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# The Future of the International Criminal Court: Complimentarity as a Strength or a Weakness?

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# THE FUTURE OF THE INTERNATIONAL CRIMINAL COURT: COMPLEMENTARITY AS A STRENGTH OR A WEAKNESS?

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## INTRODUCTION

The "complementarity" principle that shapes the relationship of the International Criminal Court (ICC) with national jurisdictions is both criticized and applauded. The idea is that states have the primary responsibility to investigate and prosecute the crimes[1] in the Rome Statute,[2] with the ICC as a backup court.[3] The built-in deference, or complementarity, of the ICC to national prosecutions respects state sovereignty and places significant control within national jurisdictions. At the same time, the ICC's secondary role arguably weakens the Court's position as a means to achieve accountability for genocide, crimes against humanity, and war crimes.

This Essay examines the strengths and weaknesses of the complementarity principle. The Essay then considers reconceptualizing the "success" of the ICC from an expectation of adjudicating cases to an expectation of fostering national prosecutions. If the ICC's role is viewed through the lens of increasing the capacity of national jurisdictions to adjudicate international crimes, the measures of the ICC's success will move from its own prosecutions to efforts to educate, assist, and facilitate national prosecutions. The focus on assisting in the development of national capacity is sometimes called "positive complementarity."[4] This

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* Professor of Law and Co-Director, Global Center, University of the Pacific, McGeorge School of Law. I would like to thank Professor Leila Sadat and the Whitney R. Harris World Law Institute at Washington University School of Law for the opportunity to present the ideas in this Essay at a conference on "The International Criminal Court at Ten" on November 11-12, 2012. I would also like to thank Rebecca Tatum White and Andrew Ducart of Pacific McGeorge for their excellent research assistance. All opinions, and errors, are mine.

1. Throughout this Essay, the terms "international crimes," "ICC crimes," and "Rome Statute crimes" will be used interchangeably with the crimes of genocide, crimes against humanity, and war crimes that are in the Rome Statute.

2. The Rome Statute is the treaty that created the ICC.

3. *See* WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 50–53 (2010) (discussing development of complementarity concept); ROY S. LEE, INTRODUCTION, THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 27–28 (Roy S. Lee ed., 1999) (discussing the role of complementarity in the drafting of the Rome Statute).

4. Report of the Bureau on Stocktaking: Complementarity to the 8th Session of the Assembly of States Parties (ASP), Mar. 22–25, 2010, Doc. ICC-ASP/8/51, ¶ 16 (Mar. 18, 2010) [hereinafter Bureau

emphasis, in turn, should suggest a different strategy for the ICC in developing national capacities. Recommendations for how the ICC can increase its role in developing national capacities are proposed, including the establishment of an Institute or Center. While complementarity could prove to be either a strength or a weakness, the Essay concludes that, with a revised definition of success and a stronger focus on capacity building, complementarity likely will prove to be a strength of the ICC as an institution.

## I. COMPLEMENTARITY AND THE ROME STATUTE

The Preamble to the Rome Statute, the treaty through which the ICC was established,[5] expressly recognizes the importance of complementarity:

> the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions. . .[6]

The idea that the ICC will be secondary to prosecutions in national jurisdictions is strikingly different from the *ad hoc* international criminal tribunals created by the United Nations Security Council for adjudicating cases from the former Yugoslavia and Rwanda. Both the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are based on a principle of "primacy." Those tribunals can preempt a prosecution in a national jurisdiction if the tribunal decides to proceed.[7] The Special Court for Sierra Leone (SCSL), a tribunal established by agreement between the government of Sierra Leone and the United Nations, similarly operates under a primacy principle.[8] Part of the reasoning behind adopting a

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Report to ASP 8] ("[P]ositive complementarity refers to all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis."); ICC Prosecutorial Strategy 2009 2012, ¶¶ 16-17 (Feb. 1, 2010), *available at* http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf (defining "positive complementarity" as "a proactive policy of cooperation aimed at promoting national proceedings"); *see also* 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 n.4 (2008) (suggesting that "proactive" is a more accurate term than "positive" complementarity).

5. Rome Statute of the International Criminal Court pmbl, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter "Rome Statute"], *available at* http://icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Pages/rome%20statute.aspx.

6. *Id.*

7. ICTY Statute art. 9; ICTR Statute art. 8.

8. SCSL Statute art. 8.

complementarity approach with the ICC was to balance a concern for state sovereignty with the creation of an international authority by giving states the first option to prosecute cases.[9] The effect of complementarity should be to encourage national prosecutions for genocide, war crimes, and crimes against humanity.[10]

In addition to the general language in the Preamble, Article 17 of the Rome Statute in particular implements the principle of complementarity. Article 17 sets out the admissibility standards for cases before the Court. Cases are not admissible in the ICC if a state with jurisdiction (1) is investigating or prosecuting the case,[11] (2) has investigated and decided not to prosecute,[12] or (3) has already tried the individual for the conduct and the retrial would be barred under the *ne bis in idem* provisions of the statute.[13] A case is also inadmissible for a fourth reason if it is not of "sufficient gravity."[14] The first three reasons to reject admissibility of a case in the ICC directly reflect deference to national prosecutions. The only exception[15] occurs when a state with jurisdiction is "unwilling or

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9. *See* JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 95–97 (2008) [hereinafter KLEFFNER, COMPLEMENTARITY] (describing the importance of state sovereignty in the negotiations over the complementarity provisions); John T. Holmes, *The Principle of Complementarity*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 41, 74 (Roy S. Lee ed., 1999) (describing the importance of the complementarity structure to the balance with sovereignty and support for the treaty); Michael A. Newton, *The Complementarity Conundrum: Are we Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT'L L. 115, 120–23 (2010) (commenting on the relationship between the sovereignty of states and the role of complementarity in obtaining states' agreement to the ICC); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 415 (2000) (noting that the treaty would likely have been unacceptable to many states if the ICC had been given greater jurisdiction; also commenting on the negative effect of complementarity on cooperation with the Court).

10. *See* KLEFFNER, COMPLEMENTARITY, *supra* note 9, at 309–12 (describing the role of complementarity as a catalyst for states for states to improve their judicial systems and to adjudicate cases of international crimes); Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT'L L.J. 85, 126–27 (2012) (noting that states are more likely to ratify the Rome Treaty if they believe they can preempt the Court through national prosecutions and suggesting that a sentence-based approach to determining the willingness and ability of a state to handle a case would maximize state support for the ICC because the prosecutions could be for ordinary crimes with sentences comparable to ICC-imposed sentences); Newton, *supra* note 9, at 146–47 (commenting on the need for states to implement ICC crimes domestically in order to meet the requirement of state investigation and prosecution); Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUST. 86, 88–89 (2003) (discussing complementarity as an incentive for states to enact international crimes into domestic law).

11. Rome Statute, *supra* note 5, art. 17(1)(a).

12. *Id.* art. 17(1)(b).

13. *Id.* arts. 17(1)(c), 20.

14. *Id.* art. 17(1)(d).

15. Although the language of "unwilling or unable" is not in article 17 (c) on prior prosecution, article 20, which specifically addresses *ne bis in idem* also excepts situations in which a trial was for

unable genuinely to carry out the investigation or prosecution"[16] or "the decision [not to prosecute] resulted from the unwillingness or inability of the State genuinely to prosecute."[17] Unwillingness occurs when a state is shielding a person from criminal responsibility or is conducting proceedings "inconsistent with an intent to bring the person concerned to justice."[18] Inability arises when a national system is so impacted that it cannot proceed with obtaining evidence or trying the individual.[19]

It is clear from the Preamble and the purpose of Article 17 that national jurisdictions can preempt the ICC from going forward with a case by conducting a good faith investigation and a subsequent prosecution or decision not to prosecute on the national level. Complementarity is a powerful device for national jurisdictions to maintain control of criminal matters and to limit the reach of the ICC. The principle is also strong motivation for national jurisdictions to prosecute international crimes, which in turn is important to an overall goal of the ICC to end impunity for atrocities. Given the significant control by states, is complementarity a weakness or a strength of the ICC as an institution? The next part considers why complementarity might be a weakness and is followed by a part that considers why it might be a strength.

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the purpose of shielding the accused from criminal responsibility or was conducted in a way inconsistent with bringing the individual to justice.

16. Rome Statute, *supra* note 5, art. 17(1)(a).

17. *Id.* art. 17(1)(b).

18. *Id.* art. 17(2)(a)–(c). The provisions state:

> 2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
>
> (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
>
> (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
>
> (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

19. *Id.* art. 17(3). The provision states:

> 3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

## II. COMPLEMENTARITY AS A WEAKNESS

There are at least two primary concerns with complementarity. One is inherent in the structure of the ICC, and the other is in the implementation of the statutory mandate.

### *A. Inherent Problem*

An inherent problem exists because with complementarity the Court is secondary to national jurisdictions, and in that sense is weaker than other international criminal courts such as the ICTY and ICTR, which have primacy over national jurisdictions. One effect of this inherent weakness is that the Court wields less authority over the states; the states have the option of maintaining the upper hand vis à vis the Court. It is within the power of the states to go forward with investigations and prosecutions, preempting the Court. If the ICC's Prosecutor wants to advance a case, there may be legal hurdles in the way. This is already happening with admissibility challenges to the Court's jurisdiction by Kenya and Libya.[20] These specific challenges are discussed below as an implementation issue.

The inherent structure of the relationship of the Court and states may be a weakness for another reason. The effect of the secondary status of the ICC is that the Court will, and, in fact, *should* try fewer cases than the other international criminal courts. This is a success for the ICC if it means national jurisdictions are trying international crimes, but it is also qualitatively different from the ICTY and ICTR, which focus on both the number of cases tried as well as the fairness of the proceedings.[21] The ICC is not going to be comparable in numbers of cases and this could be viewed as a weakness. However, if we shift the conversation from "no cases" to affirmative efforts to build national capacity, then we could measure the ICC as an institution based not only on its adjudications, but also on its success with establishing national capacity. This redefinition to include capacity building as a measure of success would partially alleviate the inherent weakness of complementarity.

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20. *See infra* notes 23–28 and accompanying text.

21. *See, e.g.*, Judge Khalida Rachid Khan, President of the ICTR, Address to the United Nations Security Council (June 6, 2011), http://www.unictr.org/Portals/0/.ictr.un.org/tabid/155/Default.aspx?id=1211 (referring to the importance of fair trials in the ICTR); ICTY, About the ICTY, http://www.icty.org/sections/AbouttheICTY (last visited Dec. 18, 2012) (noting the number of cases and that the ICTY "regards its fairness and impartiality to be of paramount importance").

### *B. Implementation Problem*

In addition to an inherent issue, there is also an implementation concern that complementarity at least indirectly creates a tension between the Court and national jurisdictions. This occurs due to admissibility challenges and also to the perception that the ICC is focused on weaker nations.

In an admissibility challenge, a state will often be pitting itself against the Office of the Prosecutor (OTP) in raising the issue whether the ICC or the state should investigate or prosecute. Litigation always raises tensions, but that pressure is heightened when there is also a political dynamic involved. Although a party can bring admissibility challenges, Article 19(2)(b)–(c)[22] provides an avenue for a state to bring the challenge, which adds a political dimension.

To date, two states have challenged the admissibility of cases in the ICC.[23] Kenya challenged the prosecution of two cases, involving six high-level government officials and opposition. Pre-Trial Chamber II rejected Kenya's challenge[24] and the Appeals Chamber affirmed.[25] Legal

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22. Rome Statute, *supra* note 5, art. 19.

23. In a third case, the accused himself challenged admissibility. *See* Prosecutor v. Katanga & Ngudjolo, Case No. ICC-01/04-01/07, Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case (Sept. 25, 2009) (affirming the Trial Chamber in its decision against Katanga's admissibility challenge, having found a "clear and explicit expression of unwillingness of the DRC to prosecute this case.").

24. There are two cases involving Kenya. Both decisions are substantially the same. Prosecutor v. Muthuara et al., Case No. ICC-01/09-02/11, 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) (finding that, at the point where the matter is a "case," the state's focus must be on the "same person" as well as the "same conduct" to successfully mount an admissibility challenge; rejecting proffer of subsequent reports by Kenya to establish appropriate investigation because assessment must be at the time of the admissibility challenge); *see also* Prosecutor v. Ruto et al., 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).

25. Prosecutor v. Muthuara et al., Case No. ICC-01/09-02/11, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute' (Aug. 30, 2011) [hereinafter *Muthuara* Appeals Decision] (affirming test of "same person" and "substantially same conduct" and the Pre-Trial Chamber's holding that the case was admissible against Kenya's challenge; finding no abuse of discretion in rejecting Kenya's request for more time and to hold an oral hearing). The second Kenya case was resolved in the same manner. Prosecutor v. Ruto et al., Case No. ICC-01/09-01/11, Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled 'Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute' (Aug. 30, 2011). In both cases, Judge Ušacka dissented. Prosecutor v. Muthuara et al., Case No. ICC-01/09-02/11, Dissenting Opinion of Judge Anita Ušacka (Sept. 20, 2011); Prosecutor v. Ruto et al., Case No. ICC-01/09-01/11, Dissenting Opinion of Judge Anita Ušacka (Sept. 20, 2011) (emphasizing the importance of complementarity in the Rome Statute; finding

commentators are debating the merits of the analysis by the Court and whether this was a proper interpretation of the statute in light of the purpose of complementarity.[26] In the second case, Libya has challenged the admissibility of cases involving two members of Moammar Gaddafi's inner circle. Pre-Trial Chamber I rejected the admissibility challenge with regard to one accused, retaining the case in the ICC; the Chamber found the case inadmissible, however, with regard to the second accused, which leaves jurisdiction with Libya to try the case.[27] These issues, too, are much debated in commentary and in the press.[28]

In part because these are issues of first impression in interpreting the statute, they are creating much attention. Embedded in the focus on admissibility, however, is the question of who will prevail—the ICC or the state? This was never an issue with the ICTY or ICTR. There is the potential for the ICC to lose credibility if states believe that decisions against them on admissibility are incorrect. Nevertheless, admissibility challenges are regulated through the statutory scheme. Although this is one part of the tension, there is a principled legal process for resolving those issues. Although individual states may take issue with the Court's ruling in a specific case, once the legal analysis is more settled,[29] this should reduce the current weakness in this aspect of complementarity.

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that assessment of complementarity should be an ongoing process; finding that the Pre-Trial Chamber abused its discretion in failing to recognize the discretion in procedures that would have allowed for additional submissions and in overemphasizing expediency in the proceedings).

26. *See, e.g.*, Charles Chernor Jalloh, *International Decision: Situation in the Republic of Kenya: No. ICC-01/09-02/11-274 Judgment on Kenya's Appeal of Decision Denying Admissibility*, 106 AM. J. INT'L. L. 118, 122 25 (2012) (discussing the strict use and application of a "same person-substantially same conduct" test as potentially undermining national efforts to prosecute and suggesting that one alternative would have been to suspend or defer prosecution pending further action by Kenya).

27. Prosecutor v. Gaddafi & Al-Senussi, Case No. ICC-01/11-01/11, Decision on the admissibility of the case against Saif Al-Islam Gaddafi (May 31, 2013); Decision on the admissibility of the case against Abdullah Al-Senussi (Oct. 11, 2013).

28. Brendan Leanos, *Cooperative Justice: Understanding the Future of the International Criminal Court Through Its Involvement in Libya*, 80 FORDHAM L.R. 2267 (2012) (arguing that the ICC should cooperate with Libya to try Saif Al-Islam Gaddafi in Libya); Eric Leonard, *Testing the ICC: The Politics of Complementarity*, JURIST (June 1, 2012, 1:06 PM), http://jurist.org/hotline/2012/06/eric-leonard-libya-ICC.php (postulating that the real issue in the Libya admissibility challenge is whether Libya is able to hold a fair trial, but suggesting nonetheless that the trials should be held in Libya because "the court should always privilege the principle of complementarity").

29. While the Appeals Chamber affirmed the use of a "same person, same conduct" test for determining admissibility, that test is still new and is dependent upon the stage of the proceedings; in the Kenya cases, the Appeals Chamber noted that this standard is for "cases" that are past the investigation phase. *Muthuara* Appeals Decision, *supra* note 25, ¶¶ 34, 41. Given the novelty of assessing admissibility, it is likely that the Court will refine the interpretation of the standards.

More difficult to address than the legal issue of admissibility is a tension between the ICC and states that arises from the perception that the Court is focusing on weaker nations and, specifically, on African countries.[30] This tension is an indirect effect of complementarity, but it nevertheless poses a potential weakness stemming from the principle. The OTP and the Court undoubtedly make decisions that have no direct connection to whether a state is strong or weak, but the reality is that nations with highly developed legal systems are likely to investigate and prosecute on their own, exercising the complementarity provisions. We are not likely to see self-referrals from developed countries as has occurred with three African nations.[31] At this point in time, this tension and perception may be somewhat inevitable as an indirect result of complementarity, but should dissipate as national capacity to try international crimes becomes more widely spread throughout Africa and other parts of the world. Thus, complementarity is a potential weakness because, indirectly, it may lead to a perception of inequality before the ICC if national capacity remains weak. As discussed further below, this potential weakness could be decreased by greater emphasis on the ICC as a capacity-building institution and greater realization of national capacity.

## III. COMPLEMENTARITY AS A STRENGTH

There is tremendous potential for complementarity to be a strength of the ICC as an institution. First, it is worth noting that states give up less sovereignty with complementarity than they would in a system based on primacy of an international criminal court.[32] With more control left in the hands of states, there is likely to be greater support for the Court and states are likely to be more willing to be parties to the treaty.[33] Despite the recalcitrance of several major nations, such as the United States, Russia, China, and India, to become states parties, the impressive number of 122

30. Charles Chernor Jalloh, *Africa and the International Criminal Court: Collision Course or Cooperation?*, 34 N.C. CENT. L. REV. 203, 209–11 (2012) (noting the criticism and perception of the ICC as focusing on weaker nations and especially those from Africa, but contesting the accuracy of the sweeping statements); William A. Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 549 (2010) (raising the question of a political aspect to the decisions to prosecute); 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. 83–84 (2012) (noting the perception that the ICC is focusing only on Africa).

31. ICC, The Court Today, Doc. ICC-PIDS-TCT-01-018/12_Eng (Nov. 30, 2012) (Uganda, the Central African Republic, and the Democratic Republic of the Congo).

32. *See supra* note 9.

33. *See supra* note 10.

member states[34] is evidence of the acceptance and support for the Court. The greater the number of states parties, the more legitimacy the ICC will have, which, in turn, allows the Court to contribute more to accountability for international crimes globally.

Secondly, complementarity will prove to be a strength if it leads to increased national capacity to adjudicate international crimes. Because complementarity gives the first option to states to prosecute, states have a strong motivation to develop their national capacities to try war crimes, crimes against humanity, and genocide.[35] State capacity provides those states with the option to preempt the ICC from hearing a case.

Moreover, national capacity promotes accountability. Even without the complementarity regime, it is not possible to try all international crimes in an international court. An increase in the number of national prosecutions would include larger numbers of cases and also include lower level perpetrators, who are not prosecuted at the international level.[36] The ICTY, ICTR, SCSL, ECCC, and the ICC are purposely designed to try those who are the most responsible for serious crimes.[37] While the number of prosecutions in the ICTY (161 indictments) is impressive,[38] this is still

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34. ICC, *The States Parties to the Rome Statute*, http://icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Oct. 22, 2013).

35. For example, Uganda has passed laws incorporating the Rome Statute Crimes and created an International Crimes Division in their High Court. *See* Alhagi Marong, *Unlocking the Mysteriousness of complementarity: In Search of a Forum Conveniens for Trial of the Leaders of the Lord's Resistance Army*, 40 GA. J. INT'L & COMP. L. 67, 83 -84 (2011).

36. The importance of the role of states in prosecuting international crime is also recognized in the efforts to promulgate a treaty on crimes against humanity. *See* George H. Stanton, *Why the World Needs an International Convention on Crimes Against Humanity*, *in* FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 354, 356 57 (Leila Nadya Sadat ed., 2011) (describing the limitations of the ICC to prosecute international crimes and the need for domestic laws to effectively punish widespread crimes against humanity).

37. SCSL Statute art. 1 ("The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996 . . . ."); ECCC Statute art. 6 ("the scope of the prosecution is limited to senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979."); ICTR Statute art. 1 ("The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994 . . . ."); ICTY Statute art. 1 ("The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 . . . ."); Rome Statute, *supra* note 5, art. 1 ("jurisdiction over persons for the most serious crimes of international concern").

38. ICTY, *Key Figures of Cases*, http://www.icty.org/sid/24 (last visited Dec. 18, 2012).

only a portion of those who could be held responsible. Similarly, the historical antecedent of Nuremberg only focused on 24 major leaders in the Nazi regime.[39] This is not intended as a criticism of the international criminal tribunals; instead, it is meant to emphasize the importance of parallel national prosecutions. If the ICC's complementarity regime contributes to the development of national capacity to try genocide, war crimes, and crimes against humanity, it should be viewed as a strength of the system.

In fact, national prosecutions for war crimes, crimes against humanity, and genocide are occurring. It is not possible to determine to what extent the ICC has had an effect on the development of national capacity,[40] and the ICC is still at a young stage. However, it is informational to note that national jurisdictions are already engaged in prosecutions of international crimes. Although the number of cases may not seem extensive at this point in time, we can expect the numbers to rise as states parties enact national legislation on the crimes in the Rome Statute and develop their own expertise to try the cases. The Coalition for the International Criminal Court reports that 59 states parties presently have legislation implementing the crimes and 38 have legislation in the works.[41] As the number of states parties with domestic legislation increases due to implementing the Rome Statute crimes for complementarity purposes, the influence of the ICC will be more direct.

An exact figure for the number of prosecutions for genocide, war crimes, and crimes against humanity is elusive because up-to-date and

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39. *See* BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 30–31 (2d ed. 2010) (24 were indicted; 2 were not tried due to illness and suicide; 1 was tried in absentia; 21 tried at Nuremberg, with 18 convictions and 3 acquittals).

40. In some specific instances, it may be possible to document the impact of the ICC on furthering national prosecutions. *See, e.g.*, Burke-White, *supra* note 4, at 105–07 (noting that prosecutions in the DRC were in response to the OTP's announcement of investigating the situation in that country).

41. COALITION FOR THE INTERNATIONAL CRIMINAL COURT, CHART ON THE STATUS OF RATIFICATION AND IMPLEMENTATION OF THE ROME STATUTE AND THE AGREEMENT ON PRIVILEGES AND IMMUNITIES (APIC) 3–39 (2012), *available at* http://www.coalitionfortheicc.org/documents/Global Ratificationimplementation_chart May2012.pdf. These are the numbers on enacting the crimes into national legislation. The CICC also reports that 65 states have either the crimes or the cooperation provisions, or both enacted, and that 35 states have legislation on one or the other in the process of enactment. *Implementation of the Rome Statute*, COALITION FOR THE ICC, http://www.coalitionfortheicc.org/?mod=romeimplementation (last visited Feb. 16, 2013). Note, too, that states parties to the Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277, have an obligation to pass domestic legislation to punish genocide; as a result, many states have domestic legislation on the crime of genocide. *See* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 400–01, 435–43 (2d ed. 2009) (for a comprehensive discussion of the obligation and of domestic prosecutions for genocide).

comprehensive databases do not exist.[42] Our research so far has yielded the following data for prosecutions from 2002 to the present time:[43]

20 prosecutions for genocide

46 prosecutions for war crimes and

67 prosecutions for crimes against humanity

The distribution of the prosecutions around the world and the variety of conflicts from which they arise is also of interest.[44] Many of the national prosecutions relate to the former Yugoslavia and to Rwanda. However, others relate to Guatemala, Argentina, Iraq, and the Democratic Republic of the Congo.[45] Moreover, some prosecutions are occurring in the countries in which the crimes occurred while others are taking place through universal jurisdiction in countries without a direct connection to the crimes other than having the accused in custody. For example, prosecutions have occurred or are occurring in Canada, Norway, France, Germany, Spain, and Belgium for crimes that occurred during the Rwandan genocide.[46]

In addition to the numbers of prosecutions, the structures within national jurisdictions are becoming more sophisticated. For example,

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42. Moreover, there are prosecutions for murder, maltreatment of prisoners, and other crimes that could be labeled as crimes against humanity or war crimes that are not; instead they are prosecuted under a more ordinary crime label. Nevertheless, they do represent national efforts to prosecute atrocities. For example, although they probably could have been prosecuted for war crimes, the U.S. soldiers who abused Iraqi prisoners at Abu Ghraib were prosecuted for assault, maltreatment of prisoners, and dereliction of duty. *See, e.g.*, United States v. Graner, 69 M.J. 104, 105 (C.A.A.F. 2010) (convicted of convicted of maltreatment of persons subject to his orders, conspiracy, assault, indecent acts and dereliction of duty). One can criticize the prosecutions for the ordinary crimes as insufficient or as not going far enough up the ladder of officials, but at least this is a form of accountability.

43. Lists of sources and individual cases are on file with author and the *Washington University Global Studies Law Review* [hereinafter "List"].

44. These numbers include completed prosecutions, whether convictions, acquittals, or dismissals for other reasons, and pending prosecutions. List, *supra* note 43. There are additional cases that are referenced in other sources. *See, e.g.*, Burke-White, *supra* note 4, at 106 (referring to 48 prosecutions for crimes against humanity and 2 for war crimes in the DRC). If one also counts all convictions in the Rwandan Gacaca courts as genocide convictions, there would be almost 2 million more genocide cases. *See Gacaca Closes Shop*, NAT'L COMM'N FOR THE FIGHT AGAINST GENOCIDE (June 19, 2012), http://cnlg.gov.rw/news/12/06/19/gacaca-closes-shop. The Gacaca proceedings were not included in our calculations here because they are an alternative to a regular judicial proceeding; only cases that were before national courts were counted.

45. *See supra* note 43.

46. It is also worth noting that some of the national prosecutions are occurring due to referrals by international criminal courts. The ICTR has referred two to France and two to Rwanda; the ICTY has referred 6 cases to Bosnia and 2 to Croatia. *Transfer of Cases*, ICTY, http://www.icty.org/sections/TheCases/TransferofCases (last visited Dec. 18, 2012); *Status of Cases*, ICTR, http://www.unictr.org/Cases/tabid/204/Default.aspx (last visited Dec. 18, 2012).

Uganda has an International Crimes Division ("ICD") in their High Court[47] with three highly trained and qualified judges in place. The specialized division promotes significant national expertise.

Some of the motivation for these developments, such as the ICD in Uganda, can be attributed, at least in part, to the complementarity regime.[48] In general, the important point is that, given the large number of states parties to the Rome Treaty, complementarity is going to contribute to greater awareness and interest in prosecuting international crimes in the future. If the ICC's accomplishments are measured at least in part by the increase in national prosecutions due to the complementarity regime, complementarity could prove to be a great strength of the ICC.

## IV. MAXIMIZING COMPLEMENTARITY AS A STRENGTH FOR THE ICC

Two developments would advance complementarity as a strength of the Court. The first is to reconceptualize what is meant by "success" of the ICC, and the second is to implement an even greater leadership role for the ICC in positive complementarity efforts than is already occurring.

### *A. Reconceptualizing "Success"*

Generally, evaluation measures for a court will be in terms of the number and types of cases tried and the fairness of the proceedings.[49] This is true for national courts and international ones.[50] On the international

47. There is also greater flexibility in national jurisdictions -e.g., in Uganda, the International Crimes Division has jurisdiction over other transnational crimes -"genocide, crimes against humanity, war crimes, terrorism, human trafficking, piracy and any other international crime [as provided for in other statutes]." *See International Crimes Div.*, REP. OF UGANDA: THE JUDICIARY, http://www.judicature.go.ug/data/smenu/18/International_Crimes_Division.html (last visited Oct. 20, 2013). This, too, is an important aspect of national capacity building. There is more flexibility in national jurisdictions than in international tribunals to expand the types of crimes over which they exercise authority.

48. *See* Marong, *supra* note 35, at 73–74, 78–87 (describing Uganda's adoption of an International Crimes Act with the goal of trying serious international crimes domestically).

49. *See* James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L.J. 616, 621-24 (2004) (positing several measures of success for international tribunals including expeditiousness of proceedings, fairness, transparency, historical documentation, inclusion of victims, reconciliation, increasing respect for the rule of law, and strengthening the judicial system); *see also* the discussion of requirement of fair standards in the context of transfers to Rwanda from the ICTR. Marong, *supra* note 35, at 95–96.

50. For example, other international criminal courts have been criticized for either a lack of impartiality/victor's justice or the small number of cases. *See, e.g.*, regarding the Extraordinary Chambers in the Courts of Cambodia (ECCC): Seeta Seully, *Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia*, 13 ASIAN-PAC. L. & POL'Y J. 300, 325–34 (2011) (lack of impartiality); Padraic J. Glaspy, *Justice Delayed? Recent Developments at the*

level, for instance, the ICTY takes pride in the number of cases tried and the significance of the accused that have been brought to justice. Reports to the United Nations[51] and information on the ICTY's website[52] emphasize the numbers and the high-level accused as evidence of the accomplishments of the tribunal. The ICTY also prides itself on conducting proceedings in accord with international due process principles.[53]

As a court, the ICC must have credibility, legitimacy, and impartiality in its judicial operations in order to be a "success." Its role as a court is important in how it tries cases and in ensuring accountability for serious international crimes. It is certainly valid to evaluate the Court on this basis. The nature of the proceedings, and even the number of cases, is highly visible, publicized, and analyzed. The website is devoted to the investigations and cases and well documented.[54] Thus, the objective of demonstrating fair and impartial proceedings is well documented.

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*Extraordinary Chambers in the Courts of Cambodia*, 21 HARV. HUM. RTS. J. 143, 153–54 (2008) (lack of impartiality); Leah Chavla, *Southeast Asia and Oceana: Cambodia's Human Rights Progress and National Reconciliatory Efforts in Jeopardy*, 18.2 HUM. RTS. BRIEF 30, 40 (Winter 2011) (small number of individuals on trial). Regarding the International Criminal Tribunal for Rwanda (ICTR), *see* Lars Waldorf, *"A Mere Pretense of Justice": Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal*, 33 FORDHAM INT'L L.J. 1221, 1271 -76 (2010) (criticizing the prosecution of only one side of the conflict); Leslie Haskell & Lars Waldorf, *The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences*, 34 HASTINGS INT'L & COMP. L. REV. 49, 70 78 (2011) (contrasting the ICTY and SCSL which prosecuted all sides of the conflict with the ICTR prosecuting only one side). Regarding the Special Court for Sierra Leone (SCSL): Charles Chernor Jalloh, *Special Court for Sierra Leone: Achieving Justice?*, 32 MICH. J. INT'L L. 395, 418 22 (2011) (describing criticisms of the small number of prosecutions); Donna E. Arzt, *Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 226, 233 (2006) (commenting on mixed views in Sierra Leone about the small number of prosecutions).

51. Report of the International Tribunal for the Former Yugoslavia, Doc. A/67/214–S/2012/592, ¶¶ 2, 67 68 (Aug. 1, 2012), *available at* http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2012 en.pdf; Report of the International Tribunal for the Former Yugoslavia, Doc. A/66/210–S/2011/473, ¶¶ 54–57 (July 31, 2011), *available at* http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual report_2011 en.pdf.

52. ICTY, *Key Figures*, http://www.icty.org/sections/TheCases/KeyFigures (last visited Dec. 12, 2012); ICTY, *Timeline*, http://www.icty.org/action/timeline/254 (last visited Dec. 20, 2012); ICTY, *About the ICTY*, http://www.icty.org/sections/AbouttheICTY (last visited Dec. 18, 2012) (noting the numbers indicated and that the accused have been "heads of state, prime ministers, army chiefs-of-staff, interior ministers and many other high- and mid-level political, military and police leaders").

53. ICTY, *About the ICTY*, *supra* note 52.

54. *News and Highlights*, ICC, http://icc-cpi.int/EN Menus/icc/Pages/default.aspx (last visited Feb. 16, 2013). The website links to updates on the situations currently under investigation at the Court, as well as all the documents relevant to each prosecution, categorized by which organ of the Court produced each. The website also provides extensive information regarding the Court's activities, including briefings from the OTP, public statements from various organs, press releases, and documentation such as policy papers and findings of various working groups. Additionally, the

Although the value and importance of the judicial proceedings should not be understated, it is also important in the case of the ICC to develop a measure for its role in complementarity. One often hears that the ICC would be a success if it had no cases at all.[55] This might be true for any court, but it is especially true for the ICC because of the principle of complementarity. No cases in the ICC should mean that national jurisdictions are trying cases of genocide, war crimes, and crimes against humanity. The problem with defining success in terms of no cases is that it is difficult for people to credit a negative or a void, even if theoretically one accepts the idea.

If we accept that the success of the ICC is dependent upon the two major prongs of (1) fair and impartial operation of judicial proceedings when they are needed, and (2) the increasing ability of national jurisdictions to prosecute international crimes, then we should look at tangible measures of both prongs. Additionally, the ICC and the international community need to build the paradigm of "success" as comprising both prongs. As mentioned above, the judicial proceedings are well documented, and it is clear that they are a major focus of how the ICC is viewing its accomplishments. It will also be important for the ICC to have substantive content and visibility in its efforts to build national capacity so that this, too, is viewed as a major accomplishment of the Court. The resolutions of the Assembly of States Parties ("ASP")[56] and the reports to the ASP from the Bureau of the Assembly (an executive committee of the ASP)[57] and the Court[58] emphasize the importance of national capacity building and those documents describe various activities by the Court to foster these efforts. However, the various efforts by the Court to assist national jurisdictions do not get equal time on the website or in the literature on the accomplishments of the Court. In part, this is due

website provides information about the history and structure of the Court as well as legal texts and legal tools. Finally, the website contains the activities and documentation of the ASP.

55. *See* Burke-White, *supra* note 4, at 54 (stating that Court could be viewed as a failure because of false expectations regarding the number of cases); Jalloh, *supra* note 30, at 218 n.60 (citing to statement by Prosecutor Luis Moreno-O'Campo that a high number of cases in the ICC would not measure Court's efficiency).

56. Resolutions and Declarations Adopted by the Review Conference, Res. RC/Res.1 (June 8, 2010); Resolutions Adopted by the ASP, Res. ICC-ASP/10/Res.5, ¶¶ 58-63 (Dec. 21, 2011); Resolutions and Recommendations Adopted by the ASP, Res. ICC-ASP/11/Res.6 (Nov. 21, 2012).

57. Report of the Bureau on Complementarity to the 11th Session of the ASP, Nov. 14–22, 2012, Doc. ICC-ASP/11/24 (Nov. 7, 2012) [hereinafter Bureau Report to ASP 11], *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-24-ENG.pdf.

58. Report on the Activities of the Court to the 11th Session of the ASP, Nov. 14–22, 2012, Doc. ICC-ASP/11/21 (Oct. 9, 2012), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-21-ENG.pdf.

to the recency of the efforts and, in part, this is due to the lesser role that the positive complementary efforts play. To give full effect to the complementarity role, it is imperative that the efforts on national capacity building be recognized and developed further so that they do have an equal role. A number of prominent non-governmental organizations have similarly called for extensive work on national capacity building.[59] The next part develops ideas on how the ICC as an institution might accentuate its positive complementary work. An increased focus on "success" as measured by assistance in national capacity building would partially diminish the first potential weakness from complementarity. In other words, the inherent secondary status of the Court would be redefined as a strength from the correlative increase in national prosecutions of international crimes.

### *B. Increased Leadership Role in Building National Capacity*

If the ICC as an institution is measured not only by the cases it tries, but also by its efforts in national capacity building, then it is worthwhile to examine what the ICC is doing now and to explore what actions the institution might consider to increase its efforts. The ASP, the OTP, and the Court itself are all fostering positive complementarity through various efforts. In this part, it is suggested that the ICC could expand these efforts and gain greater recognition for them through creation of an Institute or Center within the institutional structure or in collaboration with an outside organization.

Without question, there is an increased emphasis on what the Court can do to assist efforts to build national capacity to investigate and prosecute cases. Resolutions from the Kampala Review Conference, subsequent reports by the Secretariat and the Court, and a resolution from the most recent ASP meeting, the 11th Session in November 2012, indicate the importance of positive complementarity.

The significance given to building national capacity at the Kampala Review Conference in 2010 is especially evident because there were so

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59. Open Soc'y Justice Initiative, Building on the Complementarity Consensus: Background for the ICC Assembly of States Parties, at 4 (Briefing Paper Oct. 2012), http://www.opensociety foundations.org/sites/default/files/complementarity-asp-10152012.pdf [hereinafter OSJI Background Paper]; International Center for Transitional Justice, Stocktaking: Complementarity, Report to the Rome Statute Review Conference, June 2010 (May 2010), http://ictj.org/sites/default/files/ICTJ-RSRC-Global-Complementarity-Briefing-2010-English.pdf [hereinafter ICTJ Stocktaking]; *see also* Burke-White, *supra* note 4, at 68 (suggesting a need for a formal policy of proactive complementarity in the Office of the Prosecutor).

many major issues that were on the table to be discussed.[60] The fact that domestic competence to try international crimes was the subject of discussion indicates its importance to the ASP. For example, the Report of the Bureau on Stocktaking stated that complementarity referred to the need to focus on complementarity "as it is imperative to further the fight against impunity both at the international and at the national level . . . ."[61] A resolution emerging from the Review Conference recognized the necessity of national capability and specified some actions that should be taken. The resolution "[e]ncourages the Court [and others] to explore ways in which to enhance the capacity of national jurisdiction . . ."[62] and "[r]equests the Secretariat . . . to facilitate the exchange of information between the Court, States Parties and other stakeholders . . . aimed at strengthening domestic jurisdictions . . . ."[63]

The most recent statement by the 11th session of the ASP in November 2012 echoes the commitment to national capacity building. The ASP resolved "[t]o enhance the capacity of national jurisdictions to prosecute the perpetrators of the most serious crimes of international concern in accordance with internationally recognized fair trial standards, pursuant to the principle of complementarity."[64]

In preparation for the 11th session of the ASP, the Bureau, the Secretariat, and the Court prepared reports on their activities. Among its activities, the Secretariat noted that it has connected various actors, who can assist with knowledge and skills, with interested States[65] consulted with organs of the Court how they might exchange information, such as for a judicial training project,[66] and created the Complementarity Extranet, which is designed to bring together those with expertise with States that need assistance.[67] The Bureau's report summarized the work of the

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60. The issues raised at the Kampala Review Conference included defining the crime of aggression, expanding the definition of war crimes, strengthening the enforcement of sentences, and working toward greater justice for victims of international crimes. Resolutions and Declarations Adopted by the Review Conference, Doc. RC/11 (June 8–11, 2010).

61. Bureau Report to ASP 8, *supra* note 4, ¶ 3.

62. Resolutions and Declarations Adopted by the Review Conference, Res. RC/Res.1, ¶ 8 (June 8, 2010).

63. *Id.* ¶ 9.

64. Resolutions and Recommendations Adopted by the ASP, Res. ICC-ASP/11/Res.6, ¶ 1 (Nov. 21, 2012).

65. Report of the Secretariat on Complementarity to the 11th Session of the ASP, Nov. 14–22, 2012, Doc. ICC-ASP/11/25, ¶ 3 (Oct. 16, 2012) [hereinafter Secretariat Report to ASP 11].

66. *Id.* ¶ 5.

67. *Id.* ¶¶ 6–8. In particular with regard to the Extranet, the ICC website has forms that can be utilized by either organizations with expertise or States that need assistance. According to the Report, the "Extranet is intended to provide an information base on events relating to complementarity,

Secretariat, the Court, and the international community.[68] The report noted the Secretariat's work in building the Extranet and facilitating connections between those involved in complementarity efforts.[69] The report further commented on the Court's Legal Tools Project, which contains international and national legal documents, cases, and other resources for managing cases of international crimes.[70] The exit strategies of the Court from situations in which it has been engaged were noted as a way in which to include some type of complementarity activity.[71] The Bureau report also described the extensive efforts of the United Nations through various entities, such as the Office of the High Commissioner for Human Rights and the U.N. Development Programme ("UNDP"), on rule of law projects that build national capacity.[72] The report further noted the work of the UNDP, the International Center for Transitional Justice, and the focal point countries of Denmark and South Africa in integrating complementarity work into rule of law efforts.[73] The Report of the Court on Complementarity for the ASP meeting was similarly descriptive and detailed both actions by the Court to assist states and a highly useful list of thematic areas that states need to address to build capacity.[74] The report noted advice, exchange of information, and the Legal Tools Project that the Court has engaged in to assist States.[75] The thematic areas are a blueprint for developing national capacity to handle international crimes. The areas include legislation on the substantive law and procedure, witness and victim protection and support, adequate legal representation, outreach, victim participation and reparations, court management, training and advice, supplies and resources, security, forensic expertise, centralization of judicial information, and mutual judicial assistance.[76]

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identify the main actors and their activities, and facilitate contacts between donor States, international and regional organizations, civil society and recipients . . . ."

68. Report of the Bureau on Complementarity to the 11th Session of the ASP, Nov. 14–22, 2012, Doc. ICC-ASP/11/24 (Nov. 7, 2012) [hereinafter Bureau Report to ASP 11].

69. *Id.* ¶ 14.

70. *Id.* ¶ 18; *see also* ICC, *What Are the ICC Legal Tools?*, http://www.legal-tools.org/en/what-are-the-icc-legal-tools/ (last visited Oct. 20, 2013) (The Legal Tools "equip users with legal information, digests and an application to work more effectively with core international crimes cases").

71. Bureau Report to ASP 11, *supra* note 68, ¶ 20.

72. *Id.* ¶ 25. Other U.N. agencies mentioned include the Department of Peacekeeping Operations, the U.N. Office on Drugs and Crime, U.N. Women, the U.N. Children's Fund, and the U.N. High Commission for Refugees.

73. *Id.* ¶ 26.

74. Report of the Court on Complementarity to the 11th Session of the ASP, Oct. 16, 2012, Doc. ICC-ASP/11/39 [hereinafter Court Report to ASP 11].

75. *Id.* ¶¶ 9–10.

76. *Id.* ¶¶ 13–57.

Within each category, there is more detailed information about what is required to build a strong system. In other reports, efforts by the OTP to assist national prosecutions were also described.[77]

Despite the plethora of activities and the strong statements encouraging national capacity building, the ASP and the Court have also made it clear that the ICC is not the primary actor in leading positive complementarity efforts. For example, the Bureau's report on complementarity for the 2010 Review Conference indicated that the Court should not "become a development organization or an implementing agency."[78] Instead, they suggested that the Court should be a "catalyst of direct State-to-State assistance and indirect assistance through relevant international and regional organizations and civil society. . . ."[79] Similarly, in the Bureau's 2012 report on complementarity to the ASP, the Bureau commented:

> States Parties and the Court have expressed the view that the role of the Court itself is limited in actual capacity-building for the investigation and prosecution of Rome Statute crimes 'in the field'. Rather this is a matter for States, the United Nations and relevant specialized agencies, other international and regional organizations and civil society. The Court can in the course of implementing its core mandate in some ways assist national jurisdictions thereby contributing to the functioning of the Rome Statute System. The Assembly of States Parties has an important role to play in sustaining and furthering the efforts of the international community in strengthening national jurisdictions through complementarity activities, thereby enhancing the fight against impunity.[80]

Thus, the current position is that the ASP and the Court have a strong interest and stake in developing national capacity, but they should be considered facilitators or assistants rather than the primary actors for promoting such developments.[81]

There are reasons for assuming a secondary role. One is a concern with compromising the impartiality of the judicial mandate of the court,[82] and a

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77. For example, in the Report on the Activities of the Court to the 11th Session of the ASP, Nov. 14 22, 2012, Doc. ICC-ASP/11/21 (Oct. 9, 2012), there is mention of OTP interaction with Colombian and Guinean authorities on national prosecutions.

78. Bureau Report to ASP 8, *supra* note 4.

79. *Id.* ¶ 42.

80. Bureau Report to ASP 11, *supra* note 68, ¶ 9.

81. *See* Heller, *supra* note 10, at 106 (commenting that "the ICC has essentially outsourced responsibility for upgrading national legal systems to states and NGOs").

82. *See also* Burke-White, *supra* note 4, at 98-99 (referring to possible conflict of interest for OTP if a state that OTP has assisted subsequently challenges admissibility and argues that it is

second reason is the cost of undertaking more involved efforts.[83] Despite these concerns, the ICC would position itself better as a successful force in international criminal justice if the institution took on a leadership role in this area and engaged in even more systematic and institutionalized efforts. While NGOs and governmental organizations,[84] such as the European Union, play a very significant role, the Court as an institution should be at the center of these efforts. If part of the measure of the success of the ICC is in not having cases, but in fostering prosecutions in national jurisdictions, then it would benefit both the image of the ICC and accountability in general if the ICC becomes the leading entity in promoting national capacity.[85] The Court should also get recognition and respect for these efforts.

One way in which the ICC as an institution could assume a leadership role would be to create an Institute or Center that would be separate from the Court. Such an Institute could either be a new entity created by the ASP or could be an independent entity developed in collaboration between the ASP and another organization. The Institute could organize and lead

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satisfactorily moving forward because of OTP's assistance).

83. *See* ICTJ Stocktaking, *supra* note 59, at 2 (mentioning the concern of states parties regarding cost).

84. *See, e.g.*, Eur. External Action Serv., Reply of the European Union in response to the request for information in paragraph 6, sub-paragraph (h) of the Plan of Action for achieving universality and full implementation of the Rome Statute, ¶ 2.8 (Oct. 6, 2011), *available at* http://www.icc-cpi.int/NR/rdonlyres/9A7562A4-9BB5-4ACA-92F2-FEB7BFE7FE3B/284038/ICCASP10POA2011EUENG.pdf (explaining that the EU is taking the lead on developing a "complementarity toolkit" as a guidebook for future efforts toward capacity-building); OPEN SOC'Y FOUND., HANDBOOK FOR RULE-OF-LAW POLICYMAKERS, DONORS, AND IMPLEMENTERS (Nov. 2011), *available at* http://www.opensocietyfoundations.org/reports/international-crimes-local-justice ("The handbook takes a step-by-step approach to the elements required to ensure that a trial meets international fair trial standards, while engaging the local affected communities in the process of justice, steps ranging from the provision of witness protection capacity, to efforts to educate local journalists and community leaders."); Implementation of the Rome Statute, COAL. FOR THE ICC (last visited Oct. 20, 2013), http://www.iccnow.org/?mod=romeimplementation (describing the Coalition's efforts toward capacity-building in implementation of the Rome Statute by sharing documents, legal advice, and prior experiences with the process); *see also* Review Conference of the Rome Statute, May 31-June 11, 2010, *Focal Points' Compilation of Examples of Projects Aimed at Strengthening Domestic Jurisdictions to Deal with Rome Statute Crimes for the Review Conference of the Rome Statute* (May 30, 2010), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/RC-ST-CM-INF.2-ENG.pdf (describing efforts by multiple entities, including the ICC itself, ICTY, UN agencies, NGOs, and governmental organizations).

85. *See* Burke-White, *supra* note 4, at 73–76 (discussing proactive complementarity as a way in which OTP can better meet the high expectations for the ICC and better achieve accountability for international crimes); *see also* ICTJ Stocktaking, *supra* note 59, at 3 (suggesting that coordination is needed by the ICC to avoid piecemeal approaches to complementarity); Katharine A. Marshall, *Prevention and Complementarity in the International Criminal Court: A Positive Approach*, 17 NO. 2 HUM. RTS. BRIEF 21, 24 (2010) (suggesting that the ICC could be a facilitator for outside organizations).

the various efforts in national capacity building. The impartiality issue for the judges and other Court personnel could be addressed by making the Institute separate from the operations of the ICC as a court. Additionally, the cost could be kept at a modest level if the ASP relied on NGOs, academies, and others to implement the training or other programs.

The Open Society Justice Initiative ("OSJI"), in its October 2012 background paper for the November ASP meeting, called for greater ASP activity in increasing political will, education about the Court, information exchange, and sustaining and assessing state engagement.[86] Similar to those suggestions, I would suggest that the Institute include at least (1) facilitation of training programs; (2) coordination of international participation or advice in national prosecutions; and (3) publications.

Training programs for judges, prosecutors, investigators, defense counsel, victims' counsel, interpreters, and victim and witness protection personnel could be modeled on something like the judicial college[87] in the United States or judicial training institutes in other parts of the world.[88] The cost can be minimized by using speakers from NGOs, academia, and, as appropriate, from the Court personnel. Other parts of the training programs could include sessions on legislation to implement the Rome Statute and infrastructure advice.

A second activity, coordinating assistance or participation of international lawyers and judges in national prosecutions, could be one of the most innovative areas. For instance, the Institute could coordinate providing an international judge to sit on a mixed court in a national jurisdiction or to be an advisor for a national court. These would not be the same judges as are appointed to the permanent Court, so a concern with maintaining impartiality and availability would be avoided. Instead, the Institute could maintain a list of individuals available to serve as judges or attorneys, much as we have in an arbitration system on domestic and international levels.[89] The expense would be contained because the State

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86. OSJI Background Paper, *supra* note 59, at 2–3.

87. *See A Legacy of Learning*, THE NAT'L JUDICIAL COLL., http://www.judges.org/about/history.html (last visited Oct. 20, 2013) ("By offering an average of 95 courses/programs annually with more than 3,000 judges attending from all 50 states, U.S. territories and more than 150 countries, the NJC seeks to further its mission of advancing justice through judicial education.").

88. *See, e.g.*, *Judicial Education--Other Countries*, FED. JUDICIAL CTR., http://www.fjc.gov/ijr/jud_education_other.html (last visited Oct. 20, 2013) (describing a list of judicial training programs in countries other than the U.S.); *see also* ERSUMA (Benin), *available at* http://www.ohada.org/ersuma.html (referring to the École Régionale Supérieure de la Magistrature, the judicial training arm of OHADA, the Organisation pour l'Harmonisation en Afrique du Droit des Affaires).

89. *See, e.g.*, *About Us*, PERMANENT CT. OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1027 (last visited Oct. 20, 2013) (describing the activities of the court, including

involved would fund the cost of having an international judge or lawyer in its national process.

The third prong suggested is publications. The purpose is twofold. First, the Institute would be a valuable resource if it consolidated all of the materials that are presently being generated by NGOs, governmental organizations, and academic institutions. Second, it would benefit the ICC as an institution to have something tangible to document what the Court is doing to build national capacity. Just as extensive information about situations and cases are available on the website, there could also be expanded categories dedicated to capacity-building activities. There are already beginning steps in the Complementarity forms and the Legal Tools Project on the website.[90] This recommendation is to heighten the visibility of those steps, along with other efforts.

A feasibility and cost study would be needed, but involvement in an Institute might also be considered "cost necessary." If an objective, as already identified by the ASP, is to help build national capacity, and this may at some point in the future be a primary objective if there are few cases before the Court, then it would be far better to put it in place now.

Another issue to study is whether amendments would have to be made to the Rome Statute to create a second entity, an Institute. Certainly, the current positive complementarity activities are occurring under the present statute. This even includes some of the activities of the Secretariat of the ASP.[91] The objective of assisting with national capacity building is found within the concept of complementarity embedded in the statute.[92]

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assistance in the selection of arbitrators and ability to function as appointing authority as needed in the resolution of international disputes); ICC International Court of Arbitration, INT'L CHAMBER OF COMMERCE, http://www.iccwbo.org/about-icc/organization/dispute-resolution-services/icc-international-court-of-arbitration/ (last visited Feb. 16, 2013) (explaining that, due to its global network, the court can appoint an arbitrator with the necessary expertise for any type of business dispute); *Arbitrators and Mediators*, AM. ARBITRATION ASS'N, http://www.adr.org (last visited Oct. 20, 2013) (follow "Arbitrators and Mediators" hyperlink) (noting that the organization maintains a roster of arbitrators with various qualifications and areas of expertise); *see also* Burke-White, *supra* note 4, at 96 (suggesting a similar idea for OTP that they should keep a list of experts).

90. *Complementarity*, ICC, http://icc-cpi.int/en_menus/asp/complementarity/Pages/default.aspx (last visited Feb. 23, 2013); *What are the ICC Legal Tools?*, LEGAL-TOOLS.ORG, http://www.legal-tools.org/en/what-are-the-icc-legal-tools/ (last visited Feb. 23, 2103) (Legal Tools project).

91. The Secretariat reports to the ASP and is administratively located within the Registry. *See* Establishment of the Permanent Secretariat of the Assembly of States Parties to the International Criminal Court, Doc. ICC-ASP/2/Res.3 (Sept. 12, 2003), *available at* http://icc-cpi.int/iccdocs/asp_docs/Publications/Compendium/Compendium.3rd.21.ENG.pdf

92. Rome Statute, *supra* note 5, at 3, 12; *see also* Burke-White, *supra* note 4, at 76-82 (discussing the provisions of the Rome Statute that govern the interaction between OTP and states, and commenting on the purpose and consistency of those provisions with proactive complementarity).

Moreover, the idea of assistance to States, such as in Article 93 (10),[93] also conveys an underlying intent to work with national jurisdictions. Nevertheless, more specific provisions might be needed unless the Institute was considered part of one of the present organs of the Court or was established by the ASP in collaboration with an outside organization.

## CONCLUSION

The Assembly of States Parties of the ICC has identified and emphasized an objective of positive complementarity, or building national capacity to adjudicate the Rome Statute crimes. There is tremendous opportunity for positive complementarity to become one of the most important achievements of the ICC as an institution. With complementarity as an underlying principle of the Court, a measure of the success of the ICC will be in the development of national capacity to prosecute serious international crimes. It is often stated that the ICC would be a success if it had no cases to try because national jurisdictions were assuming the responsibility to prosecute.[94] This type of success, however, is dependent upon building national capacity and in redefining the purpose of the ICC as an institution.

Complementarity is likely to prove to be a strength of the ICC. Despite potential weaknesses in positioning the ICC as secondary to national prosecutions, the ICC could make positive complementarity its flagship in the future. This would adjust the emphasis on the judicial function and the number of cases tried to include building national capacity as an equal partner in defining the success or achievements of the Court. In order to make this adjustment, both the ICC as an institution and the international community need to focus on this reconfiguration.

The reconfiguration of the ICC to encompass a focus on positive complementarity is already ongoing, but it is not receiving sufficient recognition. The ASP through the Secretariat and the organs of the Court are assisting national capacity building through information sharing, training, and coordination with outside organizations. The ICC, however, is deliberately not taking on a leadership role in these activities. Although there are understandable concerns of maintaining impartiality of the

93. *See, e.g.*, Johan D. van der Vyver, *Time is of the Essence: The In-Depth Analysis Chart in Proceedings Before the International Criminal Court*, 48 NO. 4 CRIM. L. BULL. ART. 1, 11 (2012) (suggesting that art. 93(10) is the authority for positive complementarity as it provides that the ICC may cooperate and assist states with investigations and trials).

94. *See, e.g.*, *supra* note 55.

judicial function and the cost of more activities, the ICC as an institution could greatly benefit from increasing its visibility in the area of national capacity building. Especially if a measure of the importance of the Court is in its assistance in increasing national ability to prosecute international crimes, it would be to the ICC's advantage to take a leading role and to emphasize its activities on its website and other publications.

One way in which the ICC could establish a greater role in positive complementarity is through the creation of an Institute or Center dedicated to its work on national capacity building. The Institute should be independent of the judicial function to avoid any conflict of interest or impingement on the impartiality of the Court. The cost of such an Institute could be contained by utilizing the vast array of outside organizations that are already engaged in capacity building work. The Institute would be valuable in coordinating the efforts, disseminating information, and providing leadership.

Complementarity presently is both an advantage and a challenge for the ICC. A consequence of complementarity is that, now and in the future, the ICC will be significant both for the trials it conducts and for its impact on national capacity to try international crimes. Increasing the emphasis on building national capacity as an objective and achievement of the ICC as an institution is likely to help ensure that complementarity is a strength in the future.