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

Linda Carter

Pacific McGeorge School of Law, lcarter@pacific.edu

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

LINDA E. CARTER*

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 in the Rome Statute, with the ICC as a backup court. 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." This

* 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.


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.

1. COMPLEMENTARITY AND THE ROME STATUTE

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

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

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. 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. Part of the reasoning behind adopting a...
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. The effect of complementarity should be to encourage national prosecutions for genocide, war crimes, and crimes against humanity.

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, (2) has investigated and decided not to prosecute, 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. A case is also inadmissible for a fourth reason if it is not of "sufficient gravity." The first three reasons to reject admissibility of a case in the ICC directly reflect deference to national prosecutions. The only exception occurs when a state with jurisdiction is "unwilling or unable" to investigate or prosecute the case.

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10. See KLEFFNER, COMPLEMENTARITY, supra note 9, at 309-12 (describing the role of complementarity as a catalyst 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(e) 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\textsuperscript{16} or "the decision [not to prosecute] resulted from the unwillingness or inability of the State genuinely to prosecute."\textsuperscript{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."\textsuperscript{18} Inability arises when a national system is so impacted that it cannot proceed with obtaining evidence or trying the individual.\textsuperscript{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.

\textsuperscript{16} Rome Statute, supra note 5, art. 17(1)(a).
\textsuperscript{17} Id. art. 17(1)(b).
\textsuperscript{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.
\textsuperscript{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.

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) 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. Kenya challenged the prosecution of two cases, involving six high-level government officials and opposition. Pre-Trial Chamber II rejected Kenya's challenge and the Appeals Chamber affirmed. Legal

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).

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. 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. These issues, too, are much debated in commentary and in the press.

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, this should reduce the current weakness in this aspect of complementarity.

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).


28. Brendan Leano, 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. Mathuara 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. 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. 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. 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. 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


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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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 31 December 1996."); 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").

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. 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, 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. 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

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).

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

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. 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. 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.

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

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://cng.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/The Cases/TransferOfCases (last visited Dec. 18, 2012); Status of Cases, ICTR, http://www.unfictr.org/Cases/tabid/204/Default.aspx (last visited Dec. 18, 2012).
Uganda has an International Crimes Division ("ICD") in their High Court 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. 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. This is true for national courts and international ones. On the international
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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\(^{52}\) 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. 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”) and the reports to the ASP from the Bureau of the Assembly (an executive committee of the ASP) and the Court 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

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).


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. 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

many major issues that were on the table to be discussed. 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 . . . .” A
resolution emerging from the Review Conference recognized the necessity
of national capability and specified some actions that should be taken. The
resolution “[c]ourges the Court [and others] to explore ways in which
to enhance the capacity of national jurisdiction . . . .” and “[r]equests the
Secretariat . . . to facilitate the exchange of information between the Court,
States Parties and other stakeholders . . . aimed at strengthening domestic
jurisdictions . . . .”

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.”

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 consulted
with organs of the Court how they might exchange information, such as
for a judicial training project, and created the Complementarity Extranet,
which is designed to bring together those with expertise with States that
need assistance. The Bureau’s report summarized the work of the
Secretariat, the Court, and the international community. The report noted the Secretariat’s work in building the Extranet and facilitating connections between those involved in complementarity efforts. 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. 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. 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. 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. 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. The report noted advice, exchange of information, and the Legal Tools Project that the Court has engaged in to assist States. 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.

69 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”).
70 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.
71 Bureau Report to ASP 11, supra note 68, ¶ 20.
72 id. ¶ 26. 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.
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

78. Bureau Report to ASP 8, supra note 4.
79. Id. ¶ 42.
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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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 satisfactorily moving forward because of OTP’s assistance).

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


\textsuperscript{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,
academics, 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. 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 in the
United States or judicial training institutes in other parts of the world. 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. The expense would be contained because the State

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. 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. The objective of assisting with national capacity building is found within the concept of complementarity embedded in the statute. 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) (following “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).


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), 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. 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.