Big Fish, Small Ponds: International Crimes in National Courts

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The principle of complementarity in the Rome Statute of the International Criminal Court anticipates that perpetrators of genocide, war crimes, and crimes against humanity will be tried in domestic courts unless there is no state with jurisdiction willing or able to do so. This Article examines the situation where a state might be willing to engage in meaningful local justice but temporarily lacks the capability to do so due to the effects of the conflict. It argues that where the state submits a detailed proposal to the International Criminal Court (ICC) outlining the steps necessary to gain or regain the ability to prosecute those most responsible for the atrocities within two years, it should be allowed time to do so. The capacity building that occurs during this time is vital to promoting and ensuring stability throughout the region and beyond, and it will allow the Court to focus its efforts and resources on those cases for which there is no other forum.

INTRODUCTION

Countries plagued by conflict involving severe human rights abuses amounting to war crimes, genocide, or crimes against humanity face many challenges once a determination is made that the perpetrators will face trial. Chief among these questions is where the trials should be located. The International Criminal Court (ICC or "Court"), established in 2002, provides a forum for holding the major perpetrators—the "big fish"[1]—of these crimes responsible at the international level.[2] Its creation

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1. *See* Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 777 (1998); Charles Chernor Jalloh, *Prosecuting Those Bearing "Greatest Responsibility": The Lessons of the Special Court for Sierra Leone*, 96 MARQ. L. REV. 863, 879 (2013).

2. The Rome Statute establishing the International Criminal Court took effect in 2002 after enough countries ratified it. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute]. The Court currently has jurisdiction over genocide, war crimes, and crimes against humanity. *Id.* art. 5. The Court will add the crime of aggression in 2017. *The Crime of Aggression*, COALITION FOR INT'L CRIM. CT., www.iccnow.org/?mod=aggression (explaining that the International Criminal Court may not act on a crime of aggression until January 2017, when States Parties will activate the Court's jurisdiction).

reinforced the notion that these heinous crimes will not go unpunished and that those found to have committed them will be held responsible.[3]

Yet, not all states want the perpetrators of crimes on their territory to be tried elsewhere; some states may prefer domestic prosecutions to international proceedings. In the wake of an uprising or war, however, local trials may not be possible. Countries may be left without functioning judiciaries, qualified legal personnel, or sufficient prison facilities.[4] Moreover, those in power may have differing opinions about the best path to take, perhaps favoring more restorative justice measures as opposed to the retributive nature of trials.[5] Still, not all postconflict situations are so murky; there are countries that emerge from mass atrocities intact enough that domestic trials are viable—if not immediately, then within a reasonable period of time.[6]

The Office of the Prosecutor (OTP) at the ICC has stated that it will encourage domestic trials wherever possible.[7] Thus, where the state at issue is already investigating or prosecuting a matter that has received ICC scrutiny, the Court will not intervene, pursuant to the foundational principle of complementarity.[8] Thus, if a state has jurisdiction and is willing and able to engage in proceedings regarding genocide, war crimes, or crimes against humanity, the ICC will step aside. But what of situations where a state desires domestic trials but is temporarily unable to hold them due to a lack of infrastructure, qualified personnel, or some other deficiency that can be remedied? This Article argues that in this setting, where a state lodges a challenge to the admissibility of a matter before the ICC due to its own wish for local trials, the Court should delay the admissibility determination for a reasonable period of time to allow the state to shore up its judicial system and gain or regain the ability to pursue justice within its borders.[9]

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3. Rome Statute, *supra* note 2, pmbl. ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level . . . .").

4. *See* Mark S. Ellis, *The International Criminal Court and Its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 239 (2002) (explaining that countries in transition confront change in all aspects of government, making it difficult for a judiciary to function properly).

5. *See* Jane E. Stromseth, *The International Criminal Court and Justice on the Ground*, 43 ARIZ. ST. L.J. 427, 428 (2011).

6. For example, both Argentina and Iraq prosecuted their own citizens for crimes committed during their respective conflicts. *See generally* CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL (1996); Mark A. Drumbl, *The Iraqi High Tribunal and Rule of Law: Challenges*, 100 AM. SOC'Y INT'L L. PROC. 79, 79 (2006).

7. Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court, Statement of the Prosecutor to the Diplomatic Corps (Feb. 12, 2004), *available at* http://www.icc-cpi.int/NR/rdonlyres/0F999F00-A609-4516-A91A-80467BC432D3/143670/LOM_20040212_En.pdf (indicating that one of the OTP's strategic decisions will be to encourage rather than compete with national jurisdictions).

8. Rome Statute, *supra* note 2, art. 17 ("[A] case is inadmissible where . . . [t]he case is being investigated or prosecuted by a State which has jurisdiction over it . . . .").

9. It is unlikely that this situation—where a country is able to get its judiciary "up to code"—will arise often, but it is important that the Court be active in its approach to complementarity in order to facilitate local trials and increase stability and security.

By allowing states time to rebuild in order to pursue the perpetrators of the atrocities that occurred in their territories, the ICC would be promoting capacity building,[10] which can be vital following a period of prolonged conflict.[11] It follows logically that greater capacity can lead to greater stability—locally, regionally, and internationally. Moreover, when countries are able to deliver justice and not rely on the ICC to do so, the OTP will be able to channel its time and resources toward situations where crimes within the Court's jurisdiction have occurred but where domestic prosecution is not possible because there is no other jurisdiction willing and able to proceed.[12]

This Article proceeds in four Parts. Parts I and II address foundational questions: What are the differences in the quest for justice at the international and national levels, and is one forum preferable in certain circumstances? Furthermore, when meting out justice is the goal of a tribunal, why and how should the tribunal take on the additional role of capacity builder? Specifically, Part I examines the reasons why national courts may be preferred over the ICC—and vice versa.[13] Although some crimes are so atrocious that their perpetrators receive international attention, it does not necessarily follow that they should therefore be tried at the international level. In fact, when countries are emerging from conflict, the existence of genuine national trials can evidence a commitment to the rule of law that may not have existed previously. In the absence of action to implement judicial reforms, a stated dedication to judicial reorganization cannot serve as the only reason for keeping trials domestic. The ICC contemplates trials occurring at both levels, with the most senior offenders facing trial on the international stage and the lower-level offenders coming before national courts.[14] Yet even high-level defendants should be tried domestically whenever possible, even if there is a (reasonable) delay in the ability to bring that person before a national tribunal.[15]

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10. Capacity building, discussed *infra* Part II, generally refers to "the process through which individuals, organizations and societies obtain, strengthen and maintain the capabilities to set and achieve their own development objectives over time." CAPACITY DEV. GRP., UNITED NATIONS DEV. PROGRAMME, FREQUENTLY ASKED QUESTIONS: THE UNDP APPROACH TO SUPPORTING CAPACITY DEVELOPMENT 3 (2009), *available at* http://www.scor-int.org/SCOR_CB/CB-Bremen/UNDP_Frequently%20Asked%20Questions%20on%20Capacity%20Development%20June%202009_with%20bookmarks.pdf [hereinafter U.N. DEVELOPMENT PROGRAMME].

11. The postconflict rebuilding process increases a state's capacity through both human and physical development. In order to hold trials, for example, there must be courtrooms and jail cells and people trained to prosecute, defend, and preside over the proceedings.

12. William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 73–74 (2008).

13. Hybrid courts made up of both national and international personnel still exist, but with the establishment of the ICC, the prevailing trend is to direct situations to the OTP. This Article focuses on the ICC and national courts and does not discuss hybrids.

14. Interestingly, many defendants at the national level would prefer to face prosecution at the ICC over their own national courts, for some of the reasons discussed *infra* Part I.

15. Certainly there may also be concerns when the mastermind behind a campaign of terror and destruction faces prosecution by a fledgling judicial system, but the positive impact a local trial can have on a country grappling with the twin goals of addressing the past and looking toward the future may outweigh the defendant's preference for justice at the international level.

Part II focuses on the capacity building that occurs when the ICC delays making an admissibility determination in a situation so that a country may develop the capability to seek justice domestically. Following a period of conflict, countries can be left with a weakened judicial system.[16] Governments, nongovernmental organizations, the United Nations, and other groups—including the ICC—can play a vital role in the reconstruction of a state's institutions.[17] From training judges, lawyers, and police officers to amending existing legislation and building courthouses and prisons, these groups work together to revitalize the state's mechanisms.[18] A purely international tribunal does little to support or ignite domestic capacity building directly,[19] so it is crucial that trials be at the local level whenever possible, even if there is some lag time before the country is prepared.

Part III parses the principle of complementarity, whereby national courts are presumed to be the appropriate venue for trials, unless inability or unwillingness on the part of the national governments is an issue. A positive approach to complementarity[20] by the ICC entails active engagement with countries desiring national trials and encourages them to take ownership of the trial process. In contrast, a passive approach to complementarity means that the Court distances itself from the sovereign affairs of states desiring national trials and gets involved only if there are no other options.[21] A more practical approach to positive complementarity, whereby the ICC encourages national prosecution without substantively or financially involving itself in the judicial reforms, better promotes domestic capacity building, is a feasible process for the Court, and should be its default position. The governments of Kenya and Libya have both lodged complementarity challenges at the ICC; their different experiences provide further insight to this fundamental

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16. For example, a scorched-earth campaign carried out by forces sympathetic to Indonesia's desire to annex Timor-Leste left the judicial system in shambles. "Most court buildings had been torched and looted, and all court equipment, furniture, registers, records, archives, and—indispensable to legal practice—law books, case files, and other legal resources dislocated or burned." Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 50 (2001).

17. *See* Christian Eric Ford & Ben A. Oppenheim, *Neotrusteeship or Mistrusteeship? The "Authority Creep" Dilemma in United Nations Transitional Administration*, 41 VAND. J. TRANSNAT'L L. 55, 90–96 (2008).

18. Other capacity-building tasks can include revitalizing the economy and delivering basic services, among others. *See* JONATHAN FRIEDMAN, PRINCETON UNIV., BUILDING CIVIL SERVICE CAPACITY: POST-CONFLICT LIBERIA, 2006–2011 (2012), *available at* http://successfulsocieties.princeton.edu/sites/successfulsocieties/files/Policy_Note_ID203.pdf.

19. It is always possible, however, that ICC indictments might spark reforms on the ground in an effort to keep the process local. Christine Bjork & Juanita Goebertus, Note, *Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya*, 14 YALE HUM. RTS. & DEV. L.J. 205, 226 (2011) (stating that NGOs hoped that ICC intervention, although not directly affecting the capacity-building efforts in Kenya, would ignite action on the part of the government).

20. *See* Assembly of States Parties to the Int'l Criminal Court, *Report of the Bureau on Stocktaking: Complementarity*, ¶ 16, U.N. Doc. ICC-ASP/8/51 (Mar. 18, 2010).

21. Passive complementarity primarily mollifies the critics' sovereignty concerns. *See* Carsten Stahn, *Complementarity: A Tale of Two Notions*, 19 CRIM. L.F. 87, 88 (2008).

principle.[22] Part III argues that where a country is willing but temporarily unable to hold trials, the ICC should grant that country time to be able to prosecute the individuals who have been indicted at the Court. Such a policy is faithful to the principle of complementarity embodied in the Rome Statute[23] and will lead to national capacity building. In countries ravaged by conflict, strengthening judicial and legislative institutions is essential to increasing stability, as is ensuring the existence of adequate infrastructure.

Part IV suggests a practical approach to a delayed admissibility determination at the ICC. A country desiring time to make judicial reforms and gain or regain the ability to hold national trials should be required to present a detailed proposal to the ICC that includes a timeline and benchmarks for addressing the deficiencies in the justice system as well as resource considerations. In these situations, the OTP would need to strike a delicate balance between permitting and encouraging national trials and setting the stage for impunity to prevail. The Rome Statute already includes certain articles providing for oversight by the Court or the OTP,[24] which means that the Court will be involved at least minimally during this capacity-building process to ensure that the country's efforts are genuine and progressing in a timely fashion. If states facing scrutiny from the ICC in the form of investigation or prosecution prefer to serve justice within their own borders, they should certainly be able to do this, even if there is a reasonable delay while they get their affairs in order. By doing what is necessary to make trials possible, these states will benefit greatly from the reforms required—legislative, structural, and judicial.

I. FORUM CHOICE

When it comes to international crimes, why does the forum matter, as long as the alleged perpetrators face trial?[25] Even when crimes are committed in such a way that they rise to the level of gravity required by the Rome Statute for ICC prosecution,[26] it does not necessarily follow that justice at the international level is the best mechanism to address criminal responsibility. Despite the establishment of the ICC as a manifestation of the global consensus of the need for international justice, accountability at this level does have limitations. Likewise, while national judicial systems may sometimes be best positioned to hold trials in the aftermath of conflict,

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22. The ICC has addressed complementarity challenges from individual defendants from the Democratic Republic of Congo and Côte d'Ivoire, but this Article is focused on challenges by governments.

23. *See* Rome Statute, *supra* note 2, art. 17.

24. *See id.* arts. 18(3), 18(5).

25. Professor Jane Stromseth writes that fair and impartial atrocity trials at any level are important for the messages they send: that certain conduct is unacceptable and "universally condemned"; that trials demonstrate that impunity no longer stands; and that justice can be fair, even when the crimes and perpetrators are so horrific. Stromseth, *supra* note 5, at 432–33.

26. Article 17(1)(d) of the Rome Statute requires the ICC to deem a case inadmissible when the crimes alleged are not of sufficient gravity. Rome Statute, *supra* note 2, art. 17(1)(d). For information on the gravity standard, see generally Margaret M. deGuzman, *The International Criminal Court's Gravity Jurisprudence at Ten*, 12 WASH. U. GLOBAL STUD. L. REV. 475 (2013).

they may also face challenges that are not present at the international level. Both systems have an interest in bringing the perpetrators to justice, and they can work concurrently to achieve this end. The issue of forum choice arises when both the ICC and a national government wish to prosecute the offenders most responsible for certain crimes.[27] When a suspect can be tried at both the international and national levels, it is important to analyze the benefits and drawbacks of these systems.

Where some might argue that a crime so heinous as to fall within the jurisdiction of the ICC should be adjudicated there, others may focus instead on the victim communities and preference local justice.[28] It is crucial to remember that these situations are all different; the calculation of advantages and drawbacks of national and international tribunals will be unique to every setting.[29] There are, however, generalizations about forum choice that should be considered when evaluating the effectiveness of national and international tribunals, such as efficiency, geography, procedural fairness, and capacity building.

In terms of the efficiency of judicial proceedings, national courts are often the better choice as compared to international courts when adjudicating matters that occurred on their own territory.[30] When the proceedings are local, witnesses and evidence are easier and less costly to locate.[31] Moreover, there are generally fewer enforcement problems at the local level; because the ICC has no police force, it must rely on the States Parties to enforce its orders, which does not always occur.[32] On the other hand, one could argue that from a jurisprudential standpoint the ICC is more efficient because it is developing common standards that states can then implement themselves, thus increasing uniformity; in contrast, national jurisdictions do not

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27. The OTP has stated that though it might need to prosecute mid- or high-level defendants first, its focus is on those perpetrators who bear the greatest responsibility. OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, STRATEGIC PLAN JUNE 2012–2015, at 14 (2013), *available at* http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf.

28. Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks*, 50 B.C. L. REV. 1, 13–14 (2009).

29. *Id.* at 13.

30. This claim has been echoed by the OTP. OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 2 (2003), *available at* http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf ("National investigations and prosecutions, where they can properly be undertaken, will normally be the most effective and efficient means of bringing offenders to justice; States themselves will normally have the best access to evidence and witnesses.").

31. Katharine A. Marshall, *Prevention and Complementarity in the International Criminal Court: A Positive Approach*, HUM. RTS. BRIEF, Winter 2010, at 21, 24.

32. Rome Statute, *supra* note 2, art. 59 ("A State Party which has received a request for provisional arrest or for arrest and surrender shall immediately take steps to arrest the person in question in accordance with its laws and the provisions of Part 9."). For example, Sudanese President Omar al-Bashir has traveled throughout Africa despite the ICC warrant for his arrest issued in March 2009. *Calls for Arrest of Sudan's Leader*, NEWS.COM.AU (Mar. 5, 2014, 1:55 PM), http://www.news.com.au/world/breaking-news/calls-for-arrest-of-sudans-leader/story-e6frfkui-1226845946799.

necessarily look to the practice of other states when interpreting the law.[33] Furthermore, the comparable lack of resources at the local level, while not always present, can compromise the fair administration of justice.[34]

Geography naturally plays a crucial role in the effects of forum choice, and not just with regard to approaching witnesses and gathering evidence. National courts tend to be geographically closer to the victim populations,[35] and thus perhaps better suited to assess and respond to their needs. National judiciaries are also accountable to the local population at large, whereas international tribunals are accountable to the international community that funds them,[36] and can give the impression that the foreign personnel come in, do the work, and then get out as soon as they can.[37] The location of national courts can also result in increased media coverage at the local level, which does not occur as often when the trials take place on an international stage.[38] Local media coverage allows the population to be aware of the justice initiatives in action, which can result in increased ownership of the accountability process.[39] Still, an international tribunal may better serve the interests of justice and the victim population if that population believes that an international trial is a higher form of justice than national prosecution.[40]

The issue of procedural fairness can also affect the suitability of a particular court. International courts have been described as more impartial than national courts, as judges at this level serve in their own capacity and not on behalf of their states.[41]

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33. *See* Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 15–16 (2005).

34. *Id.* at 14. The lack of resources can manifest itself in many ways, such as a lack of qualified personnel or infrastructure (including courthouses and prisons). *See* Cynthia Alkon, *The Flawed U.S. Approach to Rule of Law Development*, 117 PENN ST. L. REV. 797, 800 (2013).

35. The International Criminal Tribunal for Rwanda (ICTR), however, is located in Arusha, Tanzania, much closer to the victim population than its sister tribunal, the International Criminal Tribunal for Yugoslavia (ICTY), which is located in The Hague.

36. José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 410 (1999).

37. Stromseth, *supra* note 5, at 436 (comparing international and hybrid criminal courts to alien spaceships that "arrive, do their business, and take off, leaving a befuddled domestic population scratching its head and wondering what, if anything, this has to do with the dire realities on the ground").

38. Turner, *supra* note 33, at 27–28. Consider, for example, the ICTY and ICTR, which were not "widely covered in the local media nor as closely followed by the affected local populations" as national trials in, for example, Argentina and France. *Id.*

39. *Cf.* Ivana Nizich, *International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 ILSA J. INT'L & COMP. L. 353, 362 (2001) (pointing out that the people of the former Yugoslavia did not view the ICTY as theirs, but rather as a tribunal by and for the international community).

40. Richard Goldstone, *The United Nations' War Crimes Tribunals: An Assessment*, 12 CONN. J. INT'L L. 227, 238 (1997) (explaining that the establishment of the ICTY "created an expectation of the highest form of justice—justice to be accomplished through an international institution").

41. *See* Rome Statute, *supra* note 2, art. 40 (stating that "judges shall be independent in the performance of their functions" to ensure judges serve in their own capacity rather than that of their state); Baylis, *supra* note 28, at 11; *see also* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (adopting the Statute of the International Tribunal for Rwanda); U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security*

National courts, especially in the aftermath of a divisive conflict, may be subject to claims of bias or corruption, thereby erasing any healing effect that the trials may otherwise have had.[42] International judges, with their distance from the conflict—both geographical and psychological—may also be more consistent in their administration of justice and create a more objective narrative.[43] Additionally, the ICC offers due process guarantees that may not always be incorporated into the laws of a state wishing to try its own alleged criminals,[44] leading to a potentially fairer outcome by international standards.

Though there are advantages and disadvantages to atrocity trials at both the domestic and international stage, by far the most compelling reason to promote national justice is for the potential lasting effects it can have on the local judiciary. Trials at the ICC do nothing to strengthen the affected country's judicial system, and a robust legal system can help with stabilization after a period of conflict.[45] Just the fact of holding trials at all, let alone with the knowledge transfer that comes with outside assistance, can affirm the rule of law in an otherwise chaotic society.[46] The ICC Prosecutor has stated that the OTP "will encourage genuine national proceedings where possible,"[47] and promoting domestic justice, with the outside assistance that often comes with the reformation or fortification of a legal system, may leave the country more stable and better positioned to move forward.

Any state considering the possibility of trials of the orchestrators of genocide, crimes against humanity, or war crimes will necessarily weigh its ability to do so

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Council Resolution 808 (1993), at 40, U.N. Doc. S/25704 (May 3, 1993) (containing the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia); U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, S/25704/Add.1 (May 19, 1993); S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (adopting *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704, *supra*, and *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704/Add.1, *supra*). At hybrid tribunals such as the Special Court for Sierra Leone, which are made up of both international and national judges, the national judges are appointed by the government of Sierra Leone, whereas the international judges are appointed by the U.N. Secretary-General. U.N. Security Council, Statute of the Special Court for Sierra Leone art. 12, Jan. 16, 2002, *available at* http://www.refworld.org/docid/3dda29f94.html.

42. *See* Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 503 (1994) (describing how the parties to the peace agreement in El Salvador had to look outside the country for truth commissioners because they could not "agree on any group of Salvadorans that they would trust to discharge that responsibility").

43. Turner, *supra* note 33, at 15–16.

44. Rome Statute, *supra* note 2, art. 67 (affording the accused entitlement "to a public hearing" as well as a number of other guarantees); Alejandro Chehtman, *Developing Local Capacity for War Crimes Trials: Insights from BiH, Sierra Leone, and Colombia*, 49 STAN. J. INT'L L. 297, 301 (2013) (citing claims that Rwanda and Sierra Leone, for example, were not able to offer the same kinds of due process guarantees that are expected by international standards).

45. Baylis, *supra* note 28, at 84.

46. *See* Turner, *supra* note 33, at 27–28.

47. OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, PROSECUTORIAL STRATEGY 2009–2012, at 5 (2010) [hereinafter OTP, PROSECUTORIAL STRATEGY].

against ICC involvement. One vital factor in this calculation will likely be the benefit to the country of local trials, even those of major perpetrators. From increased public confidence in the state to a stronger rule of law, local justice demonstrates to the world at large recognition of the horrors that occurred and the ability and commitment to address them locally and fairly. If local prosecution of high-level perpetrators is not a possibility, however, due to security concerns,[48] lack of legislation covering the crimes, or other factors, international trials can still offer justice to the victims. What is important is that the state has every opportunity to keep justice within its borders, even if it takes some extra time.

II. BUILDING CAPACITY AFTER CONFLICT

Although justice for victims of atrocity crimes can be found at both the international and domestic levels, one key difference is the capacity building that takes place when outside actors assist and invest in a country coming out of conflict with its justice initiatives. Capacity building, as defined by the U.N. Development Programme, is "the process through which individuals, organizations and societies obtain, strengthen and maintain the capabilities to set and achieve their own development objectives over time."[49] Although capacity building is broad in scope,[50] of relevance here are capacity-building initiatives related to justice and the rule of law. These programs, which focus on facilities, judicial training, and legislative issues, are but one facet of any thorough capacity-building process, but these programs specifically promote stability and predictability.[51] Establishing a stable and predictable judicial system protects the population "against anarchy as well as from arbitrary exercise of power by public officials and allows people to plan their daily affairs with confidence."[52] The ICC certainly cannot promote comprehensive capacity building, but by allowing countries desiring domestic trials time to build up their judiciaries, it can facilitate many key areas.

Depending on the nature of the conflict, a country emerging from mass atrocity may be left with a dearth of infrastructure adequate to pursue the alleged perpetrators of the crimes committed. Without prison facilities, courthouses, and police stations, justice

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48. *E.g.*, Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgement, ¶ 10 (May 18, 2012), http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf (explaining that Charles Taylor's trial was held at The Hague in the Netherlands due to concerns about regional security).

49. U.N. DEVELOPMENT PROGRAMME, *supra* note 10, at 3.

50. Other capacity-building initiatives can include, inter alia, recovery after disaster or sustainable development. UNITED NATIONS DEV. PROGRAMME, 'CAPACITY *IS* DEVELOPMENT': A GLOBAL EVENT ON *SMART STRATEGIES AND CAPABLE INSTITUTIONS FOR 2015 AND BEYOND* 3 (2010).

51. *See* Jeremy M. Wilson, *Law and Order in an Emerging Democracy: Lessons from the Reconstruction of Kosovo's Police and Justice Systems*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 152, 153 (2006) ("[Stability is] the development of a stable environment in which violence-prone groups such as insurgents or criminals are subordinated to legitimate governmental authority, reintegrated into society, or defeated. A stable government is one in which the population is free from major threats to their safety and where national and international actors are able to rebuild political, economic, and other key governance institutions.").

52. *Id.*

becomes more difficult to achieve at the domestic level.[53] In addition to actual buildings, infrastructure deficits can include the lack of appropriate technology, community outreach, or even suitable vehicles for transporting prisoners.[54] Although the ICC will not likely engage directly in this sort of capacity building, by standing aside while a country works to develop the necessary facilities, neither will it impede this process.

In addition to a lack of infrastructure, countries committed to the prosecution of individuals accused of war crimes, genocide, or crimes against humanity require personnel—judges, prosecutors, defense attorneys—who know how to run these often complex cases.[55]

> [T]here is specific knowledge applicable to war crimes cases that is required both in quite sophisticated legal systems as well as in less developed ones. This has to do with the concrete knowledge of the relevant rules of international criminal law and international humanitarian law, but also more practical areas essential for international criminal trials, including court management, case handling, and investigation of complex institutional structures and chains of events.[56]

To address the knowledge gap, it is common for various actors including bar associations and NGOs to offer seminars or other initiatives designed to impart the knowledge necessary for the successful administration of justice.[57] These programs run the gamut from quick one-day courses to longer projects or even secondments. For example, the European Union sent two individuals to Colombia to use their knowledge of the substantive law and their understanding of the situation on the ground to educate magistrates about what course of action to take.[58] Because the experts stayed with the program for two years, the knowledge transfer was ongoing and constant, allowing for a deeper understanding of the intricacies in the relevant international laws.[59]

Not every country grappling with genocide, war crimes, or crimes against humanity has domestic laws covering these acts or procedures in place for complex trials, however.[60] In some situations, laws must be amended to include certain

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53. There are, of course, plenty of trials that occur in countries lacking comprehensive infrastructure, but the existence of actual courtrooms can be an indication of the government's commitment to justice. *See, e.g.*, Lisa Clifford, *Open Air Justice in DR Congo*, INT'L JUST. TRIB. (Neth.), Mar. 16, 2011, at 3 (highlighting the mobile courts in the Democratic Republic of Congo).

54. Chehtman, *supra* note 44, at 302.

55. *See generally* GIDEON BOAS, THE MILOŠEVIĆ TRIAL: LESSONS FOR THE CONDUCT OF COMPLEX INTERNATIONAL CRIMINAL PROCEEDINGS (2007).

56. Chehtman, *supra* note 44, at 302.

57. Jeremy Sarkin, *Enhancing the Legitimacy, Status, and Role of the International Criminal Court Globally by Using Transitional Justice and Restorative Justice Strategies*, 6 INTERDISC. J. HUM. RTS. L. 83, 92 (2012).

58. Chehtman, *supra* note 44, at 305–06.

59. *See id.*

60. For example, the Democratic Republic of Congo may only prosecute war crimes and crimes against humanity and genocide through a military tribunal, rather than through a civilian court. OPEN SOCIETY JUSTICE INITIATIVE, PROMOTING COMPLEMENTARITY IN PRACTICE—LESSONS FROM THREE ICC SITUATION COUNTRIES 5 (2010), *available at* http://

procedural protections; in others, judges and lawyers must use the existing law in creative ways so as to avoid claims of *nullum crimen sine lege* violations.[61] For example, in Argentina there were no laws criminalizing the act of disappearance—the abduction (often in broad daylight), imprisonment, torture, and (often) murder by the state without acknowledgement—that plagued the Southern Cone in the 1970s and 1980s.[62] Instead, prosecutors charged defendants with, inter alia, stealing the babies born to women who had been "disappeared."[63] In Colombia, where there is no domestic law criminalizing crimes against humanity, the Constitutional Court stated that it would look to the relevant provisions in the Rome Statute itself because of this lacuna.[64] Solutions like these can enable countries lacking particular legislation to retain jurisdiction, rather than rely solely on the ICC to mete out justice for crimes committed within their borders.

Capacity building after—or sometimes during—conflict is certainly not an easy or quick task. Yet, it is imperative that countries whose situations come before the ICC and who want to hold domestic trials engage in capacity building rather than sit back and allow the Court to proceed because "preventing future atrocities and building public confidence in non-violent conflict resolution will depend on the real capacity to deliver at least a semblance of fair justice in domestic justice systems."[65] The danger of failing to promote justice and the rule of law for these countries, coupled with the small caseload at the ICC, means that countless perpetrators could go unpunished and impunity could prevail.[66]

The ICC, of course, can still administer justice by holding the high-level perpetrators accountable for crimes that fall within its statutory jurisdiction. When, at first blush, it appears that a state is unable to hold trials, the natural response, according to the principle of complementarity, would be for the Court to take on the cases itself.[67] A broad reading of this provision, however, can lead the Court to delay its proceedings in order to give the state in question time to shore up its institutions and keep justice within its borders.

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www.issafrica.org/anicj/uploads/OSJIComplementaritycasestudies.pdf.

61. This term of art means that there can be no crime without a law proscribing the conduct at issue. *See generally* Jordan J. Paust, Nullum Crimen *and Related Claims*, 25 DENV. J. INT'L L. & POL'Y 321 (1997).

62. Alejandro M. Garro & Henry Dahl, *Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward*, 8 HUM. RTS. L.J. 283, 319–29 (1987). *See generally* ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED, NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED (Farrar Straus & Giroux 1986) (1984).

63. *See generally* Lisa Avery, *A Return to Life: The Right to Identity and the Right to Identify Argentina's "Living Disappeared*,*"* 27 HARV. WOMEN'S L.J. 235 (2004).

64. Chehtman, *supra* note 44, at 317 (citing the Colombian Constitutional Court case).

65. Stromseth, *supra* note 5, at 436.

66. David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, FLETCHER F. WORLD AFF., Summer/Fall 2002, at 7, 12 (2002).

67. *See* Rome Statute, *supra* note 2, art. 17.

III. APPROACHES TO COMPLEMENTARITY

Complementarity is one of the bedrock principles of the Rome Statute[68]: it establishes the ICC as a court of last resort, leaving to willing and able national jurisdictions the task of prosecuting crimes that fall within the ICC's jurisdiction.[69] Although "complementarity" is never mentioned outright in the Rome Statute,[70] article 17 codifies this idea, stating that a case that would otherwise be inadmissible due to investigation or prosecution on the part of a state may reach the ICC anyway if the state is found to be "unwilling or unable genuinely" to investigate or prosecute.[71] Complementarity thus embeds the notion of deference to national courts into the heart of the ICC.[72] This preference for adjudication in national courts was reinforced by the first Chief Prosecutor of the ICC, Luis Moreno-Ocampo; shortly after the Court was established, he commented that the marker of the Court's success would not be the number of cases before it, but rather the absence of cases, meaning that when national jurisdictions have both the capacity and the willingness to hold trials, the ICC may cease to be necessary.[73] Indeed, the OTP has indicated that one of its functions is to encourage trials at the state level.[74]

This focus on national proceedings is necessary, given the ICC's jurisdictional limitation of pursuing accountability only for the "most serious crimes of international concern."[75] Additional limitations in terms of resources—both financial and human—make it impossible for the OTP to pursue all allegations of war crimes, crimes against humanity, and genocide.[76] Thus, for now at least, the ICC serves an essential purpose in the fight against impunity, which means that an in-depth look at the complementarity principle—in theory and in practice—can guide the parties seeking to determine the best forum for adjudication. An examination of the purpose of complementarity and how the principle was borne out in the negotiations indicates that the ICC was designed to intervene only in extraordinary situations.[77] It is thus

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68. Sharon A. Williams & William A. Schabas, *Article 17*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 605, 606 (Otto Triffterer ed., 2d ed. 2008).

69. Rome Statute, *supra* note 2, art. 17.

70. Article 1 mentions that the Court "shall be complementary to national criminal jurisdictions," but "complementarity" is absent from the Statute. *Id.* art. 1.

71. *Id.* art. 17(1)(a). It is worth noting, however, that it is the ICC that makes the determination of unwillingness or inability. *Id.* art. 17(2)–(3) (listing the factors that the Court will consider in order to determine unwillingness or inability).

72. Baylis, *supra* note 28, at 3; *see also* Turner, *supra* note 33, at 6 (pointing out that the concept of complementarity is so fundamental to the Rome Statute that it is referenced three times: in the preamble, article 1, and article 17).

73. OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE 3 (2003) [hereinafter COMPLEMENTARITY IN PRACTICE].

74. *Id.* at 4 ("A major goal of the Prosecutor . . . [is] motivating genuine national proceedings on the basis of effective legislation.").

75. Rome Statute, *supra* note 2, art. 1.

76. Phil Clark, *Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda*, *in* COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA 37, 37 (Nicholas Waddell & Phil Clark eds., 2008).

77. Turner, *supra* note 33, at 6–7.

necessary to examine competing approaches to complementarity—both passive and positive. Moreover, because complementarity is an admissibility determination, the criteria for admissibility, especially those relating to the ability of governments to hold national trials, must be considered. Finally, the Court and the OTP have previously been engaged in complementarity negotiations with the governments of Kenya and Libya.[78] These examples provide insight into the OTP's approach.

During the Rome Statute drafting negotiations, many states were concerned about a strong international court wielding too much power.[79] These states were hesitant to give up so much control to an untested international body.[80] Because such a court would necessarily impinge on states' sovereignty, the reluctant states wanted assurances that the court would be a last resort, supplementing already existing domestic judicial systems.[81] As a result of these discussions, the Rome Statute provides that the primary responsibility for preventing and punishing crimes under the Statute's jurisdiction lies with the states.[82] The ICC will only step in when states with jurisdiction do not engage in genuine investigations or prosecutions.[83] The OTP implements the principle of complementarity in two ways: through an admissibility determination that asks whether any investigation or prosecution is genuine, and by promoting and facilitating national prosecutions.[84] These two facets of complementarity are sometimes referred to as passive complementarity and positive complementarity.[85]

Passive complementarity represents the idea of the ICC as a court of last resort, intervening only when there is a failure to do so on the part of a state with jurisdiction.[86] In this sense the Court functions as a way to motivate states to take action: if the state acts, then the ICC sits back and watches, but if the state does nothing, then the Court becomes involved.[87] Positive complementarity, by contrast, means that the ICC takes a more active role in enabling states to carry out prosecutions on their own.[88] In regard to positive complementarity, the emphasis is on supporting these states as they build up their judiciaries.[89] The OTP has

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78. *See generally* COALITION FOR INT'L CRIM. CT., http://www.iccnow.org (providing information on the admissibility of the Kenyan and Libyan cases).

79. Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 583, 585 (Antonio Cassese et al. eds., 2002).

80. *See* Turner, *supra* note 33, at 5.

81. COMPLEMENTARITY IN PRACTICE, *supra* note 73, at 3.

82. OTP, PROSECUTORIAL STRATEGY, *supra* note 47, at 4–5.

83. Rome Statute, *supra* note 2, art. 17(1)(a)–(b).

84. OTP, PROSECUTORIAL STRATEGY, *supra* note 47, at 4–5.

85. Linda E. Carter, *The International Criminal Court in 2021*, 18 SW. J. INT'L L. 199, 210 (2011).

86. *See* Julie B. Martin, *The International Criminal Court: Defining Complementarity and Divining Implications for the United States*, 4 LOY. U. CHI. INT'L L. REV. 107, 109 (2006).

87. Marshall, *supra* note 31, at 21, 22.

88. In his article, William Burke-White argues that positive complementarity should be more accurately framed as "proactive complementarity" in the sense that the Court should use its power actively to encourage and facilitate local prosecutions. *See* Burke-White, *supra* note 12, at 55–56.

89. Marshall, *supra* note 31, at 21–22.

commented on this positive approach to complementarity, noting that it will encourage national proceedings, though not in ways that involve financial assistance or direct capacity building.[90] Clearly, interpreting the principle of complementarity in a positive way is consistent with the notion that national courts should take the lead in investigating and prosecuting alleged perpetrators of serious international crimes when possible.[91]

Complementarity becomes an issue when a state challenges the admissibility of a situation or case before the ICC.[92] Because it is assumed that cases are admissible by the time they make it to the ICC,[93] the Rome Statute sets out only the reasons that a case or situation would be inadmissible, including where a case is not "of sufficient gravity" or where double jeopardy is an issue.[94] Of particular relevance here, however, are the provisions of article 17 that address a state's unwillingness or inability to investigate or prosecute an individual accused of committing one of the crimes under the Court's jurisdiction.[95] Article 17(1) renders a case inadmissible where a state has already investigated and prosecuted a case or has investigated a case

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90. OTP, PROSECUTORIAL STRATEGY, *supra* note 47, at 5 (stating that the OTP's positive approach to complementarity could entail the following elements: "a) providing information collected by the Office to national judiciaries upon their request pursuant [to] Article 93(10), subject to the existence of a credible local system of protection for judges or witnesses and other security-related caveats; sharing databases of non-confidential materials or crime patterns; b) calling upon officials, experts and lawyers from situation countries to participate in OTP investigative and prosecutorial activities, taking into account the need for their protection; inviting them to participate in the Office's network of law enforcement agencies (LEN); sharing with them expertise and trainings on investigative techniques or questioning of vulnerable witnesses; c) providing information about the judicial work of the Office to those involved in political mediation such as UN and other special envoys, thus allowing them to support national/regional activities which complement the Office's work; and d) acting as a catalyst with development organizations and donors' conferences to promote support for relevant accountability efforts").

91. Burke-White's proactive approach to complementarity, which does not count out financial assistance from the ICC, would be appropriate when and if the time comes that the ICC has so few cases before it that it would no longer be a burden on its time or resources to engage more deeply with national governments. *See generally* Burke-White, *supra* note 12.

92. The investigation of a "situation" is the first step in the judicial process at the ICC. Before the Prosecutor requests arrest warrants or focuses on any individuals, she investigates the entire situation that has come before her. Rome Statute, *supra* note 2, art. 13. Because States Parties to the Rome Statute and the Security Council can refer situations to the Court, requiring the OTP to assess a situation, as opposed to the actions of one or more specific people, in theory this approach makes the investigation less biased or political in that it is the OTP that determines whom to indict. The first ICC Prosecutor, Luis Moreno-Ocampo, was criticized, however, for his perceived bias toward the Ugandan government when, while standing next to the Ugandan president, he announced the issuance of arrest warrants for five members of the Lord's Resistance Army and not one member of the government forces. Janine Natalya Clark, *Peace, Justice and the International Criminal Court*, 9 J. INT'L CRIM. JUST. 521, 524–25 (2011).

93. Mark A. Summers, *A Fresh Look at the Jurisdictional Provisions of the Statute of the International Criminal Court: The Case for Scrapping the Treaty*, 20 WIS. INT'L L.J. 57, 69 (2001).

94. Rome Statute, *supra* note 2, art. 17(1).

95. *Id.* art. 17(1)–(3).

and decided not to go forward with prosecution unless these decisions "resulted from the unwillingness or inability of the State genuinely" to carry out these proceedings.[96] The ICC Appeals Chamber has held that an article 17 admissibility analysis should proceed in two steps: first, an examination of whether the state has taken any action toward investigation or prosecution, and second, an examination of whether a state that is taking action is willing and able to do so genuinely.[97]

With regard to willingness, the Rome Statute mentions three factors weighing toward a finding that a state is acting in a manner that calls into question its genuine willingness to hold individuals accountable: where the national proceedings are being undertaken to protect the person from criminal responsibility,[98] where there is an undue delay in the proceedings,[99] or where the proceedings lack impartiality or independence.[100] Unwillingness evaluations have the potential to be complicated, considering that officials are essentially accused of nefarious behavior and the state's motives are called into question.[101]

The inability prong, by contrast, is at first blush quite simple: a state will be found to be unable to carry out genuine proceedings when its judicial system has substantially or totally collapsed or is otherwise unavailable, when the state cannot access evidence or gain custody over the accused, or when it is otherwise unable to carry out genuine proceedings.[102] Willingness does not factor into this assessment; it is purely an analysis of a state's capacity to engage in a genuine investigation and prosecution.[103]

The OTP has provided several factors that are relevant to an inability evaluation centered on the collapse or unavailability of the judiciary. These include "lack of necessary personnel, judges, investigators, prosecutor; lack of judicial infrastructure; lack of substantive or procedural penal legislation rendering system 'unavailable'; lack of access rendering system 'unavailable'; obstruction by uncontrolled elements rendering system 'unavailable'; [and] amnesties, immunities rendering system 'unavailable'."[104]

Notably, these factors are fairly structural and focus on a state's capacity to hold trials in terms of human resources, infrastructure, accessibility, and legislation. The inability assessment does not explicitly consider how guarantees such as fairness and due process affect the analysis, though article 17(3)'s catchall provision, "or otherwise unable to carry out its proceedings," may be an avenue for arguing that a lack of basic judicial protections renders a national judicial system unable genuinely

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96. *Id.* art. 17(1)(b) (concerning an investigation and a decision not to prosecute); *see also id.* art. 17(1)(a) (concerning an investigation and prosecution).

97. Carsten Stahn, *Libya, the International Criminal Court and Complementarity: A Test for 'Shared Responsibility*,*'* 10 J. INT'L CRIM. JUST. 325, 337 (2012).

98. Rome Statute, *supra* note 2, art. 17(2)(a).

99. *Id.* art. 17(2)(b).

100. *Id.* art. 17(2)(c).

101. COMPLEMENTARITY IN PRACTICE, *supra* note 73, at 14.

102. Rome Statute, *supra* note 2, art. 17(3). This Article focuses on the first two considerations, collapse and unavailability, and does not directly address a state's ability to gain custody of the individual or to access relevant evidence.

103. *See* Mahnoush H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L L. 385, 387 (2005).

104. COMPLEMENTARITY IN PRACTICE, *supra* note 73, at 15.

to engage in proceedings.[105] Indeed, the OTP has stated that, as it is not a human rights monitoring institution, the bar for a finding of inability on behalf of a state is high.[106] Thus, it is possible that a state may be found to be able genuinely to investigate and/or prosecute even where it is not in compliance with international standards of justice and fairness. It follows then that it would not be impossible for a state suffering the aftereffects of conflict to go from not being able to hold genuine proceedings to being able to do so in a relatively short period of time, especially with outside assistance.

In such a situation, where a country is able to gain or regain the ability to prosecute the same individuals who have been investigated by the ICC, it should be permitted and encouraged to do so. The period during which it shores up its judicial system will be a period of capacity building that will provide benefits long after the trials are over. Moreover, permitting a delay at the ICC to allow a state to strengthen the institutions necessary in order to deliver justice stays true to the concept of complementarity, which provides that the ICC will get involved in a matter only if there is no other available jurisdiction that is willing and able to undertake genuine investigations and prosecutions.[107]

Where a state is willing but unable, "the principle of complementarity argues in favor of offering international support for domestic prosecutions," though the ICC, being a young institution, may prefer to retain jurisdiction and "establish[ ] its own credibility."[108] Although the OTP has stated that it will not engage financially with domestic jurisdictions,[109] allowing those states time to find other groups that will engage with them on different levels—financially, legislatively, structurally, etc.—will enable states to pursue domestic accountability and leave the Court's time and resources for the cases that have no other viable forum.

Two instances in which governments have raised admissibility claims based on complementarity are the situations involving Kenya and Libya.[110] Postelection violence along ethnic lines in 2007 brought Kenya to the attention of the ICC Prosecutor in 2008.[111] Initially, the Kenyan government wanted to take control of accountability measures, and the Prosecutor and Kenyan officials worked together to come up with a plan for domestic investigations and prosecutions, as well as a timeline for implementation.[112] When Kenya failed to meet the benchmarks set out

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105. Rome Statute, *supra* note 2, art. 17(3); *see also* Stahn, *supra* note 97, at 345.

106. COMPLEMENTARITY IN PRACTICE, *supra* note 73, at 15.

107. *See* Rome Statute, *supra* note 2, art. 17.

108. Stromseth, *supra* note 5, at 441.

109. OTP, PROSECUTORIAL STRATEGY, *supra* note 47, at 5.

110. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute (May 1, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1405819.pdf; Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1078822.pdf.

111. Allan Ngari, *Kenya's Ongoing Battle with Complementarity at the ICC*, INT'L JUST. MONITOR (May 16, 2012), http://www.ijmonitor.org/2012/05/kenyas-ongoing-battle-with-complementarity-at-the-icc/.

112. Press Release, Int'l Criminal Court, ICC Prosecutor: Kenya Can Be an Example to

in the timeline, the ICC Prosecutor used her *propio motu* powers for the first time to continue with her investigations and prosecutions.[113]

As in Kenya, the Libyan government wanted to keep justice local. After the fall of the Gaddafi regime in 2011, the U.N. Security Council referred the situation in Libya to the OTP, which indicted Muammar Mohamed Abu Minyar Gaddafi; his son, Saif Al-Islam Gaddafi; and Abdullah Al-Senussi.[114] Libya, however, preferred that Saif Gaddafi and Al-Senussi face prosecution at home,[115] stating that domestic justice can be "a foundation for reconciliation, democracy and rule of law."[116] The Court ruled separately for each defendant, finding that Libya was unable to try Gaddafi due to security considerations, but that the OTP's case against Al-Senussi was inadmissible because Libyan authorities were willing and able to undertake the prosecution.[117] In July 2014, the Appeals Chamber confirmed this ruling, stating that Al-Senussi could be tried at home, despite claims by human rights groups that Al-Senussi cannot receive a fair trial in Libya.[118]

In both situations, the ICC's approach to domestic versus international justice was rather passive.[119] It is promising, however, that the Court made individualized determinations in the Libya cases rather than a blanket statement about the country's willingness or ability to serve justice within its borders.[120] Still, a better approach to

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the World (Sept. 18, 2009), *available at* http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/Pages/pr452.aspx.

113. Godfrey M. Musila, *Kenya: Prosecutor to Invoke Proprio Motu Power as GNU Pledges Cooperation*, RE-THINKING INT'L CRIM. JUST. AFR. (Nov. 5, 2009, 3:04 PM), http://rethinkingjustice.blogspot.com/2009/11/kenya-prosecutor-to-invoke-proprio-motu.html. For more information about the Kenyan admissibility challenge, see Charles Chernor Jalloh, *Situation in the Republic of Kenya*, 106 AM. J. INT'L L. 118 (2012).

114. S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

115. Anna F. Triponel & Paul R. Williams, *The Clash of the Titans: Justice and Realpolitik in Libya*, 28 AM. U. INT'L L. REV. 775, 827 (2013) (stating that at the end of the conflict the Libyan government "sought to assert its rights under the principle of complementarity to prosecute" Gaddafi and Al-Senussi). The case at the ICC against Muammar Gaddafi was closed upon his death. *See id.*

116. Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Application on Behalf of the Government of Libya Pursuant to Article 19 of the ICC Statute, ¶ 11 (May 1, 2012), http://www.icc-cpi.int/iccdocs/doc/doc1405819.pdf.

117. Press Release, Int'l Criminal Court, ICC Pre-Trial Chamber I Decides that the Al-Senussi Case Is to Proceed in Libya and Is Inadmissible Before the ICC (Oct. 11, 2013) [hereinafter Al-Senussi Press Release], *available at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr953.aspx; Press Release, Int'l Criminal Court, ICC Pre-Trial Chamber I Rejects Libyan Challenge to the Admissibility of the Case Against Saif Al Islam Gaddafi (May 31, 2013) [hereinafter Gaddafi Press Release], *available at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr911.aspx.

118. *Libya: ICC Judges Reject Sanussi Appeal*, HUM. RTS. WATCH (July 24, 2014), http://www.hrw.org/news/2014/07/24/libya-icc-judges-reject-sanussi-appeal.

119. Harry Orr Hobbs highlights a disconnect between the OTP, which seems willing to work with local jurisdictions to enable domestic trials, and the chambers, which take a more black-and-white approach to complementarity. Harry Orr Hobbs, *The Security Council and the Complementary Regime of the International Criminal Court: Lessons from Libya*, 9 EYES ON ICC 19 (2013).

120. *See* Al-Senussi Press Release, *supra* note 117; Gaddafi Press Release, *supra* note 117.

complementarity would dig deeper to try to identify relevant deficits and remedies to enable local prosecutions. The government must obviously also play an active role if it wishes to retain jurisdiction. A prosecutorial plan from the state designed to be implemented in domestic courts satisfies the ICC's goal of preventing impunity while also giving the affected state time to rebuild its judicial structure.

IV. WORKING TOGETHER TO ENABLE LOCAL TRIALS

If a country coming under the watchful eye of the ICC prefers to retain jurisdiction and hold alleged perpetrators of war crimes, crimes against humanity, or genocide responsible on a domestic level, the ICC must determine whether genuine national trials are possible. Of relevance here are the situations where a country is unable to engage in meaningful local justice at the time the ICC shines a spotlight on it, but could gain the ability to conduct trials in a relatively short period. In order for the ICC to agree to a deferred admissibility determination, however, the country at issue must submit a comprehensive proposal with a timeline, achieve its goals within a two-year period, and consent to oversight by the OTP.

The request for an extension in order to gain or regain the ability to undertake local justice must include a detailed plan outlining what exactly needs to occur in order for the country to hold local trials successfully. This requirement will serve as a filter to ensure that only countries that are serious about reforming or restoring their judicial systems are using the Court's limited time and resources with such a request. The state will assess its current condition and address any problematic structural, legislative, or judicial conditions that make the prosecution of alleged perpetrators of crimes against humanity, genocide, or war crimes difficult.

Is there a prison secure enough to hold high-level and well-connected officials?[121] Is there existing legislation covering the same actions the OTP is investigating?[122] Are there judges, prosecutors, and defense attorneys who are familiar with prosecuting these crimes? Are there investigators and forensics specialists who know how to approach these often complex cases?[123] If the state is lacking in any of these areas it must indicate how it intends to remedy the deficit. To the extent that a state intends to seek outside assistance, it must identify what kind of help it needs and from whom. States, NGOs, and other groups have knowledge, expertise, and resources to bring to bear on the situation. They also have an interest in facilitating local justice for the stability it brings to the state and beyond. Any kind of change or

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121. For example, due to security concerns, Charles Taylor, who was prosecuted before the Special Court for Sierra Leone, was put on trial in The Hague instead of in Sierra Leone. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgement, ¶ 10 (May 18, 2012), http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf.

122. The Court has followed the "same person/same conduct" rule and asks whether the individual being investigated at the domestic level is the same as the person being investigated at the international level and if the underlying conduct is the same. Claire Grandison, *ICC Appeals Chamber Confirms the Admissibility of Cases in the Situation of Kenya*, HUM. RTS. BRIEF, Fall 2011, at 36, 37.

123. For example, the Argentine Forensic Anthropology Team is a well-known NGO that operates in countries around the world to assist in the exhumation of mass graves. *See generally* ARGENTINE FORENSIC ANTHROPOLOGY TEAM, http://www.eaaf.org.

development, of course, requires resources, and thus the state also needs details regarding how it will turn its reformative ideas into reality.[124] Certainly a state that must address significant deficits in all three of these areas will be less likely to present a sufficient proposal to the ICC, but a country that lacks particular skills, structures, or laws but can remedy these deficiencies relatively quickly would benefit from keeping justice local.

Another constraint, beyond the detailed nature of the proposal, is the two-year time frame for completion. This deadline is long enough that changes can be made, but not so long that both defendants and victims suffer disproportionately. A government that is serious about strengthening its judiciary will present the ICC with a plan that can be achieved within the two-year deadline. A chief concern, naturally, regards the fate of any defendants during this time.[125] Though there is no good solution, it is worth pointing out that justice at the international level is slow: Thomas Lubanga from the Democratic Republic of Congo spent nearly three years in custody at the ICC before his trial began,[126] while fellow countrymen Germain Katanga and Mathieu Ngudjolo Chui were in pretrial detention for roughly two years each.[127] Moreover, all of these trials lasted over five years, during which time the defendants were in custody. Domestic justice is generally thought to be swifter than international justice,[128] and the idea is that the two-year period proposed here is designed to give the state an opportunity to make real improvements to its justice system without compromising the rights of the victims or defendants.

The process does not end once the proposal is submitted to and accepted by the Court; rather, the OTP should take on a supervisory role at this point, ensuring that the country is meeting its goals and making progress toward holding trials. The Rome Statute already contains language facilitating this function.[129] Article 18(5) permits the Prosecutor, having deferred investigation, to request periodic updates on a state's efforts to hold the perpetrators of war crimes, crimes against humanity, or genocide responsible domestically.[130] Moreover, article 18(3) allows the Prosecutor to review a decision to defer prosecution every six months "or at any time when there has been

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124. There may be an opportunity for corporations to fund projects, in addition to NGOs and other groups.

125. *See* Caroline Davidson, *May It Please the Crowd? The Role of Public Confidence, Public Order, and Public Opinion in Bail for International Criminal Defendants*, 43 COLUM. HUM. RTS. L. REV. 349 (2012).

126. Lubanga was arrested on March 17, 2006, and his trial began on January 26, 2009. He was found guilty by the Court on March 14, 2012. *Lubanga Case*, COALITION FOR INT'L CRIM. CT., http://www.iccnow.org/?mod=drctimelinelubanga.

127. Katanga was turned over to the ICC on October 17, 2007. Ngudjolo Chui arrived on February 7, 2008. Their joint case commenced on November 24, 2009, though it was later severed. Ngudjolo Chui was acquitted on December 18, 2012; Katanga was found guilty on March 7, 2014—nearly seven years after he was arrested. *See Katanga and Ngudjolo Chui Cases*, COALITION FOR INT'L CRIM. CT., http://www.iccnow.org/?mod=drctimelinekatanga.

128. *See supra* Part I.

129. *See* Rome Statute, *supra* note 2, art. 18(3), (5).

130. *Id.* art. 18(5) ("When the Prosecutor has deferred an investigation . . . , the Prosecutor may request that the State concerned periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions. States Parties shall respond to such requests without undue delay.").

a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation."[131] If the state is unable to reach its goals, the Prosecutor will have the option of reasserting jurisdiction; this possibility naturally increases the likelihood that the state will make judicial reform a priority within its larger agenda. Thus the statute itself anticipates regular contact between states and the OTP; applying this scheme to situations where an admissibility determination is delayed pending progress toward judicial capability is a logical use of existing tools.

This process whereby states submit proposals and the OTP retains oversight with regard to their progress can enable states to adjudicate cases of the perpetrators of heinous crimes at all levels. By having to create a detailed proposal and then meet the goals therein under the watchful eye of the Court, only states committed to local justice will undertake this task. The Rome Statute contains the tools necessary for this process to succeed, and where the Court oversees work between states, NGOs, and other organizations dedicated to the rule of law, the state's institutions will be strengthened and all those affected by the conflict will benefit from the state's increased stability.

CONCLUSION

The principle of complementarity, one of the foundational concepts of the Rome Statute that created the ICC, dictates that individuals whose actions bring them within the jurisdiction of the ICC are to be tried at the national level unless a state with jurisdiction is "unwilling or unable" to carry out genuine investigations and prosecutions.[132] The Court, then, is one of last resort, stepping in only when there is no other option, so as to prevent impunity from prevailing. The availability of a national jurisdiction in which to hold a trial hinges on this willingness or ability. Where there is willingness on the part of a state with jurisdiction but not the ability to mete out justice due to the effects of the conflict, it is in both the state's and the ICC's interests for the Court to grant the state a limited amount of time to shore up its judicial system in order to gain or regain the ability to hold trials. Encouraging states to hold their own trials builds national capacity, which can lead to greater national, regional, and, ultimately, international stability.[133]

Though complementarity contemplates that trials will occur at the national level whenever possible, it does not necessarily follow that national trials are always the best choice. There are benefits and drawbacks to trials at both levels, but because of the capacity building that occurs when trials are held locally, when possible the ICC should facilitate domestic prosecution. This approach to complementarity, in which the Court fosters national trials without active involvement, represents a feasible way for the ICC to interact in a positive manner with states and promote capacity growth. The Court should delay admissibility decisions based on inability in order to allow the state at issue time to gain the ability to prosecute the individuals who have been

131. *Id.* art. 18(3).
132. *See supra* Part III.
133. *See* Wilson, *supra* note 51.

indicted by the ICC. The capacity building that occurs during this process will have positive repercussions beyond the country's borders.

Of course, this policy of allowing states the opportunity to strengthen their judicial systems cannot exist without parameters. States wishing to use their own judiciaries to seek justice following atrocity must submit a detailed proposal to the ICC that includes a timeline with benchmarks setting out exactly how and when it intends to address the deficiencies in its justice system and how these reforms will be funded. Moreover, any such plan must be implemented within two years, lest a state use this process to thwart proceedings at the ICC. Finally, the Court may reinstate proceedings in the event that a state fails to meet its deadlines; this process is intended to allow states to benefit from the capacity building that will occur during judicial reform, but not when it results in an unjustified delay that affects both the defendants and the victims.