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# Nationalizing International Criminal Law: The International Criminal Court as a Roving Mixed Court

Jenia Iontcheva

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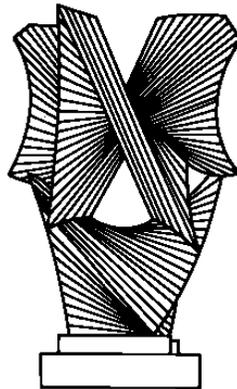
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## NATIONALIZING INTERNATIONAL CRIMINAL LAW: THE INTERNATIONAL CRIMINAL COURT AS A ROVING MIXED COURT

*Jenia Iontcheva*

THE LAW SCHOOL  
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## Nationalizing International Criminal Law: The International Criminal Court As a Roving Mixed Court

*Jenia Iontcheva\**

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## Nationalizing International Criminal Law: The International Criminal Court As a Roving Mixed Court

Jenia Iontcheva

After a period of initial optimism, a dose of reality has set in for the fervent supporters of the International Criminal Court (“ICC”). Many scholars celebrated the arrival of the ICC as heralding an era of swifter and more consistent enforcement of human rights and humanitarian law. To its most enthusiastic proponents, the Court was to be “the central pillar in the world community for upholding fundamental dictates of humanity.”<sup>1</sup>

The impracticality of these visions has become increasingly apparent. The qualified support from many countries and the complete lack of support from the United States have led to sharp limitations on the ICC’s power.<sup>2</sup> As a result, the enforcement of international criminal law remains heavily dependent on the initiative and support of actors other than the ICC.

Contrary to much academic commentary, this Article argues that a less centralized regime, and one that is less dominated by a powerful ICC, is not a cause for despair—even for those who favor vigorous enforcement of international criminal law. An all-powerful and far-reaching ICC may lack legitimacy and have little direct impact on countries recovering from violent conflict. A less hierarchical international criminal justice system that relies significantly on national governments is likely to be better informed by diverse perspectives, more acceptable to local populations, and more effective in accomplishing its ultimate goals.

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<sup>1</sup> Antonio Cassese, *From Nuremberg to Rome: International Military Tribunals to the International Criminal Court*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 18 (Antonio Cassese et al. eds., 2002) [hereinafter THE ROME STATUTE]; see also Robert Badinter, *International Criminal Justice: From Darkness to Light*, in 2 THE ROME STATUTE, *supra*, at 1935 (praising the Court as “new judicial dawn, devoted to the struggle against crimes against humanity”); Klaus Kinkel, *Der Internationale Strafgerichtshof—ein Meilenstein in der Entwicklung des Völkerrechts*, 51 NEUE JURISTISCHE WOCHENSCHRIFT 2650 (1998) The Rome Treaty, establishing the ICC, itself has been hailed as the “United Nations’ most significant accomplishment since its establishment in 1945.” M. Cherif Bassiouni, *Preface*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Otto Triffterer ed., 1999)

<sup>2</sup> See Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003)

Accepting these arguments need not lead to the view that the ICC should be abandoned altogether, the approach favored by some commentators.<sup>3</sup> The ICC can still play an important role in a less centralized regime. This Article sets forth a vision of an ICC that focuses less on independent prosecutions in The Hague, and more on involvement of the ICC at the national level. A key part of this vision is the participation of the ICC in mixed tribunals that would be established in the state most directly affected by a prosecution. The model would be closer to the war crimes tribunals recently established in Sierra Leone and East Timor than to the international tribunals established for Rwanda and the former Yugoslavia. Greater interaction between the ICC and national authorities is likely to engender better and more widely accepted interpretations of international law.<sup>4</sup> It is also more likely to produce a system of enforcement that is sustainable and enduring.

Part I of the Article describes the practical limitations on the ICC's work and concludes that the duty of enforcing international criminal law will continue to depend heavily on the action of national authorities. Part II explains why a decentralized approach to enforcement is desirable on theoretical and practical grounds. Part III proceeds to outline an appropriate place for the ICC in a pluralist, decentralized international criminal justice system. The argument will be that human rights would not suffer if the ICC's operations in The Hague take on a less visible and dominant role. As this Article argues throughout, a Court that is less hierarchical and more agile would better encourage broad enforcement of humanitarian and human rights law. Although the impact of the Court would be felt more slowly, it would be more lasting.

#### I. A COURT OF LAST RESORT: PRACTICAL LIMITATIONS ON THE ICC'S WORK

Many international law scholars and activists have high hopes for the ICC as a tool for preventing and combating human rights violations. It is doubtful, however, that the ICC will have the political capital to meet the expectations of its more ardent supporters.

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<sup>3</sup> Charles Krauthammer, *Our Real Friends in Europe*, WKLY. STANDARD, Aug. 26, 2002; George Will, *A Court for Chaos*, N.Y. POST, July 7, 2002.

<sup>4</sup> In particular, this Article builds on the idea that deliberation can produce more legitimate and more informed judgments on contested questions of law and politics, such as questions of human rights and humanitarian law. Cf. Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 339-343 (2003) (arguing that democratic deliberation leads to more informed and more legitimate verdicts in criminal cases)

Support for a powerful international court has never been resounding among those who have the power to make it so. The United States has withdrawn its support altogether, a position that is unlikely to change any time in the near future. Several other major powers have also resisted the idea of a strong Court.

Support for a powerful court was relatively thin even during the drafting of its founding statute. The qualified support from states resulted in a statute with many compromises and restrictions on the Court's powers. The statute sharply limits the ICC's jurisdiction, and both the enforcement of the Court's orders and its financing are contingent on the goodwill of domestic authorities. Even as the Court begins its operations, its powers will remain limited, and other tribunals will still carry out the majority of human rights prosecutions.

*A. Grand Visions of the Court: The ICC as the Central Pillar of Human Rights Enforcement*

Many scholars envision the ICC at the helm of global efforts to develop and enforce human rights and humanitarian law.<sup>5</sup> They have high hopes for the tribunal and expect it to advance international justice swiftly, impartially, and effectively. As UN Secretary Kofi Annan has stated, "In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision."<sup>6</sup>

More concretely, the ICC is expected to develop international criminal law by building upon the jurisprudence of the Nuremberg and Tokyo tribunals, the International Criminal Tribunal for the former Yugoslavia ("ICTY") and International Criminal Tribunal for Rwanda ("ICTR") The Court is to "clarify existing ambiguities in the law"

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<sup>5</sup> E.g., BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE (1980); M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1 (1991); Louis René Beres, *After the Gulf War: Prosecuting Iraqi Crimes Under the Rule of Law*, 24 VAND. J. TRANSNAT'L L. 487 (1991); William N. Gianaris, *The New World Order and the Need for an International Criminal Court*, 16 FORDHAM INT'L L. J. 88 (1992-93); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381 (2000); Int'l Law Assoc'n (Amer. Branch) Committee on a Permanent Int'l Crim. Ct., First Committee Report on Jurisdiction, Definition of Crimes and Complementarity, December 27, 1996, 13 NOUVELLES ETUDES PENALES 159 (1997) (Leila Sadat Wexler, Reporter) Those who have expressed greater reservations include Payam Akhavan, *The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability*, 97 AM. J. INT'L L. (forthcoming 2003) (book review); Jose E. Alvarez, *Crimes of States/ Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999); Goldsmith, *supra* note 2; W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, LAW & CONTEMP. PROBS., Autumn 1996, at 75; David Wippman, *Exaggerating the ICC* (unpublished manuscript, on file with author)

<sup>6</sup> Press Release, Statement of Secretary-General Kofi Annan Before the International Bar Association in New York (June 12, 1997), U.N. Doc. SG/SM/6257 (1997), available at <http://www.un.org/News/Press/docs/1997/19970612.sgsm6257.html>.

and to set the “highest international standards” of due process.<sup>7</sup> The Court is expected not only to make jurisprudential advances, but also to provide prompt investigations and prosecutions of reported atrocities.<sup>8</sup> The Court’s supporters believe that the ICC will put an end to impunity for grave human rights violations and deter war crimes around the world.<sup>9</sup>

The ICC is thus seen by many as the beacon of a new era of global justice, unfettered by national boundaries. Cherif Bassiouni has urged that “[w]e no longer live in a world where narrow conceptions of jurisdiction and sovereignty can stand in the way of an effective system of international cooperation for the prevention and control of international and transnational criminality.”<sup>10</sup> Instead, the ICC will serve as “a pillar in the construction of a new international political ethic, a code of conduct that the community of nations is committed to applying when states fail to do so themselves.”<sup>11</sup>

Whatever the philosophical merits of this vision of global justice, a subject to which I turn in Part II, a sober assessment of the ICC’s political standing shows that this grand vision of the Court is not likely to become a reality any time soon.

*B. Before and After the Rome Treaty: States’ Reservations About a Powerful International Criminal Court*

Even as the idea of the ICC gathered momentum, support for the Court was qualified. To a degree not appreciated by many of the Court’s partisans, the limited commitment by member states to the ICC project is likely to constrain the Court’s ability to fulfill the great expectations that many scholars and activists have for it.

The idea of a permanent international criminal tribunal traces its origins back to a convention drafted by the League of Nations in 1937.<sup>12</sup> The proposed tribunal was to try

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<sup>7</sup> E.g., Jelena Pejic, *Creating a Permanent International Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 294 (1998); see also Otto Triffterer, *Domesticos de ratificacion e implementacion*, in LA NUEVA JUSTICIA PENAL SUPRANACIONAL: DESARROLLOS POST-ROMA 13, 44, 45 (Kai Ambos ed., 2002) (expressing hope that the ICC will clarify and advance international criminal law and will thus contribute to the globalization of criminal justice)

<sup>8</sup> Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT’L L.J. 665, 712 (1996); Richard J. Goldstone, *The Role of International Criminal Law in the Prosecution of War Crimes*, 16 TEMP. INT’L & COMP. L.J. 371 (2002)

<sup>9</sup> Mauro Politi, *Introduction*, in THE ROME STATUTE OF THE INTERNATIONAL COURT: A CHALLENGE TO IMPUNITY 8, 15 (Mauro Politi & Giuseppe Nesi eds. 2001); Press Release, *supra* note 6.

<sup>10</sup> Bassiouni, *supra* note 5, at 33-34.

<sup>11</sup> Richard B. Bilder & Reed Brody, *Book Review*, 96 AM. J. INT’L L. 268, 273 (2002)

<sup>12</sup> GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY 211 (2002)

international terrorist offenses. The idea never gathered sufficient support to materialize.<sup>13</sup> After World War and the successful creation of the Nuremberg and Tokyo Tribunals, the UN General Assembly revived the proposal for a permanent international criminal tribunal in a resolution passed in 1948.<sup>14</sup> Although many countries were convinced of the need for a permanent tribunal in the wake of World War II atrocities, the idea became a casualty of the Cold War and was set aside.<sup>15</sup>

With the end of the Cold War, the notion of an International Criminal Court again became politically feasible. A resurgence of ethnic violence and transnational crimes such as drug trafficking and terrorism made the project especially relevant. Overpowered by trans-border drug crime, Latin American countries sponsored a resolution in the General Assembly, calling for an international criminal court to deal with such crimes more effectively.<sup>16</sup> After more countries expressed an interest in the proposal, the UN General Assembly charged the International Law Commission with preparing a draft statute.<sup>17</sup> The Commission completed the draft in 1994 and forwarded it to the General Assembly for consideration.<sup>18</sup> The General Assembly in turn established a Preparatory Committee to prepare a consolidated draft statute that would serve as the basis for negotiations at a Diplomatic Conference in Rome in 1998.<sup>19</sup> Delegates from more than 150 countries and 175 non-governmental organizations attended the Conference to draft and negotiate the final version of the statute.<sup>20</sup> After five weeks of intense negotiations, the Rome Statute of the International Criminal Court was adopted by a vote of 120-to-7, with twenty-one countries abstaining.<sup>21</sup>

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<sup>13</sup> *Id.* at 211.

<sup>14</sup> G.A. Res. 260B, U.N. GAOR, 3d Sess., pt.1, at 177, U.N. Doc. A/810 (1948)

<sup>15</sup> M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need To Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 52 (1997)

<sup>16</sup> The delegation of Trinidad and Tobago was the moving force behind these efforts. *See* Request for the Inclusion of a Supplementary Item in the Agenda of the Forty-Fourth Session, U.N. Doc. A/44/195 (1989); *see also* Agenda Item 152, International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking of Narcotic Drugs Across National Frontiers and Other Transnational Criminal Activities Establishment of an International Criminal Court with Jurisdiction Over Such Crimes, Report of the Sixth Committee to the General Assembly, U.N. Doc. A/44/770 (1989) [hereinafter Agenda Item 152].

<sup>17</sup> G.A. Res. 44/39 U.N. GAOR, 44th Sess., Supp.No.49, at 310, U.N. Doc. A/44/49 (1989)

<sup>18</sup> G.A. Res. 53, U.N. GAOR, 49th Sess., U.N. Doc. A/Res/49/53 (1995); G.A. Res. 46, U.N. GAOR, 50th Sess., U.N. Doc A/Res/50/46 (1995)

<sup>19</sup> G.A. Res. 46, U.N. GAOR, 50th Sess., U.N. Doc A/Res/50/46 (1995)

<sup>20</sup> ROBERTSON, *supra* note 12, at 325; Alessandra Stanley, *Conference Opens on Creating Court To Try War Crimes*, N.Y. TIMES, June 15, 1998, at A1.

<sup>21</sup> Sadat & Carden, *supra* note 5, at 384.

The large number of delegations that voted for the Statute is seen by many as an indication of the overwhelming support for the Court—especially in light of the speedy ratifications of the Statute, currently standing at ninety.<sup>22</sup> Often missed in the story of the court’s creation is that a majority of the participating states were reluctant to endorse a strong court. Throughout the drafting process, many state delegates expressed a strong preference for domestic prosecutions and insisted that international trials remain a last-resort option.<sup>23</sup> The final version of the Statute largely reflects those preferences.

The initial proposal for the ICC itself envisioned not an active supranational body, but a supporting institution that would come to the aid of countries that find themselves unable to deal with transnational crime.<sup>24</sup> Debates about the jurisdiction of the Court and its relationship to national judiciaries also suggest that the majority of negotiating states did not favor a powerful international criminal court, but were concerned about retaining the power to prosecute crimes committed on their territory or by their own nationals.<sup>25</sup>

A reflection of these sovereignty concerns is the principle of complementarity, a key feature of the ICC Statute. This principle provides that the Court can accept cases only where national authorities are unwilling or unable to handle them (complementarity will be administered in practice through ICC decisions on the admissibility of cases, so the terms admissibility and complementarity are often used interchangeably)<sup>26</sup> The ICC’s role as an institution complementary to domestic courts proved to be so fundamental to the

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<sup>22</sup> International Criminal Court, at <http://www.icc-cpi.int> (last visited July 18, 2003); Mark S. Ellis, *The International Criminal Court and Its Implications for Domestic Law and National Capacity Building*, 15 FLA. J. INT’L L. 215, 216 (2002) (noting that the speedy ratifications “surpassed nearly everyone’s hopes” and represent “a remarkable and rapid development in international law”)

<sup>23</sup> Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in 1 THE ROME STATUTE, *supra* note 1, at 583, 585; Intervention de M. Boualem Bouguetaia, Ministere des Affaires Etrangeres, Algerie, Statement Before the Plenipotentiaries Conference of the Establishment of the International Criminal Court (June 16, 1998), at <http://www.un.org/icc/index.htm> (last visited Sept. 9, 2003); Dilip Lahiri, Head of Delegation of India, Explanation of Vote on the Adoption of the International Criminal Court (July 17, 1998), at <http://www.un.org/icc/index.htm> (last visited Sept. 9, 2003); H.E. Mr. Muladi, Minister for Justice, Head of Delegation of the Republic of Indonesia, Statement Before the Plenipotentiaries Conference of the Establishment of the International Criminal Court (June 16, 1998), at <http://www.un.org/icc/index.htm> (last visited Sept. 9, 2003); Judge Eli Nathan, Head of Delegation of Israel, Statement on the Adoption of the International Criminal Court (July 17, 1998), at <http://www.un.org/icc/index.htm> (last visited Sept. 9, 2003) Cf. Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, U.N. GAOR, 50th Sess., Supp. No. 22, at 29-51, U.N. Doc. A/50/22 (1995) [hereinafter 1995 Ad Hoc Committee Report] (revealing that these preferences were also expressed at the preliminary drafting stage)

<sup>24</sup> Request for the Inclusion of a Supplementary Item in the Agenda of the Forty-Fourth Session, U.N. Doc. A/44/195 (1989); *see also* Agenda Item 152, *supra* note 16.

<sup>25</sup> Kaul, *supra* note 23, at 585 (noting that states other than those in the “like-minded group,” which included about 60 states, either wanted a weak ICC or, in the case of Security Council members, and ICC controlled by the Security Council) India, Mexico, Indonesia, and Japan were among the more vocal advocates of a weaker jurisdictional competence of the ICC. *Id.*

<sup>26</sup> ICC Statute art. 17. Complementarity applies even where the UN Security Council refers a case to the ICC. *Id.* art. 13 (6)

Court's purpose that States Parties included three references to it in the Rome Statute—in the preamble, Article 1, and Article 17.<sup>27</sup>

Even as complementarity was entrenched in the Statute, however, the Court was given the ultimate power to decide when it could admit a case to its docket. In other words, the Court itself would make the final determination as to whether a country is “unwilling” or “unable” to prosecute a case.<sup>28</sup> Many states expressed concerns, both before and during the Rome Conference, about the intrusion into national affairs that might result from this arrangement.<sup>29</sup> China and the United States urged that admissibility determinations be made by domestic courts or possibly the Security Council,<sup>30</sup> or at a minimum, that the ICC have only limited discretion to assert jurisdiction over a State's objection.<sup>31</sup> Even as a fragile consensus developed about the ICC's power to decide admissibility, state delegates repeatedly emphasized that the ICC should admit only extraordinary cases, where the national forum refuses to undertake the prosecution of war crimes in good faith.<sup>32</sup> The refrain of sovereignty concerns expressed in the debates suggests that aggressive use of the ICC's power to determine the admissibility of cases would meet with resistance.

Debates at the Rome Conference reflect a cautious and restrained approach not only with respect to the admissibility of cases, but also to drawing the boundaries of ICC jurisdiction.<sup>33</sup> As a result of this ambivalence, the statute does not provide for universal

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<sup>27</sup> Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery To Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 897 (2002) The duplication of the complementarity provision was not legally necessary, but rather reflected states' desire to ensure that international jurisdiction would not undermine state sovereignty. *Id.*; see also Statement of I.E. Ayewah (Nigeria), U.N. GAOR, 50 th Sess., at 2, U.N. Doc. A/C.6/50/SR (1995) (“[W]e would have difficulties with the statute if a hierarchy is established in which the ICC would be superior to national courts. Rather, recourse to the court should only be in the absence of national jurisdiction.”)

<sup>28</sup> ICC Statute art. 17.

<sup>29</sup> Philippe Kirsch & Darryl Robinson, *Reaching Agreement at the Rome Conference*, in 1 THE ROME STATUTE, *supra* note 1, at 67, 69; Comments of United States to Ad Hoc Committee on the Establishment Of An International Criminal Court, U.N. GAOR, 50th Sess., at 10, U.N. Doc. A/AC.244/1/add.2 (1995) [hereinafter Comments to the Ad Hoc Committee]. (noting that the draft statute “frequently fails to uphold” national jurisdiction”); Statement of H. Owada (Japan) to U.N.G.A. 6th Comm., U.N. GAOR, 50th Sess., at 4, U.N. Doc. A/C.6/50/SR (1995) (urging principal reliance upon national courts pursuant to principle of “prosecute or extradite”); Statement of C. Shiqiu (China) to U.N.G.A. 6th Comm., U.N. GAOR, 50th Sess., U.N. Doc. A/C.6/50/SR (1995) (“Regrettably, [the complementarity principal] has not been fully implemented in the operative part of the Statute and some provisions even appear to be contrary to the principle.”)

<sup>30</sup> Statement of C. Shiqiu (China) to U.N.G.A. 6th Comm., *supra* note 29, at 3.

<sup>31</sup> Comments to the Ad Hoc Committee, *supra* note 29, at 8-10, para 3.

<sup>32</sup> Jeffrey L. Bleich, *The International Criminal Court: Report of the ILA Working Group on Complementarity*, 25 DENV. J. INT'L L. & POL'Y 281 (1997); see also *id.* (citing ICC Committee Report at 9, para 43, which notes that States have “stressed that the standards [for determining “availability” and “effectiveness”] were not intended to allow the international criminal court to pass judgement on the operation of national courts in general.”)

<sup>33</sup> Kaul, *supra* note 23, at 585.

jurisdiction, meaning that the Court would not have the power to prosecute war criminals who only temporarily find themselves on the territory of a state party. This exclusion was made despite active lobbying by human rights activists who pointed out that that it gives a free pass to “traveling tyrants.”<sup>34</sup> Subject-matter jurisdiction is also limited to the most serious international crimes—genocide, crimes against humanity, war crimes—despite strong voices for a more expansive list of covered offenses.<sup>35</sup> And although the jurisdiction of the Court now covers crimes committed during both international and internal armed conflict, the provision on internal armed conflict was adopted over strong objections by, among others, the Arab League states, China and India.<sup>36</sup>

Even as states parties ceded some of their penal powers to the ICC in Rome, they refused to relinquish important sovereign prerogatives in administering criminal justice. For example, the statute lacks provisions on amnesties, pardons, parole, and sentence commutations. Various delegations argued “that the Statute should not permit the Court to intercede in the administrative (parole) or political decision-making process (pardons, amnesties) of a State.”<sup>37</sup> As a result of this compromise, it is now arguably possible for a state to convict, but then pardon an accused war criminal, without prompting ICC action.

Finally, states were also reluctant to grant the Court power in the area of enforcement. The Court depends almost entirely on the cooperation of domestic authorities to collect evidence and arrest suspects, yet it cannot directly sanction non-cooperation.<sup>38</sup> As some commentators have noted, the section on state cooperation with the ICC “suggests that while the States of the world agree to the establishment of the Court in principle, and even to its jurisdiction in theory, they are not willing to make the concessions to international cooperation.”<sup>39</sup>

The negotiations were not the only stage at which states expressed reservations about a powerful, wide-reaching ICC. After the Rome Treaty won approval by an overwhelming majority and the ICC seemed a closer reality, sovereignty concerns

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<sup>34</sup> Sadat & Carden, *supra* note 5, at 414; *see also* Goldsmith, *supra* note 2 (“The most salient class of human rights violators during the past century has been oppressive leaders who abuse their own people within national borders. Under the traveling dictator exception, the ICC does not touch this class of offenders, even if they travel abroad.”)

<sup>35</sup> 1995 Ad Hoc Committee Report, *supra* note 23, at 11; Kirsch & Robinson, *supra* note 29, at 69.

<sup>36</sup> Bilder & Brody, *supra* note 11, at 269.

<sup>37</sup> El Zeidy, *supra* note 27, at 941.

<sup>38</sup> ICC Statute art. 87 (7) (providing that the Court must refer findings of non-cooperation to the Assembly of States Parties, or, where the Security Council referred the case, to the Security Council)

<sup>39</sup> Sadat & Carden, *supra* note 5, at 444.

persisted in many states. As the Rome Treaty came up for a vote of ratification in national legislatures, reluctant policymakers needed assurances that ratification would not result in their country's relinquishing control over the prosecution of their fellow citizens.<sup>40</sup>

One such assurance has been the passage of domestic legislation that criminalizes offenses within the subject matter jurisdiction of the ICC. Although the Rome Statute imposes no explicit duty on states parties to pass such legislation,<sup>41</sup> the complementarity provisions of the Statute have prodded signatory countries to incorporate prohibitions on genocide, war crimes, and crimes against humanity into their criminal statutes.<sup>42</sup> By adopting the relevant implementing legislation, countries are ensuring that the ICC will not find them "unable" to prosecute international crimes and thus will not take away from them the control over war crimes cases.<sup>43</sup>

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<sup>40</sup> Asian countries have been particularly reluctant to ratify the ICC Treaty. *E.g.*, Goold at 2 (noting the continuing concerns of Japan, an active participant in the Rome Conference, that the ICC might undermine Japanese sovereignty); Chris Patten Speech, RAPID, Sept. 26, 2002 (noting a ratification "gap among Asian states"); Asian Campaign on the Rome Statute Ratification, at [http://www.hurights.or.jp/asia-pacific/no\\_27/02romastatute.htm](http://www.hurights.or.jp/asia-pacific/no_27/02romastatute.htm) (last visited July 17, 2003) For evidence from other countries, see Helen Durham, Australian Red Cross, International Criminal Court, at [http://www.redcross.org.au/newsroom\\_featurestories\\_icc\\_background.htm](http://www.redcross.org.au/newsroom_featurestories_icc_background.htm) (last visited May 2, 2003) (Australia); Human Rights Watch, Mexico: Ratification of ICC Overdue, at <http://www.hrw.org/press/2002/05/mexico-icc-ltr.htm> (expressing concern about Mexico's lack of progress toward ratification and noting that "Mexico is not alone in finding that ratification of the ICC raises serious juridical questions regarding state sovereignty") (last visited July 17, 2003); *Senado congelo estudio de Tribunal Penal Internacional*, EL MOSTRADOR, Apr. 9, 2002 (Peru) *But see* Roy S. Lee, *An Assessment of the ICC Statute*, 25 *FORDHAM INT'L L.J.* 750, 750 (2002) (noting the increased goodwill toward the ICC project after the Rome Treaty was signed)

<sup>41</sup> Parties have a duty to adapt their domestic laws to implement the cooperation obligations under Part 9 of the Statute. Alain Pellet, *Entry Into Force and Amendment of the Statute*, in *THE ROME STATUTE*, *supra* note 1, at 145, 152. But states are not under a legal obligation to implement other basic provisions of the Statute. *Id.* at 153 ("neither the signatory States nor even the States Parties have any clear obligation to bring their domestic legislation into harmony with the basic provisions of the Rome Statute."); *see also* Bruce Broomhall, *La Cour Penale Internationale: Directives pour l'adoption des lois nationales d'adaptation*, 13 *NOUVELLES ETUDES PENALES* 122 (1999) (stating that there is no explicit obligation under the Rome Statute on States Parties to prohibit in their national law the crimes falling within the Court's competence)

<sup>42</sup> Amnesty International, *Implementation*, at [http://web.amnesty.org/web/web.nsf/print/int\\_jus\\_icc\\_implementation](http://web.amnesty.org/web/web.nsf/print/int_jus_icc_implementation) (last visited June 27, 2003) (listing fifteen countries that have enacted implementing legislation and twelve that have drafted such legislation); ECOWAS-ICRC Seminar on the Ratification and Implementation of the ICC Statute, 29-31 January 2002 (noting that Ghana and Senegal are in the process of passing implementing legislation prohibiting offenses proscribed by the Rome Statute and encouraging other ECOWAS members to do the same); Human Rights Watch, *The Status of ICC Implementing Legislation* (noting that Argentina, Brazil, the Democratic Republic of Congo, Niger and Senegal have begun the implementation process); [http://www.dfait-maeci.gc.ca/foreign\\_policy/icc/implementing\\_icc-en.asp](http://www.dfait-maeci.gc.ca/foreign_policy/icc/implementing_icc-en.asp) (providing links to the implementing legislation of ten countries)

<sup>43</sup> *E.g.*, Benjamin Goold, *Ratifying the Rome Statute: Japan and the International Criminal Court #1*, at [http://www.hurights.or.jp/asia-pacific/no\\_29/05japanandicc.htm](http://www.hurights.or.jp/asia-pacific/no_29/05japanandicc.htm) (last visited May 2, 2003) ("Because Japanese law does not currently provide for domestic prosecution for war crimes, there is concern within the government that should a . . . Japanese citizen be accused of such crimes, Japan would be obliged to hand that individual over to the ICC for indictment. Given that this is a situation the Japanese government is keen to avoid, the passing of emergency legislation is regarded as an essential precursor to ratification of the Rome Statute and participation in the ICC."); Asian Campaign on the Rome Statute Ratification, *supra* note (noting that the "ratification of the Rome Statute by countries in Asia will certainly hinge on the way domestic law are linked to the provisions of the treaty"); Helen Durham, Australian Red Cross, International Criminal Court, at [http://www.redcross.org.au/newsroom\\_featurestories\\_icc\\_background.htm](http://www.redcross.org.au/newsroom_featurestories_icc_background.htm) (last visited May 2, 2003) ("The ICC will not impact upon national sovereignty as Australia will have fully formed domestic legislation to allow the prosecution of our own people within this country.") *See generally* Progress Report on the Ratification and National

The threat of international prosecutions had a similar effect on the German government after World War I. Faced with the threat that the Allies would try alleged German war criminals in special international military tribunals, Germany “passed new legislation and assumed jurisdiction in order to be able to prosecute the selected offenders under national law.”<sup>44</sup> By contrast, the duty to enact implementing legislation under the 1949 Geneva Conventions went largely unheeded,<sup>45</sup> because no international tribunal existed that would assume jurisdiction where nation states failed to do so. The rapid passage of implementing legislation is an indicator of the influence the ICC is already exerting on domestic judicial processes, a topic discussed further in Part III. At the same time, it confirms the determination of domestic authorities around the world to retain control over the prosecution of their nationals.

### C. U.S. Resistance to the ICC

The qualified support for the ICC from various participating states might not be a great obstacle to the flourishing of the Court if the Court had the backing of the United States. The United States has strongly opposed the idea of a powerful ICC, however.

The U.S. government was an active participant in the initial stages of the drafting of the ICC Statute.<sup>46</sup> Dissatisfied with the final version of the Rome Treaty, the United States withdrew its support from the ICC, and the U.S. delegate voted against it.<sup>47</sup> Before he left office, however, President Bill Clinton reconsidered the decision to oppose the Court and signed the Rome treaty. He reasoned that as a member of the ICC, the United

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Implementing Legislation of the Statute for the Establishment of an International Criminal Court, International Human Rights Law Institute, DePaul University (7th ed. 2001); International Centre for Human Rights and Democratic Development and the International Centre for Criminal Law Reform and Criminal Justice Policy, International Criminal Court: Manual for the Ratification and Implementation of the Rome Statute (2000), at <http://www.ichrdd.ca>.

<sup>44</sup> El Zeidy, *supra* note 27, at 872.

<sup>45</sup> Dietrich Schindler, *Book Review*, 92 AM. J. INT’L L. 158, 160 (1998) (noting that “it must be assumed that only a few states have fully complied with these obligations”)

<sup>46</sup> Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381, 383 (2002)

<sup>47</sup> There were six key objections: First, the statute included a provision for jurisdiction over nationals of non-party states; second, it included a prosecutor with the power to initiate investigations on her own authority; third, the Statute did not include a provision for a ten-year opt-out period from the court’s jurisdiction over war crimes and crimes against humanity; fourth, the statute included the crime of aggression; fifth, it incorporated a resolution proposing that terrorism and drug crimes be brought within the court’s jurisdiction in the future; and finally, it prohibited reservations. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law: State Department Views on the Future for War Crimes Tribunals*, 96 AM. J. INTL. L. 482, 484 (2002)

States would be better able to influence its development. Nonetheless, he was concerned about the “significant flaws” remaining in the Rome Statute.<sup>48</sup>

Under the Bush administration, U.S. resistance to the ICC project has intensified. Arguing that the Rome Statute is unconstitutional because it does not include many of the rights guaranteed to American citizens by the Constitution, some members of Congress introduced legislation to prohibit cooperation with the ICC.<sup>49</sup> Moved by these arguments and by concerns that the ICC may be used to prosecute U.S. military personnel for political purposes, in 2002, the Bush Administration sent a letter to the United Nations Secretary General stating that the United States “does not intend to become a party” to the Rome Treaty and “has no legal obligations arising from its signature on December 31, 2000.”<sup>50</sup> In August 2002, President Bush signed the legislation prohibiting U.S. cooperation with the ICC.<sup>51</sup> Since then, the Administration has negotiated numerous bilateral agreements with states who are parties to the statute agreeing not to surrender U.S. citizens to the ICC.<sup>52</sup>

Because of the sharp disagreement between Europe and the United States on the reach of the ICC, the Court has become a symbol of Europe’s efforts to assert itself internationally and to constrain American power. This may have had the effect of unifying Europe behind the Court while hardening U.S. opposition to it. In the growing divide between Europe and the United States, the Court itself is a likely casualty.

While the United States has been the most vocal opponent, other major powers have also resisted the idea of a powerful ICC. China and India were among the countries that voted against the treaty, and Russia has refused to ratify it.<sup>53</sup> During the negotiations of the Statute, these countries insisted on a strong regime of complementarity, and Russia, China, France, and the United States (four of the five permanent Security Council members) pushed for Security Council control over the Court, both in referring and blocking cases going to the Court.<sup>54</sup> Finally, Israel, Arab states, and sub-Saharan African states (where many of the serious conflicts are occurring) were also reluctant to accept

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<sup>48</sup> Steven Lee Myers, *U.S. Signs Treaty for World Court To Try Atrocities*, N.Y. TIMES, Jan. 1, 2001, at A1.

<sup>49</sup> Amann & Sellers, *supra* note 46, at 383.

<sup>50</sup> ICC Statute, at Statement of Depositary Status n. 6.

<sup>51</sup> James Podgers, *Quest for Credibility: International Criminal Court Faces Startup Challenges*, 88 ABA J. 16, 18 (Nov. 2002)

<sup>52</sup> *Id.* at 18.

<sup>53</sup> International Criminal Court, at <http://www.icc-cpi.int> (last visited July 18, 2003)

<sup>54</sup> ROBERTSON, *supra* note 12, at 348; Kirsch & Robinson, *supra* note 29, at 71.

various provisions of the Rome Statute and have consequently failed to sign or ratify the Statute.<sup>55</sup>

*D. The Result of Limited Support: A Weaker Court*

No international institution with political capital as limited as that of the ICC is likely to be powerful. The Court is particularly vulnerable because it relies heavily on the goodwill of domestic authorities to enforce its mandates. The capacity of the Court to command cooperation from states is so weak that it is very likely to undermine the Court's work.<sup>56</sup>

The ICC has no police force, so it depends on other states, particularly those with powerful militaries, to arrest suspects and enforce its judgments. Furthermore, the ICC prosecutor lacks subpoena powers and cannot collect evidence (e.g., compel witnesses, conduct exhumations, or seize bank accounts and government documents) without the cooperation of domestic authorities.<sup>57</sup> In addition, the ICC cannot sanction States directly for failure to comply with its orders; rather, it has to refer its findings of noncompliance to the Assembly of States Parties or the Security Council.<sup>58</sup>

The uneven record of states' cooperation with international tribunals does not bode well for the Court's ability to attract the cooperation of domestic authorities. The ad hoc tribunals for Rwanda ("ICTR") and the former Yugoslavia ("ICTY") often saw their requests for cooperation and even their orders go unheeded. The Yugoslav government for a long time refused to surrender war criminals to The Hague, and the eventual transfer of Slobodan Milosevic to the ICTY resulted in massive protests and divisions within the country.<sup>59</sup> Even after the transfer of Milosevic, despite economic and political pressure from the West, the Yugoslav government for awhile did not recognize the ICTY's legal status and denied it access to archives and documents.<sup>60</sup> Rwanda has similarly refused to cooperate with the ICTR on occasion. One notable example was the Rwandan government's protest in 1999 against the Tribunal's release from custody—on procedural

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<sup>55</sup> See Wippman, *supra* note 5, at \* 4.

<sup>56</sup> Sadat & Carden, *supra* note 5, at 415.

<sup>57</sup> ICC Statute art. 93; Sadat & Carden, *supra* note 5, at 416.

<sup>58</sup> Where a state party refuses to cooperate with the Court, the Court may "refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council." ICC Statute art. 87 (7)

<sup>59</sup> Goldsmith, *supra* note 2; Daniel Simpson, *Milosevic Trial Leaves Most Serbs Cynical*, N.Y. TIMES, Aug. 9, 2002, A8.

<sup>60</sup> Carlotta Gall, *Hague Tribunal Chief Says Yugoslavia Still Isn't Cooperating*, N.Y. TIMES, Oct. 23, 2001, A8.

grounds—of a high-level suspect.<sup>61</sup> More recently, the Rwandan government, which is overwhelmingly Tutsi, again failed to respond to requests for cooperation from the ICTR when the Tribunal began investigations into crimes committed by the Tutsi Rwandan Patriotic Front.<sup>62</sup>

Lack of cooperation has extended beyond states whose nationals were being tried by the international tribunals. Countries neighboring Rwanda have harbored fugitive war criminals,<sup>63</sup> and countries whose peacekeeping forces were on the ground in Rwanda and Yugoslavia have, on occasion, been reluctant to send their nationals to testify before the tribunals.<sup>64</sup> For a long time, peacekeeping states were reluctant to order their forces to capture war criminals who were still at large.<sup>65</sup> Importantly, although the ICTR and ICTY had jurisdictional primacy over domestic authorities, the Security Council failed to sanction domestic authorities that refused to cooperate with the international tribunals.<sup>66</sup>

Many of the successes of the Tribunals came as a result of U.S. pressure on uncooperative governments. American support was central to the arrest and surrender of suspects in the former Yugoslavia. Through sustained diplomatic, military, and economic pressure, the United States undermined Milosevic's regime in Yugoslavia, paving the way for the arrests and trials of Serb war criminals.<sup>67</sup> In particular, the United States' threat to withhold U.S. and International Monetary Fund (IMF) aid to the successor regime in Yugoslavia prompted Milosevic's transfer to the ICTY.<sup>68</sup> American diplomatic pressure also got the Croatian government to cooperate with the ICTY.<sup>69</sup> Without question, the lack

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<sup>61</sup> ICTR prosecutors had violated his rights to speedy trial by detaining him without trial for over one year. Emmanuel Goujon, *Rwanda Suspends Cooperation With Genocide Court Over Release*, AGENCE FRANCE PRESSE, Nov. 06, 1999.

<sup>62</sup> *UN Prosecutor Rallies UK Support To Investigate Rwandan Army*, AFRICA NEWS, Dec. 3, 2002.

<sup>63</sup> Goldstone, *supra* note 8, at 236 (noting that some African countries "were reluctant to cooperate in the arrest and transfer of indictees to the Rwanda tribunal"); *ICTR Worries About Hindering Arrest of Rwandan Genocide Suspects*, XINHUA, Dec. 15, 2000 (citing ICTR Prosecutor as saying that the arrests of some indicted individuals are being hampered by two African countries)

<sup>64</sup> Remy Ourdan, *La laborieuse invention d'une justice internationale*, LE MONDE, June 18, 1998. The United States imposed conditions on the way the testimony of its diplomats would be taken. Christopher Marquis, *U.S. Seeks Safeguards on Diplomats Testifying on Milosevic Trial*, N.Y. TIMES, June 13, 2002, A13.

<sup>65</sup> ARYEH NEIER, WAR CRIMES 252 (1997); Ourdan, *supra* note 64.

<sup>66</sup> Bartram Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 433 (1998) (noting that the Security Council proved reluctant "to take stronger action to arrest indictees and to sanction states that fail[ed] or refuse[d] to cooperate with the ICTY.")

<sup>67</sup> Goldsmith, *supra* note 2.

<sup>68</sup> *Id.*

<sup>69</sup> Chris Hedges, *Zagreb Sends Croat to Trial in the Hague*, N.Y. TIMES, Apr. 29, 1997, at A11; Chris Hedges, *10 Bosnian Croats Surrender to War Crimes Tribunal*, N.Y. TIMES, Oct. 7, 1997, at A3.

of political, financial and military support from the United States will be a significant constraint on the ICC's ability to function effectively.

The lack of enthusiasm for a powerful ICC might also affect the Court's financing. Under the final version of the ICC Statute, the ICC will be financed mainly by contributions by states that are parties to the Rome Treaty (general UN funds are also likely to be used, but primarily for cases referred by the Security Council)<sup>70</sup> The support of more affluent states will be essential for the effective functioning of the Court. Because of the substantial dependence on states' contributions, the ICC could be seriously undermined by the withdrawal of funds by a major contributor. Consider the examples of the Committee Against Torture and the Committee on the Elimination of Racial Discrimination: "While both were initially meant to be state supported, states' failure to pay their dues eventually led to financing from the regular U.N. budget" and thus to underfunding.<sup>71</sup> International tribunals are considerably more expensive than regular UN agencies<sup>72</sup> and as officials from the ICTR and ICTY have testified, the lack of funds can seriously impede their work.<sup>73</sup> The ICC could be similarly crippled without the support of the United States.<sup>74</sup>

*E. The Result of a Weaker Court: Multiple Sites of Interpretation and Enforcement*

The inescapable fact of the ICC's limited political capital means that other institutions will retain a critical role in interpreting and enforcing human rights and humanitarian law. Essentially, there are four broad possibilities of how international criminal law could be implemented in the absence of a strong ICC.

First, the UN could create more ad hoc international tribunals based in The Hague or another neutral location, like those established for Rwanda and the former Yugoslavia.

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<sup>70</sup> ICC Statute art. 115. The Court could also utilize "additional funds" provided voluntarily by Governments, international organizations, individuals, and corporations, but given the controversial nature of this provision, it is still unclear how and to what extent such funds will be used. ICC Statute art. 116.

<sup>71</sup> Pejic, *supra* note 7, at 328 (citing Codification Division of the U.N. Office of Legal Affairs, Possible Types of Relationship Between the United Nations and a Permanent International Criminal Court 6-7 (Background Paper 1997))

<sup>72</sup> The ICTY's and ICTR's budgets for 2002-2003 were about \$ 223 million and \$ 177 million, respectively, and the ICC is projected to cost between \$25 and 40 million in its initial years. Carola Hoyos & Nikki Tait, *A Tough Case: The International Criminal Court Becomes a Reality Today. But with Strong U.S. Opposition and Concerns About Funding, It Is in for a Difficult Future*, FIN. TIMES, Apr. 11, 2002, at 18.

<sup>73</sup> Graham T. Blewitt, *National Prosecutions—International Lessons*, in REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS (Christopher C. Joyner & M. Cherif Bassiouni eds. 1998)

<sup>74</sup> Hoyos & Tait, *supra* note 72 (citing skeptic remarks by the U.S. Ambassador for War Crimes concerning the financing of the Court)

This solution, however, would seem to defeat the entire purpose of the ICC. Although the Bush administration has expressed some support for this option,<sup>75</sup> the UN administration and most members do not favor it. In addition, although its powers will be limited, the ICC will not disappear altogether. As long as it exists, it will seem peculiar to create new ad hoc international tribunals, performing the same function as an already existing bureaucracy.<sup>76</sup>

Second, national courts could continue to prosecute crimes committed on their territory or by their nationals. These trials could arise under either international law or domestic human rights and war crimes statutes. Although some national courts have been lagging in their obligation to prosecute gross human rights violations, others have vigorously pursued such trials. Compared to international prosecutions, local trials are more efficient and rarely encounter serious enforcement problems. At the same time, political pressure on local judges or a serious lack of resources can lead to unfair results.

Other countries, not connected to the crime, could also take up cases under universal jurisdiction. Several European countries, with Belgium at the forefront, have prosecuted international crimes on this basis.<sup>77</sup> The universal jurisdiction approach, however, is more problematic and less likely to be accepted than the ICC. It does not rest on the consent of states with original jurisdiction over a case and neither its jurisdiction, nor its laws and procedures have the imprimatur of the international community. In an example of the opposition that such trials provoke, the Democratic Republic of Congo (“DRC”) successfully challenged before the ICJ Belgium’s right to prosecute the former DRC foreign minister under universal jurisdiction.<sup>78</sup> More recently, the United States threatened to move NATO headquarters out of Brussels unless Belgium amended its universal jurisdiction statute.<sup>79</sup>

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<sup>75</sup> *The U.N. Criminal Tribunals for Yugoslavia and Rwanda: International Justice or Show of Justice?: Before the House Comm. on Int’l Relations*, 107th Cong. (2002) (statement of Pierre-Richard Prosper, Ambassador-At-Large for War Crimes Issues, U.S. Department of State)

<sup>76</sup> As this Article argues in Part II, international tribunals, because of their remoteness from the country where the crime was committed, may also have less legitimacy and less impact on domestic efforts to promote reconciliation and rule of law.

<sup>77</sup> Ruth Wedgwood, *National Courts and the Prosecution of War Crimes*, in 1 *SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS* 393, 400-01 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 2000)

<sup>78</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Rep. of the Congo v. Belgium)*, 2002 I.C.J. (Feb. 14)

<sup>79</sup> Richard Bernstein, *Belgium Rethinks Its Prosecutorial Zeal*, N.Y. TIMES, Apr. 1, 2003, A8.

Finally, mixed courts, composed of international and national judges, could prosecute international crimes on the territory where those crimes occurred. Such courts have already been created in Sierra Leone, East Timor, and Kosovo, and have been proposed for Cambodia and Iraq. They have been generally well received by the UN and the countries affected by the crime, as well as by the United States. As Part III argues, they could serve as a model for recreating the mandate of the ICC.

Whatever shape international justice takes and whatever place the ICC takes in it (a topic to which I return in Part III), the Court must come to terms with the central role that national institutions will continue to play.

## II. THEORETICAL AND PRACTICAL PROBLEMS WITH A CENTRALIZED REGIME OF ENFORCEMENT

For many who believe in vigorous enforcement of international criminal law, a less powerful ICC is a cause for disappointment. It should not be. As this Part argues, advancement of international criminal law through a single, centralized institution presents both theoretical and practical problems. It is less likely to result in informed and politically acceptable interpretations of international criminal law. It will also contribute little to the process of reconciliation and judicial reconstruction in the countries affected by international crimes.

### A. *The Centralized Model of the ICC*

To understand the arguments in favor of a limited role for the ICC, it is necessary first to examine the policy arguments in favor of a powerful court. Advocates of a strong ICC argue that centralization leads to a more coherent jurisprudence and more effective enforcement of humanitarian and human rights law. Many of them have disfavored a strong complementarity regime, fearing that leaving the task of enforcement to national courts would result in failure to prosecute war crimes.<sup>80</sup> Proponents of a powerful ICC have argued that “the rendering of justice is too important to be left to the whims of

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<sup>80</sup> Some have lamented the omission of universal jurisdiction, see Luigi Condorelli, *La Cour Penale Internationale: Un Pas de Geant*, 103 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 16 (1999) (criticizing the ICC’s incomplete jurisdictional system for lagging behind the current international law); others the absence of a provision declaring national amnesties unacceptable, Christine Van den Wyngaert & Tom Ongena, *Ne Bis in Idem Principle, Including the Issue of Amnesty*, in 2 THE ROME STATUTE, *supra* note 1, at 705, 728; and yet others have argued for ICC jurisdictional primacy, see Brown, *supra* note 66.

governments that are prone to compromise either on enforcing the law against perpetrators or on guaranteeing them due process.”<sup>81</sup>

Even where national courts might be able to take on war crimes prosecutions, some international law scholars maintain that “international fora more readily fulfill victims’ expectations for the ‘highest form of justice’”<sup>82</sup> and are better at upholding the ‘rule of international law.’”<sup>83</sup> The international justice system, these scholars maintain, can count on the expertise of jurists who are better qualified, more impartial than judges ‘caught up in the milieu which is the subject of the trials,’ and better equipped to render uniform justice.<sup>84</sup> Because international tribunals are more likely than local courts to be impartial, they are also more able to build ‘objective’ records of events.<sup>85</sup>

In addition to these functional advantages, the ICC is said to have an important symbolic, norm-reinforcing value.<sup>86</sup> By articulating and solidifying international norms relating to armed conflict and human rights, the Court conveys “the sense that there is a regulation of the international realm, a legitimate international law, and an international law with shared threshold norms.”<sup>87</sup> Some scholars have speculated that, by sending a message that certain behavior will not be tolerated by the international community, a permanent international criminal court would also serve a deterrent function.<sup>88</sup> Finally, by articulating a coherent set of rules and principles, the ICC would provide a template for national authorities contemplating war crimes prosecutions. Over the long run, the

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<sup>81</sup> Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1 (1998), cited in Alvarez, *supra* note 4, at 375.

<sup>82</sup> Richard Goldstone, *The United Nations’ War Crimes Tribunals: An Assessment*, 12 CONN. J. INT’L L. 227, 238 (1997)

<sup>83</sup> Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT’L L. 2, 7 (1998)

<sup>84</sup> STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 22-23, 184 (2001); Cassese, *supra* note 81, at 8-10 (noting that in comparison to national courts, international courts “are less destabilizing to fragile governments, are less likely to cede to ‘short-term objectives of national politics.’”); Theodor Meron, *Is International Law Moving Towards Criminalization?*, 9 EUR. INT’L L. 18 (1998)

<sup>85</sup> U.N. SCOR, 55th Sess., 4161th mtg. at 3, U.N. Doc. S/PV.4161 (statement of Judge Claude Jorda); Cassese, *supra* note 83, at 9-10.

<sup>86</sup> U.N. SCOR, 54th Sess., 4063d mtg. at 7, U.N. Doc. S/PV.4063 (1999); Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT’L L.J. 237, 253 (1998) (observing that “rendering a human rights abuse an international crime serves . . . a symbolic [purpose], as a statement of international concern about the severity of the act”)

<sup>87</sup> Ruti Teitel, *Humanity’s Law: Rule of Law for the New Global Politics*, 35 CORNELL INT’L L.J. 355, 387 (2002) Geoffrey Robertson identifies in similar terms one of the greatest contributions of the Nuremberg judgment: “[The crimes committed by the Nazis] were not . . . crimes against Germans (which therefore only Germans should punish); they were crimes against humanity, because the very fact that a fellow human being could conceive and commit them diminishes every member of the human race.” ROBERTSON, *supra* note 12, at 220.

<sup>88</sup> U.N. SCOR, 47th Sess., 3119th mtg. at 11, U.N. Doc. S/PV.3119 (1992); *UN Rights Chief, ICRC Welcome ICC But Urge More Members*, AGENCE FRANCE PRESSE, Mar. 11, 2003 (citing both UN high commissioner for human rights and ICRC for proposition that ICC will deter war criminals); Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia?*, 20 HUM. RTS. Q. 737 (1999)

Court's rulings would be accepted by national communities and incorporated into domestic law.<sup>89</sup>

The aspirations of this centralized model of enforcement are universalist. The International Criminal Court is expected to advance a body of law that is applicable uniformly around the globe and is wholly independent from the context in which its subjects are situated.<sup>90</sup> To achieve the coherence and broad universality required by this conception of international law, the Court's judgments must take precedence over diverse local interpretations of humanitarian law and human rights principles. The top-down model views variation in interpretation and enforcement at the national level with skepticism. Decentralization is spurned because it is likely to lead to fragmentation and incoherence.<sup>91</sup>

On a closer look, however, top-down theories of international prosecutions seem to rest on a series of overstated claims. David Wippman has argued persuasively that the deterrent effect of international trials is at best minimal.<sup>92</sup> Jose Alvarez has pointed out that the impartiality and record-building function of international tribunals has often been exaggerated.<sup>93</sup>

Three more critiques of the centralized model are explored in the Sections below. The first is that international criminal tribunals often fail to deliver judgments that are tested and informed by diverse perspectives, particularly the perspectives of those most affected by the tribunals' decisions. The second is that the results of international prosecutions hardly foster the internalization of international norms and may in fact engender backlash by local communities. The third, related to the first two critiques, is

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<sup>89</sup> Investigations, prosecutions, and civil cases initiated at the national level (albeit in third countries) were undoubtedly influenced by the work of the ICTY and ICTR. *E.g.*, Marlise Simons, *Pinochet's Spanish Pursuer: Magistrate of Explosive Cases*, N.Y. TIMES, Oct. 19, 1998, at A1 (noting that the investigating judge who brought charges in Spain against Chilean dictator Augusto Pinochet was indebted to the work of the ICTY and ICTR)

<sup>90</sup> The universalist model is part of a larger movement toward the establishment of a global regime of the rule of law. As Ruti Teitel has observed, "More and more, a depoliticized legalist language of right and wrongs, duties and obligations, is supplanting the dominant political language based on state interests, deliberation, and consensus." Teitel, *supra* note 87, at 355, 372.

<sup>91</sup> *Cf.* Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267 (2001); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 105, 134 (1998)

<sup>92</sup> David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473 (1999); Wippman, *supra* note 5, at \* 9-18.

<sup>93</sup> Alvarez, *supra* note 5.

that international trials, far from the place where the crimes occurred, do little to promote post-conflict reconciliation and the rebuilding of the rule of law.

B. *The Problem with Insularity: Weaker Claims to a Legitimate Mandate of Interpreting the Law*

While international law scholars are happy to focus on the uniformity and universality of ICC decisions, those outside the international law community often have a different perspective. They are more likely to regard ICC judgments as one-sided or uninformed interpretations of complex issues at the intersection of local politics, morality, and law.

International criminal law is still full of gaps and ambiguities, and the ICC will inevitably have to make difficult policy and moral judgments when interpreting and applying the law.<sup>94</sup> The open-ended nature of many international criminal law principles raises serious questions about the way in which international norms should be debated and decided.<sup>95</sup> It is not clear that the ICC has a legitimate mandate to make these decisions on its own, without meaningful involvement of the states and populations most affected by the Court's decisions.

Consider several examples of potentially controversial determinations that the ICC judges will have to make:

[R]elative to the war crime of excessive incidental death, injury, or damage: are countries with the resources to use precision-guided munitions obliged to use those weapons, in order to minimize collateral damage, rather than using the much less expensive ordinary kinetic weapons? . . . Relative to the crime of genocide: what is the mens rea required for command responsibility for genocide? Where the commander knows of his subordinate's genocidal intent, but does not entertain that mens rea himself, does he have the necessary mens rea for a conviction for genocide?<sup>96</sup>

What constitutes proportionality and necessity in military action, a determination that is fundamental to deciding whether certain actions qualify as war crimes, is also

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<sup>94</sup> Madeline Morris, *The Democratic Dilemma of the International Criminal Court*, 5 *BUFF. CRIM. L. REV.* 591, 597-98 (2002)

<sup>95</sup> See Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 *COLUM. J. TRANSNAT'L L.* 73, 136 (1995)

<sup>96</sup> *Id.*

bound to entail policy judgments.<sup>97</sup> So are distinctions between military and civilian targets.<sup>98</sup> “Even elementary concepts such as accessory liability or duress cannot be divorced from the implicit construction of moral theories as to what constitutes blameworthy human conduct under extreme circumstances of mass violence. . . .”<sup>99</sup> Finally, sentencing determinations might also prove controversial, particularly when out of sync with national punishments.<sup>100</sup>

The Court will rarely find much support in statutory text for the many difficult decisions it will have to make.<sup>101</sup> The six official languages in which the Statute was written will further complicate textualist readings.<sup>102</sup> Nor will the judges have a solid base of precedent to guide them in their interpretation of the Statute. The jurisprudence on crimes against humanity, genocide, and war crimes is largely limited to the judgments of the Nuremberg and Tokyo tribunals and the ad hoc Tribunals for Rwanda and Yugoslavia. The difficulty that the ICC Preparatory Commission had in writing the Elements of Crimes (which are to serve as nonbinding interpretive guidelines to judges) is a reflection of the scarcity of authoritative sources and agreement on the content of international criminal law.<sup>103</sup>

Given the limited agreement on the content and scope of international criminal law, it is not surprising that the ICC’s mandate to interpret and enforce that law has already been contested. The challenge to the ICC’s legitimacy and authority has three dimensions. First, commentators have pointed out that few structural checks exist to ensure that the Court’s power is being used fairly and consistently.<sup>104</sup> Second, some

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<sup>97</sup> ICC Statute art. 8 (2) (b) (iv); ICC Elements of Crimes art. 8 (2) (b) (iii); Ruth Wedgwood, *The Irresolution of Rome*, LAW & CONTEMP. PROBS., Winter 2001, at 193, 194.

<sup>98</sup> Wedgwood, *supra* note 97, at 194.

<sup>99</sup> Akhavan, *supra* note 5, at \*9.

<sup>100</sup> See *infra* notes 131-134 and accompanying text.

<sup>101</sup> The Elements of Crimes, which were meant to provide more detailed guidance, are not binding on the judges. ICC Statute art. 9. The United States submitted a proposal that would have made them binding, but it was rejected. A/CONF.183/C.1/L.69 (14 July 1998), cited in Philippe Kirsch & Valerie Oosterveld, *The Post-Rome Preparatory Commission*, in THE ROME STATUTE, *supra* note 1, at 93, 97.

<sup>102</sup> ICC Statute art. 128 (stating that the Arabic, Chinese, English, French, Russian, and Spanish versions of the Statute are equally authentic)

<sup>103</sup> Kirsch & Oosterveld, *supra* note 101, at 98. (“The second obstacle was that such a document had never before been elaborated in international law. While some crimes had been examined by the Nuremberg, Tokyo, former Yugoslav, and Rwandan international criminal tribunals, many crimes had not. Even in those cases where crimes had been discussed, their elements were often unclear.”)

<sup>104</sup> U.S. policymakers and commentators have expressed concern over the wide scope of discretion that the ICC prosecutor enjoys under the Rome Statute. See Chris Lombardi, *Hot Seat*, 89 A.B.A. J. 16 (2003); Will, *supra* note 3. The prosecutor can open investigations on her own initiative, without any external oversight. The prosecutor’s actions are subject to review by

scholars have persuasively argued that the Court cannot base its legitimacy exclusively on state consent, because it can exercise its jurisdiction over nationals of states that are not parties to the ICC Treaty.<sup>105</sup> And third--the point on which I focus in this Section--the insularity of the Court from diverse local opinions puts in question the extent to which the Court's interpretations of international criminal law could be informed and legitimate.

When American commentators have charged the ICC with being unaccountable, they have usually focused on the lack of checks and balances in the Court's structure.<sup>106</sup> In particular, they have expressed concern about the lack of meaningful constraints on the prosecutor's powers.<sup>107</sup> The ICC prosecutor is said to have a wide scope of discretion because she can open investigations on her own initiative, without any external oversight. There are no guidelines that could limit *ex ante* prosecutorial screening and charging decisions.<sup>108</sup> Although the prosecutor's actions are subject to review by a three-judge panel of ICC judges, and to a lesser extent, to the Assembly of States Parties to the ICC,<sup>109</sup> the U.S. delegation to the Rome Conference argued that these constraints are not sufficient and that the consent of interested states should be required to authorize an investigation.

Although American critics have focused less on the scope of judicial discretion, it is easy to see how the argument about lack of accountability would extend to judicial actions. The point is not that judges should be directly responsible to an electorate, at the national or international level. Courts serve important countermajoritarian functions.<sup>110</sup> They derive their legitimacy to a great extent from principled and reasoned decision making and from their impartiality.<sup>111</sup> But perhaps in recognition of the tenuous nature of

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a three-judge ICC pre-Trial Chamber, which must find a reasonable basis for investigation. ICC Statute art. 15 (4) By contrast, during the drafting and negotiation of the ICC Treaty, some states, including the United States, suggested that the prosecutor should have the consent of interested states before proceeding with an investigation. 1995 Ad Hoc Committee Report, *supra* note 23, at para. 25.

<sup>105</sup> Morris, *supra* note 94.

<sup>106</sup> Cf. John Bolton, *Toward an International Criminal Court? A Debate*, 14 EMORY INT'L L. REV. 159, 164 (2000) (observing that the Court is "not part of any ordered structure of accountability")

<sup>107</sup> See, e.g., John Bolton, Under Secretary of State for Arms Control and International Security, The United States and the International Criminal Court, Remarks to the Federalist Society (Nov. 14, 2002), at <http://www.state.gov>.

<sup>108</sup> Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 510-11 (2003)

<sup>109</sup> *Id.* at 524-25 (2003) (noting that the Assembly of States Parties is unlikely to act as a strong check on the ICC Prosecutor and that judicial review, "while exerted at every level of prosecutorial decisionmaking, does not extend to judging the wisdom of prosecutorial actions")

<sup>110</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980)

<sup>111</sup> GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 312-13 (1997) [AU: add sources].

such legitimacy, at the national level, additional safeguards have been placed on judicial decision making. The system of checks and balances ensures that legislatures can rewrite a statute when they believe the judges interpreting the statute have overstepped their mandate.<sup>112</sup>

Yet no international legislature exists that could revise the ICC's interpretations of international criminal law when these interpretations are out of sync with statutory text, legislative intent, or majority preferences. The Assembly of State Parties, which does have the power to amend the ICC Statute and Elements of Crimes, is a poor substitute for a legislature.<sup>113</sup> The Assembly delegates are usually career civil servants in their respective country's executive branch and already several degrees removed from the popular will.<sup>114</sup> As other commentators have already observed, the Assembly is likely to be torn by internal disputes and ineffective as an oversight mechanism.<sup>115</sup> Moreover, because the Assembly will make decisions by a majority or super-majority vote, the preferences of one-third or more of the member states, including the states most affected by the Court's decisions, can be ignored in the final Assembly decisions.<sup>116</sup> Although we accept majority vote in domestic politics, at the international level, where decisionmaking is several degrees removed from the popular will, state consent is still considered by many to be essential to adequate representation.<sup>117</sup>

The ICC, however, cannot base its legitimacy exclusively on state consent. The Court has the power to exercise jurisdiction over nationals of states that are not parties to

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<sup>112</sup> Karen Alter makes much the same point in a recent paper. Karen Alter, *Delegation to International Courts: Four Varieties and Their Implications for State-Court Relations* 52 (unpublished manuscript, on file with author)

<sup>113</sup> Given the important check that the Assembly could provide, however, it is not surprising to see that the United States—the main proponent of greater accountability of the ICC—has been pushing for a greater role by the Assembly in the Court's decisionmaking structure.

<sup>114</sup> Cf. Robert A. Dahl, *A Democratic Dilemma: System Effectiveness Versus Citizen Participation*, 109 POL. SCI. Q. 23, 32 (1994) (observing the lack of democratic process in transnational structures where "decisions are made by unelected delegates appointed by national governments, many of which, and in some cases most of which, are not themselves dependent on elections"); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489, 491 (2001) (observing that intergovernmental organizations [IGOs] are seen as undemocratic because they are run "by an elite group of national officials who are instructed by their respective executives, and by international secretariats whose staffs at times act independently of the top IGO management")

<sup>115</sup> Danner, *supra* note 109, at 524; *see also* HAROLD K. JACOBSON, NETWORKS OF INTERDEPENDENCE 119 (1984) (observing that "representative bodies [of international institutions] often find it hard to frame coherent policies)

<sup>116</sup> This will not be as large a problem with respect to amendments of the substantive definitions of crimes, however, because such amendments will not be binding on the states that vote against them. ICC Statute art. 121 (4)

<sup>117</sup> Morris, *supra* note 94; Trimble, *supra* note. This is a problem inherent in international governance more generally: As the scale of government increases, the opportunities for citizen participation decrease. *See* Dahl, *supra* note 114, at 29-39. [Cite debates about the legitimacy of supranational governance among EU scholars].

the Rome Statute, as long as the state on whose territory the crime occurred consents. In Madeline Morris's terms, "[t]here is no democratic linkage between the ICC and those non-party nationals over whom it would exercise authority."<sup>118</sup>

Some scholars have even begun to question the sufficiency of state consent for legitimizing the actions of international institutions. Given the limited opportunities that an individual state or even a group of states have to sanction an international institution that acts outside its own mandate, national communities have no meaningful "voice" in the oversight of international institutions.<sup>119</sup> As a remedy to this problem, scholars have called for participation by national elected delegates in the governance of international institutions.<sup>120</sup> Some have even suggested holding national referenda on major issues facing an international organization.<sup>121</sup> While these suggestions are important in giving national constituencies a voice in the governance and lawmaking of international organizations, they would not apply to the adjudicative functions of institutions like the ICC.

As this Article argues, however, there are ways in which international adjudication can be anchored more closely to national democratic processes. First, the Court itself could exercise deference to local norms in its jurisprudence. Similar suggestions have been made in discussing ways to legitimize the World Trade Organization's judicial functions: "In the adjudication process, when facing a claim that national legislation restricts trade contrary to the Agreement, the panel should reject the claim of illegality . . . when 'the national measure reflects a deeply embedded value (which at times may be idiosyncratic)' and 'enjoy[s] the clear support of [that country's] population.'"<sup>122</sup> Conscious of its tenuous democratic link to national constituencies, the

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<sup>118</sup> Madeline Morris, *Lacking a Leviathan: The Quandaries of Peace and Accountability*, in POST-CONFLICT JUSTICE, *supra* note at 135, 138. *But see* Michael Scharf, *The ICC's Jurisdiction over Nationals of Non-Party States*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 213 (Sarah B. Sewall & Carl Kaysen eds., 2000) (arguing that the ICC's jurisdiction over nationals of non-party states is well grounded in international law)

<sup>119</sup> *But see* Danner, *supra* note 109, at 524 (positing a model of "pragmatic accountability" of the ICC Prosecutor, where states can exercise oversight over the Prosecutor through their choices whether or not to cooperate with her)

<sup>120</sup> Stein, *supra* note 114, at 532.

<sup>121</sup> *Id.*

<sup>122</sup> Jefferey Atik, *Identifying Antidemocratic Outcomes: Authenticity, Self-Sacrifice and International Trade*, 19 U. PA. J. INT'L ECON. L. 229, 234, 261 (1998), *cited in* Stein, *supra* note, at.505.

European Court of Human Rights also grants national authorities a “margin of appreciation” when evaluating the legality of their practices.<sup>123</sup>

An even more direct way of ensuring the accountability and legitimacy of the International Criminal Court is the mixed-court model advocated in this Article. The ICC-as-mixed-court would engage national judges and prosecutors, alongside their ICC counterparts, in the development and enforcement of international criminal law. Because these officials are more likely to be attuned to the interests and preferences of local populations, their involvement will be an important step in increasing the local legitimacy of the Court. As the next Section elaborates, holding mixed-court proceedings on the territory where the crimes were committed would be another way to connect the Court’s operations to domestic political processes. (Even as it involves local officials and holds its proceedings “on the ground,” the Court could maintain the necessary degree of impartiality and international legitimacy through its continued reliance on a corps of international investigators, prosecutors, and judges.)

The mixed-court model is more legitimate in yet another sense—it encourages deliberation among diverse participants and thus is more likely to produce informed decisions. As deliberative democratic theorists have argued, the airing of conflicting opinions is essential to correct judgments, in both politics and law.<sup>124</sup> Deliberation among diverse participants offers “the conditions whereby actors can widen their own limited and fallible perspectives by drawing on each other’s knowledge, experience and capabilities.”<sup>125</sup> On this account, truth and legitimacy are discovered in the interaction and communication among individuals of diverse backgrounds and experiences.

The current ICC structure does not promote this deliberative democratic ideal. The Court is located in The Hague, far from the places where most of the conflicts it adjudicates are likely to occur. It has a limited number of judges, and the judges’ relatively uniform training and outlook on international law narrows the range of

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<sup>123</sup> See *infra* note 177 and accompanying text.

<sup>124</sup> JOHN STUART MILL, ON LIBERTY 58 (1859) (“Truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites that very few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners.”); JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 50-68 (Thomas McCarthy trans., 1979) (arguing that deliberation is a means for discovering the truth); Hilary Putnam, *A Reconsideration of Deweyan Democracy*, 63 S. CAL. L. REV. 1671 (1990)

<sup>125</sup> Graham Smith & Corinne Wales, *Citizens’ Juries and Deliberative Democracy*, 48 POL. STUD. 51, 53-54 (2000); see also Iontcheva, *supra* note 4, 89 VA. L. REV. 311, 339-343 (2003)

opinions likely to be represented at the Court.<sup>126</sup> The judges' likely lack of appreciation for the diversity of opinions about the content of international criminal law might compromise the legitimacy of the Court's verdicts.

Applying the insights of deliberative democrats, we may want to diversify the personnel of the ICC and involve judges and prosecutors from the communities most affected by the decisions of the ICC.<sup>127</sup> These individuals are particularly likely to enrich the discourse about international criminal law by bringing to bear their unique experiences of living and working in a post-conflict society. The benefits of democratic deliberation may also accrue in interactions among institutions—for example, in an ongoing dialogue among national and international courts, or among mixed courts and an overarching international criminal appeals chamber.<sup>128</sup> Whereas a sole international criminal tribunal would tend to reinforce the already existing consensus among international lawyers, multiple venues for the pursuit of international criminal justice, at the national and international level, may encourage a more constructive debate among conflicting perspectives.<sup>129</sup> Arguments about subsidiarity in the European Union and federalism in the United States, which emphasize the importance of “laboratories of experimentation” in developing and enforcing the law, echo the same insights.<sup>130</sup>

The status of the death penalty in international criminal law provides a good illustration of the importance of deliberation among diverse participants. An overwhelming majority of international lawyers agrees that the death penalty should not be available in international tribunals.<sup>131</sup> This view prevailed during the Rome

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<sup>126</sup> Although more than half of the eighteen judges are supposed to be specialists in criminal, rather than international law, fifteen of the current eighteen judges have extensive training and practice in international law. Only a few of the judges come from countries that have recently gone through a period of massive human rights abuses.

<sup>127</sup> The Court could also involve lay participants as jurors. Contrary to conventional wisdom, both common law and civil law systems around the world use jurors in their proceedings, often alongside professional judges in mixed-court proceedings. Because such a reform would require a radical reconsideration and rewriting of the ICC Statute, however, it is not considered at length here.

<sup>128</sup> Anne-Marie Slaughter, *Judicial Globalization* [AU][on transnational judicial dialogue].

<sup>129</sup> Cf. Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697, 700 (arguing that the multiplicity of international tribunals promotes “experimentation and exploration, which can lead to improvements in international law”)

<sup>130</sup> E.g., Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38 (2003); Eva Brems, *The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 240 (1996) [AU] [add sources on federalism].

<sup>131</sup> Cf. William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 799 (1998); Geoffrey Robertson expresses a widely shared sentiment when he argues that “[t]he most notable achievement of the penalty provisions [in the ICC Statute] is to eschew the death sentence.” ROBERTSON, *supra* note 12, at 361.

negotiations, despite the opposition by countries that maintain the death penalty for ordinary crimes.<sup>132</sup> Outside the narrow circle of international lawyers, however, many jurists and non-legal scholars continue to find reasonable grounds on which to support the death penalty.<sup>133</sup> And in many states across the world (including some of those who have abolished capital punishment), a majority of people supports the death penalty, even for ordinary crimes. As the insistence of many Rwandans on the death penalty for genocidaires indicates, this number is likely to be greater when it comes to crimes such as genocide and crimes against humanity.<sup>134</sup> It is not difficult to see how it would be reasonable, on proportionality and retributive grounds, to demand the death penalty for a Hitler or a Pol Pot, particularly when common murderers continue to be executed in many countries around the world. After all, the same European states that now protest the imposition of the death penalty did not think twice about hanging the Nazi criminals convicted at Nuremberg. (The British government did not even want to bother with trials, but favored just shooting the Nazis) At the International Criminal Court, however, such debates about the death penalty have been foreclosed because of the solid consensus among international judges on the issue.

### C. *The Problem with Distant Prosecutions: Domestic Resistance*

The Court's distance from the communities affected by international crimes is also likely to impair its political acceptability within those communities. Evidence from other human rights regimes suggests that if the Court attempts to impose its mandates in a heavy top-down fashion and is not attuned to local political processes and preferences, it may provoke resistance and even a counter-reaction to international norms and practices.

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<sup>132</sup> See Discussion Turns to Range and Definition of Penalties in Draft Statute in Preparatory Committee on International Criminal Court, at 1, U.N. Press Release L/2805 (Aug. 22, 1996) (noting that some delegates from states with a predominantly Muslim population argued that "if the statute [were] to be considered representative of all systems . . . , it should include the death penalty") A major reason for excluding the death penalty was a strong insistence for that exclusion by the European states, which have constitutional provisions prohibiting them from extraditing a suspect if he or she might face the death penalty in the country making the extradition request. Kirsch & Robinson, *supra* note 29, at 86.

<sup>133</sup> *Barclay v. Florida*, 463 U.S. 939, 948-51 (1983); *Spaziano v. Florida*, 468 U.S. 447, 468-69 (1984) (Stevens, J., concurring in part and dissenting in part); *Callins v. Collins* (1994) (Scalia, J., concurring); *Ring v. Arizona*, 122 S. Ct. 2428 (2002); GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 355 (1995); Walter Berns, *The Morality of Anger*, in PUNISHMENT AND THE DEATH PENALTY: THE CURRENT DEBATE (Stuart E. Rosenbaum & Robert M. Baird eds. 1995); Christie Davis, *Safely Executed*, in *id.*; Ernest van den Haag, *On Deterrence and the Death Penalty*, in *id.*

<sup>134</sup> PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES* 131, 245-46 (1998); James C. McKinley, Jr., *Ex-Rwandan Premier Gets Life in Prison on Charges of Genocide in '94 Massacres*, N.Y. TIMES, Sept. 5, 1998, at A4.

The history of the ad hoc tribunals reveals that the remoteness of international tribunals damages their legitimacy and effectiveness with local populations. In the former Yugoslavia, the ICTY has been perceived as a distant and often biased<sup>135</sup> tribunal with little relevance to the reconciliation process in the countries of the region.<sup>136</sup> Serbs, Croats, and Bosnians have learned about the Tribunal from piecemeal headline reports from the Hague and are thus “out of touch with the court’s day-to-day proceedings.”<sup>137</sup> Even legal professionals admit they do not understand the ICTY procedures, because of the distance of the Tribunal and because of its unique blend of civil and common law procedures.<sup>138</sup>

Given the limited access that local populations have to the Hague-based Tribunal, it is not surprising to find that the Tribunal’s image in the former Yugoslavia is less than perfect. “Most Croats and Serbs view[] the Tribunal as utterly biased against their communities, and as more than willing to turn a blind eye to atrocities committed by Bosniaks [sic].”<sup>139</sup> Indicted Serbs and Croats have been hailed as heroes by some in their home countries,<sup>140</sup> while support for cooperation with the ICTY remains minimal.<sup>141</sup> At the same time, “large parts of the Bosniak community [are] disappointed by the Tribunal” and see it “as a cynical gesture to salve the guilty conscience of the West.”<sup>142</sup>

The International Criminal Tribunal for Rwanda has also been critiqued for its remoteness from the place where the crimes that it judges took place.<sup>143</sup> Hearing about the

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<sup>135</sup> Justin Brown, *World, Facing Up to Atrocities?*, CHRISTIAN SCI. MONITOR, Feb. 16, 1999, at 6; INTERNATIONAL HUMAN RIGHTS LAW CLINIC, UNIVERSITY OF CALIFORNIA, BERKELEY, JUSTICE, ACCOUNTABILITY AND SOCIAL RECONSTRUCTION 29-33 (2000) (citing interviews with Bosnian Serb and Croat judges who accused the ICTY of lacking independence and impartiality) [hereinafter JUSTICE, ACCOUNTABILITY].

<sup>136</sup> Ivana Nizich, *International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 ILSA J. INT’L COMP. L. 353, 355 (2001) Perhaps in recognition of the need to engage local judiciaries to a greater extent, the ICTY recently adopted Rule 11bis, which permits the referral of a case under indictment to the authorities of a state of which the accused is a national or where the crime was committed. ICTY R. PROC. & EVID., R. 11bis (a), available at <http://www.un.org/icty/legaldoc/index.htm>.

<sup>137</sup> INTERNATIONAL CRISIS GROUP, WAR CRIMINALS IN BOSNIA’S REPUBLIKA SRPSKA 75 (2000)

<sup>138</sup> JUSTICE, ACCOUNTABILITY, *supra* note 135, at 34.

<sup>139</sup> Sandra Coliver, *The Contribution of the International Criminal Tribunal for the Former Yugoslavia to Reconciliation in Bosnia and Herzegovina*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS 19, 20 (2000), cited in Wippman, *supra* note 5, at \*19.

<sup>140</sup> Peter S. Green, *A Fugitive Croatia General Is a Hometown Favorite*, N.Y. TIMES, June 5, 2003.

<sup>141</sup> Steven Erlanger, *Did Serbia’s Leader Do the West’s Bidding Too Well?*, N.Y. TIMES, Mar. 16, 2003 (reporting that only 12 % of Serbs support extraditions of Serb suspects to the Hague)

<sup>142</sup> Coliver, *supra* note 139, at 21.

<sup>143</sup> Kingsley Chiedu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26-FALL FLETCHER F. WORLD AFF. 21, 29 (2002); Remy Ourdan, *Un tribunal loin de Rwanda*, LE MONDE, Apr. 4, 1998 (reporting that few Rwandans follow the ICTR’s work)

ICTR from sparse radio broadcasts, most Rwandans view the ICTR as an “inherently foreign” institution that has “forfeited any impact on Rwandan society.”<sup>144</sup>

Local governments and communities have also complained about the discrepancies between their needs and concerns and the international tribunals’ priorities. Both Rwandans and Bosnians have expressed disappointment with the slow pace of the tribunals’ work.<sup>145</sup> Some Rwandans have also complained about the extraordinary (by Rwandan standards) procedural protections afforded to defendants.<sup>146</sup> Most controversially, many Rwandans, including government officials, have expressed frustration with the work of the ICTR, because the tribunal does not apply the death penalty to the high-level officials it convicts of genocide, even as many lower-level executioners of the genocide get the death penalty in Rwandan courts.<sup>147</sup> As one Rwandan official wryly observed, “it doesn’t fit our definition of justice to think of the authors of the Rwandan genocide sitting in a full service Swedish prison with a television.”<sup>148</sup>

The Tribunal has also been criticized for failing to treat victims with sufficient respect. This latter disagreement became so serious that Rwandan victims’ rights organizations began urging Rwandans not to testify before or cooperate with the Court.<sup>149</sup> The recent removal of Carla del Ponte from her position as chief prosecutor of the Rwandan tribunal was also spurred on by the Rwandan government’s dissatisfaction with the ICTR’s policies.<sup>150</sup>

Recent evidence of states’ withdrawal from a regional human rights regime also suggests that when an international tribunal attempts to dictate the law from above, while disregarding local preferences and enforcement capabilities, it is unlikely to be successful

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<sup>144</sup> INTERNATIONAL CRISIS GROUP, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: JUSTICE DELAYED 24 (2001)

<sup>145</sup> Remy Ourdan, *La laborieuse invention d’une justice internationale*, LE MONDE, June 18, 1998 (noting victims’ disappointment with the slow pace of ICTR proceedings) Rwanda’s representative to the UN General Assembly pointed out in 1999 that while the ICTR had only indicted 48 individuals and tried and sentenced only four of them, Rwandan courts have issued more than 20,000 indictments, held 1989 trials, and accepted 17,847 guilty pleas. David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT’L L.J. 473, 482 (1999) (citing statement of Joseph Mutaboba)

<sup>146</sup> Remy Ourdan, *supra* note 145.

<sup>147</sup> GOUREVITCH, *supra* note 134, at 245-46; McKinley, Jr., *supra* note 134, at A4; Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT’L L. 349, 371 (1997)

<sup>148</sup> GOUREVITCH, *supra* note 134, at 255, *cited in* Wippman, *supra* note 5, at \*14.

<sup>149</sup> Stephen Smith, *En jugeant le diable, le tribunal d’Arusha joue sa credibilite*, LE MONDE, Apr. 4, 2002 (noting that Ibuka, a Rwandan victims’ organization, no longer cooperates with the ICTR because it believes that the ICTR does not do enough to protect testifying victims)

<sup>150</sup> Felicity Barringer, *Annan Is Said To Want New Prosecutor for Rwanda War Crimes*, N.Y. TIMES, July 29, 2003, A11.

over the long run. In the late 1990s, three Caribbean states—Guyana, Trinidad and Tobago, and Jamaica, withdrew from several international human rights treaties, largely as a result of an overly demanding interpretation of the Caribbean states’ human rights obligations by the region’s highest appellate court, the Privy Council (located in London)<sup>151</sup> After the Privy Council broadly interpreted the meaning of the international prohibition on “degrading or inhuman treatment or punishment,” all Caribbean states found themselves saddled with new obligations in imposing the death penalty. Because they did not have the resources to fulfill their newly imposed duties, the affected countries could take one of three courses: stop imposing capital punishment, flout their international human rights obligations, or outright denounce those obligations. Guyana, Trinidad and Tobago, and Jamaica (the three states with the highest number of capital cases and the greatest resource problem) chose the third option and withdrew from the relevant international human rights treaties.<sup>152</sup>

The Caribbean countries’ treaty denunciations demonstrate how an international court can provoke resistance to its mandates when it attempts to change by judicial fiat the treaty obligations of a state within its jurisdiction.<sup>153</sup> Particularly where the new obligations conflict with deeply held social norms (in the case of the Caribbean countries, in favor of capital punishment), international tribunals that proceed too fast and over strong objections by local constituencies are likely to see their authority challenged.<sup>154</sup>

#### D. *The Problem with Local Non-Involvement: Inability to Achieve Reconciliation and Rebuild the Rule of Law*

Remote international prosecutions may also be less adept at promoting national self-reckoning and reconciliation in the aftermath of a violent conflict. To achieve the cathartic and reconciliation benefits of war crimes trials, nations must themselves take on war crimes trials.<sup>155</sup> The exercise of jurisdiction over war crimes allows a country to come

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<sup>151</sup> Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002)

<sup>152</sup> *Id.*

<sup>153</sup> The Court may do that by “adding new obligations, specifying existing obligations with greater particularity, or strengthening mechanisms for review and enforcement.” *Id.* at 1855.

<sup>154</sup> As Dan Kahan has argued in the domestic context, “If the law condemns too severely—if it tries to break the grip of the contested norm (and the will of its supporters) with a ‘hard shove’—it will likely prove a dead letter and could even backfire.” Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 609 (2000)

<sup>155</sup> Alvarez, *supra* note 5.

to terms with its past and to demonstrate the power of the judicial system to “domesticate chaos.”<sup>156</sup> The assertion of jurisdiction is an indispensable part of a community’s healing process.<sup>157</sup> Because local trials are more extensively covered in the media and easier to attend and follow by the local population, they are more likely to stimulate public discussion and to “foster the liberal virtues of tolerations, moderation, and civil respect.”<sup>158</sup> For all these reasons, such trials are essential to the rebuilding of a system based on the rule of law.

Commentaries in the media in countries dealing with post-conflict justice confirm the links between local trials, public debate, reconciliation, and societal “healing.” When South Korea tried its own dictators Chun Doo Hwan and Roh Tae Woo on charges of mutiny and treason for staging a coup and murdering about 200 student protesters, South Koreans followed the proceedings closely. One journalist reports that “[t]he trial has been viewed by many South Koreans less as a hearing on the specific crimes committed more than a decade ago by aging military leaders than as a pivotal step toward the establishment of the rule of law by a country trying to cleanse itself of its brutal and corrupt past.”<sup>159</sup> Similarly, recent trials in France of Klaus Barbie and Paul Touvier, officials in the Vichy government during World War II, provided “psychotherapy on a nationwide scale”<sup>160</sup> and became “the vehicle for debate on the legitimacy and activities of the Vichy regime.”<sup>161</sup> In Argentina, during the trials of military officials for murders and “disappearances” of leftist activists in the 1970s, “all the media gave ample coverage to an event that was discussed in squares and cafes, by poor and rich alike. Through this discussion, a public space was appropriated, a voice rediscovered . . . . It seemed as though common people would be able at last to come to terms with their own experiences

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<sup>156</sup> Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 432-33 (2002); see also Bill Keller, *Digging Up the Dead*, N.Y. TIMES, May 3, 2003 (arguing that trying some war criminals on their own would let Iraqis “reclaim a measure of national honor”)

<sup>157</sup> Berman, *supra* note 156, at 433 (noting that the Barbie trial had that effect on France); MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* (1997) (describing war crimes trials as constructing the “collective memories that may help cleanse both victims and perpetrators, indeed whole nations, of their brutal past”)

<sup>158</sup> OSIEL, *supra* note 157, at 2.

<sup>159</sup> *Id.* at 6.

<sup>160</sup> HENRY ROUSSO, *THE VICHY SYNDROME: HISTORY AND MEMORY IN FRANCE SINCE 1944*, at 210 (Arthur Goldhammer trans., 1991) (quoting French historian Emmanuel Le Roy Ladurie), *cited in* OSIEL, *supra* note 157, at 14.

<sup>161</sup> Leila S. Wexler, *Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France*, 20 LAW AND SOC. INQUIRY 191, 191 (1995), *cited in* OSIEL, *supra* note 157, at 14.

of fear, silence, and death.”<sup>162</sup> Finally, the Eichmann trial in Israel “compelled an entire nation to undergo a process of self-reckoning and overwhelmed it with a painful search for its identity.”<sup>163</sup>

When an international tribunal takes away from states the opportunity to face the past through criminal trials, it impedes their progress toward reconciliation and reconstruction of a society built on the rule of law. Consider the record of the ad hoc international criminal courts. Unlike the trials in France, Argentina, Israel, and South Korea, ICTR and ICTY trials were not as widely covered in the local media nor as closely followed by the affected local populations. Nor have the ICTY and ICTR aided local judiciaries to undertake war crimes prosecutions and to lead the country on the road to reconciliation and a rule of law society.

For a long time, the ICTY all but ignored national judiciaries in the former Yugoslavia, deeming them biased and thus unfit to hold trials consistent with international standards of due process. Even as the Court developed the Outreach Program, designed to raise publicity in the region about its own work, it made no systematic attempt to impart its legal and technical expertise on local judges or to engage these judges in cooperative proceedings.<sup>164</sup> As one former ICTY official bemoaned, while the international community has spent millions of dollars on the Tribunal in The Hague, it has put surprisingly little effort and money into legal reform in the former Yugoslavia.<sup>165</sup> Bosnian judges themselves have expressed frustration at their marginalization in this process<sup>166</sup>. Unsurprisingly, the “tribunal’s long-term impact on the systems of justice in the area of conflict has been minimal.”<sup>167</sup> As a result, “there is virtually no effective

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<sup>162</sup> Carina Perelli, *Memoria de Sangre: Fear, Hope, and Disenchantment in Argentina*, in REMAPPING MEMORY 39, 49-50 (Jonathan Boyarin ed., 1994), cited in OSIEL, *supra* note 157, at 14-15. While Carlos Menem eventually pardoned the military officers who had been convicted by Argentinean courts under his predecessor, Raul Alfonsin, this act does not negate the importance of national trials. A testament to the awareness-raising potential of this process are the most recent elections in Argentina, in which Nestor Kirchner came to power partly thanks to his promise to reopen trials for crimes committed during the dirty war. Larry Rohter, *Now the Dirtiest of Wars Won’t Be Forgotten*, N.Y. TIMES, June 18, 2003, A4.

<sup>163</sup> Haim Gouri, *Facing the Glass Booth*, in HOLOCAUST REMEMBRANCE: THE SHAPES OF MEMORY 153, 155 (Geoffrey H. Hartman ed., 1994); see also TOM SEGEV, *THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST* 351 (1993) (observing that “the trial served as a sort of national group therapy.”)

<sup>164</sup> David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26-FALL FLETCHER F. WORLD AFF. 7, 14 (2002)

<sup>165</sup> *Id.* at 8, 12.

<sup>166</sup> JUSTICE, ACCOUNTABILITY, *supra* note 135, at 36-39 (documenting complaints by Bosnian officials that they were treated with disrespect by ICTY officials and that they did not have open channels of communication with the ICTY)

<sup>167</sup> *Id.* at 8.

enforcement of these important laws in the courts that ultimately matter most, i.e., the region's domestic courts."<sup>168</sup>

And the ICTR, by trying all high-level officials, but leaving the hundreds of thousands of "small fish" to Rwandan tribunals, has helped reinforce perceptions of inadequacy of the Rwandan justice system. Had the ICTR left one or more high-stakes trials to national courts, it could have helped both reconciliation and the affirmation of the rule of law in Rwanda. As Jose Alvarez observes, "[a] local trial for Bagasora [a colonel indicted on genocide charges by the ICTR], even one subject to extensive international observation or even the possibility of appeal to the ICTR, would have affirmed to the world, and most importantly to all Rwandans, that Rwanda's institutions, including its judiciary, were capable of rendering justice even with respect to formerly exalted public officials."<sup>169</sup>

For all the reasons discussed in this Section—the lack of diversity on the ICC, the Court's remoteness from the place where the crime was committed, and its minimal impact on reconciliation—the real success of international criminal law will come when domestic legal systems begin enforcing human rights principles more consistently. As Jonathan Charney has argued, "[t]he test of that success is not a large docket of cases before the ICC, but persistent and comprehensive domestic criminal proceedings worldwide, facilitated by progress in a variety of contexts toward discouraging international crimes and avoiding impunity."<sup>170</sup>

### III. THE ICC AS AN AID TO LOCAL JUSTICE

If international criminal law is best enforced in a decentralized fashion, what is left for the ICC to do? Contrary to what many conservatives and political realists might argue, the ICC need not fold up its operations. As this Part argues, the Court can and should play an important role in encouraging and assisting national courts in enforcing human rights and humanitarian law. By collaborating with national courts in war crimes prosecutions, the Court could have a less dominant, but more enduring effect on the implementation of international criminal law.

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<sup>168</sup> *Id.*

<sup>169</sup> Alvarez, *supra* note 5, at 402.

<sup>170</sup> Jonathan Charney, *International Criminal Law and the Role of Domestic Courts*, 95 AM. J. INT'L L. 120, 123 (2001)

### A. *The Case for Engaging National Authorities*

Even if centralization has many problems, eliminating the ICC altogether is not a better alternative. Advocates of the International Criminal Court have repeatedly pointed out the failure of various national governments to fulfill their responsibilities to prosecute international crimes.<sup>171</sup> From the Congo, to Cambodia, to Uruguay, a number of national authorities have been either unwilling or unable to try alleged war criminals. Victims have remained without recourse to justice, the rule of law in those countries has suffered, and international criminal law has remained a dead letter.

The ICC does have the potential to make a difference in the enforcement of international criminal law in those countries. It can do so not so much by issuing progressive opinions from the bench in The Hague, but rather by prodding and assisting national authorities to fulfill their duty to prosecute international crimes. This role for the ICC may be less visible internationally, and its influence may be felt more slowly. Its effect on domestic constituencies around the globe, however, will be more enduring.

Evidence from other international courts suggests that this incrementalist approach of working with national authorities and national elites is indeed effective. Two of the more successful supranational courts, the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR), have worked closely with domestic actors—courts, agencies, organizations, and private citizens—to ground their legal authority. Observers of the European Court of Justice have emphasized the extent to which the ECJ has relied on national courts to reinforce and even expand its jurisdiction.<sup>172</sup> The court achieved enforcement of its mandates “by ‘shaming’ and ‘coopting’ domestic law-makers, judges and citizens, who then pressure[d] governments for compliance.”<sup>173</sup> Because most cases that came to the ECJ were referred to it by national courts, the European Court

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<sup>171</sup> Richard H. Stanley, *Establishing an International Criminal Court and the Pursuit of Justice*, in REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS 207, 208 (Christopher C. Joyner & M. Cherif Bassiouni eds. 1998); Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1 (1998); Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT’L L.J. 665, 710 (1996)

<sup>172</sup> Andrew Moravcsik, *Explaining International Human Rights Regimes: Liberal Theory and Western Europe*, 1 EUR. J. INT’L REL. 157, 179-80 (1995) It is worth noting that the ECJ was particularly interested in establishing close relations with national courts, because it depended on those courts to refer cases to it. Anne-Marie Slaughter & Laurence R. Helfer, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 291 (1997)

<sup>173</sup> Moravcsik, *supra* note 172, at 158.

engaged in a conscious effort to win the “cooperation and goodwill of the state courts”;<sup>174</sup> in its extensive publicity and education campaigns, the court invited state judges to seminars, dinners, and regular visits to the ECJ’s chambers in Luxembourg.<sup>175</sup>

Unlike the ECJ, which depended largely on national courts for its caseload, the ECHR could receive petitions from individual litigants, and that is where most of its cases have come from. As a result, the ECHR has had to strike a delicate balance between appealing directly to individuals and organizations that represent their interests, and, at the same time, developing strong ties to state authorities, which would ultimately be responsible for implementing the court’s decisions.<sup>176</sup> To address the latter concern, early in its operation, the ECHR developed the doctrine of margin of appreciation, which gives states some leeway in interpreting and applying the European Convention on Human Rights.<sup>177</sup> The court recognized that “a government’s discharge of [its] responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest”<sup>178</sup> and expressed respect for the space that the government needs to make these difficult policy determinations. In deciding how wide a margin to afford to a government, the ECHR has looked to the degree of consensus among the national laws of signatory states with respect to the challenged policy.<sup>179</sup>

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<sup>174</sup> G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595, 605 (1989), cited in Slaughter & Helfer, *supra* note 111, at 302.

<sup>175</sup> HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE 247 (1986), cited in Slaughter & Helfer, *supra* note 172, at 302.

<sup>176</sup> Slaughter & Helfer, *supra* note 111.

<sup>177</sup> *Lawless v. Ireland*, 1 Eur. Ct. H.R. (ser. B) at 408 (1960-1961) In that respect, the ECHR is building on the tradition of the Catholic Church in medieval Europe, which spread the universal moral and legal principles of the canon law, while at the same time accommodating differences in local laws and customs. Despite its claims to universality, the Church recognized the existence and validity of a plurality of legal regimes within Europe and limited its jurisdiction accordingly, to a select group of persons and subject matters. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 225 (1983) In addition, the canon law substantively accommodated secular law and custom. For example, canonists relied on “the pious custom” of the land to resolve interpretive ambiguities in some areas of the canon law. RICHARD H. HELMHOLZ, *THE IUS COMMUNE IN ENGLAND* 53 (2001) A notable example is the development of the law of sanctuary, with respect to which the church “did not seek to impose entire uniformity of practice in the law of sanctuary on local churches” and instead allowed “bishops to accept local customs and limitations.” *Id.* at 56-57.

<sup>178</sup> *Lawless*, 1 Eur. Ct. H.R. at 408.

<sup>179</sup> Slaughter & Helfer, *supra* note 111, at 316-317; *X v. United Kingdom*, No. 75/1995/581/667, slip op. at 13 (Eur. Ct. H.R. Apr. 22, 1997) (“The Court observes that there is no common European standard with regard to the granting of parental rights to transsexuals. . . . Since the issues in the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, the respondent State must be afforded a wide margin of appreciation.); *Otto-Preminger Inst. v. Austria*, 295-A Eur. Ct. H.R. (ser. A) at 19 (1994) (finding that the lack of a uniform European conception of rights to freedom of expression “directed against religious feelings of others” dictates a wider margin of appreciation) Some commentators have pointed to the danger that the doctrine might be applied too broadly and obliterate any meaningful supranational judicial review of suspect national practices. See, e.g., Oren Gross, “Once More Unto the Breach”: *The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT’L L. 437, 497 (1998) (“The practice of the Court and the

As the examples of the European Courts suggest, enforcing international law through national institutions is likely to be more lasting. A burgeoning literature on transgovernmental networks also emphasizes the potential of implementing international law by forming transnational coalitions to assist local elites and institutions in that task.<sup>180</sup> The price for this effectiveness, however, is that it takes a longer time. As Anne-Marie Slaughter and Laurence Helfer observe, “finding and recruiting domestic institutions as partners is likely to be a slow and sticky process.”<sup>181</sup> Patience may be too much to ask when violations of fundamental human rights remain unpunished. On the other hand, rushing the process may only undermine progress toward better human rights enforcement, as the evidence from the Caribbean states suggests.<sup>182</sup> In the end, international law’s best hope may be a gradual but broad diffusion of its norms through national governments and elites.<sup>183</sup>

The ICC will therefore mark its greatest achievement when it captures the minds of local judges, prosecutors, and investigators who will work on the ground to promote international human rights and humanitarian law. More recently, the International Tribunal for the former Yugoslavia has itself begun rethinking its isolation from its national counterparts in Yugoslavia. Last year, its former President Judge Jorda indicated an interest in referring some cases from the ICTY to local courts, observing that: “It is essential to work with the existing organs and judicial institutions—if only by assisting them—since they constitute essential reference points for all citizens . . . justice must be

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Commission demonstrates the pernicious use of the doctrine to avoid conducting an independent examination of the evidence and the tendency to succumb to the position of the relevant national government.”) Despite these dangers of overbroad application, the doctrine remains valuable as a pragmatic tool for enforcing international law and promoting dialogue between international tribunals and national communities on sensitive political and legal issues. See, e.g., Paul Mahoney, *Marvelous Richness of Diversity or Invidious Cultural Relativism?*, 19 HUM. RTS. L.J. 1 (1998)

<sup>180</sup> Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1 (2002); Anne-Marie Slaughter, *Governing the Global Economy Through Government Networks*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 204 (Michael Byers ed., 2000) [hereinafter Slaughter, *Governing*]; Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.—Oct. 1997, at 183 [hereinafter Slaughter, *The Real New World Order*].

<sup>181</sup> Slaughter & Helfer, *supra* note 111, at 335; see also Moravcsik, *supra* note, at 159 (“The most effective elements of European human rights system are thus also the subtlest. This delicate process of legal harmonization proceeds slowly.”)

<sup>182</sup> See *supra* notes 151-153 and accompanying text.

<sup>183</sup> Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 WORLD POL. 39 (1974); Slaughter, *Governing*, *supra* note 180; Slaughter, *The Real New World Order*, *supra* note 180.

brought steadily closer to the people.”<sup>184</sup> Judge Jorda is one of the judges appointed to the ICC—one can hope that he will bring this insight along with him to the new court.

B. *Where States Are Willing but Unable To Prosecute: The ICC as a Supporting Institution for National Courts*

How can the ICC engage national authorities in the enforcement of international criminal law? This Section highlights several possibilities for fruitful interaction between the ICC and national actors. Under the current admissibility structure, the ICC can take up a case where it determines that a national judicial system has substantially collapsed. The question in such instances is purely one of capacity and not of willingness to prosecute. So, if there are significant benefits to local prosecutions, as Part II has argued, then the ICC should work to rebuild the capacities of the ailing national judicial system. In cases where the local government is simply unable to prosecute war crimes by itself, the ICC should not take cases to The Hague, but instead work with the government to enforce international criminal law locally.

1. Assisting Local Investigations and Prosecutions

War crimes prosecutions usually take place after an extremely divisive and disruptive conflict. As a result, many national judicial systems lack the wherewithal to conduct adequate proceedings. With outside help, however, countries in transition could regain the capacity to prosecute war crimes fairly and effectively. Practitioners in countries in transition have suggested that the ICC could help greatly in these situations by providing logistical support and sharing its expertise.<sup>185</sup>

At the most basic level, the Court could help by training local judges, investigators, and prosecutors. It could also offer to share its expertise in matters ranging from investigation techniques to international law research to victim protection issues.<sup>186</sup> It would be well beyond the Court’s mandate to provide basic material resources that state judiciaries might lack, but the collaboration of ICC officials with local authorities is

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<sup>184</sup> ICTY Press Release JDH/P.I.S./690-e, Address by His Excellency, Judge Claude Jorda, President of the ICTY, to the United Nations Security Council (July 26, 2002), available at <http://www.un.org/icty/latest/index.htm>; see also Mark A. Drumbl, *Looking Up, Down and Across: The ICTY’s Place in the International Legal Order*, 37 NEW ENGL. L. REV. 701, 706 (2003)

<sup>185</sup> Brian Concannon, Jr., *Beyond Complementarity: The International Criminal Court and National Prosecutions, A View From Haiti*, 32 COLUM. HUM. RTS. L. REV. 201 (2002); Tolbert, *supra* note 164;

<sup>186</sup> Concannon, Jr., *supra* note 185, at 240-44; Tolbert, *supra* note 164, at 16.

likely to raise awareness of these needs among international donors. And by offering its resources and expertise during joint investigations with local authorities, the ICC could also relieve financial pressure on domestic judicial and investigative offices.<sup>187</sup>

With the consent of the national government, the ICC could provide more than logistical support and training to domestic authorities. Its officers could perform joint investigations and prosecutions on the ground.

Such a proposal was put forth by Senator Arlen Specter in the early stages of discussions about a permanent international criminal court. Senator Specter proposed that the international community create a standing body—an international or regional tribunal, which would have investigative, prosecutorial and judicial staff, but which would be used mainly to support domestic authorities in their efforts to prosecute transnational crimes. Countries would have the option of prosecuting a case on their own, utilizing the investigative and legal expertise of the standing international court while retaining control over cases, or fully transferring a case to the international court.<sup>188</sup> The court’s main function would be to promote local prosecutions; it would not serve as “a substitute for or a distraction from domestic prosecution, but [as] an additional means and facilitator for either domestic or international prosecution of international crimes.”<sup>189</sup>

The ICC Statute could accommodate this supporting and collaborative role for its investigators and prosecutors. Upon the request by a member state, the Court can cooperate with that state’s authorities in investigating offenses within the jurisdiction of the Court, or even offenses that constitute “a serious crime under the national law of the requesting State.”<sup>190</sup> Under certain conditions, the Court may also provide assistance to states that are not parties to the Rome Statute.<sup>191</sup> The types of cooperation and assistance explicitly authorized by the Statute include the transmission of evidence obtained by the Court and the questioning of persons detained by the order of the Court.<sup>192</sup>

This cooperation can even occur on the territory of the state where the crime was committed. The Statute allows the Court to “exercise its functions and powers . . . on the

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<sup>187</sup> Concannon, Jr., *supra* note 185, at 237.

<sup>188</sup> 136 Cong. Rec. S8082-83.

<sup>189</sup> 136 Cong. Rec. S8081-82.

<sup>190</sup> ICC Statute art. 93 (10) (a)

<sup>191</sup> ICC Statute art. 93 (10) (c)

<sup>192</sup> ICC Statute art. 93 (10) (b)

territory of any State Party and, by special agreement, on the territory of any other State.”<sup>193</sup> Although Article 42 provides that a member of the Office of the Prosecutor “shall not seek or act on instructions from any external source,”<sup>194</sup> a properly drafted cooperation agreement could ensure that the ICC investigators and prosecutors are acting upon instructions of their Hague supervisors, even as they collaborate with local officers. A statutory amendment, explicitly authorizing ICC officials to provide assistance to local authorities, could also allow the ICC to train local officials in investigative techniques and victims’ issues.

The ICC should actively promote such cooperation arrangements. Joint investigations harness the advantages of local prosecutions, even where the local criminal justice system is not fully capable of conducting such prosecutions by itself. By providing technical and logistical support to local authorities, this arrangement also increases the likelihood of effective prosecutions. Effective prosecutions, in turn, increase public respect for the legal system and thus promote the rule of law over the long run. Finally, the collaboration between national and international investigators and prosecutors also has the potential to spur a productive dialogue about the substance and procedure of prosecutions for international crimes.

## 2. The ICC as a Circuit Rider

Senator Specter’s proposal did not envision the possibility of joint judicial proceedings. Under his proposal, national judges would preside over national trials, and international judges would preside over the trials referred to the ICC by national authorities. Yet the logic of Specter’s plan applies to judicial, not merely investigative and prosecutorial, collaboration. During the drafting of the ICC Statute, some delegates put forth just such a model, under which the ICC would serve as a “traveling court,”<sup>195</sup> conducting both investigations and proceedings at the location where crimes were committed.<sup>196</sup> In effect, ICC judges would serve on ad hoc mixed courts, akin to the ones

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<sup>193</sup> ICC Statute art. 4 (2)

<sup>194</sup> ICC Statute art. 42.

<sup>195</sup> Mahnoush H. Arsanjani, *Financing*, in 1 THE ROME STATUTE, *supra* note, at 315, 321 (citing UN Doc. A/AC.244/L.2 para.248)

<sup>196</sup> *Id.* at 321.

currently used in Sierra Leone, East Timor, and Kosovo. Importantly, this model was proposed as a cost-saving measure.<sup>197</sup>

The popularity of mixed courts over the last several years suggests that having ICC prosecutors and judges conduct trials on the ground, with the cooperation of local authorities, might be a viable option where domestic authorities are willing but unable to prosecute war crimes. Countries in transition themselves have favored mixed courts. When the Rwandan government first contemplated prosecuting war crimes committed on its territory and asked for international aid, “it hoped that international assistance would take the form of joint trials and investigations, or at least international proceedings within Rwanda.”<sup>198</sup> The Sierra Leonean government,<sup>199</sup> Cambodian government, and East Timorese lawyers<sup>200</sup> also asked the international community to set up mixed courts on their territory.<sup>201</sup> The Bush administration has also favored mixed courts as a superior alternative to the ICC<sup>202</sup> and is considering a similar model for a court to try Iraqi officials for crimes against humanity.<sup>203</sup> Finally, the UN itself has lent its support to hybrid courts: With the consent and assistance of local authorities, the UN established such courts in Kosovo,<sup>204</sup> East Timor, and Sierra Leone,<sup>205</sup> and is negotiating a similar arrangement with the Cambodian government. Although it is too early to make a comprehensive assessment of the performance of these mixed courts, given their popularity with both the international legal community and nation states, it is useful to analyze their potential strengths and weaknesses.

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<sup>197</sup> *Id.*

<sup>198</sup> Alvarez, *supra* note 4, at 393.

<sup>199</sup> U.N. Doc S/2000/915; Micaela Frulli, *The Special Court for Sierra Leone*, 11 EUR. J. INT’L L. 857 (2000)

<sup>200</sup> The East Timor legal community was split on this issue. Despite the insistence by some international and East Timorese NGOs on an international tribunal for East Timor, UNTAET, with the support of other East Timorese lawyers, decided on a mixed court model largely based on the proposed court for Cambodia.

<sup>201</sup> A recent survey of Bosnian judges also shows support for mixed courts that would take place in Bosnia and actively involve Bosnian legal officials in the process. JUSTICE, ACCOUNTABILITY, *supra* note 135, at 36.

<sup>202</sup> E.g., Pierre-Richard Prosper, *Justice Without Borders: The International Criminal Court*, 17 TEMP. INT’L & COMP. L.J. 85, 89 (2003)

<sup>203</sup> Heidi Kingstone, *Out of the Killing Fields*, JERUSALEM REP., June 30, 2003, at 24; Michelle Mittelstadt, *U.S. Has Few Options Palatable to World for Charging War Criminals*, DALLAS MORNING NEWS, Apr. 18, 2003.

<sup>204</sup> The project for a mixed War Crimes Court in Kosovo was never implemented, but pursuant to a regulation of the UN Mission in Kosovo, an international judge sits alongside local judges in war crimes cases in regular domestic courts.

<sup>205</sup> S.C. Res. 1315, U.N. SCOR, 55th Sess., 4186th mtg., U.N. Doc. S/RES/1315 (2000)

a. Structure and Functions of Mixed Courts

Mixed tribunals operate in the country where the atrocities took place, but rely on the combined expertise of local and international judges, prosecutors, and investigators. In the Sierra Leonean and East Timorese hybrid courts, two-thirds of the judges are UN-appointed, and the remaining third is local or at least appointed by the national government.<sup>206</sup> The Kosovo courts include a majority of local judges sitting together with judges appointed by the UN.<sup>207</sup> After years of difficult negotiations concerning its composition, the proposed court for Cambodia would include panels with a majority of Cambodian judges and a prosecutor's office headed by one Cambodian- and one UN-appointed lawyer.<sup>208</sup>

The international community is heavily involved in both the creation and financing of mixed tribunals and therefore plays a significant role in devising the legal standards and procedures used by those tribunals. At the same time, mixed courts are designed to suit the needs of the host country and to involve the local population in the proceedings.

One way in which hybrid courts address local needs is that their subject matter jurisdiction incorporates both domestic and international criminal law.<sup>209</sup> The inclusion of domestic law allows the courts to address crimes that were pervasive during a particular conflict, but are not necessarily covered by international criminal law. For instance, the statute of the Special Court for Sierra Leone criminalizes abuses of girls under fourteen and the abduction and forced recruitment of children.<sup>210</sup> These provisions reflect the nature of the atrocities committed in Sierra Leone, where thousands of children were abducted and forced to fight in the civil war, or became victims of rape and physical abuse.<sup>211</sup> Furthermore, unlike international criminal tribunals, which have personal jurisdiction only over adults, the Special Court can try individuals who were fifteen or

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<sup>206</sup> Suzannah Linton, *Cambodia, East Timor, and Sierra Leone: Experiments in International Justice*, 12 CRIM. L.F. 185 (2001)

<sup>207</sup> *Id.*

<sup>208</sup> To avoid the potential deadlock from having co-prosecutors, the statute for the Cambodian mixed court provides that, in the case of disagreement between the two prosecutors, the prosecution would continue, except that one of the prosecutors could bring the case for review by the pre-trial Chamber within thirty days. Unless a supermajority of the pre-trial Chamber (four out of five judges) agrees that no basis for the prosecution exists, the prosecution would continue. Linton, *supra* note 206, at 192.

<sup>209</sup> *E.g.*, Statute of the Special Court for Sierra Leone arts. 1-5, reprinted in POST-CONFLICT JUSTICE, *supra* note, at 605, 606.

<sup>210</sup> Statute of the Special Court for Sierra Leone arts. 4 (c), 5 (a)

<sup>211</sup> Jennifer L. Poole, *Post-Conflict Justice in Sierra Leone*, in POST-CONFLICT JUSTICE, *supra* note, at 563, 583.

older at the time they allegedly committed the crime.<sup>212</sup> Although international experts wanted to limit the jurisdiction of the Special Court to adults, the Sierra Leonean government maintained that this would hurt the legitimacy of the Court. Sierra Leoneans, the government argued, demanded that child soldiers, who were among the most brutal perpetrators of war crimes, be held accountable.<sup>213</sup> While the government prevailed on that point, in deference to international demands, the Statute provides for special remedies and procedures in trials of juvenile offenders. The Statute also emphasizes the desirability of rehabilitating and reintegrating juveniles into society.<sup>214</sup>

Like the Special Court in Sierra Leone, both the Serious Crimes Unit in East Timor and the proposed Extraordinary Chambers for Cambodia have subject-matter jurisdiction over international as well as domestic crimes. In Cambodia, among the domestic crimes included are homicide, torture, and religious persecution, for which the statute of limitations is extended for twenty years.<sup>215</sup> The proposed statute also provides for the prosecution of violations of the Hague Cultural Property Convention, in reflection of the pervasive attacks on Cambodia's cultural heritage during the rule of the Khmer Rouge.<sup>216</sup> In East Timor, the Serious Crimes Unit can prosecute war crimes and crimes against humanity, as well as murders, sexual crimes, and arson attacks committed during the 1999 referendum on independence of the island nation.<sup>217</sup>

In addition to incorporating local laws in their proceedings, mixed courts are also better able than international tribunals to engage the local population in their proceedings.<sup>218</sup> Thus officials from Sierra Leone's Special Court have been visiting local schools and government agencies and have engineered publicity campaigns to educate local communities about the court's work.<sup>219</sup> They have further raised awareness about the Court's work by traveling around the country to collect evidence.<sup>220</sup> The media have also

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<sup>212</sup> Statute of the Special Court for Sierra Leone art. 7.

<sup>213</sup> Poole, *supra* note 211, at 583.

<sup>214</sup> Statute of the Special Court for Sierra Leone art. 7.

<sup>215</sup> Linton, *supra* note 206, at 193.

<sup>216</sup> *Id.* at 196.

<sup>217</sup> United Nations Transitional Administration in East Timor, Reg. No. 2000/15 (6 June 2000) §§ 3, 8, 9; Jill Jolliffe, *A Year To Remember*, THE AGE (Melbourne), May 20, 2003, A3.

<sup>218</sup> Eighth Report of the Secretary-General on the United Nations Mission in Sierra Leone, UN SCOR, 55<sup>th</sup> Sess., P7, U.N. Doc. S/2000/1199 (2000); Tolbert, *supra* note 164 (citing as one of the deficiencies of the ICTY its inability to educate the public in the former Yugoslavia about the goals and work of the international tribunal)

<sup>219</sup> INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, THE "LEGACY" OF THE SPECIAL COURT FOR SIERRA LEONE 17 (2003)

<sup>220</sup> At <http://www.allafrica.com>. [AU]

covered the proceedings of domestically based courts more extensively than those of international tribunals. More extended coverage raises public awareness of the tribunals and stimulates a dialogue about the process of reckoning with the past.

Because of their location, mixed courts also manage better to coordinate their functions with other domestic institutions dealing with human rights abuses, such as the Truth and Reconciliation Commissions set up in Sierra Leone and East Timor.<sup>221</sup> Such coordination prevents overlap and encourages a more efficient division of institutional responsibilities for dealing with the past. For example, in East Timor, the Truth Commission serves reconciliation efforts by holding public hearings to investigate the truth about the conflict in East Timor and by initiating “community reconciliation procedures” (“CRP”) at the regional level. At regional CRP hearings, lower-level criminals (who have committed incidental acts of violence or theft, but not a serious criminal offence within the jurisdiction of the Serious Crimes Unit) can testify, ask their victims and the community for forgiveness, and offer to make reparations or perform community service.<sup>222</sup> In return, they are absolved from criminal responsibility for these crimes and reintegrated into the community. At the same time, the Serious Crimes Unit serves retribution and deterrence functions by indicting higher-level officials.<sup>223</sup> This division of labor both conserves scarce resources and helps with national reconciliation.

In Sierra Leone, the Truth and Reconciliation Commission handles most juvenile offenders, who were often abducted and forced to perform horrible crimes.<sup>224</sup> By contrast, the Special Court focuses on higher-ups and particularly brutal perpetrators. This approach encourages not only a fair and proportionate treatment of different offenders, but also the reintegration of combatants into society, which is essential to rebuilding peace and stability in the country.<sup>225</sup>

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<sup>221</sup> Eighth Report of the Secretary-General on the United Nations Mission in Sierra Leone, UN SCOR, 55<sup>th</sup> Sess., PP51-53, U.N. Doc. S/2000/1199 (2000) (describing the establishment of the Truth and Reconciliation Commission, the Human Rights Commission, and a “data-gathering” project” to supplement the Special Court); Lisa Clausen, *Slow Road to Justice*, TIME, Mar 24, 2003, at 48 (describing perceptions of the Truth Commission as the institution dealing with low-level criminals and the Serious Crimes Unit as the court charged with handling high officials) .

<sup>222</sup> United Nations Transitional Administration in East Timor, Reg. No. 2001/10 (13 July 2001), On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, §§ 27, 32, *reprinted in* POST-CONFLICT JUSTICE, *supra* note, at 546, 558-59.

<sup>223</sup> Clausen, *supra* note 221.

<sup>224</sup> Poole, *supra* note 211, at 590.

<sup>225</sup> *See id.* at 591.

Mixed courts have also been generally more effective than international tribunals in processing cases. In less than three years, even as delays, language problems and inexperienced lawyers have impeded its work, the Serious Crimes Unit in East Timor has obtained thirty-two convictions and issued fifty-eight indictments involving 240 people.<sup>226</sup> By contrast, in its first eight years, the ICTY had issued nineteen judgments,<sup>227</sup> while the ICTR had issued only eight judgments in six years.<sup>228</sup> Especially given the significantly larger budgets of the international tribunals, these figures underscore the efficiency of mixed courts.<sup>229</sup>

b. Overcoming the Challenges of Mixed Courts

Despite their substantial long-term benefits, mixed court projects can be derailed by practical difficulties in their implementation. For example, differences in legal practices can cause conflicts among judicial officials and difficulties and delays in the administration of justice. Although this problem is also present in international tribunals, it is accentuated in mixed tribunals. First, mixed tribunals operate in a post-conflict environment, where the basic infrastructure is often in shambles, which exacerbates the delays in the administration of justice. Second, mixed courts rely more extensively on local laws and procedures, narrowing the common ground of legal expertise between national and international judges and thus causing longer deliberations about cases.<sup>230</sup>

Delays occasioned by a frail infrastructure, however, will always plague enforcement in countries emerging from a violent conflict, whether they investigate on their own, in the course of a mixed proceeding, or in response to an ICC request. ICC investigators who take part in mixed proceedings will at least directly proceed to gathering evidence, instead of having to go through the notoriously slow “diplomatic channels” for requesting cooperation.<sup>231</sup> By establishing a working relationship on the

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<sup>226</sup> Clausen, *supra* note 221.

<sup>227</sup> ICTY, Fact Sheet on ICTY Proceedings, at <http://www.un.org/icty/glance/procfact-e.htm> (last visited July 17, 2003)

<sup>228</sup> ICTR, ICTR Detainees, at <http://www.ict.rg/english/factsheets/detainee.htm> (last visited July 17, 2003)

<sup>229</sup> While the ICTR's and ICTY's budgets have averaged about \$75 million per year, the budget of the whole UN mission in East Timor, of which the funds for the Special Court are but a fraction, comes to \$28 million a year. See Elizabeth Neuffer, *Lagging Tribunal Is Called a Threat to a Viable East Timor; Slaughter Suspects Elude UN's Reach*, B. Globe, Sept. 2, 2001, at A6 (citing the budget of the UN mission); Linton, *supra* note 206, at 205 n.69 (citing the serious lack of resources at the East Timor mixed courts)

<sup>230</sup> Linton, *supra* note 206, at 200.

<sup>231</sup> ICC Statute art. 87 (1)

ground with local officials, they would also be less likely to encounter the suspicion and resistance that often greets requests for cooperation from foreign tribunals.

Another challenge of mixed courts is the potential for bias or unfairness. Even with the presence of international officials on the ground, host governments could attempt to manipulate the process by putting pressure on local judges and prosecutors.<sup>232</sup> This was one of the major concerns of the Group of Experts evaluating the feasibility of holding domestic trials in Cambodia for the former Khmer Rouge leaders (some of whom had struck political bargains with the current regime of Hun Sen and were allegedly promised impunity) The Group concluded that only an ad hoc UN tribunal held outside of Cambodia would meet international standards of justice.<sup>233</sup> Because Cambodian authorities “still lack[ed] a culture of respect for an impartial criminal justice system,” neither a domestic nor a mixed tribunal would be effective and free from political manipulation.<sup>234</sup>

These concerns have been largely addressed by the voting rules and composition of mixed courts in Cambodia, East Timor, and Sierra Leone. In East Timor and Sierra Leone, two-thirds of the judges are international, so every decision requires the consent of at least one international judge. This arrangement dramatically reduces the effect of any political pressure that the local government may put on local judges. In Cambodia, where the majority of judges are local, a supermajority vote is required for a decision of guilt and innocence, so that an international judge must always consent to an acquittal or a conviction. Many important decisions, however, are decided by a majority rule, which has concerned some commentators.<sup>235</sup> To address those concerns, future ICC-sponsored mixed courts could either opt for a supermajority vote on most major decisions or follow the Sierra Leonean and East Timorese model and include a majority of international judges on each panel. Either solution would present a good balance between, on the one

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<sup>232</sup> As one commentator on legal reform has observed:

The technical aspect of providing training and materials to judiciaries is straightforward, and it is this idea that international efforts focus on. More elusive is the task of restoring to the judiciary the two vital traits it requires to function under the rule of law: independence and impartiality. The greatest obstacle to judicial reform in many countries is eliminating the influence of the executive branch of government.  
RAMA MANI, BEYOND RETRIBUTION 65 (2002)

<sup>233</sup> Steven R. Ratner, *The United Nations Group of Experts for Cambodia*, 93 AM. J. INT'L L. 948, 951 (1999)

<sup>234</sup> *Id.*

<sup>235</sup> Linton, *supra* note 206, at 199 (noting with concern that aside from guilt and innocence, all other decisions will be made on the basis of a majority vote)

hand, concerns for fairness and impartiality and, on the other hand, local participation and diversity on the bench.<sup>236</sup>

Designing the structure and voting rules of a mixed tribunal would be difficult, however, in situations where the tribunal has jurisdiction over crimes arising from a multi-ethnic or multi-national conflict. Mixed tribunals would have to balance the authority not only of local and international judges, but also of local judges from different ethnicities or nationalities. To some extent, this model has already been tried with success in Kosovo, where both Kosovar Albanian and Kosovar Serb judges have sat on war crimes trials, alongside their international counterparts. It is also the proposed model for the court successor to the ICTY. The Office of the High Representative in Bosnia has proposed that once the ICTY completes its work, a tribunal be set up in Bosnia to try the remaining cases of war crimes. The tribunal would consist of five judges—one Bosnian Muslim, one Bosnian Serb, one Bosnian Croat, and two international judges.<sup>237</sup> [to be cont.]

...Because of their different composition and voting structures and their sensitivity to the local context, mixed courts may also produce inconsistency in the way they interpret international law. The Appeals Chamber of the ICC (the composition of which would not vary much from case to case) would be in a good position to resolve these inconsistencies. It will be very important, albeit difficult, for the Appeals Chamber to demarcate the boundaries between fundamental international law questions, on which inconsistency is unacceptable, as opposed to questions on which deliberation and diversity among the hybrid courts is welcome (for example, interpretations of international law sensitive to local context or questions of procedure and punishment on which no strong international consensus exists) In deciding how to balance the values of diversity and sovereignty with the values of coherence of consistency, the Appeals Chamber may be guided by the existing doctrines of “subsidiarity” and “margin of appreciation.” [to be cont.]

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<sup>236</sup> The voting rule could vary according to the political context within which mixed courts are established. Where international assistance is needed mainly to enhance local material resources, a majority of local judges and a mere majority voting rule would suffice. Where the international community has serious concerns about fairness and bias, the mixed courts could operate either under a supermajority voting rule (which brings with it the costs of deadlock and delay) or a majority international judges (which carries fewer of the benefits of local participation)

<sup>237</sup> Michael Bohlander, *Last Exit Bosnia*.

c. Statutory Basis for ICC Participation in Mixed Courts

The ICC was not intended to serve as a mixed court, and for it to perform that function fully and effectively, some amendments to the Statute might be necessary. Some legal basis for the ICC to serve as a roving mixed court in different countries does exist, however. As the previous Section discussed, investigators and prosecutors are authorized to cooperate with local authorities on the ground. The Statute also provides that, although the seat of the Court will generally be in The Hague, the “Court may sit elsewhere, whenever it considers it desirable . . . .”<sup>238</sup> There are no provisions for including local judges in the Court’s deliberations, but the Presidency of the Court can propose an increase in the number of judges, including judges who do not serve on a full-time basis.<sup>239</sup> Article 21 of the Statute, governing applicable law, also provides that the Court may rely in its decisions “on the national law of States that would normally exercise jurisdiction over the crime.”<sup>240</sup> National law comes last in the hierarchy of legal sources, however, and is to be considered only when other sources have proven ambiguous or useless. Therefore, some amendments to the ICC Statute would be necessary to ensure that national laws may be used alongside international laws when the ICC serves as a mixed court.<sup>241</sup> Finally, a general provision on the trigger of mixed-court jurisdiction would be necessary. It would allow the formation of joint investigations or mixed proceedings, with state consent, where states are unable, but willing to prosecute.<sup>242</sup>

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<sup>238</sup> ICC Statute art. 4 (2)

<sup>239</sup> ICC Statute arts. 36 (2) & 35 (3) The Assembly of States Parties would have to vote on the proposal, and two-thirds are necessary to approve it. *Id.* art. 36 (2)

<sup>240</sup> ICC Statute art. 21 (1) (c)

<sup>241</sup> The Statute may also need to provide interpretive guidelines or rules on resolving potential conflicts between national and international laws. Where international law concerns fundamental, or peremptory norms, it will automatically trump national laws (the core prohibitions on genocide, crimes against humanity, and war crimes and fundamental principles of due process embody such peremptory norms) But where there are gaps or ambiguities in international law (for example, with respect to appropriate punishments and certain aspects of mens rea) or where international law imposes standards, but not rules (for example, with respect to certain procedural protections), mixed courts should give some deference to national laws and practices. One model for balancing international norms with deference to national practices is the doctrine of “margin of appreciation” developed by the European Court of Human Rights. *See supra* notes 177-179 and accompanying text.

<sup>242</sup> The ICC Statute prohibits amendments in the first seven years of the Statute’s entry into force, however. In the absence of a clear statutory provision for mixed courts, such courts can be created by treaty between the ICC and national authorities and treated by the ICC as “local courts” that would be granted deference under complementarity.

C. *Where States Are Unwilling To Prosecute Their Nationals: A Mixed Court in The Hague*

In many cases of post-conflict justice, national governments might be unwilling to prosecute international crimes themselves and also refuse to allow the ICC to join in on prosecutions and trials. Even in the face of such reluctance, the Court might be able to obtain custody of suspects with the help of third states or of international peacekeeping forces. In those instances, the Court could take up cases in The Hague, as the current admissibility provisions state.

Although ensuring that the prosecutions will take place is a good first step, it is not enough. To obtain the advantages of a cross-cultural deliberation, the ICC must go further. It should include in its ranks and its deliberations lawyers, investigators, and judges from the affected area and incorporate relevant national law into its decisions. In effect, the ICC would again form part of a hybrid tribunal, but due to the reluctance of the national government to cooperate, that tribunal would be deliberating in The Hague rather than in the country of original jurisdiction.

Under what conditions could such a scenario develop? To begin with, the non-cooperating government need not be a rogue regime. There are various reasons why a government that is not associated with the suspects targeted by the ICC might refuse to go along with all of the Court's requests. It might be reluctant to prosecute out of concern for the stability of the country, or it might worry about its own stability. Accordingly, the government may give the international tribunal access to some evidence so as not to alienate the international community, but at the same time refuse to collaborate openly with the ICC lest it alienate forces on the ground. As mentioned earlier, the only way that the ICC can apprehend suspects in this case would be with the assistance of third states or of an international peacekeeping force stationed on the territory of the reluctant state. The former Yugoslavia after the fall of Milosevic is an apt example. The newly elect President Kostunica cooperated only minimally with the ICTY and for a long time refused to prosecute or surrender Slobodan Milosevic and other high-level suspects to the tribunal. The tribunal therefore had to rely largely on international peacekeeping forces stationed in the former Yugoslavia to capture suspects for its trials.

When one of the above scenarios transpires, the Court would be justified in taking up the case itself in The Hague. Indeed, that is what the Rome Statute provides. But as

Part II discussed, ICC prosecutions in The Hague do not reap the benefits of decentralized enforcement of international criminal law. To gain those benefits, the Court ought to incorporate into its proceedings judicial officials and laws and procedures from the country of original jurisdiction. Similar arrangements for including judges of each party's nationality are common in international arbitration and in the International Court of Justice.<sup>243</sup> In common law states, the ancient institution of juries *de medietate linguae* also provided foreign defendants convicted of international crimes with a jury partly composed of jurors of the defendant's nationality.<sup>244</sup>

As Jose Alvarez writes, incorporating judges from the affected area would have a salutary effect on the proceedings:

The presence of such judges in the courtroom as well as during deliberations could encourage a more thorough venting of difficult issues such as those surrounding the credibility of witnesses (and the role of ethnicity in these determinations), including through dissenting or separate concurring opinions. Their presence and views could also generate more nuanced accounts of what it means to be targeted for violence on the basis of ethnicity. Such judges would also provide the tribunal with valuable insight as to [domestic] law.<sup>245</sup>

Having national judges from the affected area would increase the viewpoints expressed on the Court and would contribute relevant knowledge about the circumstances of the conflict.

The Court could also incorporate the relevant domestic law in its decisions. Relying on national law to fill in gaps in international criminal law would add valuable content to the deliberations of the tribunal. It has the potential to increase the diversity of points considered in a decision. It is also more likely to be palatable to the relevant domestic constituency and therefore to reduce the hostility of the national government toward the Court. For those reasons, as well as for reasons of fair notice to the defendant,

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<sup>243</sup> Statute of the International Court of Justice art. 31; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 37.

<sup>244</sup> Deborah A. Ramirez, *The Mixed Jury and the Ancient Custom of Trial by Jury de Medietate Linguae: A History and a Proposal for Change*, 74 B.U.L. REV. 777 (1994)

<sup>245</sup> Alvarez, *supra* note 4, at 451.

national law offers a more legitimate interpretive tool than the ICC judges' own moral and policy considerations.<sup>246</sup>

The statutory basis for this model would be similar to the one for mixed courts on the territory of a state of original jurisdiction.<sup>247</sup> Hague-based mixed courts would not require the explicit consent of the affected state. Whenever possible, however, the Court should sign agreements with the state of original jurisdiction concerning the status and functions of the local judges and prosecutors who would serve in The Hague proceedings.

D. *Where States Are Unwilling To Prosecute or Surrender Their Nationals: Public Hearings in The Hague*

When the ICC takes up a case in The Hague, it still depends on nation states and on the international community to enforce its orders. In certain instances, the Court will be unable either to gather evidence or to obtain the custody of suspects, and if it opens up investigations, its orders will be publicly flouted by a rogue regime. Without the presence on the ground of a peacekeeping force sympathetic to it, the ICC could not do its work. Consider the case of Iraq under Saddam Hussein. Even if the ICC had already existed and had jurisdiction over war crimes committed in Iraq, it could not have prosecuted Hussein and his cronies while they were still in power. It would not have been able to apprehend key suspects, even if it had managed to gather important documentary evidence of human rights abuses from Kurd-controlled territory.

The same problem arises when national authorities declare themselves willing to prosecute, but then carry out sham investigations and proceedings. Where the ICC determines that national proceedings were done in bad faith and were inconsistent with a genuine intent to prosecute, it can itself conduct another round of investigations and prosecutions, without infringing the rule against double jeopardy inscribed in the ICC Statute.<sup>248</sup> The impugned national governments, however, are not likely to be receptive to

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<sup>246</sup> See Prosecutor v. Erdemovic, No. IT-96-22-A, para. 49 (ICTY Oct. 7, 1997) (judgment) (Cassese, J. dissenting), available at <http://www.un.org/icty/erdemovic/appeal/sopinion-e/71007jt3.htm> (arguing that, for reasons of fair notice, filling gaps in international criminal law should be done by reference "to the national jurisdiction of the accused, rather than to moral considerations or policy-oriented principles,"); see also Kupreskic IT-95-16-T, pp 539-41 [AUT]; S 8083 (noting that "...the Tribunal will use the substantive law of the transferring state")

<sup>247</sup> See supra Section II.B.1 (c)

<sup>248</sup> Article 20 of the Rome Statute delineates the balance between the prohibition on double jeopardy and the principle of complementarity:

ICC requests for cooperation or joint investigations. So in these cases, too, the ICC will have great difficulty gathering evidence and arresting suspects.

Instead of engaging in “judicial romanticism” and taking up cases it cannot complete, the ICC needs to recreate its mandate in such situations. Where the ICC cannot obtain key evidence or key suspects, the Court should refrain from commencing a prosecution and instead hold quasi-judicial public hearings on the human rights abuses committed by the uncooperative regime. Such hearings would provide an open forum for the discussion of serious abuses and would gather and preserve evidence for future prosecutions.

In the United States, the Supreme Court has long recognized that its legitimacy is badly damaged when the executive refuses to enforce its orders.<sup>249</sup> As a result, the Court has crafted techniques through which it can abstain from deciding a case when its decision is not likely to be enforced. Indeed, some scholars, notably Alexander Bickel, have urged courts to use these abstention techniques more often.<sup>250</sup> In international law, too, the International Court of Justice has used admissibility determinations to dispose of cases where it knows its mandates would be ignored.<sup>251</sup> A notable technique is the non-*liquet* doctrine, which allows the ICJ to abstain where the law is still unsettled.<sup>252</sup>

Although some might be disturbed by the instrumental nature of these decisions, they are important not only for the immediate self-preservation of the court that issues them, but for the long-term legitimacy of the institution and thus for the continued enforcement of the law it interprets. As Steven Ratner observes in the context of international criminal law, “[a]ttempts to create criminal law and mechanisms that will be ignored result only in pretended law, not an improvement in human rights enforcement.

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No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

ICC Statute art. 20.

<sup>249</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)

<sup>250</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 69-70 (1962)

<sup>251</sup> Antonio F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice*, 18 MICH. J. INT'L L. 399 (1997)

<sup>252</sup> W. Michael Reisman, *International Non-Liquet: Recrudescence and Transformation*, 3 INT'L LAW. 770, 773 (1969) ((arguing that, not theoretical gaps in the law, but institutional and pragmatic considerations explain and justify the decisions that in effect are non-liquets even if the Court does not describe them as such))

Judicial romanticism has serious systemic costs in a global community with sharply differing notions about the best way to mete out justice to individuals.”<sup>253</sup>

To avoid falling into the trap of judicial romanticism, the ICC and its Assembly of States Parties need to reconsider the Court’s mandate in cases where a state is unwilling to cooperate with the court and refuses to turn over evidence and suspects. The Court need not give up completely on serving human rights in such situations. It could simply reform its role to hold public hearings, collecting and preserving evidence that may in the future be used in criminal proceedings. The Court would not have any direct way to compel states or individuals to appear before it, and the only direct consequence of its hearings would be to publicize the evidence collected from voluntary witnesses.

In some ways, the ICC would be performing a function similar to that of the UN Human Rights Committee (UNHRC), although the latter does not hold public hearings with live testimony.<sup>254</sup> Under the First Optional Protocol to the International Covenant on Civil and Political Rights, UNHRC can receive written communications from individuals who seek relief for human rights violations where domestic remedies are unavailable. Only citizens of states that have ratified the Optional Protocol can submit complaints to the Committee.<sup>255</sup> Once the Committee finds a complaint admissible, it asks for written submissions by both the aggrieved individual and the state party. It does not take testimony or hear oral arguments. The Committee deliberates in private about whether the submissions indicate a violation of the Covenant and then issues a written decision (“the views of the Committee”) which contains a statement of the views of the Committee on the obligation of the State party.<sup>256</sup> The views are then forwarded to the parties and published in the Committee’s annual report to the General Assembly.<sup>257</sup>

The lack of oral testimony and hearings in the UNHCR has diminished the Committee’s shaming effect on delinquent states. One observer identifies “the absence of direct and effective fact-finding” as a “basic weakness in the system” and blames the

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<sup>253</sup> Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT’L L.J. 237, 256 (1998)

<sup>254</sup> The fact-finding Commission provided for in Additional Protocol I to the Geneva Convention performs similar functions.

<sup>255</sup> [AUT: update #] United Nations, Economic and Social Council, Human Rights Committee, Press Release: Human Rights Committee Concludes Three-Week Headquarters Session, U.N. Doc. HR/CT/494 (1997)

<sup>256</sup> DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE* 125 (1991)

<sup>257</sup> Optional Protocol, art. 15 (4), 999 U.N.T.S. 303.

ineffectiveness of the Committee on it.<sup>258</sup> Therefore, when the ICC holds its hearings, it should not simply receive written submissions, but invite witnesses to testify publicly (and offer them protection, where feasible) about suspected war crimes, crimes against humanity, and genocide. The Court should make findings of facts and open wide its doors to media from around the world, and especially from the affected country, to cover the proceedings. The coverage could have a strong shaming effect on the states publicly identified as uncooperative and unwilling to prosecute, and individuals as suspects.<sup>259</sup>

The findings of the Court would not provide a direct remedy to the victims. Instead, the hearings' contribution would consist in preserving evidence for future prosecutions and providing a forum for the victims to air their grievances. By shaming the uncooperative governments, the proceedings could also strengthen the hand of opposition forces in the affected countries. However minimal their direct effect, the hearings would contribute more to the enforcement of international criminal law than would an empty judicial order flouted by a rogue regime or inaction by both the ICC and national authorities.

#### E. *Encouraging Statutory Development*

By its very existence, the Court is bound to have a subtle influence on the enforcement of international criminal law, promoting statutory development in countries around the world. Two main factors account for this influence. First, the ICC Treaty was produced as a result of long negotiations among delegates from 150 states. Despite the numerous disagreements among them, 120 states signed on to the final product, indicating at least minimal consensus on the statutory framework of the ICC. Second and more important, states that have signed and ratified the ICC Treaty have a strong

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<sup>258</sup> Torkel Opsahl, *The Human Rights Committee*, in *THE UNITED NATIONS AND HUMAN RIGHTS* 369, 437 (Philip Alston ed., 1992)

<sup>259</sup> Such strategies have worked in the International Labor Organization, where the International Labor Conference's Committee on the Application of Standards has achieved better compliance with labor rights by singling out a few violators of in its annual report to the full conference and thus mobilizing international public opinion against those violators. Richard B. Bilder & Frederic L. Kirgis, 96 *AM. J. INT'L L.* 741, 743 (2002) (reviewing PHILIPPE SANDS & PIERRE KLEIN, *BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS* (2001)); see also Oran R. Young, *The Effectiveness of International Institutions: Hard Cases and Critical Variables*, in *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* 160, 176-77 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992) ("Policy-makers, like private individuals, are sensitive to the social opprobrium that accompanies violations of widely accepted behavioral prescriptions. They are, in short, motivated by a desire to avoid the sense of shame or social disgrace that commonly befalls those who break widely accepted rules."); Phillip R. Trimble, *Human Rights and Foreign Policy*, 46 *ST. LOUIS U.L.J.* 465, 466 (2002) (noting that shaming abusive governments has been one of the most verifiable achievements of the human rights movement)

incentive to pass legislation that criminalizes the core offenses listed in the Statute. Both under the current ICC Statute and under the proposal articulated in this Article, the ICC could take away cases from countries that do not have adequate legislation to prosecute international crimes. As one commentator has observed, states will be more likely to “pursue domestic prosecutions of international crimes so as not to trigger the jurisdiction of the ICC over the case and invite the glare of the eyes of the international community. . . .”<sup>260</sup>

Implementing legislation is likely to bring both substantive and procedural changes in domestic law. Many countries will need to incorporate into their domestic law prohibitions on crimes against humanity and breaches of the Geneva Conventions. To avoid a finding of “inability to prosecute,” some states might also need to amend their criminal procedure laws to meet minimum fair trial standards under international law. Although some commentators have suggested that complementarity would require signatory states “to enact further rights for the accused,”<sup>261</sup> in fact, only rudimentary fair trial guarantees are needed to retain national control over war crimes prosecutions (proceedings must be conducted “independently or impartially in accordance with the norms of due process recognized by international law”<sup>262</sup>)

As Section II.B discussed, the definitions of crimes in the Rome Statute are still incomplete, but legislatures could use those statutory definitions as a starting point and build on them in accordance with national preferences. It is precisely such legislative experimentation that would provide the basis for the cross-national deliberation and improvement of international criminal law and procedure.

Whereas the ICC Statute does not require states to pass implementing legislation on criminalizing offenses listed in the Statute, it does enjoin states parties to pass laws on the cooperation of national authorities with the ICC. Countries have to “ensure that there are procedures available under their national law for all of the forms of cooperation,”<sup>263</sup> including provisions on witness protection, financial assistance to the ICC, extradition of

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<sup>260</sup> Ellis, *supra* note 22, at 223.

<sup>261</sup> *Id.* at 226-27.

<sup>262</sup> ICC Statute art. 20.

<sup>263</sup> ICC Statute art. 88.

nationals, and recognition of the privileges and immunities of ICC staff.<sup>264</sup> As a result, one can expect states to pass legislation to fulfill their duties—at least on paper—under the Rome treaty. There is mounting evidence that states have begun to do so.

One of the main contributions of the ICC, therefore, will be in providing, through its statute and rules, a legal framework and language that national governments can utilize as a template for their own war crimes statutes. Once states pass implementing legislation, they will be more likely to use it by bringing war crimes prosecutions. The mere creation of the ICC as a complementary institution to domestic tribunal thus “dramatically increases the role of national courts in undertaking trials involving international crime.”<sup>265</sup> Indirectly, but effectively, it encourages broader enforcement of human rights and humanitarian law.

## CONCLUSION

International law scholars often assume that the best way to enforce human rights is by establishing strong international institutions that develop the law progressively and enforce it independently. Political realists counter that such institutions are only as useful as powerful states permit them to be, and discourage expansive visions of their mandate. Partisans of the ICC must come to terms with the realist challenge. They must work to adapt the institution accordingly, without abandoning hope for the project altogether. The ICC will undoubtedly be constrained by the state support it commands, but it can make a difference in the enforcement of human rights law by encouraging and assisting national authorities in upholding and enforcing international law.

The ICC and its supporters must decide how the institution will use the powers it has. If it pursues a path of centralization and insularity, it will encounter resistance from member states and from the United States and bring about few of the benefits of reconciliation and institution-building that its founders envisioned. If the Court engages in joint investigations and trials with national authorities, along the lines set forth in this Article, enforcement of international criminal law will become more agreeable to the participating states, who will feel a sense of ownership and control over the process. In

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<sup>264</sup> Ellis, *supra* note 22, at 225.

<sup>265</sup> *Id.* at 241.

this new, less dominant role, the Court might even become acceptable to the United States whose support is critical for the Court's effectiveness.

The mixed-court model for the ICC holds out the promise of strengthening local capacities and contributes to the rebuilding of the rule of law in nations around the globe. It would move international human rights law in directions that its true friends must admit are ultimately wise and necessary—toward a system of law that is better informed, more widely accepted, and better enforced.

Readers with comments may address them to:

Jenia Iontcheva  
University of Chicago Law School  
1111 East 60th Street  
Chicago, IL 60637

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