

THE INTERNATIONAL CRIMINAL COURT IN GUINEA: A CASE STUDY OF COMPLEMENTARITY

Will Colish

Volume 26, numéro 2, 2013

URI : <https://id.erudit.org/iderudit/1068077ar>

DOI : <https://doi.org/10.7202/1068077ar>

[Aller au sommaire du numéro](#)

Éditeur(s)

Société québécoise de droit international

ISSN

0828-9999 (imprimé)

2561-6994 (numérique)

[Découvrir la revue](#)

Citer cet article

Colish, W. (2013). THE INTERNATIONAL CRIMINAL COURT IN GUINEA: A CASE STUDY OF COMPLEMENTARITY. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, 26(2), 23–45. <https://doi.org/10.7202/1068077ar>

Résumé de l'article

En vertu du principe de complémentarité, la Cour pénale internationale et les systèmes de justice criminelle nationaux travaillent ensemble pour poursuivre les auteurs des pires crimes. Ce principe, inscrit à l'article 17 du *Statut de Rome*, énonce que la Cour n'interviendra que si l'État n'a pas la volonté ou la capacité de mener à bien une enquête ou des poursuites. Depuis l'entrée en vigueur du *Statut de Rome*, la complémentarité a évolué avec la pratique. Le Bureau du Procureur a adopté une pratique de « complémentarité positive » selon laquelle il aide activement un État à satisfaire ses obligations du *Statut de Rome*, plutôt que de simplement attendre de voir si l'État a la volonté et la capacité d'agir. La complémentarité positive considère la frontière séparant la Cour et les États perméable, laissant passer des expertises, de la coordination, et de la documentation aux fins de mettre un terme à l'impunité. Cependant, les parties peuvent coopérer de plusieurs façons sous ce régime. La pratique actuelle dépend beaucoup de la participation des acteurs et réseaux internationaux. Bien que ces réseaux puissent acheminer des ressources vers un but de justice, ces acteurs peuvent aussi avoir des intérêts concurrents, rendant au mieux une image de justice confuse; au pire, ces intérêts peuvent produire des brèches dans la lutte à l'impunité qu'aucune stratégie de poursuite ne pourrait tolérer. L'objectif de cet article est de présenter comment la situation en Guinée présage le développement de telles brèches. Il offre d'importantes leçons sur les moyens de tendre vers une pratique de complémentarité plus proactive.

THE INTERNATIONAL CRIMINAL COURT IN GUINEA: A CASE STUDY OF COMPLEMENTARITY

*Will Colish**

The International Criminal Court (ICC) and domestic criminal justice systems work together to prosecute the worst crimes through the principle of complementarity. This principle, enshrined in article 17 of the *Rome Statute*, holds that the Court will only intervene if a State is either unwilling or unable to investigate crimes falling within the Court's jurisdiction. Since the entry into force of the *Rome Statute*, complementarity has evolved with practice. The Office of the Prosecutor now adopts a practice of "positive complementarity", meaning that, more than simply wait on the sidelines to determine whether a State is both willing and able, the Court now takes an active role in helping a State fulfil its *Rome Statute* obligations. Positive complementarity treats as permeable the border between the ICC and States, through which expertise, coordination, and documentation pass in an effort to end impunity. But there are various ways in which the Court and States can work together in this process. The current practice leans on international networks and actors to help a State investigate and prosecute. While the addition of these actors can channel resources toward the aim of justice, competing aims of the players within these networks can make for a confused picture at best; at worst they can tear open large impunity gaps that no prosecutorial strategy could tolerate. The case of Guinea forebodes these gaps and provides important lessons on how they may be closed through a more proactive approach to complementarity—such is the focus of this article.

En vertu du principe de complémentarité, la Cour pénale internationale et les systèmes de justice criminelle nationaux travaillent ensemble pour poursuivre les auteurs des pires crimes. Ce principe, inscrit à l'article 17 du *Statut de Rome*, énonce que la Cour n'interviendra que si l'État n'a pas la volonté ou la capacité de mener à bien une enquête ou des poursuites. Depuis l'entrée en vigueur du *Statut de Rome*, la complémentarité a évolué avec la pratique. Le Bureau du Procureur a adopté une pratique de « complémentarité positive » selon laquelle il aide activement un État à satisfaire ses obligations du *Statut de Rome*, plutôt que de simplement attendre de voir si l'État a la volonté et la capacité d'agir. La complémentarité positive considère la frontière séparant la Cour et les États perméable, laissant passer des expertises, de la coordination, et de la documentation aux fins de mettre un terme à l'impunité. Cependant, les parties peuvent coopérer de plusieurs façons sous ce régime. La pratique actuelle dépend beaucoup de la participation des acteurs et réseaux internationaux. Bien que ces réseaux puissent acheminer des ressources vers un but de justice, ces acteurs peuvent aussi avoir des intérêts concurrents, rendant au mieux une image de justice confuse; au pire, ces intérêts peuvent produire des brèches dans la lutte à l'impunité qu'aucune stratégie de poursuite ne pourrait tolérer. L'objectif de cet article est de présenter comment la situation en Guinée présage le développement de telles brèches. Il offre d'importantes leçons sur les moyens de tendre vers une pratique de complémentarité plus proactive.

* B.A., M.A., LL.B., B.C.L. Me William Colish is currently a law clerk at the Court of Appeal of Québec. The present article draws in large part on work done during an internship at Human Rights Watch in the summer of 2012. The author would like to thank Nandini Ramanujam, Richard Dicker, Elise Keppler, Pam Singh, Balkees Jarrah, Scout Katovich, Hannah Morrill, and Danielle Fritz.

The principle of complementarity is the lynchpin that holds the International Criminal Court (ICC) and domestic criminal justice systems together. This principle means that the Court will only intervene if a State is either unwilling or unable to investigate crimes falling within the Court's jurisdiction. The Court and domestic criminal justice systems form the architecture that is designed to house the trials of offenders of the most serious crimes—genocide, crimes against humanity, and war crimes. Pull out this pin—complementarity—and the structure may very well fall: the Court becomes little more than a distant, perhaps neocolonial, institution to punish African leaders, and domestic criminal justice systems are left to the sway of local and regional politics, where interest in trying leaders responsible for the most serious crimes is often weak.

More than simply hold the pieces of international criminal justice together, the principle of complementarity can help strengthen the ability of local governments to end cycles of impunity. Complementarity aims to keep justice local and ensure that victims are able to participate in proceedings. It also encourages States to develop their national justice systems to meet the needs of trials for the most serious crimes. This encouragement can lead to reforms in national criminal legislation, appointments of special investigative and prosecutorial bodies, and cooperation with other States that possess expertise related to *Rome Statute*¹ crimes (to name a few of the benefits). This principle, in other words, can mark the turning point in a country's effort to move away from a cycle of impunity and toward national healing.

In practice, however, this principle can enable less-than-committed governments to make flowery declarations that in reality amount to little progress on the ground. A government can say that it is willing and able to investigate; it can present roadmaps to justice; it can make detailed action plans for legislative and judicial reforms, for victims' compensation funds, and for witness protection programs; and it can receive and make commitments to donors and ICC delegations. A government can do all of these things; but none, nor all of those things collectively, amount to justice.

Preliminary or faltering steps toward justice may not provide much comfort to victims, but they will keep the ICC at bay. Where a State appears to be taking action, or at least trying to take action, there is little that the ICC can do to question that appearance and take control of the situation. The principle of complementarity comes with no timeline or blueprint for investigations, prosecution, compensation, etc.—but this is with good reason. Too rigid an application of the principle and a State might miss out on its opportunity to make amends for its past wrongs, wrongs which might be the result not just of a few individuals but also of a fledgling justice system. The cooperative framework of the *Rome Statute* is supposed to help States address the shortcomings of national legal orders.

Guinea is a country that offers important lessons on how the principle of complementarity can, or may fail to, address those shortcomings. Many of its citizens

¹ *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) [*Rome Statute*].

and residents were victims of a violent crackdown led by government forces on 28 September 2009. Protestors had gathered that day in a stadium to oppose the ruling government. Members of the presidential guard fired indiscriminately upon them and engaged in other acts of violence, which led to at least 150 people murdered, dozens of public rapes, and more than 1,000 injured.² Since that time, the government has taken steps to investigate acts that likely constitute crimes against humanity.³ The government has done so with the help of the ICC—the two working together under the principle of complementarity to hold those responsible for events of September 28 to account. More than four years after the events, however, not a single person has been brought to trial. The lack of progress raises important questions about the effectiveness of complementarity.

The questions raised and possible responses they may receive will be dealt with in three sections of this essay. In the first part, I will expand upon the meaning of complementarity in theory, and situate the notion of positive complementarity within a range of relationships that the Court may have with States. Second, I will consider how complementarity looks in practice, using Guinea as a case study. Specifically, I will describe the events that took place in Guinea, the domestic government's response and the ICC's involvement. My aim here will be to present the elements of the relationship of complementarity and analyze the extent to which they live up to the expectations of this principle. Using the Guinean example, I will outline the weaknesses of complementarity and consider ways to strengthen it in the third section of the essay.

Guinea offers a good case study for the effectiveness of complementarity. It is one of the countries to be subjected to ICC scrutiny following the Office of the Prosecutor's policy shift toward positive complementarity. The government has officially assumed responsibility for the investigation and prosecution of the September 28 massacre and rapes, but it needs help in order to see this through. This challenging combination of relatively strong willingness and weak capacity put into motion the actors and institutions that are supposed to make complementarity work. The disappointing results in Guinea's investigation thus far provide valuable lessons on weaknesses of complementarity and invite reflection on how international criminal justice might be better served—such is the aim of this paper.

I. Complementarity in Theory

The role and importance of complementarity is significant. "Article 17

² Ban Ki-moon, *Letter dated 18 December 2009 addressed to the President of the Security Council by the Secretary-General*, UN Doc S/2009/693 at 2 [mimeo] [Ki-moon]; Human Rights Watch, "Bloody Monday The September 28 Massacre and Rapes by Security Forces in Guinea" (December 2009) at 4, online: HRW <http://www.hrw.org/sites/default/files/reports/guinea1209web_0.pdf> [Human Rights Watch, "Bloody Monday"].

³ *Ibid.*

dealing with [complementarity] is the cornerstone of the *Rome Statute*.⁷⁴ The two walls adjoining this cornerstone are domestic criminal jurisdiction and the ICC. The system of international criminal law depends on these two walls being connected to one another. Left on its own, domestic criminal jurisdiction is the *status quo ante* the *Rome Statute*: an often weak check on the powers of those who commit the worst crimes. Impunity is the norm—and the most common deviation from it is little more than victors' justice. Such was the situation in Guinea during the reign of the President of the First Republic, Sekou Touré. Trials of opposition leaders were designed to produce convictions.⁵ By the same token, if the ICC is not connected to the domestic criminal justice systems of the States parties of the *Rome Statute*, it appears to don the robes of a colonial institution—passing judgment on African leaders from within the chambers of the courthouse in The Hague.

The ICC and domestic criminal jurisdictions must connect with one another in order for the system to work as a whole; but the mechanism by which they are connected is more complicated than simply erecting walls adjoining by a cornerstone. The principle of complementarity is a complex set of rules that determine when a case is admissible before the ICC. Understanding these rules is essential to gauge the potential and the limits of complementarity.

A. The Mechanism of Complementarity

Article 17 determines when the ICC can admit a case for investigation and prosecution. Framed in the negative, the article envisages four scenarios in which a case may not be admitted before the court: 1) the State concerned is already investigating or prosecuting the matter; 2) the State concerned has already completed an investigation and determined that the individual should not be prosecuted; 3) the State concerned has already tried the person; and 4) the case does not meet the gravity threshold to merit the attention of the court.⁶

⁴ Sharon A Williams, "Article 17: Issues of Admissibility" in Otto Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft, 1999) 383 at 384. As William A Shabas put the importance of this article, "Without article 17, it is doubtful that the *Rome Statute* could have been adopted": William A Shabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2009) at 336.

⁵ See e.g. Maurice Jeanjean, *Sékou Touré : Un totalitarisme africain* (Paris: L'Harmattan, 2005) at 84-89.

⁶ *Rome Statute*, *supra* note 1, s 17. Article 17(1) reads as follows:
Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
(a) The 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;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

Of these four scenarios, only the first two are of concern in the case of Guinea. The third scenario is conditional on the trial not being a sham, but no trial has of yet begun in Guinea. The fourth maintains the Court's focus on the most serious offences, thereby economizing its resources and holding States responsible for ordinary criminal law jurisdiction.

While no legal determination has been made as to the gravity of the offences committed in Guinea, few would argue that the deaths of more than 150 people, over 100 public rapes, and more than 1,000 injuries within the span of a few days fall below the gravity threshold. In fact, once a determination is made that an act comes within the subject-matter jurisdiction, such as the alleged crimes against humanity in Guinea, gravity only serves to focus the Court's attention on all but peripheral offences. In its *Decision to authorize investigation in Kenya*, the Pre-Trial Chamber II held that gravity should be assessed in light of the following factors:

- (i) the scale of the alleged crimes (including assessment of geographical and temporal intensity); (ii) the nature of the unlawful behaviour or of the crimes allegedly committed; (iii) the employed means for the execution of the crimes (i.e., the manner of their commission); and (iv) the impact of the crimes and the harm caused to victims and their families.⁷

Without embarking on a comprehensive analysis of the situation in Guinea, the acts committed there have been identified as crimes against humanity by the International Commission of Inquiry (COI).⁸ These findings, combined with a review of the factors related to gravity suggest that the situation in Guinea would meet the threshold to be admissible.

Leaving aside the question of gravity, the first two scenarios under paragraphs a) and b) of article 17 are designed to ensure respect for the integrity of domestic proceedings, but this respect is accorded on two conditions: the State must be both willing and able to carry out the investigation or prosecution. These conditions are assessed in a two-part admissibility test. An article 17 analysis first confirms whether the State has discharged or is discharging its burden to investigate the crimes, and then whether a failure to discharge that burden resulted from a State being unwilling or unable to do so. As stated in the Pre-Trial Chamber II *Decision to authorize an investigation in Kenya*, "the Chamber underlines that the first step concerns the absence or existence of national proceedings."⁹ In their absence, a case is admissible and there is no need to proceed to the second step. If proceedings are underway, then at the second stage of the test the Court assesses whether the State in question is both willing and able to see the proceedings through.

(d) The case is not of sufficient gravity to justify further action by the Court.

⁷ *Situation in the Republic of Kenya*, ICC-01/09, Judgement on the Authorization of an Investigation (31 March 2010) at para 62 (International Criminal Court, Pre-Trial Chamber II), online: ICC <<http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>> [*Decision to Authorize Investigation in Kenya*].

⁸ Ki-moon, *supra* note 2 at 3; See also Human Rights Watch, "Bloody Monday", *supra* note 2 at 5.

⁹ See *Decision to Authorize Investigation in Kenya*, *supra* note 7 at para 53.

The “willing” and “able” parts of the test are the core of the interest in complementarity here. They give rise to multiple visions of how complementarity should work. In the next section, I will outline a range of relationships of complementarity according to the levels of willingness and ability on the part of the State concerned.

B. Willing and Able: A Spectrum of Complementarity

The varying levels of willingness and ability provide a spectrum along which different relationships of complementarity can be forged. Underlying these relationships are also different visions of the role of the Court and the type of support it should lend countries that are struggling to investigate and prosecute *Rome Statute* crimes.

At one end of the spectrum, we can imagine an ideal scenario where a country is fully willing and perfectly able to carry out the investigation and prosecution. It was in fact the prosecutor’s dream to have an “International Criminal Court that has to deal with no cases because of the effective functioning of domestic judiciaries.”¹⁰ Such a dream is made possible through the *Rome Statute*, which “[i]ronically [...] contemplate[s] an institution that may never be employed.”¹¹ While this dream is far from reality, domestic jurisdictions have prosecuted *Rome Statute* crimes with little or no intervention from the ICC. For example, in 2006 Corporal Payne became the first British soldier to be convicted of a war crime. The trial took place in a United Kingdom military court and the conviction was entered under the United Kingdom *International Criminal Court Act*.¹² The conviction was a notable sign of progress for the *Rome Statute* project, but the ICC as an institution had no role to play.¹³ The ICC remained an option in theory for prosecution, if domestic proceedings were never initiated or went awry. Complementarity in this type of scenario means little more than the ICC backing off and letting the domestic process run its course. At this end of the spectrum, complementarity is unnecessary because prosecution occurs without the ICC exercising its complementary role.

¹⁰ Carsten Stahn, “Introduction: Bridge over Troubled Waters?: Complementarity Themes and Debates in Context” in Carsten Stahn & Mohamed M El Zeidy, eds, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011) vol 1, 1 at 3; see also Luis Moreno-Ocampo, “A Positive Approach to Complementarity: The Impact of the Office Prosecutor” (in *ibid* 21 at 24).

¹¹ John T Holmes, “Complementarity: National Courts *versus* the ICC” in Antonio Cassese, Paola Gaeta & John RWD Jones, *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) vol 1, 667 at 667.

¹² *International Criminal Court Act 2001* (UK), c 17.

¹³ Prosecution at the ICC was an unlikely prospect, however, given that the crimes did not meet the gravity threshold. For analysis of the Payne case and its relationship to the ICC, see Nathan Rasiyah, “The Court-martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice” (2009) 7:1 *Journal of International Criminal Justice* 177.

This deferential posture of the ICC toward domestic proceedings was emphasized by scholars and delegates at the Rome Conferences, which led to the statute in force today, in order to allay fears of a court that trampled over national sovereignty.¹⁴ The Court's first President, Philippe Kirsch, stated three years before the Court came into force that "it is the essence of the principle [of complementarity] that if a national judicial system functions properly, there is no reason for the ICC to assume jurisdiction."¹⁵ This statement came at a time when the Preparatory Committee of the *Rome Statute* was working to "reassure States that [were] still hesitant about the ICC that it will indeed operate fairly, and not exercise its jurisdiction in an uncontrolled, capricious, political manner."¹⁶

It may be true that non-intervention of the ICC was the defining feature of complementarity in its pre-operational state, but one may question what import this has in today's reality, where situation countries lack the resources to do the heavy lifting of justice. *Rome Statute* crimes are more easily committed in areas where the rule of law is lacking. The rule of law stems in part from an independent and effective justice system, i.e., one that would be able to try perpetrators of *Rome Statute* crimes; it also stems in part from the governmental will to apply the law to all and to itself. It therefore seems plausible, in theory at least, that a country marred by the worst crimes would also be afflicted by a weak justice system and a government that is uncommitted to apply the law to all in the first place.

Of course, the rule of law cannot guarantee protection against *Rome Statute* violations. A country whose justice system would be up to the task and whose government would be willing to prosecute *Rome Statute* crimes may nevertheless commit violations. The point is simply that a government in this latter situation is more likely to operate in environment of accountability and deterrence, which makes the commission of *Rome Statute* crimes more difficult.

At the other end of the spectrum are cases where the government is either significantly unwilling or unable, or both. In this case, there is little that the government could mount as an admissibility challenge. The Court would assume jurisdiction, thereby complementing the first level of responsibility for international criminal justice. The impunity gaps that existed prior to the arrival of the ICC are well closed at this end of the spectrum. The situation in Darfur stands as a good example. The government of Sudan was not even willing to sign the *Rome Statute*, let alone investigate the crimes that took place during the conflict. It took the intervention of the United Nations Security Council to refer the matter to the Court and launch an investigation. The government has refused to comply with arrest warrants issued

¹⁴ See e.g. Williams, *supra* note 4 at 384-92; Philippe Kirsch, "Keynote Address" (1999) 32:3 Cornell LJ 437 at 439-40; Carsten Stahn, "Complementarity: A Tale of Two Notions" (2008) 19:1 Crim LF 87 at 96 [Stahn, "Two Notions"]; Mohamed M El Zeidy, *The Principle of Complementarity in International Criminal Law* (Leiden: Martinus Nijhoff, 2008) at 160, 163, 236 [El Zeidy, *Principle of Complementarity*]; William A Schabas, "Complementarity In Practice': Some Uncomplimentary Thoughts" (2008) 19:1 Crim LF 5 at 6.

¹⁵ Kirsch, *supra* note 14 at 438.

¹⁶ *Ibid* at 440.

against its top officials, including President Omar al-Bashir.¹⁷ Barring a regime change, the government will not assume jurisdiction over the matter—indeed they do not even recognize the need for any kind of judicial resolution. In this case, there is no challenge that can be made to the Court’s jurisdiction. At this end of the spectrum the ICC is required to intervene.

One might see this approach to complementarity as the defining feature of the ICC. “The complementarity principle is intended to preserve the ICC’s power over *irresponsible* States that refuse to prosecute those who commit heinous international crimes.”¹⁸ It is against this refusal that the ICC carries on the fight to end impunity.

The view of complementarity at this end of the spectrum is somewhat problematic, however. A total absence of State cooperation frustrates the Court’s work. If a State is as unwilling, as Sudan is, then the impunity gaps remain for as long as the government is in power or for as long as it can seek protection from friendly nations. Arrest warrants may be issued, but there is no intermediary force to guarantee compliance with them.¹⁹ If “States refuse to cooperate, the Court must [...] turn out to be utterly impotent.”²⁰ In order for the system of international criminal justice to work, there must be some level of cooperation between the State concerned and the ICC.

Neither end of this complementarity spectrum captures the relationship that Guinea has with the ICC; nor do these poles illustrate the capacity of the ICC to secure justice. Rather, it is in the middle ground between these ends that a cooperative relationship between Guinea and the ICC has evolved. This relationship enables “an element of flexibility and a managerial division of labour into the relationship between the Court and domestic jurisdictions.”²¹ Before considering the specific case of Guinea, I will elaborate on this division of labour in the next section by contrasting three models of complementarity: classical, positive, and hybrid.

C. The Middle Ground: Classical, Positive and Hybrid Complementarity

Between these two ends of the spectrum lies a range of relationships of complementarity. A government may be willing to investigate but lacks, for example,

¹⁷ See e.g. International Criminal Court, *Report of the International Criminal Court*, 14 August 2012 at 13, online: ICC

<http://www.icc-cpi.int/en_menus/icc/reports%20on%20activities/court%20reports%20and%20statements/Documents/A67308EN.pdf> [International Criminal Court, 2012 Annual Report].

¹⁸ El Zeidy, *Principle of Complementarity*, *supra* note 14 at 158 [emphasis added].

¹⁹ For a detailed discussion of complementarity in Sudan, see Robert Cryer, “Darfur: Complementarity as the Drafters Intended?” in Carsten Stahn & Mohamed M El Zeidy, eds, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge: Cambridge University Press, 2011) vol 2, 1097.

²⁰ Claus Kreß et al, “Part 9: International Cooperation and Judicial Assistance” in Triffterer, *supra* note 4, 1045 at 1045.

²¹ Stahn, “Two Notions”, *supra* note 14 at 88.

material or judicial resources. Conversely, there may be no question of ability, but instead the government prefers to heal deep wounds following widespread violence rather than bring the perpetrators to justice. In either case, the Court plays an important role in nudging upward a government's willingness or ability to investigate and prosecute. The Court may advise a government on how to support its judiciary or enact legislative reform that would include *Rome Statute* crimes. Alternatively, the Court may help convince a government that accountability is an important step toward peace rather than an obstacle.

The facts of the situation will determine the type of response from the ICC, whose intervention is not flipped like an on/off switch, but instead adapts to changing circumstances in order to bring about the best prospect for justice. As developed in the prosecutor's initial application of the principle, "decisions about the proper forum of justice and the selection of cases were shaped by normative criteria, such as the comparative advantage of the respective forum, rather than domestic failure."²²

It is within this range of relationships that the principle of complementarity has its greatest impact, and arguably where there is the most at stake for international criminal justice. Its impact is greatest because the Court can not only assist a government with investigation and prosecution for specific crimes but also help it build a durable justice system that can deter future crimes. The stakes are high in this range because the ICC's importance as an institution depends on how it negotiates its role in relation to a given situation. In cases where the ICC is of no need because domestic courts are seized of the matter, then its function recedes from view. In cases where the local government does not recognize the authority of the ICC, then there is little that it can do until a cooperative relationship develops. But where there is opportunity to do justice when a State would otherwise be unable to on its own, then the system of international criminal justice stands the chance of closing significant impunity gaps. Failure to close them, and there is little faith that can be placed in the institution to bring about meaningful change in international criminal justice.

1. CLASSICAL COMPLEMENTARITY

Classical complementarity sees the Court and domestic jurisdictions operating in a hierarchical and essentially jurisdictional relationship: the Court oversees the work of national prosecutions and intervenes if those prosecutions fail to meet the standards of willingness and ability. The relationship between the ICC and domestic jurisdictions is defined by a dispute settlement mechanism over the appropriate forum. Complementarity settles competing claims to jurisdiction by first allowing the national jurisdictions to investigate, and then calling on the ICC to intervene if necessary.

This version of complementarity, which emphasizes domestic jurisdictions as the primary sites of justice, gained favour among *Rome Statute* drafters who were

²² *Ibid* at 94.

fearful of an uncontrollable and overreaching court in The Hague. The primacy of domestic jurisdictions stood in contrast to the freshly created ad hoc tribunals for the former Yugoslavia and Rwanda, which superceded local jurisdiction; as important as the creation of these tribunals was, they were not seen as models for a permanent court, given their intrusion on State sovereignty. Protection of sovereignty, through this version of complementarity, was “a very important factor in making progress in the negotiations.”²³

While the current practice of complementarity differs slightly from this classical version, the latter version still remains relevant, as do its conceptual foundations. Carsten Stahn has identified three normative assumptions that underpin the classical model of complementarity: 1) complementarity preserves and protects domestic jurisdictions from ICC intervention; 2) ICC intervention is predicated on State failure; and 3) complementarity brings about State compliance with *Rome Statute* obligations through the threat of ICC intervention.²⁴ These three normative assumptions appear in ICC statements from time to time with varying strength. In Guinea, for example, former Deputy Prosecutor Fatou Bensouda stated on a number of occasions that either Guinea shall prosecute or the ICC will; there is no alternative.²⁵

The classical version of complementarity certainly helped assuage fears of an attack on State sovereignty during the drafting phase; but it has also come with operational costs when put into practice. While respecting State sovereignty, the ICC has in some instances watched State action falter or even fall flat. “Situations such as Colombia, Kenya or Darfur have made it clear that complementarity fails to produce its desired effects, if the Court is forced to stand still and confined to deplore inaction or lack of cooperation by a defiant regime.”²⁶

Due in part to observations like the one just cited, many advocate for, and the Office of the Prosecutor (OTP) has adopted, a policy of positive complementarity. The OTP’s version of positive complementarity is different, however, from the version that I will defend below. In order to better appreciate the OTP’s policy, it is helpful to identify the basic features of the version of positive complementarity that I support.

²³ Adriaan Bos, “From the International Law Commission to the Rome Conference (1994-1998)” in Cassese, Gaeta & Jones, *supra* note 11, 35 at 45. See also, Carsten Stahn, “Taking Complementarity Seriously: On the Sense and Sensibility of ‘Classical’, ‘Positive’ and ‘Negative’ Complementarity” in Stahn & El Zeidy, *supra* note 10, 233 at 252.

²⁴ Stahn, “Two Notions”, *supra* note 14 at 96-97; See also Carsten Stahn, “Taking Complementarity Seriously”, in Stahn & El Zeidy, *supra* note 10, 233 at 252-53.

²⁵ See e.g. International Criminal Court, Press Statement, “Statement to the Press by Ms Fatou Bensouda, Deputy Prosecutor of the International Criminal Court” (19 February 2010) online: ICC <http://www.icc-cpi.int/NR/rdonlyres/C200208B-5375-41B2-8967-FFFC05528E34/281566/FatousstatementGuinesENG1.pdf> [International Criminal Court, “19 February 2010 Press Statement”]; International Criminal Court, Press Statement, “Statement to the Press by Ms Fatou Bensouda, Deputy Prosecutor of the International Criminal Court” (5 April 2012) online: ICC <<http://www.icc-cpi.int/NR/rdonlyres/8BEEEB8C-D22E-48F6-AFB9-E4B72B92E3CF/0/StatementFatouBensoudaConakry050412Eng.pdf>> [International Criminal Court, “5 April 2012 Press Statement”].

²⁶ Stahn, “Taking Complementarity Seriously”, in Stahn & El Zeidy, *supra* note 10, 233 at 255.

2. POSITIVE COMPLEMENTARITY

Positive complementarity views States and the ICC as partners that share a common aim and a common burden of ending impunity. They work together to select a forum based on comparative advantage rather than on a one-sided assessment of a State's ability or willingness to prosecute the matter.²⁷ After a forum is selected, positive complementarity sustains a relationship of cooperation that is focused on moving upward the States' levels of willingness and ability to prosecute. Contrary to classical complementarity, this newer version creates a horizontal rather than hierarchical relationship. Moreover, the three normative assumptions of classical complementarity enumerated above stand in stark contrast to three other normative assumptions that Stahn ascribes to positive complementarity: 1) instead of emphasizing the primary responsibility of prosecuting as resting with States, the ICC and domestic jurisdictions share the burden of the *Rome Statute's* aim to end impunity; 2) instead of State failure triggering ICC intervention, the comparative advantages are weighed to determine the most appropriate forum; and 3) instead of threats, assistance and support achieve compliance.²⁸ The defining feature of this relationship, according to Stahn, is "its managerial approach towards the allocation of the forum of justice."²⁹

Stahn's model of complementarity is a helpful starting point, but it pays little attention to the totality of the relationship once a forum is selected. The selection of the forum is only one step down the long road toward accountability. The common aim that States and the ICC have of ending impunity thus drives a relationship of cooperation all the way through, particularly in situations where States risk falling below the levels of required willingness and ability to act. Stahn seems to recognize as much in his 2008 essay on complementarity where he discusses the various managerial strategies available to the prosecutor *after* the forum has been selected. It is therefore puzzling that he would see "the allocation of the forum of justice"³⁰ as the essential feature of this new form of complementarity.

It is perhaps more useful to see positive complementarity as a relationship that is concerned with the allocation of relatively cost-neutral resources in addition to the allocation of jurisdiction. Positive complementarity, as a doctrine that includes a concern with the allocation of resources, treats as permeable the border between the ICC and States, through which expertise, coordination, and documentation pass in an effort to end impunity. The budget constraints and the independence of the ICC require the resource sharing to occur at an arm's-length distance and without imposing significant costs on the ICC. But where resource sharing can help States investigate and prosecute, positive complementarity encourages it.

While using the label of positive complementarity, the OTP has adopted a model that is a blend of classical and positive complementarity. This blend is evident

²⁷ Stahn, "Two Notions", *supra* note 14 at 101.

²⁸ *Ibid* at 101-02.

²⁹ *Ibid* at 104.

³⁰ *Ibid*.

in the OTP's relationship with Guinea, to which I will turn after sketching the main contours of this policy.

3. THE OTP'S VERSION: HYBRID COMPLEMENTARITY

The Court has adopted positive complementarity as policy, but in a sense quite different from the version described above. The ICC's policy has evolved since the Court came in force, moving from a model of classical complementarity to its own version of positive complementarity. The evolution has not followed a path toward Stahn's model and instead appears to be a blend of the two. Despite the Court's professed commitment to positive complementarity, it is perhaps more appropriate to label its approach *hybrid complementarity*—a mixture of incentives and threats, on the one hand, and support and mutual assistance on the other.

The OTP's strategy evolved from the classical model to one that is more interested in capacity building through external support. The OTP's 2003 policy paper adhered at bottom to a classical view of complementarity: "As a general rule [...] the policy of the Office in the initial phase of its operations will be to take action only where there is a clear case of failure to take national action."³¹ At the same time, this policy paper recognized the potential of international actors and local NGOs to provide important capacity support.³² By 2006 the OTP formally adopted a policy of positive complementarity, which means that the Office "encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation."³³ The OTP's prosecutorial strategy for the period of 2009-2012 further entrenches positive complementarity as the way forward, restating the Office's reliance "on its various networks of cooperation" to "promote national proceedings."³⁴

This evolution has culminated in a unique approach to complementarity that is supported by at least three normative assumptions: 1) Primary responsibility for prosecution belongs to the State, but the State is supported by external actors; 2) The ICC will intervene in the case of State failure, but its primary role is to encourage prosecution and develop networks of support; 3) Compliance is brought about through the support of civil society, NGOs, and donor States and organizations.

The most striking difference between the OTP's version of complementarity and the two other versions of complementarity outlined above—in addition to nearly

³¹ Office of the Prosecutor, International Criminal Court, *Paper on some policy issues before the Office of the Prosecutor*, September 2003 at 5, online: ICC <http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf>.

³² *Ibid* at 2.

³³ Office of the Prosecutor, International Criminal Court, *Report of Prosecutorial Strategy*, 14 September 2006 at 5, online: ICC <http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf>.

³⁴ Office of the Prosecutor, International Criminal Court, *Prosecutorial Strategy 2009-2012*, 1 February 2010 at 3, 5, online: ICC <<http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf>>.

any version that can be reasonably inferred from the *Rome Statute*—is the difference in actors involved. Complementarity, as it was conceived in the drafting phase, is fundamentally about a relationship between the ICC and States. The OTP’s version is a relationship among States, the ICC, and “national and international networks.”

While the addition of these networks to the OTP’s policy can channel resources toward the aim of justice, competing aims of the players within these networks can make for a confused picture at best; at worst they can tear open large impunity gaps that no prosecutorial strategy could tolerate. The case of Guinea forebodes these gaps and provides important lessons on how they may be closed through a more proactive approach to complementarity. I will elaborate on that approach in the third section of this paper; in the meantime it is important to revisit the events in Guinea that gave rise to ICC involvement (II. A.) and the relationship of complementarity that took shape thereafter (II. B.).

II. Complementarity in Practice: Guinea and the ICC

The relationship between Guinea and the ICC has developed through a combination of mutual assistance and threatened intervention. On occasion the OTP has adopted a more rigid stance toward complementarity, which is akin to the classical view of ICC intervention only being triggered upon State failure. On a number of her visits to Guinea, then-Deputy Prosecutor Fatou Bensouda publicly declared that either Guinea takes control of the matter or the ICC will; “there is no third option.”³⁵ These statements are inspired by the classical view of complementarity, but behind the scenes the OTP has been a more engaged partner in the investigation of the murders and rapes that took place in 2009. The Court plainly says so in its latest annual report: “In accordance with its policy on positive complementarity, the Office of the Prosecutor has sought to encourage national proceedings to bring to account those bearing the greatest responsibility for the alleged crimes committed on 28 September 2009 in Conakry.”³⁶ The progress made in Guinea, therefore, serves as an important opportunity to assess the prospect of complementarity.

A. The September 28th Violence

The events of September 28, 2009 took place in a climate of instability and general dissatisfaction with the government’s targeted repression of opposition voices. The government at the time had taken control of the country in a bloodless coup ten months prior to the massacre and rapes. The junta was led by Captain Moussa “Dadis” Camara, who promised to hold presidential and legislative elections.

³⁵ See e.g. International Criminal Court, “5 April 2012 Press Statement”, *supra* note 25.

³⁶ International Criminal Court, “Report of the International Criminal Court”, *supra* note 17 at 16.

He claimed he would not be a candidate.³⁷

Once then-President Camara began showing an interest in running in the elections, tensions rose with opposition parties. The latter organized a rally to take place in a stadium in Conakry, Guinea's capital, on September 28. The government banned the rally the day before under the guise of respect for national Independence Day, which is celebrated on October 2. The ban was a last-minute decision that was not communicated sufficiently in advance to dissuade protestors from attending the rally. Knowing that the rally would proceed, the government deployed an ad hoc, armed law-enforcement unit, comprised of various government security forces, in order to patrol the rally and the surrounding area. Skirmishes with security forces during the protesters' march toward the stadium foreshadowed the widespread violence that took place once the protesters reached their final destination.³⁸

The violence that took place at the stadium was grisly and unremitting. Upon the arrival of one of the opposition leaders, tear gas was fired into the crowd, sparking panic and chaos. Shortly thereafter,

the red berets sprayed the crowd with gunfire. Demonstrators seeking to escape were killed by red berets, gendarmes [...] positioned around the complex. Others were stabbed or beaten inside the stadium and within the complex, and then also systematically robbed by the security forces. Rapes and other acts of sexual violence were committed almost immediately after the red berets had entered the stadium. Dozens of persons attempting to escape through the gates either suffocated or were trampled to death in stampedes, which were compounded by the use of tear gas. Women were taken by red berets from the stadium, and from the Ratoma medical centre, and held as sex slaves for several days in different locations.³⁹

In addition to the sexual violence that took place after the bloodshed in the stadium, security forces denied victims access to hospitals and removed bodies from morgues to be placed in a mass grave. For days after the September 28th violence, the red berets attacked and robbed residents of Conakry.⁴⁰

The massacre and rapes that took place in Guinea were of a "systemic and widespread" nature, rising to the level of crimes against humanity. The International Commission of Inquiry that investigated the attacks in Guinea found that the security forces acted with coordinated and organized effort to target a civilian population. The advance deployment of the forces, the common tactics used and the people those forces targeted qualify the attacks as systematic. The number of victims—including those murdered, forcibly disappeared, sexually violated or raped, and injured—well

³⁷ "Guinée: Le chef de la junte ne se présentera pas aux élections", *Radio France Internationale* (May 11 2009) online: RFI <http://www.rfi.fr/actufr/articles/113/article_80950.asp>; Human Rights Watch, "We Have Lived in Darkness: A Human Rights Agenda for Guinea's New Government" (May 2011) at 15, online: HRW <http://www.hrw.org/sites/default/files/reports/guinea0511webwcover_1.pdf> [Human Rights Watch, "We Have Lived in Darkness"].

³⁸ Ki-moon, *supra* note 2 at 19-33.

³⁹ *Ibid* at 18.

⁴⁰ *Ibid* at 19.

exceeds 1,000 and supports the conclusion that a large segment of the population was targeted, thereby qualifying the attacks as “widespread.”⁴¹

The nature of the acts committed brought them under the jurisdiction of the ICC. Guinea had ratified the *Rome Statute* on July 14, 2003. Although the Court would have had competence to investigate the events of September 28, the Guinean government claimed to be both willing and able to do so. But this claim did not remove the ICC from the picture. Following its policy of positive complementarity, the OTP has remained active in Guinea's effort to investigate the crimes.

B. Guinea and the ICC: Positive (re: Hybrid) Complementarity

As outlined above, a relationship of hybrid complementarity comprises threats and ICC intervention in case of State failure (classical model), support for investigation (positive model), and the presence of external actors to provide that support.

The ICC placed Guinea under preliminary examination within three weeks of the attack.⁴² The prosecutor did not seek authorization from the Pre-Trial Chamber for a full investigation because less than a month after the massacre and rapes the Minister of Foreign Affairs at the time confirmed that Guinea would assume jurisdiction over the matter.⁴³

Nearly five months after the violence, the Attorney General of Guinea appointed a three-judge panel to investigate the matter.⁴⁴ Over the course of more than two years investigating the September 28 crimes, the judges have interviewed more than 200 witnesses and victims, and indicted, detained or questioned at least seven individuals.⁴⁵ Despite the disturbing fact that no one yet has been brought to trial, the judges' work is impressive given the chronic lack of support and resources for their work. The judges receive paltry salaries and insufficient security details. From May until September 2012, work on the investigation “basically ground to a

⁴¹ *Ibid* at 42-43.

⁴² International Criminal Court, Press Statement, “ICC Prosecutor confirms situation in Guinea under examination” (14 October 2009) online: ICC <http://www.icc-cpi.int/EN_Menu/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/guinea/pages/icc%20prosecutor%20confirms%20situation%20in%20guinea%20under%20examination.aspx>.

⁴³ Human Rights Watch, “We Have Lived in Darkness”, *supra* note 37 at 20.

⁴⁴ Organisation guinéenne de défense des droits de l'homme & La Fédération internationale des droits de l'homme, “Commemoration of 28 September Massacre Overshadowed by Political Tension: Note return mission to Guinea-Conakry” (September 2011) at 6, online: FIDH <http://www.fidh.org/IMG/pdf/note_guinee_28092011_en.pdf>.

⁴⁵ Human Rights Watch, “Waiting for Justice: Accountability before Guinea's Courts for the September 28 2009 Stadium Massacre, Rapes, and Other Abuse” (2012) at 22-23 online: HRW <http://www.hrw.org/sites/default/files/reports/guinea1012forUpload_0_0.pdf> [Human Rights Watch, “Waiting for Justice”].

halt” because the judges lacked basic supplies and materials.⁴⁶ While the ICC has continued to monitor the progress of the judges, it seems that little support for the judges has been mobilized through external actors.

Since its initial visit, the ICC has visited the country on five separate occasions to monitor the progress of the investigation, the most recent in May of 2012. In addition to monitoring progress, the visits have served to reassure victims that the crimes will not go unpunished, and to reiterate the importance of prosecution and the leadership role that Guinea can assume in redressing the crimes committed in 2009. On each visit the ICC representative has exhibited cautious optimism about victims having their day in court.⁴⁷

The hybrid relationship of complementarity in Guinea is rounded out by the presence of external actors. In addition to the ICC, various local and international actors have worked with and placed pressure on the Guinean government to meet the needs of victims and follow through with prosecution. The work of these external actors is certainly beneficial to Guinea, but none, nor the collection of them, has accelerated the investigation to a more reasonable pace.

Multiple UN agencies—such as the Office of the High Commissioner for Human Rights, the United Nations Development Program (UNDP), the Peacebuilding Fund (PBF), and the Special Representative to the Secretary-General on Sexual Violence in Conflict—have taken an active role in clearing a stable path toward peace in Guinea. Each agency’s presence in Guinea comes with a different mandate, however, which may not align perfectly with the mandate of the ICC. The UNDP and the PBF, for example, focus on security sector reform and national reconciliation.⁴⁸ While neither of these focuses is at odds with prosecution for the September 28 crimes, they do not in themselves build specific capacities to meet the challenges of prosecution.

Other governments and intergovernmental organizations have been working with the Guinean government. The United States, France, the European Union, and the Economic Council of West African States (ECOWAS) have donated to Guinea or used their diplomatic muscle to urge investigation. However, given the multiplicity of interests—such as economic development or economic reform—that draw these players to Guinea, justice is not always a high priority. On the anniversary of the massacre and rapes, a few omitted to commemorate the loss and reiterate the importance of prosecution, which prompted Human Rights Watch to write in its latest report on Guinea: “The failure of key players, such as the United States, France, and ECOWAS to weigh in publicly on such relevant dates risks sending a signal that justice is not a significant issue to the international community.”⁴⁹

⁴⁶ *Ibid* at 29.

⁴⁷ See International Criminal Court, “19 February 2010 Press Statement”] and International Criminal Court, “5 April 2012 Press Statement” *supra* note 25.

⁴⁸ Human Rights Watch, “Waiting for Justice”, *supra* note 45 at 53.

⁴⁹ *Ibid* at 54.

Lastly, civil society organizations and NGOs have pushed the government on its investigation and shed critical light on the roles that other actors are playing. The Organisation guinéenne des droits de l'homme has collaborated with the Fédération internationale des droits de l'homme in issuing reports and timely statements to provide updates on the progress of the investigation and press for more concerted action.⁵⁰ Amnesty International and Human Rights Watch have also followed progress on the investigation. Human Rights Watch in particular has been a regular observer of Guinea's redress of the September 28 crimes, releasing two full-length reports on the matter already in 2009 and 2012. In a 2011 report, however, the organization covered the ambit of challenges facing the country—among which the investigation was one of many. It is therefore not surprising that other observers, in addition to one of the country's closest scrutinizers, see other priorities that undermine a focused effort on the investigation.

The combined effort that Guinean officials, the ICC, and external actors have put toward the investigation evidences a relationship of hybrid complementarity. Following the normative assumptions outlined above we can observe the following: 1) Primary responsibility for prosecution belongs to Guinea, but the ICC encourages various governmental, intergovernmental, non-governmental and civil society organizations to assist with this effort; 2) The ICC will intervene if Guinea fails to complete its investigation and prosecute; 3) Guinea's compliance with the *Rome Statute* is brought about through visits by the prosecutor threatening intervention and the support of civil society, NGOs, and donor States and organizations. These normative assumptions have proved themselves to be misguided and the results of this approach in Guinea have not been encouraging.

In the next section I will highlight some of the important results in Guinea with respect to the investigation, eventual trials, and capacity building (III. A.). Following this discussion of the results, I will tease out important lessons for the practice of complementarity and advocate for more robust engagement from the Court (III. B.).

III. Results and Lessons Learned from Guinea

A. Results

Complementarity in Guinea has focused on improving the country's capacity to investigate the September 28 crimes. In addition to developing the means to investigate, the practice of complementarity can also be assessed by the ends it has achieved. On both of these fronts, the results have been disappointing.

⁵⁰ See e.g. Fédération internationale des droits de l'homme, "Guinée, Conackry", online: FIDH <www.fidh.org>.

1. SPECIFIC RESULTS

The investigation has not progressed at great speed, nor delivered many indictments. Two notable exceptions are the indictments of Moussa Tiégboro Camara (who commanded an armed forces unit present at the rally)⁵¹ and Colonel Abdoulaye Cherif Diaby (Health Minister at the time and identified as worth investigating in the Commission of Inquiry report).⁵² These two aside, seven others have been interrogated or detained.⁵³

Three other suspects identified in the COI report remain at large or have not been summoned by the investigating judges, most importantly among them the former President Moussa Dadis Camara.⁵⁴ The COI report identified Camara as bearing individual and command responsibility, but there is no indication that he has had any contact with the investigating judges. Camara has been residing in Burkina Faso since an attack on his life left him incapacitated and forced him from office. A *commission rogatoire* was struck to interrogate Camara abroad but there has been no known progress in the commission's work. There is indication that officials in Burkina Faso did not even know of the commission.⁵⁵

To date, no trials have taken place in Guinea, nor do any appear to be on the horizon. The indictments issued thus far have not been confirmed by the *Chambre d'accusation*, the final step before a trial can proceed.⁵⁶

2. CAPACITY BUILDING

Capacity building makes available a justice system to investigate and prosecute crimes that a State would otherwise be ill equipped to handle. While investigation and prosecution can occur in many different ways, the broad objective is to do so in conformity with the *Rome Statute* and other international human rights law. One of the first specific ends sought in capacity building is, therefore, legislative incorporation of the *Rome Statute* in order to give legal direction to the process from the beginning to the end.⁵⁷ Guinea has ratified the *Statute* but it has not passed implementing legislation. As a result, the crimes of September 28, were they to reach trial, would be prosecuted as ordinary crimes.⁵⁸ Moreover, command responsibility, a key feature of international criminal law, would not be available to hold senior

⁵¹ Tiégboro was identified by the Commission of Inquiry as bearing individual and command responsibility for abuses on September 28: Ki-moon, *supra* note 2 at 52.

⁵² *Ibid* at 53. See also, Human Rights Watch, "Waiting for Justice", *supra* note 45 at 3.

⁵³ *Ibid* at 23.

⁵⁴ Ki-moon, *supra* note 2 at 47-54.

⁵⁵ Human Rights Watch, "Waiting for Justice", *supra* note 45 at 5, 39.

⁵⁶ *Loi n 037 du 31 Décembre 1998 Portant Code de procédure pénale*, Guinea 1998, s 206 [*Guinea Penal Code*].

⁵⁷ See also Morten Bergsmo, Olympia Bekou & Annika Jones, "Complementarity and the Construction of National Ability" in Stahn & El Zeidy, *supra* note 19, 1052 at 1059: "In order to be able to investigate and prosecute core international crimes, and to cooperate with the Court, States must have the requisite legislations in place allowing them to do so."

⁵⁸ Human Rights Watch, "Waiting for Justice", *supra* note 45 at 6.

officials and leaders liable.⁵⁹

Beyond the context of Guinea, the ICC has made available some resources to reform domestic law. It has developed partners with various research institutions around the world through its Legal Tools project—an online database of ICC-related documents. This project is a direct extension of the Court’s practice of complementarity: mobilizing civil society and external actors to help bring States into compliance with *Rome Statute* requirements. Within the database is a collection of national implementation laws.⁶⁰ But these model laws are of little value when Guinea still has not had legislative elections since the coup of Dadis Camara. Some measure of democratic legitimacy is presumably required before such major legislative changes could take place. The database is also of little value to the judges when they do not even have pens and paper, let alone computers with internet access.

As a result, even before one can begin to address the legislative framework of investigations and take advantage of some of the services offered by the ICC, one has to address the shortfalls in basic resources, tools, protections and skills that are essential to a properly conducted investigation. The mass grave sites still have not been uncovered because the witnesses fear the consequences of revealing their locations and because the Guinean authorities lack the forensic tools to thoroughly examine the sites’ contents and connection to the crimes.⁶¹ Witnesses and victims have given testimony in unsecure conditions and no formal witness protection program exists in the country.⁶²

The lengthy investigation has caused troubles for the rights of the accused in Guinea as well. Some suspects have been detained in excess of two years without charges being brought against them, in violation of both Guinean and international law.⁶³ Moreover, detainees have also had irregular or no access to a lawyer.⁶⁴

Part of the challenge in investigating the September 28 crimes is the massive sexual violence that took place among the massacre. It is doubtful that many justice systems are equipped to shed light on the dark circumstances that allow for systematic sexual abuse and torture. This doubt is supported by the fact that the Office of the United Nations Team of Experts on Sexual Violence was only created in 2009, even

⁵⁹ In the absence of command responsibility, senior officials and leaders could be charged via aiding and abetting, which is part of the *Guinean Criminal Code: Guinea Penal Code*, *supra* note 56, Guinea 1988, ss 51-52. However, aiding and abetting normally requires specific intention on the part of the offender to assist another in the commission of a crime. Command responsibility does not require specific intention, focusing instead on the effective control that a commander has over an organization and whether he knew or ought to have known of the offences committed by his subordinates. See *Rome Statute*, *supra* note 1, art. 28.

⁶⁰ Bergsmo, Bekou & Jones, *supra* note 57 at 1064.

⁶¹ Human Rights Watch, “Waiting for Justice”, *supra* note 45 at 13.

⁶² *Ibid* at 41-42.

⁶³ *Guinea Penal Code*, *supra* note 56, s 142(2); *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, art 14 (entered into force 23 March 23 1976); *African [Banjul] Charter on Human and People’s Rights*, 27 June 1981, OAU Doc, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), arts 3, 6, 7 (entered into force 21 October 1986).

⁶⁴ Human Rights Watch, “Waiting for Justice”, *supra* note 45 at 40.

though sexual violence has long been a gruesome feature of warfare.⁶⁵ This Office has reached out to Guinean officials, but no agreement has of yet been secured to include a sexual violence expert in the investigation or eventual trials. The investigating judges resisted housing the expert in their offices for fear of an encroachment on their judicial independence.⁶⁶ While balancing the input of the expert with judicial independence presents a significant challenge, the sexual violence committed on September 28 constitutes a major portion of the events. Without an expert, it is difficult to be confident that the investigating judges, or subsequent judicial authorities, will be able to appreciate fully the nature of the violence and the challenges it poses for ordinary trials.

More than four years on from the violent events of September 28, significant doubts remain over Guinea's ability to investigate and prosecute these crimes. The country's capacity to do so in 2009 was little more than a wobbly judicial infrastructure that the practice of complementarity has failed to reinforce. In the next section I will outline some of the lessons learned from the relationship of complementarity in Guinea and make some modest proposals about how complementarity can be improved.

B. Lessons from Guinea on Complementarity

The OTP's version of complementarity supported a collaborative relationship with Guinean officials to select a forum, but has not gone further to assist with the investigation. A more complete view of complementarity sees the relationship between States and the ICC as an ongoing commitment to seek justice beyond the selection of a forum. The relationship can support reform of domestic law, strengthen judicial institutions and competence to handle challenging and complex cases, and it can also reassure victims who are sceptical of the government's sincerity to prosecute. The Court is also well placed to draw on the body of international legal practice where it concerns the investigation and trial of major crimes. Different circumstances may require different responses, and the Court is a conceptual offshoot of the major international criminal tribunals. It can therefore propose tested solutions to problems that appear unique at first blush. This relationship can also reinforce the project of the *Rome Statute* more broadly by developing regional expertise and defenders of international criminal justice. A further consequence is that this approach can target the willingness and ability of States to investigate where one or both appear lacking. In Guinea, there has been an ungainly approach to capacity building that cries out for greater coordination.

If there is political will, and the resources available to build capacity, then a glaring shortfall in Guinea is the coordination of the efforts of external actors. This

⁶⁵ Representative of the Secretary General on Sexual Violence in Conflict, *Annual Report 2011: Team of Experts: Rule of law/Sexual Violence in Conflicts*, 2011 at 1, online: Stop Rape Now <<http://www.stoprapenow.org/uploads/advocacyresources/1334926044.pdf>>.

⁶⁶ Human Rights Watch, "Waiting for Justice", *supra* note 45 at 51.

lack of coordination stems from a fundamental flaw in the OTP's complementarity policy. While external actors and "networks of cooperation" are helpful additions to the practice of complementarity, they cannot replace either of the two actors that are primarily responsible for redressing the most serious crimes: States and the ICC. The main problem with relying on external actors is that they lack the mandate to focus on criminal responsibility. As a result, their presence in a situation country may be for reasons that have little to do with *Rome Statute* objectives. Guinea is rich in minerals and hydroelectric power. It contains nearly half the world's supply of bauxite, the main source of aluminum. States involved in Guinea might, therefore, be more patient with the investigation while they are eager to capitalize on economic opportunities.

One may rightly have misgivings about a more active OTP. Direct involvement with the activities of the domestic jurisdiction might

compromise the independence and appearance of impartiality of the Prosecutor. There is a risk that [...] providing training, advice and assistance to national proceedings may influence the capacity of the Prosecutor to 'credibly criticize and question the process if it subsequently proves to be a non-genuine proceeding.'⁶⁷

This worry, however, seems to stem more from organizationally created conflicts rather than a worry about any involvement from the ICC. If the OTP is the first arm of the ICC that reaches out to domestic jurisdictions, there is no requirement that the support lent and the decision to seize jurisdiction come from the same person or from the same office within the OTP. One would think that this conflict can be sorted out by assigning responsibility for assistance and assumption of jurisdiction to different parts of the OTP.

The focus on external actors seems to have displaced the potential role of the OTP to become a more active player. As mentioned above, the hybrid version of complementarity retains the threat/monitoring roles for the OTP that are present in the classical version. The OTP monitors the progress of investigations and trials while threatening to open its own investigation if required. The OTP's work in Guinea is confined to the sidelines, only making appearances on the playing field to encourage greater efforts from all. More cheerleader than coach, the OTP has watched disappointing results unfold before its eyes without a plan to turn things around before it must intervene.

Neither the OTP nor Guinean officials in collaboration with external actors have put forward a specific plan for justice. There is no timeline for investigations, and no plan in place, or publicly available, to deal with the complexities of trials for crimes against humanity. Timelines and roadmaps for justice could make clear to all the intentions of the Guinean authorities and the ways in which they plan to realize those intentions. It would also place the OTP in a better position to assess the investigation's progress. A plan of this type could include self-triggering mechanisms that would call for the ICC to intervene if a specific objective was not met by a certain

⁶⁷ Stahn, "Two Notions", *supra* note 14 at 108 [footnotes omitted].

time. Kenya's Waki Commission is a good example of this type of triggering mechanism. The commission's list of suspects was handed over to the ICC in a sealed envelope because the government failed to establish a special hybrid tribunal to prosecute the 2007 post-election crimes. The delivery of the envelope was part of the commission's design and was essential to ICC involvement.⁶⁸ The lack of a plan for justice in Guinea must try the patience of many. Expectations of victims and others waiting for justice exist, therefore, in a climate of uncertainty.

The lessons from Guinea can be summarized in the following fashion: the OTP and Guinean authorities should work together more closely to develop a plan for justice that will coordinate the participation of external actors. Only the ICC and Guinea bear the responsibility from the *Rome Statute* "to put an end to impunity"⁶⁹ for the most serious crimes. External actors may have resources to assist with prosecution, but their will to push for justice may be tempered by other priorities and reasons for engaging with Guinea.

This article took aim at the theory and practice of complementarity in order to assess its application in Guinea. In the first section, I argued that complementarity is most effective and most important where States are not quite able or willing enough to investigate and prosecute; the ICC then becomes an important institution to nudge those levels of willingness and ability upward and to help build a durable infrastructure for justice to deter future crimes. Different visions of complementarity, however, can underpin the ICC's engagement with local authorities. The OTP has privileged a hybrid model that comprises threat of intervention, participation from external actors, and intervention triggered by State failure. This approach has not been fruitful in Guinea. The second section outlined the violent events that took place in September 2009 in Conakry and the relationship of complementarity that developed between the OTP and Guinea. It was noted that many of the elements of the OTP's hybrid complementarity are present in the case of Guinea—external actors in the form of NGOs, donor States, etc., threats to intervene, State assuming primary responsibility for the investigation—but little headway has been made. The third section detailed that progress and highlighted the failures of capacity building in Guinea. Finally, this article concluded with lessons to be drawn from the ICC's involvement in the country, chief among which was a greater role for the OTP to play in coordinating the activities of external actors and developing a plan for justice with Guinean authorities.

⁶⁸ Chandra Lekha Sriram & Stephen Brown, "Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact" (2012) 2 *Int'l Crim L Rev* 219 at 224.

⁶⁹ *Rome Statute*, *supra* note 1, Preamble.

Complementarity is essential to an effective *Rome Statute*. This principle took shape in the drafting phase as a check on the infringement of State sovereignty. It has since evolved to promise support for domestic jurisdictions' efforts to end impunity and clear the path for stable legal orders. This promise appears to have gone largely unfulfilled in Guinea. The OTP's policy has failed to channel resources toward the capacity needs of the investigation and the judiciary as whole. With no clear mandate to prosecute *Rome Statute* crimes, external actors in Guinea follow a mix of motivations that may sometimes clash with Guinea's, and the OTP's, hope for accountability. Greater coordination from the OTP can help respond to that hope.

The lessons from Guinea come at an important time in the ICC's history. It has just marked its tenth anniversary, to the celebration and chagrin of many. Its proponents cheer the cases it has opened and the first conviction recently entered.⁷⁰ Its critics deplore a perceived African bias and selectivity of investigations by the prosecutor.⁷¹ What remains clear above the fray is that the Court's future depends not just on stable relationships with domestic jurisdictions, but on relationships that produce justice.

⁷⁰ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute (14 March 2012) (International Criminal Court, Trial Chamber I), online: ICC <<http://www.icc-cpi.int/>>.

⁷¹ See generally, Richard Dicker, "The Court of Last Resort" (29 June 2012) online: Foreign Policy <<http://www.foreignpolicy.com/>>.