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THE INTERNATIONAL CRIMINAL COURT AND PROXIMITY TO THE SCENE OF THE CRIME: DOES THE ROME STATUTE PERMIT ALL OF THE ICC'S TRIALS TO TAKE PLACE AT LOCAL OR REGIONAL CHAMBERS?

STUART FORD*

I. INTRODUCTION

In March 2008, an opinion piece in the International Herald Tribune suggested that the International Criminal Court (ICC) should take over the facilities of the International Criminal Tribunal for Rwanda (ICTR) in Tanzania to conduct its own trials after the ICTR shuts down.¹ The article's main arguments were that holding the ICC's trials in Africa (where all of the ICC's current investigations are occurring²) would simplify matters for the witnesses and improve the "legitimacy and transparency" of

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1. Christopher M. Gosnell, *A court too far*, INT'L HERALD TRIB., Mar. 29, 2008. This idea was also raised by William Burke-White as one possible way to regionalize international criminal justice. William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 750-52 (2003).

2. The ICC has issued indictments arising out of investigations in the Democratic Republic of Congo (DRC), Uganda, the Central African Republic (CAR), and Darfur, Sudan. Several trials are now underway. See *ICC—situations and cases*, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (describing the situations currently under investigation). In addition, the Prosecutor has indicated that he intends to begin an investigation of the situation in the Republic of Kenya. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Assigning the Situation in the Republic of Kenya to Pre-Trial Chamber II, 3 (Nov. 6, 2009) available at <http://www.icc-cpi.int/NR/rdonlyres/9EB64D7E-D6F0-4D1B-A0DE-360832C66E7B/281185/DecisionassigningthesituationintheRepublicofKenya.pdf>. The Pre-Trial Chamber recently authorized this investigation. 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, Pre-Trial Chamber II, (Mar. 31, 2010) available at <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>.

the proceedings.³ Perhaps in response to this idea, a little over one year later, Tanzania made an offer to host ICC trials at the ICTR's facilities in Arusha.⁴ At the time, the ICC President indicated that the Court would consider the proposition. However, the ICC has not taken any concrete action in response to Tanzania's offer.

Currently, the ICC is conducting all of its trials in The Hague, and while it has considered moving small parts of trials to the countries where the alleged crimes took place,⁵ there does not seem to have been any concerted effort to make local or regional trials a centerpiece of the ICC's strategy. This is disappointing. As the 2008 International Herald Tribune article discusses, there are compelling arguments that the ICC should conduct most or all of its trials at local or regional chambers that are located much closer to the scene of the alleged crimes.⁶ This would require a reversal of the paradigm the ICC currently operates under where the default position is that trials will take place at The Hague and only small parts of some trials might occur closer to the scene of the alleged crimes.

Just because such a radical change in the ICC's strategy would be desirable, however, does not mean that it is permissible. This Article will explore whether the Rome Statute would permit the ICC to establish local or regional trial chambers that would be based away from the ICC's seat and that would carry out all or most of the trials related to a particular situation⁷ or group of geographically-related situations. These local or regional chambers would be semi-permanent facilities located in the same region, or perhaps even the same country, where the alleged crimes took place. They would be a formal part of the ICC, be created in

3. Gosnell, *supra* note 1.

4. *Tanzania offers to host ICC trials*, HIRONDELLE NEWS AGENCY, June 3, 2009, <http://www.hirondellenews.com/content/view/12451/289/>. At one point there was also discussion of having the ICC take over the facilities of the Special Court for Sierra Leone (SCSL). Vincent O. Nmehielle and Charles Chernor Jalloh, *International Criminal Justice: The Legacy of the Special Court for Sierra Leone*, 30 FLETCHER F. WORLD AFF. 107, 118 (2006).

5. *Infra* Section III(E).

6. The question of whether the ICC should move all or most of its trials to local or regional chambers is quite distinct from the question of whether the Rome Statute permits the ICC to conduct most or all of its trials at local or regional chambers. The latter question, which is addressed in this Article, is largely a technical question and the answer lies in a close textual analysis of the Rome Statute and the ICC's jurisprudence. The former question is much more theoretical and requires a very different approach. I intend to provide a compelling answer to the question "Should the ICC move all or most of its trials to local or regional chambers?" in a subsequent article.

7. When discussing the ICC, the term "situation" refers to an incident or occurrence where one or more of the crimes that are within the jurisdiction of the Court appear to have been committed. Rome Statute of the International Criminal Court arts. 13-14, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

conformity with the Rome Statute, and conduct trials pursuant to the ICC's Rules of Procedure and Evidence.

Section II will outline what a local or regional ICC trial chamber would look like. Section III will explore whether the Rome Statute permits the establishment of local or regional trial chambers. Section IV will address how the decision to establish a local or regional chamber would be taken, while Section V will identify several relatively simple changes that could be made to the Rome Statute to make the establishment of regional or local trial chambers more likely and make the chambers themselves more effective.

II. WHAT WOULD A LOCAL OR REGIONAL ICC TRIAL CHAMBER LOOK LIKE?

Assuming that having the ICC conduct all or most of its trials at a local or regional ICC chamber would be better than conducting all or most of the trials in The Hague, the obvious first question is: what would such a local or regional chamber look like? The question can be broken down into a number of smaller questions, each of which will be addressed below: (1) would it be preferable to have a local or a regional chamber?; (2) what infrastructure and staffing needs would the chamber have?; (3) what sort of agreement would the ICC need with the receiving country for the chamber to operate?; and (4) what functions would take place at the regional or local chamber?

A. *Local v. Regional Chambers*

Ideally, the trials would take place in the same country as the crimes that are being prosecuted.⁸ This would permit the greatest level of local participation in the Court's work. In practice, however, this might be difficult to arrange in every situation. Location in-country would only be possible where the host country was stable and where there was government support for the activities of the ICC. In addition, the ICC's experience suggests that witnesses may feel safer testifying at a regional rather than local chamber, which could affect the decision to create a local rather than regional chamber.⁹

Stability is crucial because an international court needs a minimum level of security to operate. If the Court cannot be reasonably sure that it can protect its staff, the witnesses, and any detainees, then the trials cannot proceed in that location.¹⁰ This

8. See, e.g., Burke-White, *supra* note 1, at 734-36 (arguing that a court's physical proximity to the scene of the alleged crimes is an advantage).

9. Decision on Disclosure Issues, *infra* note 13, at 53.

10. See *Draft Statute for an International Criminal Court*, art. 32 [1994] Vol. II, Part 2 Y.B. INT'L L. COMM'N 26, 52 (noting that moving the place of

means that any armed conflict, if the trials arise out of an armed conflict, would have to be concluded or at the very least taking place far away from the trials. Stability, however, would not be enough on its own. The local government would also have to be supportive of the ICC's work and would have to give consent to the creation of a local trial chamber. While the ICC would operate independently of the receiving country's government,¹¹ it would be difficult for the ICC to carry out fair, impartial, and speedy trials if the domestic government was attempting to influence or undermine the process.¹² So, while it would be ideal to have the trials take place in the countries where the alleged crimes took place, it might be impractical in cases where the government is unsupportive or openly hostile. It also might be difficult to secure consent if the receiving state is legitimately concerned that having trials in-country would exacerbate existing political tensions.¹³

trial closer to the location of the alleged crimes might "create unacceptable security risks for the defendant, the witnesses, the judges or the staff of the court").

11. See Rome Statute, *supra* note 7, art. 40(1) (stating that judges must be independent in the performance of their functions). See also *id.* art. 42(1) (stating that Office of the Prosecutor "shall act independently").

12. For example, Hun Sen, the Cambodian Prime Minister, has attempted to influence who the ECCC prosecutes. In response to a request of the International Co-Prosecutor to try an additional five suspects, Hun Sen stated, "You only have two (votes) [out of the 4 needed]. You cannot make it happen. You cannot disturb or annoy us, as the final result will be zero." Hun Sen's comments are an unmistakable suggestion that the government of Cambodia controls the votes of the Cambodian judges at the ECCC who would need to vote to confirm an investigation into additional suspects. *Hun Sen Terms More Prosecutions at Khmer Rouge Trial "Impossible,"* ASIAN POLITICAL NEWS, Sept. 9, 2009, available at LEXIS ACC-NO 208216861. See also, Barbara Crossette, *Khmer Rouge Court Suffers New Blow*, UNITED NATIONS ASSOCIATION OF THE UNITED STATES OF AMERICA WORLD BULLETIN, July 8, 2009; *Political Interference at the Extraordinary Chambers in the Courts of Cambodia*, OPEN SOCIETY JUSTICE INITIATIVE 16-23 (July 2010) available at http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/political-interference-report-20100706 (summarizing evidence of the Cambodian government's attempts to interfere with the ECCC's operation). In another example, the government of Sudan has impeded attempts by the ICC to investigate alleged crimes that may have been committed in Darfur, Sudan. Stuart Ford, *Is the Failure to Respond Appropriately to a Natural Disaster a Crime Against Humanity? The Responsibility to Protect and Individual Criminal Responsibility in the Aftermath of Cyclone Nargis*, 38 DENV. J. INT'L L. & POL'Y 227, 239 n. 65 (2010). In light of the attempts to interfere with the Court's work, it is hard to imagine that the ICC would be able to carry out fair and impartial trials in Sudan. See generally Burke-White, *supra* note 1, at 741-43 (noting the dangers of political manipulation by the host state).

13. As an example, when an ICC Trial Chamber in the *Lubanga* case considered moving some of the hearings to the DRC, the DRC government refused to give consent for the move on the basis that it "could lead to ethnic tensions in an area that had been recently pacified and is potentially

Finally, it may be difficult to convince the witnesses to appear in a local proceeding. One of the most interesting results of the ICC's exploration of moving part of the *Lubanga* trial to the Democratic Republic of the Congo (DRC) was that even though the parties and the Trial Chamber seemed to agree that having local hearings was desirable, the witnesses were overwhelmingly opposed to testifying in the DRC.¹⁴

For these reasons, in some cases it may make more sense to try and establish a regional chamber—one that is not located in the same country as the crimes, but is located in the same region. Any regional location would still have to satisfy the prerequisites of stability and support, but it should be much easier to find a suitable location within the region than it would be to find a suitable location within the country. Witnesses might also be more willing to testify at a regional chamber.

In the context of the specific investigations the ICC is currently undertaking, it may not be practical to establish in-country trials. All five of the ICC's ongoing investigations are in Africa. It is extremely unlikely that the ICC would establish five separate in-country chambers in Africa. Rather, it seems much more likely that the ICC would establish a single regional chamber located (as much as possible) equidistant between the sites of the ongoing investigations. As has been suggested in other places, Arusha, Tanzania, seems like a reasonable choice for a regional ICC Chamber.¹⁵ Tanzania shares borders with three of the five countries where ICC investigations are taking place—the DRC, Uganda, and Kenya. It is relatively close to the other two locations—the Central African Republic and Sudan.

B. Infrastructure and Staffing Needs

International criminal trials have significant infrastructure needs. To be feasible, the chamber's facility has to have: (1) consistent access to utilities—primarily electricity, water, and communications; (2) a courtroom or courtrooms that will be adequate for what are intrinsically public trials (which means enough gallery space for public attendance); (3) adequate security; (4) enough space for all of the attendant administrative and functional offices (prosecution, defense, chambers, registry, etc.); (5) access to an international transportation hub; and (6) access to nearby accommodations that are adequate for the expected

unstable." Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1311, Trial Chamber I, Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, Annex 2 at 53 (April 24, 2008).

14. *Id.* at 35-36. For further discussion of this matter see *infra* Section III(E).

15. See *supra* note 1 (noting suggestions that the ICC take over the ICTR's facilities in Arusha).

international staff (including access to adequate schools for the families of international staff).¹⁶ It is also desirable for the detention facility to be located on-site to minimize the security risk of transporting detainees back-and-forth to the Court. In finding an appropriate site for a local or regional ICC chamber, one key will be to find an existing facility that can be modified to meet the needs of the ICC for a relatively modest sum, rather than building a facility from the ground up.

Most domestic courts in countries where the ICC is likely to be conducting trials are probably going to be unsuitable. They will probably have inadequate security, insufficient gallery space for public trials, may or may not have consistent access to utilities, and, perhaps most importantly, are probably already in use by domestic courts. There may well be other facilities, however, that would meet the needs of a regional ICC chamber. Conference centers may offer many of the facilities that are needed, although they may also need some modification. For example, the ICTR is housed in a conference center in Arusha.¹⁷ Unused government buildings may also be an alternative. For example, the Extraordinary Chambers in the Courts of Cambodia (ECCC) was housed in an essentially unused building that had been built for the Cambodian armed forces.¹⁸

A local or regional ICC chamber would also have significant staffing needs. At a minimum, it will need enough judges for one or more trial chambers. Those judges will need clerks. In addition, there will be a need for registry officials to maintain the trial records, as well as translators and interpreters. Given the expected length of international trials, it would probably make

16. CASSESE ET AL., *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 190 (Oxford University Press 2002) (indicating that cost of living, access to office space, adequate schooling, access to international transportation, and access to a communications network are all important considerations in locating an international tribunal). Schooling and access to decent housing will be particularly important as many of the mid-level to senior international staff at a tribunal will have children. If there is not acceptable housing and an acceptable international school nearby, it will be hard to attract qualified staff.

17. Catherine Cisse, *Symposium: Prosecuting International Crimes: An inside View: The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison*, 7 *TRANSNAT'L L. & CONTEMP. PROBS.* 103, 108 (1997).

18. It had the benefits of being empty and having an on-site auditorium that could be modified for use as a courtroom. Being a military building, it had some security, primarily in the form of a perimeter fence, although upgrades were necessary. At the same time, there were concerns that housing the court in a former military building would adversely affect public perceptions of the court's impartiality. It did not, however, have consistent access to utilities, and much of the first year of the court's existence was spent upgrading the electrical and telecommunications facilities at the court. It also did not have a detention facility, which had to be purposely built.

sense for both prosecutors and defense counsel to be based at the chamber (and facilities would have to be made available for their use at the chamber), but the choice should probably be left to the Office of the Prosecutor (OTP) and the individual defense counsel. Staff members require administrative support, so there will have to be some sort of administrative presence in the form of IT support, building maintenance personnel, and security personnel.¹⁹

C. Special Agreement with the Receiving Country

Any local or regional ICC chamber would need to have an agreement with the receiving country (the country where the chamber would be established).²⁰ The Rome Statute seems to suggest that such an agreement is not strictly necessary if the receiving country is a member of the Assembly of States Parties,²¹ but indicates that a formal agreement would be required to locate an ICC chamber in the territory of a non-member state.²² In practice, however, it is hard to imagine that the ICC would begin a trial in a country without a formal agreement with the government of that country outlining the relationship between the Court and that country.²³

Such an agreement would have to cover the privileges and immunities of the Court, court staff, witnesses, and victims.²⁴ It

19. It would be desirable to centralize as many functions as possible at the Court's administrative headquarters in The Hague because it would be expensive to duplicate functions at the local or regional chamber. Having said that, there are some administrative functions, like IT support, building maintenance, and security that simply could not be carried out from The Hague. In practice, it may take some time to discover which administrative functions can be centralized in The Hague and which ones need to be duplicated at the local or regional chamber.

20. "Receiving country" is being used to distinguish the country where a local or regional chamber would be established from the "host country," which, when referring to the ICC, is generally used to mean The Netherlands because the seat of the ICC is in The Hague.

21. Rome Statute, *supra* note 7, art. 4(2) (stating that the court may exercise its functions and powers on the territory of any state party). Since moving the trials is a power granted to the Court under Article 62, it seems that no further agreement would be needed to permit the ICC to move trials to the territory of a member state.

22. *Id.* (indicating that the Court can exercise its functions and powers on the territory of a non-state party by "special agreement" with that country).

23. *See, e.g., Draft Statute for an International Criminal Court*, art. 32, *supra* note 10, at 26, 52 (noting that any trials taking place in states other than the host state would be conducted pursuant to an agreement with the receiving country). *See also* Burke-White, *supra* note 1, at 751 ("First, the Court would need to negotiate with a state in the region to sit for at least the purposes of obtaining evidence and conducting the trial in that state.").

24. The Rome Statute states that the ICC shall have such "privileges and immunities" in the territory of each state party "as are necessary for the

would also have to cover topics like the security of the Court,²⁵ visas for people who need to attend the Court,²⁶ the detention of suspects,²⁷ and the provision of public services.²⁸ In short, such an agreement would probably be analogous to the Headquarters Agreement between the ICC and The Netherlands.²⁹

The closest example of a similar situation occurred when the Special Court for Sierra Leone (SCSL) moved the Charles Taylor trial to The Hague. The Agreement between the United Nations and the Government of Sierra Leone that established the SCSL specifically contemplates the movement of proceedings and even the relocation of the entire Court to another country.³⁰ Relocation is conditioned on the conclusion of a "Headquarters Agreement" with the government of the country where the Court would be relocated.³¹ Even though the transfer of the Charles Taylor trial was not a relocation of the Court,³² the SCSL and The Netherlands nevertheless entered into a formal agreement prior to the transfer.³³ The SCSL also entered into an agreement with the ICC

fulfillment of its purposes." Rome Statute art. 48(1). The ICC would need an agreement with the receiving country that spelled out these privileges and immunities in more detail similarly to the way the Headquarters Agreement between The Netherlands and the ICC does. See Headquarters Agreement Between the International Criminal Court and the Host State, ICC-BD/04-01-08, arts. 4-6, 11-29 (Mar. 1, 2008). In fact, almost half of the Headquarters Agreement deals with the privileges and immunities of the Court and those associated with the Court.

25. See Headquarters Agreement Between the International Criminal Court and the Host State, *supra* note 24, art. 7.

26. *Id.* arts. 37-39.

27. *Id.* arts. 44-50.

28. *Id.* art. 9.

29. TRIFFTERER ED., COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 76 (2nd ed. Hart Publishers 2008); See, e.g., *Draft Statute for an International Criminal Court*, Art. 32, *supra* note 10, at 26, 52 (noting that any trials taking place in states other than the host state would be conducted pursuant to an agreement which would need to address matters "similar to those to be provided for the agreement with the host State under article 3").

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

31. *Id.*

32. Prosecutor v. Charles Taylor, Case No. SCSL 03-01-PT, Order Changing Venue of Proceedings, ¶ 5 (June 19, 2006).

33. TRIFFTERER ED., *supra* note 29, at 118. See also S.C. Res. 1688, ¶ 2, UN Doc. S/Res/1688 (2006) ("Taking note of the exchange of letters between the President of the Special Court and the Minister of Foreign Affairs of the Kingdom of The Netherlands dated 29 March 2006 . . ."). In addition, The Netherlands demanded and received a Security Council Resolution blessing the transfer of the Taylor trial to The Hague. Order Changing Venue of Proceedings, *supra* note 32, ¶ 1, (noting that a Security Council Resolution supporting the change of venue was one of three conditions imposed by The Netherlands on its offer to host the trial of Charles Taylor).

for the use of the ICC's facilities to hold the trial.³⁴ Any establishment of a local or regional ICC chamber would probably require similar steps on the part of the ICC.

D. Functions to Be Carried Out at the Chamber

The most obvious function to be carried out at a regional or local ICC chamber would be trials. After all, the main point of having a regional or local chamber is to allow trials to take place much closer to where the alleged crimes occurred. Thus, any regional or local ICC chamber would have to contain at least one trial chamber. Given that trials at the international level can take years to complete, it would be preferable to have more than one trial chamber and more than one courtroom.

There would be less need to carry out other functions of the ICC at the local or regional chamber. For example, there would be no need to have an appeals chamber sit away from The Hague. Appeals are not fundamentally public proceedings in the way that trials are public proceedings. They constitute a review of the trial record to determine whether errors of procedure, fact, or law were made.³⁵ They are usually decided on the written record without hearing additional witnesses or receiving additional evidence.³⁶ The acquitted or convicted person need not even attend the proceedings.³⁷ The public outreach benefits that are present with a regional or local trial are much smaller during the appeals process.

Similarly, most pre-trial proceedings need not be conducted at the local or regional chamber either. For example, the Prosecutor's investigation will usually be secret.³⁸ There is very little public aspect to an investigation and therefore no necessity that it be carried out at any particular location. Indeed, in practice, the investigation will probably take place wherever the Prosecutor can

34. See The Special Court for Sierra Leone to use ICC Facilities for Trials of Charles Taylor, ICC Press Release, ICC-20060621-140 (June 20, 2006) (noting that Charles Taylor was to be tried at the ICC's facilities pursuant to a Memorandum of Understanding entered into between the ICC and the SCSL); S.C. Res. 1688, *supra* note 33, ¶ 2 ("Taking note also of the Memorandum of Understanding between the Special Court and the International Criminal Court dated 13 April 2006 . . .").

35. Rome Statute, *supra* note 7, art. 81(1) (noting that either the Prosecutor or the convicted person may appeal from alleged errors of procedure, fact or law).

36. The Rome Statute does give the Appeals Chamber the power to hear new evidence itself to resolve factual questions. *Id.* art. 83(2). But this does not give the Appeals Chamber the right to essentially retry the whole case. Rather, if the Appeals Chamber concludes that the original trial was materially affected by an error of procedure, fact or law, then it should reverse or amend the decision or grant a new trial. *Id.*

37. *Id.* art. 83(5).

38. *Id.* arts. 18(1), 54(3)(e), 54(3)(f).

find the evidence he or she needs to build a case.³⁹

Proceedings before the Pre-Trial Chamber generally need not be carried out at the local or regional chamber either. Most of the Pre-Trial Chamber's functions deal with regulating the Prosecutor's investigations.⁴⁰ Consequently, most Pre-Trial Chamber proceedings will either be secret or of little value to the public, since they will not include the presentation of evidence. However, there are two functions of the Pre-Trial Chamber that appear to be more public in nature.

First, the Pre-Trial Chamber is charged with hearing pre-trial challenges to the jurisdiction of the Court and the admissibility of the charges.⁴¹ These challenges, which can in certain circumstances be raised directly by affected states, are likely to turn on questions of whether the case is of sufficient gravity to warrant prosecution and whether the alleged crimes are being genuinely investigated or prosecuted by the domestic authorities. The answers to these questions are likely to be of substantial public interest.

Second, once the charged person is in the custody of the ICC, the Pre-Trial Chamber is responsible for confirming the charges prior to trial.⁴² This process requires a hearing during which the Prosecutor must support the charges with "sufficient evidence to establish substantial grounds to believe that the person committed the crime[s] charged."⁴³ The charged person may challenge the evidence presented by the Prosecutor and present his or her own evidence.⁴⁴ In most cases, the confirmation of the charges will be the first time the public will have an opportunity to learn about the charges brought by the Prosecutor, the evidence that supports those charges, and the objections and challenges raised by the charged person. Thus, the confirmation of the charges has a significant public aspect and it would be beneficial to have the confirmation of charges take place at the local or regional

39. The Rome Statute explicitly permits the Prosecutor to conduct investigation on the territory of a State in certain circumstances. *Id.* art. 54(2). Usually this will require the Prosecutor to secure the cooperation of the State pursuant to Part IX of the Rome Statute. *See, e.g., id.* art. 93 (describing various forms of cooperation that the Prosecutor can request states to provide). The Rome Statute, however, also provides for the Prosecutor to conduct certain investigations on the territory of a State without that State's cooperation if given leave to do so by the Pre-Trial Chamber. *Id.* art. 57(3)(d).

40. *Id.* arts. 15(3), 15(4), 18(2), 53(2), 53(3), 54(2), 57, 58.

41. *Id.* art. 19(6). The court's jurisdiction over particular matters is governed by Articles 11-13 of the Rome Statute. Admissibility is addressed in Article 17. Challenges to admissibility can be raised directly by states. *Id.* arts. 18, 19(2).

42. *Id.* art. 61.

43. *Id.* art. 61(5).

44. *Id.* art. 61(6).

chamber. Unfortunately, as indicated in Section III(h),⁴⁵ the Rome Statute does not permit either challenges to admissibility or the confirmation of charges to take place away from The Hague.

III. DOES THE ROME STATUTE PERMIT A LOCAL OR REGIONAL ICC TRIAL CHAMBER?

Assuming that it would be desirable for the ICC to conduct all or most of its trials at regional or local chambers, does the ICC have the authority to create such chambers? Any attempt to answer this question must begin with the text of the Rome Statute. There are three provisions within the Rome Statute that are most relevant to this question: Articles 3, 4, and 62. Article 62 states that “[u]nless otherwise decided, the place of the trial shall be the seat of the Court.”⁴⁶ Article 3 establishes that the seat of the Court is in The Hague. However, it also indicates that the Court “may sit elsewhere, whenever it considers it desirable, as provided in this Statute.”⁴⁷ Article 4 goes on to state that the Court “may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.”⁴⁸ Of these three articles, Article 62 is the most relevant to whether or not the ICC can create a regional chamber because it establishes that trials can take place at locations other than The Hague.

A. *How to Interpret the Rome Statute*

In determining whether or not the Rome Statute authorizes the creation of a regional ICC chamber, its provisions should be “interpreted in good faith in accordance with the ordinary meaning to be given to [them] in their context and in the light of [their] object and purpose.”⁴⁹ The “context” of the treaty provision

45. See *infra* Section III(H) (describing the Rome Statute’s limitation on conducting pre-trial proceedings away from the seat in The Hague).

46. Rome Statute, *supra* note 7, art. 62.

47. *Id.* art. 3.

48. *Id.* art. 4(2).

49. Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, U.N. Doc. A/Conf.39/27, 1155 U.N.T.S. 331. The Vienna Convention explicitly applies to treaties that act as the constituent documents of international organizations. *Id.* art. 5. In addition, the key provisions on the interpretation of treaty provisions also constitute customary international law. See MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 439-40 (Martinus Nijhoff Publishers 2009) (describing the role of customary law in interpreting certain provisions of treaties). Thus Articles 31 and 32 of the Vienna Convention on the Law of Treaties guide the interpretation of the Rome Statute. Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, ¶ 19, Pre-Trial Chamber II (March 31, 2010).

includes the whole text of the treaty, including the Preamble.⁵⁰ Thus, Articles 3, 4, and 62 should be given their ordinary meaning, but that ordinary meaning should take into account their object and purpose, as well as the appropriate context.

The negotiating history of the Rome Statute can be used as a “supplementary means of interpretation.” Evidence of the negotiating history of a provision, however, carries less weight than the ordinary meaning of the provision. The negotiating history can only supersede the ordinary meaning of the provision if the ordinary meaning is “ambiguous” or would lead to “a result which is manifestly absurd or unreasonable.”⁵¹ Alternatively, the negotiating history can be used to “confirm” the ordinary meaning of the treaty provisions.⁵²

In addition, any interpretation of Articles 3, 4, and 62 should consider any “subsequent agreement” between the parties about the meaning of the treaty as well as any “subsequent practice” that helps establish how the parties interpret the treaty’s provisions.⁵³ There does not appear to have been any subsequent agreement among the parties about Articles 3, 4, or 62, but there have been two occasions when the ICC has considered moving part of a trial, and those two occasions will be described below as examples of “subsequent practice.” In addition, there has been relevant practice by other tribunals that have quite similar provisions regarding the place of the trial; thus, this article will address some of that practice as an analogous method of understanding what is permitted.⁵⁴

The following sections will address: (1) the ordinary meaning of Articles 3, 4, and 62 of the Rome Statute in light of their object, purpose, and context; (2) the negotiating history of those Articles; (3) the ICC’s emerging practice with regards to moving the place of

50. Vienna Convention on the Law of Treaties, *supra* note 49, art. 31(2). See also VILLIGER, *supra* note 49, at 427 (stating that the context will include the remaining terms of the sentence and of the paragraph; the entire article at issue; and the remainder of the treaty.”).

51. Vienna Convention on the Law of Treaties, *supra* note 49, art. 32.

52. *Id.*

53. *Id.* art. 31(3).

54. The Vienna Convention on the Law of Treaties says nothing about using analogous provisions in similar treaties as a mechanism for understanding treaty terms. The absence of reference to similar treaties could be viewed as an implicit conclusion that analogous provisions in similar treaties are not an appropriate means of interpretation. Nevertheless, the International Court of Justice has, on occasion, referred to analogous provisions in similar treaties as a means of confirming its interpretation of a treaty provision. Case Concerning Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), 2008 I.C.J. 177, ¶ 156 (June 4). In any event, a discussion of similar practice at other courts will help put the ICC’s authority to move the place of trial in perspective, even if there is some doubt about whether that practice is a formal means of interpreting the Rome Statute.

trial; and (4) similar provisions in the constituent documents of other international courts, as well as how those provisions have been used in practice. Taken together, these should provide a basis for determining whether or not the Rome Statute permits the ICC to establish a regional or local ICC trial chamber.

B. The Ordinary Meaning of Article 62

Under Article 62, the default position is that trials are to take place in The Hague, but it also states that trials may take place at other locations if a decision is made to change the place of the trial. This is the most important provision within the Rome Statute with regard to the possibility of creating a regional or local ICC chamber because it permits the ICC to hold trials away from the seat of the Court (The Hague). It is generally understood that the power to change the location of the trials covers changes to both the location of the entire trial, as well as changes to the location of particular hearings and includes authority for the Trial Chamber to make site visits if necessary.⁵⁵ In this sense, the ordinary meaning of Article 62 seems quite clear—trials away from the seat of the Court are permitted.

The negotiating history of Article 62 is sparse and does not contradict this “ordinary meaning” interpretation. The International Law Commission’s (ILC) Draft Statute for an International Criminal Court included a provision very similar to Article 62 of the Rome Statute: “Unless otherwise decided by the Presidency, the place of the trial will be the seat of the Court.”⁵⁶ This is essentially the only relevant negotiating history for Article

55. TRIFFTERER ED., *supra* note 29, at 1187. The ICC seems to share this understanding of Article 62. For example, Trial Chamber I, during pre-trial proceedings in the *Lubanga* trial, said the following: “We’ve reached the stage where we need the assistance of the parties and the participants as to whether or not there would be identifiable advantages and disadvantages to the proposal of sitting for all or part of the trial in Africa.” Transcript of Record at 78, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1311, Trial Chamber I, Transcript ICC-01-04-01-06-T-58-ENG (Oct. 30, 2007). Later in the same proceeding, the Trial Chamber noted that this was not an “all-or-nothing possibility,” and indicated that some parts of the hearings, including potentially the opening and closing statements, might be better suited to taking place in Africa than other parts of the proceedings. *Id.* at 78-79. See also *infra* Section III(E) (describing ICC practice with regard to moving parts of trials).

56. *Draft Statute for an International Criminal Court*, art. 32, *supra* note 10, at 26, 51. In its commentary, the ILC suggested that while trials would “normally” take place at the seat of the court, the court could decide to “conduct the trial closer to the scene of the alleged crime . . . so as to facilitate the attendance of witnesses and the production of evidence.” *Id.* At the same time, the ILC warned that doing so might make the trial less fair for the defendant and might create security risks for the witnesses, defendants and court staff. *Id.*; TRIFFTERER ED., *supra* note 29, at 1185.

62. It does not appear that there was any substantive discussion of the provision during the negotiation of the Rome Statute. The only change made to Article 62 during the drafting process was the elimination of the reference to the Presidency as the organ charged with making the decision to move the place of trial.⁵⁷

There is some vagueness in Article 62 of the Rome Statute. It specifies that a “decision” is needed to change the place of trial, but does not indicate which organ within the Court makes the decision or what factors should be considered in making the decision. Uncertainty with respect to how the decision is made, however, does not undermine the plain meaning of Article 62: permitting trials to take place away from The Hague. The questions of which organ of the Court makes the decision to move the place of trial and what criteria should be considered will be addressed further in Section IV.

At least one commentator has suggested that moving the place of trial should be an exceptional occurrence,⁵⁸ which would suggest that a local or regional chamber is beyond the scope of Article 62. This conclusion, however, does not appear to be supported by the plain language of Article 62. Article 62 establishes a default location for trials, but it does not indicate that trials at The Hague are preferable to trials at other locations. Indeed, preferring The Hague over other locations simply because it is the seat of the Court would be inconsistent with other provisions of the Rome Statute and with the Statute’s object and purpose, which indicate that the Court should be concerned principally with the interests of justice.⁵⁹ It is this concern for justice that should drive decisions about where to locate the trials, not simply a preference for the seat of the Court. All Article 62 requires is that there be a “decision” to change the default location of the trial. Nothing in Article 62 prevents the Court from deciding to move all or most of its trials to a local or regional chamber if that is in the interests of justice.

The larger question of whether the Rome Statute permits the

57. This change was made relatively late in the process. The reference to the Presidency that was in the ILC draft remained in the Zutphen draft of the Rome Statute in early 1998. *Draft Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands art. 55*, in M. CHERIF BASSIOUNI ED., *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 221, 275 (Transnational Publishers Inc. 1998). It was removed by the time of the Report of the Preparatory Committee. *Report of the Preparatory Committee on the Establishment of an International Criminal Court, art. 62*, in M. CHERIF BASSIOUNI, *supra* note 57, at 119, 169.

58. TRIFFTERER ED., *supra* note 29, at 1190. *Cf. Draft Statute for an International Criminal Court, art. 32, supra* note 10, at 26, 51 (suggesting that trials would “normally” take place at the seat of the court).

59. See Section IV(B) (describing the factors the court should consider in deciding whether to move the place of trial).

establishment of a local or regional ICC chamber is not completely answered by Article 62. Article 62 permits trials to take place away from the seat of the Court, but establishing a local or regional ICC chamber would require more than just moving the trials. It would mean establishing a semi-permanent ICC facility away from The Hague. That facility would need infrastructure and staff.⁶⁰ It would have to exist prior to the start of the trials and possibly continue during periods when no trials are taking place. The facility would almost certainly require some sort of formal agreement between the ICC and whatever country will act as the receiving country for the chamber.⁶¹ It is not clear if Article 62 would permit this. To answer these broader questions, this Article will look at Articles 3 and 4 of the Rome Statute.

C. *The Ordinary Meaning of Article 3*

Article 3 is potentially relevant to any discussion of the creation of a regional or local ICC chamber because while it establishes The Hague as the seat of the Court, it also permits the Court to sit away from The Hague “whenever it considers it desirable.”⁶² If this were the extent of Article 3, then a regional ICC chamber would be possible because the Court would have the general authority to sit anywhere.⁶³ The grant of authority in Article 3, however, is limited by the clause “as provided in this Statute.”⁶⁴ Stripped of its dependent clause for ease of analysis, the text of Article 3(3) reads: “The Court may sit elsewhere . . . as provided in this Statute.” Thus, the ordinary meaning of Article 3 permits the Court to sit away from The Hague, but only as otherwise provided for in the Rome Statute.⁶⁵ Nothing in Article 3(3)’s negotiating history is inconsistent with the ordinary meaning interpretation.⁶⁶ Ultimately, Article 3 does not seem to

60. See Section II(B) (discussing the infrastructure and staffing needs of a local or regional ICC chamber).

61. See Section II(C) (discussing the requirement of an agreement with the receiving country).

62. Rome Statute, *supra* note 7, art. 3(3). TRIFFTERER ED., *supra* note 29, at 1183 (arguing that Article 62 must be read in conjunction with Article 3(3)).

63. William W. Burke-White, *supra* note 1, at 750 (arguing that Article 3(3) grants the ICC the authority to create a regional tribunal). The OTP suggested just such an overly-broad interpretation of Article 3(3) in the *Bemba* case, where it based its request to move parts of the trial to the CAR exclusively on Article 3(3) and described that article as providing “that the Court may sit elsewhere, whenever it considers it desirable.” *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-555, Prosecution’s Submission to Conduct Part of the Trial *In Situ*, 3, (Oct. 12, 2009).

64. Rome Statute, *supra* note 7, art. 3(3).

65. CASSESE ET AL., *supra* note 16, at 215-216.

66. Article 3(3) was apparently created relatively late in the process. No similar provision appears in the ILC Draft or any of the other drafts that existed up until the Rome Conference. As late as the Report of the Preparatory

add anything to the grant of authority to move the place of trial in Article 62. If Article 62 permits a local or regional ICC chamber, then Article 3 is not needed. If Article 62 does not provide the necessary authority, then Article 3 does not grant any additional authority.

D. The Ordinary Meaning of Article 4

Article 4(2) of the Rome Statute is limited in a similar way to Article 3. It states that the Court may exercise its functions on the territory of any state party or, by special agreement, on the territory of a non-state party, but it also includes the phrase “as provided in this Statute.” The “as provided” language modifies the phrase “[t]he Court may exercise its functions and powers,” and appears to limit the ICC’s ability to exercise functions or powers unless the Rome Statute expressly grants that authority in some other provision.⁶⁷ If taken literally, this provision might prevent the Court from establishing a local or regional trial chamber. For example, it might prevent the Court from entering into an agreement with the receiving country to govern the relationship between the ICC and the local or regional chamber because Article 62 does not expressly grant such authority, even though Article 62 does expressly grant the ICC the authority to move the place of trial.

Such an interpretation of Article 4(2), however, would be inappropriate because it would be inconsistent with other provisions of the Rome Statute, including Article 62 and Article 4(1). First, Article 4(2) should not be interpreted in such a way that it frustrates the Court’s express authority to move the place of trial, granted in Article 62.⁶⁸ Second, there is an inherent tension between Article 4(2) and Article 4(1). While Article 4(2) suggests that the Court can only exercise those functions and powers that are expressly provided by the Statute, Article 4(1) states that the ICC has “such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its

Committee, there was no provision analogous to current Article 3(3). *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, in M. CHERIF BASSIOUNI, *supra* note 57, at 119. According to several commentators, there was very little substantive discussion of Article 3 during the negotiations that led to the Rome Statute. TRIFFTERER ED., *supra* note 29, at 72; CASSESE ET AL., *supra* note 16, at 189.

67. CASSESE ET AL., *supra* note 16, at 215.

68. Each article must be interpreted in light of the other provisions of the Rome Statute and not in isolation because each article constitutes the “context” for each other article. Vienna Convention on the Law of Treaties, *supra* note 49, art. 32. See also VILLIGER, *supra* note 49, at 427 (noting that the overall context of the treaty is considered, in part, so as to avoid inconsistencies in the translation of individual treaty terms).

purposes.”⁶⁹ Article 4(2) should not be interpreted in such a way that it eliminates the express grant of legal capacity given in Article 4(1). Rather, the three provisions must be harmonized so that the meaning given to Article 4(2) does not conflict with Articles 62 and 4(1). The best way to harmonize these provisions is to conclude that the “as provided” language in Article 4(2) limits the ICC to a narrow version of the implied powers doctrine. This would also be consistent with the negotiating history of the provision, which suggests that the “as provided in this Statute” language was added to Article 4(2) during the first week of the Rome Conference to prevent the Court from adopting an overly broad concept of implied powers.⁷⁰

The ICC has international legal personality.⁷¹ As a consequence, the ICC has those “implied powers” that are necessary to the purpose and functioning of the Court.⁷² The

69. Rome Statute, *supra* note 7, art. 4(1).

70. TRIFFTERER ED., *supra* note 29, at 126. The rest of the negotiating history does not shed any light on the proper interpretation of the article. Article 4(2) of the Rome Statute has its origins in Article 3(3) of the ILC Draft Statute for an International Criminal Court, art. 3, *supra* note 10, at 26, 28 (1994). Except for the addition of the phrase “as provided in this statute,” the text of Article 4(2) remained the same from the time of the ILC Draft until adoption of the Statute. The only other change was to move it from Article 3 of the ILC Draft to Article 4 of the Rome Statute. This apparently occurred at the Rome Conference because the text was part of Article 3 as late as the Report of the Preparatory Committee. *Report of the Preparatory Committee on the Establishment of an International Criminal Court, at art. 3, in M. CHERIF BASSIOUNI, supra note 57, at 119.*

71. Rome Statute, *supra* note 7, art. 4(1) (explicitly conferring upon the ICC international legal personality). An explicit grant of international legal personality like that in Article 4(1) of the Rome Statute is unusual, although it is becoming more common. See PHILIPPE SANDS Q.C. AND PIERRE KLEIN, *BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS 474-75* (Thomson Reuters, 6th ed. 2009) (discussing the origins of conferring international legal personality on intergovernmental organizations).

72. See Rome Statute, *supra* note 7, art. 4(1) (noting that the ICC has “such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes”). See also SANDS & KLEIN, *supra* note 71, at 477 (examining the connection between an organization’s function and mission and its international legal capacity); A.S. MULLER, *INTERNATIONAL ORGANIZATIONS AND THEIR HOST STATE: ASPECTS OF THEIR LEGAL RELATIONSHIP 82-86* (Kluwer Law International 1995) (describing several organizations that have been found to have implied powers to enter into international agreements, including host agreements); JAN KLABBERS ET AL., *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 71-72, 74* (Oxford Univ. Press 2009) (describing the doctrine of ‘implied powers’ in terms of the common intention of members states, the express stipulations of the founding treaty and relations with other international bodies). The modern doctrine of “implied powers” is largely the result jurisprudence by the International Court of Justice (ICJ) on the legal personality of international organizations. See e.g. *Reparation for Injuries Suffered in the Service of the United Nations*, International Court of Justice, Advisory Opinion, 1949 I.C.J. 174, 12 (Apr. 11)

doctrine of implied powers has sometimes been criticized as permitting international organizations to do virtually anything when interpreted too broadly,⁷³ but there is general acceptance that a narrow implied powers doctrine, one that limits itself to powers that are necessarily implied by an existing explicit power of the organization, is appropriate.⁷⁴ Concluding that Article 4(2) of the Rome Statute limits the ICC to a narrow implied powers doctrine harmonizes the contradictory terms of Articles 4(1) and 4(2) of the Rome Statute.⁷⁵

As a result, Article 4(2) generally prohibits the ICC from granting to itself entirely new functions and powers that are unrelated to its express powers and functions, but Article 4(1) grants the ICC the legal capacity to exercise unenumerated powers and functions where that capacity is essential for the implementation of an expressly granted power or function.⁷⁶ In the context of Article 62, the ICC has the explicit authority to move the place of trial. Thus, the ICC also has the implied authority necessary to carry out the movement of the place of trial. This would include entering into a formal agreement with the receiving country,⁷⁷ posting staff to the receiving country, and signing a multi-year contract to acquire the use of suitable facilities. All of these abilities are necessarily implied by the authority granted in Article 62 to move the place of trial, because movement of the place of trial would not be possible without them.

E. The ICC's Practice

The ICC has already considered whether to move parts of two different trials, and this "subsequent practice" is relevant to interpreting Article 62. The issue first arose in the *Lubanga* case in August 2007 when the OTP indicated that it wished to discuss "the place of the trial."⁷⁸ The issue was taken up next by Trial

("Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.").

73. JAN KLABBERS ET AL., *supra* note 72, at 75-76.

74. *Id.* at 75; CASSESE ET AL., *supra* note 16, at 215-216; TRIFFTERER ED., *supra* note 29, at 126.

75. TRIFFTERER ED., *supra* note 29, at 126.

76. *Id.* One commentator has suggested that Article 4(1) would permit the ICC to do things like acquire and dispose of property. *Id.* at 124.

77. The "implied powers" doctrine can grant authority to enter into host agreements where provisions within an organization's constituent documents imply a capacity to do so. See MULLER, *supra* note 72, at 86-87 (describing several organizations that have been found to have the implied power to enter into international agreements, including host agreements).

78. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1311, Prosecution's Response to the 'Réponse de la Défense à l'invitation de la Chambre de Première Instance à présenter des conclusions sur des questions

Chamber I, when it informed the parties in September 2007 that it was considering the possibility of holding some hearings in the DRC and had commissioned a feasibility study on the issue.⁷⁹ The issue was raised again at a subsequent hearing on October 30, 2007, where the Trial Chamber asked the parties to provide written submissions regarding whether they would favor moving some or all of the trial closer to the scene of the alleged crimes and whether this would have any beneficial or adverse effect on victims or witnesses.⁸⁰

In their subsequent submissions the parties largely agreed that moving the place of trial closer to the scene of the alleged crimes would be (in theory at least) a good idea. The prosecution indicated that it was generally in favor of moving the trial closer to the victims, although it was concerned about the security of witnesses.⁸¹ The defense “agreed that ideally the trial should take place amongst the people concerned . . . so that the community concerned may attend the trial,”⁸² but the defense was concerned about the rights of the defendant, particularly the defense’s access to court records and whether or not moving the proceedings would delay the trial.⁸³ The legal representatives of the victims indicated that moving the trial might “make the trial more visible for the victims and allow the victims who otherwise would not be able to participate in the proceedings access to the trial,” but it was concerned about victim and witness security.⁸⁴

The Trial Chamber subsequently asked the OTP and Victims and Witnesses Unit to canvass the prospective witnesses to see how they felt about testifying in the DRC. The witnesses overwhelmingly indicated they did not wish to testify in the DRC.⁸⁵ In March 2008, the feasibility study commissioned by the Court was completed.⁸⁶ In April, the Chamber issued its decision

devant être tranchées à un stade précoce de la procédure,’ ICC-01/04-01/06-941, ¶ 11 (Aug. 15, 2007).

79. Transcript of Record at 4, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1311, Trial Chamber I, Transcript ICC-0104-0106-T-50-ENG, (Sep. 4, 2007).

80. Transcript of Record at 78, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1311, Trial Chamber I, Transcript ICC-01-04-01-06-T-58-ENG (Oct. 30, 2007).

81. *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1311, Trial Chamber I, Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, ICC-01/04-01/06-1311, Annex 2, 35 (Apr. 24, 2008).

82. *Id.*

83. *Id.* at 36.

84. *Id.* at 35.

85. *Id.* at 36.

86. *Id.* The feasibility study is not itself a public document. Thus, there is no way to determine whether the study concluded that moving parts of the trial would be feasible or, if not, what obstacles it identified.

on whether to have some or all of the hearings in the DRC.⁸⁷ The decision is interesting because it considers none of the issues raised by the parties in their submissions. Instead, the decision notes that the Court had received a letter from the DRC's Minister of Justice informing the Court that the DRC would not consent to having hearings take place because they "could lead to ethnic tensions in an area that had been recently pacified and is potentially unstable."⁸⁸ The Chamber concluded that because "[m]oving part of the proceedings to the Democratic Republic of the Congo can only take place with the consent of the Government" and that consent had been withheld, the entire trial would take place in The Hague.⁸⁹

The issue of moving parts of the trial subsequently came before Trial Chamber III in the *Bemba* case. In October 2009, the OTP proposed moving "parts of the trial, such as the opening, the examination of victims/crime-based witnesses and the decision" to Bangui in the Central African Republic (CAR).⁹⁰ The prosecution argued that this would "provide maximum access to the trial process for the public and the victims and would therefore be in the interests of justice."⁹¹ The prosecution also suggested that Trial Chamber III follow the process before Trial Chamber I in the *Lubanga* case and commission a feasibility study.⁹² The legal representatives of the victims agreed with the OTP's suggestion,⁹³ but there does not appear to have been any response by the defense or any decision by the Trial Chamber to date.⁹⁴

The ICC's actual practice with regards to moving parts of trials is ultimately of little use in answering the question of whether or not the ICC is permitted to create a local or regional trial chamber. It does, however, rather conclusively establish that Article 62 encompasses the right to move both the entire trial as well as discrete portions of the trial.⁹⁵ It also offers fascinating insight into an emerging practice regarding the process by which the decision to move the place of trial will be taken. That aspect of

87. *Id.* at 53. Regrettably, the actual location in the DRC that was under consideration by the Trial Chamber is not part of the public record.

88. *Id.*

89. *Id.*

90. Prosecution's Submission to Conduct Part of the Trial *In Situ*, *supra* note 63, at 3.

91. *Id.*

92. *Id.* at 3-4.

93. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08-555, Réponse conjointe des représentants légaux des victimes aux observations du Bureau du Procureur concernant la tenue de certaines audiences du procès en République centrafricaine, ICC-01/05-01/08-584 (Nov. 3, 2009).

94. It is possible that a decision has been taken but that the decision is confidential and no public redacted version is yet available.

95. *See supra* note 55 and accompanying text.

the ICC's practice will be addressed in more detail in Section IV(A)(3).

F. Similar Provisions at Other Courts

This section will consider the practice of other international courts that is relevant to the question of whether the Rome Statute permits the establishment of a local or regional chamber. A number of other courts have provisions that are similar in form and function to Articles 3, 4, and 62 of the Rome Statute. Quite a few of those courts have some history of moving the place of trial, although none has gone so far as to create a semi-permanent local or regional chamber. The court that has gone the farthest is the Special Court for Sierra Leone, which moved an entire trial from its seat in Freetown to The Hague.

1. SCSL

The Agreement between the United Nations and the government of Sierra Leone that established the SCSL designates Sierra Leone as the seat of the Court but also states that the Court may "meet" away from the seat "if necessary for the efficient exercise of the [court's] functions" and even provides for the complete "relocat[ion]" of the Court outside of Sierra Leone "if circumstances so require."⁹⁶ These powers are fleshed out in the SCSL's Rules of Procedure and Evidence. Rule 4 permits a chamber to exercise its functions away from the seat of the Court, if authorized by the President or the Presiding Judge.⁹⁷ The SCSL is the only international criminal court that has exercised its authority to move an entire trial away from its seat.

In March 2006, Charles Taylor was arrested and transferred to the SCSL. He made his first appearance before the Court in April 2006 and pleaded not guilty to charges of war crimes and crimes against humanity.⁹⁸ At roughly the same time, the governments of Liberia and Sierra Leone raised concerns that trying Charles Taylor in Sierra Leone would destabilize West Africa and the SCSL began exploring the possibility of transferring the Taylor trial to a location outside of Africa.⁹⁹ This culminated in June 2006 with an Order Changing Venue of

96. Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, *supra* note 30, art. 10.

97. SCSL Rules of Procedure and Evidence, Rule 4, *available at* <http://www.sc-sl.org/LinkClick.aspx?fileticket=yNjqn5TIYKs%3d&tabid=176>.

98. *See generally* Mark Drumbl, *Charles Taylor and the Special Court for Sierra Leone*, 10 ASIL INSIGHTS iss. 9 (Apr. 12, 2006) *available at* <http://www.asil.org/insights060412.cfm>.

99. *Id.*; TRIFFTERER ED., *supra* note 29, at 118.

Proceedings, which moved the Taylor trial to The Hague.¹⁰⁰

Consistent with Rule 4 of the Rules of Procedure and Evidence, the Order was issued by the President of the SCSL.¹⁰¹ In his Order, the President noted the “security risks” posed by the detention of Charles Taylor in Sierra Leone,¹⁰² and placed special emphasis on Security Council Resolution 1688 of 16 June 2006, which created a “Chapter VII” basis for moving the Taylor trial.¹⁰³ Initially, the President determined that the movement of the Taylor trial was an instance of the Court meeting away from its seat rather than a relocation of the entire Court, and therefore the Taylor trial could be transferred if the transfer would be “necessary for the efficient exercise” of the Court’s functions.¹⁰⁴

The President evaluated several competing considerations, including the Security Council’s determination that Taylor represented a risk to peace and security in the region, the fairness of the proceedings, the rights of the accused, and the accessibility of the trial to the public in Sierra Leone. He concluded that the fairness of the proceedings and the rights of the accused would not be affected by the transfer of the trial because they would still be guaranteed in The Hague.¹⁰⁵ He stated that the SCSL’s location in Freetown provided an advantage in terms of “better access for the public, local media, and victims and witnesses,” and acknowledged that moving the trial to The Hague would diminish the amount of “direct and personal public access,”¹⁰⁶ but ultimately concluded that the security concerns outweighed concerns about lack of public access.¹⁰⁷ Consequently, he ordered the transfer of the trial to The Hague. The trial is currently being conducted by Trial Chamber II of the SCSL at the ICC’s facilities in The Hague.¹⁰⁸

100. *See generally* Order Changing Venue of Proceedings, *supra* note 32.

101. TRIFFTERER ED., *supra* note 29, at 118.

102. Order Changing Venue of Proceedings, *supra* note 32, ¶ 1.

103. *Id.* ¶ 2. *See also* S.C. Res. 1688, UN Doc. S/Res/1688 2 (2006) (“determining that the continued presence of former President Taylor in the subregion is an impediment to stability and a threat to the peace of Liberia and of Sierra Leone and to international peace and security in the region”).

104. Order Changing Venue of Proceedings, *supra* note 32, ¶ 5. Ultimately, however, the President considered a range of factors far broader than simply the efficient exercise of the Court’s functions. Although the decision does not use the “interests of justice” language, the President, by weighing the rights of the accused, the victims, the witnesses and the public against the threat of Charles Taylor’s continued presence in Sierra Leone, was really considering the interests of justice. *See infra* Section IV(C).

105. Order Changing Venue of Proceedings, *supra* note 32, ¶ 9. The Order also dismisses concerns that movement of the trial would place undue burdens on witnesses, and indicates that the Trial Chamber has the authority to hear testimony by video-link for witnesses that are unable to travel to The Hague. *Id.*

106. *Id.* ¶ 7.

107. *Id.* ¶ 10.

108. *Id.* ¶ 11 (ordering that “the proceedings against Mr. Taylor should be

2. *The ICTR and ICTY*

Provisions that permit the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) chambers to exercise their functions away from the seat of the tribunal exist in the Rules of Procedure and Evidence of the ICTY¹⁰⁹ and the ICTR.¹¹⁰ Interestingly, neither court's constituent document expressly addresses moving the location of the trial,¹¹¹ and both courts resolve the issue through their Rules of Procedure and Evidence. In this sense, the ICC's authority to move the place of trial is on firmer ground than both the ICTY and the ICTR because the constituent document of the ICC expressly addresses the possibility. On at least one occasion, the ICTY has authorized a trial chamber to undertake a site visit to the scene of the alleged crime, although the visit was eventually canceled because of security concerns.¹¹² The ICTR has apparently never conducted any trial functions away from its seat, although there have been requests for it do so.¹¹³

3. *The International Court of Justice*

The International Court of Justice (ICJ) contains provisions that are quite similar to Articles 3, 4, and 62 of the Rome Statute. For example, Article 22 of the ICJ Statute is quite similar to Articles 3(3) and 4(2) of the Rome Statute and permits the ICJ to sit and exercise its functions in locations other than its seat in The

conducted by the Special Court for Sierra Leone sitting in The Hague . . . and using facilities provided by the International Criminal Court" and authorizing Trial Chamber II to exercise its functions in The Hague). *See also supra* notes 33-35 (describing the various agreements between the Special Court, the ICC and the government of The Netherlands that were necessary to permit the transfer of Charles Taylor to The Netherlands for trial at the ICC's facilities).

109. ICTY Rules of Procedure and Evidence, Rule 4 *available at* http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf ("A Chamber may exercise its functions at a place other than the seat of the Tribunal, if so authorised by the President in the interests of justice.").

110. ICTR Rules of Procedure and Evidence, Rule 4 *available at* <http://liveunictr.altmansolutions.com/Portals/0/English/Legal/ROP/100209.pdf> ("A Chamber or a Judge may exercise their functions away from the Seat of the Tribunal, if so authorized by the President in the interests of justice.").

111. Article 31 of the ICTY Statute says that the seat of the court will be The Hague, but makes no reference to conducting trials at other locations. Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 Annex (May 25, 1993). The ICTR statute says nothing about conducting trials at other locations. Statute for the International Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/Res/955 Annex (Nov. 8, 1994).

112. CASSESE ET AL., *supra* note 16, at 201.

113. *Id.* (noting that the defense in the *Akayesu* case requested that the Trial Chamber visit the site of several alleged mass graves, although this request was ultimately denied by the chamber).

Hague “whenever the Court considers it desirable.”¹¹⁴ In addition, Article 28 of the ICJ Statute permits the ICJ’s chambers to sit outside of The Hague in a provision similar to Article 62 of the Rome Statute, although this provision is limited somewhat by the requirement that the parties must consent to the movement of the proceedings.¹¹⁵ While the ICJ has never held a trial outside of its seat in The Hague, it has visited particular locations to collect evidence.¹¹⁶

4. Domestic Courts

In domestic jurisdictions, it is not unusual for a criminal court to be able to sit away from its seat.¹¹⁷ Temporary relocations of the court may be useful to allow the court to see the physical layout of the alleged crime scene, for example.¹¹⁸ While the majority of these movements are to locations within the territory of the state where the court sits, there has been one notable recent example of a domestic criminal court sitting outside of its home state. In the “Lockerbie case,” two Libyan nationals were tried by a Scottish court that was sitting in The Netherlands.¹¹⁹

5. Conclusions about International Practice Regarding the Place of Trial

The ability to move the place of trial is not unique to the ICC, and a number of other international courts have similar authority. While it is relatively rare for this authority to be exercised, in recent years it has occurred on several occasions, most notably at the SCSL. It appears that over time international courts are becoming more willing to exercise their authority to change the place of trial.¹²⁰ Although in most cases, courts have attempted to move only discrete parts of the trial (like visiting relevant sites to collect evidence), in the case of Charles Taylor, an international criminal court has moved an entire trial.

114. ICJ Statute, art. 22. The one thing noticeably missing from Article 22 of the ICJ Statute is the “as provided” language that appears in Articles 3 and 4 of the Rome Statute. TRIFFTERER ED., *supra* note 29, at 75.

115. ICJ Statute, art. 28. Article 62 of the Rome Statute says nothing about the consent of the parties, which suggests that consent is not needed from the defendants or the prosecutor to move a trial at the ICC. However, the ICC’s Rules of Procedure and Evidence indicate that the decision has to be in the “interests of justice,” *see infra* note 151, so the effect on the prosecution and defense must be considered by the Court.

116. CASSESE ET AL., *supra* note 16, at 200 (noting that the ICJ accepted an invitation from Hungary and Slovakia in the *Gabcikovo-Nagymaros Project* case to visit several sites along the Danube to collect evidence).

117. TRIFFTERER ED., *supra* note 29, at 1183.

118. CASSESE ET AL., *supra* note 16, at 1279.

119. TRIFFTERER ED., *supra* note 29, at 1184.

120. *Id.* at 1187.

G. The Rome Statute Does Permit a Regional or Local Trial Chamber

The central question posed by this section is whether the Rome Statute would permit the ICC to create a local or regional trial chamber. The answer is “yes.” The ordinary meaning of Article 62 permits the ICC to move the place of the trial to a location away from The Hague. There is nothing within the other provisions of the Rome Statute or its negotiating history that would prohibit the Court from deciding to hold all or most of the trials arising out of a particular situation away from the seat of the Court if that would be in the interests of justice. Moreover, Article 4(1) and the implied powers doctrine provide the ICC with the authority to enter into the agreements that would be a necessary to establish a local or regional trial chamber. In short, the ICC has the authority to create a local or regional trial chamber.

H. Pre-Trial Matters Could Not Take Place at a Local or Regional Chamber

Article 62, by its text, does not apply to pre-trial matters. Thus, Article 62 does not authorize the preparation of the trial outside the seat of the Court or the matters discussed in Article 60 or 61 of the Rome Statute.¹²¹ Of course, many pre-trial proceedings can occur away from the seat of the Court by virtue of other provisions within the Rome Statute, particularly the Prosecutor’s investigation.¹²² And most pre-trial proceedings do not need to be conducted at a local or regional chamber.¹²³ It would be advantageous, however, for challenges to the jurisdiction of the Court and the confirmation of charges to be held in public at the local or regional chamber.¹²⁴ Regrettably, Article 62 does not apply to pre-trial matters and the “as provided” language of Articles 3 and 4 prevents them from serving as the basis for moving pre-trial matters away from The Hague. Consequently, it appears that the Rome Statute would not permit pre-trial challenges to the jurisdiction of the Court or the confirmation of the charges to take place away from the seat of the Court.

121. *Id.* at 1186-1187.

122. *See supra* notes 38-39 (discussing the Prosecutor’s ability to conduct investigations away from the seat of the Court).

123. *See supra* note 40 (noting that much of the Pre-Trial Chamber’s duties in monitoring the Prosecutor’s investigations are not inherently public and therefore there is no need for them to take place at the local or regional chamber).

124. *See supra* notes 41-44.

IV. HOW IS THE DECISION TO ESTABLISH A LOCAL OR REGIONAL CHAMBER TAKEN?

A. Who Makes the Decision?

This Article argues that the ICC has the ability to establish local or regional chambers based on the authority to move the place of trial granted in Article 62 of the Rome Statute. This leads to the question: who within the ICC has the authority to establish local or regional chambers? To answer this question, one must first look to the language of Article 62 because Article 62 is the source of the authority to create the chamber. Article 62, however, is silent about who should make the decision to move the place of the trial (and thus, by extension, which organ within the Court has the authority to establish a local or regional chamber).¹²⁵ In the absence of guidance from Article 62, it is necessary to also look at the negotiating history of the article, the Rules of Procedure and Evidence, the placement of the article within the structure of the Rome Statute, and the ICC's actual practice with regards to moving the place of trial.

1. Negotiating History of Article 62

The 1994 ILC draft of the Rome Statute indicated that the Presidency would decide whether or not to move the place of trial.¹²⁶ Later, a number of competing proposals came before the Preparatory Committee regarding which organ of the Court should have the authority to determine when a trial should take place away from the seat, but none of these proposals was given serious consideration.¹²⁷ Eventually, the language identifying which organ of the Court would make the decision to move the place of trial was removed from the draft statute.¹²⁸ A note to the Preparatory Committee's Report suggests, however, that some of the proposals in draft Article 62 could be dealt with in the Rules of Procedure and Evidence.¹²⁹ Ultimately, the negotiating history suggests that

125. TRIFFTERER ED., *supra* note 29, at 1188; CASSESE ET AL., *supra* note 16, at 1278.

126. *Draft Statute for an International Criminal Court*, art. 32, *supra* note 10, at 26, 52.

127. TRIFFTERER ED., *supra* note 29, at 1185. For example, one proposal would have given the Assembly of States Parties the right to authorize the movement of trials. *Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Compilation of Proposals)*, art. 62, in M. CHERIF BASSIOUNI, *supra* note 57, at 441, 522.

128. TRIFFTERER ED., *supra* note 29, at 1185, 1188.

129. *Report of the Preparatory Committee on the Establishment of an International Court, Draft Statute*, art. 62, in M. CHERIF BASSIOUNI, *supra* note 57, at 119, 169. The text of draft Article 62 concludes with the following: "Some of the issues raised in the proposals may be dealt with in the Rules of Procedure and Evidence." *Id.*

the drafters could not agree on which organ within the Court would make the decision and left resolution of the ambiguity up to the Rules of Procedure and Evidence.

2. *Rule 100 of the Rules of Procedure and Evidence*

Rule 100 of the Rules of Procedure and Evidence describes a mechanism for deciding when to move the place of trial. The request to move the place of trial can be initiated by the Prosecutor, the defense, or a majority of the judges of the Court by making a written request addressed to the President.¹³⁰ The Presidency must then consult the relevant chamber and the state where the Court intends to sit. If the chamber and the receiving state are amenable, then the matter is put to a vote during a plenary meeting of the judges and the trial will be moved if there is a two-thirds majority in favor of the move.¹³¹ The Rule is silent as to whether the Prosecution or defense must be consulted, but it stands to reason that both parties should be allowed to respond to a request to move the party initiated by the judges, and that the non-moving party should be allowed a response to a request made by the Prosecutor or defense.¹³²

Rule 100 makes sense if the Court is faced with the decision to create a local or regional chamber. Such a chamber would be a long-term undertaking that would involve virtually every part of the Court. Judges and staff assigned to the local or regional chamber could realistically expect to spend years there, given that most trials at international criminal courts are multi-year undertakings. Consequently, the judges as a whole should vote on the decision. It is not clear, however, that Rule 100 make sense in all cases where Article 62 would be invoked. For example, Article 62 is also understood to encompass the decision to move a single hearing, rather than the whole trial.¹³³

Common sense suggests, at least in cases where only a single hearing is being moved, that it should be the particular Trial Chamber that will hear the case that decides whether to move the

130. ICC-ASP, *Rules of Procedure and Evidence*, ICC Doc. ICC-ASP/1/3, Rule 100(2) (Part. II-A) (Sept. 9, 2002) [hereinafter ICC Rules of Procedure and Evidence].

131. *Id.* Rule 100. Technically, the Rule indicates that the agreement of the receiving state is a prerequisite to the matter being put to a vote, but while the President must consult the relevant chamber, nothing suggests that the chamber's agreement is necessary. On the other hand, it seems unlikely that a vote would pass by a two-thirds majority over the objections of the chamber most affected by that vote.

132. CASSESE ET AL., *supra* note 16, at 1279; TRIFFTERER ED., *supra* note 29, at 75, 1189. As a matter of actual practice, the parties do make oral and written submissions in response to requests to move the place of trial. *See supra* Section III(E).

133. *See supra* note 55 and accompanying text.

hearing.¹³⁴ They, after all, are the ones most affected by the decision and have the best understanding of the case before them. Moreover, Article 62 appears in Part VI of the Rome Statute, the part dedicated to the trial, which suggests that the decision should rest with the Trial Chamber. Finally, Article 64 suggests that the decision should lie with the Trial Chamber by virtue of its authority under Article 64(f)(6) to rule on matters that are “relevant” to the trial.¹³⁵ It makes more sense to grant the authority to the Trial Chamber when considering moving individual hearings and to the entire Court when faced with a decision whether or not to create a local or regional chamber. Rule 100 does not seem entirely consistent with the placement of Article 62 in Part VI of the Rome Statute, but it is likely that the Court would follow Rule 100 if it were contemplating creating a local or regional chamber.¹³⁶

3. Practice with Respect to Rule 100

Requests to move part of the proceedings have come before two different Trial Chambers.¹³⁷ What is striking about these incidents has been that they show that Rule 100 is not being literally implemented by the ICC, probably because, as noted in Section IV(A)(2), it does not make sense to use the cumbersome procedure outlined in Rule 100 to move a small part of a single trial. Both times the question of whether to move part or all of a trial has come before the Trial Chamber. This is inconsistent with Rule 100, which states that an “application or recommendation changing the place of where the Court sits . . . shall be addressed

134. On the other hand, several commentators have suggested that the Presidency should decide whether to move the place of trial by virtue of its authority in Article 38(3) over the “proper administration of the court.” CASSESE ET AL., *supra* note 16, at 201; TRIFFTERER ED., *supra* note 29, at 75; Burke-White, *supra* note 1, at 751. These arguments place too much emphasis on Article 38(3). Moving the place of trial is more than a simple administrative act. As noted in Section IV(B) below, a decision to move the place of trial is fundamentally a legal act and the court must consider the rights of the accused as well as the objects and purposes of the Rome Statute.

135. TRIFFTERER ED., *supra* note 29, at 1188.

136. In this respect it is worth noting that the Rome Statute states that the Rules must be consistent with the Statute and that in the event of a conflict, the Statute prevails. Rome Statute, *supra* note 7, art. 51. Nevertheless, the Rules must be adopted by a two-thirds majority of the members of the Assembly of States Parties. *Id.* Thus, the Rules have the imprimatur of the States Parties. The Court could rule that Rule 100 is in conflict with the Statute and refuse to apply it, but it seems unlikely. On the other hand, the Court’s actual practice with regard to moving the place of trial does not seem to be consistent with Rule 100, although no organ within the court has found that Rule 100 is “unconstitutional.” *See infra* Section IV(A)(3).

137. *See supra* Section III(E).

to the Presidency.”¹³⁸ For example, in the *Bemba* case, the OTP made a specific request to the Trial Chamber to consider having parts of the trial take place in the CAR, apparently in violation of Rule 100(2).¹³⁹

In the *Lubanga* case, it appears that the issue of moving parts of the trial was raised on its own by the Trial Chamber,¹⁴⁰ and the Chamber seemed to suggest that it was simply making a preliminary inquiry into the matter so that it would be prepared for a formal Rule 100 proceeding.¹⁴¹ But that position seems inconsistent with what the Chamber actually did. It solicited the views of the parties, had the parties contact their witnesses, commissioned a feasibility study, apparently contacted the government of the DRC to see if it would be willing to host some of the hearings, and then issued a decision on where the hearings would take place.¹⁴² Much of this appears to be inconsistent with Rule 100. For example, it is the Presidency who is supposed to consult the state where the Court intends to sit, not the Chamber.¹⁴³ Moreover, it is the Presidency that is supposed to ascertain “the views of the relevant Chamber” and present them to the other judges.¹⁴⁴ Finally, it is the judges sitting in plenary that

138. ICC Rules of Procedure and Evidence, *supra* note 130, Rule 100(2).

139. See *supra* note 90 and accompanying text. Under Rule 100(2), the request should have gone to the Presidency. *Id.*

140. Judge Fulford’s remarks in open court on September 4, 2007 suggest that the Chamber was behind the decision to consider having some hearings in the DRC. Transcript of Record at 4, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1311, Trial Chamber I., Transcript ICC-0104-0106-T-50-ENG (Sep. 4, 2007). On the other hand, it was the OTP that initially requested discussion of the “place of trial.” See *supra* note 78 and accompanying text. In addition, there may well have been closed session discussions of the issue that do not appear in the public record.

141. See Transcript of Record at 4, Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1311, Trial Chamber I., Transcript ICC-0104-0106-T-50-ENG (Sep. 4, 2007) (“We are taking this course, and by that I mean the feasibility study, in order to ensure that we are in a position as a Chamber to express our views to the Presidency on this issue should we be asked to do so pursuant to Rule 100.”).

142. See *supra* notes 79-89.

143. ICC Rules of Procedure and Evidence, *supra* note 130, Rule 100(2). There is some ambiguity about whether the Trial Chamber directly contacted the government of the DRC, as the Trial Chamber’s decision says only that the Chamber “received” a letter from the government of the DRC. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-1311, Trial Chamber I, Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, ICC-01/04-01/06-1311, Annex 2, 53(Apr. 24, 2008). It is not entirely clear whether the Trial Chamber contacted the DRC directly, although it is clear that the initial contact conveyed the Trial Chamber’s wish to use a specific site in the DRC. *Id.* There is no mention of any involvement by the President or the Presidency, or any reference to the requirements of Rule 100.

144. ICC Rules of Procedure and Evidence, *supra* note 130, Rule 100(2).

are supposed to decide to move the place of trial, not the Trial Chamber.¹⁴⁵

It is difficult to reconcile the ICC's actual practice with the text of Rule 100, and there appears to be an emerging practice that circumvents Rule 100. In this emerging practice, the question of whether to move parts of the trial is raised first before the trial chamber, either by the parties or the chamber itself. The chamber solicits the views of the parties, makes inquiries of the receiving state, and then comes to a decision about whether moving part or all of the trial would be desirable and feasible. It is not clear what would happen next, as the Trial Chamber in *Lubanga* concluded that moving the trial was not feasible because the DRC would not consent, and the Trial Chamber in *Bemba* has not yet ruled on the OTP's request. A trial chamber might simply issue an order moving part of the trial, in apparent violation of Rule 100, or it might submit its findings to the President and request a Rule 100 proceeding.

This emerging practice may not be consistent with Rule 100, but it seems to be a better system than the one created by the Rules. It makes sense to raise the issue of moving parts of the trial with the Trial Chamber first because the Trial Chamber is the organ of the Court in the best position to determine whether the request is worth pursuing. Only if the Trial Chamber is satisfied will the matter then be submitted to the Presidency under Rule 100. It is unlikely, however, that a trial chamber would attempt to create a local or regional trial chamber via this emerging practice because such an undertaking would have to be an institutional commitment of the entire Court.

B. What Factors Should Be Considered?

Article 62 is also silent about what factors the Court should consider in deciding whether or not to move the place of trial or establish a new local or regional chamber.¹⁴⁶ One possible interpretation of this silence is that the decision is entirely discretionary and that the Court does not need to articulate any reasons. However, this interpretation would be inconsistent with the context of Article 62 as well as the Rome Statute's objects and

145. Technically, Rule 100(3) states that the judges sitting in plenary are supposed to make the decision to move the trial only if the receiving state consents. ICC Rules of Procedure and Evidence, *supra* note 130, Rule 100(3). If the receiving state does not consent, then the rule seems to imply that no formal vote will be taken. But even in that case, the process is supposed to go through the Presidency, as it is the Presidency that is supposed to consult with the receiving state to see whether it consents to the hearings taking place on its territory.

146. TRIFFTERER ED., *supra* note 29, at 75.

purposes.¹⁴⁷ The Rome Statute is designed to: (1) punish the most serious crimes of concern to the international community; (2) end impunity; (3) deter the occurrence of future crimes within its jurisdiction; and (4) build “lasting respect for and enforcement of international justice.”¹⁴⁸ At the same time, the trials must be “fair and expeditious,” “conducted with full respect for the rights of the accused,” and with “due regard for the protection of victims and witnesses.”¹⁴⁹ Thus, the decision cannot be simply discretionary.

Any decision to move the place of trial must weigh the potential benefits of moving the place of trial against the purposes of the Rome Statute and the rights of the accused, victims, and witnesses.¹⁵⁰ The Rules of Procedure and Evidence suggest that the decision to move the place of trial must be “in the interests of justice.”¹⁵¹ Other international courts also use this standard.¹⁵² This is an appropriate standard so long as it is interpreted broadly and encompasses the balancing of the potential benefits of moving the trial against the rights of the accused, victims, and witnesses, as well as consideration of the overall purposes of the Court.¹⁵³ Accordingly, a local or regional trial chamber could be created using Article 62 if the Court found that such a chamber was in the interests of justice.

147. See *supra* Section III(A) (discussing how the Rome Statute should be interpreted).

148. Rome Statute, *supra* note 7, pmb1.

149. Rome Statute, *supra* note 7, art. 64(2).

150. TRIFFTERER ED., *supra* note 29, at 1187, 1190 (noting that the factors motivating the movement of the trial, like ease of access for victims and witnesses, must be balanced against the necessity of ensuring a just trial). For example, in his decision to move the Charles Taylor trial to The Hague, the President of the Special Court of Sierra Leone engaged in an explicit weighing of the benefits of moving the trial against any possible infringement of the rights of the accused and the increased difficulty for Sierra Leoneans in attending the trial. Order Changing Venue of Proceedings, *supra* note 32. The President’s analysis is discussed in more detail above at notes 99-105.

151. ICC Rules of Procedure and Evidence, *supra* note 130, Rule 100(1). The commentary to the original ILC draft of a statute for a permanent international criminal court suggested that the place of trial should only be moved when it was in “the interests of justice to do so.” *Draft Statute for an International Criminal Court*, Art. 32, *supra* note 10, at 26, 52. The “in the interests of justice” language later appeared in one of the draft proposals for Article 62 but was apparently left out of the text on the assumption that it would be included in the Rules of Procedure and Evidence. *Report of the Preparatory Committee on the Establishment of an International Court*, *Draft Statute*, art. 62, in M. CHERIF BASSIOUNI, *supra* note 57, at 119, 169.

152. The ICTR and the ICTY both use the “interests of justice” standard. ICTY Rules of Procedure and Evidence, Rule 4, *supra* note 109; ICTR Rules of Procedure and Evidence, Rule 4, *supra* note 110.

153. CASSESE ET AL., *supra* note 16, at 1279; TRIFFTERER ED., *supra* note 29, at 1190.

C. *Would a Local or Regional Chamber Be in the Interests of Justice?*

Creation of a local or regional trial chamber would be in the interests of justice. There are significant benefits to be gained from a local or regional trial, including ease of access to the trials for victims, witnesses, and the public, improved outreach with local communities and non-governmental organizations (NGOs), improved perceptions of legitimacy, and ease of access for witnesses.¹⁵⁴ Thus, local or regional trials would arguably foster several of the stated purposes of the Rome Statute, including the desire to build lasting respect for international justice¹⁵⁵ and to deter future crimes.¹⁵⁶ The Court would also have to consider the fairness of the proceedings and the rights of the accused, but the trial would be conducted under exactly the same rules of procedure and evidence whether it is conducted in The Hague or in a different country. In this sense, moving the place of trial has no impact on the rights of the accused or the fairness of the trial.¹⁵⁷ Thus, it appears that the interests of justice would be served by the creation of a local or regional ICC chamber. Ultimately, the most likely stumbling blocks for moving the trials are practical ones: (1) the Court's ability to ensure the safety of the accused, victims, witnesses, and the court staff;¹⁵⁸ (2) the difficulty of securing an adequate site;¹⁵⁹ (3) the additional cost of a local or regional chamber; or (4) the difficulty of locating a country willing to accept the chamber.¹⁶⁰

154. Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. INT'L & COMP. L. 347, 361-371 (2006).

155. This would be enhanced through the opportunities for local engagement provided by a local or regional chamber.

156. Increased opportunities for public outreach and local engagement presumably translate into a higher degree of awareness about the consequences of violating international criminal law in the affected region, which is a prerequisite for effective deterrence. See Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953-56 (2003) (arguing that deterrence relies upon the potential violator being aware of the law and acting rationally).

157. Order Changing Venue of Proceedings, *supra* note 32, ¶ 9. Of course, the local or regional chamber would have to be adequately staffed and have sufficient resources to conduct the trials in accordance with the Rules of Procedure and Evidence.

158. See *supra* Section II(A) (discussing the safety and security needs of an international court); Rome Statute, *supra* note 7, art. 64(2) (noting that the Trial Chamber must ensure "due regard for the protection of victims and witnesses").

159. See *supra* Section II(B) (discussing the infrastructure needs of an international court).

160. On the other hand, Tanzania has already offered to host ICC trials in Arusha. *Tanzania offers to host ICC trials*, *supra* note 4; *Tanzania offers to*

D. Who Negotiates the Agreement with the Receiving Country?

If a local or regional ICC chamber is created, the ICC will have to enter into some sort of formal agreement with the receiving country.¹⁶¹ By analogy to Article 3(2) of the Rome Statute, which indicates that the President concludes the Headquarters Agreement on behalf of the ICC, the President would also be the logical party to negotiate an agreement with the receiving country for any movement of the trial.¹⁶² This also makes sense in terms of the President's role as the head of the Presidency, which is the organ tasked with the "proper administration" of the Court.¹⁶³ Furthermore, Rule 100 of the Rules of Procedure and Evidence makes it clear that the President plays a key role in carrying out the will of the Court when a decision is made to change the place of trial. For example, the President is charged with "consult[ing]" the state where the Court intends to sit to determine whether that state is willing to accept the Court.¹⁶⁴ It makes sense that, if an agreement with the receiving state is necessary, that the President would negotiate it on behalf of the Court.

On the other hand, the analogy with Article 3(2) suggests that the Assembly of State Parties might need to approve any such agreement with the receiving country.¹⁶⁵ However, this is probably taking the analogy too far. Article 62 grants the Court the authority to move the place of trials. It does not condition that grant of authority on the consent of the Assembly of State Parties. The Court therefore has the implied power to enter into an agreement with the receiving country if such is necessary to effectuate the grant of authority in Article 62.¹⁶⁶

V. DESIRABLE CHANGES TO THE ROME STATUTE

A. Specifically Permit Local or Regional Chambers

While this Article argues that the ICC already has the authority to create a local or regional trial chamber, there are

host future ICC convicts, ICC Observers (June 4, 2009) <http://iccobservers.org/2009/06/04/tanzania-offers-to-host-future-icc-convicts/>.

In making its offer, Tanzania stressed that the ICTR's improvements to the Arusha International Conference Center made it an ideal location for the ICC to hold trials. *Tanzania offers to host ICC trials*, *supra* note 4.

161. *See supra* Section II(C).

162. TRIFFTERER ED., *supra* note 29, at 76.

163. Rome Statute, *supra* note 7, at art. 38(3).

164. ICC Rules of Procedure and Evidence, *supra* note 130, Rule 100(3).

165. TRIFFTERER ED., *supra* note 29, at 76. Article 3(2) of the Rome Statute states that, while it is the President that concludes the Headquarters Agreement on behalf of the ICC, the agreement has to be approved by the Assembly of States Parties first. Rome Statute, *supra* note 7, art. 3(2).

166. *See supra* Section III(D).

several ways in which the Rome Statute could be amended to make local or regional trial chambers more effective and practical. The most obvious potential change would be to amend the Rome Statute to explicitly permit the creation of a local or regional trial chamber. The best way to do this would be to either amend Article 3 to add the following sub-part: "The Court may create local or regional seats and sit at these local or regional seats where it is in the interests of justice to do so" or amend Article 3(3) to read: "The Court may decide to sit elsewhere when it is in the interests of justice to do so."

B. Increase the Number of Judges

There has been a trend over time toward narrowing the number of trials at international criminal courts by narrowing the personal jurisdiction of the courts.¹⁶⁷ The ICC's personal jurisdiction is not limited in the same way as the jurisdiction of the hybrid tribunals.¹⁶⁸ Nevertheless, in practice, it appears that the ICC will follow the trend and focus on those individuals who are "most responsible."¹⁶⁹ This suggests that the number of trials that arise out of each individual situation investigated by the ICC will be more like the caseloads of the hybrid tribunals than the caseloads at the ICTY or ICTR. Nevertheless, there are likely to be a significant number of cases that come before the ICC because it is not limited to investigating a single situation.

The ICC has eighteen judges,¹⁷⁰ of which not less than six are to be part of the Trial Division.¹⁷¹ Eight judges are currently in the Trial Division.¹⁷² Each individual trial chamber is comprised of three judges from the Trial Division.¹⁷³ They are currently sitting

167. Ford, *supra* note 12 at notes 255-259.

168. For example, the Rome Statute says that "a person who commits a crime within the jurisdiction of the court shall be individually responsible," while the ECCC Law says that the ECCC has jurisdiction over "senior leaders" and those who "were most responsible" for violations of international criminal law. Rome Statute, *supra* note 7, art. 25(1); The Law on the Establishment of the Extraordinary Chambers as Amended, art. 1 *available at* http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf; Rome Statute, *supra* note 7, art. 1.

169. *See, e.g.*, OTP Press Conference on Kenya, Prosecutor Moreno-Ocampo's Statement (Apr. 1, 2010) *available at* <http://www.icc-cpi.int/Menu/ICC/Press+and+Media/Press+Releases/News+and+Highlights/> (noting that the Prosecutor will focus on "those most responsible for the most serious incidents").

170. Rome Statute, *supra* note 7, art. 36(1).

171. *Id.* art. 39(1).

172. The ICC website describes the composition of the Trial Division. Trial Division, International Criminal Court, <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/trial%20division/trial%20division?lan=en-GB>.

173. Rome Statute, *supra* note 7, art. 39(2)(b).

in three cases (involving four accused) as Trial Chambers I, II, and III.¹⁷⁴ Because three trial chambers require nine judges, there is a necessary overlap, and Judges Fulford and Benito both sit on more than one trial chamber. In short, the ICC has very little capacity to conduct additional trials.¹⁷⁵ This is problematic given the number of cases the ICC can reasonably expect to come before it.

There is one accused awaiting trial,¹⁷⁶ and there are nine outstanding arrest warrants.¹⁷⁷ Collectively, these nine individuals represent five more trials. In addition, the Prosecutor recently announced that he had a list of twenty suspects he wished to investigate regarding the situation in Kenya and that he expected his investigation to result in at least two cases, each against between one and three persons.¹⁷⁸ Finally, the Prosecutor is conducting preliminary investigations into four other situations.¹⁷⁹

In effect, the ICC is nearly at full capacity with three trials ongoing, but indications are that it can expect at least eight more trials arising out of the situations that are currently before it, and there is no reason to believe that the ICC will suddenly stop exercising jurisdiction over new situations. This issue is not directly related to the creation of a local or regional chamber. Even if the ICC were to try all of its cases in The Hague, it would still need more trial judges. But it is equally true that if the ICC were to establish a local or regional chamber, it would probably need to appoint more judges to staff that chamber. Additional permanent judges can be authorized by the Assembly of States

174. This information is available from the "Cases" page at the ICC website. Cases, International Criminal Court, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases/>.

175. The Rome Statute does allow for judges from the Pre-Trial Division to be assigned to the Trial Division. Rome Statute, *supra* note 7, at art. 39(4). However, it would only be practical to transfer a maximum of three pre-trial judges to the Trial Division because the Pre-Trial Division only has six judges and it needs three to perform its tasks. *Id.* art. 39(2). This would allow the creation of one additional Trial Chamber.

176. The case of Prosecutor v. Bahar Idriss Abu Garda is currently in the pre-trial phase but the accused is in custody and the Pre-Trial Chamber has confirmed the charges against him. Prosecutor v. Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges (Feb. 8, 2010). Thus it seems likely that a trial will occur.

177. This information is available from the "Cases" page at the ICC website. Cases, *supra* note 174.

178. OTP Press Conference on Kenya, *supra* note 169.

179. See e.g. Press Release: OTP preliminary examination in Georgia: ICC Prosecutor receives Georgian Justice Minister, ICC Doc. No. ICC-OTP-20100319-PR507 (Mar. 19, 2010) (indicating that the Prosecutor is conducting a preliminary investigation into the situation in Georgia). The ICC website also indicates that the Prosecutor is conducting preliminary investigations into the situations in Afghanistan, Colombia and Palestine. Office of the Prosecutor, International Criminal Court, <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/>.

Parties.¹⁸⁰

C. Permit Ad Litem Judges from the Region

One solution to the problem of lack of judges might be the appointment of *ad litem* judges. Both the ICTR and the ICTY faced a problem of insufficient trial judges in their early years and requested permission to add additional trial judges.¹⁸¹ Ultimately, both courts opted to increase their trial capacity through the use of *ad litem* judges.¹⁸² *Ad litem* judges are judges that are appointed for the duration of a particular trial.¹⁸³ They do not get voting rights,¹⁸⁴ but they are required to meet the same qualifications and standards as the permanent judges.¹⁸⁵

Although the Rome Statute would have to be amended to permit the use of *ad litem* judges, this might be the best way to keep pace with changes in the size of the ICC's docket. The ICC would be staffed with a core of permanent judges and *ad litem* judges could be added as needed to meet the needs of the Court's docket.¹⁸⁶ This would allow the Court to staff a local or regional chamber with a small number of permanent judges, perhaps one per chamber, supplemented with *ad litem* judges as necessary. While *ad litem* judges at the ICC would probably be modeled on their use at the ICTY and ICTR, there should be one significant change. When *ad litem* judges are appointed to serve at local or regional chambers, special preference should be given to qualified candidates from the same region. Having judges on the local or regional chamber that come from the same region will improve the Court's perceived legitimacy amongst the affected communities.¹⁸⁷

180. Additional judges can be added by an affirmative vote of two-thirds of the members of the Assembly of States Parties. Rome Statute, *supra* note 7, art. 36(2).

181. Erik Mose, *The ICTR: Experiences and Challenges*, 12 NEW ENG. J. INT'L & COMP. L. 1, 9-10 (2005).

182. *Id.*

183. Statute of the ICTY, *supra* note 111, art. 13(2).

184. *Id.*

185. *Id.* art. 13.

186. In this respect, rather than specifying how many *ad litem* judges would be appointed, it might be better if the Rome Statute permitted the Assembly of States Parties to authorize a maximum number of *ad litem* judges that could be sitting at any one time, but left the decision about how many of those *ad litem* positions to fill at any given time to either the Presidency or the judges sitting in plenary.

187. See Burke-White, *supra* note 1, at 737, 75 (arguing that using more local or regional personnel improves the perceived legitimacy of international courts).

D. Permit Some Pre-Trial Activities to Occur at Local or Regional Chambers

One problem noted above is that Article 62 of the Rome Statute only applies to the trial and thus does not permit pre-trial activities to be conducted away from The Hague.¹⁸⁸ This is unfortunate because it would be beneficial to have certain pre-trial activities, including challenges to the jurisdiction of the Court and the confirmation of charges, occur at a local or regional chamber.¹⁸⁹ If the amendment to Article 3 suggested in Section V(A) is adopted, then no further change would be required to permit pre-trial activities to occur at local or regional chambers. However, if this amendment is not adopted, then it would be desirable to add a sub-part to Article 57 that explicitly states that: "The Pre-Trial Chamber may sit at a location other than the seat of the Court when it is in the interests of justice to do so."

VI. CONCLUSION

Currently, the ICC is conducting all of its trials at The Hague. Individual trial chambers have considered moving parts of the proceedings closer to where the alleged crimes occurred, but nothing has come of this yet. The ICC needs to reverse its current approach and adopt a strategy where all or most of the trials are conducted in their entirety at local or regional trial chambers. Conducting trials at The Hague should be the exception, not the default position. However, nobody has seriously explored whether the Rome Statute would permit the ICC to establish local or regional trial chambers.

After studying the text of the Rome Statute, its negotiating history, the Rules of Procedure and Evidence, the ICC's jurisprudence, and the practice of other international courts, I have concluded that the Rome Statute permits the establishment of local and regional trial chambers. First, the ordinary meaning of Article 62 of the Rome Statute allows the Court to move all or most of its trials to local or regional chambers if that would be in the interests of justice. Second, Article 4(2) of the Rome Statute should be interpreted to permit the ICC to exercise un-enumerated powers where those powers are essential to the implementation of the ICC's authority to move the place of the trial. Accordingly, the ICC has the authority to create a local or regional trial chamber, including the authority to enter into a formal agreement with the receiving country, sign multi-year contracts to acquire the use of suitable facilities, and post staff to the receiving country.

The next question this Article addresses is the process by which the ICC could establish local or regional trial chambers. On

188. See *supra* Section III(H).

189. See *supra* Section II(D).

its face, Rule 100 of the ICC's Rules of Procedure and Evidence envisions a process for changing the place of the trial that involves a decision by all of the ICC judges voting in a plenary session, even though this seems to be inconsistent with the placement of Article 62 of the Rome Statute within the part of the Statute devoted to the powers of the Trial Chamber. In practice, however, individual Trial Chambers have heard petitions to move the place of trial and ruled on those petitions, apparently in violation of Rule 100. Despite this contradiction between the Rules of Procedure and Evidence and the ICC's actual practice, if the ICC was to decide to create a local or regional trial chamber, such a decision would probably go through the formal process outlined in Rule 100.

Finally, this Article also proposes a small number of relatively modest changes to the Rome Statute that would affirm the ICC's authority to create local or regional chambers and simultaneously make such chambers more likely to be created and more effective. First, the Rome Statute should be amended to expressly permit the creation of local or regional trial chambers, thereby avoiding controversy over the meaning of Article 62. Second, it would be beneficial if the Rome Statute was amended to increase the number of judges and permit the use of *ad litem* judges from the region where the crimes allegedly took place. Finally, the Rome Statute should be amended to expressly permit some pre-trial activities to occur at local or regional trial chambers.