Nationalizing International Criminal Law

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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."

The impracticality of these visions has become increasingly apparent. Qualified support from many countries and a complete lack of support from the United States has led to sharp limitations on the ICC's power. To a greater degree than appreciated by commentators, the court will be effective only when it acts as an institution complementary to national authorities. The enforcement of international criminal law will remain 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 isolated and dominant 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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3 For a more detailed discussion of the question of the court’s legitimacy, see discussion infra Part II.
Accepting these arguments need not lead to the view that the ICC should be abandoned altogether, the approach favored by some commentators. 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. As such, the model would be more closely related 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. It would involve ICC judges and prosecutors working together with local counterparts in a tribunal created in the territory where the crimes were committed. In the event that prosecution in the affected country proves impossible, mixed chambers could be set up in The Hague and include judges nominated by the states of original jurisdiction. Finally, where the ICC can garner no support for full prosecutions, it could hold public hearings to both preserve evidence for an eventual trial and create international pressure on noncooperating governments.

The widely positive reactions to existing mixed courts and the proposals for setting up similar courts in Cambodia, Guatemala, and Iraq suggest that the mixed-court model is politically viable. In addition to its political advantages, the hybrid-court model has a strong normative appeal. As ICC judges and prosecutors deliberate with their local counterparts in joint investigations and trials, they will render decisions that are better informed and more responsive to the communities they most directly affect. In a pluralist world, reasoned deliberation across borders and across levels of government offers the most legitimate, as well as the most durable, foundation for an international legal regime.

The proposal to restructure the ICC as a roving mixed court is true to a key principle underlying the ICC Statute—the principle of complementarity. Complementarity provides that national jurisdictions take on the prosecution of international crimes whenever they are willing and able to do so. By engaging

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5 See Samantha Power, Unpunishable, NEW REPUBLIC, Dec. 20, 2003, at 18; see also Seth Mydans, Khmer Rouge Leaders Finally Will Face Tribunal, CHI. TRIB., Oct. 5, 2004, at 6; U.N. Help for Crime in Guatemala, N.Y. TIMES, Jan. 21, 2004, at A28. The Iraqi Special Tribunal (IST), created to try war crimes and crimes against humanity committed by the Baathist regime, will include non-Iraqi jurists as advisors to the Iraqi judges and prosecutors. Statute of the Iraqi Special Tribunal art. 6(b). The IST Statute also permits the Iraqi Governing Council to appoint foreign judges to serve alongside their Iraqi counterparts, id. art. 4(d), and the establishment of a mixed tribunal has been proposed by various international organizations. E.g., Letter from Human Rights First to Ayad Allawi, Prime Minister, Interim Government of Iraq (Aug. 11, 2004) (on file with author).

national authorities in the establishment of mixed courts, the ICC could build a true complementarity regime. It could empower national authorities to enforce international criminal law even when they initially lack all the resources to do so. It could encourage governments to participate in joint prosecutions with the ICC, even where those governments might be unwilling to undertake politically divisive prosecutions on their own or to surrender their nationals to a distant court.

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. Support for a powerful international court has never been strong among those who have the ability 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. 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 Versus Political Reality: What the History of the Rome Statute Tells Us About the ICC’s Role in Human Rights Enforcement

Many scholars envision the ICC at the helm of global efforts to develop and enforce human rights and humanitarian law. They have high

7 E.g., M. Cherif Bassiouni, The Time Has Come for an International Criminal Court, 1 IND. INT'L & COMP. L. REV. 1, 33-34 (1991); Louis René Beres, After the Gulf War: Prosecuting Iraqi Crimes Under the Rule of Law, 24 VAND. J. TRANSNAT'L L. 487 passim (1991); William N. Gianaris,
hopes for the tribunal and expect it to advance international justice swiftly, impartially, and effectively. The court is to "clarify existing ambiguities in the law" and set the "highest international standards" of due process. It is to provide prompt investigations and prosecutions of reported atrocities. Some commentators even express the hope that the ICC would put an end to impunity for grave human rights violations and deter war crimes around the world. As UN Secretary-General Kofi Annan has stated, "[i]n the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision."

The idea of a permanent international criminal tribunal traces its origins back to a convention drafted by the League of Nations in 1937. In the wake of atrocities of World War II, the UN General Assembly passed a resolution renewing the call for an international criminal court. For decades, the idea expressed in these documents failed to gather sufficient support to materialize. It was only with the end of the Cold War that an International Criminal Court became politically feasible. A resurgence of ethnic violence and transnational crimes such as drug trafficking and terrorism made the project especially relevant. Overpowered by transborder 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.\(^3\) After more countries expressed an interest in the proposal, the UN General Assembly set in motion a process for drafting a statute for the court.\(^4\) At a Diplomatic Conference in Rome in 1998, delegates from more than 150 countries and 175 nongovernmental organizations gathered to discuss and agree on the final version of the proposed statute.\(^5\) 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.\(^6\)

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-seven.\(^7\) 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.\(^8\) 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.\(^9\) 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

\(^{13}\) 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 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, Agenda Item 152, U.N. Doc. A/44/770 (1989) [hereinafter Agenda Item 152].


\(^{16}\) Sadat & Carden, supra note 7, at 384.

\(^{17}\) International Criminal Court, at http://www.un.org/law/icc/index.html (last visited October 31, 2004); see also 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").


\(^{19}\) 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 13.
powerful international criminal court, but were concerned about retaining the power to prosecute crimes committed on their territory or by their own nationals. 20

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. 21 The ICC's role as an institution complementary to domestic courts proved to be so fundamental to the court's purpose that States Parties included three references to it in the Rome Statute—in the Preamble, Article 1, and Article 17. 22

Even as complementarity was entrenched in the Statute, however, the court was given the ultimate power to decide whether a country is "unwilling" or "unable" to prosecute a case. 23 Many states expressed concerns, both before and during the Rome Conference, about the intrusion into national affairs that might result from this arrangement. 24 China and the United States urged that admissibility determinations be made by domestic courts or possibly the Security Council, 25 or at a minimum, that the ICC have only limited discretion to assert jurisdiction over a state's objection. 26 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

20 Kaul, supra note 18, 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, an ICC controlled by the Security Council). India, Mexico, Indonesia, and Japan were among the more vocal advocates of a narrower jurisdiction for the ICC. Id.

21 Complementarity will be administered in practice through ICC decisions on the admissibility of cases, so the terms admissibility and complementarity are often used interchangeably. Rome Statute of the International Criminal Court art. 17, at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf (last visited Jan. 15, 2005). It is worth noting that complementarity applies even when the UN Security Council refers a case to the ICC. Id. at art. 13(6).

22 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.

23 ICC Statute art. 17(1)(a).


26 Comments to the Ad Hoc Committee, supra note 24, at 12-14, 23-26.
good faith. The refrain of sovereignty concerns expressed in the debates suggested that aggressive use of the ICC’s power to determine the admissibility of cases would meet with resistance.

Debates at the Rome Conference reflected a cautious and restrained approach with respect not only to admissibility of cases, but also to the scope of ICC jurisdiction. As a result of this ambivalence, the Statute does not provide for universal 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 it gives a free pass to “traveling tyrants.” Subject matter jurisdiction is also limited to the most serious international crimes—genocide, crimes against humanity, and war crimes—despite strong voices for a more expansive list of covered offenses. 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.

Even as states ceded some of their penal powers to the ICC in Rome, they refused to relinquish important sovereign prerogatives in administering criminal justice. As a consequence, the statute lacks provisions on amnesties, pardons, parole, and sentence commutations. Various delegations argued “that the [s]tatute should not permit the court to intercede in the administrative (parole) or political decisionmaking process (pardons, amnesties) of a State.” 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 noncooperation. As some commentators have noted, the

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27 Jeffrey L. Bleich, The International Criminal Court: Report of the ILA Working Group on Complementarity, 25 DENV. J. INT’L L. & POL’Y 281, 286 (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”).

28 A recent report commissioned by the ICC Office of the Prosecutor indicates some sensitivity to this issue. INTERNATIONAL CRIMINAL COURT—OFFICE OF THE PROSECUTOR, THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE 8 (2003) (recognizing that “[i]t was extremely important to many States that proceedings cannot be found ‘non-genuine’ simply because of a comparable lack of resources or because of a lack of full compliance with all human rights standards”).

29 Kaul, supra note 18, at 585.

30 Sadat & Carden, supra note 7, at 414; see also Goldsmith, supra note 2, at 92 (“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.”)

31 1995 Ad Hoc Committee Report, supra note 18, at 11; Kirsch & Robinson, supra note 24, at 69.

32 Bilder & Brody, supra note 7, at 269.

33 El Zeidy, supra note 22, at 941.

34 ICC Statute art. 87(7) (providing that the Court must refer findings of noncooperation to the Assembly of States Parties, or, where the Security Council referred the case, to the Security Council).
section on state cooperation with the ICC "suggests that while States agree to the establishment of the [c]ourt in principle, and even to its jurisdiction in theory, they are not willing to make the concessions to international cooperation that are needed to make the [c]ourt a success in practice."  

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 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.  

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, 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. By adopting the relevant

35 Sadat & Carden, supra note 7, at 444.


37 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; 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).

implementing legislation, countries are ensuring that the ICC will not find them “unable” to prosecute international crimes and thus will not interfere with their control over war crimes cases.39

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.”40 By contrast, the duty to enact implementing legislation under the 1949 Geneva Conventions went largely unheeded,41 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.

B. 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. Nevertheless, the United States has strongly opposed the idea of a powerful ICC.

The U.S. government was an active participant in the initial stages of the drafting of the ICC Statute.42 Dissatisfied with the final version, the United States withdrew its support from the ICC, and the American delegate voted


39 E.g., Goold, supra note 36, at 1 (“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.”); Asia-Pacific Human Rights Information Center, Asian Campaign on the Rome Statute Ratification, supra note 36, at 4 (noting that the “ratification of the Rome Statute by countries in Asia will certainly hinge on the way domestic laws are linked to the provisions of the treaty”); HELEN DURHAM, AUSTRALIAN RED CROSS, INTERNATIONAL CRIMINAL COURT, supra note 36 (“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 International Human Rights Law Institute, Progress Report on the Ratification and National Implementing Legislation of the Statute for the Establishment of an International Criminal Court, DePaul University (7th ed. 2001); INTERNATIONAL CENTRE FOR HUMAN RIGHTS AND DEMOCRATIC DEVELOPMENT & 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.dd-rd.ca/frame2.iphtml?langue=0 (last visited Nov. 15, 2004).

40 El Zeidy, supra note 22, at 872.

41 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”).

against it. 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 States would be better able to influence its development. Nonetheless, he was concerned about the "significant flaws" remaining in the court's statute.

Under the Bush administration, U.S. resistance to the ICC project has intensified. Arguing that the ICC Statute conflicts with rights guaranteed to American citizens by the Constitution, some members of Congress introduced legislation to prohibit cooperation with the court. Moved by these arguments and by concerns that the ICC may be used to prosecute American military personnel for political purposes, in 2002 the Bush Administration sent a letter to the UN 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." In August 2002, President Bush signed the legislation prohibiting U.S. cooperation with the ICC. Since then, the Administration has negotiated numerous bilateral agreements with states that are parties to the statute, to the effect that they would not surrender American citizens to the ICC.

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. The court itself is a likely casualty of this growing divide between Europe and the United States.

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 Rome Treaty, and Russia has refused to ratify it. During the negotiations, 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

43 There were six key objections: First, the statute included a provision for jurisdiction over nationals of nonparty 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).
45 Amann & Sellers, supra note 42, at 383.
48 Id. at 18.
going to the court. Finally, Israel, Arab states, and sub-Saharan African states, where many of the serious conflicts are occurring, were also reluctant to accept various provisions of the Rome Statute and have consequently failed to sign or ratify it.

C. 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. Its weak capacity to command cooperation from states will undermine its work.

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. 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.

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. Even after the transfer of Milosevic, despite economic and political pressure from the West, the Yugoslav government refrained from recognizing the ICTY's legal status and denied it access to archives and documents. Rwanda has similarly refused to cooperate with the ICTR on occasion. In 1999, it suspended cooperation with the Tribunal in protest against the Tribunal's release from custody—on procedural grounds—of a high-level suspect. More recently, the overwhelmingly Tutsi Rwandan government

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50 ROBERTSON, supra note 15, at 348; Kirsch & Robinson, supra note 24, at 71.
51 See Wippman, supra note 7, at *4.
52 Sadat & Carden, supra note 7, at 415.
53 ICC Statute art. 87; Sadat & Carden, supra note 7, at 416.
54 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).
57 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 ENGLISH WIRE, Nov. 06, 1999, WESTLAW NewsRoom Library, 11/6/99 Agence Fr.-Presse File.
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.\textsuperscript{58}

Lack of cooperation has extended beyond states whose nationals were being tried by international tribunals. Countries neighboring Rwanda have harbored fugitive war criminals,\textsuperscript{59} and countries whose peacekeeping forces were on the ground in Rwanda and Yugoslavia have been reluctant to send their nationals to testify before the tribunals.\textsuperscript{60} Peacekeeping states were reluctant to order their forces to capture war criminals that were still at large.\textsuperscript{61} Importantly, although the ICTR and ICTY have jurisdictional primacy over domestic authorities, the Security Council has failed to sanction domestic authorities that refused to cooperate with the international tribunals.\textsuperscript{62}

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 financial pressure, the United States undermined Milosevic’s regime in Yugoslavia, paving the way for the arrests and trials of Serb war criminals.\textsuperscript{63} In particular, the United States’s threat to withhold U.S. and International Monetary Fund aid to the successor regime in Yugoslavia prompted Milosevic’s transfer to the ICTY.\textsuperscript{64} American diplomatic pressure also compelled the Croatian government to cooperate with the ICTY.\textsuperscript{65} Without question, the lack 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 from member states (general UN funds are also likely to be used, but primarily for cases referred by the Security Council).\textsuperscript{66} The support of more affluent states will be essential for the court to


\textsuperscript{59} Goldstone, supra note 9, 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. 14, 2000, LEXIS, News & Business Library, Xinhua General News Service File (citing the ICTR Prosecutor as saying that the arrests of some indicted individuals are being hampered by two African countries).


\textsuperscript{61} ARYEH NEIER, WAR CRIMES 252 (1997); Ourdan, supra note 60.


\textsuperscript{63} Goldsmith, supra note 2, at 93.

\textsuperscript{64} Id.


\textsuperscript{66} ICC Statute art. 115. The Court could also utilize “additional funds” provided voluntarily by governments, international organizations, individuals, and corporations, but given the controversial
function effectively. Because of its substantial dependence on states' contributions, the ICC could be seriously undermined if a major contributor should withdraw its funding. 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 UN budget" and thus to underfunding. International tribunals are considerably more expensive than regular UN agencies, and as officials from the ICTR and ICTY have testified, the lack of funds can seriously impede their work. The ICC could be similarly crippled without the support of the United States.

D. 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 vital role in interpreting and enforcing human rights and humanitarian law. Essentially, four broad possibilities exist for the implementation of international criminal law 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. This solution, however, would seem to defeat the entire purpose of the ICC. Although the Bush administration has expressed some support for this option, the UN administration and most members do not favor it. Given the current political landscape, the ICC will have limited powers, but it will not disappear altogether. As long as it exists, it will seem peculiar to create new ad hoc international tribunals that perform the same function as an already existing bureaucracy.

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.

Countries with no connection to the underlying offenses could also take up cases under “universal jurisdiction.” Several European countries, with Belgium at the forefront, have passed laws granting their courts jurisdiction over specific international crimes regardless of where they occur or what the nationality of the victim or the offender may be. The universal jurisdiction approach is, however, even more problematic than the ICC. States are less likely to cede prosecutorial authority to the domestic courts of other states acting under universal jurisdiction than to the ICC, an organization that at least requires the consent of a state with a link to the offense. Moreover, the basis for universal jurisdiction remains highly contested. In the recent International Court of Justice’s Arrest Warrant decision, several judges expressed disapproval of Belgium’s law providing for prosecution of international crimes under universal jurisdiction and in absentia. More recently, the United States threatened to move NATO headquarters out of Brussels unless Belgium amended its universal jurisdiction statute—which Belgium promptly did in response to the pressure.

Finally, mixed courts, composed of international and national judges, could prosecute international crimes in 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, Iraq, and Guatemala. 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. Instead of creating such courts on an ad hoc basis, however, the international community can more efficiently organize them under the aegis of the ICC. A system of

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73 National courts may encounter enforcement problems, however, when an accused is out of their jurisdictional reach. See infra note 236 and accompanying text.
75 The case did not directly address the challenge to universal jurisdiction, but instead found that the subject of the arrest warrant, the former foreign minister of the Democratic Republic of the Congo, was entitled to immunity from prosecution in Belgium. Concerning the Arrest Warrant of 11 April 2000 (Democratic Rep. of the Congo v. Bel.), 41 I.L.M. 536. (Feb. 14, 2002). Compare id. at 562, para. 12 (separate Opinion of Pres. Guillaume) (rejecting the existence of universal jurisdiction in absentia), with id. 583 para. 45, 586 para. 59 (separate opinion of Judges Higgins, Kooijmans and Buergenthal) (noting that no established state practice of exercising universal jurisdiction exists, but that a state may be able to exercise universal jurisdiction lawfully if it first offers “to the national State of the prospective accused person the opportunity itself to act upon the charges concerned”).
77 For a general discussion of mixed courts and their advantages, see Laura Dickinson, The Promise of Hybrid Courts, 97 AM. J. INT’L L. 295 (2003).
78 See infra notes 237-238 and accompanying text regarding other advantages of ICC-backed mixed courts over ad hoc mixed courts.
mixed courts, with the ICC serving as a coordinating and circuit-riding body of experts and jurists, may be the best hope for international criminal law.

Whatever shape international justice takes and whatever role the ICC assumes in promoting 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. 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. Proponents of a powerful ICC have argued that “the rendering of justice is too important to be left to the whims of governments that are prone to compromise either on enforcing the law against perpetrators or on guaranteeing them due process.”

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’ “expectation[s] for the highest form of justice” and are better at upholding the “rule of international law.” 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
Because international tribunals are more likely than local courts to be impartial, they are also more able to build “objective” records of events.\(^{84}\)

In addition to these functional advantages, the ICC is said to have an important symbolic, norm-reinforcing value.\(^{85}\) 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.”\(^{86}\)

Some commentators have speculated that, by sending a message that the international community will not tolerate certain behavior, a permanent international criminal court would also serve a deterrent function.\(^{87}\) 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 court’s rulings would be accepted by national communities and incorporated into domestic law.\(^{88}\)

The aspirations of this centralized model of enforcement are universalist. The ICC is expected to advance a body of law uniformly applicable around the globe and wholly independent from the context in which its subjects are situated.\(^{89}\) 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

\(^{83}\) Steven R. Ratner & Jason S. Abrams, Accountability for Human Rights Atrocities in International Law 22-23, 184 (2001); Cassese, supra note 80, at 5, 8 (noting that in comparison to national courts, international courts are less destabilizing to fragile governments and less likely to cede to “short-term objectives of national politics”).


\(^{86}\) See 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: “[T]he 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 15, at 220.

\(^{87}\) 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 Al (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).

\(^{88}\) 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, “[m]ore 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 86, at 372.
spurned because it might lead to parochial local judgments, fragmentation, and incoherence.\textsuperscript{90}

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.\textsuperscript{91} José Alvarez has pointed out that the impartiality and record-building functions of international tribunals have often been exaggerated.\textsuperscript{92}

Several more critiques of the centralized model are explored in the Sections below. First, because international criminal tribunals are isolated from the communities affected by their decisions, the tribunals' judgments are neither tested nor informed by diverse perspectives. Furthermore, the results of international prosecutions hardly foster the internalization of international norms and may in fact engender backlash by local communities. Finally, international trials far from the place where the crimes occurred do little to promote post-conflict reconciliation or 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 ICC’s contribution to a uniform and truly global criminal law, the court’s isolation from a structured political community is likely to undermine the legitimacy of the court’s decisions. Although the court might enjoy a level of international legitimacy for the reasons outlined in the previous Section, it is likely to lack support among the populations most directly affected by its decisions. If the court develops international criminal law in a centralized fashion, from the top-down, it may also undermine the important values of deliberation, inclusiveness, autonomy, and democratic accountability.

The first major challenge to the ICC’s legitimacy comes from the open-ended nature of international criminal 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 defining the shape of the law.\textsuperscript{93} Unlike a technocratic agency that grounds its legitimacy in scientific or technical expertise, the ICC cannot simply rely on the skill of its judges to resolve contested legal, moral, and political questions. Furthermore, the court is not a part of a structured system of checks and balances. For that reason, the legitimacy of the ICC’s mandates will depend above all on the court’s meaningful engagement with the states and populations most affected by its decisions.


\textsuperscript{92} Alvarez, *supra* note 7, at 442-50.

Consider several examples of potentially controversial determinations that ICC judges will have to make: Must a state use precision-guided munitions to minimize collateral damage?\(^9\) What constitutes “proportionality and necessity” in military action?\(^9\) What is the precise boundary between military and civilian targets?\(^9\) Criminal law itself is full of trying moral questions that are difficult to decide outside the frame of reference that a political community and its norms provide. Moreover, “[e]ven 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.”\(^9\) Finally, sentencing determinations might also prove controversial, particularly when out of sync with national punishments.\(^9\)

The court will rarely find much support in the statutory text for the many difficult decisions it will have to make.\(^9\) The six official languages in which the Statute was written will further complicate textualist readings. ICC judges will not have a solid body of precedent to guide them in their interpretation. 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.\(^1\)

Given the indeterminacy of international criminal law and the diversity of views on its scope and content, it is not surprising that the ICC’s mandate to interpret and enforce the 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.\(^2\) Second, some scholars have

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\(^9\) Morris, supra note 93, at 597.


\(^9\) Wedgwood, supra note 95, at 194.


\(^9\) See infra notes 143-144 and accompanying text.

\(^9\) The ICC 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.

\(^9\) ICC Statute art. 128 (stating that the Arabic, Chinese, English, French, Russian, and Spanish versions of the Statute are equally authentic).

\(^1\) Kirsch & Oosterveld, supra note 99, 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.”).

\(^2\) 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, 16 (2003); Will, supra note 4. The prosecutor can open investigations on her own initiative, but her actions are subject to review by a three-judge ICC pre-Trial Chamber, which must
argued persuasively that the court cannot base its authority exclusively on state consent, because it can exercise its jurisdiction over nationals of states that are not parties to the ICC Treaty. \(^{103}\) 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 can 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. \(^{104}\) In particular, they have expressed concern about the lack of meaningful constraints on the prosecutor’s powers. \(^{105}\) 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. \(^{106}\) Although the prosecutor’s actions are subject to review by a three-judge panel of ICC judges, and to a lesser extent, by the Assembly of States Parties to the ICC, \(^{107}\) 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.

American critics have focused less on the scope of judicial discretion, but 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. \(^{108}\) They derive their legitimacy to a great extent from principled and reasoned decisionmaking, their legal expertise, and their impartiality. \(^{109}\) But perhaps in recognition of the tenuous nature of such legitimacy, additional safeguards have been placed on judicial decisionmaking at the national level. Legislatures can rewrite a statute when they believe that judges interpreting the statute have overstepped their

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\(^{103}\) E.g., Morris, *supra* note 93, at 597.


\(^{106}\) 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) (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”).

\(^{107}\) JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135-79 (1980).

mandate. Residence requirements also increase the likelihood that judges will consider the preferences of the community affected by their decisions.

Yet ICC judges will be far from the populations that their verdicts will affect, and 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 popular 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. The Assembly delegates are usually career civil servants in their respective countries’ executive branches and already several degrees removed from the popular will. As other commentators have already observed, the Assembly is likely to be torn by internal disputes and ineffective as an oversight mechanism. Moreover, because the Assembly will make decisions by a majority or supermajority 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. 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.

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 the Rome Statute, as long as the state on whose territory the crime occurred consents. In Madeline Morris’s terms, “[t]here is

111 Part of the problem may be that, at least at this stage of human history, there is not enough integration across national lines to produce an international demos that might be represented by an international legislature.
112 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.
113 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”).
114 Danner, supra note 106, 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”).
115 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).
116 Lee A. Casey & David B. Rivkin, Jr., The Limits of Legitimacy: The Rome’s Statute Unlawful Application to Non-State Parties, 44 VA. J. INT’L L. 63, 64-65, 67-68 (2003); Morris, supra note 93, at 592-94, 600; J.H.H. Weiler, The Transformation of Europe, 100 YALE L.J. 2403, 2473 (1991) (arguing that the veto power of EU member states in the Council of Ministers contributes to the legitimacy of the organization, whereas a shift toward majority would exacerbate the “democratic deficit” of the European Union). 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 113, at 29-39.
no democratic linkage between the ICC and those non-party nationals over whom it would exercise authority." \(^{117}\)

Some scholars have even begun to question the sufficiency of state consent for legitimizing the actions of international institutions. Given the limited opportunities available to an individual state or even a group of states to sanction an international institution acting outside its delegated powers, national communities have no meaningful "voice" in the oversight of international institutions. \(^{118}\) As a remedy to this problem, scholars have called for participation by nationally elected delegates in the governance of international institutions. \(^{119}\) Some have even suggested holding national referenda on major issues facing international organizations. \(^{120}\) 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 other ways in which international adjudication could 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 dispute settlement mechanism: “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.’” \(^{121}\) Conscious of its tenuous democratic link to national constituencies, the European Court of Human Rights also grants national authorities a “margin of appreciation” when evaluating the legality of their practices. \(^{122}\)

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


\(^{118}\) E.g., Oren Perez, Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law, 10 IND. J. GLOBAL LEGAL STUD 25, 29 (2003) (connecting legitimacy to “public accountability” because of a “widely-shared expectation that the people affected by a certain normative structure should be involved in its design and implementation”). But see Danner, supra note 106, 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).

\(^{119}\) Stein, supra note 113, at 532.

\(^{120}\) Id.


\(^{122}\) See infra note 173 and accompanying text.
likely to be attuned to the interests and preferences of local populations, their involvement will be an important step in increasing the court's accountability and inclusiveness.

The closer connection of the ICC mixed courts to domestic legal processes would also further the ideals of self-determination and cross-cultural deliberation. As discussed earlier, the international legal community has failed to generate on its own norms that could both provide meaningful guidance to ICC judges and claim wide acceptance by diverse postconflict societies. At the international level, real agreement exists on only a small set of fundamental norms, such as basic norms of due process and the core prohibitions on genocide and crimes against humanity. Encouraging national communities to supplement these broad international norms with more concrete rules and interpretations of their own is consistent with ideals of autonomy and self-determination. It provides those communities with the opportunity to influence, in accordance with their core values, the laws and institutions that govern them. It also gives national communities a more meaningful voice in shaping the course of international criminal law from the bottom-up.

The mixed-court model of developing international criminal law is more legitimate in yet another sense—it encourages deliberation among diverse participants and is thus more likely to produce informed and politically acceptable decisions. As deliberative democratic theorists have argued, the airing of conflicting opinions is essential to correct judgments, in both politics and law. 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." 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 opinions likely to be represented at the court. The judges' likely lack of appreciation for the diversity of opinions

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123 See generally M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes, 59 LAW & CONTEMP. PROBS. 63 (1996) (discussing wide disagreement among scholars, lawyers, and states about which rights are fundamental and constitute obligations upon the international community as a whole).

124 JÜRGEN HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 50-68 (Thomas McCarthy trans., 1979) (arguing that deliberation is a means for discovering the truth); 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."); Hilary Putnam, A Reconsideration of Deweyan Democracy, 63 S. CAL. L. REV. 1671, 1682 (1990) (citing Dewey for the proposition that experimental inquiry combined with free and full discussion is the best way of resolving social problems).

125 Graham Smith & Corinne Wales, Citizens' Juries and Deliberative Democracy, 48 POL. STUD. 51, 53-54 (2000); see also Iontcheva, supra note 6, at 339-43.

126 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.
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.\textsuperscript{127} 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 postconflict society. The benefits of deliberation may also accrue in the interactions among diverse institutions—for example, in an ongoing dialogue among national and international courts, or among mixed courts and an overarching international criminal appeals chamber.\textsuperscript{128} 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.\textsuperscript{129}

\textsuperscript{127} The Court could also involve lay participants as jurors. Many 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.


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. \textit{Cf. Robertson}, \textit{supra} note 15, at 361; William A. Schabas, \textit{International Law and Abolition of the Death Penalty}, 55 WASH. & LEE L. REV. 797, 799 (1998). This view prevailed during the Rome negotiations, despite the opposition by countries that maintain the death penalty for ordinary crimes. States with a predominantly Muslim population, for example, argued that “if the statute [were] to be considered representative of all systems . . . , it should include the death penalty.” \textit{See} Press Release, United Nations, Discussion Turns to Range and Definition of Penalties in Draft Statute in Preparatory Committee on International Criminal Court, L/2805 (Aug. 22, 1996), at http://www.iccnow.org/romearchive/documentsreports/2PrepCmtd/DPIPenalties22Aug96.pdf (last visited Jan. 15, 2005). A major reason for excluding the death penalty was a strong insistence for that exclusion by 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, \textit{supra} note 24, at 86. Outside the narrow circle of international lawyers, however, many jurists and nonlegal scholars continue to find reasonable grounds on which to support the death penalty. \textit{E.g.}, Gerard Prunier, \textit{The Rwanda Crisis: History of a Genocide} 355 (1995); \textit{Punishment and the Death Penalty: The Current Debate} (Stuart E. Rosenbaum & Robert M. Baird eds., 1995). And in many states across the world (including some of those who have abolished capital punishment), a substantial number of people support the death penalty, even for ordinary crimes. \textit{E.g.}, Dick J. Hessing et al., \textit{Explaining Capital Punishment Support in an Abolitionist Country: The Case of the Netherlands}, 27 LAW & HUM. BEHAV. 605, 605-06 (2003).

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. By contrast, as the debates about hybrid courts in Iraq illustrate, when local and international judges work together, these debates will inevitably take place. \textit{E.g.}, Vanessa Blum, \textit{Crafting Justice in Iraq: The Bush Administration Backs Iraqi Court Plan Criticized by Many in International Legal Community}, LEGAL TIMES, Dec. 22, 2003, at 25.
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.\(^{130}\)

As students of federalism and subsidiarity are well aware, of course, deliberation has significant costs. These include delays, disruptions and uncertainty resulting from conflicts among judges and prosecutors with different perspectives, and among institutions with different priorities. Yet federal systems have devised structural arrangements to cope with such conflict and to find the right balance between, on the one hand, deliberation and democracy, and on the other, efficiency and uniformity. As Part III discusses in greater detail, an ICC-sponsored system of hybrid courts, with an overarching Appeals Chamber and well-established rules and presumptions in resolving jurisdictional conflicts, similarly presents a feasible mechanism for mediating between these competing values.

C. The Problem with Distant Prosecutions: Domestic Resistance

The ICC's distance from the communities directly 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 counterreaction to international norms and practices.

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\(^{31}\) tribunal with little relevance to the reconciliation process in the countries of the region.\(^{32}\) 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."\(^{33}\) Even legal professionals admit they do not understand the ICTY procedures, because

\(^{130}\) E.g., Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38 (2003); Ernest A. Young, Institutional Settlement in Foreign Affairs Law (2004) (manuscript on file with author) (using insights from federal courts law to address the allocation of responsibilities among national and supranational organizations with respect to issues over which they have overlapping jurisdiction).


\(^{132}\) 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 11 bis, 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. 11 bis(A), available at http://www.un.org/icty/legaldoc/index.htm (last revised August 12, 2004).

\(^{133}\) INTERNATIONAL CRISIS GROUP, *WAR CRIMINALS IN BOSNIA'S REPUBLIKA SRPSKA* 75 (2000).
of the distance of the Tribunal and because of its unique blend of civil and common law procedures.\textsuperscript{134}

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.”\textsuperscript{135} Indicted Serbs and Croats have been hailed as heroes by some in their home countries,\textsuperscript{136} while support for cooperation with the ICTY remains minimal.\textsuperscript{137} 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.”\textsuperscript{138}

The International Criminal Tribunal for Rwanda has also been criticized for its remoteness from the place where the crimes that it judges took place.\textsuperscript{139} Hearing about the ICTR from sparse radio broadcasts, most Rwandans view the ICTR as an “inherently foreign” institution that has “forfeited any impact on Rwandan society.”\textsuperscript{140}

Local governments and communities have also complained about the discrepancies between their concerns and the international tribunals’ priorities. Both Rwandans and Bosnians have expressed disappointment with the slow pace of the tribunals’ work.\textsuperscript{141} Some Rwandans have also complained about the extraordinary—by Rwandan standards—procedural protections afforded to defendants.\textsuperscript{142} 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 are

\textsuperscript{134} JUSTICE, ACCOUNTABILITY, supra note 131, at 34.


\textsuperscript{137} Steven Erlanger, Did Serbia’s Leader Do the West’s Bidding Too Well?, N.Y. TIMES, Mar. 16, 2003, at 4 (reporting that only 12% of Serbs support extraditions of Serb suspects to The Hague).

\textsuperscript{138} Coliver, supra note 135, at 21.


\textsuperscript{140} INTERNATIONAL CRISIS GROUP, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA: JUSTICE DELAYED 24 (2001).

\textsuperscript{141} Remy Ourdan, La Laborieuse Invention d’une Justice Internationale, LE MONDE, June 18, 1998, LEXIS, News & Business Library, Le Monde (FR) File (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 forty-eight individuals and tried and sentenced only four of them, Rwandan courts have issued more than 20,000 indictments, held 1,989 trials, and accepted 17,847 guilty pleas. Wippman, Atrocities, Deterrence, and the Limits of International Justice, supra note 91, at 482 (citing statement of Joseph Mutaboba).

\textsuperscript{142} Remy Ourdan, supra note 141.
sentenced to death in Rwandan courts.\textsuperscript{143} As one Rwandan official wryly observed, "[i]t 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."\textsuperscript{144}

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.\textsuperscript{145} The Rwandan government’s dissatisfaction with the ICTR’s policies was also one of the reasons that led Rwanda to lobby for the removal of Carla del Ponte from her position as chief prosecutor of the ICTR.\textsuperscript{146}

Recent evidence of states’ withdrawal from a regional human rights regime confirms that when an international tribunal attempts to dictate the law from above, disregarding local preferences and enforcement capabilities, the tribunal is unlikely to be successful over the long run. In the late 1990s, three Caribbean states—Guyana, Trinidad and Tobago, and Jamaica—withdraw 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, which is based in London and staffed with British judges.\textsuperscript{147} 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 denounce those obligations outright. 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.\textsuperscript{148}

The Caribbean countries’ treaty denunciations demonstrate the resistance an international court can provoke when it attempts to change by


\textsuperscript{144} GOUREVITCH, supra note 143, at 255.

\textsuperscript{145} Stephen Smith, En Jugeant le Diable, le Tribunal d’Arusha Joue sa Credibilite, LE MONDE, Apr. 4, 2002, LEXIS, News & Business Library, Le Monde (FR) File (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).

\textsuperscript{146} Carla Del Ponte Replaced As ICTR Prosecutor, Africa News, Aug. 29, 2003, LEXIS, News & Business Library, Africa News File. Commentators have suggested that the Rwandan government petitioned for her removal because some officials were concerned they were vulnerable to prosecution under her leadership of the ICTR. See Felicity Barringer, Annan is Said To Want New Prosecutor for Rwanda War Crimes, N.Y. TIMES, July 29, 2003, at A11.

\textsuperscript{147} See generally Laurence R. Helfer, Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes, 102 COLUM. L. REV. 1832 (2002) (arguing that the “overlegalization,” or the increasing constraints placed on sovereignty by rules and review mechanisms, was a key reason for the withdrawal of the Caribbean countries from international human rights treaties).

\textsuperscript{148} Id.
judicial fiat the treaty obligations of a state within its jurisdiction. Particularly where the new obligations conflict with deeply held social norms (in the case of the Caribbean countries, in support of capital punishment), international tribunals that proceed too fast and over strong objections by local constituencies are likely to see their authority challenged.

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 violent conflict. To achieve the cathartic and reconciliation benefits of war crimes trials, nations must take on war crimes trials themselves. The exercise of jurisdiction over war crimes allows a country to come to terms with its past and to demonstrate the power of the judicial system to “domesticate chaos.”

The assertion of jurisdiction is an indispensable part of a community’s healing process. Because local trials are more extensively covered in the media and more easily attended and monitored by the local population, they are more likely to stimulate public discussion and to “foster the liberal virtues of tolerations, moderation, and civil respect.” For all these reasons, such trials are essential to rebuilding a system based on the rule of law.

Media commentaries in countries dealing with postconflict 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 approximately two hundred 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.” Similarly, recent trials in France of Klaus Barbie and Paul Touvier, officials in the French Vichy government

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149 A court may do that by “adding new obligations, specifying existing obligations with greater particularity, or strengthening mechanisms for review and enforcement.” Id. at 1855.

150 As Dan Kahan has argued in the domestic context, “[i]f 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).

151 Alvarez, supra note 7, at 482.


153 See MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 14-16 (1997) (describing war crimes trials as constructing the “collective memories” that may help cleanse victims, perpetrators, and even whole nations of their brutal past); Berman, supra note 152, at 434 (noting that the trial of accused war criminal Klaus Barbie had that effect on France).

154 OSIEL, supra note 153, at 2.

155 Id. at 6.
during World War II, provided "psychotherapy on a nationwide scale" and became "the vehicle for debate on the legitimacy and activities of the Vichy regime." 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...[and it] seemed as though common people would be able at last to come to terms with their own experiences of fear, silence, and death. 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." When an international tribunal deprives states of 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. Compared to the trials in France, Argentina, Israel, and South Korea, ICTR and ICTY trials were neither 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 thereby lead the country on the road to reconciliation and the establishment of a society governed by the rule of law.

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 an outreach program designed to raise publicity in the region about its own work, the court made no systematic attempt to share its legal and technical expertise with local judges or to engage these judges in cooperative proceedings. 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

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158 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 153, 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. The awareness-raising potential of this process is demonstrated by 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, at A4.
Bosnian judges themselves have expressed frustration at their marginalization in this process. Unsurprisingly, the "tribunal's long-term impact on the systems of justice in the area of conflict has been minimal." As a result, "there is virtually no effective enforcement of these important laws in the courts that ultimately matter most, i.e., the region's domestic courts."

The ICTR, by trying high-level officials, but leaving the hundreds of thousands of "small fish" to Rwandan tribunals, may itself have helped reinforce perceptions of the inadequacy of the Rwandan justice system. Had the tribunal left one or more high-stakes trials to national courts, it could have helped efforts to affirm the rule of law in Rwanda. As José 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.

For all the reasons discussed in this Section—the limited accountability and diversity of 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."

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. The court can and should play an important role in encouraging and assisting national courts in the enforcement of 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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161 Id. at 8, 12.

162 JUSTICE, ACCOUNTABILITY, supra note 131, 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).

163 Tolbert, supra note 160, at 8.

164 Id.

165 Alvarez, supra note 7, at 402.

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 responsibility to prosecute international crimes. 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 ECJ have emphasized the extent to which it has relied on national institutions to reinforce and even expand its jurisdiction. The court achieved enforcement of its mandates "by 'shaming' and 'co-opting' domestic law-makers, judges and citizens, who pressure governments from within for compliance." Because the ECJ relied predominantly on the referral cases from national courts, it engaged in a conscious effort to win the "cooperation and goodwill of the state courts." 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.

Unlike the ECJ, which has depended largely on national courts for its caseload, the ECHR can 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 its interests, and developing strong ties to state authorities who would ultimately be responsible for implementing the court’s decisions. 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. 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” 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.

As the next two Sections elaborate on in more detail, the ICC could engage local courts and prosecutors just as the European Courts of Justice and Human Rights have done. It could even go further and conduct joint investigations and trials with national authorities. The ICC Appeals Chamber could also follow the example of the European Courts and adopt a “minimalist” attitude when reviewing hybrid court decisions, particularly those decisions that are still subject to sustained debate in local courts, legislatures, and communities. A “minimalist” Appeals Chamber would say “no more than necessary to justify an outcome” and “leav[e] as much as possible undecided,” so as to leave “issues open for democratic deliberation.”

172 Slaughter & Helfer, supra note 109, at 312, 316-17.
173 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 accordingly limited its jurisdiction to a select group of persons and subject matters. HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 225 (1983). The canon law accommodated secular law and custom as well. 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.

175 Slaughter & Helfer, supra note 109, at 316-17; 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 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 Paul Mahoney, Marvelous Richness of Diversity or Invidious Cultural Relativism?, 19 HUM. RTS. L.J. 1, 2-4 (1998).

As the examples of the European Courts suggest, enforcing international law in partnership and deliberation with national institutions is likely to be more lasting. A burgeoning literature on transgovernmental networks also emphasizes the potential of forming transnational coalitions to assist local elites and institutions in implementing international law. 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." 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. In the end, international law's best hope may be a gradual but broad diffusion of its norms through national governments and elites.

As Part II elaborated, the bottom-up development of international law through mixed courts would not only be more sustainable, but also more respectful of the diversity of opinion on international criminal law that exists in states around the world. By consciously encouraging such development of the law from the ground up, the ICC-as-mixed-court can promote "social deliberation, learning, compromise, and moral evolution over time."[181]

The court 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. Perhaps in recognition of this fact, the International Criminal Tribunal for the former Yugoslavia has itself recently begun rethinking its isolation from courts in the former Yugoslavia. Last year, its former President Judge Jorda indicated an interest in referring some cases from the ICTY to local courts, observing: "[I]t 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 . . . [t]he idea being upheld is that whereby justice must be brought steadily closer to the people."[182] Judge Jorda is one of the judges appointed to

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178 Slaughter & Helfer, supra note 109, at 335; see also Moravcsik, supra note 168, at 159 ("The most effective elements of the European human rights system are thus also the subtlest. This delicate process of legal harmonization proceeds slowly.").

179 See supra notes 147-149 and accompanying text.


181 Sunstein, supra note 176, at 33.

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 could 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. Consequently, where significant benefits to local prosecutions exist, 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, many 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.

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. 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 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 some of the financial pressure on domestic judicial and investigative offices.

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. Senator Arlen Specter put forth such a proposal in the early stages of discussions about a permanent international criminal court. Senator Specter proposed that the

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183 ICC Statute art. 17.
185 Id. at 240-44; Tolbert, supra note 160, at 16.
186 Concannon, Jr., supra note 184, at 232.
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. 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."  

The ICC Statute can accommodate this supporting and collaborative role for the court’s investigators and prosecutors. Upon the request by a member state, the ICC 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." Under certain conditions, the court may also provide assistance to states that are not parties to the Rome Statute. The types of cooperation and assistance explicitly authorized by the Rome Statute include the transmission of evidence obtained by the court and the questioning of persons detained by the order of the court.

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 territory of any State Party and, by special agreement, on the territory of any other State." Although Article 42 provides that a member of the Office of the Prosecutor "shall not seek or act on instructions from any external source," 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 encourage the ICC to train local officials in investigative techniques and victims’ issues.

The importance of such cooperation arrangements is recognized in a recent informal paper commissioned by the ICC Office of the Prosecutor ("OTP"), which recommended that the ICC provide information, evidence, technical expertise, and training to national authorities. By engaging local authorities, perhaps going as far as to conduct joint investigations, the ICC

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188 Id.
189 ICC Statute art. 93(10)(a).
190 Id. art. 93(10)(a).
191 Id. art. 93(10)(c).
192 Id. art. 93(10)(b).
193 Id. art. 93(10)(c).
would increase the likelihood of effective prosecutions, even where the local criminal justice system is not fully capable of conducting such prosecutions on its own. Effective prosecutions, in turn, would 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 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

Neither Senator Specter's proposal nor the OTP report envisioned the possibility of joint judicial proceedings sponsored by the International Criminal Court. Under Specter's proposal, national judges would preside over national trials, and international judges would preside over the trials referred to the international tribunal by national authorities. Yet the logic of Specter's plan and the OTP report 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," conducting both investigations and proceedings at the location where crimes were committed. In effect, ICC judges would serve on ad hoc, mixed courts, akin to the ones currently used in Sierra Leone, East Timor, and Kosovo. Importantly, this model was proposed as a cost-saving measure.

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." The Sierra Leonean government, Cambodian government, and East Timorese lawyers also asked the international

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195 Id.
197 Id. at 321.
198 Id.
199 Alvarez, supra note 7, at 393.
201 Letter from Norodom Ranariddh, First Prime Minister of Cambodia, and Hun Sen, Second Prime Minister of Cambodia, to Kofi Annan, U.N. Secretary-General (June 21, 1997), in U.N. Doc. A/51/930 (June 24, 1997).
202 The East Timorese legal community was split on this issue. Although some international and East Timorese NGOs insisted on an international tribunal for East Timor, the UN Transitional
community to set up mixed courts on their territory. The Bush administration, too, has favored mixed courts as a superior alternative to the ICC and was considering a similar model for a court to try Iraqi officials for crimes against humanity. 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, East Timor, and Sierra Leone, and is negotiating a similar arrangement with the Cambodian and Guatemalan governments. Admittedly, it is too early to make a comprehensive assessment of the performance of these mixed courts. Yet given their popularity and their promise as a model for the bottom-up enforcement of international criminal law, it is useful to consider their strengths and weaknesses.

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. The Kosovo courts include a majority of local judges sitting together with judges appointed by the UN. 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

Administration for East Timor, with the support of other East Timorese lawyers, decided on a mixed-court model largely based on the proposed court for Cambodia.

A recent survey of Bosnian judges also concludes that mixed courts involving local jurists and taking place close to where the crimes were committed would be well-received by the local legal community. JUSTICE, ACCOUNTABILITY, supra note 131, at 48-50.


Heidi Kingstone, Out of the Killing Fields, JERUSALEM REP., June 30, 2003, at 24; Michelle Mittelstadt, Options for Hussein Trial Run Gamut; If He's Caught, He Could Face Military Tribunals, Courts or Ad Hoc Panels, DALLAS MORNING NEWS, Mar. 30, 2003, at 19A.

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.


Mydans, supra note 5, at 6; U.N. Help for Crime in Guatemala, supra note 5, at A28.


Id.
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. The inclusion of domestic law allows these 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. 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. Furthermore, unlike international criminal tribunals, which have personal jurisdiction only over adults, the Special Court can try individuals who were fifteen or older at the time they allegedly committed the crime. 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. 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.

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212 Report of the Secretary-General on Khmer Rouge Trials, U.N. GAOR, 57th Sess., Agenda Item 109(b), at 7, U.N. Doc. A/57/769 (2003). 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 pretrial Chamber within thirty days. Unless a supermajority of the pretrial Chamber (four out of five judges) agrees that no basis for the prosecution exists, the prosecution would continue. Linton, supra note 210, at 192.

213 Bohlander, supra note 182, at 70-71.


215 Id. arts. 4(c), 5(a).

216 Jennifer L. Poole, Post-Conflict Justice in Sierra Leone, in POST-CONFLICT JUSTICE, supra note 117, at 563, 583.

217 Statute of the Special Court for Sierra Leone, supra note 215, art. 7.

218 Poole, supra note 216, at 583.

219 Statute of the Special Court for Sierra Leone, supra note 215, art. 7. The prosecutor of the Special Court, David Crane, has also committed not to prosecute child soldiers, but instead to focus on the perpetrators with the greatest responsibility for the atrocities—who are all adults.

220 See Diane Marie Amann, Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone, 29 PEPP. L. REV. 167, 168 (2001).
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. 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. 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 the independence of the island nation.

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. 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. They have further raised awareness about the court by traveling around the country to collect evidence. The local media have also 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. 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

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221 Linton, supra note 210, at 193.
222 Id. at 196.
227 Eighth Report of the Secretary-General on the United Nations Mission in Sierra Leone, supra note 224, at 51-53 (describing the establishment of the Trust 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).
the conflict there, and by initiating "community reconciliation procedures" ("CRP") at the regional level. At regional CRP hearings, lower-level criminals (who 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. 228 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. 229 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—youth who were often abducted and forced to perform horrible crimes. 230 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. 231

Mixed courts have also generally been more effective than international tribunals in processing cases. In less than three years, in spite of delays, language problems, and inexperienced lawyers impeding its work, the Serious Crimes Unit in East Timor has obtained thirty-two convictions and issued fifty-eight indictments involving 240 people. 232 By contrast, in its first eight years, the ICTY issued nineteen judgments, 233 while the ICTR had issued only eight judgments in its first six years. 234 These figures underscore the efficiency of mixed courts, particularly given the significantly larger budgets of the international tribunals. 235


229 See Clausen, supra note 227, at 48.

230 Poole, supra note 216, at 590.

231 See id. at 591.

232 Clausen, supra note 227, at 48.


235 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 Linton, supra note 210, at 205 n.69 (citing the serious lack of resources at the East Timor mixed courts); Elizabeth Neuffer, Lagging Tribunal Is Called a Threat to a Viable East Timor; Slaughter Suspects Elude UN’s Reach, BOSTON GLOBE, Sept. 2, 2001, at A6 (citing the budget of the UN mission). Similarly, the proposed mixed court in Bosnia, which is to replace the ICTY around 2008, will have an estimated budget of $6 million to $11 million. Bohlander, supra note 182, at 84. The Cambodian Extraordinary Chambers are expected to require $57 million over three years. Amy Kazmin, Cambodia in Agreement on UN Genocide Tribunal Plan, FIN. TIMES, Oct. 5, 2004, at 10.
b. Overcoming the Challenges of Mixed Courts

A review of the advantages of mixed courts may suggest that they provide a better alternative to the ICC. Yet mixed courts created on an ad hoc basis face various challenges that could be addressed most effectively by involving the ICC on a regular basis in their operation.

For example, the creation of mixed courts on an ad hoc basis entails substantial start-up costs. One way to reduce these costs and to ensure a more consistent commitment to mixed-court prosecutions would be to involve a repeat player, such as the ICC, in their operations. If ICC judges and prosecutors served regularly on ICC-backed mixed courts, their experience could significantly increase the quality and efficiency of mixed court prosecutions.

The experience of the Sierra Leone and East Timor tribunals suggests that ad hoc courts may have difficulty obtaining the cooperation of foreign authorities in the investigation of international crimes. These problems are especially likely to arise in the prosecutions of foreign nationals. Both the Sierra Leone and East Timor tribunals have been unable to obtain custody over key suspects who are foreign nationals and are being protected by their own governments or have been granted exile by a third state. The ICC is better able to solicit cooperation from third states—for example, because those states are themselves members of the court. To the extent that ICC-backed hybrid courts would be more successful in enforcing international criminal law than their predecessors in East Timor and Sierra Leone.

Mixed courts might also be seen as a less coherent means of developing international criminal law. The more a hybrid court relies on domestic procedures and expertise in deciding a war crimes case, the more likely it is that its decision will differ from those of other hybrid courts in interpreting humanitarian law. As argued earlier, such variation should not be a cause for alarm. Variation is an important element of local legitimacy and a source of information and innovation in international criminal law. At the same time, a regime of mixed courts that is connected to the ICC rather than standing alone, would help stabilize the most fundamental international norms.

[236] The Special Court for Sierra Leone ("SCSL") has not been able to obtain custody over Charles Taylor, one of its key suspects and a Liberian national. Taylor was granted exile by the Nigerian government as part of a peace deal for Liberia. Nigeria refuses to surrender Taylor to the SCSL unless it is explicitly requested to do so by Liberia. Chris Melville, Liberian Assembly Protects Ousted President from Extradition to War Crimes Court, WORLD MARKETS ANALYSIS, July 09, 2004, LEXIS, News & Business Library, World Markets Analysis File. Similarly, Indonesia has refused to either prosecute or extradite to the Special Crimes Unit in East Timor some of its military officials accused of committing human rights violations in East Timor. This lack of cooperation has interfered with the work of the East Timor mixed court and has led some human rights organizations to call for the establishment of an "international commission of experts." Amnesty Says UN Dragging Its Feet in Seeking Justice for East Timor, CHANNEL NEWSASIA, Apr. 14, 2004, LEXIS, News & Business Library, Channel NewsAsia File; Wahyoe Boediwardhana, Dili Undecided on 'Expert Commission', JAKARTA POST, Aug. 16, 2004, available at 2004 WL 77631251.

[237] For a review of the potential enforcement setbacks facing the ICC itself, see discussion supra Part I.
Consistent with this goal, the treaties setting up ICC-backed hybrid courts could entrust the ICC Appeals Chamber (which could be fully international, or mixed, with ICC judges in the majority) with resolving unwarranted jurisprudential inconsistencies. The Appeals Chamber could demarcate the boundaries between fundamental international law norms, from which deviation is unacceptable, and issues on which deliberation and diversity among the hybrid courts is welcome. The Appeals Chamber ought to operate on the presumption that it should leave undecided those questions of factual and moral uncertainty that are still being contested and worked out in more representative institutions (e.g., hybrid courts or national courts and legislatures). In this way, an ICC-backed mixed court could strike the appropriate balance between legal coherence and respect for diversity and autonomy.

Although involving the ICC would minimize many of the problems faced by the existing hybrid courts, many practical and legal difficulties would persist even in ICC-backed mixed tribunals. Some of these difficulties are inherent in international prosecutions more generally. Several others, distinctive to mixed courts, could be resolved through careful institutional design. The remaining drawbacks of mixed courts are not decisive and are outweighed by the benefits of mixed-court prosecutions.

A common problem encountered in both international and mixed-court prosecutions is that differences in legal practices around the world often cause disagreements among judicial officials and delays in the administration of justice. While this problem is also present in international tribunals, it is accentuated in mixed tribunals. First, mixed tribunals operate in a postconflict environment, where the basic infrastructure is often in shambles, which exacerbates 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.

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 directly gather evidence on the ground, instead of having to go through the notoriously slow "diplomatic channels" for requesting cooperation. By establishing a working relationship with local officials, they will also be less likely to be confronted by the suspicion and resistance that often greets requests for cooperation from foreign tribunals.

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238 Sunstein, supra note 176, at 30-33. Examples of such questions would be procedural and sentencing practices on which no strong international consensus exists: the scope of the right to confrontation of witnesses, the reliance on trials in absentia, the use of plea bargaining, or the use of the death penalty. See supra note 129 and accompanying text. In resolving these questions, the ICC Appeals Chamber could look to European supranational courts and their doctrines of margin of appreciation and subsidiarity, or to American federal court decisions on habeas corpus and on the incorporation of the Bill of Rights.

239 Linton, supra note 210, at 200.

240 Id.

241 ICC Statute art. 87(1).
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. This was one of the major concerns of the Group of Experts evaluating the feasibility of holding domestic trials in Cambodia of the former Khmer Rouge leaders (some of whom had struck political bargains with the current regime of Hun Sen and were allegedly promised immunity). The Group concluded that only an ad hoc UN tribunal held outside of Cambodia would meet international standards of justice. 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.

These concerns have largely been addressed by the voting rules and composition of the mixed courts in East Timor and Sierra Leone and the chambers proposed for Cambodia. 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 would be local, a supermajority vote would be required for a decision of guilt or innocence, so that an international judge would always have to consent to an acquittal or conviction. Many important decisions, however, would be decided by a majority rule, causing concern for some commentators. To address those concerns, future ICC-sponsored mixed courts could opt for a supermajority vote on most major decisions or follow the Sierra Leonean and East Timorese model to include a majority of international judges on each panel. Either solution would present a good balance between concerns for fairness and impartiality on the one hand, and local participation and diversity on the bench on the other.

Designing the structure and voting rules of a mixed tribunal would be even more difficult in situations where the tribunal has jurisdiction over crimes arising from a multiethnic or multinational 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,}

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242 As one commentator on legal reform 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).


244 Id.

245 Linton, supra note 210, at 199 (noting with concern that aside from guilt and innocence, all other decisions will be made on the basis of a majority vote).

246 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 will 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 of international judges (which carries fewer of the benefits of local participation).
this model has already been tried with some 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 framework for the mixed court successor to the ICTY in Bosnia, which will try the remaining cases of war crimes once the ICTY completes its work. The tribunal would consist of five judges—one Bosnian Muslim, one Bosnian Serb, one Bosnian Croat, and two international judges. This composition would ensure a fair representation of all groups directly affected by the court's decisions.

Regardless of the courts' compositions and voting structures, disagreements between local and international judges are bound to arise. The debates between international and local lawyers over the use of the death penalty in Iraq and the prosecution of juvenile soldiers in Sierra Leone point to some potential areas of contention. Deliberation will inevitably raise the short-term costs of war crimes trials by bringing conflict to the surface and drawing out the decisionmaking process. As Section II.B discussed, however, these costs are outweighed by the benefits: Deliberation between national and international communities is a more legitimate means of addressing contentious legal issues than would be a decision by a self-contained international court that could simply ignore the preferences of the relevant local populations. In addition, deliberation is more likely to produce informed decisions and to encourage a healthy evolution of national and international criminal law over time.

Undoubtedly, ICC-backed mixed courts would face other, as-yet-unanticipated practical challenges depending on the legal and political context in which the courts are set up. In some contexts, a mixed court might be perceived by the local population as undue foreign interference in domestic transitional justice efforts. This problem is especially likely to arise where an unrepresentative government has invited ICC participation in a hybrid tribunal. There are no clear answers on how these context-sensitive problems might be resolved. What is clear, however, is that an ICC working independently in The Hague would not present a better alternative in these situations. Finally, this Article does not attempt to resolve every practical or political problem that might arise in the establishment and operation of ICC-backed mixed courts. Rather, it focuses on laying out guiding principles for solving such problems and on opening up a conversation about the possibility of a more decentralized approach to international criminal law.

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247 The success of the Kosovo mixed courts was limited in that respect, however. In the initial stages of the court's operation, many Serbian judges resigned from the bench under pressure from Belgrade. Dickinson, supra note 77, at 302.

248 Bohlander, supra note 182, at 70-71.

249 See Linton, supra note 210, at 214 (noting that some East Timorese actors involved in setting up mixed courts complained about the dominance of international actors in the process); Beth Dougherty, Victims' Justice, Victors' Justice: Iraq's Flawed Tribunal, 9 MIDDLE EAST POL'Y 61, 65 (2004) (quoting Iraqi Justice Minister Abdul Rahman al-Chalabi as saying that involving foreign judges in a mixed war crimes court "will undermine [Iraqi] sovereignty and would undercut the value of the Iraqi judiciary").
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, 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 in the territory of the affected countries. 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..." 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.

Article 21 of the Statute, which governs 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." Under the Statute, however, national law comes last in the hierarchy of legal sources and is to be considered only when other sources have proven ambiguous or useless. Therefore, some amendments would have to be made if national laws were to be used alongside international laws when the ICC serves as a mixed court. 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.

In the short term at least, the ICC could sign a treaty with the concerned national government every time it engages in a mixed court on the territory where the crimes were committed. Such a treaty arrangement would be consistent with Article 4(2) of the Statute, which allows the court to "exercise its functions and powers... on the territory of any State Party and, by special agreement, on the territory of any other State." The ICC-backed mixed court could then be treated as a local prosecution under the ICC's complementarity regime. If treated as a local court, the mixed court would also be free to incorporate a combination of international and domestic procedural and substantive law into its work.

250 ICC Statute art. 4(2).
251 Id. arts. 36(2)(a) & 35(3). The Assembly of States Parties would have to vote on the proposal, and a two-thirds majority is necessary to approve it. Id. art. 36(2)(b).
252 Id. art. 21(1)(c).
253 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 likely 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 greater 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 173-75 and accompanying text.
254 The ICC Statute prohibits amendments in the first seven years of the Statute's entry into force, however. ICC Statute art. 121.
C. Where States Are Unwilling To Prosecute Their Nationals: A Mixed Court in The Hague

In many cases of postconflict 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 obtain custody of suspects with the help of other nations or international peacekeeping forces. In those instances, the court could take up cases in The Hague, as the current admissibility rules provide.

Ensuring that a prosecution takes place is a good first step, but it is not enough. To obtain the advantages of crosscultural deliberation, the ICC must go further. It should include in its ranks and deliberations lawyers, investigators, and judges from the affected area and incorporate or at least consult relevant national law in 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? First, the noncooperating 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 may refuse to go along with all of the court’s requests. The government may be reluctant to prosecute out of concern for its own stability or the stability of the country. 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 judicial officials, laws, and procedures from the country of original jurisdiction in its proceedings. Similar arrangements for including judges of each party’s nationality are common in international arbitration and in the International Court of Justice. In common law states, the ancient institution of juries de

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medietate linguae also provided foreign defendants convicted of international crimes with a jury partly composed of jurors of the defendant’s nationality.256

As José 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.257

Having national judges from the affected area would increase the range of 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, national law offers a more legitimate interpretive tool than the ICC judges’ own moral and policy considerations.258

The statutory basis for this model would be similar to the one for mixed courts on the territory of a state of original jurisdiction.259 A major difference would be that Hague-based mixed courts would not require the explicit consent of the affected state. Whenever possible, however, these courts 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.


257 Alvarez, supra note 7, at 451.


259 See supra Section II.B.1(c).
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 the international community to enforce its orders. In certain instances, the court will be unable to either gather evidence or obtain the custody of suspects, and if it opens up investigations, its orders will be publicly flouted by a rogue regime. Without the presence of a sympathetic peacekeeping force on the ground, 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 in cases 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 violating the rule against double jeopardy inscribed in the ICC Statute. The impugned national governments, however, are not likely to be receptive to 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. 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

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260 Article 20 of the ICC Statute delineates the balance between the prohibition on double jeopardy and the principle of complementarity:

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.

261 See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 137-40 (1803).
techniques more often. 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. A notable technique is the non-liquet doctrine, which allows the ICJ to abstain where the law is still unsettled.

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 also 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. Judicial romanticism has serious systemic costs in a global community with sharply differing notions about the best way to mete out justice to individuals."

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 volunteer 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. 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. 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

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264 W. Michael Reisman, International Non-Liquet: Recrudescence and Transformation, 3 Int'l L. 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).
266 The factfinding Commission provided for in Additional Protocol I to the Geneva Convention performs similar functions as well.
then issues a written decision, which contains a statement of "the views of the Committee" on the obligation of the State party. The views are then forwarded to the parties and published in the Committee's annual report to the General Assembly.

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 ineffectiveness of the Committee on it. Therefore, when the ICC holds its hearings, it should not simply receive written submissions, but invite witnesses to testify publicly about suspected war crimes, crimes against humanity, and genocide. The court should then make findings of fact 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.

The findings of the court would not provide a direct remedy to the victims. Instead, the hearings' contribution would consist of 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 by 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

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271 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 in its annual report to the full conference and thus mobilizing international public opinion against those violators. Richard B. Bilder & Frederic L. Kirgis, Bowett's Law of International Institutions, 96 AM. J. INT'L L. 741, 743 (2002) (book review) (reviewing PHILIPPE SANDS & PIERRE KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS (2001)); see also Philip 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); 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.").
consensus on the statutory framework of the ICC. Second, and more important, states that have signed and ratified the ICC Treaty have a strong 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 ...."

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," in fact, only rudimentary fair trial guarantees are needed to retain national control over war crimes prosecutions.

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," including provisions on witness protection, financial assistance to the ICC, extradition of nationals, and recognition of the privileges and immunities of ICC staff. 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 tribunals thus "dramatically increases the role of national courts in undertaking trials involving international

272 Ellis, supra note 17, at 223.
273 Id. at 226-27.
274 Proceedings must be conducted "independently or impartially in accordance with the norms of due process recognized by international law." ICC Statute art. 20.
275 Id. art. 88.
276 Ellis, supra note 17, at 225.
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 it will 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 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 contributing 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.

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277 Id. at 241.