

VIEWS OF THE FUTURE OF THE FIELD OF INTERNATIONAL JUSTICE: A SCENARIOS PROJECT BASED ON EXPERT CONSULTATIONS

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The field of international justice has evolved dramatically over the last two and a half decades. After an initial start with prosecutions before the International Military Tribunals at Nuremberg and the International Military Tribunal for the Far East held in Tokyo, the field languished until the early 1990s when it resurfaced with the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹ and the International Criminal Tribunal for

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Rwanda (ICTR). Thereafter, a number of “hybrid” tribunals were created including: The Special Court for Sierra Leone (SCSL); a hybrid State Court in Bosnia-Herzegovina; the Extraordinary Chambers in the Courts of Cambodia (ECCC) as well as hybrid chambers in Kosovo, East Timor, Senegal, and the Special Tribunal for Lebanon (STL).² Most of these tribunals have concluded or are finishing their work prosecuting primarily high- and/or mid-level perpetrators of crimes committed in their respective situation countries.³ Meanwhile, the Rome Statute created a permanent International Criminal Court (ICC)⁴ to prosecute atrocity crimes. It currently has 123 States Parties⁵ with some prosecutions completed and others in progress and numerous situations at both the Preliminary Examination and Investigation phases.⁶ Furthermore, increasingly, there are also domestic courts tackling war crimes

Lovall provided research assistance and Amber Lewis filmed the interviews of most expert participants. See *infra* Appendix A. The following Center for Global Affairs students/graduates transcribed audio/visual recordings of interviews: Taylor Ackerman, Genesis Hernandez, Sabrina Diaz, Alexander O. Groskinsky, Melissa Salyk-Virk, Sepideh T. Behzadpour, Hannah Barr, Fatima Zahra El Alami, Heather A. Craig, Saarah Monawvil, and Yara Sayegh.

1. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, September 2009, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf. Statute of the International Criminal Tribunal for Rwanda, January 2010, http://unictr.unmict.org/sites/unictr.org/files/legallibrary/100131_Statute_en_fr_0.pdf.

2. David Cohen, “Hybrid” Justice in East Timor, Sierra Leone, and Cambodia: “Lessons Learned” and Prospects for the Future, 43 STAN. J. INT’L L. 1, 2 (2007).

3. See Interview with Hassan Jallow, Former Prosecutor, Int’l Criminal Tribunal for Rwanda, in Nuremberg, Ger. (Sept. 29, 2016); Interview with David Crane, Founding Chief Prosecutor, Special Court for Sierra Leone, in Nuremberg, Ger. (Sept. 29, 2016) (explaining that new hybrid tribunals are being set up to prosecute crimes committed in Kosovo, the Central African Republic, and possibly South Sudan).

4. Rome Statute of the International Criminal Court art. 1, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, 91 (entered into force July 1, 2002).

5. The number dropped from 124 to 123 when Burundi officially withdrew. See Agence France-Presse, *Burundi Becomes First Nation to Leave International Criminal Court*, GUARDIAN (Oct. 27, 2017, 8:34 PM), <https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court>.

6. See INTERNATIONAL CRIMINAL COURT, <https://www.iccpi.int/Pages/Main.aspx> (last visited Mar. 3, 2018).

prosecutions from trials in Chile, Argentina, and Guatemala, to specialized war crimes chambers created, for example, in Serbia and Uganda,⁷ to domestic courts conducting prosecutions on a universal jurisdiction basis.

Yet, the field of international justice is at something of a crossroads. Several of these context-specific international and hybrid tribunals are completing or have already completed their mandates.⁸ The ICC only issues a few warrants in each situation country, and the goal of universal ratification of the Rome Statute still remains aspirational following the first withdrawal from the Statute⁹ and cynicism engendered by the failure of some of the most powerful countries to join the court. When state actors oppose prosecutions, there is sometimes dramatic “push-back” intended to derail the court’s work.¹⁰ Even when international prosecutions occur, they fall well short of addressing all perpetrators (often leaving victim communities disappointed), take a lengthy period of time to prosecute (if charges are at least somewhat comprehensive and fair trial protections rigorously observed), and international and hybrid tribunals are frequently criticized as extremely costly. Domestic prosecutions in the countries where the crimes occur are susceptible to being thwarted if there is insufficient political will or capacity; for example, domestic prosecutions can be selectively targeted towards non-state actors, lower-level perpetrators, and/or prior regime

7. Katya Salazar, Presentation at the Due Process of Law Found. in Turk., Prosecuting Serious Human Rights Violations in Domestic Courts: The Impact of International Law and the Inter-American Human Rights System in Latin America (Jan. 2014), http://www.dplf.org/sites/default/files/katya_salazar_presentation_turkey.pdf; *Development of Local Judiciaries*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/outreach/capacity-building/development-local-judiciaries>; *International Crimes Division*, THE JUDICIARY, REPUBLIC OF UGANDA, <http://www.judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html>.

8. Jennifer Trahan, *The Future of the Field of International Justice*, March 10, 2017, <http://impunitywatch.com/report-of-symposium-on-the-future-of-the-field-of-international-justice/>. The ICTR, ICTY, SCSL, and panels in East Timor have concluded. Residual capacity for the ICTY and ICTR resides in the Mechanism for International Criminal Tribunals (MICT), and the SCSL also has a residual mechanism.

9. See *supra* note 5.

10. See discussion *infra* Section 1.3(e).

members, or thwarted by other means, or there simply may be no accountability at the national level.¹¹

How can the positive momentum that has been achieved in this field over the past twenty-five years be maintained in the face of such challenges? What is the best path forward for maintaining positive momentum?

This study examines proposals for the future of the field of international justice¹²—specifically, views regarding the best tribunal(s) to address future prosecution of the worst atrocity crimes (generally identified as genocide, war crimes, and crimes against humanity).¹³ The study includes perspectives of some of the most prominent global experts in the field—including many of the current and former Prosecutors of the international and hybrid tribunals—with a view to identifying the rationales offered for their preferences regarding focusing future prosecutions at the ICC, within new hybrid or other criminal tribunals, and/or at the national level.

The study is designed not to make an accurate prediction of the future, but to trigger long-term reflection about the future development of the field and the most effective ways to confront current and anticipated challenges.

11. Trahan, *supra* note 8.

12. *Id.* By “the field of international justice,” this study means the current international, hybrid, and domestic tribunals that prosecute the crimes of genocide, war crimes, and crimes against humanity along with additional transitional justice tools. While domestic prosecutions of international crimes are more precisely “national justice” mechanisms, they are also considered herein because they provide a potential alternative or supplemental venue to international or hybrid tribunal prosecutions. While this study does not focus on transitional justice mechanisms other than prosecutions, it acknowledges the important contribution they can provide to a country’s ability to address the aftermath of mass atrocity crimes.

13. The crime of aggression can also be considered a core atrocity crime. “Crimes against peace” were prosecuted before the International Military Tribunal held in 1945–46 in Nuremberg, Germany. *See* Charter of the International Military Tribunal, London, Art. 6(a), 82 U.N.T.S. 279 (Aug. 8, 1945). The more recent articulation of that crime, the “crime of aggression,” was adopted in an amendment to the Rome Statute at the 2010 ICC Review Conference in Kampala, Uganda. *See* Resolution RC/Res.6, advance version, 28 June 2010, 18:00. ICC jurisdiction over the crime will activate on July 17, 2018. ICC-ASP/16/Res.5. For definitions of the crimes of genocide, war crimes, and crimes against humanity, see Rome Statute, *supra* note 4, arts. 6, 7, 8.

This study is complemented by the findings of a “scenarios workshop” on “The Future of the Field of International Justice” that was held at NYU’s Center for Global Affairs, on February 10, 2017, with approximately 45 expert participants, including legal advisers of UN missions, NGO representatives, academics, and others. The findings of that workshop are separately published.¹⁴

OVERVIEW OF POTENTIAL SCENARIOS OF THE FIELD IN TWENTY YEARS

There are radically divergent views as to the future of the field of international justice. This study will focus on three scenarios while acknowledging that other scenarios are possible as are permutations of the scenarios which, in any event, are not designed to be mutually exclusive. While interviewees were asked to consider the future of the field in twenty years, it is possible that a much longer time-trajectory might be needed to accomplish some of the goals.¹⁵

The first scenario to be examined is that the ICC will be the dominant institution of the future to prosecute core atrocity crimes, perhaps complemented by some hybrid tribunals and prosecutions in national courts. This is the path—with the ICC as the central institutional actor—that the international community and the United Nations (UN) currently appear to favor. Yet, if the ICC is to be the central institution of the future, would the ICC of the future resemble the ICC of today, or would it differ in significant respects? How could the ICC be strengthened against “push-back” against its cases and/or attempts at politicization? Can the goal of universal ratification of the Rome Statute be realized? And, if it cannot, how does one defend a justice regime that leaves whole swaths of the globe beyond its jurisdictional reach, exposing the institution to the

14. Trahan, *supra* note 8.

15. *See, e.g.*, Interview with Gregory Townsend, Former Chief of the Court Support Services Section, International Criminal Tribunal for the former Yugoslavia, in The Hague, Neth. (Oct. 3, 2016) (“For me it is rather a short term of 25 years when we compare to the 70 years, where we’ve come from since Nuremberg.”); Interview with Matthew Gillett, Trial Lawyer, Office of the Prosecutor, Int’l Criminal Court, in The Hague, Neth. (Oct. 3, 2016) (“In international law, 20 years is actually a relatively brief period; it can pass by before you even notice it, so it’s right around the corner[.]”).

perpetual criticism of providing only selective justice?

A second scenario is that, given the scope of atrocity crimes being committed around the globe (e.g., in Syria, Iraq, Sri Lanka, South Sudan), there will be a need for more dedicated country-specific tribunals—for example, a future Syria Tribunal, a future Sri Lanka Tribunal, etc. Can one make an argument for additional hybrid tribunals to supplement the ICC's work, or some form of hybridization of domestic prosecutions (e.g., specialized war crimes chambers with some international features)? Or, are there instances when such hybrid tribunals might be the preferable mechanism rather than the ICC? If hybrid tribunals are a desirable model for the future then which hybrid tribunal has been our most successful model to date and why? Could regional criminal tribunals also play a role in prosecuting atrocity crimes, either in complement to the ICC, or not? Finally, although they are generally disfavored on cost grounds, could an argument be made—for instance, where an extremely large number of crimes has occurred, as is the case with Syria¹⁶—that there should be another ad hoc¹⁷ tribunal modeled after the ICTY and/or ICTR (although not necessarily created through the Security Council, as were those tribunals)?

A third scenario would be investing national courts with much more capacity (and independence, to the extent this is possible), such that they can successfully shoulder more atrocity crimes prosecutions, with therefore less need for international or hybrid tribunals. Since, by all acknowledgments, in many countries, domestic prosecution of atrocity crimes done fairly and impartially

16. See generally Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, Human Rights Council, U.N. Doc. A/HRC/36/55 (Aug. 8, 2017).

17. "Ad hoc" simply means they were created for a "particular situation." Given that all the existing international and hybrid tribunals (other than the ICC) are similarly "ad hoc," calling only the ICTY and ICTR "ad hoc" is somewhat misleading. See Interview with William Schabas, Professor of Int'l Law, Middlesex Univ., in Nuremberg, Ger. (Oct. 1, 2016) ("Actually the better way to describe all these institutions is to say they are ad hoc. They are created for a particular situation, particular circumstances. They're temporary and actually they all have mixtures of the international and the national even the Yugoslav and Rwanda Tribunals[.]"). Nonetheless, this article will continue with the widely used terminology of referring to the ICTY and ICTR as the "ad hoc" tribunals.

presents considerable challenges, a secondary question becomes: If this is the goal, how can it be accomplished? Is a centralized mechanism or institution needed to coordinate the strengthening of domestic prosecutions (loosely referred to herein as “complementary”)?¹⁸ And, if so, which institution(s) should coordinate such capacity-building work? Which institution(s) should actually conduct such capacity-building work? And, how would either be funded?

The study concludes by examining whether additional scenarios should be considered and whether envisioning the scenarios as alternatives is somewhat artificial, and one should instead consider multiple layers of justice as the approach of the future (Scenarios 1 + 2 + 3, or 1 + 3). In any event, none of the scenarios excludes the use of additional transitional justice tools (such as truth commissions, vetting, reparations, and institutional reform)¹⁹ as well as prosecutions in domestic courts using universal jurisdiction.

METHODOLOGY

The findings described below reflect primarily the results of interviews the author conducted primarily in Nuremberg, Germany, and The Hague, Netherlands, from September–November 2016. A full list of interviewees is located in Appendix A. As noted above, these findings are complemented by those from a scenarios workshop held on the same topic at NYU’s Center for Global Affairs.²⁰

The scenarios examined raise numerous broad questions, and to

18. “Complementarity” within the Rome Statute system, refers to national prosecutions in ICC situation countries. Yet, there is also need for the development of domestic capacity to prosecute atrocity crimes in non-Rome Statute State Parties—indeed, perhaps even more need since there will be no ICC-level prosecutions in non-States Parties to the Rome Statute absent a UN Security Council referral to the ICC.

19. VASUKI NESIAH, ET AL., *TRUTH COMMISSIONS AND GENDER: PRINCIPLES, POLICIES, AND PROCEDURES* (Int’l Center for Transitional Justice 2006) (“Transitional justice compris[es] five key elements: prosecuting perpetrators, documenting and acknowledging violations through non-judicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and facilitating reconciliation processes.”).

20. See text accompanying *supra* note 14; Trahan, *supra* note 8.

properly examine many of them would require multiple studies. This project only attempts to provide an overview that identifies key options and some of the merits of, or difficulties associated with, the different approaches. This study also does not attempt to “test” the views expressed—that is, if a prosecutor opined that hybrid courts, at least those located in their situation countries, are better-positioned to conduct capacity-building than a more remote tribunal, the opinion was included but it was not “tested.” For example, one could also imagine a hybrid tribunal contributing little to capacity-building, even if located in the situation country, and a more remote tribunal could make significant contributions to domestic capacity-building despite its location.²¹

This study also does not contain a quantitative analysis, for example, of cost per prosecution at each tribunal. While some might be tempted to make decisions as to future tribunals on the basis of cost and efficiency, a purely numerical analysis of that type would fail to encompass many external benefits of high-level atrocity crimes prosecutions.²² These include potentially contributing to restoring the rule of law through fair trials, generating at least some level of satisfaction amongst victim populations that justice has been served, helping to establish an historical narrative, potentially combatting denial of crimes, perhaps deterring future crimes, perhaps contributing towards global deterrence beyond specific situation

21. The ICTY is acknowledged to have contributed to capacity-building in Bosnia-Herzegovina by helping with the establishment of the hybrid State Court. See, e.g., *Capacity Building*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/en/outreach/capacity-building> (last visited Mar. 13, 2018).

22. Interview with Carsten Stahn, Professor of Int'l Criminal Law and Glob. Justice, Leiden Law Sch., in The Hague, Neth. (Oct. 4, 2016) (explaining that a cost-benefit analysis that quantifies only how many perpetrators are prosecuted would fail to measure many factors: “I think . . . that the cases being dealt with [have] large repercussions on a multiplicity of agents: [H]uman rights agents, on domestic courts, on civil society . . . [This] happens from the fact that the case is taken on internationally. . . . It triggers new networks who actually then target this type of atrocity; it alerts the media. I think these are the important effects that cannot be measured simply in terms of the number of cases that these tribunals actually do. So, the cost-benefit analysis is one which cannot be led only by quantifying how many perpetrators are actually prosecuted and how many cases even the tribunal does”).

countries, possibly contributing to peace and security, and potentially laying a foundation upon which future reconciliation may be built. Despite a trend of attempts at analytical testing of the impact of tribunals, it seems difficult to envision how such types of social change could be quantitatively measured.²³ Conversely, less costly options for prosecution that may seem superficially tempting on a cost per prosecution basis may involve tradeoffs in terms of fair trial standards which may then generate added societal costs in terms of not truly advancing accountability or the rule of law and thereby failing to advance other potential justice goals and potentially even weakening the stability of the state in question.²⁴

The interview participants are not a neutral sampling of those involved in the field of international justice with many participants having served as international or hybrid tribunal prosecutors. Their experiences undoubtedly shape their views. Also, the interview participants are largely drawn from the international community with limited participation from national jurisdictions.²⁵ Additionally, no direct victims were interviewed as part of this study although the author recognizes that victims should have a significant voice in the justice that is conducted in their name and which purports to serve them.²⁶ Most interviewees were male which appears to reflect the dominant gender composition of prominent positions held in the field

23. Interview with Robert Petit, Founding Int'l Co-Prosecutor, Extraordinary Chambers in the Courts of Cambodia, in Nuremberg, Ger. (Sept. 29, 2016) (opining on the value of leaving a tribunal's archives to a country: "I think one of the lessons from Cambodia . . . to be learned is that the impact of the court is not only the judgment, but what happens after. The archives of the court, making findings available, opening up the results of the whole institution, I think can also have a major impact because it might allow people to find answers to their own questions. . . . If the court does it right, it will have its impact with its judgments, but it will also leave . . . a legacy of information, of evidence available. I think it can help rebuild the country"). How would one measure such a value?

24. See Interview with Brenda Hollis, Prosecutor, Residual Special Court for Sierra Leone, in Nuremberg, Ger. (Sept. 29, 2016) (a cost per prosecution analysis would also fail to consider the massive numbers of victims whose crimes might be covered by a single case).

25. See *infra* Appendix A. Sierra Leone's Anti-Corruption Commissioner, Attorney-General and Minister of Justice, Joseph Kamara, did participate, along with Hassan Jallow, formerly ICTR Prosecutor, now Chief Justice of The Gambia.

26. See, e.g., Interview with David Crane, *supra* note 3 ("Justice is for the victims.").

with the notable exceptions of International Criminal Court Prosecutor Fatou Bensouda and former Sierra Leone Special Court Chief Prosecutor Brenda Hollis (also Prosecutor of the Residual Special Court for Sierra Leone).²⁷

Further discussion of the significance of this study as well as the timeliness and rationale for conducting it are contained in Appendix B hereto.

I. SCENARIO #1: THE INTERNATIONAL CRIMINAL COURT AS THE DOMINANT INSTITUTION OF THE FUTURE

This was the first scenario presented to interviewees:

In the first scenario, the ICC is the dominant institution twenty years into the future, in the field of international justice. The ICC is not necessarily the only institution conducting atrocity crimes prosecutions as there might be other tribunals (such as a few other hybrid tribunals and/or possibly a regional tribunal) as well as complementarity (national prosecutions in ICC situation countries) or other national court proceedings. Yet, the ICC would be at the “center of the stage” in terms of importance, and, thus, the main judicial institution combatting core atrocity crime prosecutions. The ICC of the future, however, would not necessarily precisely resemble the ICC of today.²⁸

Interviewees were then asked:

1. Is Scenario #1 the most likely scenario in twenty years' time? Why or why not?
2. What would the ICC of the future look like?
 - a. What are some key challenges for the ICC of the future?

27. See *infra* Appendix A. Former Sierra Leone Special Court Registrar and Registrar of the Residual Special Court for Sierra Leone Bintah Mansaray also participated.

28. As explained above, none of the scenarios rule out the use of additional transitional justice tools (over and above prosecutions) nor the exercise of universal jurisdiction in national courts.

b. Are there potential impediments to the ICC's future success?

A. SUMMARY OF FINDINGS FOR SCENARIO #1

As set forth in detail below, various interviewees expressed the view that Scenario #1 (a dominant ICC) was the most likely scenario in twenty years. Some of the factors they cited were: (1) that the ICC was designed to be the permanent tribunal for prosecution of the worst atrocity crimes, obviating the need to create additional ad hoc or hybrid tribunals; (2) that it is extremely costly, time-consuming, and inefficient to continue creating new tribunals; (3) that states generally view the ad hoc tribunals, such as the ICTY and ICTR, as too expensive and therefore unlikely to be replicated; and (4) that a multiplicity of tribunals causes fragmentation of the law.

Others expressed the view that Scenario #1 (a dominant ICC) would be most likely only if coupled with Scenario #3 (complementarity/domestic prosecutions). While some opined that, in theory, domestic prosecutions could ultimately replace the ICC, no interviewees took the view this would occur in the next twenty years.

Various interviewees identified challenges for making Scenario #1 the dominant institution of the future. For instance, the ICC would need: (1) to be a more efficient and effective institution (i.e., more cost-effective); (2) expanded institutional capacity to handle more preliminary examinations and investigations; (3) increased cooperation by States Parties; (4) follow-up by the UN Security Council as well as funding for situations referred by the Security Council to the ICC; and (5) increased universality with more states joining the Rome Statute and expanding the court's jurisdictional reach.²⁹ Some noted that: (6) there could be potentially new crimes added to the ICC's jurisdiction;³⁰ and (7) the ICC could serve as a

29. Ratification or accession by a state creates ICC jurisdiction over its nationals and crimes committed on its territory and states may also lodge an "Article 12.3 declaration." *See* Rome Statute of the International Criminal Court, *supra* note 4, art. 12, 12(3). Referral by the UN Security Council also creates jurisdiction. *See id.*, art. 13(b).

30. *See id.* at art. 5.1 (establishing ICC jurisdiction over four crimes, although only three, genocide, war crimes, and crimes against humanity, have had their jurisdiction activated, with crime of aggression jurisdiction activating July 17, 2018). There have been periodic proposals to add crimes to the Rome Statute,

model of “best practices.”

Skeptics of Scenario #1 as the dominant scenario of the future made several arguments, including: (1) the ICC’s limited capacity; (2) the ICC’s high cost; (3) the ICC not being designed to prosecute large numbers of individuals from any one situation country, such as Syria; (4) world powers not ratifying the Rome Statute; and (5) “push-back” and non-cooperation hampering the ICC’s work. The most skeptical voice added the possibility of implosion of the ICC or of the whole field of international justice.

B. DETAILS OF FINDINGS FOR SCENARIO #1

1. *Proponents of Scenario #1 and Rationales*

a) *Designed as the Permanent Institution for Atrocity Crimes Prosecutions*

Unsurprisingly, key ICC officials, as well as others, supported Scenario #1 as the dominant/most likely scenario twenty years from now in the field of international justice.

For instance, founding Chief Prosecutor of the ICTY and ICTR, Richard Goldstone explained:

I’ve really got very little doubt that we are going to continue with the ICC. I don’t believe there is any practical alternative. If the ICC were to collapse I think we would be back to the pre-1990 period where there would be complete impunity and there would be no international criminal justice at all. That would, I think, be a tragedy for humankind. . . . [T]he reason I’m optimistic for the ICC is, I don’t think there is any real alternative. And if there wasn’t [an ICC], I think we’d all be working around setting one up.³¹

such as additional war crimes, three of which were agreed to at the Kampala Review Conference, and three more of which were agreed to at the recent 2017 ICC Assembly of States Parties meeting. See generally Jennifer Trahan, *Potential Future Rome Statute Amendments*, 18 New Eng. J. Int’l & Comp. L. 331 (2012) (discussing proposed amendments); Secretariat of the Assembly of States Parties, *Informal Compilation of Proposals to Amend the Rome Statute* (Jan. 23, 2015).

31. Interview with Richard Goldstone, Founding Chief Prosecutor, Int’l Criminal Tribunal for the Former Yugoslavia & Int’l Criminal Tribunal for Rwanda, in The Hague, Neth. (Nov. 19, 2016).

ICC Prosecutor Fatou Bensouda expressed similar optimism:

I always say that one of the greatest moments of humanity I believe was the creation of the ICC. I strongly believe that. I'm not saying this because I'm the Prosecutor, but I'm saying it because I think it's true and I believe it. It's my conviction that if we did not have the ICC, the world would regress and it would regress to a worse place than where we are at today.³²

Former ICTY President, Judge Carmel Agius stated: "In my opinion, we will come to a stage where it will be just the ICC, who will . . . be the sole actor, protagonist on the scene of international law. And I think it is very important that we get to that stage."³³

ICC Office of the Prosecutor Trial Lawyer and former ICTY Office of the Prosecutor Appeals Counsel and Trial Attorney Matthew Gillett opined:

[I]n terms of what is likely, given the amount of resources and time and effort that's been put into setting up the International Criminal Court, it is going to be the first repository for the high-level cases in most situations, unless there is some political reason that prevents it getting there. . . . So, I think the likelihood is that the majority of situations will end up at the new ICC and then there'll be a certain number of additional situations [for] which other solutions are found.³⁴

b) Reluctance of States to Fund Further Ad Hoc Tribunals

Many participants noted that states seem to have rejected funding future ad hoc tribunals such as the ICTY and ICTR, which have been perceived as too costly.

For example, Judge Agius expressed skepticism that anything resembling the ICTY or ICTR would be created, for instance, to examine crimes occurring in Syria, not only for reasons of

32. Interview with Fatou Bensouda, Prosecutor, Int'l Criminal Court, in N.Y.C., NY (May 9, 2017).

33. Interview with Carmel Agius, Judge & Former President, Int'l Criminal Tribunal for the Former Yugoslavia, in Nuremberg, Ger. (Oct. 3, 2016); *see also* Interview with Gregory Townsend, *supra* note 15 (stating, "The ICC would probably be the most dominant court on the scene in twenty years' time," but also noting that he saw all three scenarios increasing).

34. Interview with Matthew Gillett, *supra* note 15.

“realpolitik”³⁵ but also due to cost.³⁶

c) Inefficiency of Creating Multiple New Tribunals

Others stressed the inefficiency of creating tribunals each time for particular situation countries—which was one of the reasons the ICC was created. Thus, Brenda Hollis explained: “I think one of the advantages of a permanent court is that you don’t have to do what all the other courts did and that is, you have to build from the ground up in the sense of—you don’t have buildings, you don’t have a courtroom, you don’t have vehicles.”³⁷

ICC Prosecutor Fatou Bensouda noted:

After the ad hoc tribunals were established there was this renewed energy to again have a permanent independent institution, the ICC, that will be there. It is permanent and ready to take action. We don’t have to go through setting up a new tribunal and setting up a new court. It is there[.]³⁸

d) Fragmentation of the Law Through Multiple Tribunals

From a jurisprudentially oriented standpoint, Judge Agius complained of the “fragmentation of the law” as a reason not to create further hybrid tribunals:

The proliferation of various ad hoc tribunals, special courts here, and special courts there, have not contributed much to the universality of international humanitarian law or international law in general. If anything, it has helped . . . to allow for fragmentation of international humanitarian law and international law, which is not good.³⁹

35. Interview with Carmel Agius, *supra* note 33 (opining that an ad hoc tribunal for Syria was “wishful thinking” if created through the UN Security Council due to “realpolitik” and also discussing the difficulty of having any accountability if Bashar al Assad remains in power); *see also* discussion *infra* Section 1.3(c) (“Inability to Prosecute Large Numbers of Individuals from Any One Situation/Crimes as Vast as Those Occurring in Syria”).

36. Interview with Carmel Agius, *supra* note 33 (invoking the high cost of his own tribunal as a reason it would not be replicated); *see also* discussion *infra* Section 2.5.

37. Interview with Brenda Hollis, *supra* note 24.

38. Interview with Fatou Bensouda, *supra* note 32.

39. Interview with Carmel Agius, *supra* note 33 (noting that when there is only

Former Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations Hans Corell also stressed the need for harmonization of the law: “I see that there will be more and more need to have, shall we say, a harmonious law that applies in the world.”⁴⁰

e) Combining Scenarios #1 and #3

Others stressed that Scenario #1 could not occur in isolation without Scenario #3, but that these scenarios needed to complement each other. Thus, for instance, ICC Deputy Prosecutor James Stewart explained:

I expect that in twenty years’ time, if we’re lucky, you’ll probably have some mix of scenario number one and scenario number three. It’s something we would like to see—a strengthening of national capacity in response to what we call “statute crimes”—war crimes, crimes against humanity, and genocide.⁴¹

He thought the ICC would not be “the” dominant institution of the future because domestic courts will complement it:

I hope we don’t see that the International Criminal Court is the dominant institution. I suppose it could happen to a limited degree, if for whatever reason States Parties to the [Rome] Statute waive jurisdiction. . . . But one hopes that there will be a much more powerful response at the national level. That’s the way the whole system was designed and you are beginning to see that, I think.⁴²

He predicted that in 50–100 years, maybe, the ICC would not be needed but in twenty years he thought it would.⁴³

the ICC, it will create only one body of law).

40. Interview with Hans Corell, Former Under-Sec’y-Gen. for Legal Affairs and Legal Counsel, United Nations, in Nuremberg, Ger. (Oct. 29, 2016).

41. Interview with James Stewart, Deputy Prosecutor, Int’l Criminal Court, in Nuremberg, Ger. (Sept. 29, 2016); *see also* Interview with Gregory Townsend, *supra* note 15 (“In my view I see scenario 1, the ICC increasing in role, and scenario 3, domestic capacity being built, as probably certainly trends that will continue[.]”).

42. Interview with James Stewart, *supra* note 41.

43. *Id.* (“[M]aybe in fifty or one hundred [years] it will be very different [with no need for an ICC], but in twenty years’ time I still think the ICC [will be] playing an important role, but one hopes there will be[,] at the national level in

Fatou Bensouda similarly opined that ICC capacity would not diminish over the next twenty years:

It doesn't mean the demands on the ICC, I do not see it diminishing in the next twenty years. I do not see that because what I see is that [domestic] capacity is still lacking. To a very large extent capacity is lacking at the domestic jurisdictions. The politics are not always allowing for the political will to try individuals who should be tried.⁴⁴

Director of the Secretariat of the Assembly of States Parties, Renan Villacis, also opined that, ideally, there would be no need for the ICC because complementarity works. However, he saw Scenario #1 as more likely for the next twenty-to-forty years:

[S]cenario three would be the ideal situation—that you would basically not actually need the ICC except on very rare occasions because the national systems would be taking care of the situations that would arise in different countries. Now that would require a very large investment of time, effort, and resources in [complementarity in] the coming decades. And, though I think there are different actors out there that are trying to develop this approach and who would like to reach that objective, it is probably not likely that we will reach that situation in twenty, thirty, or forty years. But we should continue to strive towards that. . . . [However,] [t]he first scenario would seem, to me, at least to be the more likely one.⁴⁵

Hans Corell also saw, in twenty years, a role for the ICC and for complementarity, but only if national capacity is built: “I see the need to develop the situation in a way that your reserve the ICC for the real, shall we say, serious cases, and then have the principle of complementarity. But again, that demands that rule of law is instilled at the national level in countries.”⁴⁶

2. *Challenges to Making Scenario #1 Effective*

Concerns were also raised that if the ICC were to be the dominant or central institution of the future, it could not mirror the current ICC, but would need to improve in significant respects.

every continent[,] a capacity to deal with these dreadful crimes[.]”).

44. Interview with Fatou Bensouda, *supra* note 32.

45. Interview with Renan Villacis, Dir. of the Secretariat, Int'l Criminal Court's Assembly of States Parties, in The Hague, Neth. (Oct. 5, 2016).

46. Interview with Hans Corell, *supra* note 40.

a) *Increasing Effectiveness and Efficiency (Responding to Cost Criticisms)*

Many interviewees expressed the view that the ICC needs to show increases in effectiveness and efficiency.

Fatou Bensouda stated:

We have to be effective. There are many, many, many things that challenge us for us to be effective, but we have to insist, including the budget and not providing us with the resources, but we have to insist on making a good job of this, in showing that the ICC is effective, that the ICC can be relied on, showing the credibility of the institution. Because one thing I say that, personally, when I leave the ICC, I want to have brought it to that level, my office, where people can trust the office, they can trust the court. I want for people to have no doubt that this institution is indeed independent, impartial, and effective. It is doing its work. And a lot of work needs to be done to show that. I believe that if that is shown it will also convince other states that are still hesitating that this is an institution that can be trusted because it is doing its work.⁴⁷

For instance, former US War Crimes Ambassador, David Scheffer, stated: “There has to be a basis for, I think, a more accelerated process . . . and those are first in-house trial management issues”:⁴⁸

[T]here’s a natural concern by countries like the United States just on the efficiency with which the court is actually managing itself. . . . [Y]ou go to an Assembly of States Parties meeting and you hear a lot of concern expressed about, wait a minute, here’s the budget, how are you spending it, and why do we only have this many convictions at this stage in the life of the court?⁴⁹

Founding Chief Prosecutor of the Special Court for Sierra Leone, David Crane similarly opined as to the ICC:

I think it has to be seen as an efficient, lean, flexible, politically aware organization. . . . If we can show efficiencies where needed, the cost is easier to bear. The problem is now I think this is really where it started to

47. Interview with Fatou Bensouda, *supra* note 32.

48. Interview with David Scheffer, Former U.S. War Crimes Ambassador, U.S. Dep’t of State, in Nuremberg, Ger. (Sep. 29, 2016).

49. *Id.* The Assembly of States Parties (ASP) is the management, oversight, and legislative body of the ICC.

unravel with the ICC is people saying we've put X billions of dollars into this court and we are getting [fewer] than five [trials], maybe six. But the point is that eventually diplomats and politicians are going to start saying "is this worth it?" and that's where the scenario begins to unravel in a way that none of us would like to see.⁵⁰

The cost of the ICC was also raised as a repeat concern. For example, Professor William Schabas⁵¹ suggested hiring a forensic accountant to understand the full costs of the ICC:

I think insufficient attention is being given to trying to reduce the cost of the institution and there is not enough assessing certain things that are being done in terms of cost- benefit relationship. Instead of just arguing "oh this is a good thing to have," people should look and say well how much did it cost? . . . [A]ll the victim lawyers appear to be doing in the trials is standing up after the Prosecutor spoke and saying we agree with the Prosecutor. So, if all they are is an echo chamber for the Prosecutor, \$3 million isn't really worth it, but the point is it costs a lot more than \$3 million because those lawyers stand up in court and speak, and it gets interpreted, and people have to sit there in court, every minute in the ICC, I don't know, there's a cost to it. There are fifty people in the courtroom and around the courtroom at any given time so for every minute that the victim representative speaks, there's a cost. And they produce a lot of paper because they reply to motions, and those motions get translated and they have to be read then by the defense lawyers, they have to be read by the judges, they have to be read by the Prosecutor, they have to be answered, there are rulings that are issued, and nobody knows how much this all costs. We need a forensic accountant to go and say here's what this business costs[.]

I'm sure if you went to those victims in the DRC and said to them, by the way are you happy we are spending \$10 million a year representing you in these trials? I think they'd say couldn't we just have the money?⁵²

50. Interview with David Crane, *supra* note 3 (adding critically, "I've never seen so many busy people doing so little in my life. I mean, we're just . . . not getting the bang for the buck. . . . [F]rom an organizational-management point of view it is slipping into a process-oriented organization"). Crane was also critical of the ICC's case selection under the first Prosecutor. He also discussed the political and diplomatic work needed to successfully prosecute a head of state and the importance of the timing of the indictment. *Id.*

51. Professor of International Law, Middlesex University, London; Professor of International Criminal Law and Human Rights, Leiden University.

52. Interview with William Schabas, *supra* note 17. He was similarly critical of

As to cost efficiencies, former Chief of the Court Support Services Section, ICTY Registry, Gregory Townsend, pointed out that “big trials are expensive,” and that, “on a cost basis, domestic [trials] will always be more efficient.”⁵³ He also focused on the need to appoint experienced trial judges to tribunals.⁵⁴

Hans Corell also opined that the ICC needs judges with more courtroom experience:

I had hoped for more courtroom experience among the judges. The “list B,” I’m rather suspicious of the “list B” because this means that diplomats and professors who have never set foot in a courtroom can be elected to the court. And this court is not on-the-job training. I mean, you need judges who can really hit the ground running. . . . [A]cademia has an important role to play here also, but it is not necessary that academia sits on the bench all the time.⁵⁵

He also expressed concerns about the ages of the judges.⁵⁶

Matthew Gillett also spoke of the need for sound judicial management to reduce the length of trials:

To reduce the length of trials whilst ensuring that justice is done for at least the large majority of the serious crimes committed and that the accused, the defense, are ensured a fair trial is an extremely difficult balancing operation and one key factor in that is judicial management. It is ensuring that the parties are focusing on the charges, that they are leading [with] relevant evidence, and that the proceedings are not being sidetracked into ultimately non-relevant issues. Hand in hand with that is the idea of encouraging the parties to reach agreement on facts,

the overhead of the Trust Fund for Victims, the cost of administration of justice/contempt cases, and translations into many languages. *Id.*

53. Interview with Gregory Townsend, *supra* note 15.

54. *See id.*

55. Interview with Hans Corell, *supra* note 40; *see* Rome Statute of the International Criminal Court, *supra* note 4, art. 36(5) (describing “list A” and “list B” judges).

56. Interview with Hans Corell, *supra* note 40 (“I’m worried about the age of the judges. I am 77 myself now. I was a criminal court judge in the 60s—ten years, 1962–1972. I would not consider myself competent to sit on a criminal court today because I’m too old—my hearing, my eyesight, and so forth. You have to be absolutely razor sharp when you sit on a criminal court. And also, [it is important for the judges not to be] engaged in academic exercises, writing hundreds of pages over months and months and months. Justice has to be delivered in, shall we say, an effective manner.”).

encouraging parties to allow the submission of witness evidence in writing if it's not critical evidence, so that the court can really focus on the key adversarial issues that are dispositive to the case.⁵⁷

b) Expanding Institutional Capacity

Others expressed the need for the ICC of the future to have expanded institutional capacity, so that it may simultaneously handle more preliminary examinations, investigations, and trial proceedings.⁵⁸ For instance, Gregory Townsend opined: "We will have a larger, more robust ICC, I hope, able to handle more concurrent situations, hopefully more geographically diverse, all throughout the world amongst State Parties[.]"⁵⁹

A contrary view was that, ideally, the ICC would exercise very little capacity because complementarity would work shifting prosecutions to regional, hybrid, and national courts. Thus, former ICTR Prosecutor and current Chief Justice of The Gambia, Hassan Jallow, opined:

The picture, which I see, which I hope, also, will be what will be there, is every country being a State Party to the Rome Statute, and the ICC with very little work to do and most of the work being done by the national courts and the regional courts and the hybrid courts.⁶⁰

As set forth above, however, while others suggested that capacity should shift to national jurisdictions, they did not necessarily see this occurring in the next twenty years.⁶¹

Professor Carsten Stahn⁶² suggested that even the threat of ICC action could lead to domestic prosecutions so that the ICC would not necessarily need to prosecute in each situation under preliminary

57. Interview with Matthew Gillett, *supra* note 15.

58. Interview with Richard Goldstone, *supra* note 31 (speaking of the ICC, he states: "[T]here is . . . a limiting factor—the number of court[room]s. It's a problem facing all international prosecutors, and that is, you are constricted by the number of court[room]s and the number of judges and the number of investigators").

59. Interview with Gregory Townsend, *supra* note 15.

60. Interview with Hassan Jallow, *supra* note 3.

61. See *supra* Section 1.1(e).

62. Professor of International Criminal Law and Global Justice, Leiden Law School.

examination.⁶³ He opined: “I think this model is one of the most important new developments that persons hadn’t foreseen at the Rome Conference and making [the] most of these preliminary examinations I think is something which is crucial for the future.”⁶⁴ Professor Stahn thus suggests the ICC would not necessarily require the capacity to prosecute each situation under preliminary examination.

c) Increasing State Cooperation

Others noted that state cooperation with the ICC would need to improve, for instance, reducing the number of outstanding arrest warrants.⁶⁵

As Renan Villacis explained: “The court cannot do everything that we would like it to do because it has no enforcement mechanisms. So it’s up to the cooperation of the states, in particular the States Parties but also the other states who have supported the court.”⁶⁶

As David Scheffer opined: “There has to be a . . . process that compels better cooperation by certainly the member states of the ICC. . . . It’s not enough for a prosecutor or the judges to speak in legalese with governments and say, ‘you’re a member of this Rome Statute, you are thus compelled under Part 9 to do XYZ.’ There has to be, I think, just a more sophisticated approach to governments

63. Interview with Carsten Stahn, *supra* note 22 (“[S]ome think the fact that the situation is under consideration by the ICC in itself might have certain positive ramifications.”).

64. *Id.*

65. The ICC has 14 accused at large. *See Situations and Cases, Defendants at Large*, INT’L CRIMINAL COURT, <https://www.icc-cpi.int/defendants?k=At%20large>. Furthermore, some warrants have remained outstanding for lengthy periods of time, particularly those regarding the Darfur situation referred by the Security Council in March 2005); *see, e.g.*, Fatou Bensouda, Prosecutor, Int’l Criminal Court, Statement before the United Nations Security Council on the Situation in Darfur (Dec. 13, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=161213-otp-stat-uns-c-darfur> (“Nearly a decade has passed since the first warrant of arrest was issued by the [c]ourt in the situation of Darfur. . . . [I]t is with *immense regret* that I acknowledge once again that all five suspects against whom warrants of arrest have been issued by the International Criminal Court in this situation remain at large.”).

66. Interview with Renan Villacis, *supra* note 45.

today.”⁶⁷

Former ICTY Prosecutor and current MICT Prosecutor Serge Brammertz also saw non-cooperation, in terms of the failure to execute arrest warrants, as a significant challenge for the ICC:

[T]he big challenge today is the non-arrest of the fugitives because if you have international arrest warrants and you have no arrests it totally undermines the credibility of the entire system. Now, can the ICC be blamed for the non-arrest? Of course not. It's up to the international community, and, you know, the international community at a certain moment has to decide what they want. On one hand, the very future-oriented decision about creating universal justice with the ICC is an excellent idea. But it only can work if the same international community is ready to do this extra additional step [of arrests].⁶⁸

Judge Agius also stressed the importance of State Party cooperation for the ICC to succeed:

I think some State Parties need to educate themselves better and mature and behave like mature State Parties. . . . I cannot but mention the reaction in Africa, particularly inside the [African Union], both when it came to [Sudanese President] Bashir and, also, when it came to [Kenyan President Uhuru] Kenyatta [both of whom were charged by the ICC]. And it's not the ideal of situations because, if you are a State Party, you pull the rope of the organization and cooperate and cooperate.⁶⁹

Judge Agius noted that it took the leverage of the European Union (EU) to make countries in the former Yugoslavia cooperate with the ICTY,⁷⁰ and that the ICC did not have a comparable situation.⁷¹

67. Interview with David Scheffer, *supra* note 48.

68. Interview with Serge Brammertz, Prosecutor, Mechanism for Int'l Courts and Tribunals, Former Prosecutor, Int'l Criminal Tribunal for the Former Yugoslavia, in Nuremberg, Ger. (Oct. 1, 2016).

69. Interview with Carmel Agius, *supra* note 33; *see* Prosecutor v. Omar Hassan Ahmad Al Bashir (Omar Al Bashir), Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09 (Mar. 4, 2009); Prosecutor v. Omar Hassan Ahmad Al Bashir (Omar Al Bashir), Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09 (July 12, 2010); Prosecutor v. Kenyatta, ICC-01/09-02/11, Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta (Dec. 5, 2014), <https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-01/09-02/11-983>.

70. First, the US conditioned financial assistance to countries in the region on their cooperation with the ICTY (particularly as to arrests), and, later, the EU

The Assembly of States Parties (ASP) recently adopted a “[t]oolkit for the implementation of the informal dimension of the Assembly procedures relating to non-cooperation.”⁷² It contains recommendations for sharing information as to travel plans of those against whom ICC arrest warrants have issued, and draft language for States to use to try to dissuade such travel. NGOs, coordinated through the Coalition for the International Criminal Court (CICC), have already been undertaking similar measures for years.

d) UN Security Council Follow-Up and Funding

Others noted the lack of UN Security Council follow-up,⁷³ particularly as to situations referred to the ICC by the Security Council—the situations in Darfur and Libya.⁷⁴ They noted that the Security Council must take more ownership over its referrals and provide funding for them in the future.

James Stewart stated:

Another very notorious issue is consequences—consequences for not cooperating with the court when the UN Security Council has referred a situation. And so, failure . . . to arrest the fugitives who are fugitives because of that referral, is something that has bothered us a great deal.

conditioned progress towards EU accession.

71. Interview with Carmel Agius, *supra* note 33 (“Sometimes this assistance comes with strict strings attached. So, yes, there has been leverage [by the EU] on these ex-republics of Yugoslavia to cooperate. [By contrast], the intervention of the Union of African States is in defense of some of the persons who were being either investigated or indicted, and that is exactly the opposite.”).

72. See Bureau on Non-Cooperation, Int’l Criminal Court Assembly of State Parties, Annex II: Toolkit for the Implementation of the Informal Dimension of the Assembly Procedures Relating to Non-Cooperation (Nov. 9, 2016), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-31-Add1-ENG.pdf.

73. See Interview with Stephen Rapp, Former Chief Prosecutor, Special Court for Sierra Leone, Former U.S. War Crimes Ambassador & Head of the Office of Global Criminal Justice, U.S. Dep’t of State, in Nuremberg, Ger. (Sept. 29, 2016) (“[T]he record of Security Council referrals . . . Sudan/Darfur and Libya has not been particularly successful[.]”); Interview with David Scheffer, *supra* note 48 (“[A] lot of this rests on the doorstep of the Security Council in how to activate the Security Council to follow through more effectively with its referrals to the ICC.”); Interview with Serge Brammertz, *supra* note 68 (speaking of the non-arrest of the fugitives regarding the Security Council’s referral of the situation in Darfur as “one of the big challenges as well”).

74. See S.C. Res. 1503 (Aug. 28, 2003); S.C. Res. 1970 (Feb. 26, 2011).

And it's a point that the Prosecutor makes in no uncertain terms every time she goes to the UN Security Council. We get a lot of sympathy. We get a lot of positive response from individual representatives of individual states of the Security Council, but very little united action.⁷⁵

Deputy Prosecutor Stewart hoped that, through travel restrictions, a fugitive head of state could become "kind of a pariah" who would eventually fall out of power.⁷⁶

Renan Villacis noted: "[T]he Security Council . . . has the responsibility to ensure that the referrals [are] not just the one-time matter, but supported by specific, concrete measures that assist the court."⁷⁷

Hans Corell spoke of the crucial role the UN Security Council could play in deterring warlords and dictators:

So, who could then make a difference here? The answer for me is very simple: the most powerful organ that you can find in a sense in the world, the Security Council of the United Nations. So, in my analysis, sooner or later, I end up, in particular among the permanent five members of the Security Council. What a difference they could make if they join hands and decided there is now time to draw a line. And if this line is passed, then we will join hands and act together.

Criminal justice is too—let's get as many people in prison as possible. No, the whole purpose of criminal justice is prevention—that normal, ordinary people understand that if I commit crimes, then I might end up in prison. The same thing, I think, applies in the world on the area of peace and security—that if the Security Council could demonstrate just one or two times that they go after the people who commit these deeds, then the warlords and dictators around the world will start saying, "Hey, what's happening? Maybe they will come after me also."⁷⁸

75. Interview with James Stewart, *supra* note 41.

76. *Id.* ("President al-Bashir of Sudan [is] a fugitive. We have arrest warrants outstanding for him. Any suggestion that he is going to come to New York gets the US Ambassador to the UN some power in saying some powerful things and in a sense, it's making a fugitive into a kind of pariah that can change the situation within the country, which is probably the only solution for the surrender of someone like him, if you think about, for example, the example of President Milošević of Serbia.").

77. Interview with Renan Villacis, *supra* note 45.

78. Interview with Hans Corell, *supra* note 40.

Fatou Bensouda also noted there are many situations that deserved referral and have not been referred:

With respect to referrals from the UN Security Council, it's not always forthcoming. The UN Security Council, being what it is, does not always find it easy to make referrals. I think having referred Darfur, then referred Libya, there have been many situations that deserve to be referred but have not been referred.⁷⁹

Interviewees additionally spoke of the need for the UN Security Council to stop purporting to exclude funding from its referral resolutions, as it has in the two to date.⁸⁰ James Stewart explained:

[W]e would like at the very least financial support. Fatou Bensouda, the Prosecutor, has made that point very clear to the Security Council because when we get a Security Council referral, having done a preliminary examination of the situation, if it's our view [that] it qualifies for the attention of the court—and in the two situations we are talking about, Libya and Darfur in Sudan, they have—we've opened investigations and we have conducted investigations and even brought charges. The strain on resources is enormous[.]⁸¹

One interviewee expressed the view that UN Security Council referrals should be abolished.⁸²

79. Interview with Fatou Bensouda, *supra* note 32.

80. See S.C. Res. 1593, ¶ 7 (Mar. 31, 2005) (providing “that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations[.]”); S.C. Res. 1970, *supra* note 74, ¶ 8 (similar). In the author's view, these resolutions only “purportedly” deny UN funding, as the General Assembly, under the UN Charter, is the body to make UN budget decisions. See UN Charter, art. 17.1.

81. Interview with James Stewart, *supra* note 41.

82. Interview with William Schabas, *supra* note 17 (“The Security Council referrals they have done nothing for the ICC . . . just headaches for international justice. I wish they would repeal article 13(b) from the Statute and . . . if the Security Council, if they come together and want to prosecute, set up a temporary tribunal.”); cf. Jennifer Trahan, *The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices*, 24 CRIM. L.F. 417, 419 (2013) (noting that the Security Council's powers derive from the UN Charter, not the Rome Statute, which only instructs the ICC how to react should the Security Council make a referral; the Rome Statute does not empower the Security Council to make referrals).

e) Increasing Ratifications/Universality

Many interviewees noted the need to increase ratifications of the Rome Statute in order to maximize the court's jurisdiction. The ICC currently has 123 States Parties.⁸³

James Stewart divided states into ones with "democratic values" that he was optimistic could join the court, and states with "difficult democratic records" that "may find it more troublesome to come on board."⁸⁴ He stated:

Really, in the end, it's all about a set of shared values it seems to me. I think that the rule of law concept that is essential to the International Criminal Court is a fundamentally democratic value. So, countries that live by democratic values are going to be interested in that, unless that have other concerns.⁸⁵

Stewart saw it as the ASP's responsibility to increase universality, and that the ICC could best contribute by "doing a good job."⁸⁶ Matthew Gillett similarly opined:

[T]he primary task is to do a good job on the cases that are in front of you, and hope that through that work the message that is being sent out to domestic actors is a positive one and there [are] no performance-related issues that would give them hesitation. And I think that's the best that can be done by the international actors.⁸⁷

David Scheffer explained some of the difficulties with reaching universality:

It will be difficult for the International Criminal Court to become as activated and as entrenched as I think it wishes to be as an instrument of justice if its membership does not expand to some degree significantly more. . . . What I'm saying is it just has to have two or three more

83. In the fall of 2016, three countries announced their withdrawals from the Rome Statute—South Africa, Burundi, and The Gambia. However, South Africa and The Gambia later withdrew their withdrawals, leaving only Burundi's withdrawal, which reduced the number of States Parties from 124 to 123. South Africa has now again announced its intention to withdraw but has not so far officially done so.

84. Interview with James Stewart, *supra* note 41.

85. *Id.*

86. *Id.*

87. Interview with Matthew Gillet, *supra* note 15.

superpowers as part of its membership. I mean the United States, frankly, China and Russia, no matter how improbable that may seem to us. The United States may actually be more probable of those three someday. But without expanding into that field, without expanding into Indonesia, a fair number or Asian countries whether it be Pakistan or some of the Middle Eastern countries, Saudi Arabia, etc., it has to have that sort of buy-in I think for it to be more effective and an institution recognized by some powerful political actors on the world stage. It would be fortunate, frankly, if more countries at least adopted the model of the United States over the past eight years or so under the Obama Administration where there's at least a cooperative collaborative relationship even though not membership status. That would at least move the ball further.⁸⁸

As to how universality could increase, founding ECCC International Co-Prosecutor Robert Petit took the view that victims will push non-ICC States Parties to join the Rome Statute system:

I think humanity as a whole, people always want justice. People want a fair treatment, a fair shot at having a better life, and certainly having their victimization recognized and accounted for. The push to bring some of those countries in line, if you want, will have to come from their own population. . . . I don't think the pressure to at least recognize that there has to be accountability, I don't think that pressure will let up. It's part of the political discourse now. . . . [I]f the ICC has done anything, it's certainly that—to make accountability a fact in any conflict. So, I think there's a good chance eventually that “outliers,” as you call them, and I won't mention any names, will be brought into the fold.⁸⁹

Richard Goldstone saw the problem of reaching universality as follows:

I think probably the main reasons keeping India and Pakistan out is the prospect of war between them. They don't want to be in situation where they've got to look over their shoulder for the Prosecutor of the ICC in waging a war where war crimes are inevitably going to be committed. It is difficult to conceive of a war without war crimes. It's part of the same coin. If peace [were] to break out between India and Pakistan than I wouldn't put it beyond the realms of possibility. I think it is less likely with Russia and China because there are autocratic societies where they want to do what they want to do. And, again, they don't want people

88. Interview with David Scheffer, *supra* note 48; see Interview with Brenda Hollis, *supra* note 24 (noting the difficulty of the US ratifying the Rome Statute).

89. Interview with Robert Petit, *supra* note 23.

looking at them. The United States is a singular “outlier” because it will always have its schizophrenia. It is a supporter of international justice for the whole world and it will even pay for it, but not to include “us.” So, they have got the same sovereignty and perhaps conceit that most large nations have of not wanting to be judged, unless it is in their interest.⁹⁰

Fatou Bensouda noted the importance of increasing ratification in order to minimize double-standards:

Again, first and foremost, we have to remember that it's a voluntary act, voluntary sovereign act to join the ICC and I am pleased there are various NGOs, the [CICC], [Parliamentarians for Global Action], that everyone is working towards having universality. And universality is advantageous for many reasons. Chief amongst them is this perception of double-standards. It will definitely help to eliminate that. If there are more or as many countries as possible joining the Rome Statute, we can have immediate jurisdiction and we can work. It will not be limited because the State is not a State Party and we cannot come in. So, universality is good and I think we should continue to work on it together.⁹¹

STL Registrar Daryl Mundis had the following recommendations for increasing Rome Statute membership. First, “the ICC itself needs to really lead the way and demonstrate it can do the job and it can do the job professionally, fairly, and without political influence[.]”⁹² Second, “[w]e need to be doing everything we possibly can to build democratic reforms within those [rogue] countries. We need to be changing the political environments within those countries so that the population within those countries views it as within their interest to join the court[.]”⁹³ Third, “we need to really do more with respect to the bigger ‘outliers,’ the US, to convince them that this isn’t a threat to them, as long as the US court system and particularly the military justice system continues to function and I think in many ways the US military criminal justice system is a real, shining example to other military criminal justice systems.”⁹⁴

Current ECCC International Co-Prosecutor Nicholas Koumjian

90. Interview with Richard Goldstone, *supra* note 31.

91. Interview with Fatou Bensouda, *supra* note 32.

92. Interview with Daryl Mundis, Registrar, Special Tribunal for Lebanon, in The Hague, Neth. (Oct. 5, 2016).

93. *Id.*

94. *Id.*

offered the following observations:

I think it's quite natural that the number of ratifications has slowed down because most countries in the world are members of the court. The remaining countries are often in a situation where you can see a reason why they are reluctant to join. They are particularly countries that don't want to give up their sovereignty over their allegations against their military, or their political leaders. They will be much harder to convince. Will international justice ever really be universal? I think that's a distant goal, but it will depend on the court establishing its own legitimacy, the fairness of the process, the good judgments of the prosecution and what cases to bring and whatever happens that makes people realize that they have to sacrifice sovereignty in order to get this international justice. Because there is no question about it, when you join an international court like that, like in any treaty, a country makes promises. It's giving up part of its sovereignty by committing to the obligations of the treaty. And that's of course going to be the case in the International Criminal Court. In the International Criminal Court, you expose your soldiers, your generals, your president to potential criminal prosecution.⁹⁵

Nicholas Koumjian noted the potential for exposure of US nationals before the ICC but was hopeful that if the ICC proves its objectivity and "ability to deal real justice," that the US will someday join. He stated:

I'm in favor of international justice. I think the United States is in a position that's different from any other country. I don't think that people recognize that. You know, when Syria conflicts are happening in Syria, or when chemical weapons are being used in Syria, people are not saying: Where's Indonesia? Where's Belgium? They are saying: Where's the United States? Why hasn't the United States reacted? American military is involved, and States are calling for military involvement in many conflicts around the world. So, I think . . . you can understand the reasons for reluctance. Again, I think if the court proves its objectivity and its ability to deal real justice, given the principle of complementarity of willingness of US courts to try crimes by American soldiers, I would hope that someday the United States would join.⁹⁶

David Crane took a more pessimistic view: "The US will never join the ICC. Not in my lifetime. . . . I just don't think there's enough

95. Interview with Nicholas Koumjian, Int'l Co-Prosecutor, Extraordinary Chambers in the Courts of Cambodia, in Nuremberg, Ger. (Sept. 29, 2016).

96. *Id.*

political will in this country to have us join. I think we're going the other way. . . . [W]e're going inward not outward."⁹⁷ As to other countries, he emphasized the importance of showing a successful ICC, and suggested if the ICC did more domestic capacity-building it could help incentivize "outliers," that they would benefit by joining the court.⁹⁸

Gregory Townsend suggested that when getting votes for "signing up for the rule of law" is more attractive than saying "you'll stand up the international community," then countries like Russia, the US, India, Pakistan, and China will join.⁹⁹ He also spoke of the US's leading role with the International Military Tribunal at Nuremberg, and the hope that the US will "come again full circle" and join the ICC, and that could prove a catalyst to other ratifications:

[It] having just been the 70th anniversary of Nuremberg, the thought that comes to my mind is how proud Justice Jackson was and how the US really took hold of what was count 1 of [crimes against peace] and how that really is the same crime as aggression today and how the US was the flag-bearer for that offense and how our position has turned 180 degrees [over the] last seventy years. And so, I would like to think that we would come again full circle back to that position where the US is viewed as a source of legal pride and that we are there and that once the US signs on, others will perhaps feel more political pressure to join in. I think the other states are less likely to join as long as the US stays out and so a role model needs to happen first and I think we just have to come to terms with the court, come to terms with the crime of aggression, embrace it again and perhaps there will be a watershed. Now, will that happen in twenty-to-twenty-five years? That remains to be seen, but I'd like to think there are people out there that are doing the cost/benefit thinking that this is really the kind of world we'd like to live in.¹⁰⁰

Hassan Jallow spoke optimistically that perhaps "outliers" could be embarrassed into joining: "I hope the process of justice will be so overwhelming worldwide that, you know, states would be embarrassed not to be part of it. Then they might join."¹⁰¹

97. Interview with David Crane, *supra* note 3.

98. *Id.*

99. Interview with Gregory Townsend, *supra* note 15.

100. *Id.*

101. Interview with Hassan Jallow, *supra* note 3.

Carsten Stahn noted that “outliers” were already engaged with the ICC through the UN system,¹⁰² and that states might increasingly utilize Rome Statute crimes without necessarily joining the ICC.¹⁰³

Professor William Schabas looked optimistically at the ability of the ICC to examine the conduct of US, UK, and Russian nationals through Investigations and Preliminary Examinations now before the ICC.¹⁰⁴

f) Adding Crimes to the ICC’s Subject-Matter Jurisdiction

The issue of adding crimes to the Rome Statute (beyond the crime of aggression),¹⁰⁵ did not arise much in interviews—although there are pending proposals before the ICC’s Working Group on Amendments, some of which would add crimes to the ICC’s jurisdiction.¹⁰⁶

As to adding more crimes to the Rome Statute, Renan Villacis explained:

I think in an ideal world there are many who would like the idea of the ICC to cover also other types of crimes. As you know, we have had discussions with other States Parties on expanding [the Rome Statute] to

102. Interview with Carsten Stahn, *supra* note 22 (“I think many of [the outliers] are already a part of the system obviously through the link to the United Nations network and the collaboration between the ICC particularly and the UN system I think will remain crucial. . . . We see . . . the ICC as a system of justice . . . as it gets greater importance in the UN system. I think, that might be the vehicle . . . to promote change and to convince some of the existing ‘outliers’ to move even closer to the existing system than it exists right now.”).

103. *Id.* (“I think that increasingly domestic institutions will take on and build on cases which have been done internationally and that again might create basically an environment in which the national system[,] although it might not be formally part of a treaty, actually already applies much of the essence of it.”).

104. Interview with William Schabas, *supra* note 17.

105. See Resolution ICC-ASP/16/Res.5, Activation of the Jurisdiction of the Court Over the Crime of Aggression, Dec. 14, 2017, https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res5-ENG.pdf.

106. Secretariat of the Assembly of States Parties, Informal Compilation of Proposals to Amend the Rome Statute (Jan. 23, 2015), https://asp.icc-cpi.int/iccdocs/asp_docs/Publications/WGA-Inf-Comp-RS-amendments-ENG.pdf; see also Resolution ICC-ASP/16/Res.4, Resolution on Amendments to Article 8 of the Rome Statute of the International Criminal Court, Dec. 14, 2017, https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res4-ENG.pdf (adding three more war crimes to the court’s jurisdiction).

include, for example, terrorism, drug-trafficking, [use] of nuclear weapons. Very interesting topics, but politically we haven't reached majority support for those options. . . . [I]t really depends on the political will of the States Parties who are discussing it. It will be a time, five-to-ten years from now, we may wish to expand [the Rome Statute] to include either some of the topics already on the table or maybe some new ones—environmental crimes, something else. It will just depend on the needs I think of the world community at that stage. . . . If we are struggling to deliver on our, let's say, limited mandate now, it would only get more complicated if we expand it to include other crimes.¹⁰⁷

Without saying they should necessarily be added as ICC crimes, Carsten Stahn hoped that in the future there would be examination of the “interconnection between crimes and structural violence,” particularly the “nexus between international crimes and transnational crimes,” as well as accountability for business leaders, and the “financial streams” behind some of the crimes.¹⁰⁸ He opined: “Some of this could be under the existing framework of the ICC, but for instance, imagine a transnational crimes chamber of the ICC. That would be, I think, a very interesting development of the existing practice and jurisprudence, which might allow the ICC to even operate more effectively in some of its situations.”¹⁰⁹

g) Serving as a Model of “Best Practices”

Some noted that the ICC of the future would ideally serve as a model of “best practices.” Thus, David Crane stated: “I think the ICC needs to be . . . a center of excellence of taking on the gravest of crimes when States Parties are . . . unwilling or unable[.]”¹¹⁰ Deputy Prosecutor James Stewart opined: “[T]he ICC . . . I think [is] a kind of inspiration as the standard bearer, the standard setter if you will.”¹¹¹

3. Skeptics of Scenario #1

Skeptics of the ICC—or the ICC as the main “international

107. Interview with Renan Villacis, *supra* note 45.

108. Interview with Carsten Stahn, *supra* note 22.

109. *Id.*

110. Interview with David Crane, *supra* note 3.

111. Interview with James Stewart, *supra* note 41.

justice” institution of the future— made several arguments, including: (a) its limited capacity; (b) its high cost; (c) it not being designed to prosecute large numbers of individuals from any one situation country, such as the crimes in Syria; (d) world powers not ratifying the Rome Statute; and (e) “push-back” and non-cooperation hampering the court’s work. One interviewee noted there might also be implosion of the ICC, or retreat from the field of international justice.

a) Capacity

Several interviewees took the view that the ICC cannot possibly handle all high-level genocide, war crimes, and crimes against humanity prosecutions of the future as it only prosecutes a few individuals from each situation country and, therefore, there still will be a need for additional hybrid tribunals.

Thus, Robert Petit took the view that the ICC will be the “gold standard,” but cannot conduct all the prosecutions:

I don’t think the ICC can ever be the dominant institution. . . . Its processes . . . are too cumbersome . . . to be able to respond adequately to all issues, and I don’t think it’s meant to. To me, I see the ICC first and foremost as a moral statement by the international community. Yes, there will be accountable for mass crimes. There will be something there regardless of who wins, regardless of your stature or your official position. This is a commitment that we’re making. And, obviously also the ICC . . . is the gold standard in terms of the interpretation of the law. So, it’s there as a guiding light. It’s also there as a gatekeeper, as a promise that, as I said, after a certain level, there will be no immunity. But, it . . . cannot be the answer, or at least the all-encompassing answer.¹¹²

Former US War Crimes Ambassador and Head of the Office of Global Criminal Justice, Stephen Rapp took a similar view:

I think the approach of a high-level court in The Hague conducting proceeding in a very slow and expensive way doesn’t get you very much quantity of justice. It may get you some quality. It may get you some jurisprudence. The idea that it will radically change in the next twenty years and be able to say produce a dozen judgments a year or something

112. Interview with Robert Petit, *supra* note 23.

like that, or have anything like the ICTY's numbers in less than half a century or something like that, is, I think, unrealistic, given where it's been[.]¹¹³

Serge Brammertz opined similarly that the ICC "will never be the solution for all atrocities."¹¹⁴

b) Cost of the ICC

One reason cited as to why the ICC would not be the dominant institute of the future was "cost" as a factor limiting its capacity.¹¹⁵

James Stewart responded to the cost criticism of the ICC as follows:

[I]nternational criminal justice is expensive. You're not making widgets. You can't really make these calculations. I think our responsibility is to use the resources that we are given in the most efficient and the most effective way that we can. And whatever may have been the case in the past, certainly from what I've seen since I arrived, there is a genuine effort amongst all the principles in the court. I'm talking about the Prosecutor, the Registrar, and the President, and the people in the different organs in the court. . . . I think the buzzword these days is "synergies." So that we avoid duplication in the purchase and use of resources. We make very careful calculations as to how we are going to apply our resources, but it is expensive.¹¹⁶

He continued by explaining how the complexity of cases and security of interviewees in situation countries both contribute to increased costs:

[W]here you have very difficult security situations, you have kind of rolling missions. People are in and out [of the situation country] and that's expensive. The fact that we have to take such care in how we approach people who deal with us to protect them against reprisal, again creates expensive situations. We can't always go and talk to people; we sometimes have to bring them out. All of this costs money. There's just no cheap way of putting these cases together. They are complex, difficult cases. . . . You really have to put your case together if you're going to

113. Interview with Stephen Rapp, *supra* note 73.

114. Interview with Serge Brammertz, *supra* note 68.

115. See also *supra* Section 1.2(a) (Increasing Effectiveness and Efficiency (Responding to Cost Criticisms)).

116. Interview with James Stewart, *supra* note 41.

accuse someone of these dreadful crimes, and be in a position to prove it, and it's not cheap to do that.¹¹⁷

c) Inability to Prosecute Large Numbers of Individuals from Any One Situation/ Crimes as Vast as Those Occurring in Syria

When specifically asked about the crimes occurring in Syria, many interviewees opined that the ICC could not address the number of high-level prosecutions that would be needed if full jurisdiction over the situation in Syria is ever attained, and that, therefore, a freestanding Syria tribunal, according to some, would be a preferable option.

David Scheffer envisioned that a multilateral hybrid tribunal for Syria could be created by agreement of a number of states in the region and the UN General Assembly.¹¹⁸ Stephen Rapp predicted that justice for crimes in Syria would come in the form of a hybrid tribunal or Syrian domestic trials.¹¹⁹ Gregory Townsend also endorsed the ad hoc model to handle the number of crimes being committed in Syria.¹²⁰ On the other hand, David Scheffer also stated: “I would prefer the heavy diplomatic lift being the Security Council referring the situation to the International Criminal Court because the capacity is certainly within the ICC to take this on.”¹²¹

While Serge Brammertz endorsed a hybrid “regional solution,” he noted “the problem will be to find . . . the people in the region who are able and willing to do it, [and] perceived as independent and impartial enough.”¹²²

Daryl Mundis did not envision the ICC having the institutional capacity to prosecute the crimes occurring in Syria:

117. *Id.*

118. Interview with David Scheffer, *supra* note 48.

119. Interview with Stephen Rapp, *supra* note 73.

120. Interview with Gregory Townsend, *supra* note 15.

121. Interview with David Scheffer, *supra* note 48 (opining how a Syria hybrid tribunal might work in complement to the ICC: “[M]aybe we could build a hybrid tribunal that has built into its statute that if there can be a referral to the ICC in the future, then the work of that special tribunal could be somehow transferred to the jurisdiction of the ICC”); *see also* Interview with David Crane, *supra* note 3 (“[A hybrid] can be used as an alternative in complement to the ICC.”).

122. Interview with Serge Brammertz, *supra* note 68.

Do I think the ICC can do it? I'm afraid not given the current resource limitations. So that takes us back to question [one]. How do we deal with that? How do we address that? In an ideal world, perhaps that situation might be dealt with by the ICC, but given the large number of additional situations they have going on right now, I simply don't see it possible to do that, unless you're prepared to double the size of that institution which I don't think the ASP is prepared to do.¹²³

Serge Brammertz opined similarly:

[T]he ICC will never be able to bring a comprehensive . . . solution to the conflict in Syria. If you look at the ICTY, you know, for a war which was shorter than the war already in Syria, where the number of victims is less than 50% of the number of victims in Syria, an entire tribunal was created with 161 persons indicted, with 4,000 cases ongoing in Bosnia alone. So, to think that the ICC alone would be able to resolve the situation, I don't think this will be the case. The ICC will be there and will become even more important, and we have to be supportive, [but] the ICC has to be the tribunal of last resort.¹²⁴

Nicholas Koumjian also expressed the view that the ICC cannot handle Syria prosecutions:

I would imagine, Syria is going to be a situation where most people are going to want a lot of people prosecuted. And, the ICC, by its nature, is going to be an institution that probably isn't fit to try a lot of people from one situation. I think that's one of the reasons that there is a . . . likelihood in the future of other ad hoc tribunals, or other hybrid tribunals, because they will be targeting a greater number of perpetrators than the ICC could handle.¹²⁵

Nicholas Koumjian also predicted there could be a domestic, regional, or mixed tribunal for Syria:

[I]n a country like Syria, a super complex conflict like that, I frankly would doubt that that case will go to the ICC ever. It could. I mean it could be a Security Council referral or a government could come to power that would accept retroactively jurisdiction. But I think probably there is going to be great domestic desire to keep that either domestic or regional, or some amount of sovereignty over the process. It could be a mixed

123. Interview with Daryl Mundis, *supra* note 92.

124. Interview with Serge Brammertz, *supra* note 68.

125. Interview with Nicholas Koumjian, *supra* note 95.

tribunal. I'm not saying anything like this is likely to happen any time soon, but since I'm doing a case that's over forty years old, I think one of the things you have to recognize is that the current situation can change. That conflict will end, we hope, certainly, someday. I'm sure there will be calls for some mechanism of justice and most likely some mechanism of justice will emerge.¹²⁶

On the other hand, in terms of the ICC's capacity, James Stewart pointed out that the ICC can do what it is funded to do—that States Parties could provide the funding for the ICC to prosecute more than a handful of individuals in each situation country.¹²⁷ Renan Villacis opined that if the ICC were to receive a referral of the Syria situation, it would require “a substantial investment of resources.”¹²⁸

d) World Powers Remaining Outside the Rome Statute System

As to achieving universal ratification of the Rome Statute, some expressed the view that the US, Russia, and China (each permanent members of the UN Security Council) would remain permanently outside the Rome Statute system, and, thus, the ICC will never attain its goal of universality.¹²⁹ Because the Security Council has power both to refer and to defer ICC cases,¹³⁰ the lack of ratification by these three permanent members (who hold veto power over referral decisions) is often seen as particularly problematic.¹³¹

Stephen Rapp noted: “Ratifications have clearly slowed down in the last half decade, and I don't envision very much progress on that front. . . . [Y]ou've got the classic problem where a lot of the bad things that happen in the world will happen in countries or places that are outside the legal reach of the ICC and it's hard to imagine that gap filling soon[.]”¹³²

126. *Id.*

127. Interview with James Stewart, *supra* note 41; *see also* Interview of David Scheffer, *supra* note 48 (“It's not beyond the pale for the ICC to have a larger number of targets of opportunity.”).

128. Interview with Renan Villacis, *supra* note 45.

129. *See supra* Section 1.2(e) (Increasing Ratifications/Universality).

130. Rome Statute of the International Criminal Court, *supra* note 4, arts. 13, 16.

131. Interview with Zimbabwean Attorney, in The Hague, Neth. (Nov. 21, 2016).

132. Interview with Stephen Rapp, *supra* note 73.

Judge Agius also noted the problem:

As long as you have the United States, for example, Russia, China, India, not to mention some other countries not willing to become State Parties of the ICC, you have a problem. And you have a problem in more ways than one because these countries, particularly Russia, United States, and China are amongst the permanent five in the Security Council. And you have to be realistic. Living in a fool's paradise and hoping and hoping and hoping doesn't help you much. You have to be realistic. So, these countries count and count a lot even though they are not State Parties of the ICC.¹³³

He also noted that the absence of the permanent members of the UN Security Council had an impact on the ICC's budget in terms of the lack of their financial contributions.¹³⁴

e) *"Push-Back"/Non-Cooperation*

As noted above, certain cases have unleashed significant "push back" to the court's work—particularly the issuance of ICC warrants against Sudanese President Omar al Bashir¹³⁵ and the investigation of the individuals who became Kenya's President (Uhuru Kenyatta), and Deputy President (William Ruto).¹³⁶

After the ICC's first warrant against al Bashir, the argument was made that the warrant endangered international peace and security and the African Union (AU) asked the UN Security Council to defer the warrant.¹³⁷ Similarly, Kenya and the AU requested the Security Council to defer proceedings against Kenya's President and Deputy President regarding post-election violence in 2007–2008 in which over 1,000 persons were killed.¹³⁸ The Security Council did not agree

133. Interview with Carmel Agius, *supra* note 33.

134. *Id.*

135. See Prosecutor v. Bashir, ICC-02/05-01/09, Second Decision on the Prosecutor's Application for a Warrant of Arrest; Prosecutor v. Bashir, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest.

136. Prosecutor v. Uhuru Muigai Kenyatta, ICC-01/09-02/11 (charges withdrawn); Prosecutor v. William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11 (charges vacated). The warrants were issued prior to Kenyatta and Ruto being elected.

137. Xan Rice & Tania Branigan, *Sudanese President Expels Aid Agencies*, GUARDIAN (Mar. 5, 2009, 4:50 AM), <https://www.theguardian.com/world/2009/mar/05/sudan-aid-agencies-expelled>.

138. Michelle Nichols, *African Leaders Ask U.N. to Defer Kenya International*

to either deferral. Thereafter, the AU has taken various aggressive positions vis-à-vis the ICC including insisting on a Rome Statute amendment that a sitting head of state should be immune from prosecution,¹³⁹ a position with which most ICC States Parties do not agree. There have also been calls by the AU for African States Parties to withdraw from the Rome Statute, and, individual African states, such as Uganda, Kenya, and Namibia, have also periodically suggested they could withdraw.¹⁴⁰ As noted above, in Fall 2016, South Africa, Burundi, and The Gambia, did withdraw from the Rome Statute, with South Africa and The Gambia later withdrawing their withdrawals.¹⁴¹ After extensive witness intimidation and non-cooperation in producing evidence, the Ruto and Kenyatta cases eventually collapsed.¹⁴² All of the ICC's warrants as to Sudanese officials for crimes committed in Darfur remain outstanding.

It is possible that future ICC cases could similarly engender "push-back." As James Stewart noted, "[w]e are probably down the road inevitably getting into tougher and tougher situations."¹⁴³ Fatou Bensouda similarly explained:

The very nature of what we do, the ICC, investigating and prosecuting these crimes and holding people who normally would not be held

Criminal Trials, REUTERS (Oct. 22, 2013), <http://www.reuters.com/article/us-kenya-icc-un-idUSBRE99L14O20131022>.

139. Dapo Akande, *An International Court of Justice Advisory Opinion on the ICC Head of State Immunity Issue*, BLOG EUR. J. INT'L L. (Mar. 31, 2016), <http://www.ejiltalk.org/an-international-court-of-justice-advisory-opinion-on-the-icc-head-of-state-immunity-issue>.

140. See Luckystar Miyandazi, Philomena Apiko & Faten Aggad-Clerx, *Why an African Mass Withdrawal from the ICC is Possible*, NEWSWEEK (Nov. 2, 2016, 6:11 AM), <http://www.newsweek.com/icc-international-criminal-court-africa-gambia-south-africa-burundi-515870>.

141. Manisuli Ssenyonjo, *State Withdrawal Notifications From the Rome Statute of the International Criminal Court: South Africa, Burundi and the Gambia*, CRIM. L.F. (2017), <https://link.springer.com/content/pdf/10.1007%2Fs10609-017-9321-z.pdf>.

142. Thomas Escritt, *ICC Judges Agree to Withdrawal of Kenyatta Charges*, REUTERS (Mar. 13, 2015, 11:17 AM), <http://www.reuters.com/article/us-kenya-icc-idUSKBN0M91SH20150313>; Marlise Simons & Jeffrey Gettleman, *International Criminal Court Drops Case Against Kenya's William Ruto*, N.Y. TIMES (Apr. 5, 2016), <http://www.nytimes.com/2016/04/06/world/africa/william-ruto-kenya-icc.html>.

143. Interview with James Stewart, *supra* note 41.

accountable, holding them accountable. There will definitely be push-back. It is for sure that there will be push-back against the institution because [certain countries] don't want this scrutiny.¹⁴⁴

Of the situations currently under Investigation and Preliminary Examination, certain ones can be anticipated to draw potentially hostile reactions from particular non-States Parties: The preliminary examination involving crimes committed in Palestine (potentially involving Israeli nationals);¹⁴⁵ the preliminary examination involving crimes committed in Afghanistan (potentially involving, among others, US nationals);¹⁴⁶ the preliminary examination involving crimes committed in Ukraine (potentially involving Russian nationals);¹⁴⁷ and the investigation into crimes committed in Georgia (also potentially involving Russian nationals).¹⁴⁸

Russia's recent purported "unsigned" of the Rome Statute¹⁴⁹ is not a "withdrawal" (as misleadingly reported in the media),¹⁵⁰ and therefore not very significant as a legal matter, as signing only commits a state not to defeat the "object and purpose" of the Statute.¹⁵¹ Yet, Russia's announcement also suggests that one can

144. Interview with Fatou Bensouda, *supra* note 32.

145. Press Release, Int'l Criminal Court, The Prosecutor of the International Criminal Court, Fatou Bensouda, Issues Her Annual Report on Preliminary Examination Activities (2016), (Nov. 14, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1252>.

146. *Id.* The Prosecutor has filed a request for authorization that the Afghanistan Preliminary Examination move to the Investigation stage. See OTP, Situation In The Islamic Republic Of Afghanistan, Nov. 20, 2017, https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF.

147. *Id.*

148. *Id.*

149. Shaun Walker & Owen Bowcott, *Russia Withdraws Signature from International Criminal Court Statute*, GUARDIAN (Nov. 16, 2016, 9:14 AM), <https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute>. The Vienna Convention on the Law of Treaties does not provide that treaties may be "unsigned." See Vienna Convention on the Law of Treaties, art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 336 (entered into force Jan. 27, 1980) [hereinafter VCLT].

150. Robbie Gramer, *Why Russia Just Withdrew from The ICC*, FOREIGN POL'Y (Nov. 16, 2016, 10:18 AM), <http://foreignpolicy.com/2016/11/16/why-russia-just-withdrew-from-icc-putin-treaty-ukraine-law/>.

151. See VCLT, *supra* note 149, art. 18 ("A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the

anticipate non-cooperation from Russia should the Office of the Prosecutor (OTP) proceed with the preliminary examination of crimes in Ukraine or investigation of crimes in Georgia.

The prospect that Rome Statute crimes may be occurring in the Philippines—something noted by the ICC Prosecutor¹⁵²—has also raised the possibility of a Philippine withdrawal from the Rome Statute, particularly if the OTP focuses additional attention on those crimes.¹⁵³

The initial withdrawals of Gambia and Burundi, and implied threat of withdrawal of the Philippines do raise the troubling question of whether States in the future will simply withdraw from the Rome Statute if they anticipate potential criminal exposure to state actors. The Rome Statute somewhat softens the impact in that withdrawal takes one year to be effective, with ICC jurisdiction continuing during that year, and cooperation obligations extending beyond that year as to any criminal investigations or proceedings already commenced.¹⁵⁴

James Stewart spoke of the importance of the ICC formally examining “lessons learned” from the Kenya situation in order to adjust its practices:

We already suffered some setbacks that everybody knows about. I’m

treaty[.]”); *see also* Walker & Bowcott, *supra* note 149 (“Russia’s decision to ‘withdraw’ its signature from the Rome Statute will have little or no impact on the court. Contrary to the government’s statement, Russia has never engaged with the court in any meaningful way.”).

152. ICC Prosecutor Warns Philippine Authorities over Drug War Killings, DEUTSCHE WELLE (Oct. 13, 2016), <http://www.dw.com/en/icc-prosecutor-warns-philippine-authorities-over-drug-war-killings/a-36036960>.

153. International Criminal Court, Press Release ICC-CPI-20180320-PR1371, “ICC Statement on The Philippines’ notice of withdrawal: State participation in Rome Statute system essential to international rule of law,” March 20, 2018, at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1371>.

154. Rome Statute of the International Criminal Court, *supra* note 4, art. 127 (“A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification . . . Its withdrawal shall not affect any cooperation with the [c]ourt in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective[.]”).

thinking particularly of the Kenya situation, which has been very difficult and we need to learn from those experiences.

I think we . . . in fact have learned from the Kenya situation. What we would like to do is a more formal examination[,] if I could put it that way[,] of how we handled the Kenya situation given the stakes, given the failure of justice if you will, that we never want to repeat. Each situation[,] however[,] is unique. You won't necessarily be able to draw some sort of formula from Kenya. We see certain things working in certain situations. You sometimes think to yourself, at a particular time—might that have worked in Kenya? We don't know. We'll have to see.¹⁵⁵

For example, James Stewart spoke of moving away from solely relying on witness evidence:

So now, for example, you don't find us relying solely on witness evidence. It's always going to be the core of our cases. You can't get away from that. But we try to layer our evidence, to find all sorts of other evidence from open source materials that's there on the internet to forensic examinations of crime sites and that sort of thing, documentary evidence, whatever we can get to support the eye-witness accounts and to provide a level of comfort to the Trial Chamber particularly, that we are able to establish the facts that we allege. So, it's a more sophisticated approach to investigations.¹⁵⁶

Matthew Gillett mentioned the need to ensure that ICC case are strong,¹⁵⁷ and to enhance witness protection.¹⁵⁸

Stephen Rapp noted the difficulty of the ICC receiving cooperation even from States Parties when it comes to investigating state actors, noting it is “almost impossible to investigate anyone

155. Interview with James Stewart, *supra* note 41.

156. *Id.*

157. Interview with Matthew Gillett, *supra* note 15 (“[T]he managers and the strategists at the ICC need to be sure that they are picking cases particularly that are well-supported by the evidence, that are ready to go to trial when they get put to that stage of proceedings, and so that you don't end up with a situation where a trial falls apart halfway through.”).

158. *Id.* (“I think that [witness protection] is a considerable challenge for the [ICC] because they simply don't have the personnel to be present monitoring security in any kind of comprehensive way in most of the situation locations. So, they are going to have to really enhance their strategy and find partners, states, other organizations that are able to help them secure witnesses and their families, and enable them to actually deliver their evidence to the court.”).

allied with the powers that be.”¹⁵⁹

When asked how the ICC could be strengthened against political interference in its work, Hassan Jallow suggested increasing the Prosecutor’s powers of initiating investigations on her own (*proprio motu*).¹⁶⁰

f) Implosion of the ICC (Or the Field of International Justice)

The most skeptical voice noted that the author could have included a “Scenario 4,” in which the ICC collapses, and a “Scenario 5,” pursuant to which there is a massive retreat from the international community’s commitment to the field of international justice.¹⁶¹ These possibilities are discussed further below, with most interviewees rejecting such pessimistic views.¹⁶²

II. SCENARIO #2: ADDITIONAL TRIBUNALS AS THE DOMINANT APPROACH OF THE FUTURE

This was the second scenario presented to interviewees:

In the second scenario, the international community continues to create a number of additional tribunals. These might take the form of hybrid tribunals (either freestanding new tribunals or ones created within existing national judicial systems). There might even be future ad hoc tribunals, with capacities similar to the ICTY and ICTR although perhaps not created through the UN Security Council. One or more regional criminal tribunal might also be created. While the ICC would also exist, it would not be the dominant institution; rather, it would be one of many institutions. Similarly, national courts would also continue with some domestic atrocity crimes prosecutions, although they too would not be the central feature of the system.¹⁶³

Interviewees were then asked:

159. Interview with Stephen Rapp, *supra* note 73.

160. Interview with Hassan Jallow, *supra* note 3.

161. Interview with David Crane, *supra* note 3.

162. *See infra* Part IV.

163. As explained above, none of the scenarios rules out the use of additional transitional justice tools (over and above prosecutions) nor the exercise of universal jurisdiction in national courts.

1. Is Scenario #2 the most likely scenario in twenty years' time? Why or why not?
 - a. Is there a preferred model hybrid tribunal?
2. Is there a potential role for institutions the size of the ad hoc tribunals?
3. Is there a potential role for regional criminal tribunals?

A. SUMMARY OF FINDINGS FOR SCENARIO #2

As set forth in detail below, various interviewees expressed the view that Scenario #2 (additional hybrid and other tribunals) is the most likely scenario in twenty years. In addition to the hybrid tribunals that have prosecuted, or are prosecuting, crimes committed in Sierra Leone, Cambodia, East Timor, Kosovo, Bosnia, Chad, and Lebanon,¹⁶⁴ there is now another hybrid tribunal for Kosovo (the Kosovo Specialist Chambers),¹⁶⁵ work is ongoing to operationalize a hybrid tribunal in the Central African Republic (the Special Criminal Court),¹⁶⁶ and perhaps to create a hybrid tribunal in South Sudan.¹⁶⁷ The potential use of future ad hoc tribunals, or regional criminal

164. They are: The Special Court for Sierra Leone; The Extraordinary Chambers in the Courts of Cambodia; The Special Panels for Serious Crimes in Dili, East Timor; Regulation 64 Panels in the Courts of Kosovo; the State Court in Bosnia-Herzegovina; The Extraordinary African Chambers in Senegal (which prosecuted crimes committed in Chad); and The Special Tribunal for Lebanon.

165. The Kosovo Specialist Chambers and Specialist Prosecutor's Office have jurisdiction over crimes against humanity, war crimes, and other crimes under Kosovo law, and are attached to the court system in Kosovo, but sit in The Hague. The Chambers and Prosecutor's Office are being staffed with international judges, prosecutors, and officers. *See Background, KOSOVO SPECIALIST CHAMBERS & SPECIALIST PROSECUTOR'S OFFICE*, <https://www.scp-ks.org/en/specialist-chambers/background> (last visited Dec. 1, 2016).

166. Peter Snyder, *Central African Republic Government Establishes Special Criminal Court*, JURIST (Apr. 23, 2015, 10:35 AM), <http://www.jurist.org/paperchase/2015/04/central-african-republic-government-establishes-special-criminal-court.php> (reporting that the Government of CAR has voted to establish a Special Criminal Court to be staffed by national and international judges).

167. *UN Rights Chief Urges Establishment of Hybrid Court for Atrocities in South Sudan*, UN NEWS (Dec. 14, 2016), <http://www.un.org/apps/news/story.asp?NewsID=55801#.WHA4OlzKtf0> ("The United Nations human rights chief today urged the African Union to quickly establish the hybrid court for South Sudan to investigate and prosecute those bearing criminal responsibility for the atrocities.").

tribunals (which to date have not been utilized for atrocity crimes prosecutions), could also fall within this scenario.

Some of the factors cited for supporting the creation of added hybrid tribunals were: (1) the efficiency of hybrid tribunals; (2) the successful outreach that is possible; (3) the benefits of locating hybrid tribunals in their situation countries—which has generally been the practice;¹⁶⁸ (4) the limited capacity of the ICC, suggesting the need for additional hybrid or other tribunals in situations of large-scale atrocity crimes; (5) the ability of hybrid tribunals to better resist attempts at domestic political control than purely national courts; (6) the ability of hybrid tribunals (particularly ones located in their situation country) to contribute to domestic capacity-building, and allow for more local ownership; and (7) the ability of hybrid tribunals to demonstrate to local communities rule of law functioning.

As to the most successful model hybrid tribunal, while various observations were offered, there was no one dominant model suggested with some suggesting that the best structure for future hybrid tribunals—which will necessarily contain features of the national court system— will be context-specific depending on the particular national system at issue.

Those skeptical of Scenario #2 were generally supportive of Scenarios #1 and/or #3, but additional criticisms of hybrid tribunals were: (1) that they have not been as cost-effective as originally envisioned; (2) that local ownership could also bring added difficulties in preserving independence and impartiality; and (3) that victims have expressed dissatisfaction at the high cost and slow speed of prosecutions, and the limited number prosecuted.

A few noted the possibility of future use of a regional criminal tribunal to prosecute atrocity crimes.

As to whether there could be future ad hoc tribunals¹⁶⁹ the size of

168. The only current hybrid tribunals not located in their situation countries are the STL, which sits in The Hague, Netherlands; The Extraordinary African Chambers, which sat in Senegal, but had jurisdiction over crimes committed in Chad; and the Kosovo Specialist Chambers, which also sits in The Hague.

169. See Interview with William Schabas, *supra* note 17 (mentioning the caveat as to calling the ICTY and ICTR the only “ad hoc” tribunals).

the ICTY or ICTR (although not necessarily created through the UN Security Council), many interviewees rejected the suggestion, although some endorsed it for addressing very large-scale crimes.

B. DETAILED FINDINGS OF SCENARIO #2

1. *Proponents of Scenario 2 and Rationales*

Various interviewees expressed the view that, over the next twenty years, Scenario #2 was most likely, or at least, that hybrid tribunals would still exist (along with other mechanisms).

Not surprisingly, three former hybrid tribunal prosecutors were among those who endorsed Scenario #2 as the dominant approach of the future—Brenda Hollis,¹⁷⁰ David Crane,¹⁷¹ and Robert Petit.¹⁷²

Serge Brammertz was in favor of hybrid tribunals where domestic prosecutions are not possible.¹⁷³

Others endorsed hybrid tribunals where ICC jurisdiction is not possible, or because they could have greater capacity than the number of cases the ICC typically brings in a single situation country.¹⁷⁴

Daryl Mundis stated bluntly, “although we keep talking about ‘it’s the end of all these specialized courts and tribunals,’ we keep

170. See Interview with Brenda Hollis, *supra* note 24 (“I would suspect we are more likely to be in scenario number two because there are, and I think for the foreseeable future will be, States that are not State Parties to the Rome Statute. And, for political reasons, I think we’re beginning to go back into a world where perhaps you have an automatic veto, East against West in the Security Council, so you wouldn’t have [ICC] referrals.”).

171. See Interview with David Crane, *supra* note 3 (“I think the international model is a hybrid of some sort, . . . more along the lines of the Special Court for Sierra Leone.”).

172. See Interview with Robert Petit, *supra* note 23 (“I think there will always . . . be a need for ad hoc solutions, hybrids, or specific tribunals. Look at the Specialist Chambers in Kosovo. They’re just coming online 20 years after. There will always be a need, and personally I’m a big believer in hybrids[.]”).

173. Interview with Serge Brammertz, *supra* note 68 (“[W]herever [atrocious crimes prosecutions] are not working at the domestic level for a number of reasons, [there is] not the capacity or not the political willingness, I am very much in favor of hybrid or mixed solutions.”).

174. See discussion *supra* Sections 1.3(a), (c) (“Capacity” and “Inability to Prosecute Large Numbers of Individuals from Any One Situation/ Crimes as Vast as those Occurring in Syria” under “Skeptics of Scenario #1”).

creating them.”¹⁷⁵ He further opined:

The ICC, I don't think, is in jeopardy of closing down or being overtaken by other courts and tribunals, but the reality is there are certain limitations to what any single institution can do before it becomes simply too large to function, too large to actually be able to meet its specific mandate. And, of course, there might be future conflicts that don't fall within the jurisdiction of the ICC, so I do think that notwithstanding what we've heard about for many, many years, tribunal fatigue, lack of resources overall, I do see the international community continuing to look at ad hoc or similar type hybrid situational courts that would fill a perceived gap in the capacity of the ICC to deal with these types of crimes.¹⁷⁶

Nicholas Koumjian, also a hybrid tribunal prosecutor, similarly opined that in the future there will still be a need for ad hoc or hybrid tribunals:

I do think it is very likely that [in the future] there are ad hoc or mixed tribunals. They fill a niche that they think the ICC can't fill and that domestic courts in some instances can't fill because either the state does not have the capacity (either the will or the capacity) to do the cases in the way that will have the confidence of the victims or of the international community, or because it is seen that any domestic prosecution will be too biased.¹⁷⁷

Gregory Townsend stated that whether there are more hybrid tribunals depends on whether conflicts of the future are committed in ICC situation countries or not.¹⁷⁸ Fatou Bensouda also shared this view: “I will not discount having more hybrid courts created by the UN. I think this is also a scenario we can look at because increasingly what we see happening is that a conflict erupts maybe in a state that is not party to the Rome Statute.”¹⁷⁹

a) Efficiency of Hybrid Tribunals

Some noted the relative efficiency of hybrid tribunals compared with ad hoc tribunals or the ICC. Thus, Brenda Hollis opined: “I

175. Interview with Daryl Mundis, *supra* note 92.

176. *Id.*

177. Interview with Nicholas Koumjian, *supra* note 95.

178. Interview with Gregory Townsend, *supra* note 15.

179. Interview with Fatou Bensouda, *supra* note 32.

think if we do have these hybrids they may produce a lot more concrete results a lot more quickly and a lot more efficiently than the ICC.”¹⁸⁰ Similarly, David Crane stated, “I’m not holding this up to be *the* model. What I’m saying is that we’ve shown the hybrid international war crimes tribunal *can* be an efficient model[.]”¹⁸¹

b) Successful Outreach of Hybrid Tribunals

Some also noted the successful outreach of at least one hybrid tribunal—the Special Court for Sierra Leone—as a model to follow¹⁸²—with outreach facilitated by locating most hybrid tribunals directly in their situation countries.¹⁸³

The successful work of the Special Court was also noted in terms of prosecuting all sides in the conflict.¹⁸⁴

David Crane also provided an important reminder that accountability is not for its own sake, but for the victims:

It’s about the victims. How can we effectively account for them, get justice for them? And that’s what we’re missing. We’re starting to miss the point. We don’t create courts for accountability, whatever that looks like—domestic courts, regional, international, or . . . the ICC. We have to ask ourselves: is this what needs to be done for the victims? And we may be surprised. . . . You’re talking to the victims, you’re listening to the victims, you’re investigating, you may be able to have a town hall program, a dialogue with the victims. They need to understand what’s going on, why it’s going on this way.¹⁸⁵

Commenting on the ICTY’s outreach program, by contrast, Serge Brammertz admitted that the ICTY could have used more emphasis on outreach but blamed the real difficulties on political leadership in

180. Interview with Brenda Hollis, *supra* note 24.

181. Interview with David Crane, *supra* note 3.

182. *E.g.*, Interview with Robert Petit, *supra* note 23 (“Sierra Leone, in terms of its outreach, establishes quite a good standard, recognizing the importance of outreach.”).

183. *See supra* note 168.

184. Interview with Robert Petit, *supra* note 23 (“On the other hand, [in] Sierra Leone, we went after both sides of the conflict, and much to the credit, I think, of the Prosecutor and the institution itself.”).

185. Interview with David Crane, *supra* note 3 (also emphasizing speaking with politicians and diplomats to explain a court’s work to minimize “pushback”).

parts of the former Yugoslavia:

I would not have imagined that it would be so difficult. And if I'm asked: [W]hat if you would have to start again twenty years ago? What would be different? I would say even more emphasis on outreach. . . . [P]erhaps we have not been good enough in explaining what we are doing, more specifically to the perpetrators' communities, but it is a fact that as long as the new political leadership has not the courage to accept that there were wrongdoings by the predecessors in the past, as long as you don't have this attitude by the political leadership, it is very, very difficult to convince people. We see this every day with the hate speech which is still very, very present, with the denial of the genocide in Srebrenica, or denial of crimes in general where today some parts, like Republika Srpska or others, are calling experts to rewrite the history of the conflict and to rewrite expert reports on cases on which we have already a final judgment in The Hague. So, there is for sure place for a *mea culpa* at the Tribunal to explain better, but I think the major problem is that many politicians in the former Yugoslavia are still very nationalistic in their approach and are still thinking that by dividing, they have more chances to be reelected than by moving together towards a common future, and this is extremely disappointing. This is, I would say, now nine years in the office, the most disappointing to see—a number of members in the political leadership having this kind of destructive attitude where it should be the opposite.¹⁸⁶

c) Contributions to Capacity-Building and Local Ownership

Another noted benefit of hybrid tribunals is that they allow national staff to work alongside experienced internationals at all levels, which may increase the capacity of local staff when they return to their domestic institutions.

Thus, Robert Petit stressed that hybrids can ensure a standard of justice and help with capacity-building.¹⁸⁷ Hassan Jallow similarly opined:

[M]any countries now, situation countries, would like . . . [to] see a process of reconstruction of the national legal system . . . as a part of that process. . . . And that means, of course, hybrids. It is easier done [with]

186. Interview with Serge Brammertz, *supra* note 68.

187. Interview with Robert Petit, *supra* note 23 (“The importance of hybrids is that it allows, by having internationals involved, at least theoretically, a certain standard of justice, and it allows [taking] the pressure off of the nationals who participated in it. The hard decisions can be made, and hopefully some capacity-building.”).

the hybrid structure than [with] the ad hoc. . . . I think that we need, also, to pay attention to the potential role of international justice in reconstructing the national system, enhancing its capacity, etc., and the hybrids have an advantage in that particular area.¹⁸⁸

Serge Brammertz stressed that hybrid tribunals can allow for local ownership: “I am very much in favor of hybrid or mixed solutions if possible with local ownership, because, as I said, you can resolve the problem of distance by having a hybrid, a mixed solution, where you have local ownership with international support[.]”¹⁸⁹

By contrast, Carsten Stahn noted that when hybrids are “fully transplanted” from the local context,¹⁹⁰ it might be difficult to create the normal acceptance and “spillover effect on the domestic system.”¹⁹¹ He stated: “I remain a little bit skeptical [whether] the fully transplanted [institution] actually gets the degree of acceptance and the kind of . . . domestic reception that we might expect and can create the kind of spillover effect on the domestic system that we would normally see in other scenarios.”¹⁹²

d) Too Many Atrocity Crimes Not to Have Additional Hybrid Tribunals

Others expressed the view that because the ICC has limited capacity to address crimes in any single situation country, and with atrocity crimes still occurring in large volume, the ICC cannot handle all the atrocity crimes prosecutions of the future.¹⁹³

Thus, for instance, David Scheffer stated: “If you look at the world today, you have to conclude that the worth and the value of hybrid tribunals must be available . . . because we have too many situations in the world which the International Criminal Court is simply not addressing today and may not in the future.”¹⁹⁴

188. Interview with Hassan Jallow, *supra* note 3.

189. Interview with Serge Brammertz, *supra* note 68.

190. Three hybrid tribunals have not been located in their situation countries. See *supra* note 168 and accompanying text.

191. Interview with Carsten Stahn, *supra* note 22.

192. *Id.*

193. See discussion *supra* Section 1.3(a) (criticism of the ICC as not the dominant model of the future due to limited capacity).

194. Interview with David Scheffer, *supra* note 48.

e) Hybrids Better at Resisting Political Pressure than Purely Domestic Institutions, Adding Neutrality and Objectivity

Stephen Rapp opined that hybrid tribunals can prove stronger at resisting domestic political control than purely domestic institutions: “[T]he right internationals can bring something you don’t get in a purely national system” because of the difficulty of the purely national approach being able to exercise “political control.” He explained that this was “why I don’t go all the way to . . . [Scenario] number 3.”¹⁹⁵

Nicholas Koumjian similarly noted that one of the benefits of hybrid tribunals is that international judges can add “a layer of neutrality, of objectivity”:

I think one of [the State Court in Bosnia’s] early successes was that the participation of international judges gave another little layer or added a layer of neutrality, of objectivity and probably a greater acceptance of the legitimacy of the verdicts of that court when any judge is going to be automatically seen as biased to whatever his ethnicity is, whether that’s true or not.¹⁹⁶

Yet, Koumjian also cautioned: “What you certainly don’t want is international involvement simply putting a veneer of legitimacy over an illegitimate process. . . . [T]hat’s part of the negotiations and the process to ensure that the involvement is real and that the process has a good prospect of a just result and produced transparently.”¹⁹⁷

The experience of the ECCC—which suffered from extensive attempts by the Executive in Cambodia to manipulate the tribunal’s work¹⁹⁸—suggests that not all hybrid tribunals are exempt from political pressure, particularly ones located in their situation country. However, they may still be in a better position to attempt to resist such political pressure than a purely domestic institution.

195. Interview with Stephen Rapp, *supra* note 73.

196. Interview with Nicholas Koumjian, *supra* note 95.

197. *Id.*

198. *See generally* HEATHER RYAN & LAURA MCGREW, PERFORMANCE AND PERCEPTION: THE IMPACT OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 27 (Kelly Askin & David Berry eds., 2016), <https://www.opensocietyfoundations.org/sites/default/files/performance-perception-eccc-20160211.pdf>.

Former Sierra Leone Special Court Registrar and Registrar of the Residual Special Court for Sierra Leone Bintah Mansaray opined that we will still have hybrid tribunals because sometimes domestic courts do not have the legal authority to prosecute:

[W]e would still [in the future] be seeing hybrid courts, in my view for political reasons because sometimes domestic courts . . . would not have the legal basis to prosecute atrocity crimes. In our case in Sierra Leone, the government gave blanket amnesty to all fighters. Therefore, even if the government is willing and able to prosecute people for crimes committed during the war, the government wouldn't be in a position to do so. . . .¹⁹⁹

f) Demonstrating Rule of Law at Work

Nicholas Koumjian opined that hybrid tribunals, such as the ECCC, can also demonstrate to the local population that “justice is possible”—cases can be decided based on “evidence and the rule of law” and not “who has the most money or power.” He stated:

[W]hen a court tries cases about the horrible crimes that happened in Cambodia during the Khmer Rouge time, or the horrible civil wars in Sierra Leone, the fact that those trials are going on in a transparent process, with the evidence, with the law applied, this raises the expectations of people in the country. The students that come to watch, the ordinary people that observe it, the lawyers and judges in the country [who] see this process go on. . . . I think it has a benefit of raising expectations that this kind of justice is possible. Cases can be decided not based on who has the most money or power, but based upon evidence and rule of the law. I think there is a very subtle but very, very important benefit of international justice in these countries.²⁰⁰

2. What Form of Hybrid Tribunal is the Model for the Future?

Interviewees who advocated for Scenario 2 (particularly hybrid tribunals) were asked what form of hybrid tribunal would be preferable. For instance, one model is to create a new, freestanding institution, such as the Special Court for Sierra Leone, which, while created by agreement between the UN and the Government of Sierra

199. Interview with Bintah Mansaray, Registrar Residual Special Court for Sierra Leone, in Nuremberg, Ger. (Sept. 30, 2016).

200. Interview with Nicholas Koumjian, *supra* note 95.

Leone,²⁰¹ was not created within Sierra Leone's existing judicial system.

Another model is to build a hybrid chamber within an existing domestic court system, as was done with the ECCC,²⁰² although several interviewees were quick to note that the precise experience relating to the ECCC—which has been plagued by serious problems of lack of judicial independence from the Cambodian government—should not be replicated.²⁰³

Views here were split, and some suggested that models for hybrid tribunals need to be context-specific, so that no one precise model should be selected as the dominant method, as it will depend on the existing conditions of the national court system at issue. Daryl Mundis noted that what is created may depend in part on what the national authorities want,²⁰⁴ and whether the country at issue has a common or civil law background.²⁰⁵

A strong view was also expressed that voluntary contributions are not an appropriate method to fund future hybrid tribunals.²⁰⁶

a) Freestanding Hybrid Model

Some, such as Brenda Hollis, supported a freestanding model of a hybrid tribunal: “I think it would be situational but I do favor a hybrid that is the product of an agreement between the United Nations and the state, instead of an internationalized specialized unit

201. Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone art. 10, Jan. 16, 2002, 2178 U.N.T.S 137.

202. RYAN & MCGREW, *supra* note 198, at 19 (“The ECCC is nominally a special chamber of the national courts of Cambodia, but it operates and receives funding as an independent entity.”).

203. *Id.* at 16 (“The compromise Agreement establishing the ECCC—particularly the decision to have a majority of Cambodian rather than international judges, and a complex formula designed to solve disagreements between national and international co-prosecutors and judges—was ineffective in preventing political interference in key decisions.”); *see also* Interview with Robert Petit, *supra* note 23 (stressing the importance of not precisely replicating the Cambodia model).

204. Interview with Daryl Mundis, *supra* note 92.

205. *Id.*

206. *See* discussion *infra* Section 2.2(e) (“Funding Not Through Voluntary Contributions”).

within a country. [The former] is truly an international institute and there are a lot of reasons for that.”²⁰⁷

Hans Corell lamented that the ECCC had not been a freestanding new institution, saying: “There is no way that I would support the model of the Cambodian Chambers.”²⁰⁸ Hans Corell “had hoped for a free-standing court” in Cambodia, noting that the Australians had “proposed a genuine international court, but the Cambodians didn’t want that.”²⁰⁹

Nicholas Koumjian opined that the Special Court worked in its situation, although he cautioned that that does not necessarily mean that same model would work in another situation:

I think each has their successes and their shortcomings, but, looking back on it, I think the Special Court for Sierra Leone is one where we can say it has completed its mandate. I think it was about 11 years. A limited number of individuals [were] brought to justice, as is the trend in most of the courts. In comparison to some others, this was a relatively less expensive case. . . . I think there was a very good reaction from the population, a very successful outreach program at that court. So, I think that’s one example of what worked in that situation, but that doesn’t mean it will work in another situation.²¹⁰

b) Hybrid Chamber Within an Existing Court System

The ECCC was created within the existing court system. In the circumstances of Cambodia, it was not endorsed as a model.²¹¹ Of course, this does not necessarily imply a hybrid chamber within an existing court system would not be a valid model elsewhere. The new Kosovo Specialist Chambers, for example, is created within the court system of Kosovo, while sitting in The Hague.²¹²

207. Interview with Brenda Hollis, *supra* note 24.

208. Interview with Hans Corell, *supra* note 40.

209. *Id.*

210. Interview with Nicholas Koumjian, *supra* note 95.

211. See Interview with Hans Corell, *supra* note 40 (citing an IBA study examining corruption in Cambodia); see also INT’L BAR ASS’N, JUSTICE VERSUS CORRUPTION: CHALLENGES TO THE INDEPENDENCE OF THE JUDICIARY IN CAMBODIA (2015), <https://www.ibanet.org/Document/Default.aspx?DocumentUId=4b065d2c-d691-46e5-86bf-0a17c993c938>; Interview with Robert Petit, *supra* note 23 (declining to endorse the Cambodia model).

212. Michael G. Karnavas, *Kosovo Specialist Chamber – Part I: Its Statute and*

c) Hybrid Converting to a National War Crimes Chamber

The State Court in Sarajevo, Bosnia, is also an interesting model. It began operations as a hybrid tribunal, with panels of Bosnian and international judges—first a majority of international judges and later a majority of national judges on each panel—but after a certain period of years reverted to a domestic war crimes chamber, with panels of solely national judges.²¹³ Thus, rather than ceasing operations after prosecuting a certain number of cases (as have most hybrid tribunals to date), it continues as an ongoing domestic court, having jurisdiction over both war crimes and organized crime.²¹⁴

Nicholas Koumjian, who had worked for the war crimes chamber of the Bosnian State Court, opined that it has been a successful hybrid tribunal:

[I]t started out with internationals, with the prosecution and on the bench with the judges. So initial trials were done with two international judges and one national. It changed over time to one international and two nationals and eventually all the internationals left. I think that was a good process. It helped add to the legitimacy of the court. Now would the court be further legitimized had internationals remained to some extent? I can imagine that's true. . . . [S]o I think the court has been a success, although I'm certainly aware of criticisms and not surprisingly many people feel their expectations have not been met.²¹⁵

A recent report suggests the State Court is not as successful in its current, purely national phase.²¹⁶

Rules of Procedure and Evidence in a Nutshell, MICHAELGKARNAVAS.NET: INT'L CRIM. L. BLOG (May 24, 2017), <http://michaelgkarnavas.net/blog/2017/05/24/kosovo-specialist-chambers-part-1/> (“[T]he KSC is a specialized chamber within the Kosovo Judiciary.”).

213. BOGDAN IVANIŠEVIĆ, *THE WAR CRIMES CHAMBER IN BOSNIA AND HERZEGOVINA: FROM HYBRID TO DOMESTIC COURT* 39, 41 (2008), <https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf> (regarding the inclusion and eventual phase-out of international personnel).

214. *History of the Court of BiH*, CT. BOSN. & HERZ., <http://www.sudbih.gov.ba/stranica/86/pregled> (last visited Jan. 1, 2017).

215. Interview with Nicholas Koumjian, *supra* note 95.

216. JOANNA KORNER, *PROCESSING OF WAR CRIMES AT THE STATE LEVEL IN BOSNIA AND HERZEGOVINA*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE 44 (2016).

d) Each Situation is Context-Specific so Selection of One Model is Inappropriate

Finally, as noted above, some suggested that each situation as unique, so it is impossible to decide in the abstract which is the best model for future hybrid tribunals. Thus, David Scheffer stated: “You know, I don’t literally recommend one of them. They’re all very different under different circumstances. Each one is generic to the situation.”²¹⁷ Richard Goldstone similarly stated: “One can’t generalize. It is like any form of transitional justice; it depends on local situations and history and economy and politics and all the rest of it.”²¹⁸ Robert Petit also opined that: “There is not one perfect model [of hybrid tribunal].”²¹⁹ He also stressed that what mattered was not the model in the abstract, but how it applies in reality.²²⁰ Nicholas Koumjian also took the view: “I think every situation is unique.”²²¹

Gregory Townsend also thought there would not be one model: “I think they need to be tailored for each particular situation. There’s not ‘one size fits all.’”²²² He also noted that the ability to utilize domestic judges and staff depends on how “polarized” the domestic conflict has been:

I would say that to the extent that you can involve domestic judges and domestic staff, the longer term pay-off and capacity-building benefit you’ll get. If it’s a highly polarized conflict that has one party against another party, and international independence and impartiality really need to be the hallmark of this court, then maybe you need to exclude the domestic judiciary and have a purely three judge [international] panel.²²³

217. Interview with David Scheffer, *supra* note 48.

218. Interview with Richard Goldstone, *supra* note 31.

219. Interview with Robert Petit, *supra* note 23.

220. *Id.*

221. Interview with Nicholas Koumjian, *supra* note 95.

222. Interview with Gregory Townsend, *supra* note 53.

223. *Id.* (giving as an example, “[I]n Kosovo there were these famous UN panels, Regulation 64 panels, [that] did allow for essentially a ‘mix and match’ as the situation required. You could have a three-judge bench that could be all international judges or just one international judge presiding or all domestic judges as the case required, and so that sort of fluid, efficient decision actually helped move the cases along and helped build judicial capacity where it was feasible.”).

Carsten Stahn spoke of the need for “institutional creativity” in having new forms of “hybridity”—so that each tribunal is “tailored to the respective situation”:

I think it’s very difficult to say that there’s one [optimal] model of the hybrid. I think precisely the new trend is a trend towards new hybridity. So, hybrid, in full, means also institutional creativity. That is, in my view, the lesson from the past decades. So, we indeed, have different scenarios. We have mixed experiences with different models. So, I think in each context basically it needs to be sorted out which way and which hybrid format is tailored to the respective situation.²²⁴

e) Funding not Through Voluntary Contributions

The view was also expressed that any future hybrid tribunals should be funded through UN dues or another fixed income source, rather than voluntary contributions. It was explained that funding through voluntary contributions—as the ECCC and Special Court for Sierra Leone have been²²⁵—forced the tribunals to engage in fundraising (which is not an efficient use of tribunal officials’ time), has left hybrid tribunals in precarious financial situations when funding runs short, and has created a situation where particular countries are in the role of dominant funder.²²⁶ The STL is also partly funded through voluntary contributions, and Registrar Daryl Mundis was also critical of voluntary contributions.²²⁷

William Schabas added the view that if a country does not have to

224. Interview with Carsten Stahn, *supra* note 22.

225. Stuart Ford, *How Leadership in International Criminal Law Is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts*, 55 ST. LOUIS UNIV. L.J. 953, 975–79 (2011).

226. Interview with Brenda Hollis, *supra* note 24.

227. Interview with Daryl Mundis, *supra* note 92 (“[T]he STL also is very different from some of the other tribunals or ad hoc institutions in that we require 49% of our funding to come from Lebanon under our statute, with 51% coming from voluntary contributions from States. As the person responsible within this institution for fundraising, I would say this is a model that should not be repeated elsewhere simply because it is extremely difficult. . . . It should be [funded through the] UN or . . . something like the EU, where it’s an assessed kind of contribution or assessed funding. . . . [A] voluntarily funded institution really is a bit of a problem [as is] any kind of funding mechanism where you are depending on one state for 49%—[that] is also a potentially precarious situation.”).

financially contribute to the cost of an institution, such as Sierra Leone's Truth and Reconciliation Commission, the country may prove insufficiently invested in it.²²⁸

3. *Skeptics of Scenario 2*

Other interviewees were skeptical that additional hybrid tribunals would be created in the future. These interviewees tended to be supporters of Scenarios 1 and/or 3, and their views are expressed as support for those Scenarios.²²⁹

Additionally, for instance, Richard Goldstone opined:

I don't think [the creation of more hybrid tribunals] is going to happen, save in cases where the ICC doesn't have jurisdiction. It's conceivable in cases where the crimes ante-date July 1, 2002. But, each year that goes past, it becomes less likely because it's too far back . . . [Also,] [i]t's an unlikely scenario because to get a hybrid you have to have the country in which the crimes were committed involved. And that's not going to happen too frequently, and those sorts of countries will be States Parties to the Rome Statute. I can't see any countries who are not States Parties wanting a hybrid rather than to request, even if they are not members, as Côte d'Ivoire, which submitted to jurisdiction even without ratifying. I think that would be a more likely scenario than to set up a hybrid tribunal.²³⁰

Judge Agius was similarly skeptical that there would be more hybrid tribunals: "I don't think that the tendency is towards a proliferation of further ad hoc tribunals or hybrid courts."²³¹

Some of the criticisms revolved around: (1) the cost of hybrid tribunals; (2) the difficulties associated with local ownership; and (3) victim dissatisfaction with the high costs and slow speed of prosecutions, and the limited number prosecuted.

228. Interview with William Schabas, *supra* note 17.

229. See *supra* Section 1.1; see *infra* Section 3.1.

230. Interview with Richard Goldstone, *supra* note 31.

231. Interview with Carmel Agius, *supra* note 33 (noting that exceptions might be a tribunal to deal with the downing of Flight MH17 over Ukraine and the new chamber being established for Kosovo).

a) Cost of Hybrid Tribunals and Rebuttal of Criticism

The point was made that hybrid tribunals have not proven as inexpensive as they were originally envisioned to be.²³² Cost has been a factor for which hybrid tribunals have been criticized—particularly given, sometimes, the limited number of individuals prosecuted.²³³ The Special Court for Sierra Leone prosecuted nine individuals, although thirteen were indicted.²³⁴ The ECCC is prosecuting its second and third accused, and it is unclear whether there will be additional trials.²³⁵ The STL is prosecuting four remaining accused, all in absentia.²³⁶ The Extraordinary African Chambers in the Senegalese Court System tried one accused, former Chadian president Hissène Habré.

When asked about this cost criticism, many defended the cost of hybrid tribunals. David Scheffer stated:

But, I do think the cost issue, a lot is made of this and I always want people to sort of step back a little bit and recognize that in a comparative sense, the cost of these war crimes tribunals is minimal compared to the cost of domestic legal systems. I mean the cost that was undertaken to investigate and prosecute the Oklahoma City bombing in 1995 in the

232. Interview with Richard Goldstone, *supra* note 31 (“It’s really expensive. In today’s terms, I guess you are looking at minimum of 150 to 200 million dollars to set up a hybrid tribunal.”).

233. RYAN & MCGREW, *supra* note 198, at 12–13, 16, 32, 73, 99.

234. RESIDUAL SPECIAL COURT FOR SIERRA LEONE, [HTTP://RSCSL.ORG/](http://RSCSL.ORG/) (LAST VISITED DEC. 26, 2017); Interview with Joseph Kamara, Anti-Corruption Comm’r, Attorney-Gen. & Minister of Justice, Sierra Leone, in Nuremberg, Ger. (Sept. 30, 2016) (speaking of the impact of the Special Court despite prosecuting only 9 perpetrators).

235. Trial 001 involved one accused. Trials 002/01 and 002/02 involve two accused (although four were originally indicted, with one deceased and one adjudicated incompetent). The Cambodian Government is attempting to block prosecutions in cases 003 and 004, involving four additional potential accused. RYAN & MCGREW, *supra* note 198, at 12–13, 15 (“The initial budget for the ECCC projected a three-year operation at a cost of about \$50 million. Ten years later, the Court is still going, and about to exceed a quarter billion dollars in total spending.”).

236. There originally were five accused, but due to the death of one accused, four are now being prosecuted. Prosecutor v. Ayyash, STL-11-01/T/AC/AR126.11, Decision on Badreddine Defence Interlocutory Appeal of the “Interim Decision on the Death of Mr. Mustafa Amine Badreddine and Possible Termination of Proceedings,” ¶ 3 (Special Tribunal for Lebanon July 11, 2016).

United States or the cost that was undertaken to, and is still being undertaken to respond to 9/11 in the United States, the cost of Guantánamo, which is very controversial, but guess what, there is still the cost of it. These costs dwarf what the tribunals cost, absolutely dwarf it.²³⁷

At the same time, Scheffer acknowledged the importance of demonstrating efficiency to donor countries in order to receive funding.²³⁸

In explaining the cost of the Sierra Leone Special Court, Brenda Hollis noted:

[I]f we look at Sierra Leone specifically, that court was created at the request of the government of Sierra Leone and the legislature in Sierra Leone ratified it. So, you had the leadership of the country saying, "Give us an international court." Secondly, I think it's a false assumption to say that the money if it wasn't spent on the court it would come to our country. I am not sure it would. I am not sure at all it would. Thirdly, I think that these critics are ignoring the fact that a tremendous amount of aid goes to these countries. We did some informal calculations and it was amazing how much money had gone to Sierra Leone.²³⁹

Prosecutor Hollis also suggested that, rather than measuring the cost of each person prosecuted, one might alternatively measure the number of crimes covered by the cases:

[I]n terms of the number of people that were indicted you can turn it around and say what were the number of crimes that were disposed of in these cases and you're talking about tens of thousands of crimes for which accountability was attached. . . . And so, you may have thirteen people we indicted, ten went to trial, nine to judgment, but these were individuals that in our belief based on the evidence we had gathered were the greatest responsible for the tens of thousands, hundreds of thousands of crimes that were committed there. So, if you talk about a case that determines accountability on that scale then all of a sudden that money becomes more relative.²⁴⁰

237. Interview with David Scheffer, *supra* note 48.

238. *Id.*

239. Interview with Brenda Hollis, *supra* note 24.

240. *Id.*; *see also* Interview with David Crane, *supra* note 3 (stating "I think the Special Court became expensive because of the Charles Taylor [case]" that it came "later in the life of the court" and noting that the cost of prosecutions at Nuremberg

Prosecutor Robert Petit observed the value of helping to rebuild a society, which cannot be measured by purely numeric calculations:

Ask them if in their own country they think their own justice system is too expensive and they should do away with it? There has to be accountability for crimes. Can it be done better in a more cost-efficient manner? Of course there can always be improvement and there should be, and anybody who has control over a budget should be held accountable. That's a given. However, justice has its own price, but it has a reward that's not calculated, or able to be calculated, in money. Its impact is not a budget line. It's what it helps, how it helps society to rebuild. So, I don't think you can put a price on it because that return is over many generations. Yes, you're accountable. You should be careful with the money you're given, but the return is not only in dollars. . . .²⁴¹

Daryl Mundis noted the high cost of international justice, but that continued armed conflict costs far more:

Now, yes, international criminal justice is extremely expensive, but international conflicts are extremely expensive in terms of military costs, in terms of costs to economies, in terms of disruption to individual people's lives and of course all of the non-financial non-economic costs, the suffering of war that individual people and families experience, which is the costliest aspect of any conflict. So, yes, international justice is expensive. Try the alternative. So, if we can avoid conflicts through deterrence. If we can avoid scale and scope of conflict through holding certain people accountable in country A, whereas potential perpetrators in country B might see that and say that's a bad idea to start a conflict here, then I think it's certainly money well spent.²⁴²

Serge Brammertz similarly noted the minimal cost of tribunals compared to continued armed conflict, and the contribution of removing high-level perpetrators from power:

[O]bviously it is impossible to measure the savings you have by taking out of a system individuals we consider as being the worst war criminals you can imagine. So, personally, I've never ever been convinced by these arguments. I remember giving a lecture at Harvard University two years ago, and where one [person] in the auditorium made a comment of this nature mentioning the number of billions which have been spent, and then

"in today's dollars" was "22 million dollars per person").

241. Interview with Robert Petit, *supra* note 23.

242. Interview with Daryl Mundis, *supra* note 92.

one of the professors stood up and said well I made this calculation [that] the cost of the 25 years of existence of the ICTY are similar to a very limited number of days of costs of the war in Afghanistan. So, the cost argument as a negative one has never been convincing for me because we all hope that accountability and making sure that there is no impunity must have deterrence which is much broader than the case in which you are conducting the investigation. And I think that Europe and the countries of the former Yugoslavia would look today very, very different if a number of important people would not have been prosecuted and taken out of the debate.²⁴³

A similar argument was presented by Gregory Townsend.²⁴⁴

In defending the cost of the ICTY, Judge Agius noted its important contribution to the rule of law and “that the world would be much, much worse today had they not created the ICTY and the ICTR”:

[I]f you did not have judges to observe and ensure the rule of law, the whole country might be in a mess, and that could cost you more. And the same message I have for the members of the Security Council, including our friends and our allies, because they too are very sensitive when it comes to costs. I think some of them have had just enough of forking out millions and millions and millions of dollars every year in order to keep this tribunal and, previously, the Rwanda Tribunal going. But I think it is important that they realize that the world would be much, much worse today had they not created the ICTY and the ICTR way back in 1993 and 1994.²⁴⁵

Hans Corell noted the need to contain costs by not translating into too many languages.²⁴⁶

243. Interview with Serge Brammertz, *supra* note 68.

244. Interview with Gregory Townsend, *supra* note 15 (noting the ICTY’s contributions to peace by incapacitating key political actors and described the Tribunal’s cost as “a drop in the bucket” compared to the cost of ongoing conflict).

245. Interview with Carmel Agius, *supra* note 33 (adding, puzzlingly, “It’s not a very strong argument, however because I would avoid discussing it much more than proposing it as a worthwhile thing to consider” and lamenting that creation of the ICTY and ICTR did not deter crimes in other locations).

246. Interview with Hans Corell, *supra* note 40 (deciding the ECCC did not need translations into Russian, particularly when the request came from Cambodia not Russia and stating “So, this means you could actually reduce the languages that you use in the court, and maybe have local languages also that would facilitate enormously for the court. Because the moment you have to have interpreters for

Daryl Mundis offered a proposal for a freestanding registry that could in the future service prosecutors and judges in multiple different situations.²⁴⁷ Other innovative ideas of his included having “courtrooms in containers that you could just drop in and within 3 days you could have a court up and running,” and having “something like an international peace corps that does justice.”²⁴⁸

b) Difficulties of Local Ownership in Terms of Preserving Independence and Impartiality

While Serge Brammertz spoke of one of the benefits of hybrid tribunals allowing for local ownership, he also noted the difficulties that can come from local ownership—a difficulty *ad hoc* do not share:

[R]emember the time I was in Lebanon, I dealt during two years with the Hariri Investigation Commission. I had very, very big difficulties in finding Arabic-speaking prosecutors, investigators, analysts who were willing to join the Investigation Commission because it was very delicate. So, one problem created by proximity to the crime scene, is that the closer you are getting to the area where their crimes have been committed, the higher the likelihood that people you would hire would be at least perceived as being biased towards one or the other side in the conflict, which in an extreme situation would indeed be an argument to go for an *ad hoc* solution where you have a kind of *ad hoc* tribunal which is located elsewhere and where the entire team is composed by professionals who have no link at all to the region.²⁴⁹

As noted above, local ownership, if one includes involvement of the State, has also proven a negative factor for the ECCC.²⁵⁰

several languages, then the costs are just soaring.”).

247. Interview with Daryl Mundis, *supra* note 92 (“Approximately 65–70% of the cost of the tribunal are actually borne by the registry, it’s the support, it’s the building maintenance, it’s the security, it’s the IT, it’s the human resources, it’s the procurement, it’s the victims and witnesses section, court management section, language services section. All these overhead costs are borne by the registry. They are services the registry provides to the other organs and to the chambers. We might want to consider a model where there is an international registry that’s established in which for future conflicts the international community is able to plug in a module.”).

248. *Id.*

249. Interview with Serge Brammertz, *supra* note 68.

250. RYAN & MCGREW, *supra* note 198, at 13.

Hans Corell also drew a contrast between Sierra Leone, where the Sierra Leoneans nominated a judge from another country, “[w]hilst in Cambodia, they insisted that these should be judges from the Cambodian system.”²⁵¹ “But . . . Sierra Leone really wanted a genuine court, whilst Cambodia wanted a court that they could control from the government. . . .”²⁵² He also stated: “But in this case with Cambodia, . . . what I warned against actually happened.”²⁵³

c) Victim Dissatisfaction at High Costs, Slow Speed, and Limited Number Prosecuted

Commenting on the difficulty in explaining to Sierra Leoneans that the Special Court would only prosecute a few individuals, Hans Corell provided this moving account:

Here, I never forget my meeting with the traditional chiefs, some twenty-five of them—a few were women. And they asked me: “What can I tell my people?” One of the chiefs rose in his dignified African way and asked the question: “What can I tell my people when you come here with this Court that can judge only a few when we know among us there are so many who have committed the most heinous crimes?” And I thought for a moment: what can I say as a white European to this African chief? And, all of a sudden, it came to me. “Well look at your own continent. Look at Nelson Mandela, Madiba. What did he say when he came out of prison? Look at Kofi Annan. How do they act? So, you have now also a reconciliation commission in Sierra Leone, so these will work in parallel.”

And this is the only way ahead because even the best organized national criminal justice system would crumble if all these people would be brought to justice. And I saw in my eyes, when I came in my armored car to go to the negotiations, there were children coming, showing arms with no hands. Or a little boy sitting on a little four-wheeled thing, pushing himself forward like if he [were] on skis. His legs had been chopped off. And these were crimes committed by other young people who had been drugged and taught by grownups to commit these crimes.²⁵⁴

Nicholas Koumjian also spoke of victims’ frustration at the high costs, slow speed, and limited number of prosecutions:

251. Interview with Hans Corell, *supra* note 40.

252. *Id.*

253. *Id.*

254. *Id.*

[Victims] think it costs too much money and it's too slow. I don't generally disagree with them about that. I think it's very important in international justice to think of ways to make it more efficient and make it faster. But, I explain to them simply that we are limited by the jurisdiction of the court that was established by a treaty and the resources that are available.²⁵⁵

(The author notes that while none of the interviewees raised victim dissatisfaction with the high cost, slow speed and limited number prosecuted by the ICC and ad hoc tribunals, those views no doubt would also exist.)²⁵⁶

4. Can a Case Be Made for Future Regional Criminal Chambers?

As noted above, a regional criminal court could also be envisioned in the future as another venue for prosecuting core atrocity crimes. For instance, both Hassan Jallow²⁵⁷ and David Crane²⁵⁸ spoke of the potential role of such a regional court.²⁵⁹

Renan Villacis spoke of the role both hybrid tribunals and regional courts could have in complementing the ICC:

There will be situations of course where countries or regions feel they might need a hybrid court. There are some ideas of having regional courts

255. Interview with Nicholas Koumjian, *supra* note 95.

256. For discussion of concerns with the high costs of victim representation at the ICC, see interview with William Schabas, text accompanying *supra* note 52. The ICTY indicted 161 individuals, but still some victims groups are dissatisfied it did not conduct even more prosecutions. See *Infographic: ICTY Facts & Figures*, UNITED NATIONS: MECHANISM FOR INT'L CRIM. TRIBUNALS, <http://www.icty.org/en/content/infographic-icty-facts-figures> (last visited Mar. 16, 2018).

257. Interview with Hassan Jallow, *supra* note 3 (“Africa is already taking initiative with the preparation of a draft protocol to amend the Statute of the [African Court of Justice and Human Rights], in order, to give it criminal jurisdiction. That is another direction I think, which we will see developing, and, I think, ideally, that is what I would like to see.”).

258. Interview with David Crane, *supra* note 3 (“I think that we need to make sure that we keep an open mind on accountability and that accountability can be a local court, domestic court, or with international help. It can be a regional court of some sort, or can be an international court[.]”).

259. *But see* Interview with Gregory Townsend, *supra* note 15 (speaking of Syria, “and the regional [tribunals] I see as being too weak or not able to get jurisdiction over the . . . highest levels of responsibility”).

out there, which is something that wasn't foreseen in the Rome Statute. . . . [T]hose regional initiatives may at some point be helpful for the broader process. It may deal with . . . criticism that is sometimes made of the ICC in terms of [being] a distant court, way in Northern Europe, far away from the victims.²⁶⁰

The recent "Malabo Protocol,"²⁶¹ by which the jurisdiction of the yet-to-be established African Court of Justice and Human Rights was expanded to cover a variety of crimes,²⁶² suggests the potential of regional criminal tribunals. Yet, the Malabo Protocol has a startlingly broad immunity provision.²⁶³ Hassan Jallow opined that that immunity provision would need to be removed.²⁶⁴

5. *Can a Case Be Made for Future Ad Hoc Tribunals?*

Conventional wisdom is that states view the ad hoc tribunals as too expensive and a model that will not be replicated.²⁶⁵ Yet, the ad

260. Interview with Renan Villacis, *supra* note 45.

261. African Union Assembly of Heads of State and Government [AU-AHSG], Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights arts. 16–17 (June 27, 2014) [hereinafter Malabo Protocol].

262. Amnesty Int'l, *Malabo Protocol: Legal and Institutional Implications of the Expanded African Court*, AFR 01/3063/2016, at 14–15 (2016); see Malabo Protocol, *supra* note 261, art. 28A(1)–(2) (in addition to the Rome Statute crimes, the Protocol covers unconstitutional change of government, piracy, terrorism, mercenaryism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, and illicit exploitation of natural resources).

263. Malabo Protocol, *supra* note 261, art. 46A *bis* ("No charges shall be commenced or continued before the court against any serving AU Head of State of Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.").

264. Comments of Hassan Jallow, Chief Justice of The Gambia, at Georgetown University, Washington, D.C. (Apr. 4, 2017).

265. Some, for example, have argued that the money expended on the ICTR would have been better spent on rebuilding the Rwandan judiciary. See José E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 466 (1999) ("[E]ach dollar spent by the international community on the ICTR is one less dollar available for assistance to Rwandan courts"). Yet, that ignores both that "it is unlikely . . . that international donors would have been willing to finance the Rwandan judiciary system at anywhere near the levels of financing for the ICTR" and the extreme unlikelihood of high-level accused génocidaires receiving anything resembling fair trials in Rwanda. See Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 46 n.245 (2006).

hoc tribunals are also the tribunals that, to date, have prosecuted the greatest number of cases at the international level from any one situation, with the ICTY having issued 161 indictments,²⁶⁶ and the ICTR having issued 93.²⁶⁷

Despite acknowledged skepticism regarding future ad hoc tribunals like the ICTY and ICTR, interviewees were asked whether there might be a conceivable case made for them, for instance, to prosecute mass atrocities such as those occurring in Syria (were this politically feasible, which, at present, it is not).²⁶⁸ The ICTY and ICTR are here suggested as potential models in terms of their capacity, not their creation through the UN Security Council. (Given Russia's veto power, it seems improbable the Security Council would create a Syria tribunal while the Assad regime remains event partly in power.)

Most interviewees opined that there would be no future ad hoc tribunals.²⁶⁹ A few interviewees, however, endorsed the view that in

266. Infographic: *ICTY Facts & Figures*, *supra* note 256.

267. *Key Figures of Cases*, UNITED NATIONS: MECHANISM FOR INT'L CRIM. TRIBUNALS, <http://unictr.unmict.org/en/cases/key-figures-cases> (last visited Jan. 6, 2017).

268. Tribunals to date have generally been created either by the UN Security Council (as were the ICTY, ICTR, and STL) or agreement between the UN and the host country (as were the ECCC and Special Court for Sierra Leone). As to Syria, neither method appears possible. Russia has repeatedly vetoed resolutions pertaining to Syria (suggesting a future Syria tribunal will not be created through the UN Security Council). *See, e.g.*, Ian Black, *Russia and China Veto UN Move to Refer Syria to International Criminal Court*, *GUARDIAN* (May 22, 2014, 11:07 AM), <https://www.theguardian.com/world/2014/may/22/russia-china-veto-undraft-resolution-refer-syria-international-criminal-court>. Furthermore, the Assad Government (which currently appears poised to retain control over significant parts of the country) will certainly not consent to a tribunal, given the regime's own criminal exposure. *See, e.g.*, Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, Human Rights Council on its Thirty-First Session, U.N. Doc. A/HRC/31/CRP.1, *Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic*, paras. 83–99 (Feb. 3, 2016) (concluding Government forces are implicated in crimes against humanity and war crimes). What could be needed is a creative new approach—such as a regional hybrid tribunal, created by various Middle Eastern countries (preferably, ones not involved in the war in Syria), and the UN General Assembly. *See* Interview with David Scheffer, *supra* note 48.

269. *See* Interview with Judge Carmel Agius, *supra* note 33 (invoking the high cost of his own tribunal as a reason it would not be replicated for Syria); Interview with Hassan Jallow, *supra* note 3 (“I doubt whether we’ll see any new ad hoc

terms of capacity, the ICTY and ICTR could provide a model for a future Syria tribunal, or elsewhere, should there be the political will to create one.²⁷⁰

For example, Gregory Townsend argued that “an ad hoc for Syria for me [is] the model that makes the most sense.” He explained:

I think in the breadth and scope . . . people look at the conflict in Syria and say this is this generation’s Yugoslav conflict. So, I see the analogous solution working. Now, would it be costly? Would it take a long time? Absolutely. Do I think a freestanding institution makes more sense? I think the volume speaks more than perhaps anything. We had six trials going on here [at the ICTY] at one time in three separate courtrooms and so would that essentially take over a huge amount of the ICC’s capacity? Yes. And, so, from a capacity and courtroom, even just physical location sense, for me [the situation in Syria] requires that. You have high-level suspects in Syria that would obviously warrant international adjudication. I wouldn’t push this down to a Syrian version of the Iraqi High Tribunal if I could put it that way. And the international presence warrants this size and scope of an investment. . . . And if you say the ICTR was created because why are we creating the ICTY in Yugoslavia and not doing

being created in the future. They’ve proven to be very, very effective like the ICTY and the ICTR, but they’ve also been very difficult to manage in terms of cost, in terms of time, etc. I think the international community is less likely to proceed with that and more with the hybrid system, and encourage the empowerment also of regional courts.”)

270. See Interview with Brenda Hollis, *supra* note 24 (“I think that if there is an ad hoc court in the future, I mean there could be. . . . But given the atmosphere in the Security Council I don’t think it would be a Chapter VII court.”); Interview with Daryl Mundis, *supra* note 92 (When asked “wouldn’t we need something the size of the ICTY for the Syria conflict if we are serious about justice?” Mundis responded: “I’m afraid so. . . . You’re going to need an institution that’s going to be about the size of the ICC looking at Syria and it’s going to be extremely expensive[.]”); Interview with Richard Goldstone, *supra* note 31 (“You know it is possible, if there was sufficient political will. It is all a question of the politics. And, you know, I would think there is more likely to be more push for some sort of domestic court even if it’s augmented by international judges and prosecutors. But, you know there is no point in foisting courts on unwilling parties because without their cooperation, the court can’t function.”); Interview with Serge Brammertz, *supra* note 68 (“I probably think that an ad hoc solution for Syria would be important independently of the ICC question. But, if I say ad hoc solution or hybrid, I mean everything else but ICC or the national level. So, I’m not excluding an ad hoc tribunal, but it’s obvious that one of the reasons that the hybrid tribunals and the ICC were created was that it was considered being very time-consuming and costly to set up a full-fledged ad hoc tribunal in relation to one situation.”).

anything for [Rwanda], I could again make the argument a third time.²⁷¹

In response to the question about a future ad hoc tribunal for Syria, Hans Corell stated only that the Security Council can set up more ad hocs but appeared unpersuaded: “[T]he Rome Statute does not mean that the Security Council is prevented from establishing more courts along the lines of ICTY and ICTR. They can do that. There’s no legal objection to that. [Yet], here I think it’s a question of being pragmatic and see to the realities on the ground.”²⁷²

Robert Petit also noted as to the cost of the ad hoc tribunals: “[I]f you tend to focus on just the numbers game [as to ad hocs], you might miss the point. These are not money-making ventures, they’re to account for mass violations of human rights, and their impact in not measured in dollars. . . .”²⁷³

III. SCENARIO #3: COMPLEMENTARITY/DOMESTIC PROSECUTIONS AS THE DOMINANT APPROACH OF THE FUTURE

This was the third scenario presented to interviewees:

In the third scenario, complementarity or domestic prosecutions become the most dominant feature of the future of the field. “Complementarity” refers to national court prosecutions in Rome Statute States Parties. Yet, there is also need to strengthen the capacity of domestic courts to prosecute atrocity crimes in non-Rome Statute States Parties—indeed, possibly greater need, since the ICC will not be conducting prosecutions in such countries absent a UN Security Council referral. In this third scenario, there is less need for the ICC or hybrid (or other) tribunals, as there is a shift towards domestic capacity to prosecute atrocity crimes. This may occur before a specialized war crimes chamber or the ordinary court system. Thus, national courts would have much stronger capacity

271. Interview with Gregory Townsend, *supra* note 15.

272. Interview with Hans Corell, *supra* note 40.

273. Interview with Robert Petit, *supra* note 23; *see also supra* notes 22–24 and accompanying text (suggesting a tribunal’s merit should not simply be judged by a calculation of the cost per prosecution, and there are many tribunal benefits that may not be subject to quantitative measurement).

(and, ideally, will) to fairly conduct atrocity crime prosecutions.²⁷⁴

Interviewees were then asked:

1. Is Scenario #3 the most likely scenario in twenty years' time? Why or why not?
2. Should complementarity/domestic capacity-building be centrally coordinated or conducted?
 - a. Why or why not?
 - b. If so, by what entity?

A. SUMMARY OF FINDINGS FOR SCENARIO #3

Various interviewees expressed the view that, over the next twenty years, Scenario #3 was likely. As noted above, some interviewees suggested that Scenario #1 and Scenario #3, combined, represented the future of the field.²⁷⁵

Others were skeptical that domestic prosecutions/complementarity²⁷⁶ would be the way of the future because high-level prosecutions of large-scale atrocity crimes are too difficult for most domestic judiciaries to tackle. And, others suggested that whether domestic prosecutions/complementarity could work in any particular country very much depended on the situation in that country. The view was also expressed that not only

274. As explained above, none of the scenarios rules out the use of additional transitional justice tools (over and above prosecutions), nor the exercise of universal jurisdiction in national courts.

275. See *supra* Section 1.1(e) ("Combining Scenarios 1 and 3").

276. Interview with Fatou Bensouda, *supra* note 32 ("Under the Rome Statute primarily you retain the responsibility to investigate and prosecute these crimes. It is only when you cannot that this institution that you are a part of takes on the responsibility to investigate and prosecute. So, in a way, I always look at the ICC as an attempt to ensure there is no impunity because that's what we wanted to make sure [doesn't] happen. But at the same time, we looked for a way of developing the domestic jurisdictions so that they will not have the need to go to the ICC when these crimes take place. So, this is the system that we have created, the system of States being part of the ICC, knowing that if they cannot prosecute, the ICC will come; knowing that if there is no political will, the ICC will come; but, at the same time, if they are doing it themselves, the ICC will not come. I think it's a beautiful system. It is a system that we are seeing evolve over time.").

national prosecutions, but also hybrid and regional tribunals should be viewed as part of complementarity.

As to whether a centralized entity/institution should lead capacity-building efforts, many suggested that centralized coordination would be helpful, with some suggesting the ICC could lead this effort in ICC situation countries. Several opined that the ICC should not perform the actual capacity-building work, but should play only a facilitation role. Some argued that there should *not* be another entity coordinating domestic capacity-building in ICC situation countries, as that could create competition with the ICC's efforts. A few suggested that the current ad hoc approach suffices—with domestic capacity-building/rule of law work conducted by various development actors and States, and funded through various donor countries, without overall coordination. Some were skeptical of one large organization conducting capacity-building work—both that individual countries might not welcome what could be seen as interference in their national court systems, and donor countries might choose to retain control over how they invest funding.

Domestic court prosecutions of atrocity crimes may occur before a country's ordinary domestic courts,²⁷⁷ before its military courts,²⁷⁸ or

277. For example, war crimes prosecutions in Croatia occur before the four largest district courts. See Amnesty Int'l, *Behind a Wall of Silence: Prosecution of War Crimes in Croatia*, EUR 64/003/2010, 6 (2010). In Bosnia, in addition to the hybrid State Court in Sarajevo, local war crimes prosecutions occur before cantonal courts in the Federation of Bosnia and Herzegovina, and district courts in Republika Srpska). *Bosnia and Herzegovina: Local Courts Face Obstacles in War Crimes Trials*, HUM. RTS. WATCH (July 10, 2008, 8:00 PM), <https://www.hrw.org/news/2008/07/10/bosnia-and-herzegovina-local-courts-face-obstacles-war-crimes-trials>. See also Jonathan Gilbert, *Ex-Military Officers Convicted of Human Rights Crimes During Argentina Dictatorship*, N.Y. TIMES (Aug. 25, 2016), <https://www.nytimes.com/2016/08/26/world/americas/argentina-trial-cordoba.html> (writing about convictions of "38 former military officials" in an Argentine federal court); *World Report 2017: Guatemala*, HUM. RTS. WATCH (Jan. 2017), <https://www.hrw.org/world-report/2017/country-chapters/guatemala> (detailing Guatemala's progress in prosecuting corruption and human rights cases); *World Report 2017: Chile*, HUM. RTS. WATCH (Jan. 2017), <https://www.hrw.org/world-report/2017/country-chapters/chile> (describing prosecutions in Chile before military and civilian courts).

278. For example, military courts in the Democratic Republic of Congo (DRC) have prosecuted war crimes and crimes against humanity since the DRC's self-referral to the ICC in 2004. William W. Burke-White, *Proactive*

before a specialized war crimes chamber.²⁷⁹ The advantage of the latter is to potentially centralize expertise before one court; creating a specialized war crimes chamber may also attract added donor funding, assistance and/or training.

B. DETAILED FINDINGS FOR SCENARIO #3

1. *Proponents of Scenario #3 and Rationales*

Various interviewees expressed the view that, over the next twenty years, Scenario #3 was the most likely. Some of the factors they cited were: (1) that national justice “has to be delivered where the crimes have happened”;²⁸⁰ (2) the benefits of strengthening national institutions; (3) that strengthening rule of law can avoid future conflict; and (4) that international institutions do not have the capacity to prosecute large numbers, which domestic courts could potentially do.

For example, Sierra Leone’s Anti-Corruption Commissioner, Attorney-General and Minister of Justice, Joseph Kamara opined on the importance of prosecuting atrocity crimes before national courts:

Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice, 49 HARV. INT’L L.J. 53, 106 (2008) (explaining that numerous convictions have occurred as a result of these domestic military courts using the Rome Statute as the operative law and basis for the convictions); *see, e.g., DR Congo Puts Fighters on Trial for Civilian Massacres*, AL JAZEERA (Aug. 20, 2016), <http://www.aljazeera.com/news/2016/08/dr-congo-puts-fighters-trial-civilian-massacres-160820160714182.html> (“A military court in the DRC has begun the trial of 215 members of an armed group accused of killing hundreds of civilians in and around Beni town in the country’s northeast.”).

279. *See International Crimes Division*, JUDICIARY REPUBLIC UGANDA, <http://www.judiciary.go.ug/data/smenu/18/International%20Crimes%20Division.html> (last visited Mar. 16, 2018) (detailing the establishment of a specialized chamber in Uganda known as the International Crimes Division of the High Court); Kirsty McNamara, *Seeking Justice in Ugandan Courts: Amnesty and the Case of Thomas Kwoyelo*, 12 WASH. U. GLOBAL STUD. L. REV. 653, 653 (2013) (explaining that in 2008, the Government of Uganda established the International Crimes Division to try individuals alleged to have committed international crimes during the 20-year insurgency in northern Uganda); *see also Justice for Serious Crimes Before a National Court: Uganda’s International Crimes Division*, HUM. RTS. WATCH (Jan. 15, 2012), <https://www.hrw.org/report/2012/01/15/justice-serious-crimes-national-courts/ugandas-international-crimes-division> (providing an overview of the International Crime Division’s progress in Uganda).

280. Interview with Robert Petit, *supra* note 23.

I do have a very strong view that building the capacity of national institutions is the way forward, and that international bodies such as the ICC . . . could be a last resort. . . .

I [endorse] the option that will strengthen the national institutions, because justice is not just about war crimes. There are many, many other offences, as I was saying, about sexual violence and even armed robbery. And then everything that will [occur] to a community, that is their prime concern, and the address system or the remedy system should be in their immediacy. . . .

[T]he international community should prioritize the strengthening of national institutions rather than building more ad hoc courts, because . . . it gives the results but it takes too long and sometimes [is] too far away from the people with whom the intent was meant to rebuild. Normally, in justice, when you do justice, delivery is not just about sending people to jail, it's about building the community. It's about the community coming to accept the outcome, that there was a redress mechanism. These are aspects that cannot be overlooked.²⁸¹

Serge Brammertz similarly opined on the benefits of local trials: “[T]he advantage of course would be that justice is rendered close to the victims’ and perpetrators’ communities, which is today the biggest weakness of international tribunals because perpetrators’ communities mainly distance themselves very much from something which is happening far, far away.”²⁸² While he endorsed Scenario #3 as the “best case scenario,” Brammertz also found it to be “wishful thinking” that national courts would be able to handle atrocity crimes prosecutions by themselves.²⁸³

Matthew Gillett also opined on the benefits of local trials:

[I]n theory whenever you can have domestic proceedings for the crimes in the locations where they occurred or close to where they occurred that is preferable. We are starting to see that with courts like the Mobile Court in the Democratic Republic of Congo, and this is not only preferable from a resource perspective because of the proximity to the crime scenes, the

281. Interview with Joseph Kamara, *supra* note 234.

282. Interview with Serge Brammertz, *supra* note 68.

283. *Id.* (“I would say the best-case scenario would . . . be that complementarity is working in a way that all countries can deal with atrocities committed on their territories by themselves. Unfortunately, this is very much wishful thinking if we look at the world today that I’m not too optimistic about.”).

victims, the judges, but it is also preferable for the other let's say less tangible aspects of the proceedings in terms of encouraging reconciliation, the acceptance of the proceedings, the awareness of the proceedings.²⁸⁴

Matthew Gillett also noted that local prosecutions are needed because international tribunals cannot conduct all prosecutions:

Realistically in twenty years' time there will have to be more domestic proceedings for these types of crimes where possible, and there simply is going to have to be more capacity-building support to these domestic initiatives because the ICC or whatever ad hoc tribunal is set up in the future is never going to be capable of handling all the cases. And, for example, here, at the Yugoslav Tribunal we only deal with a small percentage of the crimes that were actually committed in the former Yugoslavia. Many more are dealt with by domestic courts in the region. So, resources and capacity-building are going to be critical in supporting those domestic efforts.²⁸⁵

Hans Corell noted the importance of rule of law for avoiding conflict: "If I looked at any conflict in the world—anywhere, and at any time really—and asked the question: why is there a conflict? The answer is the same. No democracy, no rule of law. That's the recipe for conflict."²⁸⁶

Others noted that "Scenario three is a real possibility," but that it would only happen if States are supported with more "capacity-building."²⁸⁷ As mentioned above, some interviewees suggested that Scenario #1 and Scenario #3, combined, represented the future of the field.

Fatou Bensouda opined: "So what I see really coming in the future is that domestic jurisdictions will perhaps be more active. We are already seeing it happen."²⁸⁸ She mentioned the ICC's current work as to Uganda, Guinea, and Mali.²⁸⁹

284. Interview with Matthew Gillett, *supra* note 15.

285. *Id.*

286. Interview with Hans Corell, *supra* note 40.

287. Interview with David Crane, *supra* note 3 ("[W]e've got to support them . . . to create capacity at the State Party level to do this. And in 25 years, we've got something pretty cool but that's not where the emphasis is. It is inward [to the ICC] not outward [to complementarity].").

288. Interview with Fatou Bensouda, *supra* note 32.

289. *Id.*

Several suggested that national court prosecutions will always play a role in the field, even if they do not become the dominant model, or central focus. Thus, there will always be a role for domestic prosecutions/complementarity, without it being the central feature of the system of international justice. In this way, Scenario #3 can be consistent with either Scenarios #1 or #2, or both Scenarios #1 and #2, as none of the scenarios is mutually exclusive.

Robert Petit noted that there were “best practices” for national courts, but not necessarily one single model of how they should function.²⁹⁰

Hassan Jallow opined that not only national prosecutions, but also hybrid and regional tribunals should be viewed as part of complementarity:

I'd like to see an ICC which really is in the forefront in helping to strengthen these hybrid and regional courts, which are being proposed and not see them as kind of outside the system. Bring them into the chain of complementarity. Help the African region develop its own international criminal court.²⁹¹

2. *Skeptics of Scenario #3*

Other interviewees were skeptical that domestic prosecutions/complementarity would be the way of the future. These interviewees tended to be supporters of Scenario #2, or simply skeptical of domestic capacity to fairly conduct major war crimes trials. Some of the reasons for skepticism included: (1) the tremendous difficulty of national judiciaries conducting high-level prosecutions in an even-handed and fair manner, particularly vis-à-vis the gravest atrocity crimes; (2) the difficulty of a State prosecuting “its own” state actors; (3) the difficulty of building “will” as opposed to capacity; and (4) the significant effort needed

290. Interview with Robert Petit, *supra* note 23 (“I think there is some thought to be given to trying to develop a more efficient, best-practice sharing model as well as supporting these countries with money and expertise if you want that to happen. . . . I don't think [one] model can work. Every situation is different. That's why I've co-authored a . . . suggested practice manual. . . . So, there is no one standard approach that should be put forth other than, of course, having a certain standard of equity in the proceedings.”).

291. Interview with Hassan Jallow, *supra* note 3.

for domestic capacity-building.

a) Difficulties of Fairly Prosecuting High-Level Perpetrators Through National Courts

Some expressed the view that national courts would never be in a position to bring large-scale atrocity crimes prosecutions against former high-level officials, and that there would therefore always be a need for additional hybrid or international tribunals. For instance, Brenda Hollis stated:

For there to be true access to justice for victims and survivors you need an independent and impartial judiciary. That doesn't exist in an awful lot of countries in this world and without that then that's simply a way to avoid [responsibility] or it's only your opponents who would ever find themselves being held accountable. Perhaps they should be held accountable, but it should be broader than that. So, I don't think the state model, unless the world evolves a great deal more than it has, will ever be truly a just model.²⁹²

She further explained that having an international court, rather than national courts, prosecute atrocity crimes: (a) could ensure fair trial rights for the accused; (b) could ensure strong witness protection; (c) would not potentially threaten a fragile peace; (d) allows the state to concentrate its limited resources on rebuilding medical care, schools and infrastructure; and (e) allows creation of a uniform body of jurisprudence.²⁹³

William Schabas also opined that there will always be situations where countries are “unwilling or unable” to prosecute, so that in the future “that’s where we will need the international institutions.”²⁹⁴

Nicholas Koumjian also opined on the difficulty of domestic courts adjudicating high-level cases:

[T]here are many, many courts and countries around the world that simply don't have the capacity to do the cases at a high level. If you want to do it at a high level, particularly to do cases that link leaders to crimes on the ground is something very difficult to do and then international

292. Interview with Brenda Hollis, *supra* note 24.

293. *Id.*

294. Interview with William Schabas, *supra* note 17.

involvement in the investigation and in the cases would be very useful.²⁹⁵

Others mentioned the importance of having national justice “up to standards.”²⁹⁶

Whether complementarity could work in a particular country, Richard Goldstone stated: “I don’t think one can generalize. I think one has to look at each country on its own merits.”²⁹⁷

James Stewart opined that the ICC will always be needed because there are things it can do that domestic courts cannot: “We can do things as an international organization removed in a sense from a country that in some situations local prosecutors cannot. They just don’t have the political space to do it or they’re just too vulnerable. The remark has been made to me by people in that situation to say, well, there’s some things we can’t do and you can.”²⁹⁸

He continued:

[T]here are always going to be situations, I’m afraid, where national authorities for one reason or another are simply not going to be able to respond. Either you are going to have a complete breakdown of authority or breakdown in the judiciary or the actors in place are just too powerful. You are going to need some international action and the International Criminal Court will always be there as the fallback.²⁹⁹

Judge Agius opined that only when there is political will and commitment to observe rule of law will domestic prosecutions work:

When the time is ripe, and there is maturity on the ground and political will and determination to make justice synonymous and tantamount to the observance of the rule of law, then, yes, I would tell you, that having the domestic courts and tribunals will be the ideal thing to pursue but it’s not easy. And, until then, you need international courts.³⁰⁰

295. Interview with Nicholas Koumjian, *supra* note 95.

296. Interview with Robert Petit, *supra* note 23; *see also* Interview with Daryl Mundis, *supra* note 92 (“[W]e don’t want to be shifting a bunch of cases or activity to courts that are politicized or that aren’t fair, that don’t meet international due process standards.”).

297. Interview with Richard Goldstone, *supra* note 31.

298. Interview with James Stewart, *supra* note 41.

299. *Id.*

300. *See* Interview with Judge Carmel Agius, *supra* note 33 (Judge Agius had a

Renan Villacis opined that smaller/weaker states will lack capacity for a long, long time:

[W]hy does the [ICC] exist? It was precisely because smaller states, weaker states never felt that they had the judicial capacity to deal with some of the crimes. This is probably the situation for a long, long time. We can only hope that things improve around the world and [in] all the different judicial systems, but there are many particular situations around the world that it is very difficult to cater for.³⁰¹

Nicholas Koumjian also opined that national proceedings that lack capacity and/or legitimacy will require an international solution:

[Complementarity] will be the first . . . preference for countries involved, but again I think there will be situations where the country will realize: we don't have the capacity. We don't have the ability, for example, to secure the safety of witnesses. We don't have the ability that our verdicts [are] seen as legitimate because of the divisions within society or the country. So, I think there will be space also for international courts.³⁰²

b) Difficulty Prosecuting One's Own Atrocity Crimes

David Scheffer was generally also skeptical whether countries would take "self-responsibility for investigating and prosecuting 'one's own' with respect to atrocity crimes." He explained: "It's not that difficult to say, 'Oh yes, if we can get jurisdiction over the neighboring country that inflicted so much pain and suffering on us, we'll bring those individuals in to court and prosecute them even under our existing national criminal code.' But, the real question is turning the light on one's self and doing that."³⁰³

Bintah Mansaray explained the difficulty of a State's involvement in prosecutions if the State is also potentially implicated in crimes: "[E]ven if we strengthen domestic courts, there is a political issue.

pessimistic evaluation of the work of the local judiciaries in the former Yugoslavia.).

301. Interview with Renan Villacis, *supra* note 45.

302. Interview with Nicholas Koumjian, *supra* note 95.

303. See Interview with David Scheffer, *supra* note 48 ("We love the issue of complementarity and divesting cases down to the national level. But then sometimes things go wrong at the national level and you hear calls for 'please, shoot this back up to the international level' and that's what we're dealing with in Bosnia and Herzegovina.").

Because sometimes when wars start, for instance in the case of Sierra Leone, you had the government that had a fighting faction. And if the government is participating in wars and then you set up courts to prosecute atrocity crimes, who is prosecuting who?"³⁰⁴

c) Differentiating Lack of Capacity from Lack of Will

It may be significant to differentiate shortcomings in capacity (which can be rectified by international assistance) and shortcomings in political “will”—which may be far more difficult to address. Yet, it is possible to work on the latter, for instance through capacity-building mechanisms that assist in strengthening judicial independence, or outside actors who provide political support for,³⁰⁵ or even insist on, an agenda that would include prosecutions that may be unpopular with current State actors. An example of the latter is the EU’s insistence on prosecution of Kosovo Liberation Army (KLA) crimes through the Kosovo Specialist Chambers.³⁰⁶

d) Significant Work Needed to Build Complementarity/Domestic Capacity

Hassan Jallow gave the reminder that it takes significant work to build complementarity/ domestic capacity:

[A] lot more could be done to make sure complementarity works. I have been saying that complementarity is not ready-made; it has to be created. It has to be made. I mean, looking at our experience with the transfer of cases to Rwanda. Many things had to be done in Rwanda, in order for them to qualify to take on our cases. There was a whole process for

304. Interview with Bintah Mansaray, *supra* note 199.

305. INT’L CTR. FOR TRANSITIONAL JUSTICE, SYNTHESIS REPORT ON SUPPORTING COMPLEMENTARITY AT THE NATIONAL-LEVEL: FROM THEORY TO PRACTICE, para. 8 (2012) [hereinafter INT’L CTR. FOR TRANSITIONAL JUSTICE, FROM THEORY TO PRACTICE], <https://www.ictj.org/publication/synthesis-report-supporting-complementarity-national-level-theory-practice> (discussing the issue of political will and the importance of outside actors providing development assistance and political support).

306. Mark Kersten, *The New Kosovo Tribunal - Turning Victors’ Justice on its Head?*, JUSTICE IN CONFLICT (Jan. 18, 2016), <https://justiceinconflict.org/2016/01/18/the-new-kosovo-tribunal-turning-victors-justice-on-its-head/> (“The product of long-term negotiations aimed at integrating Kosovo into the European Union, the [Kosovo Specialist Chambers] will focus *exclusively* on KLA combatants[.]”).

reform, like abolishing the death penalty, making sure the fair-trial guarantees of the international system are reflected in Rwandan law, taking care of the penitentiary system, training, building up capacity in the institutions with the training of investigators and prosecutors, et cetera, building up the political will, and so on. So, a lot of that has to be done in order to make sure complementarity works.³⁰⁷

Matthew Gillett noted that funding and resource limitations can impact domestic proceedings:

In terms of domestic capacity, I've been involved in a number of projects, for instance with the Ugandan International Crimes Division of the High Court, helping work together with the judges there for instance on their rules of procedure and evidence. There is a lot of human talent and highly skilled jurists, but realistically there is a funding and resource problem, and that does have an impact on proceedings.³⁰⁸

3. Does Complementarity/Domestic Capacity-Building Need to be Centrally Coordinated?

For those who supported Scenario #3, as to how one would reach that outcome—that is, complementarity/national court trials being the dominant mechanism, or even just a more effective mechanism in twenty years—interviewees were asked whether capacity-building efforts should be centralized.

a) Current Approach

Some noted the role that the ICC is already playing in trying to facilitate “positive” complementarity. The ICC website features the Case Matrix Network (CMN) as a way of helping build capacity.³⁰⁹ The website states that the CMN provides two distinct services:

(1) online legal tools, which “equip users with legal information, digests and an application to work more effectively with core international crimes

307. Interview with Hassan Jallow, *supra* note 3.

308. Interview with Matthew Gillett, *supra* note 15.

309. Centre for Int'l Law Research & Policy, *Knowledge-transfer, Legal Empowerment and Capacity Development*, CILRAP, <https://www.casematrixnetwork.org/icc-legal-tools-database/> (last visited Mar. 5, 2018); Int'l Criminal Court, *Legal Tools Database*, ICC, <https://www.legal-tools.org> (last visited Mar. 5, 2018).

cases (involving war crimes, crimes against humanity, genocide or aggression);³¹⁰ and

(2) the provision of advice and expertise either “in situ or remotely” on an “ad hoc basis or through secondment” by a team of CMN Advisers who have “first-hand experience with and a broad range of skills required for the effective and fair documentation, investigation and prosecution of serious human rights violations that may amount to core international crimes, as well as in the legislative and administrative facilitation of such work processes, including the formulation of best practices.”³¹¹

Renan Villacis explained: “[O]ur efforts have been more to try to do a mapping of possible needs of particular countries and who are the donors or the countries who can provide assistance of a technical nature, of a legal nature.”³¹²

Yet, the ICC has limited capacity and resources for complementarity.³¹³ One could, however, imagine the ICC playing a more robust role that would include conducting systematic needs assessments, and linking local actors to potential donor countries and

310. Int’l Criminal Court, *What are the ICC Legal Tools?*, ICC, <https://www.legal-tools.org/what-are-the-icc-legal-tools> (last visited Mar. 5, 2018).

311. Centre for Int’l Law Research & Policy, *Other Services*, CILRAP, <https://www.casematrixnetwork.org/services-and-issues/other-services/> (last visited Mar. 5, 2018); Centre for Int’l Law Research & Policy, *Some Issues Addressed By CMN Services*, CILRAP, <https://www.casematrixnetwork.org/services-and-issues/issues/> (last visited Mar. 5, 2018). These are some issues Case Matrix states that the CMN Services address: 1) Mapping of open case files, 2) Selection and prioritization of cases, 3) Abbreviated criminal procedures, 4) Preserving the overview of evidence, 5) Strengthening capacity on substantive law, 6) The role of analysis in criminal justice for atrocities, 7) Balancing criminal justice for atrocities with other transitional justice, 8) Advice on national implementing legislation, and 9) Advice on international criminal procedure and evidence case law.

312. Interview with Renan Villacis, *supra* note 45.

313. See INT’L CTR. FOR TRANSITIONAL JUSTICE, SYNTHESIS REPORT ON SUPPORTING COMPLEMENTARITY AT THE NATIONAL LEVEL: AN INTEGRATED APPROACH TO RULE OF LAW, para. 10 (2011), <https://www.ictj.org/publication/supporting-complementarity-national-level-integrated-approach-rule-law> (understanding that the ICC has limited capacity to address complementarity); see also Int’l Criminal Ct., Rep. of the Bureau on Complementarity on its Fifteenth Session, ICC-ASP/15/22 ¶16 (Nov. 10, 2016), https://asp.iccpci.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-22-ENG.pdf (“States Parties and the Court have expressed the view that the role of the Court itself is limited in actual capacity-building[.]”).

other development/rule of law actors.³¹⁴

Currently, there are many different actors involved in domestic capacity-building work/rule of law, particularly from the UN and EU. For example, according to the International Center for Transitional Justice (ICTJ):

- The United Nations Organization Stabilization Mission in the Democratic Republic of the Congo has conducted efforts to advance national prosecutions through its Joint Investigation Teams and Prosecution Support Cells;³¹⁵
- The UN Development Programme has provided technical support in Guatemala to the public prosecutor's office allowing for the creation of a special investigative unit; it also provides the platform for coordination among national actors;³¹⁶
- The EU, in the Ivory Coast, has implemented a justice program that includes a "full-fledged program encompassing different parts of the justice system."³¹⁷

According to the International Center for Transitional Justice (ICTJ), UN activities in relation to complementarity also include: the [Civilian Capacity] Review process which could be useful in identifying types of specialized capacity needed for domestic prosecutions; the Rule of Law Indicators Project; the efforts by the UN to strengthen national capacity to do in-country assessments; and the efforts by ISAP in Geneva to strengthen the capacity of the UN system to conduct assessments of national institutions.³¹⁸

314. James Stewart did not portray the ICC's complementarity efforts as particularly robust. Interview with James Stewart, *supra* note 41 ("[W]e are learning in a very practical way how to deal with these situations and we're always prepared to share that experience with national authorities who are trying, with NGOs, who are trying to develop this capacity.").

315. INT'L CTR. FOR TRANSNATIONAL JUSTICE, FROM THEORY TO PRACTICE, *supra* note 305, para. 15.

316. *Id.* para. 16.

317. *Id.* para. 17; *see also* Interview with James Stewart, *supra* note 41 (noting many different capacity-building efforts by NGOs, governments, the EU, and the AU).

318. *See* INT'L CTR. FOR TRANSITIONAL JUSTICE, FROM THEORY TO PRACTICE, *supra* note 305, para. 4 (summarizing the May 2012 meeting convened by the ICTJ and the Government of Sweden during which participants "noted the role of policy

Gregory Townsend also cited “organizations like the Institute for International Criminal Investigations and other actors . . . [as a good] example of how to build capacity and complementarity.” He did not necessarily endorse the “[Justice Rapid Response] model being the answer of parachuting in people from rosters.”³¹⁹

Hans Corell spoke of the different roles bar associations play in rule of law development, citing the role of the American Bar Association, the International Bar Association, and the International Legal Assistance Consortium.³²⁰

Renan Villacis observed: “[I]n the field of complementarity there are a large number of actors. Each one of those actors is basically going forward with their own objectives with their own funds and in their own regions or in their own countries of interest.”³²¹

The kinds of assistance that can, for instance, be provided by international or hybrid tribunals to domestic systems, include:

Training programs targeting national officials such as prosecutors, investigators, prison guards, and witness protection officials; the transfer of knowledge from the specialized institution to national institutions; making archives accessible to national authorities; provision of technical and logistical support; and raising awareness about the importance of international criminal law through extensive outreach efforts.³²²

One challenge identified is that those traditionally in development agencies and working on rule of law implementation have not necessarily seen it as within their mandate to assist with capacity-building of national courts to conduct war crimes prosecutions.³²³

considerations when addressing complementarity efforts”).

319. Interview with Gregory Townsend, *supra* note 15.

320. Interview with Hans Corell, *supra* note 40.

321. Interview with Renan Villacis, *supra* note 45.

322. INT’L CTR. FOR TRANSITIONAL JUSTICE, MEETING SUMMARY OF THE RETREAT ON “COMPLEMENTARITY AFTER KAMPALA: THE WAY FORWARD” 2 (2010).

323. *See, e.g.*, INT’L CTR. FOR TRANSITIONAL JUSTICE, FROM THEORY TO PRACTICE, *supra* note 305, para. 4 (identifying “the challenge of incorporating efforts to prosecute the most serious crimes of international concern into existing programs designed to build capacity for broader rule of law initiatives”); Interview with Stephen Rapp, *supra* note 73 (“[C]orruption is very important, transnational organized crime is very important, etc. But that’s where resources are going, or

b) Whether to Centrally Coordinate Complementarity/Capacity-Building

Many expressed support for the idea of centrally coordinating the strengthening of complementarity/capacity-building,³²⁴ while a few suggested that States would not want to give external actors a role in running their legal systems, and were skeptical that such centralization and coordination would occur.³²⁵ Others thought that donor countries would not want to give up control over how to invest their resources.³²⁶

For example, Hassan Jallow opined: “There should be a program supported internationally to build capacity in order to make sure that complementarity becomes a reality. If it doesn’t, the process of accountability will suffer.”³²⁷

Fatou Bensouda opined:

I think [capacity-building] can be done in a more coordinated fashion than it is currently being done. . . . [U]nder positive complementarity, . . . we take it as our responsibility to, for instance, contact partners and bring them into contact with the State concerned. We’ve done that in Guinea for instance. We have been able to get other UN agencies and other

into general efforts to build national judiciaries or good prisons. . . . These are all important goals. But focus on complementarity is a very small piece of that[.]”.

324. Interview with Brenda Hollis, *supra* note 24 (“[T]here’s no orchestrated comprehensive program to deal with [domestic-capacity building]. And I think that’s what’s needed.”); Interview with Daryl Mundis, *supra* note 92 (“[T]hat’s part of the problem . . . that this is still so fragmented between the ICC and the hybrid courts and this organization and that NGO and that government taking the lead on these [capacity-building] issues.”); Interview with Stephen Rapp, *supra* note 73 (When asked, “should this [complementarity] somehow be coordinated and centralized within a mechanism so it’s not so ad hoc in nature?” Rapp answered, “Well it definitely should be[.]”); Interview with Renan Villacis, *supra* note 45 (“There is not a central coordinating mechanism which I think may be the way forward[.]”).

325. Interview with Richard Dicker, Director, Human Rights Watch International Justice Program.

326. Interview with Stephen Rapp, *supra* note 73 (voicing skepticism of being able to coordinate complementarity because governments do not want to be told how to spend their money on complementarity); Interview with Renan Villacis, *supra* note 45 (“You know it’s also very difficult for let’s say one country to give up sovereign use of its resources for purposes determined by some other entity or group of entities or group of countries.”).

327. Interview with Hassan Jallow, *supra* note 3.

partners, NGOs, to assist in capacity-building. I continue to say that we are not a development organization; we are a court. We can only give as much as our resources allow us to do because also we have to do our core business which demands a lot of resources and already we do not have enough resources to do that core business. So, it becomes difficult for the ICC to take on that role.³²⁸

Others expressed the contrary view that the current ad hoc approach of a “coalition of the willing” of different states and other actors doing what each is willing to do in terms of domestic court capacity-building is sufficient at least for now.³²⁹ Stephen Rapp suggested that complementarity would remain ad hoc—thinking of solutions, for example, for the Habré case, CAR, and then finding donor funding.³³⁰

Others noted that States might have sovereignty concerns, and noted the importance of developing a two-way symbiotic relationship:

[T]here are jurisdictional issues and sovereignty issues and each State does have its own legal requirements for its proceedings, and so the ICC, I think would have to act in a supportive and assisting type of role, but should not be seen as some overarching power that can dictate how domestic proceedings are going to be run. I think it will be important to have that two-way communication, to develop a real symbiotic relationship between the international level and the domestic level.³³¹

Another way to put this is that, regardless of international assistance, there must be domestic ownership of the process—it cannot simply be imposed from outside.

Because of the concern about attracting donor funding, Stephen Rapp endorsed hybrid tribunals, which he thought more likely to attract funding, as the way to accomplish complementarity: “I think complementarity . . . remains largely a false, concept, positive

328. Interview with Fatou Bensouda, *supra* note 32.

329. Comments of Marieke Wierde, Rule of Law Coordinator, Dutch Ministry of Foreign Affairs, in The Hague, Netherlands (Nov. 11, 2016); Interview with Richard Goldstone, *supra* note 31 (“I don’t think there is the money to do it in a synchronized way. I think it’s got to be ad hoc.”).

330. Interview with Stephen Rapp, *supra* note 73.

331. Interview with Matthew Gillett, *supra* note 15.

complementarity anyway. There really isn't any engine behind it, and so that's the problem. So, if . . . the ICC is running out of gas and there's nothing going on [in terms of] complementarity, then there's nothing there, you know. That's why . . . I seek these other approaches where we can get resources."³³²

According to David Scheffer, too much centralization might create a "heavy hand" in domestic legal systems:

[T]here are lots of international non-governmental organizations, international bar associations, international commission of [jurists], . . . These organizations are definitely out there doing these things. . . . [But] if you centralized all of this too much then I think governments may be a little too intimidated by the heavy hand that may enter their system. You know, national criminal codes are very sensitive issues and maybe . . . having a somewhat fragmented approach to complementarity actually has its benefits.³³³

Hans Corell warned of too much bureaucracy, and suggested there are some areas appropriate to centralization and not others: "I think that too much centralization . . . might create bureaucracy."³³⁴ In terms of judicial contact, he stressed that it needed to be person to person, whereas educational materials could be centralized.³³⁵ He added: "But it's very important that you can communicate directly with people, and also understand their particular traditions."³³⁶

Carsten Stahn also did not endorse centralization of capacity-building, except to gather best practices:

I would hesitate to promote a centralization. I think that different organizations have a role in this. So, I think regional organizations will be key in this so I think harmonization would rather come through shared best practices. So I think it's very important that we take close stock of the lessons that can be learned from domestic experiences—that we have the best lessons on procedural practices, on how victim participation might operate, on how reparations can be handled effectively so that these experiences are shared. This is where I see a deficit in the existing system where we need to centralize more that we have a community of

332. Interview with Stephen Rapp, *supra* note 73.

333. Interview with David Scheffer, *supra* note 48.

334. Interview with Hans Corell, *supra* note 40.

335. *See id.*

336. *Id.*

knowledge in relation to these issues, but we will, in my view, always need different institutions to actually then implement these policies and to actually act locally on the ground.³³⁷

*c) What Body, if Any, Should Centrally Coordinate
Complementarity/Capacity-Building*

To the extent that interviewees endorsed centralization and coordination, some suggested that the ICC was well-positioned to lead the coordination within ICC States Parties, particularly because the ICC OTP would be interacting with domestic authorities in situation countries, and could provide information, evidence and share best practices.³³⁸

For example, Matthew Gillett opined:

[T]he logical body to be doing that or to be channeling that support through is some kind of International Criminal Court-related body. Because they are dealing with the same subject matter, they are dealing with the same types of challenges that come up, and so establishing a repository of helpful information and human and other resources to share for these types of initiatives, has to be a positive thing.³³⁹

Others strongly voiced the view that the ICC was not a “development organization” and not the entity to engage in the actual capacity-building work.³⁴⁰ Thus, generally, it seemed interviewees

337. Interview with Carsten Stahn, *supra* note 22.

338. Comments by ICC Official, ASP, The Hague, Netherlands (Nov. 2016); *see* INT’L CTR. FOR TRANSNATIONAL JUSTICE, FROM THEORY TO PRACTICE, *supra* note 305, para. 20; *see also* Interview with David Scheffer, *supra* note 48 (“The international agent right now for it is the International Criminal Court, but they don’t have the resources to take on the entire world on this issue. But of course, they are sort of a logical clearinghouse.”); Interview with Hassan Jallow, *supra* note 3 (“I think the ICC should be encouraged to manage [coordination of complementarity]. Or else, you are going to build another institution and another bureaucracy, and other costs again. I think the ICC should be able to do that.”).

339. Interview with Matthew Gillett, *supra* note 15.

340. Interview with James Stewart, *supra* note 41 (“We simply don’t have a budget and we’ve been told we don’t have a mandate to develop this kind of capacity[.]”); Interview with Robert Petit, *supra* note 23 (“[A]s you know the ICC has always stated it’s not in a capacity-building field.”); Interview with Hassan Jallow, *supra* note 3 (“I don’t expect the ICC can provide the funding in order to implement complementarity. But it can point out the needs, look for the expertise, and then I think the Member States now have to provide the resources in order to

envisioned the ICC playing a “facilitation” role.

David Crane opined that States Parties could “create an academy . . . where people come to The Hague and are trained, and go back out and prosecute these individuals.”³⁴¹

Others feared that if a new entity led centralized complementarity coordination and/or implementation efforts, it might compete with the ICC’s efforts.

James Stewart thought there would not be “some sort of centralized and coordinated body” unless the United Nation creates it.³⁴²

Renan Villacis noted that it was not only States Parties who would need help with capacity-building, but also non-States Parties.³⁴³

IV. ADDITIONAL SCENARIOS

Finally, interviewees were also asked whether Scenarios #1–3 represented the most likely and/or most reasonable scenarios to discuss in terms of the future of the field of international justice, or whether there were added scenarios that should be considered.

As noted above, one interviewee noted that one could have included a “Scenario 4,” in which the International Criminal Court collapses, and a “Scenario 5,” pursuant to which there is a massive retreat from the international community’s commitment to the field

implement the capacity-building measures.”); Interview with Renan Villacis, *supra* note 45 (“The Court as a judicial institution is not called upon to deal with complementarity. The States Parties have been very clear that there is no specific mandate for the Court to engage in that type of work.”); Interview with Fatou Bensouda, *supra* note 32 (“The ICC, we have to remember, is not a capacity-building institution. It is there to support, to do its core business, and wherever we can support any State that is doing its own domestic proceedings, we will be there to support them.”).

341. Interview with David Crane, *supra* note 3 (“[T]he ICC is a center-point to energize States Parties, to take this burden on themselves. Someone’s got to say ‘we can’t do this. We will be glad to help train you.’”).

342. Interview with James Stewart, *supra* note 41 (“I don’t think you’re ever going to get some sort of centralized and coordinated body unless the United Nations somehow sets something up that really works[.]”).

343. Interview with Renan Villacis, *supra* note 45 (“[N]ot all the States in the world, including many who are very active in complementarity issues, are part of the ICC[.]”).

of international justice. David Crane explained:

Another scenario is that the International Criminal Court twenty-five years from now doesn't exist and that the field of modern international criminal law is still moving forward . . . but we have the world looking inward nationally with fewer countries involved. . . . I think it is important that we think about the fact that the International Criminal Court [could have] a diminished role in all of this. In fact, we're already seeing that. . . . Twenty-five years from now it could be a robust ICC with a larger group of States Parties working in tandem assisting with complementarity and teaching our States Parties how to [prosecute] domestically. . . . I don't see that happening personally.³⁴⁴

Indeed, while Scenarios #4 and #5 are extreme, the ICC has seen both “push-back” to its work, and withdrawals made and threatened,³⁴⁵ so that threats to its future are a distinct possibility. It is also too soon to know fully what the US administration's policy to the ICC will be, although the Court has survived hostility from past US administrations.³⁴⁶

However, Fatou Bensouda was optimistic both about the future of the ICC and the field of international justice:

What I disagree with is those who say that international criminal justice will weaken because there is this fight against multilateralism or institutions. I don't think so. I think it will get stronger and stronger. At the Court, we are receiving demands all the time for the ICC's intervention. In all the debates, most of the debates, that you have today concerning the different conflicts, you always find that the ICC is right there in the middle, with it being said “what can the ICC do?” Call me an optimist, but I believe that international criminal justice will become

344. Interview with David Crane, *supra* note 3 (“It could be a League of Nations—great idea with a lot of hope, a lot of initial energy, but just dies on the vine because it just loses the respect that it started with[.]”).

345. *See supra* Section 1.3(e).

346. US efforts against the ICC during the George W. Bush Administration consisted of anti-ICC legislation, two resolutions barring the ICC from investigating possible crimes by peacekeeping forces from non-States Parties (UN Security Council resolutions 1422 and 1487), the creation of over 100 bilateral immunity agreements, as well as depositing a note with the UN suspending the legal force of the US's signature on the Rome Statute. *Bush Administration*, AM. NGO COALITION INT'L CRIM. CT., <https://www.amicc.org/bush-administration-1> (last visited Mar. 16, 2018).

stronger, and will manifest itself in these various forms.³⁴⁷

Nicholas Koumjian was also optimistic that international justice is “here to stay,” because victims now have expectations of accountability and will demand justice when international crimes occur:

I think the world has changed in the past twenty-three or twenty-four years since the ICTY was set up, and what we see now, which is different than two or three decades ago, that when there’s a conflict like Syria, North Korea, even domestically, you immediately have people talking about international crimes, talking about accountability. This wouldn’t have happened two or three decades ago. So, I do think [international justice] is here to stay. Victims in the conflicts I’ve handled in many different countries from different economic levels and different religions, the feeling of victims that I find is quite universal. They want to see their suffering recognized and someone held to account for what happened to them. I think they will continue to demand justice. So, I think [the field] is here to stay.³⁴⁸

David Scheffer was also optimistic: “I am just staying that I don’t think international law is going to implode or that international criminal justice is on some huge deep slide into the oblivion.”³⁴⁹ Others tended to share similar optimism for the future.³⁵⁰

Richard Goldstone downplayed the significance of the three Fall 2016 withdrawals (of which two have since been revoked).³⁵¹ He offered a more long-term perspective: “I think that these present withdrawals will be seen historically to have been an unpleasant few

347. Interview with Fatou Bensouda, *supra* note 32.

348. Interview with Nicholas Koumjian, *supra* note 95.

349. Interview with David Scheffer, *supra* note 48.

350. Interview with Robert Petit, *supra* note 23 (“You know, humanity has a long . . . way to go, but I think this area is here to stay and will hopefully help.”); Interview with Daryl Mundis, *supra* note 92 (“The ICC, I don’t think, is in jeopardy of closing down or being overtaken by other courts and tribunals.”); Interview with William Schabas, *supra* note 17 (“[T]here is no assurance that this is going to keep going . . . but I think that’s increasingly unlikely [international justice cresting and dying out]. It looks to me like this is here to stay. I guess it’s because, compared with the past, you have a very solid human rights movement which is part of the international legal order and, unless that disappears, that’s not a realistic scenario. This is going to continue[.]”).

351. *See supra* note 83.

months, but I don't think more than that. I don't think it threatens the existence of the ICC. I hope I am not being too optimistic, but that is what I believe."³⁵²

Hassan Jallow also did not foresee a mass retreat from the ICC, or even a mass African exodus, which has periodically been threatened.³⁵³ Jallow stated:

I think a mass retreat is very improbable. I think Africa remains very committed to the ICC and to the process for accountability. It still remains the biggest group, bloc, within the ICC system, and is the only region that has referred cases to the ICC. . . . I think what is important is for the ICC also the Rome System to begin to listen to the complaints of the African region and see how this could be resolved, and to help out Africa also develop its own, as I said, regional accountability system, you know, to assist the ICC.³⁵⁴

V. COMBINING SCENARIOS

The above exercise, with three competing scenarios, admittedly presents something of an artificial choice. As noted above, some proponents of Scenario #1 (ICC), opined that it needed to be combined with Scenario #3 (complementarity/domestic capacity), 1 + 3.³⁵⁵ Various other interviewees thought that the future would actually combine elements of all three scenarios, 1 + 2 + 3.

For instance, despite initially stating that one could not predict the future of the field because it was simply "too political,"³⁵⁶ Binta Mansaray also suggested the future will combine elements of all

352. Interview with Richard Goldstone, *supra* note 31.

353. See Miyandazi, Apiko & Aggad-Clerx, *supra* note 140.

354. Interview with Hassan Jallow, *supra* note 3.

355. See *supra* Section 1.1(e) ("Combining Scenarios 1 and 3").

356. Interview with Bintah Mansaray, *supra* note 199 (Bintah Mansaray initially took the view that it was simply "too political" whether new tribunals will be set up, and would be done on a "case-by-case" basis, making it impossible to predict where the field is heading: "It mainly depends on a case-by-case basis. It depends on the political situation and more importantly it depends on international politics. . . . [S]o we don't actually know where things are moving to be able to determine in twenty years whether it should be complementarity or whether we will have hybrid courts like the Special Court for Sierra Leone, or the Special Tribunal for Lebanon, or whether the International Criminal Court will be the dominant court that would be policing the world, or bringing people to account. It is too premature to make that prediction.").

three scenarios:

Our hope, as I mentioned is that domestic courts be strengthened. The value in doing so is that it would assist national governments to be able to nip in the bud, any crimes . . . war crimes or skirmishes before it even gets to the international level. Again, as I mentioned, that does not take away the fact that in some situations, in some context you would have hybrid courts like the Special Tribunal for Lebanon, or the Special Court for Sierra Leone. . . . At times you would have a need for the International Criminal Court and why is that? Assuming you are dealing with a head of state. No domestic court can bring to account a head of state even if it is there in theory; in practice it will not happen. So, you need courts that have teeth like the International Criminal Court, or even the Special Court for Sierra Leone.³⁵⁷

Gregory Townsend opined likewise that there will be all three scenarios:

[T]hat's the trend I see is all three [scenarios] increasing. . . . We will have a larger, more robust ICC, I hope, able to handle more concurrent situations, hopefully more geographically diverse, all throughout the world amongst State Parties, other regional [tribunals] filling gaps, and international capacity-building, the use of rosters and [Justice Rapid Response] and that sort of international deployment and also NGOs and States building freestanding domestic capacities. . . .³⁵⁸

Nicholas Koumjian also envisioned a combined approach:

I think the most likely outcome would be a combination of all of these. Obviously domestic courts will always have a role if a State has the capacity. Most States will want to exercise jurisdiction that they have over their own nationals or over conflicts that occur in their territory where there are victims. Whether the international community likes that or not, I think that States will exercise jurisdiction similar to the Bangladesh Tribunal that's been set up. I think the ICC is probably going to be around and it fills a niche. It's still growing. We are seeing some pickup in activity and as long as [it] remains 100 or plus members of the Court, I think it will have a role to play. On the other hand, I do think it is very likely that there are ad hoc or mixed tribunals. They fill a niche that they think the ICC can't fill and that domestic courts in some instances can't fill because either the State does not have the capacity (either the will or

357. *Id.*

358. Interview with Gregory Townsend, *supra* note 15.

the capacity) to do the cases in the way that will have the confidence of the victims of the international community, or because it is seen that any domestic prosecution will be too biased.³⁵⁹

A number of other interviewees also suggested a combination of scenarios was realistic.³⁶⁰

Professor William Schabas opined: “I think a decade ago the attitude was: this is it now, don’t talk about any competitors, we [the ICC] are the new, permanent institution, and there’s nothing else. And now I think there’s an acceptance that there’s actually lots of room for other institutions so I think that’s a part of the future.”³⁶¹

Carsten Stahn posited there would be justice “4D”:

I think we actually will have justice “4D” basically: the domestic, the regional, the international, and the hybrid. So, we will have a 4D picture in the future. I don’t think the fact that we have an ICC actually should preclude hybrid approaches and other mechanisms that complement the Court, nor does complementarity in national jurisdictions fully supplant or basically replace the needs for certain hybrid and situation-driven mechanisms. In these situations, you will need to find basically an appropriate traditional formula and precisely our lesson, of course, in many cases [is] in a lot of conflict situations, obviously national authorities are not the best forum to deal with these investigations and prosecutions. So, there will remain a certain need for hybrid mechanisms being established—basically sometimes maybe even established in traditional scenarios.³⁶²

Carsten Stahn also pondered whether tribunals will be at the

359. Interview with Nicholas Koumjian, *supra* note 95.

360. Interview Fatou Bensouda, *supra* note 32 (“This is why, of the scenarios that you mention, I think there is a possibility for any of them to be. Mainly 1 and 3, but also there is the possibility that 2 could happen.”); Interview with Serge Brammertz, *supra* note 68 (“I think at the end of the day it will be a mix of the three.”); Interview with Robert Petit, *supra* note 23 (“I think the future will look a little bit like all three of your scenarios”); Interview with David Scheffer, *supra* note 48 (“I think the more sophisticated speculation is that there will have to be some sort of combination [of types of tribunals].”).

361. Interview with William Schabas, *supra* note 17 (“We’ve never had this and I think that’s kind of the future. . . . [W]hen we look at a situation like DRC for example, that’s really a place for a specialized tribunal [in addition to the ICC][.]”).

362. Interview with Carsten Stahn, *supra* note 22.

forefront, or whether transitional justice mechanisms might supplant them:

The first question I think is, “will traditional institutions at all be at the forefront of this or are there alternative plans which might actually become as important, or maybe even more important, than classical traditional institutions?” So, I think particularly from transitional justice, from bottom up approaches, we’ve seen more and more critics of the effectiveness and the efficiency of these classical international courts. So, I think that criticism will continue. . . . [Some will continue to] look critically at whether these institutions fulfill their functions and whether their mandates actually are accomplished.³⁶³

To date, in fact, the more comprehensive prosecutorial approaches have occurred where there were layers or tiers of justice mechanisms. Thus, for instances, to address crimes in Bosnia-Herzegovina there have been three tiers of prosecutions: the ICTY; the hybrid State Court in Bosnia; and local cantonal and district courts.³⁶⁴ Similarly, for crimes perpetrated during the Rwandan genocide, there have also been three tiers of prosecutions: the ICTR prosecuting top-level perpetrators in Arusha, Tanzania; mid-level perpetrators tried in domestic courts in Rwanda; and the remainder tried before *Inyiko-Gacaca* in Rwanda.³⁶⁵ These models suggest that for any large-scale crime scene one actually needs multiple levels of prosecutions through different mechanisms.

The existence of such levels of justice then presents the distinct possibility that one should view Scenarios #1, #2, and #3 as complementary to each other. While there might be hybrid tribunals designed to try top-level perpetrators that would obviate the need for

363. *Id.* This study does not intend to exclude the role of transitional justice, although it does not assume transitional justice would supplant tribunals.

364. Jennifer Trahan & Iva Vukusic, *The ICTY and the Three-Tiered Approach to Justice in Bosnia and Herzegovina*, in LEGACIES OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A MULTIDISCIPLINARY ACCOUNT (Carsten Stahn et al. eds., forthcoming Oxford Univ. Press 2018).

365. *Rwanda: Justice After Genocide—20 Years On*, HUM. RTS. WATCH (Mar. 28, 2014, 6:02 AM), <https://www.hrw.org/news/2014/03/28/rwanda-justice-after-genocide-20-years> (discussing the different levels of justice); Waldorf, *supra* note 265, at 48 (noting that *Inyiko-Gacaca* in Rwanda was an adaptation of a “local dispute resolution mechanism” that was used for genocide trials in helping Rwanda cope with the numbers of accused in the aftermath of the 1994 genocide).

the ICC (for instance a court like the Special Court for Sierra Leone, which had the mandate to try only those with the “greatest responsibility”),³⁶⁶ there might alternatively be a hybrid or regional tribunal designed to prosecute at the mid-level, which might complement the ICC.³⁶⁷ National court prosecutions, ideally, will always operate to prosecute at least lower-level perpetrators, and thus, the building of complementarity/ domestic capacity is necessary even if one does not endorse Scenario #3 as the future dominant model.

Daryl Mundis shared his views on the need for multiple layers of justice:

I think it’s really clear as well from the experience we’ve had at an international level, that no court, no single international court is going to be able to hold accountable all perpetrators [in Syria] from the most senior level down, actually shooters or actual torturers. It’s just not possible. So, what we need to be doing is thinking conceptually about courts at different levels in different regions in different places that will address the different levels of responsibility for the crimes. So, the international community might be directing its efforts at one level. Regional efforts might be done for secondary levels. Local courts or hybrid courts, international involvement in domestic courts, again going back to complementarity. You can look at complementarity in a variety of different ways and of course you could have complementarity at a variety of different levels streaming down from very senior level perpetrators being held accountable in an international ad hoc tribunal down to lower-level perpetrators being tried at local courts with perhaps intermediate level perpetrators being tried in national courts, but with international judges present.³⁶⁸

Hassan Jallow also proposed multiple institution: “The ICC will remain” but only to handle “cases when the national systems can’t

366. U.N. Security Council, Rep. of the Secretary-General on the establishment of a Special Court for Sierra Leone, ¶ 1.1, U.N. Doc. S/2000/915 (Oct. 4, 2000) [hereinafter U.N. Doc. S/2000/915].

367. Interview with Richard Goldstone, *supra* note 31 (Richard Goldstone, however, did not share this view that a hybrid could complement the ICC, stating, “I don’t see an alternative [to the ICC]. I can’t see hybrids or mixed criminal courts being set up where the ICC has jurisdiction. It would be an utter waste of money to reinvent, as the United States wanted to do for Darfur, during George W. Bush’s Administration, rather than get the Security Council to refer.”).

368. Interview with Daryl Mundis, *supra* note 92.

handle [them].” For those, “the bulk of the work will be done by the national jurisdictions and regional courts and hybrid courts.”³⁶⁹

Gregory Townsend endorsed levels of prosecutions:

I'd like to see if I can say it, the “smaller lesser fish” being tried domestically on a complementarity model; something in the middle for the hybrids and regionals; and then those situations that really require international independence, impartiality, that those go up to the ICC. Those [who] bear the greatest responsibility, . . . the most expensive cases have to be reserved for the highest levels.³⁷⁰

Thus, just as none of the above scenarios excludes the existence of additional transitional justice tools to complement prosecutions (truth commissions, reparations, vetting, truth-telling, institutional reforms, memorials, etc.),³⁷¹ and the use of universal jurisdiction, ideally, Scenarios #1, #2, and #3 may also complement each other. And, ideally, transitional justice tools will also complement each other, rather than a country relying on solely one.³⁷²

CONCLUSION

The field of international justice is certainly entwined with political constraints, and faces limitations due to competition for donor funding. The political constraints make long-term planning in the field extremely difficult. Possibly the best the international community can do is the current ad hoc approach—that each time there are mass atrocity crimes still occurring (as there still unfortunately are), the international community, or particular actors, try to ensure that either ICC prosecutions occur, another tribunal can prosecute the crimes, or that assistance is provided to the domestic

369. Interview with Hassan Jallow, *supra* note 3.

370. Interview with Gregory Townsend, *supra* note 15.

371. Traditional or local “justice” mechanisms such as ones found in Acholi areas of Northern Uganda, and in Mozambique, Sierra Leone, and East Timor, may also play a role. *See, e.g.,* Waldorf, *supra* note 265.

372. Interview with Richard Goldstone, *supra* note 31 (reflecting on the accomplishments of the South African Truth and Reconciliation Commission and stating “[T]he greatest gift of the South African Truth and Reconciliation Commission is we have one history of what happened during the apartheid years with regards to serious crimes. . . . [But,] “there weren’t sufficient reparations and there were insufficient prosecutions.”).

system to conduct prosecutions—that is, if any of these approaches is politically feasible. Yet, it still seems a worthwhile endeavor to examine the field as a whole and try to engage in long-term reflection, so that perhaps responses in each situation will not always be ad hoc.

This study has not attempted to predict the future, but has suggested some variables of how the ICC of the future might look, the role of hybrid or regional tribunals in the future, and whether complementarity/capacity-building might need more centralized coordination, and, if so, how to achieve that.

Many interviewees suggested that the future is likely going to contain some elements of all the scenarios—and one would hope this could be the case—that there will be multiple tiers of prosecutions in any country that requires such a robust approach to justice. And, while not a focus, this study acknowledges the important role other transitional justice tools can play, as well as universal jurisdiction prosecutions. Of course, none of these mechanisms can take the place of preventing the crimes in the first place, which should always be the priority, as justice after mass atrocities occur is always a second-best solution.

While remarkable progress has been made in this field over the last twenty-plus years, it will be crucial to continue this forward momentum, analyzing soberly where the field stands (including assessing difficulties encountered) and where best to try to direct it (despite the obstacles that will no doubt arise). Maybe, someday, these institutions will not be needed, because there will have been enough prosecutions of atrocity crimes and global acceptance of norms of international criminal law that would-be perpetrators are finally deterred from committing the crimes.

APPENDIX A

INTERVIEWEES (IN THE ORDER IN WHICH THEY WERE INTERVIEWED):

Robert Petit	Founding International Co-Prosecutor, The Extraordinary Chambers in the Courts of Cambodia
Hassan Jallow	Former Prosecutor, International Criminal Tribunal for Rwanda; current Chief Justice of The Gambia
David Crane	Founding Chief Prosecutor, the Special Court for Sierra Leone
David Scheffer	Former US War Crimes Ambassador; UN Secretary-General Special Expert on UN Assistance to the Khmer Rouge Trials
Nicholas Koumjian	International Co-Prosecutor, The Extraordinary Chambers in the Courts of Cambodia
Brenda Hollis	Former Chief Prosecutor, the Special Court for Sierra Leone; Prosecutor, The Residual Special Court for Sierra Leone
Stephen Rapp	Former Chief Prosecutor, the Special Court for Sierra Leone; former US War Crimes Ambassador & Head of the Office of Global Criminal Justice
Hans Corell	Former Under-Secretary-General for Legal Affairs and

	Legal Counsel of the United Nations
James Stewart	Deputy Prosecutor, International Criminal Court
Binta Mansaray	Former Registrar, Special Court for Sierra Leone; Registrar Residual Special Court for Sierra Leone
Joseph Kamara	Anti-Corruption Commissioner, Attorney-General and Minister of Justice, Sierra Leone
William Schabas	Professor of International Law, Middlesex University, London; Professor of International Criminal Law and Human Rights, Leiden University
Serge Brammertz	Prosecutor, the Mechanism for International Courts and Tribunals; former Prosecutor, International Criminal Tribunal for the former Yugoslavia
Judge Carmel Agius	Former President, International Criminal Tribunal for the former Yugoslavia
Gregory Townsend	Former Chief of the Court Support Services Section, International Criminal Tribunal for the former Yugoslavia
Matthew Gillett	Trial Lawyer, Office of the Prosecutor, International Criminal Court; formerly International Criminal Tribunal

	for the former Yugoslavia, Office of the Prosecutor, appeals counsel and trial attorney
Carsten Stahn	Professor of International Criminal Law and Global Justice, Leiden Law School
Renan Villacis	Director of the Secretariat of the International Criminal Court's Assembly of States Parties
Daryl Mundis	Registrar, Special Tribunal for Lebanon
Richard Goldstone	Founding Chief Prosecutor, International Criminal Tribunal for the former Yugoslavia & International Criminal Tribunal for Rwanda
Fatou Bensouda	Prosecutor, International Criminal Court

[Many interviewees have held, or do hold, additional positions. The above list includes either the current, and/or most significant past, position(s). All interviewees spoke in their individual capacities and not on behalf of the UN or the particular tribunals with which they are currently or were previously affiliated.]

APPENDIX B

SIGNIFICANCE

The urgency and complexity of international prosecutions often deprive practitioners of opportunities to step back and assess the bigger picture and think strategically about preparing for the future. This project invited international justice specialists to take a step back from dealing with the crisis of the moment and look at the bigger trajectory of where the field ought to be heading over the next twenty years. There is a strategic significance to this. If the international justice field fails to put in motion preparations for developments that may arise in the future, it will be ill-equipped to address them.

The international community constantly grapples with these very significant questions—the next biggest challenge will be addressing atrocity crimes in Syria—but it does not necessarily do so with the benefit of structured long-term vision. Nor does it agree on criteria for measuring effectiveness. It is therefore valuable to identifying the rationales behind currently favored institutional options. A key long-term objective is to achieve maximum impact (in terms of the greatest number, and/or highest level, prosecutions pursuant to internationally accepted fair trial standards, and incorporation of at least some level of local ownership), while minimizing donor fatigue and minimizing impunity gaps.

Another reason the study is significant is because it hopefully deepens and helps to structure conversations amongst experts in the field. The goal of such reflections is to improve strategic thinking regarding the field.

TIMELINESS/COMPELLING RATIONALE AND UNIQUE HISTORICAL MOMENT

The field of international justice stands at a crossroads, where most practitioners have maintained and some continue to maintain that the international community can rely upon the International Criminal Court to lead the bulk of genocide, war crimes, and crimes against humanity prosecutions of the future. Yet, the Court is underfunded and beleaguered by political attacks and other

difficulties. Moreover, in the current political environment—with the current US administration, attempted withdrawal from the Rome Statute by three African States (with only one ultimately leaving), “unsigning” or the Rome Statute by Russia, and withdrawal by the Philippines, one can anticipate further “push-back” not just against the ICC but possibly the whole field of international justice.

It would be extremely useful for those working in the field to examine whether we are moving along the most effective trajectory, or need to develop an alternative model, that includes the creation of more tribunals, and creates some kind of centralized mechanism to strengthen the domestic capacities in local courts around the world.

SOURCES OF INFORMATION & DATA

The findings contained in this article are based on information/data gathered in two primary ways. The first source of information/data consists of interviews by the author of key individuals: current international and hybrid tribunal prosecutors, as well as other experts.³⁷³ This “key informant” method is appropriate to an inquiry of this kind, because of the role of these experts in both shaping the international justice field and in determining its future direction. The interviews were conducted primarily in September–November 2016 in Nuremberg, Germany, and The Hague, Netherlands.

The second source of information/data was an innovative approach to stimulating strategic thinking: a “scenarios workshop” held at NYU’s Center for Global Affairs on February 10, 2017, organized by the author, with the assistance of CGA Professor Michael Oppenheimer and then-CGA student, Heather Craig. Oppenheimer offers extensive expertise in developing detailed projections of future scenarios and testing them against assumptions regarding future conditions. The scholarly debate assessing the three models for the future of international justice provided added information/data for analysis. The exposure of experts to questions regarding the three scenarios was also designed to facilitate strategic thinking about the viability of the different approaches. This also

373. See *supra* Appendix A.

hopefully encouraged strategic thinking about the field. As noted, these findings have been separately reported.³⁷⁴

374. Trahan, *supra* note 8.