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Winter 2008

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#### Repository Citation

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# Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice

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William W. Burke-White\*

*When the International Criminal Court ("ICC" or "Court") was established in 2002, states, nongovernmental organizations ("NGOs"), and the international community had extraordinarily high expectations that the Court would bring an end to impunity and provide broad-based accountability for international crimes. Nearly five years later, those expectations remain largely unfulfilled due to political constraints, resource limitations, and the limited ability of the ICC to apprehend suspects. This article offers a novel solution to the misalignment between the Court's limited resources and legal mandate on the one hand and the lofty expectations for it on the other, arguing that the Court must engage more actively with national governments and must encourage states to undertake their own prosecutions of international crimes. It advocates a shift in the ICC's role through a policy of "proactive complementarity," whereby the Court would encourage and at times assist states in undertaking domestic prosecutions of international crimes. The article examines the legal mandate for such a policy, considers the political constraints on the Court, offers a practical framework for the implementation of proactive complementarity in the range of circumstances the ICC is likely to face, and documents examples of proactive complementarity in the ICC's initial operations. Overall, the article argues that encouraging national prosecutions within the "Rome System of Justice" and shifting burdens back to national governments offer the best and perhaps the only ways for the ICC to meet its mandate and help end impunity.*

## I. INTRODUCTION

The establishment of the International Criminal Court in 2002 was accompanied by extraordinary optimism for the prospects of international criminal justice. After the sixtieth state ratified the Rome Statute in April 2002, U.N. Secretary-General Kofi Annan announced that "[i]mpunity has

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been dealt a decisive blow.”<sup>1</sup> States, nongovernmental organizations, and the global public all had high expectations for the new Court’s ability to provide widespread accountability for international crimes.<sup>2</sup> These high hopes largely failed to reflect the reality of the ICC’s modest capabilities. Whereas the preamble to the Rome Statute anticipates that the Court should help “put an end to impunity for the perpetrators of . . . [international] crimes,” the capacity of the Court and the limited resources made available to it suggest that it will, at best, make a far more limited contribution to ending impunity.

Neither the legal mandate of the ICC nor the resources available to it are sufficient to allow the Court to fulfill the world’s high expectations. The global community expects the ICC to provide worldwide accountability, yet the Court’s own internal predictions and the current level of funding from the Assembly of States Parties (“ASP” or “Assembly”) anticipate a maximum of two to three trials per year.<sup>3</sup> In addition, the Court optimistically assumes that states will cooperate in the arrest and surrender of indictees. This combination of unrealistic hopes and limited capacity raises the real prospect that the Court will be seen as a failure only a few years after its creation. Any limited contribution it may make will inevitably fall short of the global community’s high expectations.

As a potential solution to this misalignment of expectations, mandate, and resources, the ICC could participate more directly in efforts to encourage national governments to prosecute international crimes themselves. This solution, predicated upon the ICC’s ability to motivate and assist national judiciaries, could be termed “proactive complementarity.”<sup>4</sup> Under such a policy, the ICC would cooperate with national governments and use political leverage to encourage states to undertake their own prosecutions of international crimes. In order for the Court to meet expectations, national governments must fulfill their obligations to provide accountability. The

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1. Press Release, Office of the Secretary-General, Transcript of Press Conference with President Carlo Ciampi of Italy and Secretary-General Kofi Annan in Rome and New York by Videoconference, U.N. Doc. SG/SM/8194 (Apr. 11, 2002) (following ratification of the Rome Statute of the International Criminal Court in Rome, Italy).

2. See *infra* Part II.A.

3. This prediction is based on the average trial length at similar international tribunals, such as the International Criminal Tribunal for the former Yugoslavia (“ICTY”), where many trials have taken a year or more. While the ICC does have three simultaneously operating trial chambers, it presently has only one courtroom available, limiting the potential sitting time of any particular chamber. See *infra* Part II.D.

4. The term “positive complementarity” is used by some commentators to describe a similar policy approach. Proactive complementarity, however, better reflects the nature of the policy and better highlights its distinction from the Court’s present approach that might be termed “passive complementarity.” See Payam Akhavan, *The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT’L L. 403, 413 (2005) (referring to a positive interpretation of complementarity). Various NGOs have also used the term “positive complementarity.” See, e.g., Christopher Keith Hall, Amnesty International, Statement at the Second Public Hearing of the Office of the Prosecutor (Sept. 26, 2006), available at [http://www.icc-cpi.int/organs/otp/otp\\_public\\_hearing/otp\\_ph2/otp\\_ph2\\_HGNGO\\_2.html](http://www.icc-cpi.int/organs/otp/otp_public_hearing/otp_ph2/otp_ph2_HGNGO_2.html).

formal adoption of a policy of proactive complementarity would help the ICC come far closer to meeting expectations with its limited resources.

Upon assuming office in 2003, the ICC's Prosecutor, Luis Moreno-Ocampo, stated, "[a]s a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."<sup>5</sup> Similarly, in an address to the diplomatic corps at The Hague in 2004, the Prosecutor noted that a key strategic priority would be to take "a positive approach to complementarity. Rather than competing with national systems for jurisdiction, we will encourage national proceedings wherever possible."<sup>6</sup> The Prosecutor's statements embody the concept of proactive complementarity, according to which the Office of the Prosecutor ("OTP") will, in the right circumstances, encourage national governments to undertake their own investigations and prosecutions of crimes within the Court's jurisdiction.<sup>7</sup>

Despite these early statements, the Prosecutor appears to have moved away from a policy of proactive complementarity, instead focusing the OTP on the direct prosecution of international crimes.<sup>8</sup> As the Prosecutor explained in a major policy address in June 2007, "I was given a clear judicial mandate. My duty is to apply the law without political considerations. I will present evidence to the Judges and they will decide on the merits of such evidence."<sup>9</sup> The Prosecutor noted that he would neither attempt to adjust his approach based on political considerations nor respond to or alter the policies of national governments. He stated that

for each situation in which the ICC is exercising jurisdiction, we can hear voices challenging judicial decisions, their timing, their timeliness, asking the Prosecution to use its discretionary powers to adjust to the situations on the ground. . . . These proposals are not consistent with the Rome Statute. They undermine the law States Parties committed to."<sup>10</sup>

To date, the ICC has not, at least intentionally, engaged in a policy of proactive complementarity. Nor has it strategically used the various tactics

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5. Luis Moreno-Ocampo, Prosecutor of the ICC, Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (June 16, 2003), available at [http://www.icc-cpi.int/library/organs/otp/030616\\_moreno\\_ocampo\\_english\\_final.pdf](http://www.icc-cpi.int/library/organs/otp/030616_moreno_ocampo_english_final.pdf).

6. Luis Moreno-Ocampo, Prosecutor of the ICC, Statement of the Prosecutor to the Diplomatic Corps (Feb. 12, 2004), available at [http://www.icc-cpi.int/library/organs/otp/LOM\\_20040212\\_En.pdf](http://www.icc-cpi.int/library/organs/otp/LOM_20040212_En.pdf).

7. Christopher Keith Hall, *The Powers and Role of the Prosecutor of the International Criminal Court in the Global Fight Against Impunity*, 17 LEIDEN J. INT'L L. 121, 135-36 (2004).

8. See Luis Moreno-Ocampo, Prosecutor of the ICC, Building a Future on Peace and Justice, Address at the International Conference in Nuremberg (June 24-25, 2007), available at [http://www.icc-cpi.int/library/organs/otp/speeches/LMO\\_nuremberg\\_20070625\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/speeches/LMO_nuremberg_20070625_English.pdf).

9. *Id.*

10. *Id.*

developed in this article that could further such a policy. The Court's failure to use consciously its power to catalyze national prosecutions is a potentially dangerous mistake. Although the Prosecutor is right to focus on the Court's legal mandate and to reject politically driven calls for amnesty, neglecting the ICC's political and legal power to encourage national prosecutions of international crimes may well undermine the institution's best hope to meet expectations and enhance accountability. This article urges the OTP to implement a policy of proactive complementarity that utilizes the full range of legal and political levers of influence available to the Court to encourage and at times even assist national governments in prosecuting international crimes themselves. By following such a policy, the Court will maximize its impact despite its limited resources.

The concept of complementarity inherent in a policy of proactive complementarity differs considerably from the understandings of complementarity articulated at the time of the drafting of the Rome Statute in 1998 and in the Court's practice to date. Compared to proactive complementarity, the Court's current practice and the understanding of the drafters might better be termed "passive complementarity." The complementarity provisions of the Rome Statute, at least as understood in 1998, highlight the Court's role as a backstop to national jurisdictions.<sup>11</sup> Passive complementarity suggests that the ICC would step in to undertake its own prosecutions only where national governments fail to prosecute and where the Court has jurisdiction.<sup>12</sup> The ICC, it was thought, would simply substitute an international forum for a domestic one. In contrast to passive complementarity, proactive complementarity recognizes that the ICC can and should encourage, and perhaps even assist, national governments to prosecute international crimes.

Proactive complementarity builds on the fact that the Rome Statute does far more than merely define the limits of the Court's power. The Statute creates a system of judicial enforcement for the prosecution of the most serious international crimes at both the domestic and international levels of governance. The Statute also affirms the duties and rights of both national governments and the ICC to prosecute such crimes<sup>13</sup> and reifies the obliga-

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11. See Rome Statute of the International Criminal Court art. 17, July 12, 1998, 2187 U.N.T.S. 900 [hereinafter Rome Statute]; see also John Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 41 (Roy Lee ed., 1999) [hereinafter Holmes, *The Principle of Complementarity*]; John Holmes, *Complementarity: National Courts versus the ICC*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667 (Antonio Cassese et al. eds., 2002) [hereinafter Holmes, *Complementarity: National Courts versus the ICC*] ("Ironically, however, the provisions of the Rome Statute itself contemplate an institution that may never be employed.")

12. See Holmes, *Complementarity: National Courts versus the ICC*, *supra* note 11, at 667 ("Of course, in reality there is a need for the ICC, since States may be unwilling to exercise jurisdiction over international crimes.")

13. See Rome Statute, *supra* note 11, pmbl. ("[I]t is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and "the most serious crimes of concern to the international community as a whole must not go unpunished and . . . their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.")

tions of states to assist the ICC in its own investigations and prosecutions.<sup>14</sup> In so doing, the Rome Statute creates a tiered system of prosecutorial authority that could be characterized as the “Rome System of Justice.”<sup>15</sup> Within this system, both the domestic and international levels of governance have interrelated international legal duties to provide accountability for international crimes.

As a strategy for encouraging national governments to undertake their own prosecutions of international crimes, proactive complementarity would allow the Court to catalyze national judiciaries to fulfill their own obligations to prosecute international crimes. Those obligations are found in a wide range of international treaties, including the Geneva Conventions of 1949 and the Genocide Convention, and such obligations are reaffirmed in the preamble to the Rome Statute itself. Specifically, a strategy of proactive complementarity would use the Court’s legal and political powers to activate states’ domestic courts in international criminal prosecutions. The admissibility requirements of article 17 of the Rome Statute do not merely limit the cases the ICC can hear; rather, they regulate the allocation of authority between states and the ICC. Article 17 recognizes the shared competence, and perhaps even common duty, of national and international institutions to help bring about an end to impunity. In the Rome System, then, the ICC and national governments are engaged in a broad set of interactions directed toward accountability for international crimes.

Proactive complementarity derives its force from this broad perspective on the Rome System of Justice since it utilizes the potential for the ICC to encourage domestic prosecutions and contribute to the effective functioning of national judiciaries. Such a policy could produce a virtuous circle in which the Court stimulates the exercise of domestic jurisdiction through the threat of international intervention. As a result, the Court would not have to undertake prosecutions of at least some cases itself and could focus its energy and resources on those cases in which there is no available domestic alternative, thereby maximizing its contribution to the statutory goal of ending impunity.

For the ICC to meet its mandate and to fulfill expectations, the Prosecutor’s early rhetoric of encouraging domestic prosecutions must be transformed into a formal policy of proactive complementarity that would structure the ICC’s interactions with national governments. Specifically, a strategy of proactive complementarity would draw upon the fact that the potential for intervention by the ICC, if backed by a strong track record of

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14. See *id.* arts. 86–99.

15. See William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multilevel Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT’L L. 557–90 (2005) [hereinafter Burke-White, *Complementarity in Practice*]; see also William Burke-White, *A System of Multilevel Global Governance in the Enforcement of International Criminal Law* (July 14, 2006) (unpublished Ph.D. dissertation, Cambridge University) (on file with author) [hereinafter Burke-White, *Multilevel Global Governance*].

investigating and prosecuting the most serious crimes within the Court's jurisdiction, will often have a catalytic influence on national governments. The possibility of international prosecution can create incentives that make states more willing to investigate and prosecute international crimes themselves. Likewise, proactive complementarity recognizes that some outside assistance may allow states to undertake prosecutions when they lack the means to do so alone. Finally, proactive complementarity can shift both expectations and the burden of action back to states—which, after all, have the primary legal obligations to prosecute international crimes.<sup>16</sup>

Just as proactive complementarity offers a potentially effective and efficient means of allowing the ICC to fulfill its mandate, its implementation raises new questions for the Court. These include the development of useable tactics of political influence, the practical difficulties of coordinating with national governments, and the legal dangers around compromising a case's subsequent admissibility before the ICC. The OTP must therefore develop a cautious and carefully tailored strategy of proactive complementarity that achieves its benefits and minimizes potential dangers.

This article argues that a policy of proactive complementarity and the full activation of the Rome System of Justice offer the most effective, and perhaps the only, way for the ICC to meet its mandate and expectations. Particularly as the 2009 Review Conference approaches, if the Court is to avoid an early and visible failure, the formal adoption of a policy of proactive complementarity is an urgent imperative.<sup>17</sup> Asserting that proactive complementarity would go far to remedy the misalignment of expectations and resources available to the ICC, this article develops the legal, political, and practical frameworks for such a policy. Part II examines the misalignment of expectations, mandate, and resources. Part III suggests that proactive complementarity offers an effective means for maximizing the Court's impact on ending impunity. Part IV develops specific tactics for the implementation of proactive complementarity within the range of circumstances potentially faced by the ICC. The article concludes by arguing that a cautious policy of proactive complementarity has the potential to significantly enhance the success of the overall objectives of the Rome System of Justice and to ensure the Court's long-term ability to meet expectations.

## II. THE MISALIGNMENT OF EXPECTATIONS, MANDATE, AND RESOURCES

The entry into force of the Rome Statute of the ICC in July 2002 was the culmination of more than a century of effort toward the establishment of a

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16. See Rome Statute, *supra* note 11, pmb1. ("Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . .").

17. Pursuant to article 123(1) of the Rome Statute, a Review Conference will be held seven years after the Statute's entry into force, at which amendments and changes to the Statute can be proposed and considered. See *id.* art. 123(1).

permanent international criminal tribunal. The creation of the Court was widely viewed as a significant contribution toward ending impunity and promoting the global rule of law. However, this optimism has not been matched by the legal mandate given to the Court in the Statute or the resources made available to it by the Assembly of States Parties. Moreover, the creation of the ICC has given states an excuse to shift, at least rhetorically, the burdens of prosecuting international crimes from national governments to the new international tribunal. As a result of unrealistic expectations and limited resources, the Court may well come to be seen as a failure.

### A. *The Growth of Unrealistic Expectations*

New institutions with global scopes often are accompanied by extraordinarily lofty expectations as a consequence of the concerted effort to generate the necessary political support. The ICC is no exception. The Secretary-General's 2004 Report on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies observed that the ICC "offers new hope for a permanent reduction in the phenomenon of impunity."<sup>18</sup> NGOs and civil society movements in favor of the Court's establishment championed its cause and emphasized its transformative potential. Amnesty International has argued that "[t]he establishment of a permanent International Criminal Court will bring perpetrators to justice and provide redress to victims when states are unable or unwilling to do so."<sup>19</sup> The executive director of Human Rights Watch has described the rise of the ICC as a "turning point for justice and the rule of law."<sup>20</sup> The convener of the Coalition for the International Criminal Court has likewise observed that the "Court is capable of ending an era of impunity and is a symbol of the triumph of law over violence and brutality."<sup>21</sup> The same groups that raised hopes to facilitate the creation of the court have continued to emphasize its potential even after the Rome Statute's entry into force in order to secure additional ratifications of the Rome Statute and to generate ongoing support for the Court.<sup>22</sup>

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18. The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, at 1, delivered to the Security Council and the General Assembly, U.N. Doc. S/2004/616 (Aug. 23, 1994).

19. Amnesty International, International Criminal Court, <http://www.amnestyusa.org/icc/index.do> (last visited Nov. 14, 2007).

20. Kenneth Roth, Executive Director, Human Rights Watch, Remarks to the International Criminal Court Assembly of State [sic] Parties (Sept. 9, 2002), <http://hrw.org/campaigns/icc/docs/ken-icc0909.htm>.

21. Press Release, Coalition for the International Criminal Court, International Criminal Court Established at Landmark U.N. Treaty Event (Apr. 11, 2002), available at <http://www.iccnw.org/documents/04.11.2002ICCEstablished.pdf>.

22. See William Pace, Convener of the Coalition for the ICC, Statement on the Occasion of the Entry into Force of the Rome Statute (July 1, 2002), available at <http://www.iccnw.org/documents/BillPacePrepCom1July02.pdf> (noting the Court's potential and the need to secure additional ratifications of the Rome Statute).



The governments that have ratified the Rome Statute similarly look to the ICC to perform a myriad of tasks, many of which go well beyond the capacity and capability of the institution.<sup>23</sup> For example, the Prime Minister of Liechtenstein has noted that the Court has “a strong potential to help prevent conflicts.”<sup>24</sup> Canadian Foreign Minister Lloyd Axworthy has stressed the ICC’s deterrent effect: “We need a new form of deterrence [against atrocities]. The establishment of an International Criminal Court . . . which makes impunity illegal and which holds individuals directly accountable for their actions, is that deterrent.”<sup>25</sup> Other states have suggested that the Court will expand human rights protections. The former president of Argentina has noted an expectation that the “institution will contribute to enhance the rule of law and the respect for human rights.”<sup>26</sup> The president of Croatia has argued that the ICC will help ensure “universal protection” of human rights.<sup>27</sup> Finally, some states have boldly suggested that the ICC may promote international peace and security. The Czech Republic has gone so far as to claim that the Court may transform the international system by “projecting the principle of justice into international relations.”<sup>28</sup> Such hopes, realistic or unrealistic, have come to dominate global public debate.

Admittedly, many of these statements are rhetorical, and even the Court’s proponents recognize its limitations. In particular, they acknowledge its constrained jurisdiction and its lack of enforcement mechanisms.<sup>29</sup> The Prosecutor himself has observed that “[t]he Court can contribute to galvanize international efforts, and support coalitions of those willing to proceed with such arrests. But ultimately, the decision to uphold the law will be the

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23. Even when these expectations accurately portray the Court’s goals, it is highly unlikely that the expectations will be achieved. See *Recent Declarations: Statement of H.E. Mr. Mario Frick, Prime Minister of the Principality of Liechtenstein*, ICC UPDATE (Coalition for the Int’l Criminal Ct., New York, N.Y.), Sept. 21, 2000, available at <http://www.iccnw.org/documents/iccupdate13.pdf> (noting that “[t]he ICC will lead to full accountability for the commission of the most serious crimes under international law”).

24. *Id.*

25. *Recent Declarations: Statement of H.E. Lloyd Axworthy*, ICC UPDATE (Coalition for the Int’l Criminal Ct., New York, N.Y.), Oct. 18, 2000, available at <http://www.iccnw.org/documents/iccupdate14.pdf>. The former Bulgarian foreign minister also has suggested that the ICC “[is] an efficient step . . . towards deterring the possible perpetrators from committing such acts.” *Recent Declarations: Statement of H.E. Nadezhda Mibailova*, ICC UPDATE (Coalition for the Int’l Criminal Ct., New York, N.Y.), Oct. 18, 2000, available at <http://www.iccnw.org/documents/iccupdate14.pdf>.

26. *Recent Declarations: Statement of H.E. President Fernando de la Rúa*, ICC UPDATE (Coalition for the Int’l Criminal Ct., New York, N.Y.), Sept. 21, 2000, available at <http://www.iccnw.org/documents/iccupdate13.pdf>.

27. *Recent Declarations: Statement of H.E. President Stipe*, ICC UPDATE (Coalition for the Int’l Criminal Ct., New York, N.Y.), Sept. 21, 2000, available at <http://www.iccnw.org/documents/iccupdate13.pdf>.

28. *Statements to the United Nations, Czech Republic*, THE INTERNATIONAL CRIMINAL COURT MONITOR, Nov. 2000, at 11, available at <http://www.iccnw.org/documents/monitor16.200011.english.pdf>. Italy has likewise expressed the view that the ICC will result in a “more democratic international system.” See *Statements to the United Nations, Italy*, THE INTERNATIONAL CRIMINAL COURT MONITOR, Nov. 2000, at 11, available at <http://www.iccnw.org/documents/monitor16.200011.english.pdf>.

29. See *Questions and Answers: The Office of the Prosecutor of the International Criminal Court*, Coalition for the Int’l Criminal Ct. (Sept. 29, 2003), <http://www.iccnw.org/documents/FS-Prosecutor.pdf>.

decision of States Parties.”<sup>30</sup> As might be expected, those with a more ambivalent view of the Court have also commented on its limitations.<sup>31</sup> Nevertheless, the extraordinarily high hopes—even if, in part, rhetorical—into which the ICC was born have fueled popular conceptions (or misconceptions) as to its judicial power and transformative potential. Even Joseph Kony, the leader of the Lord’s Resistance Army now under ICC indictment, is rumored to believe that the Court may be able to swoop down on his hideout in Garamba National Park in the eastern Democratic Republic of Congo (“D.R. Congo”) with Blackhawk helicopters to arrest him.<sup>32</sup>

Simultaneously, the Court’s detractors have sought to undermine its support by creating the perception of a powerful and invasive institution that threatens national sovereignty. Former U.S. Secretary of State Henry Kissinger has denounced the ICC’s power to “assert jurisdiction over Americans even in the absence of U.S. accession to the treaty.”<sup>33</sup> Another American critic has warned that the ICC would “transfer the ultimate authority to judge the policies adopted and implemented by the elected officials of the United States, the core attribute of sovereignty . . . away from the American people and to the ICC’s Prosecutor and judicial bench.”<sup>34</sup> The American Servicemembers’ Protection Act (“ASPA”) of 2002—which bars foreign assistance to states that support the ICC unless the country has signed a bilateral immunity agreement and authorizes the President to use “all means necessary and appropriate” to “rescue” Americans in ICC custody—is designed to respond to what critics have portrayed as an extraordinarily powerful institution.<sup>35</sup>

The ICC emerged on the global stage in 2002, when the treaty entered into force, with supporters and opponents alike expecting (or fearing) an extremely strong and transformative institution. The Court, many claimed, would offer an easy solution to long-term challenges ranging from impunity to deterrence, from human rights protection to redress for victims. These hopes may have been understandable and perhaps even necessary to the Court’s creation; however, they are difficult, if not impossible, to satisfy.

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30. Moreno-Ocampo, *supra* note 8.

31. See generally Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT’L L. 93 (1999).

32. Interview with Fabius Okomo, in Gulu, Uganda (Aug. 27, 2006).

33. Henry Kissinger, *The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny*, FOREIGN AFF. (July–Aug. 2001), at 86, 94.

34. Lee A. Casey, *Assessment of the United States Position: The Case Against the International Criminal Court*, 25 FORDHAM INT’L L.J. 840, 844 (2002).

35. The American Servicemembers’ Protection Act was signed into law by President George W. Bush through the Supplemental Defense Appropriations Act of 2002. American Servicemembers’ Protection Act of 2002, Pub. L. No. 107-206, §§ 2001–15, 116 Stat. 820, 899–909 (codified at 22 U.S.C.S. §§ 7421–33 (2007)).

### B. *The Dangers of Burden Shifting*

The emergence of the ICC has had an unexpected and potentially dangerous effect on the pursuit of accountability as some states have sought to shift the burdens of prosecuting international crimes from their own courts to the new international tribunal. This burden shifting may take two forms. First, the states in whose territory international crimes occur may decline to investigate and prosecute international crimes themselves, allowing the ICC to carry the financial and political costs of prosecution. Second, other states may limit the political pressure they apply to territorial states to prosecute international crimes or may decline to exercise universal jurisdiction over international crimes, again citing the ICC as an alternative to national prosecutions. Both of these scenarios involve shifting the legal and moral burden of investigation and prosecution away from national governments and toward the ICC, making it all the more difficult for the Court to achieve the more narrow mandate set forth in the Rome Statute.

In the first burden-shifting scenario, the potential for external intervention by the ICC provides the territorial state in which the crimes occurred a kind of political cover for its own failure to investigate or prosecute. This scenario presents a classic free-rider problem or “moral hazard,” in which the existence of the ICC allows the territorial state to neglect its own legal duties by pursuing a sub-optimal policy of judicial inaction and transferring the costs of such prosecution to the ICC.<sup>36</sup> The ICC investigation in Uganda demonstrates a clear example of this free-rider problem. In January 2004, the Ugandan government, led by President Yoweri Museveni, self-referred crimes committed in northern Uganda—particularly those committed by the Lord’s Resistance Army (“LRA”)—to the ICC pursuant to article 14 of the Rome Statute, claiming that his government was unable to apprehend suspects who had taken refuge in Congo and Sudan.<sup>37</sup> In this case, the hidden moral hazard arises from the fact that, in all likelihood, the Ugandan government is itself capable of bringing key members of the LRA to justice through the use of domestic institutions and by cooperating with Congolese authorities to allow the Ugandan military to apprehend suspects in Congo.<sup>38</sup> However, domestic prosecutions would be financially and politically costly

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36. For a more detailed discussion of this moral hazard effect, see Burke-White, *Multilevel Global Governance*, *supra* note 15, at 217–24.

37. Press Release, ICC, President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC (Jan. 29, 2004), *available at* <http://www.icc-cpi.int/press/pressreleases/16.html>. Apparently, the Ugandan President began to consider this move in December 2003 and subsequently met with the ICC Prosecutor in London before making the formal referral. See Mohamed M. El Zeidy, *The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State’s Party Referral to the ICC*, 5 INT’L CRIM. L. REV. 83, 84 (2005).

38. The Ugandan People’s Defense Force (UPDF) is among the strongest armies in East Africa and could arguably apprehend the fewer than 3000 LRA soldiers who remain at large. The strength of the Ugandan military is demonstrated by its successful conduct of a war in the neighboring D.R. Congo, where Kony is still hiding, from 1998 to 2003. See John F. Clark, *Museveni’s Adventure in the Congo War: Uganda’s Vietnam?*, in *THE AFRICAN STAKES OF THE CONGO WAR* 145–61 (describing Ugandan interven-

to the Museveni government.<sup>39</sup> By referring the case to the ICC, Museveni has been able both to garner international commendation and to respond to domestic critics without having to face the costs of domestic prosecution. In short, he has shifted the costs to the ICC, heightened expectations that the Court will contribute to the Ugandan peace process, and raised the stakes for the Court's success.<sup>40</sup>

The second burden-shifting scenario involves a decreased willingness of states to exercise universal jurisdiction to prosecute crimes that have occurred outside of their jurisdiction as a consequence of the ICC's existence as an alternative prosecutorial forum. In the wake of the war in the Balkans and the genocide in Rwanda, a number of European states exercised universal jurisdiction to prosecute perpetrators of crimes committed in those conflicts.<sup>41</sup> In the future, such states may fail to exercise universal jurisdiction themselves precisely because the ICC, to which they now make regular budgetary contributions, exists and can itself prosecute. This scenario would again shift costs to, and increase expectations of, the Court.<sup>42</sup>

It may be argued that while the alternative strategy of proactive complementarity may prevent states from shifting burdens onto the ICC, the strategy itself causes national governments to bear a disproportionate share of the costs of prosecuting international crimes. This financial equity concern has been particularly acute with respect to the referral-back mechanisms at the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), whereby the ICTY sends cases back to national judiciaries in order to meet the goals of its own completion strategy but does not provide financing to

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tions in the Congo). In addition, Uganda has a regular and well-functioning judiciary that could be used to undertake prosecutions.

39. These political costs are exacerbated by the fact that the government is currently involved in a delicate peace negotiation with the LRA, and evidence suggests that many victims might prefer an amnesty process and reconciliation through traditional domestic mechanisms to ICC prosecutions if it could help broker peace. Marc Lacey, *Victims of Uganda Atrocities Choose a Path of Forgiveness*, N.Y. TIMES, Apr. 18, 2005, at A1. Lacey observes that "a number of those who have been hacked by the rebels, who have seen their children carried off by them or who have endured years of suffering in their midst say traditional justice must be the linchpin in ending the war."

40. See Interview with Fabius Okumu, in Gulu, Uganda (Aug. 27, 2006) (noting the dangers of the ICC's involvement in northern Uganda). For broader discussion of the possible implications of self-referrals to the ICC, see generally Paola Gaeta, *Is the Practice of 'Self-Referrals' a Sound Start for the ICC?*, 2 J. INT'L CRIM. JUST. 949, 952 (2004); Matthew Happold, *The International Criminal Court and the Lord's Resistance Army*, 8 MELB. J. INT'L L. 159, 165-69 (2007) (analyzing the impact of the self-referral).

41. See, e.g., *Military Prosecutor v. Gabrez*, Tribunal militaire de division 1 [Military tribunal of division 1] Lausanne, Apr. 18, 1997, unpublished; discussed in Andreas R. Ziegler, *In re G.*, 92 AM. J. INT'L L. 78, 78-82 (1998). But see *In re Javor*, Cass. crim. [highest court of ordinary jurisdiction, criminal chambers], Mar. 26, 1996, Bull. crim., No. 132, at 379 (Fr.); *In re Munyeshyaka*, Cass. crim. [highest court of ordinary jurisdiction, criminal chambers], Jan. 6, 1998, Bull. crim., No. 2, at 3 (Fr.); *Samiha Abbas Hijazi v. Sharon*, Cour d'appel [intermediate court of appeals] Brussels, June 6, 2002 (Belg.).

42. After the war in the Balkans, the Netherlands formed a special investigation unit for war crimes committed in the former Yugoslavia that identified as many as eighty-five Dutch residents who could be prosecuted. See LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* 171-72 (2003). This unit has subsequently been closed. Whether the Dutch government might create an equivalent organization to address perpetrators of crimes within the ICC's jurisdiction in the future or instead rely on the ICC to conduct such prosecutions itself remains an open question.

national jurisdictions for such prosecutions.<sup>43</sup> While more active national prosecutions of international crimes may well require domestic governments to expend greater resources, this does not present a cost-shifting problem because national governments already have a duty to prosecute such crimes. Hence, a strategy of proactive complementarity does not actually impose additional costs on them, but rather merely encourages them to fulfill their extant international legal duties. In contrast, where the ICC takes up a case in place of a national government, it essentially relieves the government of the costs it would otherwise have to bear.

### C. *The Reality of a Limited Mandate*

Born of compromise, the ICC is limited in many ways that its champions sought to avoid.<sup>44</sup> In particular, American fears of an overly strong Court resulted in the creation of a far weaker tribunal than the optimistic statements quoted above would suggest.<sup>45</sup> These limitations are clearly articulated in the Rome Statute's jurisdiction and admissibility requirements. Pursuant to article 12, the ICC can only assert jurisdiction where a crime is committed on the territory of a state party or by a national of a state party.<sup>46</sup> Though referrals from the Security Council, acting under Chapter 7 of the U.N. Charter, may occasionally broaden the Court's jurisdiction, the jurisdiction of the Court is extremely narrowly tailored, leaving out, for example, jurisdiction based on the victim's nationality or on the state in which an accused is located.<sup>47</sup> As a result, the ICC has no power to investigate or prosecute many international crimes that would otherwise meet the gravity threshold for ICC prosecution.

The admissibility requirements of the Rome Statute further limit the legal mandate of the Court and restrict its ability to meet the expectations of its supporters. According to the Statute, the "International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions."<sup>48</sup> As a consequence of this requirement, the ICC can only

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43. For a discussion of the transfer procedure, see generally Daryl A. Mundis, *The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT'L L. 142, 146 (2005); Larry D. Johnson, *Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity*, 99 AM. J. INT'L L. 158, 168-74 (2005). José E. Alvarez has also noted this problem with respect to the International Criminal Tribunal for Rwanda ("ICTR"), which he argued diverted resources that could be better spent on national prosecutions. See generally José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 400, 414-15, 461-62 (1999).

44. See, e.g., Laurence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for an ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 85 (Sarah B. Sewall & Carl Kaysen eds., 2000) (describing the compromises pushed by the United States during the Rome Conference).

45. *Id.* (describing the compromises that resulted in a weaker Court).

46. See Rome Statute, *supra* note 11, art. 12.

47. See *id.* art. 13 ("The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if . . . [a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.").

48. *Id.* pmb.

investigate or prosecute where national governments fail to act or where they undertake investigations or prosecutions that are not genuine.<sup>49</sup> Unlike prior *ad hoc* tribunals such as the ICTY, the ICC does not have the power to remove cases from national courts or to prosecute where national governments are already investigating a case.<sup>50</sup>

Perhaps the Court's greatest legal limitation is that it lacks any means to ensure the arrest and surrender of suspects. Although states parties face a legal obligation to arrest indictees within their jurisdictions, their willingness and ability to do so is often questionable.<sup>51</sup> The continued liberty of Joseph Kony and the rest of the indicted leadership of the Lord's Resistance Army, who sought refuge from Uganda in the D.R. Congo, highlights the ICC's inability to ensure that indictees are brought to trial in a timely fashion.<sup>52</sup> Likewise, the recent appointment of ICC indictee Ahmad Mohammed Harun to the post of Sudanese Minister of State for Humanitarian Affairs demonstrates the difficulties the Court faces in getting states to surrender suspects to it.<sup>53</sup> In fact, one of the only two individuals arrested to date was already in Congolese custody at the time his arrest warrant was served on the government of the D.R. Congo.<sup>54</sup> Without a direct means to arrest indictees and in the face of limited state cooperation in apprehending suspects, the prospect that the ICC courtroom in The Hague will sit largely empty for the foreseeable future is all too real.

49. *Id.* art. 17.

50. Compare Statute of the International Criminal Tribunal for the Former Yugoslavia art. 9, May 25, 1993, 32 I.L.M. 1192, with Rome Statute, *supra* note 11, art. 17. The best example of the ICTY assuming jurisdiction from national courts is the early case of Duško Tadic, who was being prosecuted by Germany at the time the ICTY decided to exercise jurisdictional primacy. See Prosecutor v. Tadic, Case No. IT-94-1-D, Decision of the Trial Chamber on the Application by the Prosecutor for a Formal Request for Deferral (Nov. 8, 1994).

51. See Rome Statute, *supra* note 11, arts. 86, 89 (providing a general obligation of cooperation and imposing an obligation to arrest).

52. See Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 as Amended on 27 September 2005 (Sept. 27, 2005), available at [http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53_English.pdf). Despite the fact that D.R. Congo and Uganda both face affirmative legal obligations to arrest Kony, neither state has taken action to do so, even though the location of Kony's hideout in Garamba Park, eastern D.R. Congo, is widely known. See Press Release, U.N. Mission in DR Congo, Garamba, Kony's New Hide-Out (June 9, 2006), available at <http://www.monuc.org/news.aspx?newsID=11306>. This failure to arrest may be due to capacity constraints on both governments, the implications that such an arrest might have for the ongoing peace process in Uganda, and/or the simple unwillingness of the two states to meet their obligations under the Rome Statute. The arrest warrant for Kony and the LRA leadership has subsequently been circulated through Interpol. See Interpol, Arrest Warrant Issued by ICC, <http://www.interpol.int/Public/Wanted/Search/SearchWantedBy.asp?WANTEDBY=ICC> (last visited Nov. 14, 2007).

53. For a discussion of the challenges of apprehending Harun, see Press Release, ICC, Prosecutor Briefs U.N. Security Council, Calls for the Arrest of Ahmed Harun and Ali Kushayb for Crimes in Darfur (June 7, 2007), [http://www.icc-cpi.int/pressrelease\\_details&id=251.html](http://www.icc-cpi.int/pressrelease_details&id=251.html).

54. See Marlise Simmons, *Congo Warlord Handed to International Court*, N.Y. TIMES, Mar. 19, 2006, at A10.

#### D. *The Reality of Limited Resources*

Beyond limited legal powers, the Court and each of its organs—the OTP, the Chambers, and the Registry—have limited budgets that are set annually by the ASP.<sup>55</sup> The approved budget for the ICC fiscal year 2005 was only €66,784,200.<sup>56</sup> This allocation represented less than a quarter of the annual operating budget of the ICTY, despite the ICC’s far broader jurisdiction.<sup>57</sup> Moreover, this €66.8 million allocation fell short of the Court’s request to the ASP and required the ICC to scale back certain programs and staffing.<sup>58</sup> These budget limitations provide an absolute ceiling on the activities that can be undertaken by each of the Court’s key units and restrict the strategies that the ICC can pursue to meet its goals. No institution with a €66.8 million annual budget can possibly provide global accountability.

The limited resources provided by the ASP mean that, at present, the OTP is only able to undertake three simultaneous investigations, and it is unlikely that its capacity will expand in any meaningful way in the near future.<sup>59</sup> Going forward, the OTP “aims at conducting 4–6 investigations between June 2006 and the end of 2009.”<sup>60</sup> Even such an expanded number of investigations can in no way live up to the expectations of NGOs, states parties, and the global community.

The Court’s Chambers also face similar resource constraints. At present, it is anticipated that the Chambers will be able to undertake at most two trials per year, with a target of between four and six trials over the next three-year

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55. While thus far the Assembly has been relatively generous in its funding of the Court, there are reasons to believe that the Assembly will not support the continued enlargement of the Court and that serious budget limitations may arise in the immediate future. See, e.g., ICC, *Report of the Committee on Budget and Finance on the Work of Its Sixth Session*, ICC-ASP/05/01 (May 4, 2006), available at [http://www.icc-cpi.int/library/asp/ICC-ASP-5-1\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-5-1_English.pdf). For information on currently available finances, see ICC, *Financial Statements for the Period 1 January–31 December 2005*, ICC-ASP/05/02 (Aug. 8, 2006), available at [http://www.icc-cpi.int/library/asp/ICC-ASP-5-2\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-5-2_English.pdf). Admittedly, national prosecutors’ offices may also face budget constraints that dictate which cases may be tried. However, whereas the ICC’s budget is out of the Court’s direct control and rests with the ASP, national governments generally have greater flexibility in the allocation of resources among domestic institutions.

56. Jonathan O’Donohue, *The 2005 Budget of the International Criminal Court: Contingency, Insufficient Funding in Key Areas and the Recurring Question of the Independence of the Prosecutor*, 18 LEIDEN J. INT’L L. 591, 593 (2005). Even the Court’s budgetary request was tempered by the political realities of ASP funding. States were unwilling to provide additional funding and sought to limit the growth of the Court. See generally *id.*

57. The 2005 operating budget of the ICTY was approximately \$329 million, equivalent to €273 million at then-prevailing exchange rates. See The Secretary-General, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, at 5, U.N. Doc. A/60/267-S/2005/532 (Aug. 17, 2005).

58. O’Donohue, *supra* note 56, at 595.

59. At the time of writing, four investigations are simultaneously underway in D.R. Congo, Uganda, Central African Republic, and Sudan.

60. Michel de Smedt, OTP, Statement at the Second Public Hearing of the Office of the Prosecutor (Sept. 25, 2006), available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_PH2\\_HGSTATES.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_PH2_HGSTATES.pdf). These predictions are also used in the Court’s budget as set by the ASP. See O’Donohue, *supra* note 56, at 593.

period.<sup>61</sup> Given the budgeting policies of the ASP, it seems most unlikely that there will be any considerable capacity increase in the number of trials the Court can undertake per year in the foreseeable future.<sup>62</sup> As a result, the actual number of cases that can be heard by the ICC in any given period will remain low, particularly in comparison to the vast number of international crimes committed under the ICC's jurisdiction each year.

Three investigations and, at most, two trials per year cannot end impunity or even make a statistically significant contribution toward accountability. Though the prosecution of a few high-level offenders can have considerable legal and moral impact, it cannot achieve the broader goals of the Rome System, much less meet the unrealistic demands that have been put on the Court. Given this context of inflated expectations, burden-shifting from states to the ICC, and severe resource limitations, there is a significant risk that the ICC will soon come to be viewed as a failing institution. The forthcoming 2009 Review Conference of the Rome Statute will provide a critical opportunity for an assessment of the ICC's impact to date. If present trends continue, it seems highly unlikely that the ICC will be deemed to have met expectations when this reflection process begins in earnest.

To avoid either a real or perceived failure, new strategies must be developed to end impunity and to contribute to at least some of the broader expectations of the Court. Such strategies must fit within the ICC's legal, political, and financial limitations and must help shift the burden of prosecution back to states. By effectively harnessing national jurisdictions in the pursuit of accountability, the policy of proactive complementarity advocated here has the potential to make a considerable contribution toward ending impunity without the need for a substantial expansion of the Court's resources and capacity. Likewise, such an approach would help further the Court's other goals, such as national reconciliation and judicial reconstruction. Critically, a policy of proactive complementarity would shift burdens back to states to meet their duty "to exercise . . . criminal jurisdiction over those responsible for international crimes."<sup>63</sup> In so doing, the policy would moderate expectations on the Court by emphasizing that it is the primary duty of national governments—not the ICC—to provide accountability and to end impunity.

### III. MAXIMIZING THE IMPACT OF THE ICC THROUGH A POLICY OF PROACTIVE COMPLEMENTARITY

A policy of proactive complementarity offers the potential to transform the Court's statutory limitations into advantages that would allow it to

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61. De Smedt, *supra* note 60, at 16.

62. For somewhat skeptical views of the ASP providing additional funding, see O'Donohue, *supra* note 56, at 593–96.

63. Rome Statute, *supra* note 11, pmb1.



maximize its impact on impunity. Such a policy confers upon the ICC a dual function: first, the Court encourages national governments to undertake prosecutions of international crimes themselves; second, it directly prosecutes such crimes where national governments remain unable or unwilling to do so. By heretofore focusing almost exclusively on the second of these two potential roles, the ICC has not made the most of the resources and mandate available to it. By instead balancing the functions of promoting domestic prosecutions with direct prosecution by the Court, the ICC can significantly enhance its overall impact.

Applied in practice, this policy would use the legal and political influence of the ICC to catalyze domestic investigations and prosecutions of international crimes. By threatening international prosecution, for example, the Court would alter the incentives facing national governments to try such crimes themselves. Such an approach would be properly employed where there is reason to believe that, with proper encouragement and assistance from the ICC, states may become willing or able to undertake genuine investigations and prosecutions. Additionally, it would be appropriate where the active encouragement of national proceedings offers a resource-effective means of ending impunity without compromising the direct investigations and prosecutions the ICC may decide to undertake. Such a formal policy of proactive complementarity would give substance to the idea inherent in the Rome System of Justice that states and the Court share responsibility for the prosecution of international crimes and should complement, and even influence, one another in achieving their common goal of ending impunity. To this end, it would be appropriate for the OTP to formalize a policy of proactive complementarity.

#### A. *The Logic of Proactive Complementarity*

Recognizing that national courts are often the most effective and efficient institutions at providing accountability, a policy of proactive complementarity seeks to promote the exercise of domestic jurisdiction over international crimes.<sup>64</sup> As the Prosecutor's September 2003 Policy Paper concluded, "[n]ational investigations and prosecutions, where they can properly be undertaken, will normally be the most effective and efficient means of bringing offenders to justice; States themselves will normally have the best access to evidence and witnesses."<sup>65</sup> National courts also are generally the most cost-effective entities to undertake prosecutions, as their cost structures are often lower than those of international tribunals by virtue of employing local

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64. For a discussion of the processes whereby international criminal law has been nationalized to allow for domestic prosecutions, see Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1 (2005).

65. ICC, OTP, Paper on Some Policy Issues before the Office of the Prosecutor, at 2 (Sept. 2003), available at [http://www.icc-cpi.int/otp/otp\\_policy.html](http://www.icc-cpi.int/otp/otp_policy.html) [hereinafter Paper on Some Policy Issues before the Office of the Prosecutor].

rather than foreign personnel. They can also operate exclusively in the local language rather than translating all materials into the official U.N. languages.<sup>66</sup> Finally, national prosecutions are often better situated to respect the interests of affected communities and have a greater potential to contribute to restorative justice efforts.<sup>67</sup> Broader activation of national courts in the effort to end impunity can capitalize on these comparative advantages. Proactive complementarity offers a powerful means of achieving these goals.

The establishment of the ICC in 2002 radically changed the incentives facing states with respect to the prosecution of international crimes in two different ways. First, as noted above, national states may act as free riders and fail to prosecute crimes because the ICC now provides an alternative forum to which they can shift the costs of prosecution. Second, however, the threat of international prosecution by the ICC also generates a counter-vailing, positive set of incentives for national governments to pursue prosecutions themselves. ICC prosecution not only shifts a financial burden from states to the international community, but its intervention into otherwise exclusively domestic criminal processes imposes considerable sovereignty costs on national governments that states may seek to avoid by undertaking their own investigations and prosecutions.<sup>68</sup>

Involvement by the ICC also imposes a wide range of non-financial costs on states that fail to undertake genuine investigations and prosecutions. In particular, through a prosecution by the ICC, states will lose prosecutorial freedoms like the ability to determine specific charges, witnesses to be called, and evidence to be presented.<sup>69</sup> Additionally, the internationalization of a prosecution may result in greater (and largely negative) publicity for the state and restrict its ability to control or manipulate publicity surrounding a trial. Likewise, international prosecutions may impose reputation costs on

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66. See William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L. J. 729, 738–41 (2003).

67. Specifically, the proximity of national courts to impacted communities facilitates greater involvement in, and awareness of, judicial proceedings for victims. Similarly, the use of domestic law and national judges helps make judicial proceedings more understandable for impacted communities. See Neil Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, in POST-CONFLICT JUSTICE (M. Cheriff Bassiouni ed., 2002). For a discussion of restorative justice, see Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, in TRUTH v. JUSTICE 68, 79–83 (Robert I. Rotberg & Dennis Thompson eds., 2000). On the importance of the proximity of trials for restorative justice efforts, see Burke-White, *supra* note 66, at 734–38.

68. Here “sovereignty costs” refer to what Kenneth Abbott calls “the symbolic and material costs of diminished national autonomy.” Kenneth W. Abbott, *Symposium on Method in International Law: International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361, 375 (1999).

69. For example, territorial states have no control over actual prosecutions before the ICC. Charges are determined by the Prosecutor and confirmed by the Pre-Trial Chamber. Decisions to keep certain information under seal are at the discretion of the Chamber, and publicity is handled through the Court's Public Information Division. See Rome Statute, *supra* note 11, arts. 53–58. To get a sense of the ICC's present and, perhaps, inadequate media and publicity efforts, the ICC website provides a catalog of press releases, which are indicative of the relatively limited outreach efforts to date, <http://www.icc-cpi.int/press/pressreleases.html> (last visited Nov. 14, 2007).

national governments, both with respect to other states and domestic audiences, by indicating that they have failed to meet their legal obligation to prosecute crimes domestically.<sup>70</sup> Given these sovereignty costs imposed by international prosecutions, many states may be willing to accept the political and financial costs of domestic prosecution in order to avoid international intervention. Where the sovereignty costs of international intervention outweigh the political and financial costs of domestic prosecution, the threat of ICC intervention may encourage domestic judicial systems to prosecute international crimes themselves.

One consequence of generating both positive and negative incentives is that the Court must essentially perform a balancing act in its relations with national governments. It must seek to minimize its free-rider effect and maximize its catalytic impact. To achieve this goal, the Court should strive to reduce the financial and political costs that national governments bear when they prosecute crimes domestically by assuming some of those political costs itself. Likewise, the Court should attempt to increase the sovereignty costs associated with international intervention where national governments fail to prosecute. It can do so first by making the prospect of international prosecution appear inevitable should national courts fail to prosecute and, second, by stressing the costs an international prosecution would impose on national governments. By appearing to force the hand of national governments to prosecute international crimes, the ICC may be able to assume some of the political costs associated with domestic prosecutions and thereby make it easier for the national government to act.

Whether the threat of international intervention will create free-rider states or instead prompt national judicial action will depend, to a large degree, on how national governments calculate the comparative costs of domestic and international prosecution. National governments that perceive the financial and political costs of domestic prosecution to be quite high, and the sovereignty cost of international intervention to be quite low, are likely to become free riders. On the other hand, national governments that perceive the costs of domestic prosecution to be relatively low, and the sovereignty costs of international intervention to be relatively high, are more likely to utilize national prosecutions.

The goal of a policy of proactive complementarity must be to create incentives for states to maximize the catalytic effect of the Court and minimize the free-rider problem. Essentially, the Court must structure its relationship with each government in ways that seek to reduce the perceived costs of domestic prosecution and increase the perceived sovereignty costs of international intervention. The key to a policy of proactive complementarity lies in recognizing that the Court—and the OTP in particular—has the potential

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70. For a discussion of the role of reputation, see JONATHAN MERCER, *REPUTATION AND INTERNATIONAL POLITICS* (1996).

to impact and shape the incentives facing national governments to meet their obligations to prosecute international crimes within the Rome System.<sup>71</sup>

The ICC and the OTP have a number of tools they can use to promote national investigations, including leverage and persuasion. The ability to use leverage arises principally from the basic legal relationship enshrined in the Rome Statute, which confers upon the ICC the authority to intervene when national governments fail to undertake investigations or when their efforts at prosecution are less than genuine. For national governments that would prefer domestic investigation and prosecution to international action, the mere existence of the ICC may do much to encourage genuine national proceedings. Where the use of such leverage is not possible, more active efforts by the OTP could range from diplomatic communications with governments to the provision of assistance in undertaking prosecutions.

The current ICC investigation in Sudan provides a clear example of how the threat of international prosecution can induce domestic authorities to prosecute international crimes themselves. In March 2005, the U.N. Security Council referred the situation in Sudan to the ICC.<sup>72</sup> Immediately after the Prosecutor's June 6, 2005 announcement that he would begin an investigation,<sup>73</sup> the Sudanese government objected to ICC prosecution of Sudanese nationals and announced that it would establish special domestic tribunals to prosecute approximately 160 individuals suspected of international crimes in Darfur.<sup>74</sup> On June 14, 2005, the Sudanese government established the Darfur Special Court, and, in November of the same year, it created two additional courts: a Judicial Investigations Committee and a Special Prosecutions Committee.<sup>75</sup> The Sudanese Minister of Justice, Ali Mohamed Osman Yassin, publicly asserted that the Sudanese domestic courts would be a "substitute to the International Criminal Court."<sup>76</sup> Given the timing of the creation of the new Sudanese domestic courts and the government's rhetoric, the new institutions appear to be a direct response to

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71. See Rome Statute, *supra* note 11, pmb., art. 4.

72. S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005). For a discussion of the situation in Sudan, see International Crisis Group, *Darfur: The Failure to Protect*, at 1 (Mar. 8, 2005). On resolution 1593, see Robert Cryer, *Sudan, Resolution 1593, and International Criminal Justice*, 19 LEIDEN J. INT'L L. 195 (2006).

73. See Press Release, ICC, The Prosecutor of the ICC Opens Investigation in Darfur (June 6, 2006), available at <http://www.icc-cpi.int/press/pressreleases/107.html>.

74. SUDAN: *Darfur War-Crime Suspects Won't Go to ICC, Government Says*, IRINnews.org, Apr. 4, 2005, <http://www.irinnews.org/print.asp?ReportID=46436>.

75. See ICC, OTP, *Third Report of the Prosecutor of the International Criminal Court to the U.N. Security Council Pursuant to UNSCR 1593 (2005)* (June 14, 2006), available at [http://www.icc-cpi.int/library/cases/OTP\\_ReportUNSC\\_3-Darfur\\_English.pdf](http://www.icc-cpi.int/library/cases/OTP_ReportUNSC_3-Darfur_English.pdf) [hereinafter *Third Report*].

76. SUDAN: *National Courts to Try Suspects of War Crimes*, IRINnews.org, June 15, 2005, <http://www.irinnews.org/report.asp?ReportID=47654>.

the ICC's investigation in an effort to block the admissibility of cases pursuant to article 12 through a domestic prosecution.<sup>77</sup>

Although Jan Pronk, U.N. special representative of the Secretary-General for Sudan, described the new Sudanese court as "positive," there is real concern as to whether it will undertake genuine prosecutions or merely act as a legal shield to ICC activities.<sup>78</sup> In the wake of the establishment of these new domestic institutions, the OTP has undertaken a careful admissibility analysis in Sudan. To date, reports suggest that while a number of domestic investigations have been opened, few have been concluded.<sup>79</sup> The Darfur Special Court has "conducted six trials of less than thirty suspects," with charges limited to armed robbery, possession of stolen goods, and illegal possession of a firearm.<sup>80</sup> Based on its analysis of the work of these domestic institutions, the OTP has determined that domestic Sudanese institutions do not prejudice the admissibility of cases before the ICC because they have "not investigat[ed] or prosecut[ed] . . . cases that are or will be the focus of ICC attention."<sup>81</sup> Despite questions as to whether the Sudanese efforts to prosecute are genuine, the situation clearly demonstrates that states will respond to altered incentives created by the threat of ICC investigation, ideally by utilizing their own courts to prosecute international crimes genuinely.

Significantly, the Sudanese case also illustrates that employing a policy of proactive complementarity would in no way limit the statutory authority of the ICC to investigate and to prosecute where the Court has jurisdiction and where national governments fail to undertake genuine prosecutions themselves. Though proactive complementarity seeks to stimulate national jurisdictions, there may be circumstances in which domestic courts cannot be motivated to act and the ICC will find it more effective to undertake its own prosecutions. In addition, where domestic proceedings that result from a policy of proactive complementarity are less than genuine, the ICC retains the power to intervene, pursuant to article 17 of the Rome Statute.

In addition to altering the incentives facing national governments through the threat of international prosecution, the ICC can also change the domestic calculation of whether to undertake national prosecutions by utilizing the diplomatic and publicity channels available to the Court. The ICC can also use publicity and outreach to increase the reputation costs for states that fail to undertake genuine prosecutions on their own. Statements to the U.N. Security Council and the Assembly of States Parties or to NGOs that condemn states for failing to prosecute international crimes can signifi-

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77. See *Sudan Reiterates Opposition to Try Darfur Suspects Before ICC*, SUDAN TRIB., Oct. 18, 2005, <http://www.globalpolicy.org/intljustice/icc/2005/1018opposition.htm>.

78. *Id.*

79. See *Third Report*, *supra* note 75, at 5.

80. *Id.*

81. *Id.* at 7.

cantly increase the reputation costs those states face for their policies of inaction. Demands for the ICC to provide widespread accountability may be legitimate but nonetheless fall outside of the Court's current capabilities.

Integral to a policy of proactive complementarity must be an effort to temper expectations and shift the burden of providing accountability back to the national governments. In its public statements, the OTP must make clear what it is capable of doing itself (the investigation and prosecution of a very limited number of crimes), what may follow from its activities (greater domestic accountability and deterrence), and what lies beyond the scope of its powers (national reconciliation, rule of law, and international peace and security). Through publicity and outreach, the OTP must channel such demands toward their most appropriate recipients, in most cases the state with primary jurisdiction over the offenses in question. Reminding governments and the global public that national governments, and not the ICC, have the primary duty to prosecute will be particularly important. In circumstances in which the OTP cannot act because of limited resources or an inability to obtain evidence or arrest an accused, the OTP may want to consider deflecting demands for accountability toward the Assembly of States Parties as part of a broader call for additional resources or support from states parties in apprehending suspects.

### *B. Implications of a Policy of Proactive Complementarity*

A policy of proactive complementarity has the potential to significantly enhance the effectiveness of the OTP and may help it meet at least some of the high expectations of its various constituents. The most immediate implication of a policy of proactive complementarity is to increase the number of available judicial fora through which to prosecute international crimes. To the degree that the OTP is able to encourage states to prosecute international crimes themselves, a greater contribution can be made toward ending impunity beyond those few cases that the Court itself can prosecute. Moreover, proactive complementarity can help guide the OTP in selecting the situations in which it can have the greatest impact.<sup>82</sup> Where there is reason to believe that a state can be encouraged to prosecute crimes on its own, the Prosecutor may not need to formally open an investigation and commit significant resources to a case. Instead, by using the threat of investigation and demonstrating that his Office is actively considering prosecutions, the Prosecutor may be able to catalyze the domestic prosecution without a large investment of resources. As a result of greater national accountability, the ICC can focus its resources where they matter most: situations in which serious international crimes have occurred and there is no available national

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82. The OTP uses a number of criteria to select situations and cases for investigation and prosecution. See ICC, OTP, Draft Policy Paper on Criteria for Selection of Situations and Cases (June 13, 2006) (on file with author).

forum able and willing to undertake a genuine prosecution or that could be encouraged to do so through the Court's use of proactive complementarity.

Proactive complementarity would also make a significant contribution toward meeting many of the other goals of the Court, including deterring crime, closing the impunity gap, promoting reconciliation, and developing effective exit strategies. First, a policy of proactive complementarity would enhance the ICC's ability to deter crimes.<sup>83</sup> Although there is no empirically verifiable evidence to date demonstrating that the Court has been able to reduce the occurrence of crimes, deterrence theory suggests that an increase in the perceived likelihood of punishment should decrease the commission of international crimes.<sup>84</sup> Some extant qualitative research studies suggest, for example, that certain ICC indictees were concerned about the prospect of ICC prosecution years before their indictment or arrest.<sup>85</sup> Paramilitaries have reportedly cited the Court's potential prosecution as part of their reasoning for relinquishing power.<sup>86</sup>

Second, a policy of proactive complementarity offers an effective means of closing the impunity gap. An impunity gap arises where an international forum prosecutes only those most responsible for international crimes, leaving lesser offenders a degree of impunity.<sup>87</sup> Proactive complementarity can help close this gap by encouraging domestic prosecutions of international crimes, including those that may not meet the gravity threshold for prosecution by the ICC. In addressing such an impunity gap, proactive complementarity may provide a space within which the OTP can recognize and respect the diverse ways in which states provide accountability for international crimes. Although the Rome Statute specifies that the ICC will undertake *criminal* investigations and prosecutions of the most serious crimes within the Court's jurisdiction, states may choose to pursue other forms of accountability, especially for lower-level offenders, including truth commissions, reparations programs, lustration policies, or traditional justice mechanisms.<sup>88</sup> A policy of proactive complementarity would allow the OTP to

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83. For domestic legal analogies, see JOHANNES ANDENÆS, PUNISHMENT AND DETERRENCE (1974) (providing a traditional account of the logic of criminal deterrence); DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (Alfred Blumstein et al. eds., 1978) (examining how punishments impact criminal behavior). For an application to the work of the ICTY, see Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Deter Future Atrocities?*, 95 AM. J. INT'L L. 7, 12 (2001) ("[T]he threat of punishment may persuade potential perpetrators to adjust their behavior."). For broader application in international criminal law, see Jan Klabbbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 FINNISH Y.B. INT'L L. 249, 251–53 (2001).

84. For application of deterrence theory to international criminal law, see Klabbbers, *supra* note 83, at 251–53.

85. See Burke-White, *Complementarity in Practice*, *supra* note 15, at 587–89.

86. *Habla Vicente Castaño*, SEMANA (COLOM.), June 6, 2005, at 29, available at [http://www.semana.com/wf\\_InfoArticulo.aspx?idArt=87628](http://www.semana.com/wf_InfoArticulo.aspx?idArt=87628).

87. For a discussion of the impunity gap, see Carla Del Ponte, Prosecutor of the ICTY, Address to the Permanent Council of the OSCE (Sept. 7, 2006), [http://www.un.org/icty/pressreal/2006/p1106e-CDP\\_speech.htm](http://www.un.org/icty/pressreal/2006/p1106e-CDP_speech.htm). See also Paper on Some Policy Issues before the Office of the Prosecutor, *supra* note 65.

88. For a discussion of these choices and the various mechanisms available to states to provide some form of accountability, see PRISCILLA HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR

decide when to pressure national governments to undertake criminal prosecutions of their own with the possibility of an ICC investigation acting as a coercive alternative. Without having to endorse states' choices with respect to non-criminal sanctions,<sup>89</sup> the OTP could decide in some situations not to initiate investigations or pressure states to prosecute, particularly where it appears that national efforts at accountability, even if based on non-criminal sanctions, have adequately served the goals of ending impunity.<sup>90</sup> As a result, proactive complementarity could help the Court regulate a "margin of appreciation" afforded to national governments in determining which accountability mechanisms are most appropriate within their particular context.<sup>91</sup>

Third, in certain situations proactive complementarity may offer a viable exit strategy for the OTP and help the OTP leave a lasting legacy when it concludes its work in each situation. Given the potentially global mandate of the Court and its limited resources, it will often not be possible for it to prosecute all or even a majority of those most responsible for international crimes within any particular situation. At some point, as a result of resource allocation, global events, national prosecutions, and impact to date, the OTP will need to move on to a new situation.<sup>92</sup> The ideal exit strategy for the Court would be the establishment of an effectively functioning national judiciary to pick up where the ICC leaves off.<sup>93</sup> If the ICC is able to encourage

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AND ATROCITY (2001) (recounting the work of various truth commissions); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998) (exploring alternative justice mechanisms); RUTI TEITEL, *TRANSITIONAL JUSTICE* (2002) (examining mechanisms of justice); Carsten Stahn, *The Geometry of Transitional Justice: Choices in Institutional Design*, 18 *LEIDEN J. INT'L L.* 425 (2005) (considering institutional design choices in implementing international criminal law enforcement mechanisms).

89. From a legal perspective, the OTP's adoption of a strategy of proactive complementarity should not have adverse consequences for its legal authority to prosecute international crimes. The ongoing threat of prosecution by the ICC may, however, influence the choices of national governments with respect to the nature of domestic accountability efforts they undertake, i.e., whether to pursue criminal prosecutions, non-criminal sanctions, truth commission proceedings, or something else.

90. Though the use of non-criminal sanctions, such as truth commissions, can be criticized for failing to provide punishment, national governments may, at times, choose to pursue these routes for a variety of reasons. As the ICC is focused only on providing accountability for those most responsible for international crimes, it can leave choices as to proper accountability mechanisms for lower-level offenders to national governments. See ICC, OTP, Draft Policy Paper on the Selection of Cases (June 2006) (on file with author) (referring to the gravity threshold for ICC investigation). Moreover, depending on the design and requirements of a truth commission, it may still allow for some degree of accountability or at least condition amnesty on a truth-telling process. Other types of non-criminal accountability could include the payment of compensation to victims or ineligibility for certain governmental positions.

91. The term "margin of appreciation" is drawn from the European Court of Human Rights jurisprudence and refers to the space given to national governments to implement human rights obligations. See *Handyside v. United Kingdom*, App. No. 5493/72, 24 Eur. Ct. H.R. (ser. A) (1976). For an extension of the margin of appreciation doctrine to other areas of international law, see Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 *EUR. J. INT'L L.* 907 (2005).

92. For a discussion of the plans of the OTP over the next three years, see De Smedt, *supra* note 60.

93. Obviously, this will not be possible in every situation, and resource allocation must be carefully considered before engaging in significant domestic capacity-building. However, to the extent a functioning national judiciary can be established, it would represent an ideal exit strategy for the Court.



national prosecutions through proactive complementarity, such that domestic courts are actively providing justice, the ICC may be able to exit a situation precisely because its continued intervention is no longer necessary.<sup>94</sup>

As a whole, a policy of proactive complementarity can make an important contribution to ending impunity by utilizing all available judicial resources, not just national courts or international institutions, in a common quest for accountability. It would encourage states to meet their international legal duties to prosecute international crimes and would go far toward reaching the high expectations that the ICC could not otherwise meet.

### C. *The Legal Mandate for a Policy of Proactive Complementarity*

For the ICC to embrace a policy of proactive complementarity that encourages national prosecutions of international crimes, such a policy must have a legal basis in the Rome Statute or in the inherent powers of the Prosecutor. The passive model of complementarity appears to offer little support for a policy of proactive complementarity. Interpreting complementarity to operate in its passive form, one views article 17 of the Rome Statute as circumscribing the powers of the OTP, and thus limiting the admissibility of cases to situations where national governments are “unwilling or unable” to prosecute.<sup>95</sup> In contrast, an understanding of complementarity derived from the Rome System of Justice, in which national courts and the ICC share a common responsibility to prosecute international crimes, sees the admissibility criteria of article 17 as empowering domestic courts and the ICC to cooperate in ensuring accountability. From this perspective, the Statute provides both implicit and explicit legal support for a policy of proactive complementarity.

Despite the fact that the active encouragement of national prosecutions may not have been envisioned by the drafters of the Rome Statute, a careful analysis of article 17 makes clear that nothing in the article prohibits the OTP from pursuing a policy of proactive complementarity. According to article 17, cases must be deemed inadmissible before the ICC if they are being or have been investigated or prosecuted by national authorities, unless such national investigation or prosecution is not genuine.<sup>96</sup> As a result,

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94. To the extent that the threat of prosecution by the OTP is a necessary pressure point to encourage national governments to prosecute such crimes themselves, the ICC's exit from a situation may offer such governments a disincentive for further prosecution. For proactive complementarity to offer a meaningful exit strategy for the ICC, the momentum of domestic prosecutions will have to be sufficient for their continuation even in the absence of immediate threat of further action by the Court. Of course, the ICC could always decide to reopen a particular situation for further investigation, though that appears an unlikely scenario. It is also possible that the initiation of domestic prosecutions could serve a socialization or acculturation function that alters incentives in favor of further domestic action even after the ICC exits. For a discussion of such acculturation, see Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004).

95. Rome Statute, *supra* note 11, art. 17.

96. Article 17 provides that a case shall be inadmissible where the case is being or has been “investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable

states have the primary right and duty to prosecute international crimes and the Court steps in where they fail, for whatever reason, to do so. The Statute calls upon the Prosecutor to evaluate the ability and willingness of a national government to investigate or to prosecute crimes within the Court's jurisdiction. Specifically, in his decision to initiate an investigation or prosecution, the Prosecutor must, under article 53, consider whether "[t]he case is or would be admissible under article 17."<sup>97</sup> Even after the initiation of an investigation, the Statute further requires the Prosecutor to evaluate national judicial efforts and to inform the Pre-Trial Chamber if there are no grounds for prosecution because a genuine national proceeding has made the case inadmissible.<sup>98</sup> Article 17, however, in no way limits the OTP from attempting to encourage national prosecutions, even if the result of such effort would be to render cases inadmissible before the ICC.

The principle of complementarity has different legal implications at two separate phases of investigation by the OTP. The first phase, the situational phase, arises when the Prosecutor makes an initial decision to investigate a particular situation. The second phase, the case phase, arises subsequently, when the Prosecutor identifies a particular suspect and develops an investigative hypothesis as to the crimes that the suspect may have committed.<sup>99</sup> At both of these stages, the Prosecutor must scrupulously consider actions by states that might bar admissibility.

At the situational phase, complementarity requires the OTP to undertake a general examination of whether the cases the Prosecutor might decide to undertake are already being investigated or prosecuted by national authorities.<sup>100</sup> Where efforts by states to investigate or to prosecute within a given situation are sufficient and genuine, the complementarity analysis at this phase would suggest that investigation by the OTP is inappropriate. In con-

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genuinely to carry out the investigation or prosecution." Rome Statute, *supra* note 11, art. 17. On the principle of complementarity, see generally Holmes, *Complementarity: National Courts Versus the ICC*, *supra* note 11, at 66; Mohamed El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869 (2002); and M. A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001).

97. Rome Statute, *supra* note 11, art. 53(1)(b).

98. *Id.* art. 53(2).

99. For the distinction between situations and cases, see Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, ¶ 65 (Jan. 17, 2006), public redacted version available at [http://www.icc-cpi.int/library/cases/ICC-01-04-101\\_tEnglish-Corr.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-101_tEnglish-Corr.pdf) [hereinafter Situation in the Democratic Republic of the Congo]. See also Silvia A. Fernández de Gurmendi, *The Role of the International Prosecutor*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 175, 180–82 (Roy S. Lee ed., 1999). On the same distinction, but in the context of Security Council referrals, see Lionel Yee, *The International Criminal Court and the Security Council: Articles 13(b) and 16*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 147–48 (Roy S. Lee ed., 1999).

100. Pursuant to article 53(1)(b), when seeking to initiate an investigation, the Prosecutor "shall consider whether . . . the case is or would be admissible." Such a preliminary admissibility determination requires the Prosecutor to have reasonable grounds for believing that admissibility would not be barred by reasons of complementarity. Rome Statute, *supra* note 11, art. 53(1)(b).

trast, where national proceedings have not been initiated, have been initiated only with respect to certain groups of suspects (such as lower-level perpetrators), or where there is reason to believe national proceedings are less than genuine, there would be a reasonable basis for the OTP to proceed with an investigation.<sup>101</sup>

At the case level, which arises when the Prosecutor develops an investigative hypothesis with respect to particular suspects and factual events, complementarity requires a more specific and detailed analysis of any prosecutions occurring at the national level involving that particular suspect. Article 17 requires that the Prosecutor determine whether the specific case he intends to bring is being or has been investigated or prosecuted by national authorities. To do so, the Prosecutor must determine whether national authorities have investigated or prosecuted the individual subject to potential prosecution by the OTP for the same underlying factual events.<sup>102</sup> Where no such investigation has been or is being undertaken, the case would be admissible. If an investigation or prosecution has been or is being undertaken by a state, a second step of analysis is required. In such circumstances, the Prosecutor must consider whether the national investigation is genuine or not, based on the criteria set forth in article 17(2).<sup>103</sup> If the national proceedings are not genuine or the state is unable to prosecute, then the OTP may proceed with an investigation and prosecution of its own.

The Pre-Trial Chamber also has a role in making admissibility determinations. When a situation has been referred to the Court by another state or by the Security Council, the Prosecutor must inform the Pre-Trial Chamber of his decision not to proceed with an investigation due to admissibility limitations.<sup>104</sup> Where the Prosecutor seeks to proceed with an investigation initiated under his *proprio motu* powers, the Pre-Trial Chamber must affirmatively approve his decision and may take admissibility into account in deciding whether to authorize the investigation.<sup>105</sup> The Pre-Trial Chamber also has to make determinations of admissibility in its decisions to issue

101. This statement assumes that the other requirements of article 53(1) are met.

102. See Situation in the Democratic Republic of the Congo, *supra* note 99, ¶ 65 (Jan. 17, 2006). Although evaluating a domestic judiciary may be difficult, the benefit of the formulation adopted by the Office of the Prosecutor is that the test is considerably narrower than the “unable or unwilling” examination found in article 17 of the Rome Statute and requires the Prosecutor to determine merely whether a national investigation of the same individual based on the same factual basis has been initiated. See Rome Statute, *supra* note 11, art. 17.

103. The Prosecutor is required to determine whether the investigation or prosecution was undertaken for the purpose of shielding the accused from criminal liability, whether there was an unjustified delay in the proceedings, whether the proceedings were not independent and impartial, or whether they were being undertaken in a manner inconsistent with bringing the person concerned to justice. In this second step of analysis, the Prosecutor may also consider whether the state is unable to prosecute pursuant to article 17(3) due, for example, to a “total or substantial collapse or unavailability of its national judicial system.” Rome Statute, *supra* note 11, art. 17(2)–(3).

104. See Rome Statute, *supra* note 11, art. 53(1). Where the Prosecutor has initiated action based on referral by a state or the Security Council, the referring party can request the Pre-Trial Chamber to review the Prosecutor’s decision. *Id.* art. 53(3)(a).

105. Rome Statute, *supra* note 11, art. 15.

arrest warrants and, when admissibility is challenged by either an accused or a state party, before the opening of an actual trial.<sup>106</sup> Direct efforts by the OTP to encourage national prosecutions do not, however, interfere with the authority of the Pre-Trial Chamber to make final determinations of admissibility. While domestic trials catalyzed through a policy of proactive complementarity could lead to admissibility challenges, the Pre-Trial Chamber would retain its ultimate authority to evaluate the genuineness of those proceedings.

The formal requirements of admissibility found in article 17 are indicative of a passive approach to complementarity, in which the ICC provides a substitute for national jurisdictions when they fail to act. Critically, however, none of the formal requirements of article 17 nor other parts of the Statute restrict the Prosecutor from seeking to encourage national prosecutions. Instead, they merely limit the power of the OTP to undertake investigation or prosecution where genuine national investigations or prosecutions are underway or have taken place. Hence, there is no statutory bar to the Prosecutor's pursuing a policy of proactive complementarity and such an approach would in no way interfere with the powers of the Pre-Trial Chamber.

Complementarity is not only a formal legal requirement of admissibility limiting the power of the OTP but also a broader principle that allocates authority among concurrently empowered institutions with differing levels of governance authority within the international justice system.<sup>107</sup> This broad reading of complementarity sees the Rome Statute not just as the foundational instrument of the ICC but also as the basis of a Rome System of Justice in which states have a clear duty to prosecute international crimes within their jurisdictions. The provision in the preamble to the Rome Statute that nations have a duty "to exercise . . . criminal jurisdiction over those responsible for international crimes" derives from the *aut dedere aut judicare* (extradite or prosecute) requirement<sup>108</sup> to which most states parties are already subject through external legal obligations contained in, for example, the four Geneva Conventions of 1949 and the Genocide Convention.<sup>109</sup>

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106. For Pre-Trial Chamber jurisprudence on the admissibility determination at the arrest warrant stage and reference to further consideration of the issue at the trial phase, see Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo (Feb. 24, 2006), Annex I ("Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58" (Feb. 10, 2006), formerly under seal), ¶¶ 17–18, available at [http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf) [hereinafter Prosecutor v. Dyilo].

107. See generally El Zeidy, *supra* note 96 (describing the historical origins of complementarity and the development of the principle); William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 91–95 (2003).

108. See M. CHERIF BASSIOUNI, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995) (discussing the duties of states to prosecute international crimes and providing the detailed legal foundations for such duties in international law).

109. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 49–51, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter

Though encouraging national jurisdictions to undertake prosecutions is not affirmatively referenced in the Statute, it furthers the Rome System's overall purpose of ending impunity. Pursuant to the Vienna Convention on the Law of Treaties, the Rome Statute must be interpreted in light of its object and purpose.<sup>110</sup> The preamble to the Statute affirms that the purpose of the Court is to "put an end to impunity for the perpetrators of [international] crimes . . . ."<sup>111</sup> Likewise, the preamble recognizes that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . . ."<sup>112</sup> Although these provisions are preambular in nature, they provide critical guidance to the object and purpose behind the Statute itself.<sup>113</sup> Interpreting the Rome Statute in light of this object and purpose leads to a broad construction of the Prosecutor's specific powers and suggests that leeway should be given to the Prosecutor to utilize not only his enumerated powers but also the stature and broader potential of his Office to help bring about an end to impunity. Moreover, the fact that the Statute established an independent Prosecutor reveals that, in order to fulfill his duties, he may have to take actions consistent with the Statute but not expressly stated in it.<sup>114</sup> From this perspective, the ICC and the OTP should not be restricted to a purely passive exercise of complementary prosecutions.

In the Rome System, then, the complementarity provisions of the Rome Statute offer a mechanism for allocating authority between states and the ICC and recognizing the shared competence and duty that national and international institutions have in the realm of international justice. Although

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Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 50–52, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War arts. 129–31, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 146–48, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. The Grave Breaches provisions of each convention call upon states parties "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case." Geneva Convention III art. 129; *see also* Convention on the Prevention and Punishment of the Crime of Genocide art. 6, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (establishing jurisdiction over the crime).

110. Vienna Convention on the Law of Treaties art. 31, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter Vienna Convention] ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

111. Rome Statute, *supra* note 11, pmb1.

112. *Id.*

113. *See* Vienna Convention, *supra* note 110, Jan. 27, 1980. For a discussion, see Quincy Wright, *The Interpretation of Multilateral Treaties*, 23 AM. J. INT'L L. 96 (1929) (noting the use of the preamble as part of logical interpretation).

114. The position of Secretary-General of the United Nations provides a useful point of comparison. Though some of the Secretary's powers are spelled out in the U.N. Charter, it is generally accepted that he has additional authority, based on his position and office, that allows him to take actions necessary to fulfill his mandate and mission. For the formal legal mandate of the Secretary-General, *see* U.N. Charter arts. 97–100.

it does not expressly refer to a policy of proactive complementarity, the Rome Statute provides for a number of specific interactions between the OTP and states parties that may directly serve the goals of proactive complementarity. For example, it creates opportunities for communication and dialogue between the Court and national governments that may be utilized as mechanisms to encourage national prosecutions. Specifically, article 15 allows the Prosecutor to seek information from states with respect to communications he receives.<sup>115</sup> Article 18 requires that, in certain circumstances, the Prosecutor notify the state that would ordinarily exercise jurisdiction of his intent to open an investigation. Should the Prosecutor defer to a state's investigation, he has the authority to request that the state "periodically inform the Prosecutor of the progress of its investigations and any subsequent prosecutions."<sup>116</sup> Such communications, which have a clear statutory basis, provide a legal foundation for many of the tactics central to proactive complementarity.

Article 53 of the Rome Statute allows the Prosecutor to continue his evaluation of admissibility issues—potentially through ongoing dialogue with national governments—throughout the investigative phase of proceedings.<sup>117</sup> Such an ongoing evaluation of admissibility, as evidenced in the OTP's approach to Sudan,<sup>118</sup> anticipates that some states that are initially unable or unwilling to prosecute may become able and willing during the course of the OTP's investigation. It also implies that outside factors, including the Court's own activities, might contribute to that new willingness or capacity. To the degree that this evaluative process by the ICC has an impact on the willingness or ability of a national government to undertake genuine prosecutions, it would be a hallmark example of proactive complementarity with clear statutory authority.

Article 54 of the Statute specifies the Prosecutor's powers with respect to investigations. The Prosecutor is empowered, *inter alia*, to "[s]eek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate" and to "enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person."<sup>119</sup> Such cooperation arrangements and agreements again provide affirmative legal support for the types of interaction between the OTP and states that could be used strategically to encourage domestic prosecutions by national judicial systems. In fact, the grant of authority in

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115. Rome Statute, *supra* note 11, art. 15(2).

116. *Id.* art. 18(5).

117. *Id.* arts. 53(1)(b), (2)(b).

118. In Sudan, the OTP has continuously monitored the Sudanese government's efforts to provide accountability. This process has involved ongoing evaluation of trials in Sudan, multiple missions by OTP officials to Sudan for evaluative purposes, and periodic reports to the U.N. Security Council on issues of admissibility. See *Third Report*, *supra* note 75.

119. Rome Statute, *supra* note 11, art. 54(3)(c)–(d).

article 54 is extraordinarily broad, allowing the Prosecutor to enter into any kind of arrangements not in conflict with the Statute itself and to design such arrangements in ways that encourage active prosecutions by national judiciaries.

The Rome Statute also creates a range of obligations on states parties that, taken collectively, may provide an additional legal foundation for a policy of proactive complementarity. These obligations include duties to cooperate with the Court's investigations (article 86), to have appropriate procedures under national law to facilitate such cooperation (article 88), to surrender persons to the Court if legal requirements are met (articles 59 and 89), and to undertake various other forms of judicial cooperation (article 93).<sup>120</sup> These provisions and the general principle of *pacta sunt servanda*<sup>121</sup> create direct legal obligations for states parties to cooperate with the Court and to enact necessary domestic legislation.<sup>122</sup> Such obligations presuppose interactions between the OTP and states that, if used strategically, may encourage prosecution of international crimes by domestic courts. Hence, they offer a basis for developing tactics of proactive complementarity around the interactions they create between the OTP and states.

With respect to interactions between states and the OTP that have a statutory basis, the only distinction that may be drawn in the context of a policy of proactive complementarity is that these interactions are being used strategically to encourage national prosecutions. That distinction is not legally significant in the Rome Statute. In fact, such strategic use of interactions is fully in keeping with the object and purpose of the Statute. Concerning potential tactics of proactive complementarity that are not expressly envisioned by the Statute, the key questions are whether those actions somehow violate the Statute and, if not, whether they legitimately further its object and purpose. All of the tactics of proactive complementarity discussed herein either are expressly mentioned in the Rome Statute or are consistent with its object and purpose.

#### *D. Proactive Complementarity is Aligned with the Mission of the Office of the Prosecutor*

A policy of proactive complementarity is directly aligned with the mission of the OTP and would help the Prosecutor achieve his key goals. The benefit of proactive complementarity is that it can leverage the Court's limited resources to fulfill the purposes of the Rome Statute and more fully meet expectations through the activation of national judiciaries. However,

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120. *Id.* arts. 59, 86, 88–89, 93.

121. See Vienna Convention, *supra* note 110, art. 26 (*Pacta sunt servanda* embodies the principle that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”).

122. See Julio Bacio Terracino, *National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC*, 5 J. INT'L CRIM. JUST. 421 (2007) (discussing the processes by which states have adopted national implementing legislation for the Rome Statute).

given the mission of the OTP and the fixed resources of the Court, efforts at proactive complementarity may detract resources from the direct investigations and prosecutions that the ICC can undertake. From a practical perspective, then, the pursuit of proactive complementarity must be balanced with the direct investigation and prosecution of crimes so as to conform to the mission of the OTP and maximize the Court's overall impact.

The mission and functions of the Office of the Prosecutor are expressed in a number of provisions of the Rome Statute and can be summarized as the investigation and prosecution of those responsible for crimes under the jurisdiction of the Court, subject to the limitations of articles 12 (governing jurisdiction) and 17 (governing admissibility). The Statute clearly specifies the Prosecutor's powers with respect to the investigation and prosecution of crimes.<sup>123</sup> The Statute thus makes clear that the investigation and prosecution of international crimes are to be the primary functions of the OTP; other activities, such as proactive complementarity, are of a secondary—though potentially significant—nature.

The legal mandate of the Office of the Prosecutor highlights its primary function of investigating and prosecuting international crimes where national governments fail to act themselves. As a criminal prosecutor's office, the OTP is institutionally designed to engage in the direct investigation and prosecution of criminal conduct within the Court's jurisdiction. Any policy of proactive complementarity must further, rather than detract from, this primary mission. Although selective activities designed to encourage or enhance domestic judicial activities may further the mission of the OTP, the OTP cannot eschew its central prosecutorial mission by becoming either a political lobbying body or a national judicial reconstruction institution. Hence, it must pursue a policy of proactive complementarity within this limited framework.

Other restrictions placed on the Prosecutor indicate that there are limits to the reach of a policy of proactive complementarity. For example, the Rome Statute provides that the OTP is to focus on crimes "of sufficient gravity to justify further action by the Court."<sup>124</sup> The preamble specifies that the Court is intended "to put an end to impunity for the perpetrators" of "the most serious crimes of concern to the international community."<sup>125</sup> Given these gravity limitations, the focus of any policy of proactive complementarity must be targeted at crimes that would otherwise fall within the

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123. See Rome Statute, *supra* note 11, arts. 12 (jurisdiction), 13 (jurisdiction), 15 (powers of the Prosecutor), 17 (admissibility), 53 (investigation), 54 (duties of the Prosecutor). These powers of the Prosecutor are subject to supervision by the Pre-Trial Chamber to ensure that the Prosecutor does not overstep his statutory powers. For a discussion of the role of the Pre-Trial Chamber and its supervisory function, see Fabricio Guariglia & Kenneth Harris, *Functions and Powers of the Pretrial Chamber*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE* 743 (Otto Triffterer ed., 1999).

124. Rome Statute, *supra* note 11, art. 17(1)(d).

125. *Id.* pmb1.



Court's jurisdiction and not reach more broadly to general judicial reconstruction efforts. However, efforts by the OTP to catalyze national courts to prosecute crimes that would otherwise fall within the ICC's jurisdiction may well have the downstream effect of encouraging national governments to pursue lower-level suspects and promote judicial development more broadly.

The resource limitations on the OTP also must limit the breadth of a policy of proactive complementarity. Activities aimed at encouraging prosecution by national jurisdictions consume resources. Though activities such as communication with national governments may be of relatively low cost, other activities like national judicial reconstruction efforts may be very resource-intensive. Given that it is unlikely that the ASP will provide considerable new resources for the Court to devote to proactive complementarity,<sup>126</sup> such a policy necessarily involves tradeoffs with the resources committed to direct investigations and prosecutions by the OTP.

A key benefit of proactive complementarity, however, is that, if well implemented, it is far less resource-intensive for the ICC than would be the direct investigation and prosecution of international crimes. For example, an actual investigation and prosecution by the ICC can require a large team of field investigators and trial staff in The Hague. In contrast, proactive complementarity can be implemented through a shift in the Court's understanding of its own functions and simple activities such as direct communications with national governments undertaken by one or two primary staff members.<sup>127</sup> The OTP must design a strategy whereby, without significantly diverting resources from the investigations and prosecutions it must conduct, it can more effectively use certain resources available to it to catalyze domestic prosecutions and to relieve the Court of the need to expend even greater resources in prosecuting those crimes itself. Moreover, redirecting too many resources away from prosecutions would undercut the effectiveness of proactive complementarity, which itself depends on the credible threat of intervention by the ICC.<sup>128</sup>

A policy of proactive complementarity must therefore involve a careful balancing of resource allocation to maximize the Court's impact. The bulk of the OTP's resources and personnel must remain devoted to direct investigation and prosecution of international crimes both to comply with the OTP's core mission and to make a credible threat of international intervention. Where it appears that the selective diversion of resources toward proactive complementarity could result in genuine national prosecutions, the OTP must weigh the potential benefits of such national prosecutions against the

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126. For discussion on funding provided by the ASP, see generally O'Donohue, *supra* note 56, at 591–95 (discussing budgeting policies of the ASP).

127. Admittedly, if a policy of proactive complementarity is successful, states will have to invest the resources to undertake investigations and prosecutions. Yet, as already noted, states have the primary obligations to undertake such prosecutions.

128. For a discussion of the political logic of proactive complementarity, see *supra* Part III.A.

costs of the particular tactics of proactive complementarity in question. Often, communicating with and applying political pressure to such governments, providing limited assistance to national judiciaries, and mobilizing external resource networks will represent cost-effective means of encouraging national prosecutions. Even if more resource-intensive efforts, such as the provision of considerable direct assistance to national judiciaries, were to enable domestic prosecutions, they would likely divert sufficient resources away from the Court's core mission to make them inadvisable.

Much of the work of a policy of proactive complementarity is likely to fall within the auspices of the Jurisdiction, Cooperation, and Complementarity Division ("JCCD") of the OTP. This unit has already faced budgetary constraints imposed by the ASP.<sup>129</sup> The OTP should request that the ASP provide specific post allocations within the JCCD for the purposes of proactive complementarity. This would not only ease these resource constraints but would also provide formal support for such a policy from the ASP. To the extent that proactive complementarity must be implemented with existing resources, the JCCD may be able to build elements of proactive complementarity into existing posts—for instance, as part of its work in admissibility assessment, bilateral and multilateral diplomacy, situation monitoring, and state cooperation.<sup>130</sup> Again, proactive complementarity cannot subsume these other functions, but it can become a secondary goal of the OTP's interactions with states. In many circumstances, such as during the process of assessing admissibility, the tactics of proactive complementarity can closely synergize with the existing activities of the JCCD and provide a cost-effective means of achieving the goals of the Rome System of Justice.<sup>131</sup>

#### IV. IMPLEMENTING A POLICY OF PROACTIVE COMPLEMENTARITY

A policy of proactive complementarity would help the ICC resolve the misalignment of mandate, resources, and expectations; and it would facilitate a more effective contribution toward ending impunity. Such a policy does, however, raise real concerns with respect to resource allocation, the reactions of states, and its impact on national judicial systems. These concerns require the execution of careful strategic choices and cautious implementation. This section examines potential strategies and key tactics that the OTP could utilize to implement proactive complementarity.

The simplest approach to proactive complementarity would involve making it clear to states that the OTP welcomes their involvement in the genu-

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129. See O'Donohue, *supra* note 56, at 595–97.

130. For a discussion of the role of the Jurisdiction, Cooperation, and Complementarity Division, see Luis Moreno-Ocampo, *supra* note 6.

131. Clearly, other tactics of proactive complementarity, such as the provision of direct assistance to national governments, would involve separate resource outlays. Such tactics must be carefully weighed to determine their potential benefit. Such tactics might also involve other units of the OTP, such as the Prosecution Division, that could provide prosecutorial training to national judiciaries.

ine prosecution of international crimes. By articulating a strategy of proactive complementarity in public statements and diplomatic exchanges with states, the OTP could help ensure that the ICC does not create a chilling effect on domestic prosecutions or result in free-rider states. Additionally, such statements and exchanges would explicitly remind states of their duty to prosecute international crimes and would reiterate the admissibility criteria of the Rome Statute. Clear declarations to this effect would help states recognize their own interests in national investigations and prosecutions.

A more robust version of proactive complementarity would involve creating incentives for states to undertake investigations and prosecutions of crimes that fall within the overlapping jurisdiction of the ICC and national courts. Often, the OTP's most powerful tool to encourage national prosecution is the threat of its own investigation, as such an investigation would likely impose significant sovereignty costs on the state affected. The OTP could use a range of communication methods that are authorized by the Rome Statute to remind domestic authorities of the potential for intervention by the ICC. The creation of strategic incentives for national prosecution through such communications and political leverage may be particularly effective where national governments have the capacity, but lack the will, to prosecute international crimes.

The strongest version of proactive complementarity would actively enhance the ability of states to undertake genuine investigations and prosecutions. Efforts aimed at enhancing the ability of states to prosecute international crimes may help domestic regimes exercise jurisdiction over the perpetrators of such crimes where they previously lacked the capacity to do so. Such efforts, however, may be highly resource-intensive and their ultimate success may be out of the direct control of the Court. Hence, in seeking to enhance the capacity of national judiciaries, the Court must carefully consider whether any particular project would be an efficient use of the OTP's limited resources, whether the Court is well-suited to engage in the particular capacity-building task, and whether the means chosen are the most effective for seeking to help end impunity.

A wide range of strategies for implementing a policy of proactive complementarity is available to the OTP. The tactics likely to be effective in any situation will depend upon context, especially the preferences and capabilities of particular national governments. Accordingly, differentiated strategies based on the specific circumstances of the state in question will be necessary. Generally speaking, the OTP's relationships with the states over which it elects to exercise jurisdiction will fall into one of three distinct classes: (1) the state is able but unwilling to prosecute, (2) the state is willing but unable to prosecute, or (3) the state is engaged in an active division of labor with the OTP. The sections that follow consider the application of proactive complementarity in each of these contexts.

A. *The State with Jurisdiction Is Unwilling to Prosecute International Crimes*

The first class of relationships between the ICC and domestic governments arises where a state is unwilling to undertake its own prosecutions despite the fact that it has the capacity to do so. Of course, where a state with jurisdiction is unwilling to prosecute a particular case, the OTP's goal is to prevent impunity. Under the traditional vision of the ICC's role and the passive approach to complementarity, the ICC would likely pursue that goal by undertaking its own prosecution of those most responsible for the international crimes in question. In contrast, a policy of proactive complementarity suggests that the ICC should first attempt to motivate the state to undertake its own investigations and prosecutions and then, only if these efforts are unsuccessful, undertake its own investigation and prosecution.

The unwillingness of a state to exercise jurisdiction is often the result of a political calculation by judicial or executive officials of a government, according to which inaction is politically preferable to the exercise of domestic jurisdiction. For example, a state might determine that the political and financial costs of prosecution are simply too great to justify action. In these cases, the implementation of proactive complementarity would involve the OTP's altering the incentives facing the unwilling state so as to increase the likelihood that the state finds it politically advantageous to initiate its own prosecutions. The OTP can alter these incentives most efficiently through the threat of international prosecution and its attendant sovereignty costs.

A number of readily available tactics may allow the OTP to communicate the threat of international prosecution to states and to increase the extent to which states perceive their own failure to prosecute as detrimental to their sovereignty. First, the OTP will need to develop a strong track record of international investigations and prosecutions. Often, the most potent means available to the Court to motivate unwilling states to act is to threaten intervention should the states continue to abstain from undertaking their own investigations and prosecutions. A strong track record of ICC interventions makes those threats credible. By developing such a track record, the OTP can signal that international prosecution is a meaningful possibility, and this real possibility of international prosecution will likely make the alternative of domestic prosecutions far more palatable to states previously unwilling to act. Simultaneously, the OTP can make clear to states that real sovereignty costs will follow from such international intervention. The effective threat of international prosecution should therefore alter the incentives facing states regarding the activation of previously unwilling national judiciaries as an alternative or complement to international prosecution.

Second, the OTP will need to actively monitor for potential crimes within its jurisdiction and alert states to crimes within their jurisdictions.<sup>132</sup> By

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132. The OTP already routinely monitors the commission of crimes within its jurisdiction and is aided in this effort by a robust set of communications to the OTP from NGOs and individuals. See Rome

drawing attention to crimes within a state's jurisdiction that appear to be going unpunished, the OTP can alert national authorities and judiciaries to the possibility of international prosecution and thereby encourage the activation of domestic judicial institutions by national governments seeking to avoid the sovereignty costs of international prosecution.<sup>133</sup> Ongoing attention from, and interaction with, the Court increases the perceived likelihood of eventual international prosecution and thus may alter the interest calculation of some states—or, at least, of the domestic judicial officials within those states—in favor of domestic action.

Third, the OTP will need to engage in dialogue with states that are unwilling to investigate or prosecute crimes themselves. By using the modalities established in the Rome Statute to communicate with states that were previously unwilling to prosecute, the OTP may be able to cajole those states into prosecuting crimes domestically. Such communication may focus states' attention on their obligations to prosecute international crimes, may provide a form of acculturation through which accountability becomes a norm of state conduct,<sup>134</sup> and may allow states to recognize their own interests in domestic prosecutions. The OTP may also consider increasing the reputation costs of continued domestic inaction through diplomatic or political pressure on states unwilling to prosecute. To do so, the ICC may use bilateral dialogues with third-party states, encourage pressure from NGOs, and raise the continued unwillingness of a state to prosecute in multilateral fora.<sup>135</sup> In some cases, direct communication and dialogue between the OTP and states may facilitate the activation of previously unwilling domestic jurisdictions, as it would put states on notice that the ICC is considering initiating an investigation. Similarly, raising a state's failure to prosecute in public fora may pressure the state to act so as to avoid negative reputation costs.

The possibility of such communication is explicitly provided for in the Rome Statute. The Prosecutor's assessment of a potential situation under article 15, the initial determination of admissibility under article 17, the process of informing states of a possible investigation under article 18(1), the reports to the Prosecutor with respect to a deferred investigation under

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Statute, *supra* note 11, art. 15. For an exemplary indication of communications to the OTP, see ICC, OTP, Update on Communications Received by the Office of the Prosecutor of the ICC (Feb. 10, 2006), available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_Update\\_on\\_Communications\\_10\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf) (noting that 1732 communications had been received to date).

133. Articles 15 and 18 of the Rome Statute and Rule 104 of the Court's Rules of Procedure and Evidence explicitly provide for such contact between the OTP and states. Rome Statute, *supra* note 11, arts. 15, 18; ICC, R. EVID. & PROC. 104, ICC-ASP/1/3 (part II-A) (2002).

134. For a discussion of how interaction with international institutions can play such a socialization role, see generally Goodman & Jinks, *supra* note 94.

135. For example, the Prosecutor has used his regular reports to the U.N. Security Council with respect to the situation in Darfur to raise the profile of the case and highlight the Sudanese government's unwillingness to prosecute. See ICC, OTP, *Fourth Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno-Ocampo, to the U.N. Security Council Pursuant to UNSCR 1593 (2005)* (Dec. 14, 2006), available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_ReportUNSCR4-Darfur\\_English.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_ReportUNSCR4-Darfur_English.pdf).

article 18(5), and the Prosecutor's decision to initiate or terminate an investigation under articles 53(1) and 53(2) all foresee communication between the OTP and states and the provision of information to the OTP with respect to investigations and prosecutions undertaken by national judiciaries.<sup>136</sup> Utilizing such communications would be fully consistent with the OTP's powers under the Rome Statute, would put states on notice of the potential for international prosecution, and could pressure them to exercise domestic jurisdiction.

Dialogue between states and the OTP can also address the problems of both inadvertent and willful blindness to international crimes. With respect to inadvertent blindness, dialogue can draw states' attention to international crimes, of which they may be unaware, that are occurring within their jurisdictions. Informing a state of the OTP's interest in crimes within its jurisdiction might force a state to confront the reality that such crimes are occurring and spur it to undertake prosecutorial efforts. With respect to willful blindness, a public dialogue with the state may impose significant reputation costs and may ultimately result in the state acknowledging ongoing crimes and undertaking domestic investigation to avoid continued international condemnation.

The potential for dialogue with national governments to encourage domestic prosecutions is illustrated by the ICC's influence on Colombia's hesitancy to hold paramilitary groups accountable for their crimes. In an effort to bring paramilitary groups out of the jungle, the Colombian government offered very generous terms for paramilitaries willing to join the peace process.<sup>137</sup> Specifically, Colombia's Peace and Justice Law, passed in late June 2005, limited accountability for the perpetration of crimes within the jurisdiction of the ICC by allowing paramilitaries to confess and face relatively light sentences.<sup>138</sup> The confessions, investigations, and sentences were designed to cover any crimes an individual may have committed and did not offer guarantees of transparency or judicial process. At the very least, the scope of accountability that the law would provide was questionable. Nonetheless, the judicial process enabled by the law might have been deemed a national investigation sufficient, under articles 17 and 20 of the Rome Statute, to limit the admissibility of those cases before the ICC.<sup>139</sup> Even though the ICC had not opened an investigation in Colombia, senior officials in the

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136. Rome Statute, *supra* note 11, arts. 15, 17, 18(1), 18(5), 53(1), 53(2).

137. For a background discussion on the situation of paramilitary groups in Colombia, see HUMAN RIGHTS WATCH, *SMOKE AND MIRRORS: COLOMBIA'S DEMOBILIZATION OF PARAMILITARY GROUPS* (Aug. 1, 2005), available at <http://www.hrw.org/reports/2005/colombia0805/colombia0805.pdf>.

138. Juan Forero, *New Colombia Law Grants Concessions to Paramilitaries*, N.Y. TIMES, June 23, 2005, at A3. Crimes under the law are also deemed political offenses, providing a shield to extradition requests from other states.

139. The law has been significantly criticized by foreign governments, including the United States, which has exerted pressure for the law to be amended before it will provide additional foreign aid. See Juan Forero, *U.S. Threat Is a Blow to Colombia's Easy Terms for Death Squads*, N.Y. TIMES, July 7, 2005, at A5. For other criticism, see Press Release, Amnesty International, *Colombia: Justice and Peace Law Will*

OTP, concerned by the lack of accountability for potential crimes within the Court's jurisdiction, addressed a letter to the Government of Colombia in 2005 alerting them to the nature of the crimes to which the law applied and informing them of the Court's potential interest in the situation.<sup>140</sup> Subsequently, the Colombian Constitutional Court struck down the law, modifying it to remove certain amnesty provisions and to better address various human rights concerns.<sup>141</sup> Senior Colombian officials have attributed this change, at least in part, to fear of ICC involvement.<sup>142</sup> Through dialogue with the Colombian government, the ICC was able to help preserve the possibility of full accountability in domestic courts.

The potential for dialogue to catalyze domestic prosecutions is greatest when the OTP pursues communication with a wide range of domestic officials. When the OTP communicates with national governments to encourage domestic prosecutions of international crimes, as it did in Colombia, it must determine the appropriate national interlocutors with whom to interact. Such communications are a form of diplomatic exchange that, according to the Rome Statute, should be "transmitted through the diplomatic channel" unless states specify otherwise.<sup>143</sup> Generally, that provision dictates that the OTP should address its communications to the executive authority of the state in question, usually the Minister of Foreign Affairs. Although such use of diplomatic channels is required as the first means of communication between the OTP and a state, in many circumstances, especially where the executive authorities of the state are resistant to national prosecutions, the OTP may seek follow-up communication directly with judicial or prosecutorial authorities. Without circumventing the statutory use of diplomatic channels, such follow-up communication may allow the OTP to encourage an independent national judiciary to open a prosecution itself, despite informal executive preferences or policies to the contrary.<sup>144</sup> Like-

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Guarantee Impunity for Human Rights Abusers (Apr. 26, 2005), available at <http://news.amnesty.org/index/ENGAMR230122005>.

140. Interview with Paul Seils, Senior Legal Officer, International Criminal Court, in The Hague, Netherlands (June 30, 2005).

141. For a discussion of the decision, see Press Release, Human Rights Watch, Court Fixes Flaws in Demobilization Law: Constitutional Ruling Orders Paramilitaries to Confess (May 19, 2006), available at <http://hrw.org/english/docs/2006/05/19/colomb13430.htm>.

142. See *Habla Vicente Castaño*, *supra* note 86.

143. Rome Statute, *supra* note 11, art. 87 (providing statutory authority for communication with States Parties and specifying the use of "the diplomatic channel"); see also ICC, R. EVID. & PROC. 176, 177, ICC-ASP/1/3 (part II-A) (2002) (delineating the responsibilities for communications among the organs of the court).

144. Given the statutory requirement that formal communications be addressed through diplomatic channels, direct contact with judicial officials may either follow from a formal diplomatic request to the executive authorities of the state in question or may constitute more informal, voluntary interactions through, for example, the growing number of networks of judicial officials in which the OTP participates. See Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 MICH. L. REV. 985 (2007) (noting the growing role of transgovernmental networks in enforcing international criminal law); see also ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (developing the theoretical model for governance through networks).

wise, such direct contact may help encourage interest groups within a state to pressure their own government to alter policies to favor prosecutions.<sup>145</sup>

In addition to implementing strategies that will allow the OTP to convey more effectively a meaningful threat of intervention to unwilling states, the OTP will also need to monitor ongoing domestic judicial proceedings to ensure that any national prosecutions that are initiated meet the standards of genuineness outlined in the Rome Statute.<sup>146</sup> There is reason to be concerned that, where previously unwilling states undertake domestic prosecution in response to the threat of international prosecution by the OTP, the resultant domestic proceedings may lack a genuine intent to bring senior level suspects to justice. The current attempts by the Sudanese government to use domestic courts as an alternative to the ICC provide a clear example of this potential danger.<sup>147</sup> The OTP may seek to minimize this risk by monitoring national proceedings directly or, in order to conserve resources and maximize impact, by developing partnerships with NGOs and international organizations to conduct such monitoring.<sup>148</sup> By watching domestic proceedings and issuing public statements when necessary, the OTP and its partners may be able to provide ongoing pressure to ensure that domestic investigations and prosecutions meet basic standards of due process and represent genuine efforts to bring the accused to justice. Such monitoring may also be able to draw a state's attention to inadvertent inadequacies in its domestic processes at a stage when reform or adjustment is still possible. Taken collectively, these tactics offer a promising means of catalyzing domestic prosecutions by at least some initially unwilling states.

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145. Such an approach draws heavily on liberal theories of international relations. See Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 518 (1997) ("Representative institutions . . . constitute the critical 'transmission belt' by which the preferences and social power of individuals and groups are translated into state policy.").

146. See Rome Statute, *supra* note 11, art 17. For a discussion of standards of genuineness, see Burke-White, *Complementarity in Practice*, *supra* note 15, at 574–80; Holmes, *Complementarity: National Courts versus the ICC*, *supra* note 11, at 667–69.

147. See *infra* text accompanying notes 74–77 for a discussion of the present domestic processes in Sudan.

148. For example, the Organization on Security and Cooperation in Europe ("OSCE") has taken primary responsibility for monitoring *11bis* trials before the State Court of Bosnia & Herzegovina and transmits reports on the quality of those proceedings to the Prosecutor of the ICTY. See OSCE, Domestic War Crimes Prosecutions: Providing Expert and Technical Assistance in Prosecuting War Crimes Cases, [http://www.oscebih.org/human\\_rights/warcrimes.asp?d=1](http://www.oscebih.org/human_rights/warcrimes.asp?d=1) (last visited Nov. 14, 2007). See also Burke-White, *Multilevel Global Governance*, *supra* note 15, at ch. 5. Other NGOs also routinely monitor such national court proceedings. For example, Human Rights Watch, Amnesty International, the Judicial System Monitoring Program, and the International Center for Transitional Justice have all issued reports on the quality of proceedings before various national and international courts. See, e.g., JUDICIAL SYSTEM MONITORING PROGRAM, OVERVIEW OF THE JUSTICE SECTOR: MARCH 2005 (2005), available at [http://www.jsmp.minihub.org/Reports/jsmpreports/Overview%20of%20Justice%20March%202005/Overview%20of%20Justice%20March%202005\(e\).pdf](http://www.jsmp.minihub.org/Reports/jsmpreports/Overview%20of%20Justice%20March%202005/Overview%20of%20Justice%20March%202005(e).pdf); Human Rights Watch, *Judging Dujail: The First Trial Before the Iraqi High Tribunal*, 18 HUMAN RIGHTS WATCH NO. 9(E), Nov. 2006, available at <http://hrw.org/reports/2006/iraq1106/iraq1106web.pdf>; INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, CROATIA: SELECTED DEVELOPMENTS IN TRANSITIONAL JUSTICE (2006), <http://www.ictj.org/static/Europe/TJdevelopments.eng.pdf>.



B. *The State with Jurisdiction Is Unable to Prosecute International Crimes*

A second class of relationships between the ICC and states arises where the state in question is unable to undertake investigations or prosecutions of international crimes. Such inability may stem from civil war, the collapse of domestic institutions, or a lack of resources and expertise. In these circumstances, the mere threat of international prosecution by the OTP is unlikely to result in national prosecutions because the failure of national institutions reflects a deeper structural problem.<sup>149</sup> Where states are unable to take action, a policy of proactive complementarity suggests that the OTP should carefully consider the reasons behind that inability and determine whether it can alter the ability of a state to investigate and prosecute. Such a determination again requires a careful balancing of the OTP's limited resources with the likely impact that international assistance will have. In some circumstances, efforts by the OTP to enhance domestic judicial capacity will be appropriate. In other circumstances, the resources required to enhance the ability of a national judiciary to prosecute will be far too great to justify ICC assistance.

Indeed, the OTP, working together with other international actors, may have a role to play in assisting national courts, particularly where states are unable to undertake investigations due to the collapse of national judiciaries, domestic capacity constraints, or the inability to obtain a suspect or key evidence. Carefully targeted international assistance may help national governments develop the skills and resources to undertake prosecutions on their own.<sup>150</sup> However, such efforts can be both time- and resource-intensive and, to the degree that they become a focus of the OTP's activities, may divert resources from direct investigation and prosecution by the OTP. Careful balancing of the costs and benefits of domestic capacity-building efforts is therefore required before the Court undertakes significant efforts to reform domestic judiciaries.

1. *Tactics Available to Enhance the Judicial Capacity of States Unable to Prosecute*

Through a policy of proactive complementarity, the ICC may be able to facilitate domestic judicial reform efforts that can transform a state previously unable to prosecute international crimes into a state both able and willing to undertake domestic investigations and prosecutions. This policy

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149. For a discussion of such scenarios, see Burke-White, *Complementarity in Practice*, *supra* note 15, at 574–80.

150. See Turner, *supra* note 144, at 1007 (“Networks can be of assistance in helping states establish effective investigation and prosecution strategies.”). The Justice Rapid Response Network has been created expressly for this purpose. See ANDRAS VAMOS-GOLDMAN ET AL., JUSTICE RAPID RESPONSE FEASIBILITY STUDY (2005), available at <http://www.auswaertiges-amt.de/diplo/en/Aussenpolitik/Voelkerrecht/IStGh/IStGH-JRRdownload.pdf> (noting the goal of providing “resources and expertise at short notice in support of genuine efforts to bring to justice perpetrators [sic] mass crimes.”).

might include the training of officials, the provision of resources, or assistance with investigations. Indeed, even recognizing the Court's limited mandate and resources, a number of tactics are available to the OTP to promote more effective exercise of domestic jurisdiction.

First, the OTP may wish to share legal resources, analysis, and information with national governments or judiciaries. Where a national judiciary is unable to prosecute because it lacks particular legal resources, investigative information, or analytical tools, the OTP may be able to catalyze domestic prosecutions by providing access to publicly available information, analysis of such information, or even case files that the OTP has opened but decided not to pursue further. Such an approach would be unlikely to detract significant resources from the Court's ongoing international investigations.

Second, the OTP may wish to develop and disseminate clear standards and best practices for the domestic prosecution of international crimes. Such standards and codes of best practices are already being used in other areas of international law.<sup>151</sup> Standards and best practices provided by the OTP or through the jurisprudence of the Pre-Trial Chamber may offer a non-legally binding means of encouraging genuine domestic prosecutions by giving national governments guidance around which they can structure their own activities.

Third, the OTP may seek to externalize the political costs of prosecution away from national governments to free them of the political pressures that might previously have prevented them from acting. When a state is unable to prosecute because of extreme political pressure from domestic groups or other powerful states, the OTP may be able to reduce the political costs of domestic action for the state by making clear to domestic and international audiences that, if national prosecutions do not unfold, international intervention will follow. East Timor offers an example of such cost-externalization. The Special Panels for the Prosecution of Serious Crimes, established under U.N. auspices by the U.N. Transitional Administration in East Timor, absorbed pressure from Indonesia not to undertake prosecutions, thereby shifting the political costs of prosecution away from the fragile East

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151. In Security Council Resolution 1377, the Security Council refers to "best practices" that may assist states in implementing the resolution. S.C. Res. 1377, ¶ 13, U.N. Doc. S/RES/1377 (Nov. 12, 2001). Subsequently, a Directory of International Best Practices, Codes and Standards for the Implementation of Security Council Resolution 1373 (2001) was promulgated. See Security Council, Counter-Terrorism Comm., *Directory of International Best Practices, Codes and Standards for the Implementation of Security Council Resolution 1373* (2001), available at [http://www.un.org/sc/ctc/best\\_prac.html](http://www.un.org/sc/ctc/best_prac.html) (last visited Nov. 12, 2007). Such best practices and codes of conduct have been particularly useful in the area of international environmental law. The U.N. Global Compact, which includes environmental standards, represents a more formal code of best practices for corporate responsibility. For a list of its principles, see U.N. Global Compact, *About the Global Compact: The Ten Principles*, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> (last visited Nov. 14, 2007). See also Sean D. Murphy, *Essay in Honor of Oscar Schachter: Taking Multinational Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389, 411 (2005).

Timorese government and onto the United Nations.<sup>152</sup> As a result, the East Timorese government was able, despite Indonesian opposition, to undertake such prosecutions until the United Nations withdrew its mission and costs were shifted back to the fragile new state.

Fourth, the OTP may, at times, choose to provide direct technical assistance to states that are unable to prosecute. Such activities present the greatest danger of resource diversion and, thus, must be pursued with the utmost caution. Where states need specific but limited technical assistance, the OTP may consider such requests, bearing in mind its resource limitations, mandate, and the potential legal implications.<sup>153</sup> In many cases, in order to minimize potential admissibility challenges, assistance may be best provided through general seminars or trainings for national officials, conducted in The Hague rather than through an on-site mission to the state in question.

Fifth, in scenarios in which the ICC does pursue international prosecution, the OTP may wish to consider domestic judicial reform as part of its exit strategy from the situation. When the OTP finishes its work in a particular situation, it may seek to make a longer-lasting contribution to domestic judicial efforts through direct assistance, training, and resource provision that would allow national officials to pick up where the ICC leaves off. As noted below, after the conclusion of proceedings before the Court, the risk that significant involvement with domestic governments will preclude the admissibility of the case in future ICC proceedings declines sharply. Additionally, national judicial systems may be better positioned to receive assistance once the immediate conflict has passed. Accordingly, judicial reform efforts will often be optimized if incorporated into the OTP's exit strategies.<sup>154</sup>

While the tactics discussed above provide the OTP with a number of direct means to enhance the capacity of national governments to prosecute international crimes, the most effective and cost-efficient means for the ICC

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152. For a discussion, see Burke-White, *supra* note 107, at 41–53.

153. The ICTY has taken this approach and provided a variety of training sessions, usually through the involvement of ICTY experts in programs organized by third parties. See, e.g., Press Release, ICTY, President Pocar Participates in Expert Meeting on Inter-State Judicial Cooperation in War Crimes Proceedings (June 13, 2007), available at <http://www.un.org/icty/pressreal/2007/pr1163e.htm> (noting that exclusively for the media and not an official document); Press Release, ICTY, ICTY Weekly Press Briefing (May 16, 2007), available at <http://www.un.org/icty/briefing/2007/pb070516.htm> (noting a training program for Macedonian judges).

154. The ICTY has also been considering the question of domestic judicial capacity and the Tribunal's long-term impact. See Press Release, ICTY, Address by His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council, JDH/PIS/690-e (July 26, 2002), available at <http://www.un.org/icty/pressreal/p690-e.htm> [hereinafter Jorda July 2002 Address]. The ICTY's exit strategy from the Balkans, memorialized in its Completion Strategy, involves explicit efforts to activate domestic judicial institutions in Bosnia. See generally Johnson, *supra* note 43; William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia and Herzegovina*, 46 COLUM. J. TRANSNAT'L L. (forthcoming 2008); Michael Bohlander, *Last Exit Bosnia—Transferring War Crimes Prosecutions from the International Tribunal to Domestic Courts*, 14 CRIM. L.F. 59 (2003).

to improve the functioning of failed domestic judiciaries will be through the mobilization of external resource networks. The Court's position on the global stage and the vast array of NGOs that have developed in relation to the Court give it a powerful role in networking, resource generation, and agenda setting, all of which would help to promote domestic judicial reform.<sup>155</sup> By mobilizing such external resource networks, the Court may be able to leverage its own limited resources in an efficient manner to support broader judicial development by other actors in the international system.

Such a network-based approach recognizes that other institutions and organizations may be more effective and efficient in providing aid to national judiciaries than the OTP itself. Local and international NGOs, inter-governmental organizations, and third-party states may have more resources, greater experience, and a superior ability to facilitate and assist with domestic judicial capacity building.<sup>156</sup> For example, the recently created Justice Rapid Response Initiative makes it possible to provide immediate assistance to states that seek to undertake investigations of international crimes but lack the domestic resources to do so.<sup>157</sup> A number of national governments have developed special offices within their ministries of justice for the prosecution of international crimes, and these offices regularly provide assistance to other states.<sup>158</sup> Even the United States, traditionally an opponent of the ICC, might be willing to provide assistance to the national governments that seek to prosecute international crimes themselves; and it has considerable capacity to do so.<sup>159</sup> Indeed, many national governments are likely to have greater financial resources that can be devoted to domestic judicial reform programs than does the ICC.<sup>160</sup>

Ultimately, therefore, the most effective role for the ICC to play in the endeavor of enhancing domestic judicial capacity may be one of mobilizing

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155. Such NGOs include, for example, The Coalition for the International Criminal Court, Parliamentarians for Global Action, and the International Center for Transitional Justice.

156. For a discussion of the potential of such networks in the enforcement of international criminal law, see Turner, *supra* note 144.

157. For information on the current status on the Justice Rapid Response Initiative from the perspective of one of the states that has shown early interest in and support for it, see German Foreign Office, Foreign Policy: Justice Rapid Response, <http://www.auswaertiges-amt.de/diplo/en/Aussenpolitik/Voelkerrecht/ISrGh/ISrGH-JRRSeite.html> (last visited Nov. 14, 2007).

158. See, e.g., U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, 2001 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2001> (discussing, within individual reports, a number of national prosecutors' offices with such capacities).

159. For information on the capabilities of the relevant U.S. program, see U.S. Dep't of Justice, What is the Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT), <http://www.usdoj.gov/criminal/opdat/mission/mission.html> (last visited Nov. 14, 2007).

160. For example, the European Commission has recently approved significant funding for the extension of an initial project for the restoration of the judicial system in eastern D.R. Congo. See European Union at the United Nations, The European Commission Contributes to the Restoration of Justice in the East of the Democratic Republic of the Congo, [http://www.europa-eu-un.org/articles/en/article\\_6062\\_en.htm](http://www.europa-eu-un.org/articles/en/article_6062_en.htm) (last visited Nov. 14, 2007). Such a program would be far beyond even the most ambitious program that the ICC could undertake.

networks of actors. As Jenia Turner has noted, “The ICC is . . . likely to serve as a catalyst for networks . . . .”<sup>161</sup> The OTP is uniquely positioned to draw attention to the failure of domestic judiciaries and to seek others to channel resources to them. Likewise, the Court could focus global attention on particular countries with judicial inadequacies by, for example, convening meetings of NGOs and states with respect to judicial reform activities. The OTP may wish to maintain a roster of willing experts, consultants, and NGOs able to assist states that would be made available to national governments seeking assistance. The OTP can draw the attention of such networks to particular states; broker contacts between states, institutions, and organizations to facilitate domestic judicial reform efforts; and directly request networks to assist troubled states. Moreover, the OTP can use its connections with national governments, perhaps through the ASP, to stimulate bilateral aid to states seeking assistance in judicial capacity building. Indeed, the ICC is likely to excel at coordinating the efforts of different institutions.

This network approach fits closely with the Prosecutor’s existing strategies. As he noted to the diplomatic corps at The Hague on February 12, 2004, the OTP will rely “on extensive networks of support with States, civil society, multilateral institutions, academics and the private sector. This approach enables [the OTP] to better represent [ninety-two] States Parties and to benefit from ideas and perspectives from around the world.”<sup>162</sup> Mobilizing networks of support may be the best way to realize the benefits of proactive complementarity without broader resource commitment or legal complications.

## 2. *Grounds for Caution in Undertaking Domestic Judicial Reform*

Despite the benefits that would flow from making improvements to struggling domestic judiciaries, two sets of considerations counsel particular caution in the ICC’s undertaking of national judicial reform. First, the existing international criminal tribunals have had very limited success in such efforts. Second, active involvement in national judicial reform or in specific national cases may have dangerous legal consequences in the form of subsequent admissibility challenges to ICC proceedings.

The experiences of other international courts and tribunals indicate some of the difficulties that the ICC may face if it chooses to engage directly in domestic capacity building. Such courts have largely been ineffective as agents of domestic judicial reform. The *ad hoc* tribunals for both the former Yugoslavia and Rwanda have been the subjects of considerable criticism due to their limited contact with national governments and their marginal influ-

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161. Turner, *supra* note 144, at 1004.

162. Luis Moreno-Ocampo, Prosecutor of the ICC, Statement to the Diplomatic Corps, The Hague, Netherlands (Feb. 12, 2004), available at [http://www.icc-cpi.int/library/organs/otp/LOM\\_20040212\\_En.pdf](http://www.icc-cpi.int/library/organs/otp/LOM_20040212_En.pdf).

ence—at least in their early years—in promoting the effective exercise of national justice.<sup>163</sup> The ICTY's Completion Strategy, which involves transfer of some cases to national jurisdictions, as endorsed by the Security Council,<sup>164</sup> recognizes the Tribunal's limited impact on domestic judicial institutions in the region and the need to enhance national capacity in order for the Tribunal to complete its work.<sup>165</sup> The ICTY and the International Criminal Tribunal for Rwanda ("ICTR") have had neither the legal mandate nor the resources to undertake broad-based judicial reform. Other programs and institutions—such as aid from states and training programs undertaken by governments, the Office of the High Representative in Bosnia & Herzegovina, and NGOs—have proven better situated to lead such efforts.

Perhaps more effective than the two *ad hoc* tribunals at facilitating domestic judicial reform and reconstruction are the more recent generation of hybrid tribunals, which draw on a mix of domestic and international resources and have operated or are operating in Sierra Leone, East Timor, Kosovo, Bosnia, and Cambodia.<sup>166</sup> The Special Court for Sierra Leone ("Special Court"), for example, is likely to leave a longer legacy on the country's domestic judiciary than the Yugoslavian and Rwandan tribunals will leave upon their respective domestic judiciaries, particularly considering the Special Court's location in Freetown and its broader utilization of domestic local staff.<sup>167</sup> Yet, even the Special Court does not have a clear mandate for do-

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163. See Alvarez, *supra* note 43, at 365. In fact, the ICTY has at times had a negative impact by freezing out national judicial efforts or imposing high barriers on national prosecutions through its "Rules of the Road" provision. For the Rules of the Road provision of the Rome Agreement, see Office of the High Representative, Agreed Measures (Feb. 18, 1996), as cited in Mark S. Ellis, *Bringing Justice to an Embattled Region—Creating and Implementing the "Rules of the Road" for Bosnia-Herzegovina*, 17 BERKELEY J. INT'L L. 1, 7 n.49 (1999). Approximately 2300 cases sent to the ICTY were never reviewed and lost in administrative limbo. See OSCE, WAR CRIMES TRIALS BEFORE THE DOMESTIC COURTS OF BOSNIA AND HERZEGOVINA, PROGRESS AND OBSTACLES 6 (2005), available at <http://www.oscebih.org/documents/1407-eng.pdf>. The result, according to observers, was that "[F]or nearly five years, 'The Rules of the Road' agreement shut down all efforts by Bosnian government authorities to utilize justice to remove war criminals from powerful post-war positions." See Paul R. Williams & Patricia Taft, *The Role of Justice in the Former Yugoslavia: Antidote or Placebo for Coercive Appeasement?*, 35 CASE W. RES. J. INT'L L. 219, 253–54 (2003).

164. See Jorda July 2002 Address, *supra* note 154, at 5; see also Security Council, Statement by the President of the Security Council, U.N. Doc. S/PRST/2002/21 (July 23, 2002), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/491/47/PDF/N0249147.pdf>. The Security Council itself has frequently called for the transfer of cases in resolutions relating to the two tribunals. See S.C. Res. 1503, ¶ 7, U.N. Doc. S/RES/1503 (Aug. 28, 2003) (reaffirming that the ICTY's goal should be "concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY's jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions"). See also S.C. Res. 1534, ¶¶ 4, 6, U.N. Doc. S/RES/1534 (Mar. 26, 2004) (requiring a review of the ICTY's case load and regular reports by its president and prosecutor).

165. See generally Burke-White, *supra* note 154. It should be noted that under the new Completion Strategy the ICTY has been far more effective in facilitating domestic judicial reform. See *id.*

166. For a discussion, see generally Burke-White, *supra* note 107 (considering the law and politics of the creation of hybrid tribunals in Cambodia, East Timor, and Rwanda). See also Laura Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003).

167. For a discussion, see Richard S. Williamson, *Transitional Justice: The UN and the Sierra Leone Special Court*, 2 CARDOZO PUB. L. POL'Y & ETHICS J. 1 (2003).

mestic judicial reform; nor does it have the resources or experience necessary to be highly effective in facilitating such efforts.<sup>168</sup>

Given the ICC's limited resources—both in absolute terms and in comparison to other tribunals such as the ICTY—there is little reason to think that the Court will be more effective in promoting domestic judicial reform in the future than other international tribunals have been in the past. Hence, in attempting to enhance the capacity of states that have been unable to prosecute international crimes, the ICC's best tactic will be to mobilize networks of external actors that have the resources and skills to rebuild and reform domestic judiciaries.

A second reason for being cautious of direct ICC involvement in domestic judicial reform efforts is that such efforts may have adverse legal consequences for subsequent admissibility determinations. Regardless of the means by which a case reaches the Court, the Prosecutor and the Pre-Trial Chamber are called upon, at a number of points during the investigation and prosecution, to engage in a determination of admissibility. Article 17 requires that, when a situation is investigated under the Prosecutor's *proprio motu* powers, both the Prosecutor and the Pre-Trial Chamber must examine issues of admissibility.<sup>169</sup> When the investigation is initiated based on a referral from a non-affected state party or from the Security Council, article 18 provides that the Prosecutor must make an initial determination of admissibility. That determination may be challenged by the Pre-Trial Chamber's own motion, the accused, or a state party that is investigating or has investigated the case. Once admissibility is challenged, the Pre-Trial Chamber may then make its own admissibility determination. Additionally, article 53 indicates that the Prosecutor must take issues of admissibility into account when initiating an investigation or suspending an already open investigation with the approval of the Pre-Trial Chamber. All such determinations of admissibility include an evaluation of the complementarity criteria as provided in article 17 of the Statute; and, within that evaluation, any assistance provided by the Court could have a direct bearing on whether national prosecutions are considered genuine.

The problems of legal admissibility would be most troubling in circumstances where the ICC undertakes domestic judicial reform efforts and the national government then proceeds to undertake prosecution on its own. Although, ideally, this would yield an active national judiciary that provides real accountability, in certain circumstances, domestic prosecutions might

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168. See Statute of the Special Court for Sierra Leone, available at <http://www.sc-sl.org/scsl-statute.html>; see also S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000) (authorizing the creation of a special court for Sierra Leone). The one exception to the limited impact of international criminal tribunals on domestic judicial reform is the recent effect of the ICTY's Completion Strategy on the establishment of the State Court in Bosnia and Herzegovina. For a discussion, see Burke-White, *supra* note 154.

169. See Rome Statute, *supra* note 11, art. 17. For a further discussion of admissibility determinations, see Mohamed El Zeidy, *Some Remarks on the Question of the Admissibility of a Case during Arrest Warrant Proceedings before the International Criminal Court*, 19 LEIDEN J. INT'L L. 741 (2006).

still lack genuineness or may intentionally shield a particular accused.<sup>170</sup> In such circumstances, the Prosecutor may seek to exercise jurisdiction and assert admissibility based on the lack of a genuine domestic prosecution. If the ICC takes up such a case, an admissibility challenge may be filed, pursuant to article 19 of the Statute, by either the accused, a state with jurisdiction over the case, or a state from which acceptance of jurisdiction is required. The entity challenging admissibility of the case may well cite the assistance from, training by, or involvement of the OTP in domestic proceedings as evidence of a genuine national process and, thereby, seek to prevent the admissibility of the case at the ICC.

Article 17 of the Statute provides that a case will be inadmissible where it “is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>171</sup> In determining the ability of a national government to undertake genuine proceedings, the Prosecutor and Pre-Trial Chamber are instructed to consider “whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”<sup>172</sup> Direct assistance from the ICC could be decisive in the Pre-Trial Chamber’s determination that, for example, the national judicial system is now able to prosecute.<sup>173</sup> In cases in which admissibility is asserted by the OTP based on an undue delay of national proceedings, it is also conceivable that a state or accused challenging admissibility could claim that, where the Court has committed to provide assistance, any delay of process was attributable to the slow pace of cooperation or to difficulties encountered in receiving such assistance from the OTP.

Thus far, the Pre-Trial Chamber has taken an active approach to determining whether cases are admissible, even at the arrest warrant phase of proceedings.<sup>174</sup> In the case of Thomas Lubanga Dyilo, for example, Pre-Trial Chamber I observed, “it is the Chamber’s view that an *initial determination* on whether the case against Mr. Thomas Lubanga Dyilo falls within the jurisdiction of the Court and *is admissible* is a *prerequisite* to the issuance of a warrant of arrest for him.”<sup>175</sup> In considering admissibility, the Pre-Trial

170. In these circumstances, the OTP could still seek to assert the admissibility of the case despite a national proceeding. See Rome Statute, *supra* note 11, art. 17(2) (“In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5.”).

171. Rome Statute, *supra* note 11, art. 17(1)(a). For further discussion, see Holmes, *The Principle of Complementarity*, *supra* note 11, at 41–78.

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

173. In egregious cases, the failure of the state to heed the advice of the OTP might, instead, be viewed as evidence of the state’s continued inability to prosecute international crimes.

174. For a detailed discussion of admissibility requirements and the Pre-Trial Chamber’s role in judging admissibility, see El Zeidy, *supra* note 169.

175. See Prosecutor v. Dyilo, *supra* note 106, ¶ 18 (emphasis added).



Chamber undertook a detailed analysis of the charges against Lubanga before Congolese courts prior to determining that there had not been a domestic investigation of the same charges as those included in the Prosecutor's indictment.<sup>176</sup> Elsewhere, in a decision of July 8, 2005, Pre-Trial Chamber II concluded that the case against Joseph Kony "appear[ed] to be admissible" only after considering the inability of the Ugandan authorities to apprehend Kony, who was in the D.R. Congo at the time.<sup>177</sup> In both cases, the Pre-Trial Chamber conducted an extensive analysis of admissibility on its own accord, suggesting that it will not merely accept the Prosecutor's assertions of admissibility. Similarly, other jurisprudence from the Pre-Trial Chamber suggests that it may seek to challenge prosecutorial submissions on its own accord.<sup>178</sup> Given the strict scrutiny applied by the Pre-Trial Chamber, the Prosecutor must be cautious when undertaking actions that could preclude admissibility in the future.

Given the dearth of jurisprudence indicating how the Pre-Trial Chamber would treat assistance from the OTP, the development of specific strategies to avoid adverse admissibility findings may be premature. However, certain types of assistance and training are likely to pose greater risks than others. Two key factors are likely to influence whether any assistance programs cause admissibility risks: the specificity of the assistance provided and the depth of the ICC's involvement in the domestic case or in national reform efforts. The more specifically tailored that ICC assistance is to a particular national case, the greater the likelihood that its assistance could provide grounds for a future admissibility challenge. At the lowest levels of specificity, general training made available to any national government would be unlikely to pose a substantial risk, as it would be both available to all states and of a non-specific nature. Training tailored to the needs of a particular national government or domestic judicial institution would pose a greater risk of causing admissibility problems. Finally, assistance and training—or even direct ICC involvement—in a particular case at the national level would present the greatest risk to a subsequent admissibility challenge.

Just as the specificity of assistance is likely to be relevant to admissibility determinations, so too is the depth of the OTP's involvement in a national proceeding likely to play a crucial role. The mere provision of information or

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176. *Id.*, ¶¶ 30–40.

177. Prosecutor v. Kony, Otti, Lukwiya, Odhiambo, and Ongwen, Case No. ICC-02/04-01/05, Decision on the Prosecutor's Application for Warrants of Arrest Under Article 58 (July 8, 2005), available at [http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-129\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-129_English.pdf).

178. In publicly available decisions to date, both the Pre-Trial Chamber and the Appeals Chamber have sought to develop an independent voice and, at times, check the Prosecutor's freedom of action. For example, the Pre-Trial Chamber decided, over the Prosecutor's objections, to allow victims a clear role in proceedings even before crimes were alleged; and the Appeals Chamber refused the Prosecutor an interlocutory appeal on that question. See Situation in the Democratic Republic of the Congo, *supra* note 99; Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber 1's 31 March 2006 Decision Denying Leave to Appeal (July 13, 2006), available at [http://www.icc-cpi.int/library/cases/ICC-01-04-168\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-168_English.pdf).

evidence to a national judiciary is least likely to impact admissibility. Similarly, the publication of general standards, the compilation of best practices, the provision of a list of experts, or the mobilization of a network of resources by the OTP is not likely to be problematic. In contrast, field visits by Court personnel for the purpose of training or direct participation of Court staff in a national proceeding would pose a far greater risk of adverse admissibility consequences.

Overall, the OTP will need to balance the potential benefits of providing assistance to national proceedings with the downstream legal risks that may result from such a strategy. Again, therefore, the danger of admissibility consequences flowing from the ICC's direct involvement in judicial reform efforts suggests that mobilizing external resources may be the best tactic for the Court to improve the ability of states unwilling to prosecute.

*C. Where a State with Jurisdiction Engages in an Active Division of Labor with the Court*

A third class of relationships between the Court and states is likely to arise where the ICC and a state cooperate in the prosecution of international crimes through a division of labor. From a legal perspective, the division of labor may be a rare occurrence because the ICC is unable to act where national governments act themselves. Nonetheless, a window of opportunity for a division of labor arises in three circumstances. First, a division of labor may occur when a state is able and willing to prosecute international crimes generally but is unable or unwilling to prosecute a particular suspect or case. Often for political reasons, even a national judicial system that is able to undertake the prosecution of serious international crimes may be unable to investigate and prosecute the most senior perpetrators of such crimes or may be unable to obtain necessary evidence from third-party states with respect to particular crimes. In such a situation, the particular cases not addressed domestically would be admissible before the ICC, despite the general willingness of the national government to act. Second, a division of labor may also arise where the OTP seeks to prosecute those crimes meeting the gravity threshold articulated in article 17 and a state seeks accountability (whether criminal or non-criminal) for lower-level offenders who are not likely to be the subjects of an ICC investigation.<sup>179</sup> Finally, a division of labor may occur where a non-territorial state prosecutes particular suspects

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179. As noted above, the ICC will only prosecute those that are most responsible for international crimes and those crimes that meet the gravity threshold of article 17. Rome Statute, *supra* note 11, art. 17(1)(d) (providing that a case is inadmissible if it is "not of sufficient gravity to justify further action by the Court"). The Prosecutor has treated this restriction more as a policy choice than a legal requirement but has nonetheless emphasized that the gravity of the crime will be an important element of case selection. *See* ICC, OTP, Criteria for Selection of Situations and Cases (June 2006) (unpublished policy paper, on file with the author).

under principles of universal jurisdiction, leaving the ICC to prosecute other cases.

The Dutch prosecution of Guus Kouwenhoven illustrates a further scenario in which a division of labor can exist between the ICC and national governments as part of a policy of proactive complementarity, namely where a third state undertakes a prosecution under universal jurisdiction to complement the work of the ICC. In 2003, shortly after assuming office, the Prosecutor publicly drew attention to the financial links behind many international crimes and encouraged states to join him in investigating “criminal business.”<sup>180</sup> In response thereto, the Netherlands began an investigation of Guus Kouwenhoven, a Dutch businessman involved in the arms trade with Liberia. Subsequently, Kouwenhoven was convicted by Dutch courts and sentenced to eight years imprisonment based on violations of the U.N. arms embargo against Liberia.<sup>181</sup> According to the spokeswoman for the Netherlands Prosecution Service, the ICC Prosecutor’s comments prompted the Dutch investigation of nationals involved in grave human rights violations abroad.<sup>182</sup>

For a division of labor to be successful, communication between the OTP and states undertaking domestic justice processes will be needed, and a coordinated approach that maximizes the collective contribution toward ending impunity must be devised. An active division of labor fits closely with the strategic objectives of the OTP, as it can help maximize the Court’s effectiveness while efficiently allocating resources. Dividing labor with states would allow the OTP to focus on prosecuting those most responsible for crimes within the jurisdiction of the Court and allow it to carefully focus its resources on maximizing its impact.<sup>183</sup> By partnering with national judiciaries, the Court can help minimize or eliminate the impunity gap by ensuring that even suspects who do not meet the ICC’s gravity threshold are held accountable domestically.

While active division of labor has the potential to significantly further the OTP’s goals, it also raises potential conflicts. First, where the OTP and a state seek to divide labor, there is a danger that the state will free ride on the Court’s provision of public goods like investigation and prosecution. By allowing the OTP to prosecute certain individuals, a state may benefit from reduced financial and political costs and avoid its own international legal

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180. Marlise Simons, *The Dutch Try One of Their Own over Links to Liberia*, N.Y. TIMES, May 3, 2006, at A3.

181. Marlise Simons, *8 Year Sentence for Businessman Who Smuggled Arms to Liberia*, N.Y. TIMES, June 8, 2006, at A8. However, Von Kouwenhoven was acquitted of war crimes charges based on insufficient evidence. *Id.*; see also *Dutch National Faces Eight Year Prison Sentence for Arms Trading in Liberia*, INTEGRATED REG’L INFO. NETWORKS, June 7, 2006, <http://www.irinnews.org/report.aspx?reportid=59248>.

182. Marlise Simons, *supra* note 180, at A3.

183. See Paper on Some Policy Issues Before the Office of the Prosecutor, *supra* note 65, at 3 (“The Office will function with a two-tiered approach to combat impunity. On the one hand it will initiate prosecutions of the leaders who bear most responsibility for the crimes. On the other hand it will encourage national prosecutions, where possible, for lower ranking perpetrators . . .”).

obligations to prosecute. Hence, some governments that are able and willing to prosecute all crimes within their jurisdiction may seek greater involvement from the OTP than is strictly necessary in order to avoid the burdens of prosecuting themselves.<sup>184</sup> The OTP should be vigilantly mindful of this possibility, particularly in the case of “self referrals,” where a state refers a situation in its own territory to the Court.<sup>185</sup>

Second, active division of labor with a state may result in the appearance of impropriety or bias. The ICC and Uganda, for example, have essentially divided labor, with the ICC only prosecuting the four surviving senior leaders of the LRA and the Ugandan government providing accountability or amnesty for remaining perpetrators.<sup>186</sup> Yet, the now infamous “handshake” at a London hotel in 2004 between Ugandan President Museveni and ICC Prosecutor Luis Moreno-Ocampo has led many Ugandans to view the Court as a tool of the government and to question its independence.<sup>187</sup> Active division of labor requires cooperation and, often, close contact with a state that could be viewed as inappropriate for the independence and impartiality of the OTP. Hence, an active division of labor is best pursued where the state with which the OTP seeks to cooperate has clean or relatively clean hands. Even in those cases, the Court must avoid appearing biased.

Third, an active division of labor may result in future admissibility challenges similar to those that might arise when the ICC attempts to directly enhance the capacity of domestic courts. The cooperation, inherent in any effective division of labor, between a state and the OTP may subsequently be cited by the state in an admissibility challenge. In light of this potential legal implication, the division of labor may be most appropriate for states

184. This situation may seem to conflict with one of the arguments at the heart of proactive complementarity, namely that states will generally prefer to prosecute domestically than allow international intervention. However, there will be situations in which the perceived sovereignty costs of international intervention are low and the political or financial costs of domestic action are high. In such circumstances, positive complementarity is unlikely to be successful and the real danger is that national governments will seek to outsource the costs of prosecution to the ICC, resulting in greater ICC involvement than is necessary or efficient.

185. On the practice of self-referrals, see William A. Schabas, *First Prosecutions at the International Criminal Court*, 27 HUM. RTS. L.J. 25, 27–29 (2006); Mohamed M. El Zeidy, *The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State’s Party Referral to the ICC*, 5 INT’L CRIM. L. REV. 83, 99–110 (2005); Claus Kress, *‘Self Referrals’ and ‘Waivers of Complementarity’: Some Considerations in Law and Policy*, 2 J. INT’L CRIM. JUST. 944 (2004); Paola Gaeta, *Is the Practice of ‘Self-Referrals’ a Sound Start for the ICC?*, 2 J. INT’L CRIM. JUST. 949 (2004).

186. See Agreement on Justice and Reconciliation, Uganda-Lord’s Resistance Army/Movement (LRA/M), Jun. 29, 2007; see also Moreno-Ocampo, *supra* note 8, at 8 (“[In] Uganda, the Court has issued arrest warrants against [four] individuals; but other national mechanisms can be useful for the other combatants . . . those who do not bear the greatest responsibility.”).

187. For discussions of the perception of bias generated by this meeting, see David Lanz, *The ICC’s Intervention in Northern Uganda: Beyond the Simplicity of Peace vs. Justice* 10 (Fletcher School of Law and Diplomacy Working Paper, May 2007), available at [http://fletcher.tufts.edu/humansecurity/pdf/paper\\_uganda-ICC\\_lanz.pdf](http://fletcher.tufts.edu/humansecurity/pdf/paper_uganda-ICC_lanz.pdf); see also Zachary Lomo, *Why the International Criminal Court Must Withdraw Indictments Against the Top LRA Leaders: A Legal Perspective*, SUNDAY MONITOR (Kampala), Aug. 20, 2006, available at <http://www.refugeelawproject.org/resources/papers/others/whyICCmustwithdraw.htm>.

that are likely to undertake genuine prosecutions, thereby rendering potential admissibility concerns moot.

Fourth, the active division of labor may result in conflicts with states that, in turn, lead to a less-than-efficient allocation of resources. For example, the failure to agree in advance on the gravity threshold that separates crimes to be prosecuted by the OTP and those to be prosecuted domestically may create confusion or actually widen the impunity gap if certain suspects fall through the cracks. Even where such an agreement has been reached with a state, the state might subsequently alter its policies and assert primacy over the ICC. As the national government would then be prosecuting the case, the ICC investigation would be barred by article 17.<sup>188</sup> OTP resources would have been wasted, but—because the national judiciary would have been activated—the net result would still be proactive. Careful coordination is necessary for such a strategy to work.

A final form of conflict may arise where a state seeks to provide non-criminal accountability for lower-level offenders. The experience of the Special Court for Sierra Leone demonstrates potential difficulties where truth commissions and prosecutions operate simultaneously.<sup>189</sup> Tensions may arise with respect to the use of information uncovered by a truth commission in criminal proceedings, or victims and witnesses may not understand the purposes and powers of various institutions. Again, such problems can be addressed through careful coordination and sequencing. Outreach programs will need to make the different purposes and powers of various institutions clear. Timing and sequencing of institutional responses can minimize conflict by, for example, completing some criminal prosecutions before initiating truth commission proceedings.

Despite the potential complications and difficulties inherent in an active division of labor, sharing the burden of providing accountability for crimes within the Court's jurisdiction remains an efficient and effective way to end impunity more broadly and to meet the high expectations of the Court. To maximize the potential benefits of a division of labor, the OTP must engage in two preliminary steps. First, the OTP will have to carefully identify appropriate partner states. Generally, the OTP will only be able to divide labor with states that have jurisdiction over the crimes in question—most often the territorial or national states. Beyond jurisdictional considerations, the OTP should only partner with states that are unlikely to generate subsequent admissibility challenges—ideally states that have clean hands themselves and have independent, effective judiciaries.<sup>190</sup> Sometimes, a division of

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188. See Rome Statute, *supra* note 11, art. 17.

189. For a discussion of the interaction of these institutions, see William Schabas, *Amnesty, The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS, J. INT'L L. & POL'Y 145 (2004); William Schabas, *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone*, 25 HUM. RTS. Q. 1035, 1049–51 (2003).

190. Of course, states with clean hands and independent judiciaries are also those least likely to need to divide labor with the ICC since they will presumably be able to prosecute all crimes within their

labor with the territorial state would be unwise, and the OTP will have to consider whether a division of labor with a non-territorial state might be an appropriate alternative.<sup>191</sup> Second, the ICC will need to determine the best interlocutors within a state with whom to cooperate in a division of labor. As noted above, initial contact would presumably occur through formal diplomatic channels. Given the specific and, at times, technical nature of the cooperation and coordination necessary for an effective division of labor, it may be necessary to develop additional direct communication with judicial officials. For instance, coordination with the ministry of justice or prosecutors may result in a more effective division of labor.<sup>192</sup>

Beyond these two general considerations that arise in the context of a division of labor, the OTP must be wary of the potential conflicts that may flow from close cooperation with national governments. Specifically, the Prosecutor must avoid the free-rider scenario through careful "willingness" evaluations. The OTP should also maintain an independent and objective position concerning the states with which it divides labor and remain cognizant of any crimes alleged to have been committed by or with the acquiescence of the state in question. Finally, the OTP will need to carefully coordinate with the states with which it seeks to divide labor through ongoing dialogue. Where possible, the OTP and the state in question should reach a nonbinding strategic agreement as to which cases will be prosecuted at which level.<sup>193</sup>

## V. CONCLUSION

Perhaps the best example of how a policy of proactive complementarity might be able to impact a domestic government is the ICC's current investigation in the D.R. Congo. Though the ICC has not intentionally sought to activate the Congolese domestic judiciary, that investigation has had the

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jurisdictions themselves. Hence, risks will have to be taken involving, on occasion, the division of labor with less than ideal partners. Such risks, however, must be carefully considered; and the benefits of a division of labor must be balanced against the potential dangers of partnering with states that may not ultimately undertake genuine prosecutions.

191. For example, the OTP could divide labor with the national state of the perpetrator or a state acting under passive personality or universal jurisdiction. For a discussion of the exercise of universal jurisdiction, see Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 *TEX. L. REV.* 785 (1988). For the treatment of the contemporary practice of universal jurisdiction, see REYDAMS, *supra* note 42.

192. Where a state has undertaken a non-judicial form of accountability for lower-level offenders, it may be appropriate to communicate directly with a truth commission or traditional justice leader so as to minimize potential conflicts.

193. Such an agreement could, for example, involve the ICC starting its investigations with those most responsible for international crimes and the state starting with lower-level offenders. Alternatively, the agreement could use sequencing to allow the ICC to act first and have national prosecutions follow at a later date. Such a division of labor agreement might also cover the sharing and use of investigative files and other information between the OTP and national governments. For an overview of the types of arrangements possible between states and the ICC, see Coalition for the International Criminal Court, *Cooperation with States*, <http://www.iccnw.org/?mod=agreementsgov> (last visited Nov. 15, 2007).

very catalytic effects that could be expected to flow from a policy of proactive complementarity. Following the Prosecutor's announcement in September 2003 that he would examine the situation in the D.R. Congo,<sup>194</sup> key Congolese government figures sought to make a case for the assertion of primacy over the ICC. In late September 2003, a series of senior Congolese officials appeared on local TV and radio to argue that the D.R. Congo was competent to try these cases.<sup>195</sup> Notable judicial reform efforts were subsequently undertaken, though the Congolese judiciary remains in a general state of disrepair.<sup>196</sup> More recently, and due in part to the strengthening of the national government, domestic courts in the D.R. Congo have become considerably more active in investigating and prosecuting international crimes.<sup>197</sup> In the first half of 2006 alone, domestic military courts in the D.R. Congo convicted one officer of war crimes and another of recruiting child soldiers.<sup>198</sup> Similarly, forty-eight soldiers were convicted in the Equateur Province for rape and murder as crimes against humanity.<sup>199</sup> In 2007, verdicts were delivered by the Kissangani Military Court on a high-profile case in Bunia, and trials continued before the Military Tribunal in Bukavu.<sup>200</sup>

Not only does the D.R. Congo situation highlight the potential for the ICC to prompt domestic governments to take action, it also demonstrates how the Rome System of Justice in fact empowers domestic governments to take that action. In each of these cases, Congolese military courts directly applied the Rome Statute of the ICC as the operative law and basis for convictions.<sup>201</sup> The *Haute Cour Militaire* recently confirmed that the Rome

194. ICC, OTP, *Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr. Luis Moreno-Ocampo* (Sept. 8, 2003), available at <http://www.iccnw.org/documents/LMOstatementASP8Sept03.pdf>.

195. Interview by Yuriko Kuga, Leslie Medema & Adrian Alvarez with Joe Wells, International Human Rights Law Group, in Kinshasa, D.R. Congo (Oct. 27, 2003). For a more detailed discussion, see Burke-White, *Complementarity in Practice*, *supra* note 15, at 570.

196. For an evaluation of the Congolese judiciary, see Burke-White, *Complementarity in Practice*, *supra* note 15, at 576; see also HUMAN RIGHTS WATCH, *DEMOCRATIC REPUBLIC OF THE CONGO: CONFRONTING IMPUNITY* (2004), available at <http://www.hrw.org/english/docs/2004/02/02/congo7230.htm>.

197. The growing ability of the Congolese judiciary to undertake its own investigations has not in any way compromised the admissibility of cases before the ICC because D.R. Congo has not sought to prosecute the same individuals named in ICC indictments for the same crimes. The Pre-Trial Chamber did, however, have to address the Congolese charges against Thomas Lubanga for murder before deeming the case admissible before the ICC. In that case the Pre-Trial Chamber found that the ICC indictment with respect to child soldiers was for different crimes than any domestic prosecution would involve and therefore the admissibility criteria of article 17 of the Rome Statute were met. See *Prosecutor v. Dyilo*, *supra* note 106.

198. U.N. Mission in the Congo [MONUC], Human Rights Div., *The Human Rights Situation in the DRC During the Period of January to June 2006* (July 27, 2006), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=publisher&docid=46caaaf0&skip=&publisher=MONUC> [hereinafter *The Human Rights Situation in the DRC*].

199. *Id.*

200. MONUC, Human Rights Div., *Monthly Human Rights Assessment: July 2007* (Sept. 17, 2007), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=publisher&docid=46ee75401a&skip=&publisher=MONUC&type=COUNTRYREP>.

201. MONUC, *The Human Rights Situation in the DRC*, *supra* note 198, at 11.

Statute could be applied domestically and that judges could rely on “definitions of international crimes according to international law,” rather than the less precise and less complete definitions in Congolese military law.<sup>202</sup> The situation makes clear that the Court can meaningfully influence domestic governments. Indeed, without the involvement of the ICC in D.R. Congo, it is unlikely that Congolese domestic courts would have initiated proceedings or that there would have even been a basis for such prosecutions in the country’s domestic law.<sup>203</sup>

A policy of proactive complementarity would transform the fortunate, but unintended, consequences of ICC investigations like the one in D.R. Congo into a strategic policy of the Court. That policy would be predicated upon the Court’s actively attempting to catalyze domestic jurisdictions so as to maximize the collective impact of the ICC and national judiciaries. In so doing, it would fully activate the Rome System of Justice, provide more efficient prosecution of international crimes, and help the ICC meet extremely high expectations.

The International Criminal Court’s core mission is to end impunity for the most serious international crimes. Alone, the OTP can make a contribution to this process by investigating and prosecuting those most responsible for international crimes. However, the resources and reach of the ICC are seriously limited; and, acting alone, the Court cannot end impunity, much less meet the unrealistic hopes that have been placed on the new institution. The Court is already coming under criticism for having only two suspects in detention after more than five years of operation. Only if states meet their international legal obligations to prosecute international crimes can widespread accountability become possible. Proactive complementarity provides a policy framework for catalyzing and coordinating national prosecution efforts so that the overarching goal of the Rome System of Justice can be achieved as effectively and efficiently as possible.

The Rome System of Justice envisions clear interactions between the ICC and national governments in the collective quest of ending impunity. Within that system, the ICC is uniquely and strategically positioned to prompt national judicial action. A policy of proactive complementarity would allow the Court to take advantage of that unique position to maximize the contribution of domestic judiciaries toward ending impunity and

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202. *Id.* In fact, the decision even allows for the application of the ICC Rules of Procedure and Evidence and sentencing guidelines in domestic military courts.

203. Prior to the Rome Statute, Congolese domestic law provided only the most limited bases for prosecution of international crimes. See FEDERICO BORELLO, INT’L CTR. FOR TRANSITIONAL JUSTICE, A FIRST FEW STEPS: THE LONG ROAD TO A JUST PEACE IN THE DEMOCRATIC REPUBLIC OF THE CONGO 39–40 (2004), available at <http://www.ictj.net/downloads/ICTJ.DRC.Eng.pdf>. As Flavia Lattanzi notes in a commentary on the Statute, “The lack of implementation in domestic legal orders of applicable international standards . . . could lead to the Court’s decision of the admissibility of a case, as a consequence of the ‘incapability’ of national jurisdictions to provide justice in the case.” Flavia Lattanzi, *The International Criminal Court and National Jurisdictions*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 181 (Mauro Politi & Giuseppe Nesi eds., 2001).



would also allow the OTP to focus the majority of its resources on those situations in which national governments are truly unable or unwilling to prosecute. Such a policy is a key to the Court's ultimate success. Though the Court is likely, over the long term, to be primarily judged on the success of its own investigations and prosecutions, it is also likely to be blamed for its own inaction and the ability of a number of serious international criminals to evade accountability. Pursuing a policy of proactive complementarity can help the Office of the Prosecutor close the impunity gap and make the greatest contribution toward the success of the Rome System.

Proactive complementarity critically affirms that neither the ICC nor states parties to the Rome Statute can view themselves in isolation; they are part of the Rome System of Justice. That interdependent system relies on the collective engagement of each of the system's constituent entities. A policy of proactive complementarity would provide a powerful mechanism to link the national and international elements of that system and would offer the greatest, and perhaps only, prospect of meeting expectations. Within this system, both states and the ICC must be held jointly accountable for their failure or success at helping to end impunity.

While there are certain risks inherent in a strategy of proactive complementarity, careful implementation can help avoid, manage, or minimize them. Overall, the most promising prospect for achieving an end to impunity is a combined set of policies using the influence and suasion that comes with the threat of international prosecution; providing advice and assistance to national judiciaries in limited circumstances; dividing labor with states; and helping mobilize networks of states, NGOs, and international organizations to facilitate judicial efficacy. As the 2009 Review Conference approaches, the OTP needs to take serious steps to achieve better congruence between expectations, mandate, and resources and to avoid perceptions of failure. The strategic implementation of a policy of proactive complementarity would go far toward achieving that end.