

CATALYZING NATIONAL JUDICIAL CAPACITY: THE ICC’S FIRST CRIMES AGAINST HUMANITY OUTSIDE ARMED CONFLICT

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This Note joins two previously parallel tracks of scholarship regarding the International Criminal Court (ICC). The first track studies the ICC’s authority to prosecute certain crimes that do not have links to armed conflict. This power means that the ICC could have jurisdiction over repression of mass civil uprisings of the type occurring in the Arab Spring. The second branch of scholarship concerns “complementarity,” or the principle of ICC deference to national prosecutions, and how that practice pressures reform in national judiciaries. This Note argues, at their intersection, that the prosecution of cases outside armed conflict by the ICC further encourages national judicial reform by mobilizing civil society groups. I call this “capacity catalyzing.” Because states wish to retain control over national prosecutions that may infringe upon their sovereignty, especially in the prosecution of cases outside armed conflict, these cases create an incentive for states to avert ICC prosecution by trying the cases themselves. I demonstrate this through two recent ICC cases that occurred outside armed conflict. In Kenya in 2007, pro-government forces and criminal organizations perpetrated killings against civilians during post-election violence. In Libya in 2011, anti-government protests snowballed over two weeks before civil war began. The ICC only focused on these crimes in its initial warrant. When crimes against humanity were allegedly committed, armed conflict did not exist in either country. The ICC’s involvement in these cases has encouraged national judicial reform.

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INTRODUCTION

The so-called “Arab Spring” began in 2010 and spread rapidly through the Middle East and North Africa. Embittered citizens in several countries took to the streets in protest against dictatorial regimes.¹ Many regimes violently or fatally repressed the protesters in response.² In some cases, unpopular leaders were removed and subsequently prosecuted in national courts. For example, former President Hosni Mubarak of Egypt was sentenced to life in prison by the Cairo Criminal Court, a national court, for sponsoring extrajudicial executions (EJEs)³ of protesters.⁴ Such national prosecutions of former

¹ See Jon Jensen, *A Region in Upheaval*, GLOBAL POST (Feb. 28, 2011), <http://www.globalpost.com/dispatch/africa/110126/protests-riots-tunisia-egypt-lebanon-middle-east-north-africa> (noting “civil unrest” throughout the Middle East and North Africa); Rashid Khalidi, *The Arab Spring*, THE NATION (Mar. 3, 2011), <http://www.thenation.com/article/158991/arab-spring> (describing the Arab Spring protests in several countries).

² See Jack Healy, *Popular Rage is Met with Violence in Mideast*, N.Y. TIMES, Feb. 18, 2011, at A12 (describing the protests and violence in Libya, Bahrain, Yemen, Iran, Algeria, Tunisia, and Iraq).

³ EJEs are defined as state-sponsored killings of individuals without legal process. See BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP’T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES, APPENDIX A: NOTES ON THE PREPARATION OF THE REPORTS (2001), available at <http://www.state.gov/g/drl/rls/hrrpt/2000/app/650.htm> (noting that extrajudicial executions are “killings committed by [state] forces . . . that result[] in the death of persons without due process of law”); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. f (1987) (“[I]t is

leaders present many challenges. On the one hand, transitional judicial systems are often rife with cronyism favoring old leaders. On the other, retributive fervor can bias systems against former leaders.⁵ These challenges can undermine a transitioning government's ability to effectively prosecute former heads of state or cabinet officials.

There are international alternatives to national prosecution, including international criminal tribunals, such as the International Criminal Court (ICC) in The Hague, Netherlands. EJE's like those allegedly committed by Mubarak violate customary international law⁶

a violation of international law for a state to kill an individual other than as lawful punishment pursuant to conviction in accordance with due process of law, or as necessary under exigent circumstances.”). As a caveat, the prohibition against EJE's in the statutes of the international criminal tribunals codifies the crime of murder. The United Nations Security Council *did* use the term EJE's in reference to Libya. See Press Release, International Criminal Court Prosecutor Briefs Security Council on ‘Libya Case,’ U.N. Press Release SC/10433 (Nov. 2, 2011) (noting “[e]vidence regarding rapes, extrajudicial killings and other crimes committed by Mr. Qadhafi”). All of the tribunals prosecute murder as at least a crime against humanity. See, e.g., Rome Statute of the International Criminal Court, art. 7(1)(a), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (“[C]rime against humanity’ means any of the following acts[:]. . . . [m]urder”); Statute of the International Tribunal for Rwanda, S.C. Res. 955, art. 3(a), U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute] (“The [ICTR] shall have the power to prosecute . . . [m]urder”); Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 5(a), Sept. 2008 [hereinafter ICTY Statute] (“The [ICTY] shall have the power to prosecute . . . murder”); Statute of the Special Court for Sierra Leone, art. 2(a), Jan. 16, 2002 [hereinafter SCSL Statute] (“The Special Court shall have the power to prosecute . . . [m]urder”). “Murder” typically requires a mens rea element. The killings addressed by this Note would satisfy a purpose or knowledge mens rea. Thus, this Note sees “murder” as defined by the tribunals to satisfy EJE's done with purpose or knowledge. But there are certainly EJE's that, because they are unintentionally committed, do not constitute murder. This Note does not argue that all EJE's should be prosecuted within the jurisdiction of international criminal law.

⁴ David D. Kirkpatrick, *New Turmoil in Egypt Greets Mixed Verdict for Mubarak*, N.Y. TIMES (June 2, 2012), <http://www.nytimes.com/2012/06/03/world/middleeast/egypt-hosni-mubarak-life-sentence-prison.html?pagewanted=all>.

⁵ See William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. L. INT'L L. 1, 15–16 (2011) (noting the danger of possible bias and political motivation in local national courts).

⁶ See generally Brief of Professors Philip Alston and Sarah Knuckey, New York University School of Law, as Amici Curiae in Support of Rehearing and Rehearing En Banc, *Mamani v. Berzain*, 654 F.3d 1148 (11th Cir. 2011) (Nos. 09-16246 & 10-13071), 2011 WL 3795468 (giving detailed support from the former U.N. Special Rapporteur on EJE's and advisor to the Special Rapporteur on EJE's that state-sponsored EJE's of unarmed protesters violate established norms of customary international law). I contributed to the research and writing of this brief.

when committed outside of war.⁷ They implicate the “crimes against humanity” jurisdiction of the ICC.⁸

The requirement of a link to war or “armed conflict” for prosecuting crimes against humanity has been debated for most of the twentieth century. The ICC was the capstone on that debate, crystallizing the consensus answer of “no” by being the first international tribunal to formally remove “armed conflict” as a *de jure* or *de facto* requirement for crimes against humanity.⁹ This move has been the topic of one branch of ICC scholarship, which analyzes the limits of crimes against humanity, now that crimes occurring “outside of war”—and thus with no clear international character—can fall under the purview of an international court. For example, the Center for Constitutional Rights recently filed a crimes against humanity complaint before the ICC against the Catholic Church for sexual abuse by members of the clergy.¹⁰

A separate track of scholarship focuses on how the ICC can either directly or indirectly effect reform in national judiciaries. As discussed, EJE cases may invite either national or international prosecution. The ICC, through a “complementarity” regime, must defer to national courts when the national courts can adequately try a case. The ICC can *only* prosecute cases when national judiciaries are unable or unwilling.¹¹ The mere existence of an ICC investigation can prod states toward reform when they wish to retain prosecutorial control. The ICC may leverage this power to encourage “capacity building,” or national judicial reform. This is premised on the view that states, preferring to maintain sovereignty over and faith in their judicial systems, will generally want to retain control over prosecutions. If states are aware that the ICC will defer to their judgments over when national courts are appropriate, this encourages states to take a proactive role in meaningful prosecution of human rights issues before the ICC does.¹² Scholars such as Professor William W. Burke-

⁷ Killing civilians during armed conflict may be permissible under the laws of war so long as the civilians are not specifically targeted and the killing is proportional to harm done to military targets. *See generally* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter Geneva Convention IV] (describing the protections of civilians in wartime).

⁸ Rome Statute, *supra* note 3, art. 7.

⁹ *See id.* art. 7(1) (requiring no armed conflict under crimes against humanity).

¹⁰ *See generally* Benjamin David Landry, *The Church Abuse Scandal: Prosecuting the Pope Before the International Criminal Court*, 12 CHI. J. INT’L L. 341 (2011) (analyzing the politically unlikely but technically valid prosecution of the alleged widespread and systematic abuses committed by Catholic priests against children worldwide).

¹¹ Rome Statute, *supra* note 3, art. 17(1)(a).

¹² *See* William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J.

White have argued for a direct and proactive role for the Court in this context, whereby the Court actively negotiates with, trains, and pressures national judiciaries. Burke-White calls this “proactive complementarity.”¹³

This Note links these two tracks of scholarship. Both, at their core, hinge on issues of state sovereignty. The prosecution of crimes outside armed conflict broadens the reach of international law into a state’s sovereign domain. Similarly, complementarity entails balancing compliance with international law against respect for national sovereignty over prosecutions.¹⁴ From this intersection, I argue that ICC prosecution of cases outside of armed conflict reinforces a new type of capacity building. Scholars have alluded to this development, though it does not have a name; remaining faithful to the current discourse, I call it “capacity catalyzing.”¹⁵ Unlike proactive complementarity, it features little to no direct interaction with judiciaries.¹⁶ Instead, the mere presence of an ICC prosecution of crimes against humanity outside armed conflict can galvanize civil society groups and other national actors like embassy officials, lawyers, and judges to place stronger pressure on their governments in light of the prosecutions. Capacity catalyzing thus serves as an additional benefit of ICC prosecution that can shape national judiciaries. This argument, which builds on the scholarship of Burke-White, effectively demonstrates how the ICC can be a plausible tool in post-Arab Spring states. Moreover, it draws on the underlying assumptions of Professor Elena A. Baylis, who remains skeptical of a proactive role for the Court, arguing that national courts are likely better suited to try these cases.¹⁷

I use two cases to explore and evaluate what capacity-catalyzing role the ICC has played to date. The cases, with defendants from the Republic of Kenya (Kenya) and the Libyan Arab Jamahiriya

53, 58 (2008) (“The possibility of international prosecution can create incentives that make states more willing to investigate and prosecute international crimes themselves.”).

¹³ See *id.* at 70 (defining proactive complementarity).

¹⁴ See Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, 7 MAX PLANCK Y.B. UNITED NATIONS L. 591, 600 (2003) (observing that complementarity is “an implicit restriction” on state sovereignty).

¹⁵ Stromseth and Burke-White respectively refer to the ICC’s “catalyzing” and “catalytic” impact. Jane E. Stromseth, *The International Criminal Court and Justice on the Ground*, 43 ARIZ. ST. L.J. 427, 438 (2011); Burke-White, *supra* note 12, at 58.

¹⁶ Burke-White also coined the concept of “passive complementarity,” which I address *infra* note 134 and accompanying text.

¹⁷ See Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks*, 50 B.C. L. REV. 1, 25 (2009).

(Libya),¹⁸ involve EJE as crimes against humanity, and are the first ICC cases to be prosecuted outside armed conflict. In 2007, Kenya saw widespread violence break out after an allegedly fixed election. Opponents of the incumbent regime protested both peacefully and violently. Over the course of a week, the old regime employed criminal organizations to kill perceived supporters of their political opposition. In three months, more than 1000 civilians were killed.¹⁹ Kenya's cases are currently underway before the ICC.

Over three years later, in February 2011, protests sparked by the Arab Spring broke out against the late President Muammar Al-Gaddafi's (Gaddafi's) authoritarian rule in Libya. The regime responded violently by killing hundreds of protesters. The situation escalated as rebels organized and allied themselves with former police and military forces. By the end of the month, the country was in a state of civil war. The U.N. Security Council referred the situation to the ICC, and in June, the Court issued arrest warrants for Gaddafi, his son Saif Al-Islam Gaddafi (Saif Gaddafi), and the "spy chief," head of military intelligence Abdullah Al-Senussi (Senussi).²⁰ Senussi and Saif Gaddafi are in custody.²¹ Gaddafi was killed in October 2011.²² All three warrants singled out crimes committed before the armed conflict began, and omitted any mention of war crimes or killings done after the end of February (which marked the beginning of the civil war).

These cases are significant because they represent the first occasions that the ICC has exercised its authority to prosecute crimes against humanity outside of armed conflict.²³ Whether or not the

¹⁸ In February of 2011, the U.N. Security Council referred the Libyan case to the ICC. S.C. Res. 1970, ¶ 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011). In June of 2011, the ICC issued an arrest warrant for Libyan President Gaddafi for his suspected criminal responsibility for extrajudicial executions. Prosecutor v. Gaddafi, Case No. ICC-01/11, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1101339.pdf>.

¹⁹ See *infra* note 93 and accompanying text.

²⁰ Prosecutor v. Gaddafi, Case No. ICC-01/11, Warrant of Arrest for Abdullah Al-Senussi (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1099332.pdf>; Prosecutor v. Gaddafi, Case No. ICC-01/11, Warrant of Arrest for Saif Al-Islam Gaddafi (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1101345.pdf>. Mauritania pressed charges against Al-Senussi for illegally entering the country. *Ex-Gaddafi Spy Chief Al-Senussi 'Charged' in Mauritania*, BBC NEWS (May 21, 2012), <http://www.bbc.co.uk/news/world-africa-18149489>.

²¹ Saif Gaddafi is in custody in Libya, while Al-Senussi is in Mauritania; there is currently a debate regarding the location to which he will be extradited. Adrian Blomfield, *Libya Rejects Claims It Cannot Try Abdullah Al-Senussi*, THE TELEGRAPH (Mar. 18, 2012), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/9151625/Libya-rejects-claims-it-cannot-try-Abdullah-al-Senussi.html>.

²² Barry Malone, *Gaddafi Killed in Hometown, Libya Eyes Future*, REUTERS (Oct. 20, 2011), <http://www.reuters.com/article/2011/10/20/us-libya-idUSTRE79F1FK20111020>.

²³ This Note focuses on crimes against humanity only because they omit the armed conflict nexus. While crimes against humanity are prosecuted more frequently than geno-

alleged crimes in Kenya and Libya are successfully prosecuted, this expansion has dramatic implications. Both states have scrambled, in an attempt to avert ICC prosecution of their nationals, to prove that their national judicial systems can adequately address these crimes. "Our courts are very good, even excellent," stressed the Libyan Justice Minister, claiming that the country has worked hard to remedy its judicial shortfalls.²⁴ Some of these shortfalls included failing to provide defendants access to attorneys or otherwise failing to guarantee effective due process.²⁵ If the justice minister's claims prove true, the ICC will be required by statute to defer to the national prosecutions.²⁶ Scholars on the ground have already observed how civil society groups have been catalyzed in the Kenya case.²⁷ And the defensive posture of the Libyan government makes clear that at least *something* has been catalyzed at the top levels of its state apparatus. This Note proposes that prosecutions of crimes outside of armed conflict (prosecutions that controversially step into state sovereignty) serve to pressure states and spark national judicial reform. Without ICC prosecution, the steps taken by the Libyan and Kenyan governments toward reform may not have occurred.

This Note proceeds in three parts. Part I examines the context and evolution of the legal standards for armed conflict. Part II evaluates ICC jurisprudence to establish that situations outside of armed conflict have not been addressed by the ICC except for the Kenya and Libya cases. It then analyzes the Kenya and Libya cases and shows how their facts are distinguishable from those in the existing case law. Finally, in Part III I argue that the most important implication of this trend will be the capacity catalyzing of national judiciaries. I also contend that the catalyzing process has already begun in Kenya and Libya, and further argue that moving beyond the armed conflict nexus will lead to these types of prosecutions occurring more frequently.

cide, this Note does not take the position that there is any hierarchy in international crimes. According to current ICC Prosecutor Luis Moreno-Ocampo, the ICTY and ICTR "created gradations for the severity of crimes, with genocide the worst and war crimes less important. For us it is different. My view is all these crimes are so serious that we request close to the maximum punishment for all of them." Luis Moreno-Ocampo, ICC Prosecutor, Speech at the University of Minnesota Law School, *How Prosecution Can Lead to Prevention*, in 29 *LAW & INEQ.* 477, 484–85 (2011). This Note adopts the same view, that all crimes are so serious as to render useless the establishment of hierarchies.

²⁴ Blomfield, *supra* note 21.

²⁵ Chris Stephen, *Saif Gaddafi Sets Libya's New Rulers a Test of Commitment to Human Rights*, *GUARDIAN* (Jan. 7, 2012), <http://www.guardian.co.uk/world/2012/jan/07/saif-gaddafi-libya-human-rights>.

²⁶ Rome Statute, *supra* note 3, art. 17(1)(a).

²⁷ See *infra* notes 148–49 and accompanying text.

I
THE EVOLUTION AND IMPLEMENTATION OF THE
ARMED CONFLICT NEXUS

Because the bulk of this Note deals with the question of whether cases were prosecuted outside armed conflict, it is crucial to establish the legal parameters for an armed conflict under international law. This is a complex question and implicates a great deal of humanitarian law, also known as the law of war. Thus, I first briefly parse the interaction of humanitarian and human rights law, which are distinct concepts. Then, I describe the evolution of the armed conflict nexus in international criminal law. Finally, I establish a rough definition for armed conflict used by the ICC: a “protracted struggle between multiple organized armed groups.”

A. Armed Conflict Implicates Two Distinct Fields of Law

Today, most armed conflicts occur not between states, but rather as civil conflicts involving groups that are marginalized politically, racially, or socially. However, the classification of these conflicts as “international” or “national,” as well as their status as “armed” or not, can have dramatic legal implications. Perpetrators of crimes that cause widespread death domestically, but take place outside of armed conflict, have traditionally fallen outside the reach of international law.²⁸

The existence of armed conflict triggers rights and obligations under the laws of war, called *humanitarian* law. This is a field distinct from *human rights* law, which sets forth fundamental rights of persons during both war and peacetime.²⁹ Under humanitarian law, which applies only during armed conflict, civilians and combatants have rights and protections under the Geneva Conventions.³⁰ These protections include providing humane treatment to prisoners of war and protecting both civilians and combatants from torture. The protections vary significantly depending on whether armed conflicts are

²⁸ See generally *infra* Part I.B (describing how international bodies did not do away with the armed conflict nexus until recently).

²⁹ The distinction and interaction between these bodies of law is enormously complex, prompting debates over whether humanitarian law completely takes precedence, or is “lex specialis,” over human rights law in times of armed conflict. These debates falls outside the scope of this Note, but for an informative discussion, see generally Natasha Balendra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2491–503 (2008) (describing the complex interplay between these bodies of law).

³⁰ Compare Geneva Convention IV, *supra* note 7 (describing the protections of civilians in wartime), with Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter Geneva Convention III] (setting forth the distinct rights of prisoners of war).

international or internal.³¹ These differences developed out of respect for state sovereignty and reluctance to interfere with a state's internal affairs.³²

Acts committed outside armed conflict fall outside the jurisdiction of humanitarian law. Riots and other civil disturbances are categorically excluded from "armed conflict" under Geneva Protocol II.³³ Before the armed conflicts began in Kenya and Libya, the situations there could only have been classified as riots or civil disturbances because they involved clashes between civilians and police forces rather than between multiple organized, armed groups. Thus, the victims and their relatives in those cases were not protected under humanitarian law.

B. *The Nexus Evolved with International Criminal Law*

The jurisdiction of the international criminal courts that predated the ICC was mostly limited to cases of armed conflict.³⁴ The armed conflict nexus was integral to the Nuremberg Trials, which arose out of World War II and first articulated the concept of crimes against humanity.³⁵ As early as 1948 the nexus fell into disfavor in light of

³¹ Compare Geneva Convention III, *supra* note 30 (offering detailed rights for prisoners of war in international armed conflict), and Geneva Convention IV, *supra* note 7 (offering detailed rights for civilians in international armed conflict), with *id.*, art. 3 (devoting a much more cursory set of protections to combatants and civilians in conflict "not of an international character").

³² See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 3, June 8, 1977, 6 U.S.T. 3114 [hereinafter Geneva Convention Protocol II] ("Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government . . . to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State."); see also Geneva Convention III, *supra* note 30, art. 3 ("The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.").

³³ Geneva Convention Protocol II, *supra* note 32, art. 1(2) ("This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.").

³⁴ The Nuremberg Trials and Tokyo Trials followed World War II. Similarly, the ICTY was formed as a result of and in connection with the Bosnian War, ICTY Statute, *supra* note 3, art. 1 (granting jurisdiction for humanitarian violations committed in the former Yugoslavia since 1991), while the ICTR mandate was restricted to the armed conflict in Rwanda, ICTR Statute, *supra* note 3, art. 1 (granting jurisdiction for humanitarian violations committed in 1994 in Rwanda or by Rwandan citizens in neighboring states).

³⁵ Mohamed Elewa Badar, *From the Nuremberg Charter to the Rome Statute: Defining the Elements of Crimes Against Humanity*, 5 SAN DIEGO INT'L L.J. 73, 87-88 (2004). Note that the Nuremberg Trials did have jurisdiction over crimes committed leading up to the war (which would seem to mean no armed conflict nexus). *Id.* However, since they followed World War II this was never explored at the time and did not seem to establish any precedent for future decades.

other international crimes such as genocide.³⁶ The International Law Commission suggested doing away with the armed conflict requirement for crimes against humanity in 1954.³⁷ The Commission reasoned that crimes against humanity should be classified as crimes of peacetime and could occur outside of war.³⁸ It is ambiguous whether an armed conflict nexus was an element of crimes against humanity from 1960 to 1980.³⁹ In 1968 the Statute of Limitations Convention, which sought to redefine several international crimes, attempted to raise the issue.⁴⁰ Like the International Law Commission in 1954, it offered the rationale that these crimes could be committed during peacetime. The Convention did not gain traction.⁴¹ The Apartheid Convention, however, which entered into force in 1976 and declared apartheid a crime against humanity, did not include the nexus.⁴²

³⁶ See Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, Dec. 9, 1948, 78 U.N.T.S. 277 (“The Contracting Parties confirm that genocide, *whether committed in time of peace or in time of war*, is a crime under international law which they undertake to prevent and to punish.”) (emphasis added).

³⁷ Stuart Ford, *Crimes Against Humanity at the Extraordinary Chambers in the Courts of Cambodia: Is a Connection with Armed Conflict Required?*, 24 UCLA PAC. BASIN L.J. 125, 130 (2007). The International Law Commission (ILC), created in 1947, is tasked with codifying existing international law and assisting the development of new international law. *Id.* at 153. In its report to the U.N., it presented a definition of crimes against humanity that removed the armed conflict requirement, noting that it had “decided to enlarge the scope of the paragraph so as to make the punishment of the acts . . . independent of whether or not they are committed in connexion with other offences defined in the draft Code.” *Id.* at 158 (quoting Report of the International Law Commission Covering the Work of its Sixth Session, June 3–July 28, 1954, *available in* 2 Y.B. INT’L L. COMM’N 140, 150 (1954)).

³⁸ Ford, *supra* note 37, at 156. This is precisely what happened in 2011 in Libya.

³⁹ Western commentators have generally taken the position that the armed conflict nexus eroded over time. See, e.g., Jing Guan, *The ICC’s Jurisdiction over War Crimes in Internal Armed Conflicts: An Insurmountable Obstacle for China’s Accession?*, 28 PENN ST. INT’L L. REV. 703, 742 (2010). *But see id.* (describing how not all Chinese scholars “acquiesce” to this view and some feel that customary international law is still ambiguous as to the armed conflict nexus at the adoption of the Rome Statute). This could possibly be due to China’s hesitance to expand crimes against humanity out of fear that situations within its sovereign territory could be targeted by the ICC.

⁴⁰ Co-Prosecutors v. Nuon, Case No. 002/19/09-2007/ECCC/TC, Decision on Co-Prosecutors’ Request to Exclude Armed Conflict Nexus Requirement from the Definition of Crimes Against Humanity, ¶¶ 26–29 (Extraordinary Chambers in the Courts of Cambodia Oct. 26, 2011), http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/E95_8_EN.pdf (interpreting the Statute of Limitations Convention in a decision on whether crimes against humanity was codified then).

⁴¹ See *id.* (noting that the convention did not gain traction due to other issues unrelated to the nexus).

⁴² International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR Supp. No. 30 at 75, U.N. Doc. A/9030 (1974), 1015 U.N.T.S. 243 (entered into force July 18, 1976). However, the Convention notably lacked the signatures of several major Western powers including the United States, France, Germany, the United Kingdom, and Australia. *Id.*

Finally, the 1980s gave way to a more concrete debate, where many, including a U.N. Special Rapporteur, supported a definition that did away with the nexus requirement.⁴³

Around that time, the international consensus began to turn against the nexus. As Professor Stuart Ford explains, the details of the shift have a rich and complex history. International crimes at the time of Nuremberg were largely synonymous with war.⁴⁴ Throughout the twentieth century there were many debates beyond the Conventions described above. Those who resisted the shift generally feared that crimes against humanity would be transformed into a new crime with overly broad reach.⁴⁵ Those favoring omitting the nexus generally argued that crimes against humanity by nature could be committed outside armed conflict.⁴⁶ In their view, maintaining the nexus did not provide adequate recourse outside armed conflict.

Despite these debates and the growing consensus against the nexus, the first modern international criminal tribunals, established in the 1990s, maintained the nexus in some way. The International Criminal Tribunal for the Former Yugoslavia (ICTY) incorporated the armed conflict nexus requirement in the statute that created the ICTY.⁴⁷ However, the ICTY quickly discarded it as a substantive element of crimes against humanity in its first case, the seminal *Tadić* case.⁴⁸ The requirement still lingered, except it was a loose jurisdictional element.⁴⁹ That is, armed conflict had to exist somewhere in the

⁴³ Ford, *supra* note 37, at 170. The Rapporteur later argued that “crimes against humanity can [now] be committed not only within the context of an armed conflict, but also independently of any such armed conflict.” *Id.* (quoting Special Rapporteur’s Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind (Mar. 11, 1986), available in 2 Y.B. INT’L L. COMM’N (1) 53, 56 (1986)).

⁴⁴ Ford, *supra* note 37, at 144–45.

⁴⁵ See *id.* at 157 (noting that many representatives at the ILC debates feared the creation of an overly broad international crime).

⁴⁶ See *id.* (noting how the proponents for omitting the nexus argued that the definition should be broader than that used at Nuremberg).

⁴⁷ ICTY Statute, *supra* note 3, art. 5.

⁴⁸ Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 141 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> (“It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all.”).

⁴⁹ Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 249 (Int’l Crim. Trib. for the Former Yugoslavia, July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> (“[T]he armed conflict requirement is a *jurisdictional* element, not ‘a substantive element of the mens rea of crimes against humanity.’”); Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶ 53 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002), <http://www.icty.org/x/cases/krnjelac/tjug/en/krn-tj020315e.pdf> (same).

backdrop of the crimes, but the crimes did not have to necessarily be committed as part of the hostilities. Thus, every case before the ICTY, occurring under the umbrella of the Yugoslav Wars, could have satisfied this element because every case could be connected to the that armed conflict. The International Criminal Tribunal for Rwanda (ICTR), which was created a year before the *Tadić* motion decision formally dispelled the ICTY's armed conflict requirement, incorporated no armed conflict nexus by statute.⁵⁰ Unfortunately, the reasons for this decision were not made public.⁵¹ Still, the ICTR's jurisdiction was over an armed conflict: the Rwandan Genocide following the Rwandan Civil War.⁵² This placed the ICTR's crimes against humanity in an identical situation to their counterparts under the ICTY. In other words, they required no nexus substantively, but nonetheless incorporated armed conflict as a jurisdictional element indirectly by mandate.

The Special Court for Sierra Leone (SCSL), like the ICTY and ICTR, incorporates the armed conflict that had been occurring in Sierra Leone since late 1996 directly into its statute.⁵³ The Extraordinary Chambers in the Courts of Cambodia (ECCC), a hybrid tribunal like the SCSL,⁵⁴ held that the status of customary international law on the nexus was unclear in 1979.⁵⁵ The armed conflict nexus was decidedly in a state of flux around that time,⁵⁶ and

⁵⁰ See ICTR Statute, *supra* note 3, art. 3 (omitting the armed conflict nexus requirement). Arguably this does not matter, as the mandate of the ICTR was basically confined to the armed conflict. *But see infra* note 52 and accompanying text (detailing an example where the nexus did not exist).

⁵¹ For a discussion of the background of and reasons for this, see Ford, *supra* note 37, at 179–80 n.299 (detailing the absence of information about the negotiation of the ICTR statute).

⁵² I acknowledge that there is at least one case before the ICTR where crimes against humanity, but not war crimes charges, were successful because there was no nexus to an armed conflict. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 599–644 (Sept. 2, 1998), <http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf> (holding that the armed conflict nexus was not met). However, my position is that the ICTR's jurisdiction was effectively constrained by its mandate to prosecute the genocide that followed civil war. To the extent that there is scholarly disagreement over the existence of any nexus, it is not relevant to the claims advanced in this Note.

⁵³ See SCSL Statute, *supra* note 3, art. 1 (granting jurisdiction over “persons who bear the greatest responsibility for serious violations of *international humanitarian law* and *Sierra Leonean law*”) (emphasis added).

⁵⁴ “Hybrid” means that the tribunal applies both international law and Cambodian domestic law. See Virginia Hancock, “*No-Self*” at *Trial: How to Reconcile Punishing the Khmer Rouge for Crimes Against Humanity with Cambodian Buddhist Principles*, 26 *WIS. INT'L L.J.* 87, 89–90 (2008) (defining hybrid tribunals).

⁵⁵ *Id.* at 101 (“[T]here is no consensus on the status of the nexus requirement at that time.”).

⁵⁶ See *supra* Part I.B (describing the debate around the armed conflict nexus in the 1970s and 80s).

Professor Ford argues that the ECCC could feasibly hold that the nexus was disfavored by then.⁵⁷

The drafters of the Rome Statute, which defines the ICC's jurisdiction, finally and formally did away with the nexus to armed conflict.⁵⁸ Due to the state of customary international law at the time, especially after the ICTY's *Tadić* decision, this was less an earth-shattering shift and more a crystallization of an existing consensus.⁵⁹ The result was an evolved international criminal tribunal that could prosecute a broader range of crimes than ever before.

C. *Armed Conflict Is Still Being Defined*

International law does not clearly define the precise point at which domestic uprisings become armed conflicts.⁶⁰ However, the most commonly applied definition requires protracted conflict between armed groups.⁶¹ The Geneva Conventions and their Protocols do not clearly delineate the threshold for armed conflict.⁶² Professor Natasha Balendra suggests using a factors-based approach to determine whether a situation has become an armed conflict, weighing the organization of parties, intensity of conflict, degree of violence, and duration.⁶³ International bodies have adopted similar factors. In a seminal 1997 case, the Inter-American Commission on

⁵⁷ Ford, *supra* note 37, at 199.

⁵⁸ See Rome Statute, *supra* note 3, art. 7(1) (not requiring armed conflict).

⁵⁹ See *supra* notes 47–49 and accompanying texts (describing the treatment of the nexus requirement in *Tadić*).

⁶⁰ See Balendra, *supra* note 29, at 2471 (“Drawing a clear distinction between situations that constitute armed conflict and those that do not has never been an easy task at the periphery.”). In particular, Professor Balendra raises the conflicts between Israel and Hezbollah and the Irish Republican Army’s conflict with the British government as examples where the definition is unclear. *Id.* Her article generally focuses on armed conflicts and combating terrorism, where she concludes that due to potential conflict between humanitarian and human rights law “armed conflict” should be construed narrowly vis-à-vis the War on Terror. *Id.* at 2510–12.

⁶¹ See *infra* notes 66–69 and accompanying text for a discussion of the most commonly applied definition of armed conflict.

⁶² Surprisingly, this shortcoming is conceded by the International Committee of the Red Cross, the driving force behind the Geneva Conventions. See 30th International Conference of the Red Cross and Red Crescent, Nov. 26–30, 2007, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 21, I.C.R.C. Doc. 30IC/07/8.4 (Oct. 2007) (“Determining if and when a given situation amounts to a non-international armed conflict remains sometimes difficult.”).

⁶³ See Balendra, *supra* note 29, at 2470 & n.21 (citing International Conference of the Red Cross and Red Crescent, Dec. 2–6, 2003, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, (June 12, 2003), <http://www.icrc.org/eng/resources/documents/misc/5udgkt.htm> (quoting Professor Sassoli of the University of Quebec)). These were the views of another professor speaking before the International Committee of the Red Cross (ICRC) rather a reflection of any ICRC standard.

Human Rights held that “what principally distinguishes situations of serious tension [such as armed conflict] from internal disturbances is the level of violence involved.”⁶⁴ The Commission explained that there are situations in which states may use police or armed forces to restore order without leading to an armed conflict.⁶⁵ The Commission distinguished situations of armed conflict: “In contrast to these situations of domestic violence, the concept of armed conflict, in principle, requires the existence of organized armed groups that are capable of and actually do engage in combat and other military actions against each other.”⁶⁶ According to the Inter-American Commission, which iterated previous articulations by the ICRC,⁶⁷ an armed conflict necessitates the existence of organized armed groups as well as a minimum threshold of conflict.

The ICC adopted a similar definition, which comes from the aforementioned ICTY *Tadić* case: “[A]n armed conflict exists whenever there is a resort to armed force between States or *protracted armed violence* between governmental authorities and organized armed groups or between such groups within a State.”⁶⁸ The *Tadić* definition is similar to the Inter-American Commission’s, although it adds a “protracted” requirement, which the ICC’s definition closely mirrors.⁶⁹

The problem with these definitions is the lack of case law providing guidance for terms like “protracted” and “organized.” The

⁶⁴ *Abella v. Argentina*, Case 11.137, Inter-Am. Comm’n H.R., Report No. 55/97, OEA/Ser.L/V/II.98, doc. 6 rev. ¶ 150 (1998).

⁶⁵ These are cases where “there exists a confrontation within a country, which is characterized by a certain seriousness or duration and which involves acts of violence. . . [sic] In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order.” *Id.* ¶¶ 150–51 (quoting ICRC *Protection and Assistance Activities in Situations Not Covered by International Humanitarian Law*, 28 INT’L REV. RED CROSS 11, 12 (1988) (quoting Int’l Comm. of the Red Cross [ICRC], *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, V, *Protection of Victims of Non-international Armed Conflicts*, 79 (Jan. 1971))).

⁶⁶ *Id.* ¶ 152.

⁶⁷ See *supra* note 65 (citing the origin of the Inter-American Commission’s language).

⁶⁸ *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995) (emphasis added), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>.

⁶⁹ Compare Rome Statute, *supra* note 3, art. 8(2)(f) (defining internal, non-international armed conflicts as those that “take place in the territory of a State when there is *protracted armed conflict between governmental authorities and organized armed groups or between such groups*” (emphasis added)), with *Tadić*, Case No. IT-94-1-I Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (“[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”).

universe of international criminal case law is relatively small. The ICC, fortunately, has developed its standard in recent cases. In a procedural decision in the *Lubanga* case, ICC Pre-Trial Chamber I stipulated that the “organized” requirement “focuses on the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time.”⁷⁰ Violence between armed groups may not meet the ICC definition if those groups are not sufficiently organized or not operating for a prolonged period of time. In the next section I evaluate ICC case law using this definition.

II THE FIRST CASES PROSECUTED OUTSIDE OF ARMED CONFLICT

ICC cases apart from Kenya and Libya have focused exclusively on situations occurring in armed conflict. In this Part, I address these cases, and then argue that the Kenya and Libya cases departed from the previous trend.

A. ICC Crimes Against Humanity Cases Within Armed Conflict

Apart from Kenya and Libya, cases before the ICC have consistently addressed crimes against humanity committed during armed conflict. So far there has been one completed case addressing crimes against humanity in the Democratic Republic of the Congo (DRC) situation.⁷¹ There are seven situations currently before the Court: the DRC, Uganda, the Central African Republic, the Republic of Sudan (Sudan), Kenya, Libya, and Côte d’Ivoire. This section addresses the presence of armed conflict in the first four cases. Côte d’Ivoire, the most recent ICC case, also features an armed conflict.⁷²

⁷⁰ Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 234 (Jan. 29, 2007).

⁷¹ See Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, ¶¶ 1357–58 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> (finding Defendant guilty).

⁷² The case focuses on post-election violence committed by supporters of the former President, Laurent Gbagbo. Situation in the Republic of Côte d’Ivoire, Case No. ICC-02/11, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, ¶¶ 14, 26 (Oct. 3, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1240553.pdf>. These supporters, following the November 28, 2010 election, committed attacks against actual or perceived political opponents of former President Gbagbo. *Id.* ¶ 34. The situation deals with post-election violence somewhat resembling that committed in Kenya. Notably, unlike in Libya, the Prosecutor does not distinguish the crimes against humanity committed before the situation escalated to armed conflict from those committed after armed conflict began. The parties included military forces, the police, pro-government militias of youth groups, and about 4500 mercenaries,

The common thread running through the DRC cases is the well-established international armed conflict. The DRC situation deals with crimes committed during the Second Congo War, the deadliest armed conflict since World War II.⁷³ All the counts also include allegations of war crimes.⁷⁴ The Prosecutor alleges that there existed in the Ituri province “a protracted armed conflict between various armed groups . . . on the one hand, and . . . militias, on the other.”⁷⁵ The ICC’s Chambers also held that there are reasonable grounds to believe that over a period of nine months, “several attacks were directed by the FDLR [Democratic Forces for the Liberation of Rwanda] troops against the civilian population” during a “protracted armed conflict between the FDLR and government forces present in the . . . Kivu [provinces] in the DRC.”⁷⁶

The Ugandan situation is consolidated in one case, *Prosecutor v. Kony*. The Court in 2005 issued warrants for five senior officials of the Lord’s Resistance Army (LRA) in Northern Uganda. The LRA is an

which were trained and armed by pro-government forces. *Id.* ¶ 37. Heavy military arms were used, while pro-Gbagbo and pro-Ouattara forces at times controlled parts of Côte d’Ivoire. *Id.* ¶ 122. The Court held that “there is a reasonable basis to believe that an armed conflict not of an international character existed . . . from 25 February 2011 until 6 May 2011.” *Id.* ¶ 127.

⁷³ See INTERNATIONAL RESCUE COMMITTEE, MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: AN ONGOING CRISIS 1 (2008) (stating that an estimated 3.9 million people died in the conflict between 1998 and 2004, arguably making DRC the world’s “deadliest humanitarian crisis since World War II”).

⁷⁴ *Prosecutor v. Mbarushimana*, Case No. ICC-01/04-01/10, Warrant of Arrest for Callixte Mbarushimana, ¶¶ 7, 8, 10 (Sept. 28, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc954979.pdf> (“[T]here are reasonable grounds to believe that” Mbarushimana led attacks against civilian populations and committed murder, rape, torture, and destruction of property.); *Prosecutor v. Katanga & Ngudjolo*, Case No. ICC-01/04-01/07, Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, Annex 1A, 31–35 (June 12, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc511681.pdf> (charging Katanga and Ngudjolo with war crimes, including murder, cruel or inhumane treatment, enlisting children to participate in hostilities, sexual slavery, rape, outrages upon personal dignity, attacks against civilian population, pillaging, and destruction of property); *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 15, 31 (Sept. 30, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc571253.pdf> (alleging war crimes); *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶¶ 7–8, 9–12 (Jan. 29, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc266175.pdf> (charging Lubanga Dyilo with war crimes, including enlisting children into armed groups and using them to participate in hostilities); *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Warrant of Arrest, 3 (Aug. 22, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc305330.pdf> (“[Considering] that there are reasonable grounds to believe” that Ntaganda enlisted children to participate in hostilities).

⁷⁵ *Katanga*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 233 (quoting *Katanga & Ngudjolo*, Case No. ICC-01/04-01/07, Amended Document Containing the Charges Pursuant to Article 61(3)(a) of the Statute, ¶ 36).

⁷⁶ *Mbarushimana*, Case No. ICC-01/04-01/10, Warrant of Arrest for Callixte Mbarushimana, ¶¶ 6, 9.

anti-Ugandan government insurgent group that has allegedly, over at least a fifteen-year period, attacked the civilian population.⁷⁷ Four officials remain at large,⁷⁸ with outstanding warrants for crimes including war crimes.⁷⁹ War crimes necessarily entail the presence of armed conflict. The U.S. government has, in acknowledging the armed conflict, committed one hundred U.S. soldiers as military advisors to Uganda to assist in capturing the LRA leaders.⁸⁰

For the Central African Republic, the case against Jean-Pierre Bemba, the leader of the *Mouvement de Libération du Congo* (MLC), was initiated in 2008.⁸¹ The MLC was allied with the then Central African Republic president, and allegedly committed crimes against humanity against civilians over five months as part of a campaign to suppress a rebellion.⁸² The Chamber held that there was “sufficient evidence to establish substantial grounds to believe that an armed conflict not of an international character existed” over the

⁷⁷ The LRA allegedly “direct[ed] attacks . . . against civilian populations” and “in pursuing its goals, the LRA has engaged in a cycle of violence and established a pattern of ‘brutalization of civilians’ by acts including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlements.” Situation in Uganda, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005, ¶ 5 (Sept. 27, 2005), <http://www.icc-cpi.int/iccdocs/doc/doc97185.pdf>.

⁷⁸ Proceedings against Raska Lukwiya were terminated in July 2007 following his death. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Decision to Terminate the Proceedings Against Raska Lukwiya, 2, 4 (July 11, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc297945.pdf>. Note that according to some widely-reported rumors, Otti has already been killed. See, e.g., *Otti ‘Executed by Uganda Rebels,’* BBC NEWS (Dec. 21, 2007), <http://news.bbc.co.uk/2/hi/africa/7156284.stm>. However, this has not yet been officially confirmed by the Court.

⁷⁹ See, e.g., Situation in Uganda, Case No. ICC-02/04-01/05, Warrant of Arrest for Vincent Otti, 12–20 (July 8, 2005), <http://www.icc-cpi.int/iccdocs/doc/doc97189.pdf> (charging Otti with rape, attacking civilian populations, enlisting children, cruel treatment, pillaging, and murder); Situation in Uganda, Case No. ICC-02/04-01/05, Warrant of Arrest for Okot Odhiambo, 10–12 (July 8, 2005), <http://www.icc-cpi.int/iccdocs/doc/doc97197.pdf> (charging Odhiambo with murder, enlisting children, attacking civilian populations, and pillaging).

⁸⁰ Mark S. Smith & Bradley Klapper, *Obama Sends Military Advisers to Central Africa to Help Fight Lord’s Resistance Army*, HUFFINGTON POST (Oct. 14, 2011), http://www.huffingtonpost.com/2011/10/14/obama-central-africa_n_1011245.html.

⁸¹ Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Warrant of Arrest for Jean-Pierre Bemba Gombo, ¶ 9 (May 23, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc504390.pdf>.

⁸² See Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶¶ 297, 393 (June 15, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf> (describing how MLC forces targeted civilians who were considered party to rebels); *id.* ¶¶ 71–72, 129 (charging Bemba with crimes against civilians and finding reason to believe that the MLC conducted widespread attacks against civilians).

period in question.⁸³ The Prosecutor charged Bemba with war crimes, alleging that the five-month period was “protracted.”⁸⁴ During that period, violence occurred among several armed groups, including 500 Chadian mercenaries, 100 Libyan troops, 1500 MLC soldiers, and organized rebels.⁸⁵ The Court seems to agree that there was armed conflict.⁸⁶

The conflict in Sudan has been underway for nearly a decade. The crimes against humanity were committed in context of a larger conflict that has involved allegations of genocide, unlike any other ICC case. The case features the first ICC arrest warrant for a sitting head of state, President Omar Hassan Ahmad Al-Bashir,⁸⁷ and he is also the first defendant facing charges of genocide.⁸⁸ Furthermore, the Prosecutor alleged that there was a protracted armed conflict between the Sudanese Armed Forces, the Popular Defence Force, and the Janjaweed militia against organized rebel groups.⁸⁹ This meets the traditional nexus requirement.

B. The Evolution of ICC Non-Armed Conflict Jurisprudence: Kenya and Libya

In this subpart I argue that two situations before the ICC—Kenya and Libya—are the first cases alleging crimes against humanity outside of armed conflict. I conclude that neither case occurred within armed conflict under the core facts alleged.

1. Kenya

Kenya is the first ICC situation to occur outside armed conflict. Two cases were alleged, and were brought proprio motu, or at the Prosecutor’s discretion. In the first, Francis Kirimi Muthaura, Uhuru

⁸³ *Id.* ¶ 212; *see also Bemba*, Case No. ICC-01/05-01/08, Warrant of Arrest for Jean-Pierre Bemba Gombo, ¶ 11 (finding reasonable grounds to believe that a “protracted armed conflict existed in the Central African Republic at least from 25 October 2002 to 15 March 2003”).

⁸⁴ *Bemba*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 213.

⁸⁵ *Id.* ¶ 212.

⁸⁶ *See id.* (finding that crimes had occurred “in the context of this armed conflict”).

⁸⁷ *Warrant Issued for Sudan’s Leader*, BBC NEWS (Mar. 4, 2009), <http://news.bbc.co.uk/2/hi/africa/7923102.stm> (“It is the first warrant issued by The Hague-based UN court against a sitting head of state.”).

⁸⁸ *See Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 8–9 (July 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf> (issuing an arrest warrant for Al-Bashir for three counts of genocide).

⁸⁹ *Prosecutor v. Harun*, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun, 3 (Apr. 27, 2007), <http://www.icc-cpi.int/iccdocs/doc/doc279813.pdf>. (“[T]here are reasonable grounds to believe that . . . a protracted armed conflict . . . took place . . .”).

Muigai Kenyatta, and Mohammed Hussein Ali were charged, among other counts, with murder as a crime against humanity. The charges arose from politically motivated killings of civilian supporters of the Orange Democratic Movement (ODM) over two months from December 2007 to February 2008.⁹⁰ In particular, during the week of January 24, 2008 through January 31, 2008, the Mungiki criminal organization attacked perceived supporters of the ODM.⁹¹ These attacks resulted in at least 112 deaths.⁹² Overall, 1133 people were reportedly killed in the Kenyan post-election violence.⁹³ In the second case, William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang were charged with similar crimes, including murder as a crime against humanity, committed in various towns from the end of December 2007 to the end of January 2008.⁹⁴ The killings were committed by large, organized gangs of youth against civilians as part of a “widespread and systematic attack.”⁹⁵

The events in Kenya did not, however, amount to an armed conflict. First, Kenya witnessed the second shortest alleged period of violence in ICC cases (behind Libya), at about three months.⁹⁶ Second, the circumstances in Kenya did not amount to civil war. They featured post-election violence after a regime’s attempts to maintain power following alleged electoral fraud. The opposition’s response varied from peaceful protest to violent rampage, but these rampages were largely unorganized. Mba Chidi Nmaju has concluded that the situation in Kenya did not constitute an armed conflict.⁹⁷ The Prosecutor seems to

⁹⁰ Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶ 13 (Mar. 8, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf>. For a detailed factual background of the Kenyan post-election violence, see generally COMMISSION OF INQUIRY INTO THE POST ELECTION VIOLENCE (CIPEV), FINAL REPORT (Oct. 15, 2008), http://www.communication.go.ke/Documents/CIPEV_FINAL_REPORT.pdf [hereinafter CIPEV FINAL REPORT].

⁹¹ *Muthaura*, Case No. ICC-01/09-02/11, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶ 17.

⁹² *Id.*

⁹³ CIPEV FINAL REPORT, *supra* note 90, at 345.

⁹⁴ Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ¶ 13 (Mar. 8, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1037044.pdf>.

⁹⁵ *Id.* ¶ 14.

⁹⁶ *Muthaura*, Case No. ICC-01/09-02/11, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ¶ 13 (charging defendants with committing crimes against humanity from December 2007 to February 2008).

⁹⁷ See Mba Chidi Nmaju, *Violence in Kenya: Any Role for the ICC in the Quest for Accountability?*, 3 AFR. J. LEGAL STUD. 78, 82 n.18 (2009) (“This assertion [that there was no armed conflict] is based on reports which make it clear that the violence did not involve

agree, as there is no mention of war crimes or armed conflict in the key documents.⁹⁸ These assessments tip in favor of Kenya being the first situation brought before the ICC to occur outside of armed conflict.

2. *Libya*

The Libya situation began with the violent and fatal repression of protests by the late President Muammar Al-Gaddafi, as well as by his son, Saif Al-Gaddafi, and Minister of Defense, Abdullah Al-Senussi. The warrants for their arrest focus in particular on a two-week period in late February 2011 and do not allege war crimes. The core crimes emphasized are injuries, killings, and imprisonment of hundreds of civilians as crimes against humanity “within a period of *less than two weeks* in February 2011.”⁹⁹

The first protests reportedly began in January 2011, and they escalated beginning in mid-February 2011.¹⁰⁰ The protests grew more widespread as police violently broke up groups of hundreds of demonstrators in cities such as Benghazi, the second-largest city in Libya.¹⁰¹ On February 15th, soldiers fired live ammunition at peaceful protesters who called for the release of a human rights lawyer from prison.¹⁰² Nationwide reactions were not all peaceful—some resorted to forceful reprisals using bombs and rocks.¹⁰³ The government response was violent: For example, on February 17, government forces opened fire on hundreds and a helicopter fired into an unarmed crowd.¹⁰⁴ In turn, the protests escalated, as protesters burned down

any military activity. It also did not involve armed dissidents or rebels. It was a civil disobedience spurred on by the manipulated election results and subsequently became violent.”).

⁹⁸ See Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (Mar. 31, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf> (not alleging the existence of armed conflict); *Muthaura*, Case No. ICC-01/09-02/11, Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (not alleging or mentioning armed conflict).

⁹⁹ Prosecutor v. Gaddafi, Case No. ICC-01/11, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, 4 (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1101339.pdf>.

¹⁰⁰ Jensen, *supra* note 1.

¹⁰¹ Alan Cowell, *Protests Take Aim at Leader of Libya*, N.Y. TIMES, Feb. 17, 2011, at A14.

¹⁰² U.N. SCOR, 66th Sess., 6490th mtg. at 4, U.N. Doc. S/PV.6490 (Feb. 25, 2011) (quoting the Libyan representative who condemned the actions of Gaddafi).

¹⁰³ Cowell, *supra* note 101.

¹⁰⁴ Anthony Shadid, *Clashes in Libya Worsen as Army Crushes Dissent*, N.Y. TIMES, Feb. 19, 2011, at A1, available at <http://www.nytimes.com/2011/02/19/world/africa/19libya.html>. February 17th was called a “day of rage.” Jack Healy, *Popular Rage is Met with Violence in Mideast*, N.Y. TIMES, Feb. 18, 2011, at A12.

buildings and tore down a statue.¹⁰⁵ Over the next several days, the protests and violence “snowballed” and spread to several other cities including Tripoli, Libya’s capital.¹⁰⁶ State support fractured as some local police turned their guns on the army to defend protesters.¹⁰⁷ Rebels reportedly stole arms from government bases, and some called the clashes “urban warfare.”¹⁰⁸ By February 21, as rebels took control of Benghazi, the United States ordered its non-emergency personnel to leave Libya.¹⁰⁹ By the 24th, the *New York Times* considered the violence an “increasingly well-armed revolutionary movement.”¹¹⁰ The rebels had procured access to large caches of weapons, including heavy artillery and rocket-propelled grenades, which were either smuggled in or donated by defectors from the military.¹¹¹ The U.N. Security Council met on February 26.¹¹² Within two weeks from when protests began, the Security Council referred the Libya situation to the ICC, “condemning the violence and use of force against civilians.”¹¹³ By that time, significant portions of Libya were under rebel control.¹¹⁴ The Security Council’s referral is in contrast to Kenya, where investigation was initiated by the Prosecutor.

Although the Libya situation eventually and undisputedly evolved into armed conflict once NATO became involved, it began as a civil disturbance and remained one for about two weeks. The allegations in the arrest warrants did not uniformly occur *during* the armed conflict. The two weeks were not “protracted” per the ICC definition

¹⁰⁵ Shadid, *supra* note 104.

¹⁰⁶ Charles Levinson & Tahani Karrar-Lewsley, *Libya Death Toll Surges in Crackdown*, WALL ST. J. (Feb. 21, 2011), http://online.wsj.com/article/SB10001424052748703498804576156074096202208.html?mod=WSJEUROPE_newsreel_world.

¹⁰⁷ *Id.* (describing how police were protecting protesters from soldiers firing live ammunition at them).

¹⁰⁸ *Id.* In particular, the state forces defending Tripoli included thousands of “mercenaries and irregular security forces.” Kareem Fahim & David D. Kirkpatrick, *Qaddafi Massing Forces in Tripoli*, N.Y. TIMES, Feb. 24, 2011, at A1.

¹⁰⁹ Kim Dixon, *Update 1-U.S. Orders Non-Emergency Staff to Exit Libya*, REUTERS AFRICA (Feb. 21, 2011), <http://af.reuters.com/article/idAFN2123040020110221>. In particular the State Department observed that “[d]emonstrations have degenerated on several occasions into violent clashes between security forces and protesters . . .” *Id.*

¹¹⁰ Kareem Fahim & David D. Kirkpatrick, *Libyan Rebels Repel Qaddafi’s Forces Near Tripoli*, N.Y. TIMES, Feb. 25, 2011, at A1.

¹¹¹ *Id.*

¹¹² Helene Cooper & Mark Landler, *Following U.S. Sanctions, U.N. Security Council to Meet on Libya*, N.Y. TIMES (Feb. 26, 2011), <http://www.nytimes.com/2011/02/27/world/africa/27diplomacy.html>. At that point the *New York Times* reported that the conflict resembled “something close to civil war.” *Id.*

¹¹³ S.C. Res. 1970, *supra* note 18, at 1, 2.

¹¹⁴ *Rebels Repulse Efforts in Libya*, N.Y. TIMES, Feb. 28, 2011, at A9. By that time, Gaddafi’s government genuinely feared that elements of the military, which were defecting, would fall into rebel hands. *Id.*

of armed conflict. While media commentators were quick to label the situation a civil war when rebels began using rocket-propelled grenades, armed conflict under international law had not clearly begun at that point.

Commentators debate when the armed conflict began. Some opine that armed conflict started by the end of February, while others point out the difficulty in being precise.¹¹⁵ In late February, the Security Council noted that “violations of human rights and *international humanitarian law* . . . [were] being committed in [Libya].”¹¹⁶ As international humanitarian law necessarily implies the existence of armed conflict, this statement implies that there *was* an armed conflict in “late February.” This is supported by a May ICC press release following a conference by Prosecutor Luis Moreno-Ocampo: “The Office will further investigate allegations [of crimes] . . . committed . . . *during the armed conflict that started at the end of February.*”¹¹⁷

The arrest warrants for Gaddafi, however, focus largely on the last two weeks of February, and they neither mention armed conflict nor allege war crimes.¹¹⁸ Arrest warrants in other contexts, such as the Central African Republic warrant for Bemba, do allege war crimes where they exist.¹¹⁹ The warrant for Gaddafi ranges from February 15, 2011, to “at least” February 28, 2011.¹²⁰ This later becomes “until at least 25 February” in the paragraph referencing murders as crimes

¹¹⁵ Compare Marko Milanovic, *How to Qualify the Armed Conflict in Libya?*, EUR. J. INT’L L. BLOG (Sept. 1, 2011), <http://www.ejiltalk.org/how-to-qualify-the-armed-conflict-in-libya/> (asserting that the situation in Libya was an armed conflict which became internationalized from a mixed international armed conflict to a non-international armed conflict), with Xavier Rauscher, *Libya: UNSC Refers the Situation to the International Criminal Court*, INT’L JURIST (Feb. 27, 2011) <http://www.theinternationaljurist.org/2011/02/27/libya-unscrefers-the-situation-to-the-international-criminal-court/> (disagreeing with Milanovic, stating in February, after the UN Security Council had referred the Libya situation to the International Criminal Court, that “it is hard to clearly state whether Libya is in a state of armed conflict”), and Dapo Akande, *The ICC Prosecutor Requests an Arrest Warrant for Gaddafi: Immunity Issues and Questions About the Start of the Libyan Armed Conflict*, EUR. J. INT’L L. BLOG (May 23, 2011), <http://www.ejiltalk.org/the-icc-prosecutor-requests-an-arrest-warrant-for-gaddafi-immunity-issues-and-questions-about-the-start-of-the-libyan-armed-conflict/> (“[I]t is not clear when the armed conflict in Libya started.”).

¹¹⁶ S.C. Res. 1970, *supra* note 18 (emphasis added).

¹¹⁷ Press Release, ICC Prosecutor Luis Moreno-Ocampo, *Gaddafi Used His Absolute Authority to Commit Crimes in Libya*, ICC Press Release PR667 (May 16, 2011) (emphasis added).

¹¹⁸ See Prosecutor v. Gaddafi, Case No. ICC-01/11, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1101339.pdf> (failing to mention armed conflict or war crimes).

¹¹⁹ See, e.g., Prosecutor v. Bemba, Case No. ICC-01/05-01/08, Warrant of Arrest for Jean-Pierre Bemba Gombo, ¶¶ 9, 13 (May 23, 2008), <http://www.icc-cpi.int/iccdocs/doc/doc504390.pdf> (alleging war crimes).

¹²⁰ *Gaddafi*, Case No. ICC-01/11, Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi, 4 (emphasis added).

against humanity.¹²¹ The warrant emphasizes that injuries, killings, and imprisonments of hundreds of civilians happened “within a period of *less than two weeks* in February 2011.”¹²² The Prosecutor, in his submissions, emphasized killings perpetrated during a funeral procession and during protests against unarmed civilians from February 17 to February 20.¹²³ The submissions do not focus on the one week starting on February 22, when global media suggested civil war was breaking out. The Prosecutor addressed this, noting that his allegations specifically “do not include war crimes committed during the armed conflict that started at the end of February.”¹²⁴ Moreover, neither the arrest warrant nor the verbatim record of the U.N. Security Council referral meeting mention “war crimes” or “armed conflict.”¹²⁵ Finally, the overall factual timeframe alleged is the *shortest* of any ICC case. The length of time for the commission of offenses in previous ICC jurisprudence during armed conflict has been anywhere from five months to fifteen years.¹²⁶ The ICC apparently was willing to proceed with issuing the warrant for crimes against humanity without a clear start date for armed conflict. Even the media was conflicted as to whether the situation was or was not becoming a “civil war.”¹²⁷ In sum, (1) the precise start date of the armed conflict in Libya is ambiguous, but the warrant for crimes against humanity was issued nevertheless, (2) at least half of the two-week period emphasized in the warrant probably did *not* feature armed conflict, and (3) the Security Council acted quickly outside clear armed conflict.

¹²¹ *Id.* at 5.

¹²² *Id.* at 4 (emphasis added).

¹²³ Prosecutor v. Gaddafi, Case No. ICC-01/11, Prosecutor’s Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ¶¶ 11–17 (May 16, 2011) <http://icc-cpi.int/iccdocs/doc/doc1073503.pdf>.

¹²⁴ *Id.* ¶ 2.

¹²⁵ See *id.* (failing to mention war crimes or armed conflict); U.N. SCOR, 66th Sess., 6491st mtg. at 2, U.N. Doc. S/PV.6491 (Feb. 26, 2011) (failing to mention war crimes or armed conflict).

¹²⁶ See *supra* Part II.A (discussing the time frames of various conflicts).

¹²⁷ Compare Richard Spencer, *Libya: Civil War Breaks Out as Gaddafi Mounts Rearguard Fight*, TELEGRAPH (Feb. 23, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8344034/Libya-civil-war-breaks-out-as-Gaddafi-mounts-rearguard-fight.html> (asserting that civil war had broken out by February 23), with *Civil War Possible in Libya Unrest*, REUTERS UK (Feb. 26, 2011), <http://uk.reuters.com/article/2011/02/26/libya-protests-son-idUKLDE71P0DA20110226> (reporting on February 26 that civil war was “possible”), and *Italian Minister Warns of Possibility of “Civil War” in Libya*, TRIPOLI POST (Feb. 23, 2011), <http://www.tripolipost.com/articledetail.asp?c=1&i=5465> (reporting on the Italian government’s fears of civil war breaking out).

The Prosecutor may still amend the warrant to add war crimes.¹²⁸ Even if war crime charges are added, however, the warrant will still endorse the prosecution of crimes against humanity outside armed conflict. This indicates that unambiguous existence of an armed conflict is no longer a requirement for crimes against humanity in practice.

III

CATALYZING NATIONAL JUDICIAL CAPACITY

The initiation of prosecutions in the Kenya and Libya cases signals that the ICC is beginning to fully explore and shape its statutorily granted power. Even if the cases are not fully prosecuted, the mere existence of these prosecutions serves as a tool in national judicial improvement and reform, or “capacity building.” Capacity building can take the form of implementing meaningful judicial reforms such as bolstering due process rights or witness protections.¹²⁹ These rights might also include the right to examine witnesses, access interpreters, and remain silent.¹³⁰ Because the ICC can only prosecute cases when national judiciaries are unable or unwilling, the mere existence of an ICC investigation can prod states toward reform when they wish to retain prosecutorial control.¹³¹

Professor Burke-White argues that the ICC should have a direct role in capacity building.¹³² This involves training lawyers and judges as well as having an active presence in overseeing and implementing national judicial reform. While Burke-White acknowledges the ICC’s reluctance to pursue such a policy, he nonetheless argues that it would

¹²⁸ Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, *Statement to the United Nations Security Council on the Situation in Libya, Pursuant to UNSCR 1970 (2011)*, ¶ 18 (Nov. 2, 2011) (noting the possibility that war crimes will enter the warrant).

¹²⁹ See generally Mark S. Ellis, *The International Criminal Court and Its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT’L L. 215, 225–26 (2002) (detailing offenses that need to be criminalized nationally to comply with the ICC, including giving false testimony, tampering with evidence, or corruptly influencing witnesses). Procedures must also protect judicial independence, impartiality, and equality. *Id.* at 226.

¹³⁰ *Id.* at 227. Ellis notes that some extrajudicial proceedings, like truth and reconciliation commissions (TRCs), could be permissible in lieu of prosecuting individuals with these procedural protections. *Id.* at 228–29.

¹³¹ See Yvonne M. Dutton, *Explaining State Commitment to The International Criminal Court: Strong Enforcement Mechanisms as a Credible Threat*, 10 WASH. U. GLOB. STUD. L. REV. 477, 531 (2011) (noting that states may engage in reforms to protect sovereignty).

¹³² See generally Burke-White, *supra* note 12, at 53 (arguing that the ICC “must engage more actively with national governments and must encourage states to undertake their own prosecutions of international crimes”).

be an ideal implementation. Burke-White calls this “proactive complementarity.”¹³³

I propose that the ideal role of the Court is that of a catalyst, rather than a builder. Thus, a separate concept, “capacity catalyzing,” or the *indirect* promotion of state-level judicial reform, should be used to analyze the capacity building role of the ICC. On the one hand, capacity building implies that the Court actively “builds” or reshapes state judiciaries. This is in line with Burke-White’s arguments for “proactive complementarity.” He also advances a distinct concept, that of “passive complementarity.”¹³⁴ Passive complementarity exists when the Court does the opposite, merely prosecuting cases and not interfering with national judiciaries. “Capacity catalyzing” may be a middle road—a way for passive complementarity to achieve the same objectives as proactive complementarity. In other words, capacity catalyzing is a byproduct of passive complementarity under Burke-White’s framework. The ICC may not cause sweeping structural changes immediately. Nor would this be ideal. I argue that the Court’s role should remain more distant, reviewing the judiciaries of states that are investigated and leaving specific solutions to states. I begin this Part by briefly describing the complementarity regime as a foundation for the following discussion as to how Kenya and Libya are capacity-catalyzing cases. I then predict that this trend will continue as more cases outside armed conflict are prosecuted. I conclude by bringing this Note full circle to the issues raised by the Mubarak trials in Egypt, assessing the normative argument of whether the move to national-level prosecution is a good one.

A. *The Court’s Complementarity Regime*

According to the Rome Statute, the Court must find a case inadmissible where “[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”¹³⁵ The ICC is thus a backup instrument.¹³⁶ It is neither an appellate court, nor is it meant to supplant national prosecutions where they function properly. When national courts are impartial and can ensure effective

¹³³ *Id.*

¹³⁴ *Id.* at 54 n.4.

¹³⁵ Rome Statute, *supra* note 3, art. 17(1)(a).

¹³⁶ See Moreno-Ocampo, *supra* note 23, at 481 (“[T]he best outcome of this Court would be zero cases, because that means either (1) there is no genocide, or (2) in cases of genocide, national systems are handling the prosecutions. I have to respect national decisions to prosecute cases, because the Court is *just a backup system.*” (emphasis added)).

justice, the Court must defer to them.¹³⁷ These national efforts, however, must be supported by genuine investigations and due process. The Office of the Prosecutor noted that “complementarity represents the express will of States Parties [to the ICC] to create an institution that is global in scope while recognising the primary responsibility of States themselves to exercise criminal jurisdiction.”¹³⁸ Thus, the complementarity regime protects state sovereignty and the right of a state to try its own nationals when it is able. However, as I argue in the next section, complementarity serves a unique purpose in crimes against humanity cases outside armed conflict.

B. Catalyzing Kenya and Libya Outside Armed Conflict

The cases of Kenya and Libya are prime examples of the capacity catalyzing role of the ICC. In both countries, there have been significant judicial reforms since the ICC prosecutions began. Although many criticize them as being inadequate or possibly even disingenuous, in both cases the government is responding to pressures from the ICC in various ways. In this Part, I show that the actions of the Court are promoting dialogue and defensive responses. These attempts at reform may not have occurred without the ICC’s pressures. While the Court may not necessarily be effecting sweeping change immediately, this catalyzing effect can serve to mobilize civil society groups. Though states are complex, and government responses (and strategies toward reform) are far from one-dimensional, scholars have been able to identify a rough framework under which catalyzing outside armed conflict may have advantages.

1. Indirect ICC Pressure Has Prompted Responses in Kenya and Libya

Kenya suffers from serious deficiencies in its criminal justice system, including police corruption, lack of resources, and political interference with prosecutions.¹³⁹ Yet, after the ICC began to pursue

¹³⁷ Rome Statute, *supra* note 3, art. 20(3)(b) (stipulating that no person tried before another court will be brought before the ICC unless that court’s proceedings were “for the purpose of shielding the person concerned from criminal responsibility” or otherwise “not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice”).

¹³⁸ THE INTERNATIONAL CRIMINAL COURT, OFFICE OF THE PROSECUTOR, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 4 (2003) [hereinafter ICC PAPER ON POLICY ISSUES], available at http://www.amicc.org/docs/OcampoPolicyPaper9_03.pdf.

¹³⁹ Christine Bjork & Juanita Goebertus, *Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya*, 14 YALE HUM. RTS. & DEV.

the Kenya case, the state's government appealed to the ICC. It insisted that its "house [was] being put in order" and that "fundamental and far-reaching constitutional and judicial reforms [were] very recently enacted in Kenya."¹⁴⁰ These reforms included allowing national courts to try the crimes alleged by the ICC rather than requiring the creation of special tribunals due to state inaction.¹⁴¹ The Kenyan government further emphasized that its new Bill of Rights provided greater procedural protections.¹⁴² The government even acknowledged the criticisms levied by international institutions against its judicial system which "inspired and shaped the [government's] fundamental process of reform"¹⁴³ In sum, directly after the Waki Commission, which was created to investigate the violence in Kenya,¹⁴⁴ the international community and ICC criticized Kenya's response, and the government responded with reforms. While the ICC was not the sole cause of these reforms, which were set in motion by the political violence in Kenya, it has still exerted influence on the state, promoted dialogue, and moved the government to address these issues. Kenya even emphasized that not allowing it to try its own citizens in this case would "send out the wrong message to countries that are seeking to strengthen their national jurisdictions"¹⁴⁵

Despite these reforms, the government is still unlikely to try those specific individuals indicted by the ICC.¹⁴⁶ The ICC ultimately

L.J. 205, 207 (2011) (listing the deficiencies of the Kenyan criminal justice system); see generally Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Addendum: Mission to Kenya*, U.N. Doc. A/HRC/11/2/Add.6 (May 26, 2009) (by Philip Alston) [hereinafter Special Rapporteur Report on Kenya] (discussing instances of corruption and deficiencies in the Kenyan justice system with respect to extrajudicial executions).

¹⁴⁰ Prosecutor v. Ruto, Prosecutor v. Muthaura, Case Nos. ICC-01/09-01/11, ICC-01/09-02/11, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, ¶¶ 2, 10 (Mar. 31, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1050005.pdf>.

¹⁴¹ *Id.* ¶ 23.

¹⁴² See Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Follow-up Country Recommendations – Kenya*, U.N. Doc. A/HRC/17/28/Add.4 (Apr. 26, 2011) (by Christof Heyns) (acknowledging improvements in the Bill of Rights but admonishing the government for failing to implement recommendations of the last Rapporteur, Philip Alston).

¹⁴³ *Ruto*, Nos. ICC-01/09-01/11, ICC-01/09-02/11, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, ¶ 4.

¹⁴⁴ CIPEV FINAL REPORT, *supra* note 90.

¹⁴⁵ *Ruto*, Nos. ICC-01/09-01/11, ICC-01/09-02/11, Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute, ¶ 10.

¹⁴⁶ See *id.* ¶ 32 ("The Government accepts that national investigations must, therefore, cover the same conduct in respect of persons *at the same level in the hierarchy* being investigated by the ICC." (emphasis added)); see also *id.* ¶ 71 ("In Kenya to date there have been investigations and prosecutions mostly of *low level offenders* There is every

denied Kenya's appeal, expressing skepticism of the reforms and noting that there were no proceedings or investigations in Kenya against the specific defendants before the ICC.¹⁴⁷ Christine Bjork and Juanita Goebertus, who conducted a detailed on-the-ground study of Kenyan NGO advocacy strategies as affected by the ICC, are also doubtful of any alleged reforms. However, they still argue, based on meetings with NGO leaders, that civil society groups in Kenya saw a "window of opportunity" in the ICC's actions and have been "successful in leveraging" the ICC.¹⁴⁸

Civil society will indeed be more responsive to the complex political intricacies within a state than international bodies will be, though it is difficult to generalize a response from organizations that may have diverse agendas. This will be the case mainly since those organizations work constantly within the state and will generally be more receptive to the political process. Bjork and Goebertus encountered many NGOs that supported ICC intervention, seeing it as a crucial step in furthering civic education, promoting political participation, and other grassroots reforms.¹⁴⁹

Libya has followed a similar path. While the new regime in Libya is still developing as of the publication of this Note, the National Transitional Council (NTC) has so far instituted reforms acknowledging greater rights.¹⁵⁰ Some of these include a Constitutional Declaration on respect for human rights and rights to fair trial.¹⁵¹ The NTC has encouraged supporters to avoid "revenge attacks" and to treat detainees with dignity.¹⁵² Saif Gaddafi was arrested on November 19, 2011.¹⁵³ The Libyan authorities expressed their desire to prosecute

reason to believe that continuing investigations . . . pursuant to a 'bottom up' exploration of what happened *will be much to the advantage of the rule of law generally.*" (emphasis added)). This language might suggest that the government wants to avoid any guarantees that it will prosecute those specific individuals indicted by the ICC. But the Kenya Admissibility Application also suggests that the priority of the Kenyan government is to not allow the six defendants to become scapegoats for all the violence that occurred. *Id.* ¶ 11.

¹⁴⁷ Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ¶¶ 60, 65 (May 30, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1078822.pdf> (questioning the "will of the State [Kenya] to actually investigate the three suspects").

¹⁴⁸ Bjork & Goebertus, *supra* note 139, at 226, 227.

¹⁴⁹ *Id.* at 216–17.

¹⁵⁰ AMNESTY INTERNATIONAL, YEAR OF REBELLION: THE STATE OF HUMAN RIGHTS IN THE MIDDLE EAST AND NORTH AFRICA 17 (2012).

¹⁵¹ *Id.*

¹⁵² *Id.* at 20.

¹⁵³ Prosecutor v. Gaddafi, Case No. ICC-01/11-01/11, Prosecutor's Submissions on the Prosecutor's Recent Trip to Libya, ¶ 1 (Nov. 25, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1276955.pdf>.

him nationally.¹⁵⁴ The Prosecutor responded that the Court would first need to determine if the prosecutions would provide due process.¹⁵⁵ He suggested that the elder Gaddafi's killing may have constituted a war crime.¹⁵⁶ Libya's National Transitional Council has already promised to investigate the killing.¹⁵⁷

Despite these positive responses, human rights groups have been critical of the transitional government's ability to set up a proper justice system. The government has reportedly failed to provide Saif Gaddafi with access to a lawyer or inform him of his charges.¹⁵⁸ "One of the problems of the victors dispensing justice to the vanquished is there will be political interference," said Sir Geoffrey Nice, a British Queen's Counsel who prosecuted Slobodan Milošević before the ICTY.¹⁵⁹ Over seven thousand political detainees are currently being held without access to lawyers in Libya.¹⁶⁰ Tunisia, Libya's neighbor, refused to extradite Libya's former prime minister, fearing that he would be tortured upon return to Libya.¹⁶¹ The ICC and Libya debated who would obtain custody of Al-Senussi.¹⁶² As of the writing of this Note, Al-Senussi was charged in Mauritania for illegally entering the country.¹⁶³ And Saif Gaddafi reportedly prefers to be prosecuted in the ICC, rather than in Libyan courts.¹⁶⁴

To be sure, it is unclear whether any reforms are taking effect in Libya. Amnesty International has criticized the government's failure to implement a trial system, and Libyan leaders remain defensive.¹⁶⁵ Saif Gaddafi's Australian lawyer, Melinda Taylor, was detained in Libya for nearly four weeks while visiting him.¹⁶⁶ As in Kenya, the

¹⁵⁴ *Id.* ¶ 2; Martin Chulov, *Libya Insists Saif al-Islam Gaddafi Should Be Tried at Home*, GUARDIAN (Oct. 29, 2011), <http://www.guardian.co.uk/world/2011/oct/29/libya-saif-gaddafi-justice>.

¹⁵⁵ See Luis Moreno-Ocampo, *supra* note 128, ¶ 19 ("[Whether Libya prosecutes the defendants] will be for the ICC Judges to decide.").

¹⁵⁶ Louis Charbonneau, *Gaddafi's Death May Be War Crime: ICC Prosecutor*, REUTERS (Dec. 16, 2011), <http://www.reuters.com/article/2011/12/16/us-libya-icc-idUSTRE7BF08820111216>.

¹⁵⁷ *Id.*

¹⁵⁸ Stephen, *supra* note 25.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See Blomfield, *supra* note 21.

¹⁶³ *Ex-Gaddafi Spy Chief Al-Senussi 'Charged' in Mauritania*, *supra* note 20.

¹⁶⁴ *Gaddafi Son Pleads for ICC Trial*, THE AUSTRALIAN (Aug. 2, 2012), <http://www.theaustralian.com.au/news/breaking-news/gaddafi-son-pleads-for-icc-trial/story-fn3dxix6-1226439936686>.

¹⁶⁵ See Stephen, *supra* note 25 ("We are ready to prosecute him . . . [w]e have adopted enough legal and judicial procedures to ensure a fair trial for him.").

¹⁶⁶ *Gaddafi Son Pleads for ICC Trial*, *supra* note 164.

government has attempted to defend itself by asserting that proper reforms are underway. The ICC's actions, at the very least, are eliciting explanations and reactions from the government. Global media attention is focused on the issue. This may be partly because the conflict between the ICC and the NTC produces more palatable journalism than simple coverage of Libya's internal judicial procedures. As in Kenya, this will likely mobilize civil society in the absence of NTC action. At least so far, the types of responses by the Libyan and Kenyan governments have been very similar. The future policies of the NTC are undoubtedly a "litmus test of the new regime's commitment to justice."¹⁶⁷ So far the ICC has applied pressure. This should translate, in time, to momentum for judicial reform within Libya. Unfortunately, no studies on NGO mobilization like those in Kenya have yet been undertaken by scholars in Libya. Due to continuing political unrest, it may be some time before such research is possible.

2. *How Catalyzing Is Strengthened Outside of Armed Conflict*

Bjork and Goebertus provide a persuasive framework for analyzing the comparative advantages of civil society capacity catalyzing. They identify two tools that prosecutions have provided for civil society actors—"legitimacy" and "stigma."¹⁶⁸ Legitimacy concerns the perception of groups, and stigma refers to the internal and external public relations concerns of a state. However, Bjork and Goebertus argue that these two alone are insufficient in evaluating Kenya, as they observed that many NGOs aimed to displace the national government rather than effect judicial reform.¹⁶⁹ Here they point out a paradox. On the one hand, when the ICC begins preliminary investigations, civil society groups may use it as an opportunity to incentivize reform, holding the "stick" of possible ICC prosecution as a bargaining chip.¹⁷⁰ On the other, civil society groups may equally desire that the ICC actually go through with a prosecution. In this latter case, they may focus their efforts not on reform, but on exposing as much government deficiency as possible so that the Court will declare the state unable to prosecute. This tension between the cooperative and adversarial roles of civil society groups will vary according to the country, and Kenya's political situation may pose unique challenges. Still, the notions of legitimacy and stigma lay a helpful foundation for

¹⁶⁷ Stephen, *supra* note 25.

¹⁶⁸ Bjork & Goebertus, *supra* note 139, at 223.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 222, 224.

analyzing why the prosecution of cases outside armed conflict is a particularly powerful tool for catalyzing judicial reform.

First, prosecuting crimes against humanity outside armed conflict may bring with it greater international stigma. Under the Geneva Conventions, actions failing to meet the threshold of armed conflict are framed as riots and civil disturbances—domestic occurrences that should facially fall within the sovereign authority of a state.¹⁷¹ Having the ICC—a legitimate treaty-based mechanism adopted by a majority of states—initiate an investigation signals that a state’s own judiciary is viewed negatively or is “unwilling” to prosecute.¹⁷² This effect may exist less in war crimes cases, where an international court may be viewed as merely necessary for the doctrinal expertise and impartiality it provides. It is amplified, on the other hand, in cases outside of armed conflict, where the involvement of an international court more dramatically steps into a state’s sovereign authority. As a result, a state may be forced to save face not only in front of other states, but also before civil society groups within its borders. This stigma effect may consequently provide these groups a window of opportunity to exert leverage on their government.¹⁷³

Second, ICC prosecutions outside armed conflict may lend legitimacy to a greater variety of national civil society groups. When crimes are committed outside armed conflict, there is an increased likelihood that the perpetrators are national and local police rather than the state’s military apparatus. This was the case in Kenya and was at least partially the case in Libya. In these cases civil society groups concerned with issues of monitoring policy or police misconduct will therefore be more directly and greatly implicated by ICC actions. In Kenya, it was the chief of police and attorney general who were implicated.¹⁷⁴ By having an established international organization endorse the idea that these otherwise domestic, “within our borders” crimes are legitimate violations of the law of nations, groups can be empow-

¹⁷¹ See *supra* note 33 and accompanying text (describing how riots and civil disturbances fall outside the Geneva Conventions).

¹⁷² Bjork & Goebertus, *supra* note 139, at 221.

¹⁷³ Bjork and Goebertus argue that legitimacy and stigma do not adequately explain the changes in Kenya, but concede that Kenya is a somewhat unique case because its government institutes reforms in “cycles” tied to election years; they also see a somewhat adversarial relationship between the government and civil society. *Id.* at 221–23. Kenyan civil society, they argue, seems more concerned with international justice than instituting domestic reforms. *Id.* at 223. This Note adopts a somewhat broader view in that the ICC is still serving to catalyze these actors. Reform need not mean reform *now*, and replacing members of the government can be a plausible step in that direction.

¹⁷⁴ See Special Rapporteur Report on Kenya, *supra* note 139, ¶¶ 31–32, 93–95 (finding that much of the problem in Kenya was the chief of police and attorney general, who the Rapporteur suggested should resign).

ered in ways that enhance their credibility and bargaining power. This provides argumentative and moral support,¹⁷⁵ and, in turn, makes it more difficult for governments to ignore or discredit the claims and concerns of these groups.

C. *The Future for “Capacity Catalyzing”*

The ICC Review Conference, which considered amendments to the Rome Statute, explicitly foresaw a future in which the Court encourages capacity building in states.¹⁷⁶ Prosecutor Moreno-Ocampo too has noted that one of his objectives is to “encourage and facilitate” domestic investigation and prosecution of crimes.¹⁷⁷ He has explicitly stated that he will not do so aggressively, however, which lends credence to the indirect “capacity catalyzing” model rather than the proactive model advanced by Burke-White.¹⁷⁸ Still, other commentators have stressed the capacity-building potential of the Court.¹⁷⁹ Professor Linda E. Carter notes that sixty-five States Parties to the ICC have enacted legislation against the crimes outlined by the Rome Statute, while some states have adopted concrete changes in their judiciaries.¹⁸⁰ For example, Uganda is establishing a war crimes chamber, while the DRC established a “mobile gender justice court” to try sexual assault cases.¹⁸¹ As the Kenya and Libya cases develop and more crimes against humanity are prosecuted outside armed conflict, this potential will be further realized.

Indeed, this model of indirect capacity building through the ICC’s prosecution of crimes outside armed conflict is feasible. While the orchestrated killing of hundreds of civilians is an extremely complex crime, crimes outside armed conflict may be more conducive to national prosecution than crimes committed in armed conflict. Armed conflict requires *protracted* struggle between *armed* groups. Conflicts failing to meet this threshold will probably tend to be shorter (less protracted) or less complex (unarmed groups) than those occurring in

¹⁷⁵ Bjork & Goebertus, *supra* note 139, at 221.

¹⁷⁶ International Criminal Court, Review Conference of the Rome Statute of the International Criminal Court, at 5, Doc. No. RC/11 (June 8, 2010).

¹⁷⁷ ICC PAPER ON POLICY ISSUES, *supra* note 138, at 5.

¹⁷⁸ Bjork and Goebertus describe the Prosecutor as reluctant to allow the ICC’s capacity-building role to be anything more than indirect. Bjork & Goebertus, *supra* note 139, at 213.

¹⁷⁹ See, e.g., Linda E. Carter, *The International Criminal Court in 2021*, 18 SW. J. INT’L L. 199, 208 (2011) (predicting that by 2021 the Court will have achieved significant capacity building of national judiciaries).

¹⁸⁰ *Id.* at 208–09.

¹⁸¹ *Id.* at 209 (quoting Kelly Askin, *A Crime Against Humanity Trial in South Kivu, DRC: Proof Complementarity Can Work*, INTLAWGRRLS (Feb. 18, 2011), <http://www.intlawgrrls.com/2011/02/crime-against-humanity-trial-in-south.html>).

armed conflict. Without crimes committed in the midst of armed conflict, the prosecution might not need the detailed investigations into military tactics, or ballistics, that are often necessary in armed conflict cases.¹⁸² Of course, not every case involving armed conflict may require this involved calculus, though in general, armed conflict cases may be less amenable to national prosecution.

The ICC will also likely be utilized more in future cases occurring outside armed conflict. The haste of the Security Council in referring Libya to the ICC demonstrates that the ICC has become an effective instrument in the Council's toolbox. This means the ICC's capacity catalyzing capabilities will expand. This might carry with it some challenges as well. More active referral by the Security Council (or increased *proprio motu*, or prosecutorial, referral) might raise neocolonial-type concerns about whether an international court established in The Netherlands can effect judicial reform or "rule of law strengthening from abroad."¹⁸³ An indirect ICC role through capacity catalyzing addresses many of these concerns, and probably is one of the reasons why Prosecutor Moreno-Ocampo has effectively dismissed the possibility of Burke-White's proactive complementarity.

It is worth considering how capacity catalyzing is affected, if at all, when states refer themselves to the ICC. When states refer themselves to the ICC, some scholars fear this will lead to a free-rider problem. Nidal Nabil Jurdi makes such an argument, noting that the complementarity regime allows states to avoid investing the resources necessary for effective prosecutions, because they know that the ICC will do so. Jurdi cites Uganda and the DRC, two states that referred themselves to the ICC, arguing that neither state was actually unable or unwilling to investigate or prosecute their defendants.¹⁸⁴ These cases, however, are distinguishable from Kenya and Libya, in that the states yielded to ICC prosecution.¹⁸⁵ And, as Professor Carter has argued, these states have still implemented national-level judicial

¹⁸² See, e.g., Prosecutor v. Milošević, Case No. IT-98-29/1-T, Judgement, ¶¶ 192–799 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 12 2007), http://www.icty.org/x/cases/dragomir_milosevic/tjug/en/071212.pdf (detailing sniping, shelling, and the various weapons used by the VRS in the attack on Sarajevo).

¹⁸³ Bjork & Goebertus, *supra* note 139, at 213 (comparing the views of some scholars who argue that capacity building is ineffective with those of development agencies that consider it an "elixir" for development).

¹⁸⁴ See Nidal Nabil Jurdi, *The Prosecutorial Interpretation of the Complementarity Principle: Does It Really Contribute to Ending Impunity on the National Level?*, 10 INT'L CRIM. L. REV. 73, 94 (2010) (noting that just because Uganda could not arrest suspects did not mean it was unable or unwilling to investigate and prosecute them). Jurdi also argues that the policy could encourage states to pass the burdens and costs of prosecution to the ICC. *Id.* at 96.

¹⁸⁵ *Id.* at 82.

reforms.¹⁸⁶ Professor Baylis goes further, attributing several of these reforms directly to the catalyzing effect of the ICC.¹⁸⁷

This Note has argued that the ICC is, for the first time, utilizing its statutory power to prosecute crimes against humanity outside armed conflict. I posit that the ICC prosecutions outside armed conflict boost its catalyzing effect. As seen so far with Kenya and Libya, cases occurring outside armed conflict promote efforts by governments to retain control of prosecutions. This can occur without alarming critics of broad ICC expansion. At the Rome Conference, many states from the Arab League, Africa, and Asia—including China—were worried that ICC jurisdiction over crimes against humanity outside armed conflict swept too broadly.¹⁸⁸ States like China have expressed discomfort with the ICC exercising, in the words of one commentator, “a kind of judicial review power over national criminal justice systems [and therefore having] de facto supreme judicial oversight.”¹⁸⁹ China, in particular, is concerned that its responses to the issues of Tibet, Xinjiang, and Falun Gong—purely internal affairs, in its view—might be considered crimes against humanity outside of armed conflict and subject to ICC jurisdiction.¹⁹⁰ Still, due to its position on the U.N. Security Council, China has the power to veto any referrals of cases implicating it to the ICC.

A greater concern is that prosecution of non-armed conflict crimes against humanity by the ICC may exacerbate already serious tensions between the ICC and several African states, thereby undermining the ICC’s potential to catalyze judicial reform in those states. A Congressional Research Service report emphasized that every current ICC case involves an African state, and that the African Union has “strongly objected” to various ICC actions, including issuing war-

¹⁸⁶ See *supra* note 180 and accompanying text (noting how many states have adopted ICC crimes into their own laws).

¹⁸⁷ See Baylis, *supra* note 17, at 5 (“Imperfections in the trials have highlighted areas of needed reform and created focal points for advocacy; for example, lacunae in the laws against sexual violence came to light, and advocates pressed for passage of new legislation remedying the gaps.”).

¹⁸⁸ Guan, *supra* note 39, at 740–41 (citing Rome Conference, June 15–17, 1998, Comm. of the Whole, 4th mtg., U.N. Doc. A/CONF.183/C.1/SR.28, ¶¶ 12, 90 (July 8, 1998)) (describing how the states were worried that the prosecutions outside armed conflict would cause the ICC to meddle in domestic affairs). Among these were Syria, the United Arab Emirates, Sudan, Bahrain, Iraq, Saudi Arabia, Tunisia, Algeria, Morocco, and Pakistan. *Id.*

¹⁸⁹ Gary T. Dempsey, *Reasonable Doubt: The Case Against the Proposed International Criminal Court*, 311 CATO POL’Y ANALYSIS (July 16, 1998), <http://www.cato.org/pubs/pas/pa-311.html>.

¹⁹⁰ Guan, *supra* note 39, at 743 (noting the Chinese government’s concerns about its responses to the Xinjiang and Tibet riots on July 5, 2009 and March 14, 2008, as well as the anti-Communist activities of the Falun Gong around the 2008 Beijing Olympic Games).

rants for Sudanese President Al-Bashir as well as Gaddafi.¹⁹¹ This has enormous implications for the legitimacy of the Court and its ability to catalyze national judicial reform, and may increase resistance both to the ICC and to prosecuting perpetrators. Moreover, some states with judicial systems in desperate need of reform, such as Sudan,¹⁹² may prove to be especially difficult cases for capacity catalyzing. Because Sudan has not acceded jurisdiction to the ICC and is witnessing severe political divisions, there may be little desire to attempt to even prosecute perpetrators or acknowledge the ICC. This would, in turn, undermine the efforts of civil society groups mobilized by the Court. Given the level of communication and defensiveness exhibited in the Kenyan and Libyan governments in response to ICC action, overwhelmingly poor judicial capacities like those in Sudan will hopefully be an extreme, rather than the norm.

There are also political hurdles to initiating an ICC investigation in the first place.¹⁹³ Cases must be referred by a state or the Security Council, or initiated by the Prosecutor proprio motu. Self-referral usually entails state cooperation, eliminating much of the incentive structure leading to capacity building. Still, as the judicial reforms in Uganda and the DRC show, this does not necessarily mean a stay on *any* national reform. Referral by the Security Council requires what commentator Benjamin Perryman refers to as the “critical mass of political will” required to bring perpetrators before the Court.¹⁹⁴ Because Security Council referral necessarily involves political balancing by the permanent members with veto power, others argue that international criminal enforcement boils down to “realist power politics.”¹⁹⁵ Syria illustrates this. The country has received global attention and condemnation for violent government crackdowns on

¹⁹¹ Alexis Arieff et al., Cong. Research Serv., RL34665, International Criminal Court Cases in Africa: Status and Policy Issues 26, 27 (July 22, 2011); see also *Dim Prospects: The International Criminal Court Loses Credibility and Co-operation in Africa*, THE ECONOMIST, Feb. 19, 2011, at 66, available at <http://www.economist.com/node/18176088> (noting that the Court is “disliked by many African governments” and should refrain from “excess zeal”).

¹⁹² See Jakob Pichon, *The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb Before the International Criminal Court*, 8 INT’L CRIM. L. REV. 185, 202–14 (2008) (describing the failings of the Sudanese judicial system).

¹⁹³ See Raluca David, *The International Criminal Court and the Doctrine of Complementarity* 15–22 (2011), available at <http://ssrn.com/abstract=1809971> (discussing how the ICC “does not operate in a vacuum” politically and how ICC prosecutions can be at tension with state sovereignty).

¹⁹⁴ See Benjamin Perryman, *Review: Eve La Haye, War Crimes in Internal Armed Conflicts* (Cambridge, UK: Cambridge University Press, 2008), 36 QUEEN’S L.J. 673, 683–84 (2011) (describing the argument of Eve La Haye as to why the effectiveness of the ICC might be undermined).

¹⁹⁵ Burke-White, *supra* note 5, at 27.

protests akin to Libya.¹⁹⁶ Yet, unlike Libya, it has not seen any collective foreign action.¹⁹⁷ Russia and China both vetoed a Security Council condemnation of the Syrian government.¹⁹⁸ Unless the Prosecutor initiates an investigation proprio motu, ICC involvement is unlikely. The Court will be a powerful tool moving forward, but it is far from a panacea.

D. *Is National Prosecution Best?*

National courts are the first and most natural stage of recourse for victims of human rights abuses. In transitional governments, functional justice is one promise of a fallen dictatorial regime and emerging democratic values. National prosecutions can facilitate a collective healing process within a state after atrocities are committed.¹⁹⁹ Moreover, a new regime, if it is responsive to the needs of the people, may be equipped and willing to pursue criminal prosecution of former leaders. Two famous examples of such national prosecution were the prosecutions of Augusto Pinochet of Chile and Alberto Fujimori of Peru. Pinochet was tried in the Chilean Courts, largely for the human rights abuses and EJE's committed during the "Caravan of Death."²⁰⁰ He died before any judgments were handed down.²⁰¹ Fujimori, President of Peru in the 1990s, turned death squads against his own people. He was convicted by the Peruvian Supreme Court for the massacres committed at Barrios Altos and La Cantuta against per-

¹⁹⁶ See Roula Khalaf, Op-Ed, *Unity Tested as Uprising Takes Militarised Turn*, FINANCIAL TIMES (Oct. 4, 2011), <http://www.ft.com/intl/cms/s/0/4f376d46-ee9a-11e0-9a9a-00144feab49a.html?ftcamp=rss#axzz1b5I661Pp> (noting how the Syrian protests were in their seventh month in October, 2011, and the regime was still escalating violence against protesters); Agence France-Presse, *Gunfire, Arrests Mark Seventh Month of Syria Protests*, NOW LEBANON (Oct. 15, 2011), <http://nowlebanon.com/NewsArchiveDetails.aspx?ID=322262#> (same).

¹⁹⁷ See U.N. SCOR, *supra* note 125, at 2 (showing the unanimous vote for referring Libya to the ICC).

¹⁹⁸ *Id.* at 2 (noting that China and Russia voted against the resolution).

¹⁹⁹ See Brady Hall, *Using Hybrid Tribunals as Trivias: Furthering the Goals of Post-Conflict Justice While Transferring Cases from the ICTY to Serbia's Domestic War Crimes Tribunal*, 13 MICH. ST. J. INT'L L. 39, 61 (2005) (noting that hybrid tribunals can be particularly useful in ensuring justice while also promoting national healing); Rosanna Lipscomb, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV. 182, 197–98 (2006) (noting that a domestically situated but internationally overseen mechanism may be more effective at promoting national reconciliation than purely international tribunals).

²⁰⁰ Heather Walsh, *Augusto Pinochet, Chilean Dictator for 17 Years, Dies (Update2)*, BLOOMBERG (Dec. 10, 2006), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aHzYOpudu4as>.

²⁰¹ *Id.*

ceived political dissidents who turned out to be unarmed civilians.²⁰² Peru had incorporated many of the crimes of the Rome Statute into its own constitution, but since that occurred after the massacres, the crimes committed by Fujimori were tried as offences under national law.²⁰³ Scholars like Professor Baylis critique that, after the disappointing ten-year track record of the ICC, national prosecutions should be favored.²⁰⁴ She cites challenges such as effective outreach, arguing that “[h]ybrid and international courts are simply too few and too slow to take on the lion’s share of this work.”²⁰⁵

On the other hand, national courts have their limitations. I classify these roughly as doctrinal, political, and procedural. Doctrinally, national legislatures may not have developed penal codes that address the type of widespread human rights violations perpetrated by oppressive regimes. Charging mass murder as simply a myriad of counts of murder likens former heads of state to domestic criminals. While acknowledging the volume of killings committed, such a method may fail to do justice to or acknowledge the gravity of a scheme of deliberately orchestrated extermination.²⁰⁶ Politically, national courts may not even try their former leaders in war crimes cases.²⁰⁷ Some perpetrators of human rights abuses and their cohorts may still retain power, despite an executive transition.²⁰⁸ During post-regime development, as remnants of the old regime linger, courts may be biased, inexperienced, or even corrupt. This was an issue in Kenya in the aftermath of the post-election violence.²⁰⁹ Contrast this, however,

²⁰² See Aimee Sullivan, *The Judgment Against Fujimori for Human Rights Violations*, 25 AM. U. INT’L L. REV. 657, 765–66 (2010) (translating the Supreme Court of Peru’s decision finding former President Alberto Fujimori responsible for the Barrios Altos and La Cantuta massacres).

²⁰³ See Lisa J. Laplante, *The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court’s Sphere of Influence*, 43 J. MARSHALL L. REV. 635, 660 (2010) (noting the “difficulty” faced by the Peruvian Special Court because the international crimes tried were not codified during the massacres in question, so the Court relied on trying them as “ordinary offences”).

²⁰⁴ Baylis, *supra* note 17, at 3–4.

²⁰⁵ *Id.* at 24.

²⁰⁶ See Burke-White, *supra* note 5, at 16 (noting that many states simply have not passed legislation enabling proper prosecution of large-scale crimes).

²⁰⁷ See Philippe Sands, *After Pinochet: The Role of National Courts*, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 68, 72 (Philippe Sands ed. 2003) (noting that national courts rarely try their leaders and are even less likely to do so where charges center around crimes against humanity or genocide).

²⁰⁸ See Philippe Kirsch, *Introductory Remarks*, in THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS 1, 2 (Mauro Politi & Federica Gioia eds., 2008) (“[H]istorically agents of the state themselves often were complicit in or even directing the crimes later referred to international tribunals.”).

²⁰⁹ See Special Rapporteur Report on Kenya, *supra* note 139, ¶¶ 31–32, 93–95 (observing after visiting Kenya that “[t]he judiciary in Kenya is an obstacle in the path to a

with the Peruvian and Argentinian cases, where at least a decade passed since the former leaders were in power. Procedurally, limitations may also undermine the process. Courts may not have the proper fact-finding or investigative tools.²¹⁰ Tribunals typically address large-scale crimes committed by heads of state or other prominent officials. These cases consequently have complex factual situations requiring voluminous discovery. These are by nature unlike most cases that show up before national courts.

Some of these concerns are mitigated outside armed conflict. Doctrinally, as the Fujimori case demonstrated, crimes against humanity can be prosecuted nationally without necessarily incorporating the explicit crimes of the Rome Statute. As more crimes against humanity are prosecuted outside armed conflict, future scholarship might weigh the advantages of incorporating the Rome Statute into national legislation. Politically, there may be more pressure to retain prosecutorial control over cases. As in Kenya and Libya, governments may at the very least make superficial gestures toward reform that can then be used as anchors for civil society groups to exert pressure. The other concern—procedure—will pose the greatest challenge for national-level prosecution. Crimes against humanity require offenses to meet a threshold of “widespread” and “systematic,”²¹¹ and could still lead to voluminous discovery. This is certainly the case in Kenya or Libya where the prosecution alleged that hundreds, or even one thousand, individuals were killed. Still, the fact that the ICC took ten years to secure its first conviction, which may “horrify” Saif Gaddafi’s victims in Libya,²¹² leaves open the possibility that national processes may be more efficient. Future cases will certainly provide greater clarity as to whether national-level prosecutions, post-catalyzing, will more effectively tackle these issues.

CONCLUSION

The Kenya and Libya cases signal new ground for the ICC, tying together two separate tracks of ICC-related discourse. While the

well-functioning criminal justice system”). Then U.N. Special Rapporteur for EJE, and New York University School of Law Professor, Philip Alston, investigated Kenya and concluded that the justice system was filled with “crony[ism]” and “extraordinary levels of corruption.” *Id.* He further advised that political control over prosecutions should be completely eliminated. *Id.*

²¹⁰ See Burke-White, *supra* note 5, at 16 (noting that local courts may lack basic legal tools).

²¹¹ *E.g.*, Rome Statute, *supra* note 3, art. 7(1).

²¹² Blomfield, *supra* note 21 (“The prospect of Senussi standing trial at the notoriously slow ICC, which only secured its first conviction in 10 years last week, will horrify his many victims.”).

armed conflict nexus for crimes against humanity was removed in the Rome Statute, these cases were the first to implement that change in fact. Cases like these will serve an indirect role of capacity catalyzing that fits into the Court's overall complementarity framework. Sweeping structural reforms have not yet occurred. But at the very least, the ICC mobilizes civil society. It has sparked defensive reactions in both Kenya and Libya. This "soft law" response promotes internal dialogue and centers the national spotlight on judicial reforms. More is happening than if the ICC had never taken up these cases—cases that occurred outside armed conflict.