”

The following nine sections of the Act permitted the federal government to deploy a range of measures for the enforcement of these rights, ranging from criminal penalties for state officials acting under the color of state laws that discriminated on the basis of race, to empowering the President to mobilize the armed forces of the United States “as shall be necessary” to enforce the Act.

Most crucially for the United States’ experiment with the principle of complementarity, Section 3 of the Act granted federal courts the power to hear any “cause, civil or criminal, affecting persons who are denied or cannot enforce” their federal civil rights in state courts. By the terms of this section, federal courts were granted jurisdiction over cases governed by state law that formerly could be heard exclusively in state courts, but their jurisdiction would be activated only upon a showing that a person “affected by” the lawsuit was unable to vindicate his or her federal rights in the courts of the state. Section 3 dramatically expanded the jurisdiction of federal courts, subject to the limitation that their ability to exercise this power was contingent on the failure of the state court to uphold civil belief in congressional enforcement of civil rights paralleled the predominant antebellum theory of federal citizenship.”

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200. 14 Stat. 27 § 1.
201. Id. § 2.
202. Id. § 9.
203. Id. § 3 (granting United States district courts jurisdiction over ”all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act”).
204. Id.; see Theodore Eisenberg, State Law in Federal Civil Rights Cases: The Proper Scope of Section 3’s law-selection clause applies only to state-law causes of action). The second sentence of Section 3 required the federal court hearing the case to apply federal law, but permitted the court to apply state common law if the court found that federal law did not provide an adequate definition or punishment for the offense committed. See 14 Stat. 27 § 3. (allowing the federal court to apply common law as “modified and changed by the constitution and statutes” of the state if the court determined that federal law was “deficient in the provisions necessary to furnish suitable remedies and punish offenses”); see also Robert D. Goldstein, Blyew: Variations on a Jurisdictional Theme, 41 STAN. L. REV. 469, 478 (1989) (“In a removed case bottomed on state law, the federal court would apply the state law that gave rise to the civil or criminal action, provided that it did not conflict with federal law.”).
The Civil Rights Act of 1866 envisioned a complementary relationship between state and federal courts, whereby both courts possessed jurisdiction over the subject matter of crimes defined by state law, but federal jurisdiction could be activated only upon a showing of the failure of state courts to vindicate civil rights.

The language of Section 3 of the Civil Rights Act, taken on its face, reflected the concept of complementarity asserted by Chairman Maktos during the 1948 discussions of the Genocide Convention. The United States representative’s proposal would have allowed the international court to take jurisdiction over the crime of genocide if national jurisdictions simply “failed” to vindicate the international prohibition of genocide by omitting to act in response to an instance of that crime. Similarly, Section 3 allowed state law claims into federal court wherever state courts simply failed to vindicate the federally recognized rights of persons affected by a case. In this respect, the notion of complementarity asserted by the text of the 1866 Civil Rights Act differs from the more probing inquiry into the state's “unwillingness” or “inability” to prosecute violations of international crimes provided by Article 17 of the Rome Statute. However, federal legislators interpreted the Act as embodying the principles of “unwillingness” and “inability” to define the context in which federal jurisdiction would attach to matters arising under state law. Senator Lyman Trumbull, the bill’s primary author and sponsor in Congress, recognized that the bill

may be assailed as drawing to the Federal Government powers that properly belong to the ‘States’ [sic.]; but I apprehend, rightly considered, it is not obnoxious to that objection. It will have no operation in any State

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205. See supra note 181 and accompanying text; see generally Goldstein, supra note Error! Bookmark not defined. at 482–83 (differentiating the role of this jurisdictional provision from others enacted in Section 3); Kaczorowski, supra note 35 at 168–69 (describing the struggles of federal attorneys in drafting indictments under the 1870 and 1871 Enforcement Acts to avoid conflicts with state criminal jurisdiction.)

206. See supra note 113 and accompanying text.

207. See 14 Stat. 27 at § 3; see also CONG. GLOBE 39th Cong., 1st Sess. 475 (1866) ("[Section 3] provides further that no person whose equal civil rights are denied him in the State courts shall be tried by those courts for any offense, but that he shall have a right to remove his cause into the courts of the United States, and be there tried . . . according to the common law as modified by the statutes and constitution of the State where the offense is committed.") (Statement of Senator Trumbull). Cf. United States v. Rhodes, 27 F. Cas. 785, 787 (C.C.D. Ky. 1866) (No. 16,151) (interpreting the Civil Rights Act as authorizing federal jurisdiction where the victim of the crime is unable to present testimony in state court).

208. See Holmes, supra note 9, at 671–79 (describing the procedure for applying the admissibility criteria established by Article 17 of the Rome Statute).
where the laws are equal, where all persons have the same civil rights without regard to color or race.\textsuperscript{209}

Where the states proved unwilling to recognize civil rights by failing to remedy racial discrimination in their judicial systems, federal courts would be competent to exercise jurisdiction over state law claims involving any person whose civil rights were denied in state court.\textsuperscript{210} Similarly, where state courts were simply unable to vindicate the civil rights of an individual affected by a lawsuit due to the breakdown of law and order, as was soon to be the case in the state of Arkansas and elsewhere throughout the South,\textsuperscript{211} the jurisdiction of federal courts was activated.

Even in the Thirty-Ninth Congress, dominated by a Republican majority and omitting the representation of ten of the eleven former Confederate states,\textsuperscript{212} this new vision of federal power was vigorously opposed by Democratic members of the Senate, who, like the Soviet representative to the committee that drafted the Genocide Convention\textsuperscript{213} and those delegates to the Preparatory Committee who opposed the notion of “inherent jurisdiction” in the ICC,\textsuperscript{214} argued that the Act overrode traditional doctrines of local sovereignty by removing the predicate of state consent. Drawing on the “compact” theory of the Constitution that construes the federal government as one established by an agreement among the sovereign states and possessing only those powers expressly delegated to it by the states,\textsuperscript{215} Democratic Senator Willard Saulsbury of Delaware made two arguments in opposition to the Act. First, he asserted that the Thirteenth Amendment merely abolished the condition of slavery and did not confer authority on Congress to enforce freestanding conceptions of civil rights.\textsuperscript{216} Second, because neither the Thirteenth

\begin{enumerate}
\item \textsuperscript{209} See \textit{Cong. Globe}, 39th Cong., 1st Sess. 475 (1866).
\item \textsuperscript{210} See supra note 207 (statement of Senator Trumbull explaining the provisions of the Civil Rights Act).
\item \textsuperscript{211} See supra note 58.
\item \textsuperscript{212} See Biographical Directory, supra note 194 (listing members of 39th Congress).
\item \textsuperscript{213} See supra note 102 and accompanying text.
\item \textsuperscript{214} See supra note 154 and accompanying text.
\item \textsuperscript{216} See \textit{Cong. Globe}, 39th Cong., 1st Sess. 476 (1866) (“The States have simply said by adopting [the Thirteenth] amendment that the \textit{status} or condition of slavery in this country shall no longer exist . . . . The attempt . . . to confer civil rights which are wholly distinct and unconnected with the \textit{status} or condition of slavery, is an attempt unwarranted by any method or process or sound reasoning.”). 
\end{enumerate}
Amendment nor the Constitution as originally adopted conferred on Congress the authority to enforce civil rights, the adoption of the Civil Rights Act of 1866 would violate the principle of state sovereignty by imposing federal law upon them without their consent. According to Senator Saulsbury, upon the ratification of the Constitution in 1789,

[n]o nation or State of America existed; but States did exist. The Constitution was made by and for them, and not by or for the nation or State of America. The people of each State, or each State constituted by a people, conveyed to a Federal authority, organized by States, a portion of State sovereign powers, and retained all other State sovereign powers. 217

The power to define and enforce the civil rights of citizens remained vested exclusively in the states and had not been given to the federal government by the Thirteenth Amendment. 218 Proponents of the Civil Rights Act were required to confront these arguments that Congress’s power to enforce civil rights was limited to the scope of the states’ consent to yield their sovereignty. The necessity of reconciling this asserted authority with traditional doctrines of local sovereignty mirrored the difficult reality faced by the members of the International Law Commission of the early 1990s, who were forced to confront the problem of sovereignty as one “often raised but rarely elaborated upon” in international efforts to create an international criminal court. 219

Republicans countered the argument that state sovereignty precluded the federal courts from upholding civil rights when state courts would not by asserting that the federal government possessed an inherent authority to enforce the rights of United States citizens. They rested this argument in part on the text of the Constitution, and identified the Thirteenth Amendment as its source. 220 However, they accompanied these textual arguments with a more expansive view of federal power, insisting that the capacity to enforce civil rights was vested in Congress by virtue of the relationship between citizens and the national government. If that power had not been clearly established before the Civil War, the recent conflict

218. See id. at 476; see also id. at 478 (“I know of no clearer definition of civil rights than that; the rights which I have by reason of the law of the State under which I live . . . .”) (statement of Senator Saulsbury).
219. See supra note 121 and accompanying text.
220. See id. at 475 (“[U]nder the constitutional amendment which we have now adopted . . . I hold that we have a right to pass any law which, in our judgment, is deemed appropriate, and will accomplish the end in view, secure freedom to all people in the United States.”) (Statement of Senator Trumbull).
and the emancipation of the former slaves confirmed its existence. Whether relying solely on the Thirteenth Amendment or also upon notions of the national government’s inherent nature, proponents of federal enforcement asserted the federal government’s inherent authority to enforce civil rights. At the same time, they relied on the principle of complementarity by limiting the role of federal power according to states’ willingness to enforce civil rights. Thus, Senator Trumbull reassured Senator Saulsbury that “[the Civil Rights Act] will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race.” His comments mirror John T. Holmes’s able summary of the role of complementarity in the Rome Statute: According to Holmes, “if states fulfill their obligations under international law by exercising effective jurisdiction over the crimes set out in the Rome Statute, then the Court... will not be seized of any cases.” The federal government’s authority to enforce civil rights ended where the states fulfilled their responsibilities to uphold civil rights, just as the ICC’s competence ends where states fulfill their obligation to prosecute international crimes.

221. See id. at 1757 (“Can it be that our ancestors struggled through a long war and set up this Government, and that the people of our day have struggled through another war... to maintain it, and at last we have got a Government which is all-powerful to command the obedience of the citizen, but has no power to afford him protection? Sir, it cannot be... Allegiance and protection are reciprocal rights.”) (Statement of Senator Trumbull); see also Steven J. Heyman, The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment, 41 DUKE L.J. 507, 513–520 (1991) (tracing the origins of the Republicans’ emphasis on the reciprocal rights of allegiance and protection to natural law and contractarian political theory embedded in the seventeenth- and eighteenth-century English common law); Kaczorowski, supra note 3, at 890–91 (discussing the influence on Congressional Republicans of natural law theory and its emphasis on the guarantee of governmental protection in exchange for citizens’ allegiance);

222. See CONG. GLOBE, supra note 221.

223. See supra note 9.

224. The contingency of the exercise of federal power upon the default of a state in enforcing federally guaranteed civil rights forms the basis for Professor Benedict’s perception that the Reconstruction project was restrained by the Republicans’ fundamentally conservative constitutional philosophy. See generally Michael Les Benedict, Preserving the Constitution: The Conservative Basis for Radical Reconstruction, 61 J. OF AM. HIST. 65 (1974). Although Professor Benedict’s depiction of the Radical Republicans as seeking to do little more than address a temporary defect in an otherwise sound pre-War constitutional order is challenged by later scholarship, see, e.g., Kaczorowski, supra note 3, Farber & Muench, supra note (whatever), his insight that Republicans were willing to continue to rely on the states as the primary enforcers of individual security, with federal power acting as the ultimate guarantor, gains new vitality when understood as an expression of the complementarity principle. See Benedict at 79 (arguing that the purpose of the Civil Rights Act “was to provide the threat of national assumption of jurisdiction over civil rights in order to force states to fulfill that role themselves”).
Contrary to Senator Saulsbury’s position, most state and federal courts hearing constitutional challenges to Congress’s authority to pass the Civil Rights Act before 1871 upheld the Act in its entirety under the Thirteenth Amendment. Among these, Justice Swayne’s decision in United States v. Rhodes provided crucial support for the federal Department of Justice’s efforts to enforce civil rights in the South, as it interpreted Section 3 of the Civil Rights Act to allow federal attorneys to prosecute state-law crimes in federal court wherever state law prevented black victims of crimes from testifying in court. As Justice Swayne observed, the Act was aimed in part at the problem that, under state law, “where a white man was sued by a colored man, or was prosecuted for a crime against a colored man, colored witnesses were excluded.” This state of affairs amounted to “a denial of justice,” and “[c]rimes of the deepest dye were committed by white men with impunity.” The Justice recognized that, in enacting the Civil Rights Act,

Congress met these evils by giving to the colored man everywhere the same right to testify ‘as is enjoyed by white citizens’ . . . and by giving to the courts of the United States jurisdiction of all causes, civil and criminal, which concern him, wherever the right to testify as if he were white is denied to him or cannot be enforced in the local tribunals of the state.

Under Justice Swayne’s ruling, not only was the Civil Rights Act constitutionally valid, but the Act enabled United States Attorneys to claim the functions of state authorities who refused to prosecute crimes committed by whites against black citizens. The United States Attorney for Kentucky, future Solicitor General Benjamin Bristow, had feared that the court would adopt a narrow construction of the statute that would have deferred to state jurisdiction. The court’s ruling made progress in satisfying Bristow’s request in correspondence with Senator Trumbull for

225. See Kaczorowski, supra note 3, at pt. IV (describing the unanimous rulings of lower federal courts and near-unanimous rulings of state courts upholding the Civil Rights Act under the Thirteenth Amendment).
227. Id.
228. Id.
229. See id. at 794 (“It would be a remarkable anomaly if the national government, without this amendment, could confer citizenship on aliens of every race or color . . . and can not, with the help of the amendment, confer on those of the African race, who have been born and always lived within the United States, all that this law seeks to give them.”).
230. See KACZOROWSKI, supra note 12, at 11–12 (describing Bristow’s correspondence with Senator Trumbull prior to the court’s ruling in United States v. Rhodes).
legislation that would “furnish the colored people of Ky. [Kentucky] complete & ample protection from outrage & oppression.” His request would soon be met with additional legislation passed under the Fourteenth Amendment, according to which Congressional Republicans continued to assert a new relationship between state and federal jurisdictions justified by states’ apparent unwillingness or inability to enforce civil rights.

B. The Enforcement Acts of 1870 and 1871

Concerned that the Supreme Court would disagree with lower court rulings upholding the constitutionality of the Civil Rights Act under the Thirteenth Amendment, Congress adopted the Fourteenth Amendment in 1866 to ensure that the purposes of the Civil Rights Act would not be defeated if the Act were ultimately repealed or held unconstitutional by the highest court. The Reconstruction Act of 1867 made ratification of the Amendment a precondition for the end of military rule in the South, and in this context the proposed amendment received the approval of the required three-fourths of the states in 1868.

Like the content of the Act that preceded it, the Fourteenth Amendment was aimed at establishing a direct relationship of citizenship between individuals and the national government and a concomitant power vested in Congress to enforce federally recognized civil rights. Section 1 of the Fourteenth Amendment affirmed the Civil Rights Act’s grant of citizenship to “all persons born or naturalized in the United States, and subject to the jurisdiction thereof.” Its following three clauses established the general framework for the rights of these citizens, that States may not “abridge the privileges or immunities” of United States citizens, nor “deprive” them of “life, liberty, or property, without due process of law,” nor “deny” to them the “equal protection of the laws.” Its final section,

231. Id. at 12.
232. See FONER, supra note 11, at 251 (“Republicans grappled with the task of fixing in the Constitution, beyond the reach of Presidential vetoes and shifting political majorities, their understanding of the fruits of the Civil War.”); Kaczorowski, supra note 3, at pt. IV (discussing Congressional Republicans’ objectives in framing the Fourteenth Amendment).
233. See supra note 21.
234. See EPPS, supra note 21, at 232–33 (noting that the Fourteenth Amendment enabled Congress “to enforce its view of free and equal government.”).
235. U.S. CONST., amend. XIV, § 1, cl. 1.
236. Id. cl. 2.
237. Id. cl. 3.
238. Id. cl. 4.
like the Thirteenth Amendment, bestowed upon Congress the power to
“enforce” its provisions “by appropriate legislation.”

As white supremacist violence escalated throughout the South after
the establishment of Reconstruction governments in 1867, reports of
atrocities perpetrated by the Klan and like-minded organizations found
their way through the doors of Congress. In 1870, Congress passed the first
of the two Enforcement Acts, which included criminal penalties aimed
directly at Klan activity in Section 6 of the Act, which made it a federal
crime to “go in disguise upon the public highway” with the intent to
“injure, oppress, or intimidate any citizen” in order to “prevent or hinder
his free exercise” of constitutional rights.

Congress expanded on these
provisions in 1871 in the Ku Klux Klan Act, Section 2 of which punished
any conspiracy formed “for the purpose, either directly or indirectly, of
depriving any person or any class of persons of the equal protection of the
laws.” The acts punished were identical to state law crimes such as
assault and murder, but the law attempted to distinguish these common law
crimes by requiring that such acts be done with the further intent to
interfere with the constitutional rights of citizens. In relying on this
element of further intent to distinguish crimes over which federal courts
could assert jurisdiction from state law crimes, the drafters of the Ku Klux
Klan Act applied the same tool of subject matter differentiation that was
used by the framers of the Genocide Convention to distinguish the
international crime of genocide from the domestic-law crime of murder.
For legislators in Congress and those on the Ad Hoc Committee that
produced the draft Convention, the subject matter of the crimes proscribed
played an important role in preserving the local sovereign’s jurisdiction to
punish crimes under local law while endowing an external judicial forum
with concurrent power to punish the same constitutive actions.

Taken together, the two laws went beyond the Civil Rights Act by
creating a category of acts that were virtually indistinguishable from
traditional state law crimes and re-defining these as federal crimes.
Whereas the Civil Rights Act had asserted federal jurisdiction over state

239. Id. § 5.
240. 16 Stat. 141 § 6 (1870).
Ku Klux Klan Act on the grounds that the offenses proscribed by the Ku Klux Klan Act “are such in the
States, and uniformly punished there by the State laws and courts as felonies or misdemeanors . . . .”)
243. See supra note 117 and accompanying text.
244. See KACZOROWSKI, supra note 181.
law crimes in circumstances where the state judicial system would not uphold civil rights, the Enforcement Acts could be interpreted as wholly supplanting common law crimes with new federal offenses, just as crimes within the jurisdiction of the ICC supplanted the definitions of those offenses in preexisting customary international law.\footnote{See Antonio Cassese, \textit{Genocide, in The Rome Statute of the International Criminal Court: A Commentary} 335, 347 (Antonio Cassese et al. eds., 2002) (describing the limited distinction between the customary international law definition of the crime of genocide and the definition found in Article 6 of the Rome Statute); Antonio Cassese, \textit{Crimes Against Humanity, in The Rome Statute of the International Criminal Court: A Commentary} 353, 375-77 (Antonio Cassese et al. eds., 2002) (surveying differences between the respective definitions of crimes against humanity found in customary international law and Article 7 of the Rome Statute); Michael Bothe, \textit{War Crimes, in The Rome Statute of the International Criminal Court: A Commentary} 379, 381-89 (Antonio Cassese et al. eds., 2002) (distinguishing the customary international law definition of war crimes from the definition in Article 8 of the Rome Statute); see also Crawford, \textit{supra} note 137, at 33 (“The Statute of the ICC makes a major effort to consolidate, expand, and develop substantive international law, relying only to a limited extent on the \textit{droit acquis} [pre-existing customary international law].”).} Although the further intent element appeared to place a clear limit on federal jurisdiction, it was difficult to apply in practice: All that distinguished the state-law crime of assault from the new federal offense was the malleable question of whether an accused committed the assault for the purpose of interfering with the victim’s exercise of his civil rights.\footnote{See Kaczorowski, \textit{supra} note 12, at 97 (describing United States Attorney E.C. Jacobson’s difficulties in applying the Enforcement Acts to distinguish “the federal crime of assault with intent to deprive the victim of his life form the state crime of assault with intent to murder”); see also infra notes 259-261 and accompanying text.} Consequently, defenders of the legislation in Congress were required to distinguish the scope of federal jurisdiction from state jurisdiction over what could be understood as identical acts.\footnote{See supra note 181.} To justify the exercise of federal jurisdiction in light of this fine distinction between subject matter falling within state and federal purviews, they asserted an inherent power of federal law enforcement to punish violations of civil rights where state authorities failed to do so. Like their international analogues, the framers of the Ku Klux Klan Act turned to the criterion of the local sovereign’s action or omission to justify external judicial intervention.

The primary sponsor of the Ku Klux Klan Act in the House of Representatives began discussion of his bill with the assertion that the enactment of the Fourteenth Amendment “inserted into the Constitution that which was not in it before . . . that the United States thereby were authorized to directly protect and defend” the civil rights of its citizens.\footnote{CONG. GLOBE, 42d. Cong., 1st Sess. 69 (1871) (statement of Rep. Shellabarger).}
In advocating for the bill, Representative Shellabarger acknowledged his opponents’ arguments that “in attempting this legislation Congress blots out the jurisdiction and power of the States,” but insisted that the legislation created a form of concurrent jurisdiction between state and federal courts, whereby both state and national authorities could claim jurisdiction over these acts as “constituting a crime against each government.” Jurisdiction would be concurrent in both courts, but the principle justifying the exercise of Congress’ power to invest federal courts with this jurisdiction was based on the failure of a state to enforce guaranteed rights. Thus, according to Representative Shellabarger, under the Fourteenth Amendment, “[t]wo things are provided—equal laws and protection for all; and whenever a State denies that protection Congress may by law enforce protection. . . . [T]he provision is that when the State authority deny [sic] protection, when they do deny it, then you may give the remedy.”

Like the members of the Preparatory Committee and the national delegations at Rome, Congressman Shellabarger adopted the criterion of the state’s denial of protection to justify Congress’s power to vest jurisdiction in federal courts over crimes that were virtually indistinguishable from state law prohibitions. His Republican colleague, Congressman Stoughton, specified the causes of this denial of protection that justified the federal courts’ exercise of jurisdiction over these cases. Stoughton quoted the words of judge Thomas Settle of the Supreme Court of North Carolina in his testimony to Congress regarding the deplorable condition of law enforcement in his state. The judge testified that “it is impossible for the civil authorities” of his state, “however vigilant they may be, to punish those who perpetrated these outrages.” The local influence of the Klan made it almost inevitable that state jury pools would be comprised of Klan members, sympathizers, or those too afraid to testify against the Klan, so that obtaining convictions was virtually impossible. Moreover, the leaders of the state Democratic Party, which by 1871 had regained control of the legislature, were similarly involved with the Klan organizations, foreclosing the possibility of obtaining any remedy from the

249. Id.
250. Id. at 71.
251. Id. at 320 (statement of Rep. Stoughton).
252. See id. (“I suppose any candid man in North Carolina would tell you it is impossible for the civil authorities, however vigilant they may be, to punish those who perpetrate these outrages. . . . You cannot get a conviction; you cannot get a bill [indictment] found by a grand jury, or, if you do, the petit jury acquits the parties.”).
political branches of state government.\textsuperscript{253} For these reasons, by 1871, local authorities had not convicted a single member of the Klan despite widespread violence throughout the state.\textsuperscript{254}

Based on the testimony gathered by Congressional committees, Mr. Stoughton concluded that “[t]he whole South . . . is rapidly descending into a state of anarchy and bloodshed . . . . The State authorities and local courts are unable or unwilling to check the evil or punish the criminals.”\textsuperscript{255} The states’ unwillingness and inability to stanch this violence justified Congress’ intervention, including risking the danger that the newly defined federal crimes would eclipse the jurisdiction of the states. Stoughton insisted that,

> When thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice, when the State courts are notoriously powerless to protect life, person, and property . . . the denial of equal protection of the laws is too clear to admit question or controversy. Full force is therefore given to section five [of the Fourteenth Amendment], which declares that “Congress shall have power to enforce by appropriate legislation the provisions of this article.”\textsuperscript{256}

Representative Stoughton articulated in clear terms the principles of unwillingness and inability that underpinned the Republicans’ legal argument for the federal enforcement of civil rights. The same principles furnished the cornerstone of the agreement reached by the negotiators of the jurisdictional provisions of the Rome Statute.\textsuperscript{257}

The Republicans’ application of the complementarity principle evolved between their adoption of the Civil Rights Act in 1866 and the Enforcement Acts of 1870 and 71. While the framers of the Civil Rights Act of 1866 applied the complementarity principle to determine the circumstances in which a federal court could exercise jurisdiction over a state law crime,\textsuperscript{258} the supporters of the Enforcement Acts invoked complementarity as a justification for their power to legislate proscriptions

\textsuperscript{253} See id. (presenting testimony of Judge Settle that the legislature of North Carolina was controlled by Klan members or sympathizers).

\textsuperscript{254} Id. (presenting testimony of Judge Settle that “there has not been a single instance of conviction in the State”).

\textsuperscript{255} Id. at 321.

\textsuperscript{256} Id. at 322.

\textsuperscript{257} See Williams & Schabas, supra note 6 at 613 (discussing the centrality of complementarity to the adoption of the Rome Statute).

\textsuperscript{258} See supra notes 200–203 and accompanying text.
that were based on the same underlying acts as offenses punishable by state law. In either case, the Republicans applied the basic ingredients of complementarity to prevent states from asserting exclusive jurisdiction over certain crimes in order to shield offenders from an external forum for prosecuting those crimes. Local sovereigns’ failure to enforce new normative guarantees of individual protections justified intervention by an external judicial body empowered to uphold these guarantees.

For Democrats who were determined to maintain the pre-war concept of states’ sovereign autonomy, these conditions were not sufficient to bring the asserted power of the federal legislature and the federal courts within the boundaries of the Constitution. The subject matter of the crimes comprised in the Act were not sufficiently distinguishable from common law crimes prohibited by the states to be punishable in federal courts, regardless of whether the conferral of this jurisdiction was precipitated by states’ failure to enforce their own laws. In the words of Representative Kerr, the legislation required only the commission of acts that were “calculated to infringe any of the rights, privileges, or immunities of citizens, as construed by the Radical [Republican] party, officers, or courts (and certainly all crimes have such effect), then the jurisdiction of Federal courts attaches.”

The supposed subject matter limitation of the Act was a distinction without a difference. Since the Republicans construed civil rights so broadly as to encompass “privileges and immunities which are in their nature fundamental” and “belong of right to the citizens of all free Governments,” any murder could be construed as committed with intent to violate the civil right to life and any assault could include the intent to deprive the victim of the right to protection by the government. Thus, Representative Kerr maintained that passage of the Act would bring about the “complete subversion of the power of the States to enforce their criminal laws, adopt and execute their own policy, or protect their own citizens and society.”

Some Republicans shared Representative Kerr’s concern that the Act might lack sufficient limitations on the jurisdiction of federal authority to enforce civil rights. Representative Hoar struggled to define the criteria according to which the enforcement powers could be limited. While arguing in favor of a “power in Congress to intervene” in state affairs wherever the state government is “administered by a conspiracy under the

259. Id. at 50 (statement of Rep. Kerr).
261. Id. at 50 (statement of Rep. Kerr).
pretense and under the form of republican security.”\textsuperscript{262} Congressman Hoar inquired “how do you distinguish the right to interfere in a case like this from the right to interfere” where there is a mere “imperfection in the administration of justice?”\textsuperscript{263} Representative Hoar returned to the principle of “denial of government” as the precondition for any form of federal intervention, and argued that such a condition exists where state law enforcement authorities routinely deny “equal protection of the laws” to a “class of citizens.”\textsuperscript{264} His focus on these criteria reflects Chairman Maktos’ concentration on the concept of “denial of justice” as a limiting principle for international jurisdiction.\textsuperscript{265} Further, in reiterating the Republicans’ emphasis on the denial of state action to redress violations of its own criminal law, Representative Hoar’s comment invokes the animating principle behind the criteria of unwillingness and inability that played an essential role in delineating the scope of the International Criminal Court’s competence to intervene.

IV. COMPLEMENTARITY AS COMPROMISE: “THE POWER TO MAKE THAT LAW RESPECTED”

The Congressional debates over the enactment of the Civil Rights Act of 1866 and the Enforcement Acts of 1870 and 1871 provided a forum for the Republican Party to test its legal justifications for federal enforcement of civil rights. To justify the exercise of this authority, the Republicans relied upon the principle of complementarity in two distinct but interrelated contexts. In Section 3 of the Civil Rights Act, Congress adopted a model of complementarity that closely resembles the instrument that appears in Article 17 of the Rome Statute. According to Section 3 as interpreted by the lower federal courts,\textsuperscript{266} the district courts of the United States could assume jurisdiction over crimes defined by state law wherever state jurisdictions proved incapable, for any reason, of upholding federally

\textsuperscript{262} Id. at 331 (statement of Rep. Hoar).

\textsuperscript{263} Id. at 332.

\textsuperscript{264} Id.

\textsuperscript{265} See supra note 109 and accompanying text.

\textsuperscript{266} See United States v. Rhodes, 27 F. Cas. 785, 794 (C.C.D. Ky. 1866) (No. 16,151) (interpreting Section 3 of the Act as providing for federal jurisdiction over common law crimes where the victim of the crime is unable to testify in state court due to discriminatory local laws or customs). Important from an historical perspective, although not for the comparison explored by this paper, Justice Swayne was reversed in Blyew v. Kentucky, 80 U.S. 581 (1872), which began the Supreme Court’s gradual erosion of the enforcement powers asserted by the federal government during Reconstruction, a process that culminated in the Slaughterhouse Cases, 83 U.S. 36 (1873), and in the Civil Rights Cases, 109 U.S. 3 (1883).
guaranteed civil rights. 267 Section 3 established a complementary relationship between federal and state courts that recognized state courts’ primary jurisdiction to try crimes under state law but that enabled federal courts to claim jurisdiction subject to their determination that civil rights would not be upheld in state courts. 268 This relationship closely resembles the model of complementarity in Article 17 of the Rome Statute by vesting jurisdiction to punish certain crimes simultaneously within a local sovereign’s courts and in an external adjudicatory forum, but permitting the external authority to exercise its jurisdiction only when the external authority determines that the local sovereign has failed to do so. 269 Thus, just as the Rome Statute applied the principle of complementarity to distinguish the roles of the International Criminal Court and national courts in punishing core international crimes, Section 3 of the Civil Rights Act adopted this principle to differentiate the roles of state and federal courts in exercising their shared jurisdiction over common law crimes.

The debates over the Enforcement Acts of 1870 and 1871 demonstrate that the Congressional Republicans drew on the concept of complementarity for the additional purpose of establishing the scope of Congress’s power to enforce civil rights. 270 As Congressman Stoughton asserted, Congress’s power to enforce the Fourteenth Amendment was activated by the condition that “State authorities and local courts are unable or unwilling to check the evil or punish” crimes against black citizens. 271 This application of the principle of complementarity asserted not only the power of the courts to exercise jurisdiction over state-law crimes, but also sought to establish the power of the federal government to enforce individual rights in light of the states’ failure to do so. 272

In the debates over the Enforcement Acts and the Civil Rights Act, the complementarity principle enabled Republicans to combine their assertions of a new power, whether of the federal courts specifically or of the federal government as a whole, with criteria that limited the exercise of this power

267. See supra note 207 (statement of Senator Trumbull explaining Section 3 of the Civil Rights Act).
268. Supra pt. III (1).
269. See Rome Statute, art. 17 §§ (a)–(b); see also supra note 10.
270. Supra pt. IV (2).
271. Supra note 255.
272. See generally Michael P. Zuker, Congressional Power Under the Fourteenth Amendment—The Original Understanding of Section Five, 3 CONST. COMMENT 123, 138–55 (1986) (arguing for the “state failure” theory as the original Congressional understanding of its enforcement power under Section 5 of the Fourteenth Amendment). Professor Zuker’s conclusions are supported by the evidence presented by this paper.
in order to appease state sovereignty by allowing federal intervention only when states failed to uphold civil rights. In this respect, both cases are similar to the use of complementarity in the debate over the formation of the International Criminal Court, where complementarity played a crucial role in balancing the existence of an independent court possessing concurrent jurisdiction over international crimes with the doctrine of national sovereignty that defined the traditional scope of national courts’ jurisdiction.

The comparison extends to the nature of the authority to enforce individual protections that was asserted by legislators in the international and United States contexts. In both cases, legislators weighed a newly asserted “inherent authority” to protect individuals against traditional claims of exclusive local authority. Those arguing for this inherent power asserted that it occurred as a necessary function of the role that the new adjudicatory forum was intended to play. Republicans believed that the power to enforce civil rights irrespective of states’ agreement was a necessary appurtenance of the United States’ status as a national government having a claim on the allegiance of its citizens. Delegates to the Rome Conference ultimately endorsed the view that the Court possessed “inherent” jurisdiction over grave crimes irrespective of national states’ consent to the Court’s functioning in each case as necessary to enable the Court to achieve its mission of punishing and perhaps deterring these crimes. Legislators in both contexts used the principle of complementarity to balance their assertions of a new inherent authority to protect individual rights against pre-existing assumptions that such authority could not be possessed “inherently” but only by delegation from a local sovereign.

Finally, the comparison embraces not only the fact of the assertion of complementarity as an instrument to balance competing claims to jurisdiction, but also embraces the substance of the particular model of complementarity that was adopted in both cases. Complementarity was asserted in the United States context not only for its general utility in

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273. See supra note 168 and accompanying text.
274. See supra pt. II (3) (discussion of inherent authority at the Preparatory Committee on the Establishment of an International Criminal Court); supra notes 207, 208 and accompanying text (assertions of inherent federal power to enforce civil rights).
275. See supra note 221 (statement of Senator Trumbull).
276. See id.
277. See Williams & Schabas, supra note 95 at 547 (“Article 12 on preconditions for the actual exercise of jurisdiction is fundamental to an effective ICC.”).
ordering the relationship between overlapping jurisdictions, but was asserted in a manner that also used the same principles of “unwillingness” and “inability” that ultimately garnered the support of state delegations at the Rome Conference.

The explanation for these similarities between the two cases may stem from the similarity in the nature of the problems that were addressed by legislators in the United States and in the international context. Both situations involved a conflict between a newly asserted forum for the enforcement of protections of individuals that encroached upon the powers traditionally exercised by a collection of sovereigns. Democrats resisted Congress’s assertions of federal power as a violation of state sovereignty, just as many perceived the ICC as a threat to national sovereignty. In both cases, the encroachment on sovereignty was necessitated by the fact that the individuals sought to be protected would not receive protection from the traditional sovereign due to their political vulnerability within the community regulated by the sovereign. Thus, the International Criminal Court emerged in part out of the experience of Nazi Germany, where Jews and other minorities were actively persecuted by the German government, or of the Former Yugoslavia, where Bosnian Muslims were persecuted by the Serbian government and paramilitaries, just as the federal enforcement of civil rights emerged out of the experience of the former

279. See supra notes 250–59 and accompanying text.
280. See Holmes, supra note 9, at 671–78 (describing the negotiating process in the Preparatory Committee that led to the adoption of the criteria of “unwillingness” and “inability”); supra note 156 (noting the emergence of a “wide degree of consensus” around the criteria of “unwillingness” and “inability” during the Preparatory Committee discussions).
281. See supra notes 33, 36, and accompanying text; see also Flanigan, supra note 68, at 365 (“Most magistrates refused to deviate even slightly from community norms. [Federal] officers complained that justices of the peace were the most zealous persecutors of blacks and the most important opponents of Congressional policy.”); id. ch. 8 (describing the distortion of state justices systems by officials who subscribed to a white supremacist ideology); see generally Steven J. Heyman, The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment, 41 DUKE L.J. 507 (1991) (arguing that Congress sought to establish a “federal constitutional right to protection” in framing the Fourteenth Amendment).
282. See Antonio Cassese, From Nuremberg to Rome: International Military Tribunals to the International Criminal Court, in 1 The Rome Statute of the International Criminal Court: A Commentary 667, 667 (Antonio Cassese, Paolo Gaeta & John R.W. D. Jones, eds. 2002) (recognizing the ICC Statute as “the culmination of a process started at Nuremberg and Tokyo and further developed through the establishment of the ad hoc Tribunals for the former Yugoslavia . . . and Rwanda . . .”).
Confederate states denying protection to their black and Republican citizens and actively supporting white supremacist terror.  

The comparison between the United States’ application of the principle of complementarity and the use of the same criteria by the International Criminal Court suggests a further conclusion, that the criteria of “unwillingness” and “inability” are well-adapted to address the situation that legislators in both instances were facing. If local sovereigns fail to enforce protections for individuals, complementarity implemented according to the criteria of unwillingness and inability enables an entity other than the local sovereign to exercise its jurisdiction in a manner that is limited to the immediate crisis, and that therefore preserves local sovereignty in all matters not implicated by the crisis. The outside intervention is assumed to play an exceptional role in the enforcement of law over which both it and the local sovereign possess jurisdiction. Thus, in the words of John T. Holmes, writing in 2002, “[i]f States fulfill their obligations . . . then the Court, recognizing the primacy of national jurisdictions . . . will not be seized of any cases.” Or, as Congressman Sheldon spoke of federal intervention in 1871, “[c]onvenience and courtesy to the States suggest a sparing use, and never so far as to supplant the State authorities except . . . when the State governments criminally refuse or neglect those duties which are imposed upon them.”

Both Holmes and Sheldon sought to assert the power to punish crimes committed against the most basic dignity of individuals. In the principle of complementarity, they found the means to reconcile this asserted power with doctrines that confined the authority to enforce individual protections to the boundaries of local sovereignty. In so doing, they found a valuable instrument to obtain respect for the law on the side of individual freedom.

283. See supra note 255 and accompanying text (statement of Rep. Stoughton); see also Kaczorowski, supra note 35, at 157 (“Southern Republicans were at the mercy of roving bands of Klansmen who attacked them with virtual impunity.”).

284. Cf. 1 Preparatory Committee Report 1996, supra note 144 at para. 154 (summarizing the views embodied in the International Law Commission’s 1994 Draft Statute for an international criminal court, that the “intention was for such a court to operate in cases where there was no prospect of persons . . . being duly tried by national courts” and so “[the court’s] jurisdiction should be understood as having an exceptional character.”); Goldstein, supra note __, at 536 (concluding that the provision in Section 3 of the Civil Rights Act of 1866 vesting jurisdiction over state law crimes in federal court where states failed to honor constitutional guarantees “narrowly addressed the nonenforcement problem and did not sweep more broadly than necessary” against state sovereignty).

285. Holmes, supra note 9, at 667.