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### The ICC's Exit Problem

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# THE ICC'S EXIT PROBLEM

REBECCA J. HAMILTON\*

*The International Criminal Court (ICC) was never meant to supplant the domestic prosecution of international crimes. And yet, the Court is now entering its second decade of operations in four African nations, with no plan for exit in sight. While the literature on the ICC to date has devoted much space to considerations involved in the Court's entry into situations, this Article identifies the looming need for the ICC to consider when and how to exit situations. However, the consideration of exit reveals an immediate problem: While the Court's constitutive document, the Rome Statute, provides ample guidance on when the Court may enter a new situation, it offers no explicit guidance on exit whatsoever. This Article fills that lacuna, proposing a framework to guide exit decisionmaking that draws on both statutory and policy prescriptions, as well as insights from analogous international institutions. The Article is driven by a concern that the failure to start planning for exit undercuts the Court's placement within a system of complementarity, creating a moral hazard in which domestic justice systems (and those who could support them) come to rely on the ICC in lieu of developing their own capacity to prosecute international crimes. Framed in the positive, planning for exit could present an opportunity to catalyze the development of domestic justice systems and provide a secondary benefit of alleviating the current strain on the Court's resources. The consideration of exit decisionmaking also provides a new occasion to assess and extend our understanding of prosecutorial discretion, an issue that the Court has been grappling with since its inception. This Article argues that the Prosecutor's ability to navigate exit in a way that is acceptable to the Court's key stakeholders will be crucial to the ICC's ability to implement its mandate over the long term.*

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*Since this Article was finalized, the ICC Prosecutor informed the U.N. Security Council that she was suspending operations in the Darfur situation. Citing a lack of support from states, especially for the enforcement of arrest warrants, and highlighting resource constraints, the Prosecutor's statement marked the first time the ICC has publicly announced any halt in its activities. Although suspension is distinct from exit (only the former leaves the door open for the resumption of investigative activities in the same situation), the parallels between the two are significant enough that issues of timing, benchmarks, and process raised in this Article can and should be considered in relation to Darfur and any other situation where the Prosecution is considering suspending operations. Suspension might also be thought of as an alternative to exit, akin to the redeployment model addressed in this Article, but distinguishable in the Darfur situation by virtue of the reasoned and public statement that accompanied the decision. Such public notification can transform suspension into a positive development, alleviating pressure on the Court's resources in a transparent manner, shielding the Prosecution from allegations of inefficiency, and potentially shaming states into increased cooperation with the Court. But as with other alternatives to exit considered in the body of this Article, suspension does not create strong incentives with respect to complementarity. That remains something that only a fully fleshed-out exit strategy can do.*

## INTRODUCTION

The International Criminal Court (ICC) was never meant to supplant the domestic prosecution of international crimes. Situated within a system of complementarity, this "court of last resort" was designed to operate only in instances where states themselves are unable or unwilling to prosecute. As the Court pursues its tenth year of operations in both the Central Afri-

can Republic and Sudan, and its eleventh year in the Democratic Republic of the Congo and Uganda, it is an appropriate juncture to recall this aspect of the Court's design.

This Article argues that to avoid the specter of perpetual presence in every situation it enters, the ICC needs to start considering when and how to exit existing situations.<sup>1</sup> The problem, however, is that existing statutory sources provide no guidance on how the Court might go about doing this.<sup>2</sup> To fill this void, I propose a framework for exit decisionmaking that is benchmark-driven but acknowledges that the Court may sometimes need to exit a situation under conditions of only partial success, or even failure.

Both the identification of exit as an issue and the proposed framework through which to guide exit decisionmaking mark a new direction within the scholarship on the ICC, which to date has devoted much attention to issues related to the Court's entry into new situations. Entry has also been a preoccupation of the Court itself; however, it is time to update this focus, recognizing that the Court today is quite different from what it was at its inception in 2002.

When the ICC's founding Prosecutor, Luis Moreno-Ocampo, took office in June 2003, his first order of business was to find situations to investigate.<sup>3</sup> He began his work against an inauspicious backdrop, and it was unclear whether the Court would ever secure enough cases to become fully func-

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1. "Situation" is a term of art used in the Rome Statute. It refers to the location of the alleged crimes under investigation. Rod Rastan, *Situation and Case: Defining the Parameters*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 422 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011). It is distinct from the term "cases," which refers to the particular crimes prosecuted within a situation. *Id.* at 437-38.

2. Under the statutory interpretation advanced in this Article, the decision to exit would be taken by the Prosecutor. *See infra* Part II. But this Article refers to ICC exit, rather than prosecution exit, since from the perspective of most of the Court's stakeholders, the internal divisions between different arms of the Court are quite opaque.

3. Paul Seils, among the earliest of the lawyers to join the Office of the Prosecutor, notes that even in more recent times, "there remains a sense of 'looking for business.'" Paul Seils, *Making Complementarity Work: Maximizing the Limited Role of the Prosecutor*, in 2 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 989 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

tional.<sup>4</sup> But fast-forward to 2014, and the Court finds itself in a very different situation.<sup>5</sup> While still deeply controversial in many quarters, the Court has secured itself a prominent place on the international stage. Far from being short of cases, its docket is now bulging. Yet, such success raises new challenges, including the question of exit.

The term “exit,” as used in this Article, refers to public notification that the ICC is ceasing new operations in any of the situations in which it is already involved. It does not mean that existing arrest warrants would be nullified, or that defendants already subject to arrest warrants would not proceed to trial (although, as discussed later, under appropriate circumstances, such trials could potentially take place at the domestic level instead of at the ICC).

In theory, exit could be unspoken: The Court could end active operations in a situation without making any public announcement to that effect. Indeed, one might argue that such a scenario would be optimal, in the sense that those who had committed crimes but had not yet been indicted would be unlikely to draw attention to themselves by committing further crimes, fearing future prosecution, and those considering committing future war crimes would be deterred, fearing they would become subjects of an ICC investigation.

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4. Writing soon after the Rome Statute was adopted, future U.S. Ambassador to the United Nations John Bolton argued the Court should be left “to the obscurity it so richly deserves.” John Bolton, *Courting Danger: What’s Wrong with the International Criminal Court?*, AMERICAN ENTERPRISE INSTITUTE (Dec. 1, 1998), <http://www.aei.org/article/foreign-and-defense-policy/international-organizations/courting-danger/>. Throughout the first term of the Bush administration, the United States appeared to be doing everything it could to emasculate the Court. *See, e.g.*, American Service Members Protection Act of 2002, 22 U.S.C. §§ 7421 et seq. (2002) (cutting economic and military aid to countries who had joined the ICC without signing a bilateral immunity agreement with the United States); Draft U.N. Security Council Resolution, U.N. Doc. S/2002/712 (June 30, 2002) (proposal to extend the U.N. peacekeeping force in Bosnia-Herzegovina vetoed by the United States on the grounds that nationals of states not party to the ICC had not been granted immunity from ICC prosecution in the draft resolution).

5. The U.S. position has warmed to a stance best described as constructive engagement, and 122 countries have joined the court. *States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Aug. 22, 2014).

On balance, however, such de facto exit seems ill-advised. Firstly, it works against transparency, one of the principles generally seen as contributing to the legitimacy of international organizations.<sup>6</sup> Secondly, any deterrent effect of perceived ICC presence in a situation will inevitably wear thin once it becomes clear that the ICC is not, in fact, still conducting operations. Finally, and perhaps most importantly, the absence of a public announcement of withdrawal also precludes the possibility of exit serving as a catalyst for capacity-building organizations, whether U.N. actors or private non-governmental organizations (NGOs), to ramp up their efforts to support the domestic system to handle any residual cases in the situation, or indeed any new cases in the future. And, ultimately, deterrence by virtue of a functioning domestic system is a more sustainable goal than deterrence by way of an expensive and distant court.

At present, the Office of the Prosecutor (OTP) has no exit strategy in place for any of the situations in which it operates. This is problematic because it risks undermining the system of complementarity, so integral to the design of the Court, by creating a moral hazard scenario whereby domestic justice systems default towards dependency on the ICC for the prosecution of international crimes. This was not a risk that early watchers of the Court foresaw. Most believed that the possibility of the ICC's entering a given state would spur that state's government to take up its own prosecutions, saving itself from ICC encroachment.<sup>7</sup> To date, however, the reverse seems to have been more common, with ICC involvement decreasing incentives for domestic prosecutions.<sup>8</sup> In light of this

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6. See, e.g., Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 17 (2005) (defining global administrative law as encompassing mechanisms to ensure that, inter alia, adequate standards of transparency are met).

7. See, e.g., William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 57 (2008) (hoping for "a virtuous circle in which the Court stimulates the exercise of domestic jurisdiction through the threat of international intervention").

8. See SARAH NOUWEN, *COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN* 396–99 (2014) (finding that the assumptions underlying initial expectations that the ICC would have a catalyzing effect on domestic prosecutions must be reviewed, both because the normative force of complementarity has

development, this Article argues that a well-constructed exit strategy has the potential to revitalize the complementarity system that the Court's founders hoped would be more active than it has been in the first decade of the Court's existence.

Exit would also generate a secondary benefit by releasing pressure on the Court's current resources. In 2009, the prosecution's 217 staff members were prosecuting eight cases. In the projected budget for 2014, 217 staff were responsible for prosecuting twenty cases.<sup>9</sup> While one should expect the Court to become more efficient in its operations over time, such stretching of resources cannot be limitless, and already complaints have been lodged that the mismatch between the Court's resources and the number of situations it is involved in has led to staff burnout and an over-reliance on secondary sources of information that may not stand up at trial.<sup>10</sup> By exiting situations in appropriate circumstances, the Court would

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been undermined by its lack of legal obligation, and because the states' cost-benefit analysis of undertaking domestic prosecutions to avoid ICC intervention has not played out as expected). With respect to the latter, the assumed cost to the sovereignty of the state in which the ICC intervenes may in fact be seen by the state as a benefit, as has been the case in Uganda, where the government has been able to outsource prosecution of a rebel group to the ICC while avoiding ICC scrutiny of alleged crimes by its own government forces. And even in situations where the sovereignty cost to the state is high, as with the ICC's intervention in Sudan, where the ICC has investigated government activity, these costs can be avoided by means other than complementarity, such as by the state's refusal to execute arrest warrants. These findings run contrary to the expectations of early writers who assumed that, faced with the threat of ICC intervention, states would prefer to undertake domestic prosecutions.

9. 2 INTERNATIONAL CRIMINAL COURT, ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, OFFICIAL RECORDS 34, ICC-ASP/7/20 (Nov. 2008), *available at* [http://icc-cpi.int/icc\\_docs/asp\\_docs/A.pdf](http://icc-cpi.int/icc_docs/asp_docs/A.pdf); *cf.* 2 INTERNATIONAL CRIMINAL COURT, ASSEMBLY OF STATES PARTIES TO THE INTERNATIONAL CRIMINAL COURT, OFFICIAL RECORDS 190, ICC-ASP/12/20 (Nov. 2013), *available at* [http://www.icc-cpi.int/icc\\_docs/asp\\_docs/ASP12/OR/ICC-ASP-12-20-ENG-OR-Vol-I-18Dec1230.AV.pdf](http://www.icc-cpi.int/icc_docs/asp_docs/ASP12/OR/ICC-ASP-12-20-ENG-OR-Vol-I-18Dec1230.AV.pdf).

10. *See* Elena Baylis, *Outsourcing Investigations*, 14 UCLA J. INT'L L. & FOREIGN AFF. 121, 130–133 (2009) (discussing the problems associated with the ICC's reliance on third parties to perform investigations); AM. UNIV. WAR CRIMES RESEARCH OFFICE, INVESTIGATIVE MANAGEMENT, STRATEGIES, AND TECHNIQUES OF THE INTERNATIONAL CRIMINAL COURT'S OFFICE OF THE PROSECUTOR 4, 12 (2012), *available at* <http://www.wcl.american.edu/warcimes/icc/documents/ICCReport16.pdf> (finding that "investigators hired by the OTP have left the Office due to burn out resulting from being over-

be in a better position to accommodate the demands on its resources.

Given the scale of crimes generally involved in situations the ICC enters, it is unlikely that exit would occur only when all possible suspects in a situation have been investigated and prosecuted by the ICC. And while, in an ideal world, exit would not occur unless remaining potential suspects were being investigated and prosecuted by domestic authorities in lieu of the ICC, even this may be an unrealistic goal to have for all situations, given the debilitated state of some domestic justice systems and the time necessary to get them to a point where they can handle the investigation and prosecution of international crimes. Constraints on resources and cooperation failures may mean that, in many instances, exit will not be simply the reverse of the statutory conditions of entry. In other words, although the Court enters situations only when domestic justice systems are unable or unwilling to prosecute,<sup>11</sup> it may need to exit situations before the domestic system is able and willing to prosecute. As a result, exit decisionmaking will need to factor in the possibility of suboptimal exit scenarios, in situations where there is no guarantee that remaining suspects will be investigated or prosecuted by either the ICC or domestic authorities.

While this Article argues that the Court must start considering exit, it recognizes that the lack of guidance from existing sources poses a significant problem for the ICC, which must develop its own process for exit decisionmaking. With respect to the question of how to exit a situation once a decision to exit has been made, there is a growing body of best practices to draw on from the experiences of the closure of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) (together, "the ad hoc tribunals").<sup>12</sup>

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stretched" and describing the reliance on secondary sources as "problematic").

11. Rome Statute of the International Criminal Court art. 17, July 1, 2002, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

12. Indeed, the ICC's legislative body, the Assembly of States Parties, placed the question of exit on its annual meeting for the first time at the end of 2013 with a paper to discuss what lessons such tribunals may have for the ICC. See Int'l Criminal Court, Assembly of States Parties, Report of the Court on Complementarity: Completion of ICC Activities in a Situation Country,



But consideration of how to exit does not address the antecedent, and perhaps more challenging issue, of *when* to exit. And on this question, the ad hoc tribunals have little to offer, since their exit decisions have been made by the political body that established and funded the tribunals—the U.N. Security Council. By contrast, the decision to exit a situation at the ICC appears to fall within the discretion of the Prosecutor.<sup>13</sup>

With the Court's constitutive document, the Rome Statute, providing no direct guidance on exit, the degree of prosecutorial discretion involved in the decision to exit is significant. And while the first decade of literature on the ICC focused heavily on the higher degree of discretion the ICC Prosecutor had to enter situations as compared with his counterparts in the ad hoc tribunals,<sup>14</sup> this Article is the first to recognize that an even greater degree of discretionary decision-making is involved when it comes to exit.

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ICC-ASP/12/32 (Oct. 15, 2013), available at [http://icc-cpi.int/iccdocs/asp\\_docs/ASP12/ICC-ASP-12-32-ENG.pdf](http://icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-32-ENG.pdf). This is a welcome, if belated, development. However, the report failed to recognize that the experiences of these temporary tribunals provide little guidance on the question of when the ICC, as a permanent institution, should exit a situation.

13. The question of who should decide when the ICC exits a situation is explored in Part II.

14. See, e.g., Richard J. Goldstone & Nicole Fritz, *"In the Interests of Justice" and Independent Referral: The ICC Prosecutor's Unprecedented Powers*, 13 LEIDEN J. INT'L L. 655, 657 (2000) (arguing that the degree of discretion afforded to the ICC Prosecutor constitutes a "fundamental departure" from the ad hoc tribunals); William A. Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 541 (2010) (noting that "for the first time, we have an international criminal tribunal where the choice of situations for prosecution is the prerogative of a judicial official within the institution and not a political body outside it"). Unlike the ICC, the ad hoc tribunals were limited to investigating in situations established ex ante by the U.N. Security Council. For instance, the Council limited the geographic jurisdiction of the ICTR to Rwanda, meaning that the ICTR Prosecutor had no discretion to pursue crimes that took place over the border in the Democratic Republic of the Congo. However, this is not to say that there are no checks on the ICC Prosecutor's discretion. The Rome Statute that established the Court defines the geographic and temporal limits of the Court's jurisdiction, and when the Prosecutor seeks to open an investigation into a situation *proprio motu*, a Pre-Trial Chamber composed of three international judges must approve the decision. Rome Statute, *supra* note 11, art. 15. The Pre-Trial Chamber can also review the decision of the Prosecutor not to proceed with an investigation or prosecution if the decision was taken solely "in the interests of justice." *Id.* art. 53(3)(b).

The dearth of scholarship on the question of exit in this field parallels the comparatively greater attention that has been placed on entry, as compared to exit, in other international interventions until quite recently.<sup>15</sup> This Article argues that, as scholars and practitioners in these other settings are finding, the Prosecutor's ability to navigate exit in a way that is acceptable to the Court's key stakeholders will be crucial to the perceived legitimacy of the ICC's work going forward. This is particularly important for a Court that is entirely dependent on others, including governments and civil society organizations, for the access it needs to investigation sites and witnesses,<sup>16</sup> and for the enforcement powers required to execute its judgments.<sup>17</sup> In short, a poorly managed exit from one situation is likely to impact the ICC's ability to enter new situations in the future.

Part I of this Article describes what I term a "complementarity imperative" driving the need to start considering exit. It argues that for the Court to remain in situations without developing any exit strategy risks creating a moral hazard scenario whereby domestic justice systems come to rely on the ICC for the prosecution of international crimes in their territories and, as a result, neither the domestic justice systems nor other actors who could help to build the capacity of those systems have an incentive to plan for prosecuting international crimes domestically. It also observes that exit would have the secondary benefits of protecting the Court against perceptions of inefficiency and of alleviating some of the pressure on the Court's resources. It finally considers whether there are any alternatives to exit, describing two approaches other than exit through which the Prosecutor, currently Gambian lawyer Fatou Bensouda, could align workload and resources in a

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15. The first book to look systematically at exit strategies with respect to international institutions only came out in 2012. *See generally* EXIT STRATEGIES AND STATE BUILDING (Richard Caplan ed., 2012).

16. *See, e.g.*, Jacob Katz Cogan, *The Problem of Obtaining Evidence for International Criminal Courts*, 22 HUM. RTS. Q. 404, 405 (2000) (arguing that international criminal courts "depend on states to provide them with evidence or access to evidence").

17. *See, e.g.*, Burke-White, *supra* note 7, 60–61 (noting the ICC's lack of enforcement mechanisms and quoting the ICC Prosecutor as stating that "ultimately, the decision to uphold the law will be the decision of States Parties").

world of limited budgets: The Prosecutor could decline to enter new situations or she could decide to under-staff existing situations in order to free the resources to enter new situations. However, the costs to the mandate and credibility of the Court that are likely to flow from either of these approaches render both of them problematic. More importantly, neither addresses the fundamental concern about creating positive incentives toward complementarity. Only exit planning can address this issue.

Having established the importance of exit, Part II turns to the core problem facing the ICC: how to develop a decision-making process for exit in the absence of clear statutory guidance. Starting with the question of who should make the decision to exit, this Part argues that the decision to exit falls within the discretion of the Prosecutor. It then reviews the existing literature on prosecutorial discretion at the ICC in order to identify problems the Prosecutor has faced with discretionary decisionmaking and to extract potential lessons that might be usefully applied to exit decisions. Next, this Part turns to a search for comparative examples, distinguishing ICC exit from the exits undertaken by the ad hoc tribunals, and arguing that an ICC exit might most readily be analogized to exit from a U.N. peacekeeping operation. Like U.N. peacekeeping, the perceptions of the ICC's credibility flowing from its actions in one location have an impact on its ability to enter different locations in the future. The emphasis, then, is less on the ICC as a court, and more on the ICC as a permanent international institution.

Finally, Part III moves from problem to solution. First, it draws together both statutory and policy prescriptions to propose a working definition of success for the purposes of exit. It then uses insights from the U.N. peacekeeping context to develop a decisionmaking framework for exit that is guided by substantive benchmarks, rather than hard deadlines. While completion of cases is the goal, the timeline for considering exit begins much earlier than the end of a case, and the Prosecutor should engage in a continual process of assessment to determine whether benchmarks such as investigative access and warrant enforcement are being met, and whether the domestic system in question is developing the capacity to undertake its own prosecutions. In developing this framework, it be-

comes clear that the Court's success with respect to exit cannot be divorced from the actions of other entities, especially states.

### I. WHY EXIT?

The ICC is a permanent institution. In the absence of any requirement of institutional closure, such as that facing the ad hoc tribunals, does the ICC really need to exit any situation? The answer is yes, for both principled and pragmatic reasons. The primary reason is what I term the "complementarity imperative." Remaining permanently in a situation undercuts the principle of complementarity that lies at the heart of the Rome Statute. This principle strives toward a scenario in which states take responsibility for prosecuting international crimes. Beyond this complementarity concern, operating in any situation without a plan for exit may ultimately undermine the Court's reputation by opening it to criticism that the duration of its stay in a situation is the result of inefficiency or, worse yet, intentional delay. Finally, exit would help to alleviate the financial constraints currently facing the Court. At present, the Court's budget is not expanding fast enough to accommodate the increasing number of situations it is entering, without some cost to the quality of its work.<sup>18</sup> A decrease in the quality of the Court's work can, in turn, undermine the credibility of the Court, and ultimately limit its ability to fulfill its mandate of ending impunity.

There are, of course, alternative mechanisms to exit for aligning the Court's resources with its workload, namely, refusing to enter new situations or purposely under-staffing existing ones. But both generate significant problems for the Court's reputation. One might suggest, then, that the answer is simply to push for the Court to be given more resources. But even in a world of unlimited resources, the complementarity imperative alone would still point toward the need for the Court to consider exit.

#### A. *The Complementarity Imperative*

By placing the ICC within a system of complementarity, the drafting of the Rome Statute marked a distinct and conscious decision to depart from the model of the ad hoc tribu-

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18. See *infra* Part I.C.1.ii.

nals that were, in many other respects, the Court's contemporary forerunners. The ad hoc tribunals were granted primacy over relevant domestic jurisdictions in the prosecution of genocide, crimes against humanity, and war crimes. By contrast, the ICC was designed to be a "court of last resort" that would step in only when domestic justice systems were unable or unwilling to undertake genuine prosecutions. As the OTP's 2009-2012 strategy document explained, "the number of cases that reach the Court is not a positive measure of effectiveness. Genuine investigations and prosecutions of serious crimes at the domestic level may illustrate the successful functioning of the Rome system."<sup>19</sup>

This principle of complementarity is central to the functioning of the international criminal justice system that was conceived of by the drafters of the Rome Statute. As Carsten Stahn notes, it is "both unrealistic and undesirable" to imagine the ICC being able to prosecute all crimes within its jurisdiction.<sup>20</sup> As the Court strives toward its ambitious mandate of putting "an end to impunity,"<sup>21</sup> it is clear that domestic systems must take up their share of the work. Yet by conducting its operations without any plan for exit, the Court risks becoming a stand-in for, rather than a catalyst to, the domestic prosecution of international crimes.<sup>22</sup>

Under the Statute, the Court only enters a situation if the domestic justice system is unable or unwilling to conduct its

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19. Int'l Criminal Court Office of the Prosecutor, *Prosecutorial Strategy 2009-2012*, ¶ 79 (Feb. 1, 2010) available at <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>.

20. Carsten Stahn, *Introduction: Bridges over Troubled Waters?*, in 1 *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE*, *supra* note 1, at 3.

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

22. By saying there is a risk that the ICC becomes a stand-in for the domestic justice system, I do not mean to suggest that the two are interchangeable, or that the ICC can ever serve as a complete substitute for a functioning domestic justice system. Quite apart from the qualitative differences between the two, the ICC will only ever be able to prosecute a fraction of those cases that a functioning domestic system could prosecute. But the ICC can be seen as a stand-in in respect of the fact that for as long as it is present in an atrocity or post-atrocity situation, other actors, including the domestic state, can point to the ICC as the mechanism responsible for dealing with accountability, thereby alleviating its own responsibility in that regard.

own prosecutions. Thus, at the point of entry, there are no complementarity concerns. However, with respect to the question of whether the domestic jurisdiction will become willing and able to prosecute at a future point, the Court's ongoing presence in the country risks the creation of a moral hazard unless it has an exit strategy in place.

Long identified in economic literature, moral hazard scenarios arise when actors do not have to bear the consequences of their (in)actions, leading to a reduction in their incentive to partake in a particular desired behavior.<sup>23</sup> In concrete terms, one may consider a typical scenario in an insurance setting, where a "no-fault" policy reduces the incentive for policyholders to protect their belongings relative to what they would have done in the absence of insurance.<sup>24</sup>

Translating this into the ICC scenario, the desired behavior in a system of complementarity is the prosecution of international crimes by domestic justice systems. As noted earlier, the ICC does not enter a situation if the domestic justice system is able and willing to conduct prosecutions, and so it is not the ICC's intervention *per se* that creates the moral hazard. But by continuing its operations without any exit strategy in place, the Court reduces the incentive for the domestic system (and other regional and international actors who might support the domestic system) to begin planning for the prosecution of these crimes in the future.

This is the dynamic that played out in the former Yugoslavia, where, in advance of publicizing its exit strategy, the ICTY determined that there were no national judicial systems within Bosnia and Herzegovina that could undertake the prosecution of international crimes once it closed.<sup>25</sup> Only once the ICTY

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23. For an overview of moral hazard, see generally Mark V. Pauly, *The Economics of Moral Hazard: Comment*, 58 AM. ECON. REV. 531 (June 1968).

24. See, e.g., Joseph E. Stiglitz, *Risk, Incentives and Insurance: The Pure Theory of Moral Hazard*, 8 GENEVA PAPERS ON RISK & INS. 4, 6 (1983) ("[T]he more and better insurance that is provided against some contingency, the less incentive individuals have to avoid the insured event, because the less they bear the full consequences of their actions.").

25. See Letter Dated 17 June 2002 from the U.N. Secretary-General to the President of the Security Council, U.N. Doc. S/2002/678 (June 19, 2002), (summarizing the ICTY's view that "it would not be possible for it to refer cases to the national jurisdictions of that State as they currently are organized and function").

started publicizing its exit strategy did the tribunal, international support actors, and the domestic parties themselves begin to try and ensure there would be a domestic mechanism for handling residual cases. Three years after the ICTY first announced a plan for exit, the War Crimes Division of the State Court of Bosnia and Herzegovina commenced operations.<sup>26</sup>

As long as the domestic system and those who could support it believe that the ICC will do the work, these parties do not bear the consequences of their failure to develop the domestic system, and there is a reduced incentive for them to develop a strategy to take on the prosecution of international crimes in the future. By contrast, were the Court to signal its future exit to the domestic justice system and other relevant parties in any situation in which it operated, both the incentive and the time would exist for these actors to begin planning for how the domestic justice system might handle remaining or future prosecutions in the absence of the ICC.

### B. *Perceived Inefficiency*

The experience of the ad hoc tribunals shows that patience with the pace of war crimes trials is generally limited. Criticisms have been made of both the ICTY and ICTR that

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26. See HUMAN RIGHTS WATCH, JUSTICE FOR ATROCITY CRIMES: LESSONS OF INTERNATIONAL SUPPORT FOR TRIALS BEFORE THE STATE COURT OF BOSNIA AND HERZEGOVINA 1 (2012), available at <http://www.hrw.org/reports/2012/03/12/justice-atrocity-crimes-0> (“[T]he War Crimes Chamber began operations in March 2005.”). The experience of Rwandan justice mechanisms in relation to the ICTR provides a counterpoint to the ICTY example; however, Rwanda seems likely to be a sui generis case. Although the Rwandan government initially supported the idea of an international tribunal for the prosecution of crimes committed during the 1994 genocide, it ultimately voted against the U.N. Security Council resolution establishing the tribunal because of the ICTY’s restriction against the death penalty, the presence of the tribunal outside Rwanda, and the fact that those convicted would serve their time in jails outside of Rwanda. See U.N. SCOR, 49th Sess., 3453d mtg. at 14, U.N. Doc. S/PV.3453 (Nov. 8, 1994) (statement of the Rwandan representative Mr. Bakuramutsa). Thus, far from a moral hazard scenario, the Rwandan government never depended on the ICTR’s existence to begin with. Concurrently with the ICTR starting its operations, the Rwandan government implemented domestic justice mechanisms to respond to the atrocities, firstly through the regular court system, and later through a traditional system known as Gacaca. There is no comparable situation for any of the countries in which the ICC currently has operations.

their operations are too slow;<sup>27</sup> indeed, this has been described as the consensus view of international tribunals overall.<sup>28</sup>

Independent from the question of whether international justice is in fact too slow, it certainly flows from the principle of complementarity inherent in the ICC's design that states that join and fund the Court do not expect it to remain in any situation on a permanent basis. On this metric alone, the current situation, whereby the Court operates without any exit strategies in place, creates a risk that the states will start to view the Court as inefficient. Indeed, the absence of an exit strategy may increase the likelihood of the Court's actually being inefficient. Without any sense of a completion point in a situation, there is little incentive for the Court to increase the speed of any of its activities, even when it has the capacity to do so.<sup>29</sup> Ultimately, state perceptions of inefficiency, whether accurate or not, are problematic on a pragmatic level, because the Court relies on states for the funding it needs to fulfill its mandate.

### C. Resource Constraints

The Court's budget is growing at a rate that is vastly short of what is needed to enter more situations while still maintaining the quality of the Court's work. Over the past five years, the OTP's budget has increased by 17 percent, whereas the number of situations in which it is operating has increased by 100 percent.<sup>30</sup> Although one would hope the OTP has become

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27. See, e.g., Richard J. Goldstone & Gary Jonathan Bass, *Lessons from the International Criminal Tribunals*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* 51, 53 (Sarah B. Sewall & Carl Kaysen eds., 2000) (describing delays in the establishment of tribunals as "not just undignified; they are damaging").

28. Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 *HARV. INT'L L.J.* 323, 323–324 (2009).

29. The satirical observer of bureaucratic systems, C. Northcote Parkinson, may well have put it best when he noted that "work expands so as to fill the time available for its completion." C. Northcote Parkinson, *Parkinson's Law*, *ECONOMIST* (Nov. 19, 1955), available at <http://www.economist.com/node/14116121>.

30. In 2009, the OTP was active in four situations and had a budget of 24.6 million Euros. 2 *INT'L CRIMINAL COURT, ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, OFFICIAL RECORDS, ICC-ASP/7/20*, *supra* note 9, at 7. By the end of 2013, the OTP was



more efficient over time as procedures are streamlined and staff experience grows, the mismatch between resources and workload seems greater than one would reasonably expect any efficiency gains to compensate.<sup>31</sup> According to Dr. Phil Clark, an expert in international justice, “[t]he court operates on a shoestring budget, which greatly affects all of its work, particularly on-the-ground investigations.”<sup>32</sup>

### 1. *Alternatives to Exit*

In broad terms, the OTP has three options through which to align workload with resources. The Prosecutor could decide not to enter new situations, to enter new situations by redeploying staff assigned to existing situations, or to open new situations by exiting existing ones.

#### a. *No Entry into New Situations*

The Rome Statute establishes three ways in which the OTP can acquire new situations to investigate. A situation can be referred to the Prosecutor by a State Party or by the U.N. Security Council, or the Prosecutor can initiate an investigation *proprio motu*.<sup>33</sup> Thus, although the Prosecutor can decide not to initiate any new investigations on her own initiative, State Parties and the U.N. Security Council can continue to request that she investigate the situations that they refer.<sup>34</sup>

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active in eight situations and had a budget of 28.3 million Euros. 2 INT’L CRIMINAL COURT, ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, OFFICIAL RECORDS, ICC-ASP/12/20, *supra* note 9, at 12.

31. The difficulties the OTP is experiencing with current resource constraints are documented in its most recent strategic plan. See Int’l Criminal Court Office of the Prosecutor, Strategic Plan 2012–2015, ¶ 17 (Oct. 11, 2013), available at [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Documents/OTP-Strategic-Plan-2012-2015.pdf) (“The rotational model that was used to meet the staffing demand for the Office’s investigations and prosecutions has surpassed its limits.”).

32. Lilian Ochieng, *International Criminal Court Secures Budget Increase*, DAILY NATION (Jan. 17, 2014), <http://mobile.nation.co.ke/news/International-Criminal-Court-Budget-Increase/-/1950946/2150244/-/format/xhtml1/-/hie0p0z/-/index.html>.

33. Rome Statute, *supra* note 11, arts. 13–15.

34. Article 53(3)(a) does permit the state (or the U.N. Security Council) that made the referral to ask the Pre-Trial Chamber to review a decision by

Despite their ability to make continued requests, neither a state nor the U.N. Security Council can force the Prosecutor to open an investigation. Indeed, the Prosecutor's discretion not to open investigations into situations that political actors have referred to the Court<sup>35</sup> (and to open investigations into situations that political actors have not referred to the Court)<sup>36</sup> is one of the factors that distinguishes the ICC from the ad hoc tribunals.<sup>37</sup> Nonetheless, the ICC Prosecutor's discretion not to open an investigation into a situation that has been referred to the Court is not unfettered.<sup>38</sup> For both legal and political reasons, it is difficult to imagine the Prosecutor repeatedly declining to open investigations into statutorily viable situations referred to the Court.

The Rome Statute establishes the factors that the Prosecutor must consider in deciding whether to open an investigation. The Statute presumes that the Prosecutor "shall" initiate an investigation, provided there is a reasonable basis to believe a crime within the Court's jurisdiction has been committed and the case is admissible in terms of complementarity.<sup>39</sup> Assuming these grounds are met, the only basis left for the Prosecutor to decline the investigation is if "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."<sup>40</sup>

The current policy of the OTP establishes a strong presumption in favor of prosecution, noting that a decision not to prosecute in the interests of justice would be "highly excep-

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the Prosecutor not to open an investigation (or not to prosecute after having opened an investigation). *Id.* art. 53(3)(a). The Pre-Trial Chamber may also request that the Prosecutor review his or her decision. However, there is no basis for legal sanction should the Prosecutor maintain the decision not to open an investigation.

35. *Id.* art. 53.

36. *Id.* art. 15.

37. Goldstone & Fritz, *supra* note 14; Schabas, *supra* note 14.

38. Likewise, the Prosecutor's discretion to open an investigation into a situation that has not been referred to her is not unfettered. As per article 15 of the Rome Statute, the Prosecutor must receive authorization from the Pre-Trial Chamber for a *proprio motu* investigation to proceed. Rome Statute, *supra* note 11.

39. *Id.* art. 53(1).

40. *Id.* art. 53(1)(c).

tional.”<sup>41</sup> But because the Prosecutor has never invoked this provision, it remains unclear what, in concrete terms, such “highly exceptional” circumstances might be. What is clear is that if the Prosecutor decided not to enter a new situation solely on the basis of “interests of justice” considerations, she would have to inform the Pre-Trial Chamber, which would then have the right to review the decision.<sup>42</sup> If the judges decided to review, then her decision not to enter a new situation could be maintained only with the Pre-Trial Chamber’s confirmation.<sup>43</sup>

The Prosecutor could also try to make the case that, as a consequence of resource constraints, it would not be in the interests of justice to enter a new situation. An argument might be that properly staffing a new situation would mean diverting resources from existing prosecutions, which in turn would generate delays significant enough to violate the internationally recognized human rights standards incorporated under article 21(3) of the Rome Statute.<sup>44</sup> But it would be up to the Pre-Trial Chamber to decide whether resource constraints satisfied the interests-of-justice exception to the presumption in favor of entering a situation that in all other respects met the statutory requirements.

In addition to this significant legal hurdle, the Prosecutor would likely have political difficulty maintaining a decision not to enter any new situations until additional funds were allocated. Presumably, whenever a political actor—a state or the

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41. Int’l Criminal Court Office of the Prosecutor, Policy Paper on Preliminary Examinations 17 (Nov. 2013), available at [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf).

42. Rome Statute, *supra* note 11, art. 53(3)(b).

43. *Id.* The scenario of the Pre-Trial Chamber overriding the Prosecutor’s decision not to open an investigation has not yet arisen at the ICC. However, in such an instance, one could imagine that the Prosecutor, while formally instructed to open an investigation by the Pre-Trial Chamber, would have a number of informal options at her disposal, from general bureaucratic delay to the avoidance of investigative inquiries likely to lead to the hardest cases, through which to demonstrate formal compliance while avoiding a genuinely thorough investigation.

44. *E.g.*, International Covenant on Civil and Political Rights art. 14(c), Mar. 23, 1976, 999 U.N.T.S. 171 (enumerating the right to be tried without undue delay).

U.N. Security Council—refers a situation to the Court, it typically has a strong interest in seeing the Prosecutor open an investigation, and would complain loudly about a decision not to do so.<sup>45</sup>

In and of itself, this would not necessarily be a significant problem for the Prosecutor; indeed, she should expect states to express dissatisfaction with her decisionmaking any time they believe their interests are not being served by the ICC. Yet, if the Prosecutor cited resource constraints as the grounds for refusing to enter new situations on a repeated basis, this would inevitably cause conflict between the Prosecutor and the Court's legislative body, the Assembly of States Parties (ASP), which is made up of states that have joined the ICC and is responsible for financing the Court's work.<sup>46</sup>

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45. Of course, one can also imagine a scenario in which a state, unwilling to intervene in a conflict situation itself, views a referral to the ICC as a way of outsourcing the problem while appearing to be "doing something" to address the situation. See, e.g., BENJAMIN N. SCHIFF, *BUILDING THE INTERNATIONAL CRIMINAL COURT* 232 (2008) (noting that, with respect to the U.N. Security Council's referral of Darfur to the ICC, "the international community showed little willingness to take more vigorous action . . . and assignment to the Court could be seen as a fig leaf for inaction").

46. The formation of the ASP arises from article 112 of the Rome Statute. Rome Statute, *supra* note 11, art. 112. The relationship between the ASP and the organs of the Court, including the OTP, has not been without tension. For instance, the OTP submitted objections to the ASP's proposal to form an Independent Oversight Mechanism that would have *proprio motu* power to investigate any OTP staff without the Prosecutor's permission. The Prosecutor argued that this would encroach on the independence of the OTP. Int'l Criminal Court Office of the Prosecutor, Legal Memorandum on the IOM Mandate (Nov. 19, 2010), available at [http://iccforum.com/media/background/lectures/ask-former-prosecutor/2010-11-19\\_OTP\\_Memorandum\\_on\\_IOM\\_Mandate\\_\(English\).pdf](http://iccforum.com/media/background/lectures/ask-former-prosecutor/2010-11-19_OTP_Memorandum_on_IOM_Mandate_(English).pdf). The ASP ultimately decided to establish the oversight mechanism despite the Prosecutor's objection. Int'l Criminal Court, Assembly of States Parties, Report of the Bureau on the Independent Oversight Mechanism, ICC-ASP/9/31 (Dec. 10, 2010), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP9/ICC-ASP-9-31-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/ICC-ASP-9-31-ENG.pdf). The ASP referred to article 112(4) of the Rome Statute, which enables the ASP to establish subsidiary bodies, "including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy." Rome Statute, *supra* note 11, art. 112(4). On the relationship between the Prosecutor and the ASP, see generally David Donat-Cattin, *Decision-Making in the International Criminal Court: Functions of the Assembly of States Parties and Independence of the Court's Judicial Organs*, in 2 *ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 69–83 (Flavia Lattanzi & William A. Schabas eds., 2004).

On the positive side, such tensions could lead the ASP to increase its funding, thus enabling the OTP to take on new situations without any trade-off in its staffing. But such a dispute could also go in the opposite direction.<sup>47</sup> In addition, there are informal accountability checks on the Prosecutor through non-signatory states and especially through NGOs.<sup>48</sup> The latter in particular are likely to object to a Prosecutor who repeatedly refuses to enter new situations.<sup>49</sup>

In sum, even if the Prosecutor could satisfy the judges of the Pre-Trial Chamber that resource constraints meant that it would not serve the interests of justice to open a new investigation, it would be difficult to sustain repeated refusals to open investigations without incurring the wrath of both state and non-state actors who could credibly argue that such an approach cuts against the ICC's mandate of ending impunity.

b. *Entry into New Situations by Redeploying Staff from Existing Situations*

A second approach, used by the OTP until 2012, is to re-deploy staff from existing situations without exiting those situations. This policy, described by the OTP as “the flexible use of resources through expanding or reducing joint teams in accordance with needs,” sounds sensible enough on paper.<sup>50</sup> But in

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47. Both the ASP and the Prosecutor understand that the Rome Statute permits the ASP, by majority, to remove the Prosecutor from office if he or she is “unable to exercise the functions required by this Statute.” Rome Statute, *supra* note 11, art. 46(1)(b). It would be perverse, to say the least, for any member of the ASP to try to have the Prosecutor removed for failure to enter new situations due to a lack of funding by the ASP. Nonetheless, the existence of this provision impacts the power dynamics in the relationship between the Prosecutor and the ASP.

48. See generally Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L LAW 510, 525–34 (2003).

49. While one might foresee some NGOs raising their concerns directly to the ASP and pushing it to disburse more funds, the NGO community is not a monolith. If new investigations were repeatedly demanded, and denied, in relation to a specific geographic region—Latin America, for instance—then it seems reasonable to imagine that Latin American NGOs in favor of investigations would not hesitate to challenge the Prosecutor for prioritizing existing situations in Africa over new situations in Latin America.

50. Int'l Criminal Court, Assembly of States Parties, Proposed Budget for 2012, ICC-ASP/10/10, ¶ 94 (July 21, 2011), available at [http://www.icc-pi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-10-ENG.pdf](http://www.icc-pi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-10-ENG.pdf).

practice, the approach has harmed the credibility of the Court.

As the number of situations the Court enters has increased, redeployed staff members have been spread increasingly thin. This seems to have had a detrimental impact on the staff themselves. In a 2008 letter of concern to the Prosecutor, Human Rights Watch noted that “many investigators experienced ‘burn out’ because there were simply not enough of them to handle the rigorous demands for conducting investigations.”<sup>51</sup> The transfer of experienced investigators from a situation further exacerbates the problem of limited resources, as even if new staff are hired, it takes time to build their knowledge of the situation under investigation.

In part as a means of counterbalancing these staff shortages, the OTP has undertaken labor-saving measures, such as relying on secondary sources of information in lieu of first-hand investigations.<sup>52</sup> This has discredited the Court’s investigations in the eyes of at least some victims. For example, in the case against the Deputy President of Kenya, William Ruto, victims and witnesses made a submission to the Pre-Trial Chamber expressing their concern that the Prosecutor had not conducted a “meaningful” investigation into their experiences.<sup>53</sup> According to victims, not only had they not been interviewed by the OTP, but they also did not know of anyone in their area who had been, nor had they heard of the OTP’s having conducted investigations in their region at all.<sup>54</sup>

By late 2012, the OTP publicly acknowledged the difficulties the redeployment model was generating. According to the OTP’s 2012–2015 Strategic Plan, “[t]he rotational model that was used to meet the staffing demand for the Office’s investi-

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51. Human Rights Watch, *Letter to the OTP* (Sept. 15, 2008), available at <http://www.article42-3.org/Secret%20Human%20Rights%20Watch%20Letter.pdf>.

52. See generally AM. UNIV. WAR CRIMES RESEARCH OFFICE, *supra* note 10.

53. Prosecutor v. William Samoei Ruto, Case No. ICC-01/09-01/11, Request by the Victims’ Representative for Authorization to Make a Further Written Submission on the Views and Concerns of Victims, ¶ 10 (Nov. 9, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1264964.pdf> (“Some of the victims felt that the failure of the OTP to conduct on-site investigations or to interview victims could explain why the case as presented by the Prosecution did not fully accord with the victims’ own personal experiences.”).

54. *Id.*

gations and prosecutions has surpassed its limits. Current staffing levels are insufficient to meet all the demands.”<sup>55</sup>

c. *Exiting Existing Situations*

For the Prosecutor to refuse to enter new situations until additional funding is provided would entail significant legal and political challenges. Yet, as the OTP itself now seems to recognize, the potential damage to the Court’s reputation also makes redeploying staff from existing situations a fraught path to pursue.

Under these circumstances, there are two remaining options for addressing the problem of resource constraints. The first would be the possibility of the ASP significantly increasing the Court’s resources such that it could appropriately staff every situation. This seems unlikely in practice.<sup>56</sup> The second would be for the Court to exit some situations in order to enter new ones. While either of these approaches would address the Court’s resource constraints, only the latter addresses the moral hazard that arises when the Court stays, on an essentially permanent basis, in the situations it enters. In order to address the complementarity imperative, the Court must be transparent about the need to consider exiting existing situations in order to enter new ones. Putting this final approach into practice, however, is not without its own complications.

## II. THE EXIT PROBLEM

Once the necessity for the ICC to start considering exit has been established, the next question is how it might go about doing this. The immediately apparent problem, how-

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55. Int’l Criminal Court Office of the Prosecutor, Strategic Plan 2012–2015, *supra* note 31, at 12.

56. This would start to become a more realistic possibility if the U.N. Security Council began to provide funding for the referrals it makes to the ICC. However, this is unlikely to happen in the foreseeable future. Quite apart from the opposition of Russia and China to the Court, the United States is prohibited under its own domestic law from providing financial support to the Court. *See* American Service Members Protection Act of 2002, 22 U.S.C. § 7423(e) (2008) (“Notwithstanding any other provision of law, no agency or entity of the United States Government or of any State or local government, including any court, may provide support to the International Criminal Court.”).

ever, is that the Rome Statute provides no explicit guidance on this question. As a result, the Court is left to develop its own answers to such basic questions as which branch of the Court should make the decision, as well as when and how to exit.

#### A. *Who Decides?*

In the absence of direct guidance from the Rome Statute, the three obvious contenders for decisionmaker are the Prosecutor, the judges, and the ASP. Of these options, the Prosecutor would seem to have the greatest institutional competence for the task. The states of the ASP are not involved with any of the Court's situations in a granular way. And, although the judges gain detailed knowledge of any given situation through the cases that are presented to them, they cannot be expected to have the same awareness as the Prosecutor of the range of possible future cases in a situation.

Article 42 of the Rome Statute provides for an independent Prosecutor with "full authority" over the staff and resources of the OTP<sup>57</sup> and responsibility for conducting investigations and prosecutions.<sup>58</sup> While the Rome Statute says nothing explicit about exiting situations, the principle of complementarity advanced in the Statute, not to mention the finite resources of the Court, means that states could not have intended for the ICC to stay permanently involved in every situation it entered. As a result, the Prosecutor's discretion to exit can be implied through the authority that states have delegated under the Statute. This reading of the Statute makes most sense in terms of the comparative institutional competencies involved. However, placing the exit decision in the hands of the Prosecutor would not necessarily mean excluding the judges or the ASP altogether. One could consider, for instance, bolstering the legitimacy of the Prosecutor's exit decisions by way of judicial review, for which there may already be a statutory mechanism.

The Rome Statute clearly gives the Pre-Trial Chamber authority to review the Prosecutor's decision not to open a new investigation when that decision is taken in the interests of justice.<sup>59</sup> And if, after an investigation, the Prosecutor decides

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57. Rome Statute, *supra* note 11, art. 42(2).

58. *Id.* art. 42(1).

59. *Id.* art. 53(3)(b).



not to prosecute, again “in the interests of justice,” the Chamber can review that decision as well.<sup>60</sup> From the face of the text, one could argue that the Chamber has the authority to exercise this latter power of review for new cases in situations where prosecutions have already been undertaken. But the text could equally be construed as limiting this review power to the first prosecution in a new situation. And, unfortunately, the drafting history of the Statute fails to clarify whether the Chamber’s power only applies to situations in which the Prosecutor decides not to pursue any prosecutions in the first place, or also includes situations where prosecutions underway are now being brought to a close.<sup>61</sup>

Assigning exit decisionmaking to the judiciary, however, may bring its own risks. The Rome Statute assigns the judges a solely judicial role, and the adjudication of a case is distinct from the political and logistical considerations that will almost inevitably be involved in an exit decision. In the words of ICTY Judge Patricia Wald, in her partial dissent from a case on appeal in which the majority decided to end proceedings on the grounds of judicial economy,

[It] is the job of the Prosecutor who must calibrate legal and policy considerations in making her choices on how to utilize limited resources. To recognize a parallel power in judges to accept or reject cases on extra-legal grounds invites challenges to their impartiality as exclusively definers and interpreters of the law.<sup>62</sup>

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60. *Id.*

61. See Morten Bergsmo & Pieter Kruger, *Article 53*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES ARTICLE BY ARTICLE 1073 (Otto Triffterer ed., 2d ed. 2008). Based on the decision of Pre-Trial Chamber II to convene a status conference to inquire whether the Prosecutor had decided to close the Uganda investigation after five warrants of arrest had already been issued, it would seem that those judges at least believe that article 53(3)(b) grants them the authority to review the Prosecutor’s decision not to pursue further prosecutions even after the prosecution phase is underway. Situation in Uganda, No. ICC-01/04-01/05-68, Decision to Convene a Status Conference on the Situation in Uganda in Relation to the Application of Article 53, ¶ 13 (Dec. 2, 2005). The record of the status conference itself has not been made public.

62. Prosecutor v. Jelisić, Case No. IT-95-10-A, Appeal Judgment, Partial Dissenting Opinion of Judge Wald, ¶¶ 4, 14 (Int’l Crim. Trib. for the Former Yugoslavia July 5, 2001).

Nonetheless, Wald's views on this may be a particular product of her background and training in the U.S. domestic legal system. In civil law systems, the prosecutor's discretion is comparatively limited, and in instances where the prosecutor is given more latitude, judicial oversight may be seen as appropriate.<sup>63</sup> Overall, in light of the substantial challenges facing the OTP as it develops a framework for exit decisionmaking, it does seem advisable for it to pursue a position that accepts a Pre-Trial Chamber review of its exit decisions as a component of a strategy for safeguarding the legitimacy of such decisions.

With respect to the ASP, the Rome Statute assigns it "management oversight" of the Court's administration,<sup>64</sup> and to the extent the decision to exit falls within the administration of the Court, the ASP could provide another procedural check on the Prosecutor's discretion. However, the experience of the ad hoc tribunals highlights the risks involved in handing exit decisions to the ASP. The states of the ASP fund the Court, just as the states of the United Nations fund the ad hoc tribunals. Leaving exit decisions to these funders, as has been the case with both the ICTY and ICTR, risks a situation where exit is driven primarily by financial considerations, rather than by the justice needs of the situation.<sup>65</sup>

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63. This is the situation in France, for instance, where an investigating judge, rather than the prosecutor, orders an indictment upon finding that the facts in the case constitute a crime. C. PR. PÉN. art. 181 (Fr.) cited in Margaret M. deGuzman & William A. Schabas, *Initiation of Investigations and Selection of Case*, in INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 161 (Göran Sluiter et al. eds., 2013).

64. Rome Statute, *supra* note 11, art. 112(2) (b).

65. See, e.g., Cecil Aptil, *Closing the U.N. International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues*, 14 NEW ENG. J. INT'L & COMP. L. 169, 169-70 (2008) (describing how the financial concerns of state funders generated "pressure on the officials of these international tribunals to complete their work"); Dominic Raab, *Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and Their Tribunals*, 3 J. INT'L CRIM. JUST. 82, 95 (2005) ("The ICTY Completion Strategy was, to some extent, born from the ongoing debate about the cost-efficiency of its activities."); Daryl A. Mundis, *The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT'L L. 142, 157-58 (2005) (decrying the detrimental impact of a date-driven completion strategy on due process at the ad hoc tribunals). *But see* Larry D. Johnson, *Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity*, 99 AM. J. INT'L L. 158, 160-61 (2005)

Assuming the interpretation advanced in this Article is correct, and that the Prosecutor is responsible for exit decisions, then even if the judges and/or ASP provide oversight, the discretionary power in the hands of the Prosecutor is significant. But this would not be the first time the Prosecutor has dealt with high-stakes discretionary decisions.

### 1. *Prosecutorial Discretion at the ICC*

The birth of the ICC spurred a body of scholarship on how the first Prosecutor should use his discretion to determine what situations to investigate and which cases to prosecute—in other words, decisions of entry. Given the centrality of prosecutorial discretion to the question of exit, it is worth reviewing this literature in order to extract any lessons on discretionary decisionmaking by the Prosecutor that should be considered when developing a framework for discretionary decisionmaking with respect to exit. But first, a few caveats.

In many respects, exit presents the flipside of the issues regarding entry that the first wave of literature on prosecutorial discretion engaged with. Like the choice of which situation to enter, exit decisions impact the Court's legitimacy in the eyes of its stakeholders. And like entry, exit decisions also reflect the decisionmakers' view of the goals of the original intervention. But the expressive function of entry and exit are different. With respect to victims, for instance, the entry of the ICC into a situation signals that they have faced some of the most serious crimes of concern to humanity and that, although their government is not in a position to account for them, the ICC will. But exit will not necessarily express the opposite. Given the scale of crimes in the situations where the ICC is currently involved, and the debilitated state of the domestic judiciary in most of those situations, the ICC's exit may not mean that all of the worst crimes have been accounted for, or that a victim's own government is now able to prosecute any outstanding cases.<sup>66</sup>

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(arguing that Mundis overestimated the negative impact of the completion strategy on due process).

66. Moreover, in practical terms, exit raises new issues, including how to account for residual functions, like the oversight of post-conviction detention, and legacy issues, such as the archiving of trial material. *See, e.g.*, Kevin Jon Heller, LEUVEN CENTRE FOR GLOBAL STUDIES, COMPLETION STRATEGIES

Exit will not typically be the mere mirror of entry from a statutory perspective either. The Rome Statute ensures that the Court only enters a situation when the relevant domestic justice system is unable or unwilling to conduct its own prosecutions.<sup>67</sup> But given both the current state of the domestic systems in many of the situations in which the Court operates, and the resource and cooperation constraints facing the Court, exit may need to be undertaken before the relevant domestic system becomes willing and able to prosecute.

With these caveats in mind, the existing literature on discretionary decisionmaking can provide useful insights to guide the Prosecutor's decisionmaking regarding exit.

a. *Legitimizing Discretionary Decisions Through Good Process*

One of the first, and still most widely cited, pieces on prosecutorial discretion at the ICC was written by Allison Marston Danner.<sup>68</sup> The Article opens by comparing the ICC Prosecutor's discretion to that of his counterparts at the ICTY and ICTR, finding that, unlike the ad hoc tribunals, the ICC "vests the power to investigate and prosecute the politically sensitive crimes within its broad territorial sweep in a single individual, its independent Prosecutor."<sup>69</sup>

Danner emphasized the reality that the ICC relies entirely on states for the enforcement of its decisions.<sup>70</sup> She argued that the way to counterbalance this structural weakness was for the Prosecutor to build the legitimacy of the Court, and that the Prosecutor's discretionary powers should be put in service of this goal.<sup>71</sup>

Acknowledging that democratic elections, the usual basis for legitimacy in a liberal domestic setting, were unavailable to the ICC, and that scholars had developed other bases of legitimacy for international institutions, Danner nonetheless declined to offer "an alternative comprehensive theory of legiti-

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(2009), available at <http://www.ipp.ghum.kuleuven.be/publications/heller.pdf>.

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

68. Danner, *supra* note 48.

69. *Id.* at 510.

70. *Id.* at 535.

71. *Id.* ("In order to cope with the weaknesses of the ICC's enforcement regime . . . the Prosecutor must seek to enhance the Court's legitimacy.")

macy”<sup>72</sup> that might be applicable to a treaty-based Court with multiple constituencies. Instead, she drew on Abram and Antonia Chayes’ account of legitimacy as applied to norms of international law.<sup>73</sup> The result was a focus on good process, characterized by principled, reasoned, and impartial decisionmaking, which Danner argued would be facilitated by the publication of criteria to guide prosecutorial discretion, akin to what is done in many domestic jurisdictions.<sup>74</sup>

This focus on good process permeated much of the first wave of literature.<sup>75</sup> And, at least initially, a consensus seemed to have emerged around Danner’s argument that the Prosecutor could build legitimacy by fostering good process through the formulation and public promulgation of *ex ante* criteria to guide what situations to enter and which cases to prosecute.<sup>76</sup>

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72. *Id.*

73. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 127–34 (1995) (describing legitimacy as demanding a “fair and accepted procedure” that is applied equally and satisfies basic minimum standards of “fairness and equity”).

74. Danner, *supra* note 48, at 537–38.

75. See, e.g., Daniel D. Ntanda Nsereko, *Prosecutorial Discretion Before National Courts and International Tribunals*, 3 J. INT’L CRIM. JUST. 124, 142 (2005) (arguing that enhanced transparency shields prosecutorial decisionmaking from error and abuse); Brian Lepard, *How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles*, 43 J. MARSHALL L. REV. 553, 558–62 (2010) (arguing for the role of key ethical principles in the use of prosecutorial discretion); David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 569, 579 (Samantha Besson & John Tasioulas eds., 2010) (arguing that the legitimacy of international tribunals comes “from the manifested fairness of their procedures and punishments”).

76. See, e.g., AVRIL McDONALD & ROELOF HAVEMAN, *PROSECUTORIAL DISCRETION—SOME THOUGHTS ON “OBJECTIFYING” THE EXERCISE OF PROSECUTORIAL DISCRETION BY THE PROSECUTOR OF THE ICC* 2–3 (2003), available at [http://www.issafrica.org/anicj/uploads/McDonald-Haveman\\_is\\_sues\\_relevant.pdf](http://www.issafrica.org/anicj/uploads/McDonald-Haveman_is_sues_relevant.pdf) (“It seems to be of vital importance that guidelines are developed – and made public – giving direction to the decision either [sic] or not to initiate an investigation.”); Héctor Olásolo, *The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-judicial or a Political Body?*, 3 INT’L CRIM. L. REV. 87, 143 (2003) (arguing for a set of “precise and binding” criteria for prosecutorial discretion to be introduced into the ICC’s Rules of Evidence and Procedure); Philippa Webb, *The ICC Prosecutor’s Discretion Not to Proceed in the “Interests of Justice”*, 50 CRIM. L.Q. 305, 324 (2005) (arguing in favor of *ex ante* criteria to guide prosecutorial discretion).

Such *ex ante* criteria are also something that the Prosecutor could consider adopting with respect to exit. One could imagine the Prosecutor issuing a policy statement with a checklist of standards to guide her decisionmaking regarding exit. But as the following section demonstrates, the *ex ante* criteria approach has not served the Court particularly well to date in terms of shielding the Prosecutor's discretionary decisions from criticism. Of course, it is unrealistic to imagine that any discretionary decision of the Prosecutor would be met with uniform acceptance, given the high stakes of the issues and diversity of the stakeholders involved. But the degree to which the *ex ante* criteria approach has failed to serve as a bulwark against criticisms of the Court's legitimacy is nonetheless striking when compared to what the first wave of scholars on the topic expected, and many of the same failings of the *ex ante* criteria approach in relation to entry may apply equally to discretionary decisionmaking on exit.

b. *Ex Ante Criteria*

The Court's first Prosecutor responded favorably to the policy prescriptions arising from the early scholarship recommending the use of *ex ante* criteria to demonstrate principled entry decisionmaking, initially releasing a draft policy paper on his prosecutorial strategy<sup>77</sup> and then circulating a set of criteria to guide the OTP's selection of situations and cases.<sup>78</sup> In practice, however, this *ex ante* criteria approach has not ful-

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77. Int'l Criminal Court, Paper on Some Policy Issues before the Office of the Prosecutor (2003), *available at* [http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905\\_policy\\_paper.pdf](http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf).

78. Int'l Criminal Court Office of the Prosecutor, Criteria for Selection of Situations and Cases 1–7 (2006) (unpublished policy paper) (on file with author). This was followed, in 2007, by a public paper on criteria to be considered when exercising discretion not to enter a situation, and in 2010 by criteria on the opening of a preliminary investigation, which has recently been updated. *See* Int'l Criminal Court Office of the Prosecutor, Draft Policy Paper on The Interests of Justice (2007), *available at* <http://icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf>; Int'l Criminal Court Office of the Prosecutor, Draft Policy Paper on Preliminary Examinations (2010), *available at* [http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP\\_Draftpolicypaperonpreliminaryexaminations04101.pdf](http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf); Int'l Criminal Court Office of the Prosecutor, Policy Paper on Preliminary Examinations, *supra* note 41.

filled its promise of protecting the Court's legitimacy. Instead, the Prosecutor's decisions over both what situations to enter and which cases to prosecute have been mired in controversy.

The situation in Uganda is a case in point. The OTP opened its Uganda investigation in 2004, after the President of Uganda, Yoweri Museveni, referred the situation to the Court. From the outset, the situation attracted controversy. Museveni's referral asked the OTP to investigate solely those crimes allegedly perpetrated by a rebel group in northern Uganda, the Lord's Resistance Army (LRA).<sup>79</sup> The Prosecutor's December 2003 joint appearance with Museveni in London to announce that Uganda had given the ICC its first referral led human rights organizations to question the Prosecutor's impartiality and fuelled concerns that the Court was being used by Museveni as a tool to persecute his opponents.<sup>80</sup> Human rights advocates quickly pointed out that there were allegations of serious crimes committed by Museveni's government forces in northern Uganda as well.<sup>81</sup>

The Prosecutor's subsequent announcement of his decision to open an investigation made clear that he did not intend to limit his investigation to only one party.<sup>82</sup> However,

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79. Int'l Criminal Court, Press Release, 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/en\\_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation00%20concerning%20the%20lord\\_s%20resistance%20army%20\\_lra\\_%20to%20the%20icc.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation00%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc.aspx).

80. Michael Atim & Marieke Wierde, *Justice at Juba: International Obligations and Local Demands in Northern Uganda*, in *COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA* 22 (Nicholas Waddell & Phil Clark eds., 2008).

81. See, e.g., Human Rights Watch, Press Release, ICC: Investigate All Sides in Uganda (Feb. 5, 2004), available at <http://www.hrw.org/news/2004/02/04/icc-investigate-all-sides-uganda> ("Violations committed by the UPDF include extrajudicial killings, rape and sexual assault, forcible displacement of over one million civilians, and the recruitment of children under the age of 15 into government militias.").

82. Int'l Criminal Court, Press Release, Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda (July 29, 2004), available at [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/press%20releases/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20nothern%20uganda.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/press%20releases/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20nothern%20uganda.aspx).

the only arrest warrants to date have been issued for members of the LRA.<sup>83</sup>

According to the Prosecutor, while his office investigated allegations against all groups, arrest warrants were justified for the LRA first because their crimes were the gravest, and the OTP's *ex ante* criteria emphasized the need to prioritize the gravest crimes.<sup>84</sup> However, the Prosecutor's persistent refrain that his office simply acted consistently with its previously announced criteria has done little to quell the controversy.<sup>85</sup>

In addition to being criticized for what situations the OTP has entered, the Prosecutor has also been attacked for the situations the OTP has not entered. One such controversy was over the decision not to open an investigation into allegations of crimes committed by British soldiers in Iraq. Notwithstanding the Prosecutor's publicly circulated explanation, which emphasized the small number of victims and connected the decision to the *ex ante* OTP criterion of considering the number of victims when assessing whether the statutory standard of

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83. Situation in Uganda, Case No. ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony (July 8, 2005); Situation in Uganda, Case No. ICC-02/04-01/05-54, Warrant of Arrest for Vincent Otti (July 8, 2005); Situation in Uganda, Case No. ICC-02/04-01/05-56, Warrant of Arrest for Okot Odhiambo (July 8, 2005); Situation in Uganda, Case No. ICC-02/04-01/05-57, Warrant of Arrest for Dominic Ongwen (July 8, 2005); Situation in Uganda, Case No. ICC-02/04-01/05-55, Warrant of Arrest for Raska Lukwiya (July 8, 2005).

84. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Statement to the Informal Meeting of Legal Advisors of Ministries of Foreign Affairs, 7 (Oct. 24, 2005), available at [http://www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO\\_20051024\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO_20051024_English.pdf) ("[I]n Uganda, the criterion for selection of the first case was gravity . . . Our investigations indicated that the crimes committed by the LRA were of dramatically higher gravity . . . we have continued to collect information on allegations concerning all other groups, to determine whether other crimes meet the stringent thresholds of the Statute and our policy are met.") (emphasis added).

85. See, e.g., Matthew Happold, *International Criminal Court and the Lord's Resistance Army*, 8 MELB. J. INT'L LAW 160, 171-72 (2007) (noting with skepticism the likelihood that warrants will ever be issued for members of the UPDF).



gravity is met,<sup>86</sup> the decision opened the Prosecutor to charges of politicization.<sup>87</sup>

Prosecutorial decisions with respect to which cases to pursue have been even more contentious. Most recently, the pursuit of cases against sitting heads of state in Sudan and Kenya have drawn attention to the Court's all-African docket and led the Chairperson of the African Union to claim that the Prosecutor is "race-hunting" Africans.<sup>88</sup> In response, the OTP has pointed to the *ex ante* criteria in its policy paper on the selection of situations and cases, noting that "[f]actors such as geographical or regional balance are not relevant criterion [*sic*] for a determination that a situation warrants investigation under the Statute."<sup>89</sup> Nonetheless, in October 2013, the African Union held an emergency meeting to discuss whether it should withdraw en masse from what many African heads of state argue is a politicized court.<sup>90</sup> Although blanket withdrawal did not proceed, the Kenyan parliament has voted to

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86. Letter from the Chief Prosecutor of the ICC in Response to Communications Received Concerning Iraq (Sept. 9, 2006), *available at* [http://www.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf) ("The Office considers various factors in assessing gravity. A key consideration is the number of victims of particularly serious crimes, such as willful killing or rape. The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of willful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office.").

87. *See, e.g.*, Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 298–99 (2012) (arguing that by refusing to pursue allegations of crimes committed by British officials in Iraq, while opening a preliminary examination into allegations of crimes committed by North Korean soldiers, the Prosecutor "seems to be currying favor with powerful states"); William Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 742–43 (2008) (criticizing the decision not to open an investigation in Iraq where British soldiers were alleged to have killed civilians).

88. Aislinn Laing, *International Criminal Court Is "Hunting" Africans*, TELEGRAPH, (May 27, 2013), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/10082819/International-Criminal-Court-is-hunting-Africans.html> (quoting AU Chairperson Hailemariam Desalegn).

89. Int'l Criminal Court Office of the Prosecutor, Policy Paper on Preliminary Examinations, *supra* note 41, at 3.

90. Faith Karimi, *African Union Accuses ICC of Bias*, CNN (Oct. 12, 2013), <http://www.cnn.com/2013/10/12/world/africa/ethiopia-au-icc-summit/>.

leave the Court,<sup>91</sup> and a draft U.N. Security Council resolution to suspend the ICC's cases against Kenyan President Uhuru Kenyatta and his deputy, William Ruto, was only narrowly defeated.<sup>92</sup>

The views of many citizens in Africa differ from their leadership, and there is strong support for ICC prosecutions among segments of both the Sudanese and Kenyan populations.<sup>93</sup> But the fact that so many states who initially joined the Court are now openly considering withdrawal indicates that relying on ex ante criteria as the primary means of legitimating the Prosecutor's discretionary decisions has not been as successful as scholars had initially hoped, giving pause to any suggestion that the same model be used for exit decisionmaking.

### c. *Beyond the Ex Ante Approach*

While the trend within the first wave of literature was strongly in favor of ex ante guidelines as a way to shield the Prosecutor from criticism about the way he used his discretion, a minority of scholars raised concerns about the approach.

In a thoughtful 2007 paper, Alexander Greenawalt argued that the kinds of dilemmas that are subject to prosecutorial discretion at the ICC may be so politically complex and context-specific as not to be amenable to ex ante legal standards at all.<sup>94</sup> Moreover, he worried that the guidelines approach was tied "to a domestic administrative law model, which is rooted in a democratic legitimacy that the ICC inherently lacks."<sup>95</sup> He proposed, instead, that in times of ongoing crisis or political transition, the Prosecutor defer to political actors about whether or not to pursue prosecutions, reasoning that they

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91. Edmund Blair, *Kenya Parliament Votes to Withdraw from ICC*, REUTERS (Sept. 5, 2013), <http://www.reuters.com/article/2013/09/05/us-kenya-icc-vote-idUSBRE9840PB20130905>.

92. Michelle Nichols, *African Bid for Kenya Trials Deferral Fails at U.N. Security Council*, REUTERS (Nov. 15, 2013), <http://uk.reuters.com/article/2013/11/15/uk-kenya-icc-un-idUKBRE9AE0S020131115>.

93. Robert Wanjala, *Kenya Victims Relieved by Refusal to Postpone ICC Cases*, ALLAFRICA (Nov. 18, 2013), <http://allafrica.com/stories/201311190492.html>; Interviews with Darfurian refugees at the Oure Cassoni refugee camp (Aug. 2008) (on file with author).

94. Alexander K.A. Greenawalt, *Justice Without Politics: Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 654 (2007).

95. *Id.* at 656.

would have more specialized knowledge of the political dynamics involved.<sup>96</sup> Of course, such a proposal is not without its own problems, and as Greenawalt himself recognized, it would “come at a cost to the ideal of an independent Prosecutor vigorously pursuing investigations in the face of political weakness.”<sup>97</sup> Yet, if the alternative is for the Prosecutor to have to delve into what are essentially political decisions, then the outsourcing of such decisions to political actors may, in fact, serve as the best means of protecting the institutional integrity of the ICC.<sup>98</sup>

Greenawalt’s concerns about the political nature of discretionary decisions of what situations to enter arguably apply with even more force to the question of exit. The Rome Statute requires the Prosecutor elected by the ASP to be an individual “of high moral character [and] be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases.”<sup>99</sup> Meanwhile, a well-managed exit from a situation is likely to require a level of context-specific local knowledge and political judgment that may not be within the skill set of someone chosen for their prosecutorial experience. As a result, credible challenges to the Prosecutor’s expertise for this task could well be raised.

To insulate itself from these challenges, the OTP might consider consulting with those who have expertise the Prosecutor lacks. Under the statutory interpretation advanced in this Article, the decision to exit would still need to be taken by the Prosecutor. But one could envisage the OTP establishing an Exit Guidance Committee for each situation, comprised of local representatives and country-area experts with more legitimacy than the Prosecutor on the implications of ICC exit for the domestic justice system and local political dynamics.

More recently, Margaret deGuzman has developed an alternative critique of *ex ante* criteria, arguing that “good process is not enough.”<sup>100</sup> In her view, any criteria will inevitably be so indeterminate that the Prosecutor’s claim that such standards were the basis for selection decisions may, in fact, under-

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96. *Id.* at 660–69.

97. *Id.* at 660.

98. *Id.*

99. Rome Statute, *supra* note 11, art. 42(3).

100. deGuzman, *supra* note 87, at 289.

mine the Court's legitimacy, instead generating suspicion that the Prosecutor's own preferences filled in the gaps in the criteria.<sup>101</sup> For deGuzman, legitimacy will continue to be a problem for the ICC unless the criteria used to make prosecutorial decisions are connected to goals and priorities that the Court's stakeholders accept.<sup>102</sup>

With respect to exit, deGuzman's concern that good process will be insufficient as long as the ultimate goals of the Court remain contested presents a significant challenge. A lack of consensus around the goals of the ICC among and within the Court's various constituents means that there is unlikely to be agreement over what constitutes an appropriate basis for exit in the medium term. Some groups believe the goal of the ICC is prevention or retribution, while others believe it is establishing an accurate historical record, reconciliation, deterrence, or advancing the rule of law.<sup>103</sup>

There is a large, and growing, body of scholarly work presenting normative arguments in favor of the various philosophical underpinnings of international criminal law.<sup>104</sup> Between these competing views there is an important question of whose voices should be amplified. If, as some contend, justice is to serve the victims of internationally recognized crimes, then their views must be taken into account. And yet, victims are no more a monolith than any other group of actors in this

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101. *Id.* at 296. deGuzman's concern about the inevitability of indeterminate guidelines echoes Greenawalt, who worried that "[t]he kind of guidelines that provide for meaningful ex ante decisional rules likely to demonstrate the ICC Prosecutor's impartiality may not be the kind likely to embrace the full complexity and contingency of each situation." Greenawalt, *supra* note 94, at 656.

102. deGuzman, *supra* note 87, at 299.

103. See, e.g., MARK DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 149–80 (2007) (discussing retribution, deterrence, and expressivism); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 586 (2002) (discussing truth-telling, punishing perpetrators, promoting healing for victims, advancing the rule of law, and facilitating national reconciliation).

104. See, e.g., deGuzman, *supra* note 87, at 298–99; Alexander Greenawalt, *International Criminal Law for Retributivists*, 35 U. PA. J. OF INT'L L. 101, 102 (forthcoming 2014) (on file with author); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39 (2007); Andrew K. Woods, *Moral Judgments & International Crimes: The Disutility of Desert*, 52 VA. J. INT'L L. 633 (2011).

realm.<sup>105</sup> Which of competing victims' voices should be heard? If, on the other hand, advancing the rule of law is a core priority, then perhaps legal professionals deserve more say.

One way to navigate through these competing views is to consider the question from the perspective of accountability, a close cousin of legitimacy. Who among the Court's constituents has the power to hold the Prosecutor accountable for her discretionary decisions? Traditionally, the power to hold decisionmakers accountable has rested with those who have delegated the authority, as the ASP has done with respect to the Prosecutor.<sup>106</sup> Indeed, for some commentators, this formal, hierarchical relationship remains the only true form of accountability.<sup>107</sup> Given that the ASP is responsible for funding the Court, there is good reason for the Prosecutor to prefer its views.<sup>108</sup> From a normative standpoint, one might object to the notion that those with financial power have more influence than the victims in whose name the Prosecutor acts, and the experiences of the ad hoc tribunals' funder-driven completion strategies provide a sobering warning in this respect. Yet the views of the ASP cannot be discounted altogether, since with-

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105. A comprehensive survey of Darfuri refugees, for instance, found that more than half believed there should be ethnically based collective responsibility for the crimes committed against them, whereas one third believed that only the individuals who committed crimes should be held to account. Jonathan Loeb et al., *Darfurian Voices: Documenting Darfurian Refugees' Views on Issues of Peace, Justice and Reconciliation*, 24 HOURS FOR DARFUR, <http://static.squarespace.com/static/52920ed5e4b04a0741daa89c/t/529224ffe4b049dd0ca09a3f/1385309439460/Darfurian%20Voices%20-%20Report%20-%20English.pdf> (last visited Oct. 1, 2014).

106. See, e.g., Mark Pallis, *The Operation of UNHCR's Accountability Mechanisms*, 37 N.Y.U. J. INT'L L. & POL. 869, 870 (2006) (observing that the delegation model of accountability is currently the most popular).

107. See, e.g., Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV., 2073, 2075 (2005) (explaining that "true accountability . . . [involves] . . . hierarchy, monitoring, reporting, internal rules, investigations, and job evaluations"); but see Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L. & POL. 663, 688 (2005) (arguing that a post-hierarchical mode of accountability is both possible and desirable in the international realm).

108. Of course, the ASP itself is not a monolith, and to the extent there are divergent views, one might expect the perspectives of the largest donor countries, namely Japan, Germany, the United Kingdom, France, and Italy, to hold sway.

out funding, no one could be prosecuted, precluding success on any metric, regardless of viewpoint.

This traditional analysis of accountability relations is, however, open to challenge. Descriptively speaking, Mark Bovens draws a useful distinction between “vertical” and “horizontal” accountability relationships, with only the former involving relationships where the constituency has the formal power to impose consequences on the authority concerned.<sup>109</sup> Under this framework, the Prosecutor is engaged in a vertical accountability relationship with the ASP, but a horizontal relationship with the victims and witnesses of the situations she enters. The latter have no formal power to sanction the Prosecutor, but they can readily frustrate her work by refusing to cooperate with an investigation or, more indirectly, by generating negative publicity about the Prosecutor’s investigative activities. Furthermore, although one might argue that once the OTP has exited a situation, those victims and witnesses lose that power, this may be too simplistic a conclusion.

As Julia Black points out, in the polycentric regulatory context, the accountability ecosystem involves an evolving set of interrelationships.<sup>110</sup> In an interconnected world, one could imagine victims and witnesses in one situation reaching out in solidarity to poison or strengthen the Prosecutor’s future relationship with the victims and witnesses of the next situation the OTP enters.

In sum, the underlying goals of the Court are contested and likely to remain so in the medium term, and the OTP ignores any of the constituencies that can hold it accountable at its own peril. But waiting for an imagined future point at which there is broad consensus among the Court’s constituents over the goals to be achieved before exit generates its own significant problems.<sup>111</sup> Thus, it seems likely the OTP will need to start planning for exit, even in the face of this ongoing process of contestation.

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109. Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. J. L. 447, 460 (2007). Nico Kirsch advances a normative defense of a pluralist, rather than hierarchical, framework of accountability, based on the deficits of a given constituency. Nico Krisch, *The Pluralism of Global Administrative Law*, 17 EUR. J. INT’L L. 247, 272–74 (2006).

110. See generally Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REG. & GOVERNANCE 137 (2008).

111. See *supra* Part I.

### B. *When and How to Exit*

The lack of guidance from the Rome Statute compels the search for comparative experiences upon which the ICC can draw in developing its own process for exit decisionmaking. The ICTR's final appeal is scheduled for completion in 2015,<sup>112</sup> and the ICTY anticipates that its final trial will be held in 2016.<sup>113</sup> Already, a residual mechanism is in operation to handle the legacy issues of both tribunals,<sup>114</sup> and the experiences of these ad hoc tribunals as they wind down their operations have generated a number of lessons from which the ICC could learn.<sup>115</sup> However, because of the ICC's status as a permanent institution, the considerations involved in the exit of the ICC from a situation differ from those of the ad hoc tribunals.

Even for a temporary institution, the costs of a poor exit are high. As the ICTY has found, when constituents feel an exit has been badly managed, it can color their perceptions of the intervention as a whole.<sup>116</sup> But for a permanent institution like the ICC, the stakes are even higher, since a poor exit is likely to impact the ongoing credibility of the institution and its associated ability to undertake future interventions.

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112. President of the ICTR, *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda*, ¶ 18, U.N. Doc. S/2013/663 (Nov. 13, 2013).

113. *Completion Strategy*, ICTY, <http://www.icty.org/sid/10016> (last visited Sept. 1, 2014).

114. *Mechanism for International Tribunals*, ICTY, <http://www.icty.org/sid/10874> (last visited Sept. 1, 2014).

115. See, e.g., Heller, LEUVEN CENTRE FOR GLOBAL STUDIES, *supra* note 66, at 33–44; Fausto Pocar, *Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY*, 6 J. INT'L CRIM. JUST. 655 (2008) (arguing for completion to be viewed as a continual project that involves an effort to strengthen the rule of law in domestic settings). There are also more than twenty Completion Strategy Reports available on the ICTY and ICTR websites. *Reports and Publications*, ICTY, <http://www.icty.org/sections/AbouttheICTY/ReportsandPublications> (last visited Oct. 1, 2014); *ICTR Completion Strategy*, ICTR, <http://www.unict.org/AboutICTR/ICTRCompletionStrategy/tabid/118/Default.aspx> (last visited Sept. 1, 2014).

116. See Giovanna M. Frisso, *The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims*, 3 GOETTINGEN J. INT'L L. 1093, 1120–21 (2011) (arguing that the ICTY completion strategy instrumentalized victims, negatively affecting their perceptions of the legitimacy of the trials).

U.N. peacekeeping operations have been struggling with these risks for decades. Of course, the goals of a peacekeeping intervention are different from an international judicial intervention, and the control the U.N. Security Council has over peacekeeping operations is more akin to the control the Council has over the ad hoc tribunals than to its relationship to the ICC.<sup>117</sup> However, the analogy between peacekeeping exit and ICC exit is relevant in the sense that in both cases, exit from one situation must be undertaken while other situations remain active, and with the knowledge that new situations will need to be entered into in the future.

For the ICC and the United Nations alike, there is a constant cost-benefit calculation in play, since the continuation of operations in one situation uses resources, both financial and political, that could be deployed in other current or future situations. For the ICC, launching an investigation into a new situation is a resource-intensive activity; institutional knowledge of the new situation needs to be built from scratch. While the benefits of the first case in a new situation might be greater than the eighth case in an existing situation (the impact of a shift from total impunity to the start of accountability is presumably greater than the shift from start of accountability to further accountability), the costs will be greater, too. Also true for both the ICC and U.N. peacekeeping is that the reputational impact of a poor exit on current and future operations is an ever-present risk.

A report of the U.N. Secretary General, issued in 2001, is instructive. Reviewing exits from the U.N. peacekeeping operations of the nineties, the report explains that while an unsuccessful intervention reflects badly on the legitimacy of peacekeeping as a tool in general, and that exit following the successful completion of a mandate is optimal, in reality exit must often be considered in circumstances of failure or, most commonly, partial success.<sup>118</sup>

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117. Although the Rome Statute gives the U.N. Security Council the power to refer situations to the ICC, the ICC's relationship to the Council differs from the ad hoc tribunals in that the ICC was created by treaty, and not by the U.N. Security Council. As such, the ICC is not a U.N. body.

118. U.N. Secretary General, *No Exit Without Strategy: Security Council Decision-Making and the Closure or Transition of United Nations Peacekeeping Operations*, U.N. Doc. S/2001/394 (Apr. 21, 2001).



While the ultimate goals of the ICC's activities are subject to ongoing contestation,<sup>119</sup> at least from a statutory perspective the Preamble to the Rome Statute establishes the goal of an "end to impunity" for perpetrators of the most serious international crimes.<sup>120</sup> Potential refinement of this sweeping mandate is discussed in Part III, but taking the preambular language at face value, it seems that the Court will inevitably need to exit situations where something less than an end to impunity has been achieved, since it deals with crimes that occur on such a scale that the prosecution of all perpetrators will ordinarily be a financial and logistical impossibility. And, as the Secretary General's Report warns, "it is in the grey area between clear success and failure that a decision [to exit] becomes complex."<sup>121</sup>

As Richard Caplan notes with respect to U.N. peacekeeping operations, "[t]he reasons for partial success or failure are germane to the formulation of exit strategies."<sup>122</sup> The same would seem to be true for the ICC. For instance, the Court would need to consider its approach to exit differently in a situation where states have refused to execute the remainder of the Court's arrest warrants than in a situation where the OTP has failed to get arrest warrants in the first place because of a lack of access to the investigation site.<sup>123</sup>

Reflections from U.N. peacekeeping operations also highlight the role that states play in determining the likely success of an exit strategy.<sup>124</sup> This attention to actors beyond the control of the international institution in question is similarly relevant to the ICC. Just as a U.N. peacekeeping operation cannot accomplish sustainable peace without financial and political support from states for transitional arrangements as peacekeepers exit, so too the ICC cannot hope to fulfill the

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119. See *supra* Part II.A.1.iii.

120. Rome Statute, *supra* note 11, pmbl.

121. U.N. Secretary General, *supra* note 118, ¶ 55.

122. Richard Caplan, *Exit Strategies and State Building*, in EXIT STRATEGIES AND STATE BUILDING, *supra* note 15, at 3, 8.

123. See *infra* Part III.B.

124. See U.N. Secretary General, *supra* note 118, ¶ 52 ("No matter how carefully a mission is conceived and tailored to the circumstances, it cannot succeed . . . without the timely contribution and deployment of personnel, material and funds [by Member States].").

ideal of ending impunity unless the capacity of domestic justice mechanisms is strengthened.

Recognition of the ICC's dependency on states is nothing new. The Court's need for cooperation from states is clear from the Rome Statute, and the question of the relationship between the Court and domestic jurisdictions was one of the most discussed topics in the first decade of scholarship on the ICC.<sup>125</sup> There are views along a spectrum as to whether the Prosecutor should be in a competitive or cooperative relationship with domestic jurisdictions.<sup>126</sup> And views differ as to how passive or active the OTP should be in its approach to complementarity, with some maintaining that the OTP should stay at arm's length from domestic jurisdictions,<sup>127</sup> while others argue that the OTP should "motivate and assist" national judicial-

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125. See, e.g., John T. Holmes, *Complementarity: National Courts Versus the ICC*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667 (Antonio Cassese et al., eds. 2002) (analyzing the relationship between the ICC and national courts); Burke-White, *supra* note 7 (arguing for the Prosecutor to pursue a policy of "proactive complementarity" by encouraging and assisting domestic prosecutions); Mohamed El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869 (2002) (providing a comprehensive history of the development of the principle of complementarity); Federica Gioia, *State Sovereignty, Jurisdiction and Modern International Law: The Principle of Complementarity in the International Criminal Court*, 19 LEIDEN J. INT'L L. 1095 (2006) (arguing that complementarity is crucial to the realization of the goal of ending impunity for international crimes); Kevin J. Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L. F. 255 (2006) (concerned that complementarity will expose defendants to national proceedings that lack due process); William A. Schabas, *Complementarity in Practice: Some Uncomplimentary Thoughts*, 19 CRIM. L. F. 5 (2008) (arguing that the kind of cooperative relationship between the ICC and a State that is present in instances of self-referral is inconsistent with the underlying purpose of the Rome Statute); Carsten Stahn, *Complementarity: A Tale of Two Notions*, 19 CRIM. L. F. 87 (2008) (arguing that a cooperative relationship between the ICC and a State is consistent with a "positive" reading of complementarity, grounded in the Rome Statute).

126. See, e.g., Schabas, *supra* note 125 (arguing that the kind of cooperative relationship between the ICC and a State that is present in instances of self-referral is inconsistent with the underlying purpose of the Rome Statute). Cf. Stahn, *supra* note 125.

127. See, e.g., Seils, *supra* note 3, at 1012 ("There are very good reasons for the OTP not to be involved in anything to do with national prosecutions.").

ies.<sup>128</sup> What is not in dispute is that, as with peacekeeping operations, states have a vital role to play in determining the success of the Court's activities.

Finally, lessons from U.N. peacekeeping operations counsel that exit must be understood as a process, not a singular point.<sup>129</sup> As with the kind of interventions undertaken by the ICC, realities on the ground are dynamic, and the decision of when to exit must be sufficiently flexible to take into account the impact of changing circumstances. One could imagine a scenario in which the ICC planned to exit on the basis of an assessment that domestic justice mechanisms were capable of prosecuting crimes in the situation, only to find months later that a military coup unraveled gains the domestic system had made.<sup>130</sup> As a result, a successful exit strategy must be designed around benchmarks, such as whether the domestic justice system is able to undertake prosecutions of outstanding cases, rather than on specific dates for withdrawal.<sup>131</sup>

### III. TOWARD A SOLUTION

The core of the problem identified in this Article is that the ICC needs to start thinking about a plan for exiting existing situations in the absence of any pre-existing guidance on how to go about doing so. Because the Court is a permanent institution, a poor exit decision has the potential to undermine not only perceptions about the Court's work in the situation it is leaving, but also perceptions of the Court as an institution that is active in other situations, both now and in the future. Given the ICC's high level of dependency on the coop-

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128. See, e.g., Burke-White, *supra* note 7, at 54 (“[T]he ICC could participate more directly in efforts to encourage national governments to prosecute international crimes themselves.”).

129. U.N. Secretary General, *supra* note 118; Dominik Zaum, *Exit and International Administrations*, in *EXIT STRATEGIES AND STATE BUILDING*, *supra* note 15, at 137, 144–45.

130. The Rome Statute appears to account for such scenarios with respect to investigations that the Prosecutor has agreed to defer at the request of the State, with such a referral being open to review “any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation.” Rome Statute, *supra* note 11, art. 18.

131. See Caplan, *supra* note 122, at 10–11 (describing the problems with deadlines and benefits of a benchmark system for exit strategies).

eration of external actors, these perceptions can affect the Court's ability to carry out its mandate. With such high stakes involved, both the procedural and substantive aspects of exit decisionmaking must be carefully developed.

### A. *Defining Success for the Purpose of Exit*

Although the Rome Statute offers no explicit guidance on exit, it does provide several parameters within which the decision must be taken. Combining these statutory parameters with the policies to which the OTP has committed itself over the past decade generates a working definition of success for the purposes of exit: The OTP will have succeeded when the main perpetrators of the main types of victimization across the gravest incidents in a situation have been prosecuted by the ICC, or will be prosecuted by domestic authorities in the future.

In an ideal world, the ICC would only exit a situation after having achieved this goal. But as the experiences of U.N. peacekeeping operations indicate, this ideal will rarely be achieved.<sup>132</sup> Before considering how scenarios of partial success or failure might impact exit decisionmaking, however, I first describe the statutory and policy provisions from which this Article's working definition of success emerges.

#### 1. *Statutory Parameters*

The Rome Statute is clear that the ICC "shall be complementary to national criminal jurisdictions."<sup>133</sup> The majority of article 17 is dedicated to putting this principle into effect, and the ICC Appeals Chamber has provided clear guidance on how to assess whether the domestic prosecution of a particular case renders it inadmissible before the ICC.<sup>134</sup> In an ideal, al-

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132. See *supra* Part II.B.

133. Rome Statute, *supra* note 11, art. 1.

134. Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 82 (Sept. 25, 2009) (confirming that the inadmissibility test involves two stages, the first of which is to establish if the case is being investigated or prosecuted by a state that has jurisdiction over it; only if the case is being investigated or prosecuted do the "unwilling or unable" tests need to be addressed). See also Darryl Robinson, *The Inaction Controversy: Neglected Words and New Opportunities*, in 1 THE INTERNATIONAL CRIMINAL COURT AND

beit unlikely, situation where all remaining cases were being pursued at the domestic level in a way that satisfied article 17 guidelines, this would be an obvious situation for the ICC to exit.

Beyond the issue of complementarity, article 17(d) and article 21(3) also give the Prosecutor guidance on when a particular prosecution must not be pursued. With regard to article 17(d), which states that “the case is not of sufficient gravity to justify further action by the Court,” the case law interpreting the article remains unsettled. In *Lubanga*, Pre-Trial Chamber I tried to establish a highly prescriptive interpretation of what constituted a sufficiently grave case to avoid an inadmissibility determination under article 17(d), delineating criteria for the assessment of the gravity of both the alleged crime and responsibility of the alleged perpetrator.<sup>135</sup> However, this decision was overturned by the Appeals Chamber, which rejected the Trial Chamber’s criteria and also found that the determina-

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COMPLEMENTARITY: FROM THEORY TO PRACTICE, *supra* note 1, at 460 (explaining admissibility as a two-step test, and noting that commentators often overlook the first step of determining whether a state is investigating or prosecuting, or has investigated or prosecuted, a case). Cf. Schabas, *Prosecutorial Discretion v. Judicial Activism*, *supra* note 87, at 757 (accusing the Pre-Trial Chamber in *Lubanga* of having “invented” the criterion of inactivity in its article 17 analysis).

135. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-8 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, ¶ 63 (Feb. 24, 2006) (requiring an affirmative answer to the following three questions: “(i) Is the conduct which is the object of a case systematic or large scale (due consideration should also be given to the social alarm caused to the international community by the relevant type of conduct)? (ii) Considering the position of the relevant person in the State entity, organisation or armed group to which he belongs, can it be considered that such person falls within the category of most senior leaders of the situation under investigation?; and (iii) Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts or omissions when the State entities, organizations or armed groups to which he belongs commit systematic or large-scale crimes within the jurisdiction of the Court, and (2) the role played by such State entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation?”).

tion of the responsibility of an alleged perpetrator cannot be made on “excessively formulistic grounds.”<sup>136</sup>

The Court has, however, suggested that the guidelines given by the Rules on Evidence and Procedure with respect to the determination of sentences might be relevant in a gravity analysis.<sup>137</sup> This means that in considering whether a case can proceed under article 17(d), it is legally valid to consider “the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behavior and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.”<sup>138</sup>

In the absence of any guidance as to how to weigh the various factors against each other, this list cannot provide any determinative assistance to the Prosecutor in deciding whether to exit a situation. But invoking these factors as part of an explanation of exit would at least be one means of bolstering the statutory legitimacy of any decision. For example, if all the remaining cases in a situation involved crimes that caused limited damage and were perpetrated by people who were elderly, the Prosecutor could turn to article 17(d) to help justify her decision to exit the situation. In practice, of course, such a scenario is unlikely. In most instances, the Prosecutor will be faced with remaining cases that are of equivalent severity to

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136. Situation in the DRC, Case No. ICC-01/04-169, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled “Decision on the Prosecutor's Application for Warrants of Arrest, Article 58”, ¶ 73 (July 13, 2006) (criticizing the lower chamber's reasoning that the Court's deterrent effect would be strengthened by only prosecuting those in positions to issue orders and stating that it would be “more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is per se excluded from potentially being brought before the Court”). *Id.* ¶ 78 (finding that the Pre-Trial Chamber's proposed test was inconsistent with a contextual reading of the Statute as a whole—for instance, only prosecuting those who issue orders would render superfluous the need for article 33 of the Statute, which states that superior orders are no defense).

137. *See, e.g.*, Prosecutor v. Bahar Idriss Abu Garda, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶ 31–33 (Feb. 8, 2010).

138. INTERNATIONAL CRIMINAL COURT, RULES OF EVIDENCE AND PROCEDURE 55 (2d ed., 2013) (Rule 145(1)(c)).

those previously prosecuted, thus rendering the list related to article 17(d) of little use.

Article 21(3) of the Statute directs the OTP's attention to the principle of impartiality and prevents the Prosecutor from pursuing a prosecution on account of the alleged perpetrator's personal characteristics, such as gender, race, religion, or political affiliation.<sup>139</sup> As such, the Prosecutor could turn to the Statute to help legitimate her decision to exit a situation by drawing on article 21(3) in a scenario where the primary reason for pursuing additional cases would be to demonstrate parity across ethnic lines.

Any framework developed to guide decisions about what situations to exit should take the principles underlying articles 17 and 21(3) into account. However, these provisions alone are almost certainly under-determinative. One can readily imagine a scenario in which all of the OTP's existing situations involve current and future cases that continue to satisfy all of the statutory requirements, and yet a decision on exit must be taken.

## 2. *Policy Parameters*

In terms of drawing on guidance the OTP has already developed, one goal seems clearly relevant: While "the [OTP] mandate does not include production of comprehensive historical records for a given conflict, incidents are selected to

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139. Rome Statute, *supra* note 11, art. 21(3). The principle of equality before the law was, of course, established in core international human rights documents (and in many domestic jurisdictions) long before the Rome Statute was drafted. *See, e.g.*, International Covenant on Civil and Political Rights, art. 14, G.A. Res. 2200A (XXI) (Dec. 16, 1966); Universal Declaration of Human Rights, art. 7, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (Dec. 10, 1948). However, evidence from the ad hoc tribunals suggests that establishing such a prohibited purpose on the part of the Prosecutor is not easy. For example, ICTY judges found that a defendant seeking to challenge his indictment on the grounds that the Prosecutor was discriminating on the basis of his religion would have to establish "an unlawful or improper (including discriminatory) motive for the prosecution" and "that other similarly situated persons were not prosecuted." The suspect could not meet the standard, and his challenge was rejected by the court. Prosecutor v. Delalic ("Celebici case"), Case No. IT-96-21-A, Judgment, ¶ 611 (Int'l Crim. Trib. for the Former Yugoslavia, Feb. 20, 2001).

provide a sample that is reflective of the gravest incidents and the main types of victimization.”<sup>140</sup>

However, applying this “gravest incidents” prong is by no means simple. In addition to the ambiguity that already exists around the article 17(d) gravity standard, how should the OTP think about similarly grave incidents that occur in different time periods or geographic locations?<sup>141</sup> If, in its DRC investigation, the OTP had decided to exit after having prosecuted the gravest incidents in Ituri but not in the Kivus, would its record have failed to provide a representative sample of the gravest incidents? What if, in its Darfur investigation, the OTP were to exit after having prosecuted the gravest incidents from 2004, but not from 2011?

Less complicated is the “main types of victimization” prong, which would preclude exiting before prosecuting a particular category of crimes, say gender-based violence, if such crimes were a central feature of the overall criminality. Relatedly, the OTP might consider supplementing this prong to ensure that the main types of perpetrators are also prosecuted before the OTP closes its investigation. The OTP policy that “parity within a situation between rival parties” is not relevant to the selection of cases<sup>142</sup> is entirely appropriate and necessary to avoid article 21(3) concerns that no one be prosecuted

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140. Int'l Criminal Court Office of the Prosecutor, Prosecutorial Strategy 2009–2012, *supra* note 19, ¶ 20.

141. The jurisprudence of Rule 11*bis* cases at the ICTY is instructive in terms of competing ways of viewing whether a “gravest incidents”-type standard has been met. *See, e.g.*, Prosecutor v. Milošević, Case No. IT-98-29/1-PT, Prosecution's Further Submissions Pursuant to Chamber's Order of 9 February 2005, ¶ 4 (Int'l Crim. Trib. for the Former Yugoslavia, Feb. 21, 2005) (arguing that although crimes it alleged had been committed by Dragomir Milošević were very grave, “they were already tried before the International Tribunal in [Galic] and are now well documented in that judgment”). The Court, however, denied the prosecution's request to send the Dragomir Milošević case for prosecution at the domestic level, noting that although Rule 11*bis* does not require it to consider the historical record, even if it did, the Court would decide that prosecution should continue at the international level on the grounds that the crimes allegedly committed by Dragomir Milošević covered a different time period from those committed by Galic. Prosecutor v. Milošević, Case No. IT-98-29/1-PT, Decision on Referral of Case Pursuant to Rule 11*bis*, ¶ 20 (Int'l Crim. Trib. for the Former Yugoslavia, July 8, 2005).

142. Int'l Criminal Court Office of the Prosecutor, Prosecutorial Strategy 2009–2012, *supra* note 19, ¶ 39.



solely on account of party affiliation. But there is an important difference between a lack of parity and a distorted representation of which types of actors committed serious crimes.<sup>143</sup> Concern for representing the main types of perpetrators before exiting a situation would preclude exiting the Uganda situation, for instance, until some serious crimes committed by government forces have been prosecuted.

### B. *A Decisionmaking Framework*

By pulling together the statutory prescriptions of articles 17(d) and 21(3), along with the guidelines that the OTP has already developed with respect to other forms of discretionary decisionmaking, we can see the working definition of success for the purposes of exit emerge: Success is when the main perpetrators of the main types of victimization across the gravest incidents in a situation have been prosecuted by the ICC, or will be prosecuted by domestic authorities in the future.

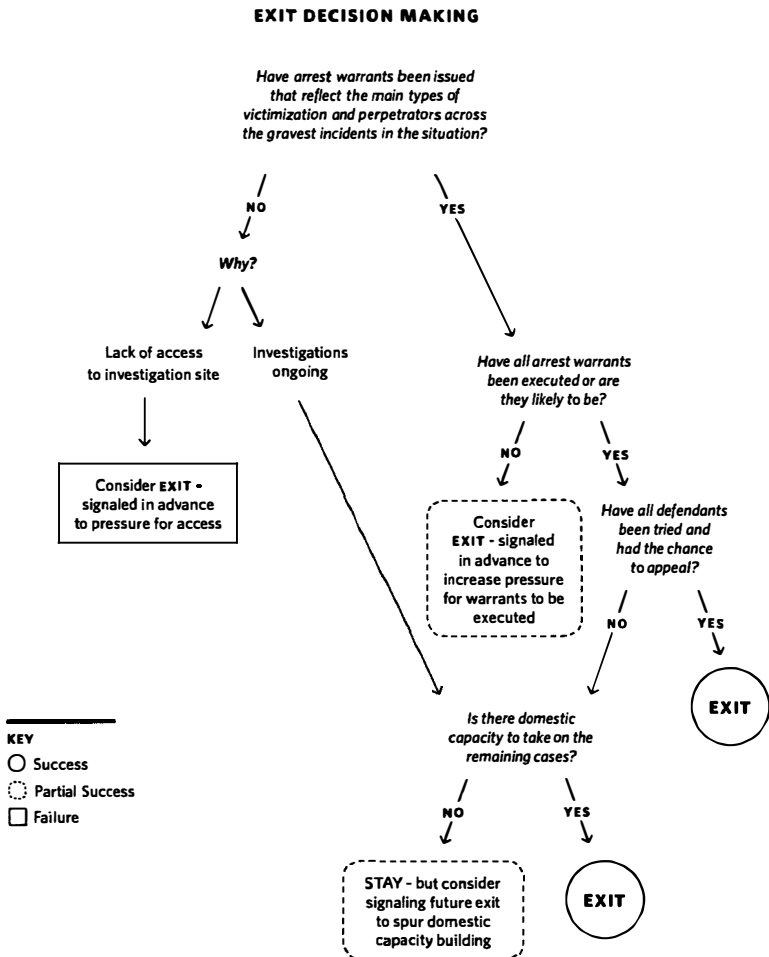
To the extent this definition draws on goals the OTP has set for itself, which are far from settled in the eyes of the Court's various constituencies, it follows that the definition is open to contestation. Victims may be concerned that so-called "lesser" perpetrators—people that they witnessed killing their families, rather than those who issued orders from headquarters—will not be prosecuted before the ICC exits the situation. International lawyers and victims alike might disagree with the OTP's assessment of what constitutes the gravest incidents in a situation. But as the first scholarship on this issue, my goal here is not to establish a definitive metric of success, but in-

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143. The situation in Rwanda illustrates this point. There is unquestionable parity between the crimes committed by the perpetrators of the 1994 genocide and those committed by the RPF as it sought to stop them. Yet the RPF are alleged to have committed serious crimes, none of which have been prosecuted at the ICTR. As Human Rights Watch explains, "a failure also to address the RPF's killing of tens of thousands of civilians will result in serious impunity for grave crimes committed in 1994 and would leave many with a sense of one-sided, or victor's, justice. Such a result would seriously undermine the Tribunal's legacy." Human Rights Watch, *Letter to the Prosecutor of the International Criminal Tribunal for Rwanda Regarding the Prosecution of RPF Crimes* (May 26, 2009), available at <http://www.hrw.org/node/83536>. The Defence at the ICTR has also tried to push the Prosecution to investigate alleged RPF crimes, though with no success. See, e.g., *Prosecutor v. Kabiligi*, Case No. ICTR-97-34-I, Decision on Defence Motion Seeking Supplementary Investigation, ¶¶ 19–22 (June 1, 2000).

stead to put forward a plausible option in the hope of spurring discussion among the Court's stakeholders about precisely what the metric should be.

Combining this definition with the insights from peacekeeping operations that exit is best conceived of as a process guided by benchmarks, and that while exit following success is ideal, exit must also sometimes be considered in situations of partial success or failure, yields a decision tree represented in Graph 1.



Graph 1

Under the proposed definition, success turns ultimately on prosecution, either by the ICC itself or by domestic authorities. But as shown in Graph 1, the exit decisionmaking process begins much earlier, and starts with the question of whether arrest warrants have been issued in accordance with the above criteria. If they have not been, the first question, represented on the left-hand side of the graph, is why.

It could be that the OTP has been unable to gather enough evidence to make a full set of successful warrant applications to the Pre-Trial Chamber because it is being barred from the investigation site, as is currently the scenario with its Sudan cases. If there is no prospect of cooperation from the situation state, this is a scenario in which the OTP might consider signaling its intention to exit the situation.

This approach has the benefit of avoiding the transparency problems present in Uganda, where the situation remains formally open, but the OTP has not secured arrest warrants for a representative sample of the crimes.<sup>144</sup> Stakeholders have been left to speculate as to why no government forces have been charged, and allegations of bias by the OTP are common.<sup>145</sup> The OTP could avoid ending up in such a situa-

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144. See *supra* Part II.A.1. In drawing this comparison, I am not suggesting that the reason for the one-sided pattern of warrants in the Uganda situation is a denial of access to investigative sites. My point is simply that the failure of the OTP to narrate a credible reason for a non-representative sample of warrants is problematic, and in a future scenario in which sample problems arise as the result of a non-cooperative domestic state, the OTP would be well advised to explain this publicly.

145. See, e.g., Happold, *supra* note 85 (noting it is unlikely that warrants will ever be issued for members of the UPDF). The official OTP summary of its first three years of operation maintained that while the first arrest warrants were for LRA members, analysis of alleged crimes by other groups was ongoing. Int'l Criminal Court Office of the Prosecutor, Report on the Activities Performed During the First Three Years (June 2003–June 2006) (Sept. 12, 2006), available at [http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP\\_3yearreport20060914\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf). The OTP has not maintained the practice of issuing three-yearly updates. But some, including the judges of the pretrial chamber, have questioned whether the investigation is actually ongoing. In 2005, the prosecutor stated that the Uganda investigation was “nearing completion.” Prosecutor v. Joseph Kony, Case No. ICC-02/04-01/05-67, Registration in the Record of Proceedings of Statement by Luis Moreno-Ocampo, Informal Meeting of Legal Advisors of Ministries of Foreign Affairs, New York, 24 October 2005, 1 (Dec. 2, 2005). Referring to this statement, Pre-Trial Chamber II convened a

tion by instead communicating clearly the reasons it has not sought arrest warrants for a representative sample of the crimes committed, thereby ensuring the blame would be placed where it belongs, such as on an uncooperative situation state. Still, the outcome is the least satisfactory of all the exit possibilities explored in Graph 1, as it gives situation states seeking to avoid accountability an easy way out. Once the OTP exits under such circumstances, states will learn that they can avoid ICC action if they deny the OTP access to investigative sites for long enough that it eventually gives up.

An alternative explanation could be that a representative sample of arrest warrants have not yet been issued simply because investigations are ongoing. In such a scenario, the OTP could continue investigations through to completion or, if there is an indication that domestic authorities might be moving toward a position of being both interested in and capable

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status conference, seeking to establish whether the Prosecutor had closed the Uganda investigation. *Prosecutor v. Joseph Kony*, Case No. ICC-02/04-01/05-68, Decision to Convene a Status Conference in the Investigation in the Situation in Uganda Under Article 53 (Dec. 2, 2005). The subsequent status conference was non-public, but before the conference, the OTP lodged a public filing stating that it had not made a decision not to conduct further prosecutions. *Prosecutor v. Joseph Kony*, Case No. ICC-02/04-01/05-76, OTP Submission Providing Information on Status of the Investigation in Anticipation of the Status Conference to Be Held on 13 January 2006, ¶ 2 (Jan. 11, 2006). The OTP also stated that regarding alleged crimes by the Ugandan government forces, its "inquiries and analysis of information and potential evidence related to these allegations are ongoing." *Id.* ¶ 7. Since then, however, no new arrests have been made, and official OTP reports on the status of investigations have often excluded updates on investigations in Uganda. *See, e.g.*, Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Address to the Eighth Session of the Assembly of States Parties (Nov. 23, 2009), *available at* <http://www.icc-cpi.int/NR/rdonlyres/CDF496C7-7BA7-4AA3-B670-1EE85BC3E3E8/281268/20091118ASPspeech.pdf>; Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Address to the Assembly of States Parties (Dec. 6, 2010), *available at* [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP9/Statements/ICC-ASP9-statements-LuisMorenoOcampo-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/Statements/ICC-ASP9-statements-LuisMorenoOcampo-ENG.pdf) (noting the need to present, or evaluate the need to present, new cases in existing investigations in Darfur and the Democratic Republic of Congo, but making no mention of the possibility of new cases in Uganda). In the absence of either an acknowledgment by the OTP that it has effectively closed the Uganda situation or, if the situation remains open, an explanation as to why there have been no arrest warrants since those sought for LRA members in 2005, allegations of partisanship seem certain to continue.

of taking over investigations, the OTP could signal its future intention to exit in the hope of catalyzing the domestic system to action.<sup>146</sup>

Turning to the right-hand side of the decision-tree, if arrest warrants have been issued for a sample that reflects the OTP's goals, the next benchmark to consider is enforcement. If there has been foot-dragging by states over the enforcement of arrest warrants, the OTP might communicate that it will not wait for the enforcement of warrants indefinitely and that it is developing an exit strategy. One might argue that, much like exiting after being denied access to an investigative site, exit in the face of enforcement failure gives states seeking to avoid accountability an easy way out. But unlike access to investigative sites, warrant enforcement is not solely dependent on the situation state. Defendants travel, and when they do, there is an opportunity for other states, including those with much less interest in avoiding accountability than the situation state, to arrest them. There may be reluctance to incur the diplomatic costs of arresting the national of another state, but that is all the more reason to counter this reluctance with pressure for enforcement from the ICC. The threat of exit could build a sense of urgency that supports this goal.

Once arrest warrants have been executed, the final benchmark relates to whether the ICC has completed the trials and appeals of all defendants. In the perhaps rare scenario where this is the case, the OTP can exit under the banner of success. Equally, if the domestic system becomes willing and able to take over the remaining cases,<sup>147</sup> the OTP would also be justified in exiting, again claiming success.

In the more likely scenario, where domestic capacity is not yet strong enough to complete the investigation and prosecution of outstanding cases, the OTP could communicate its desire to exit in the hope of spurring not only the situation state, but also institutions and non-state actors in the international community who could support the project of capacity building, to prepare the domestic justice system to take on the remaining cases.

As discussed earlier, much scholarly attention has been devoted to the dependence of the ICC on states with respect to

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146. *See infra* Part III.C.

147. *Infra* Part III.C.

the opening of situations and conduct of investigations. What should be clear from Graph 1 is that the ICC's dependence on states has significant implications for the question of exit as well.

### C. *Exit as Opportunity*

The assessment of when to exit a situation is complex enough in purely theoretical terms, let alone in practice. However, the Prosecutor must remember that although exit will bring substantial challenges, it can also be framed as a way of revitalizing the system of complementarity.

In 2008, William Burke-White wrote that "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 states affected."<sup>148</sup> In practice, genuine national prosecutions have not been spurred by the threat of ICC action,<sup>149</sup> and Burke-White's alternative concern that the ICC might facilitate a "free-rider problem"<sup>150</sup> has been the more characteristic outcome. Indeed, a recent book-length treatment of the subject concludes that the literature's early expectation that the threat of ICC involvement would catalyze domestic proceedings has barely occurred at all.<sup>151</sup>

In its preparation for the 2010 Rome Statute Review Conference, the Bureau of Stocktaking on International Criminal Justice concluded that it was of "paramount importance that the complementary justice system of the Rome Statute is

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148. Burke-White, *supra* note 7, at 86.

149. NOUWEN, *supra* note 8.

150. Burke-White, *supra* note 7, at 69. In more recent work, Burke-White has recognized that the approach of "proactive complementarity" that he espoused in 2008 has not been adopted by the OTP, largely for fear of the perception that it would politicize the Court. Writing in 2011, he suggests that the OTP could reframe complementarity not as engaging in domestic politics, but as part of a screening function akin to what U.S. federal prosecutors do in their relations with state criminal justice systems. William W. Burke-White, *Reframing Positive Complementarity: Reflections on the First Decade and Insights from the US Federal Criminal Justice System*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE, *supra* note 1, at 360 (suggesting the ICC Prosecutor reconsider complementarity, "drawing on [gate-keeping and case selection functions within] the US federal criminal justice system").

151. NOUWEN, *supra* note 8.

strengthened and sustained.”<sup>152</sup> More thought must be given to ways of increasing the incentives for national authorities to pursue accountability themselves, and the need to exit a situation presents a new opportunity to develop this thinking.<sup>153</sup>

The spurring of domestic prosecutions as a component of an exit strategy is one dimension in which lessons from the ad hoc tribunals may be relevant for the ICC. The primacy that the U.N. tribunals have over domestic jurisdictions places them in a different relationship to national courts than the ICC, but one example from the completion strategy of the ad hoc tribunals does seem particularly relevant to ICC exit, namely, the cooperation with domestic jurisdictions to complete outstanding cases.

Cases in which the ad hoc tribunals have already issued indictments are handed over to domestic prosecutors under Rule 11*bis*, which sets the standards under which such a transfer can occur.<sup>154</sup> Were the ICC to adopt a similar process, there would be a strong argument that once an ICC arrest warrant is issued, the Court has a responsibility to ensure that, regardless of where that defendant is actually prosecuted, he or she receives the same level of international rights protections he or she would have received at the ICC.<sup>155</sup> This, in turn, would require additional Court resources in order to assess domestic standards, and so may not bring huge efficiency gains over simply continuing to prosecute the cases directly.

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152. Int'l Criminal Court, Assembly of States Parties, Report of the Bureau on Stocktaking: Complementarity, Mar. 22–25, 2010, ¶ 49, ICC-ASP/8/51 (Mar. 18, 2010), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8R/ICC-ASP-8-51-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf).

153. As one commentator warns, however, domestic prosecutions should be seen “as a problem in their own right, not a solution to the ICC’s capacity constraints.” Marlies Glasius, *A Problem, Not a Solution: Complementarity in the Central African Republic and Democratic Republic of Congo*, in 2 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE, *supra* note 1, at 1204.

154. ICTY, Rules of Procedure and Evidence, R. 11*bis*, U.N. Doc. IT/32/Rev.44 (July 24, 2009) (providing guidelines for the transfer of cases from the International Criminal Tribunal for the Former Yugoslavia to domestic courts); ICTR, Rules of Procedure and Evidence, R. 11*bis*(c), U.N. Doc. IT/32/Rev.19 (Feb. 9, 2010).

155. Once a defendant is brought to the ICC, he or she can rely on “internationally recognized human rights” standards to protect his or her rights. Rome Statute, *supra* note 11, art. 21(3).

Nevertheless, such oversight is certainly possible, as it has been undertaken by both the ICTY and ICTR in their 11*bis* cases.<sup>156</sup>

Perhaps more promising as a component of an exit strategy for the ICC would be something akin to what the ICTY has called Category Two cases. These are cases in which the tribunal undertook investigations but never actually issued indictments. In an effort to close the ICTY on the timeline desired by its U.N. funders, the ICTY began passing Category Two case information, gathered in the course of its investigation, over to the domestic authorities.

The Rome Statute provides for exactly this kind of information sharing. The Court may provide assistance to a State Party conducting an investigation into ICC crimes or serious crimes under the national law of the state, and such assistance shall include “[t]he transmission of statements, documents or

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156. In both the ICTY and ICTR, this issue was formally incorporated into the requirements that judges authorizing the referral of cases back to domestic jurisdictions had to consider. See ICTY, *supra* note 154 (stating that the ICTY referral bench must be satisfied that “the accused will receive a fair trial and that the death penalty will not be imposed or carried out”); ICTR, *supra* note 154 (stating the same requirement). Until recently, the ICTR had consistently denied the Prosecutor’s requests to refer cases to Rwanda. See, e.g., Prosecutor v. Munyakazi, Case No. ICTR-97-36-R11bis, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11*bis*, ¶ 38 (Oct. 9, 2008) (upholding the trial chamber’s refusal to grant the Prosecutor’s request to transfer the case to Rwanda under Rule 11*bis* for reasons including that Munyakazi’s right to obtain the attendance of, and to examine, defense witnesses under the same conditions as witnesses called by the prosecution cannot be guaranteed at this time in Rwanda); Prosecutor v. Hategekimana, Case No. ICTR-00-55B-E11bis, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11*bis*, ¶ 38 (Dec. 4, 2008) (upholding the trial chamber’s refusal to grant the Prosecutor’s request to transfer the case to Rwanda under Rule 11*bis*, including on the grounds that in Rwanda, Hategekimana “may face life imprisonment in isolation without adequate safeguards, in violation of his right not to be subjected to cruel, inhumane and degrading treatment”). However, in 2011, the trial chamber permitted a referral to Rwanda for the first time. Prosecutor v. Uwinkindi, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor’s Request for Referral to Republic of Rwanda (June 28, 2011). The decision was upheld on appeal with the requirement that the African Commission on Human and Peoples’ Rights submit monthly monitoring reports on the case. Prosecutor v. Uwinkindi, Case No. ICTR-01-75-AR11*bis*, Decision on Uwinkindi’s Against the Referral of his Case to Rwanda and Related Motions (Dec. 16, 2011).



other types of evidence obtained in the Court of an investigation . . . by the Court.”<sup>157</sup>

The process only works if one has a receptive domestic jurisdiction. Therefore, it is not an opportunity that will be realized in all instances. But where a state is interested in using material gathered by the ICC to further accountability, or could be incentivized to become interested by others concerned about impunity in the face of a looming ICC exit, it could be useful for the ICC Prosecutor to adopt this Category Two-type approach as part of an overall exit strategy.

Of course, this approach would also entail consideration of the obligations that may flow from it. Would the provision of information under article 93(10) burden the OTP with some level of responsibility (and thus additional resources) for how that information is used? What about states that are keen to receive information from the Court but do not have the capacity to prosecute cases according to international standards?<sup>158</sup> Unlike the Rule 11*bis* cases, however, in instances where the defendants were never indicted at the international level in the first place, the case for an extended period of responsibility is less clear.<sup>159</sup>

If the ICC were to follow the path of the ICTY on this type of information sharing, then the provision of information to national authorities before the arrest warrant stage of proceedings would not be enough to attach responsibility to the ICC for a defendant’s subsequent treatment. As former ICTY Deputy Prosecutor David Tolbert explained with respect to Category Two cases, “[t]he national prosecuting authorities are on

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157. Rome Statute, *supra* note 11, art. 93(10)(b)(i).

158. See generally Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, *supra* note 125, at 255 (discussing the effect complementarity has on the likelihood defendants will receive due process in national proceedings).

159. Views on this will undoubtedly diverge. There are good reasons for actors within the international community to be cautious of supporting prosecutions with less than stellar human rights credentials, but as Frédéric Mégret argues, human rights organizations that push too far in the direction of demanding that domestic jurisdictions reform to the point where they are capable of taking on trials that are equivalent to what takes place in the Hague may be making the perfect the enemy of the good, and losing valuable legal diversity in the process. Frédéric Mégret, *Too Much of a Good Thing?: Implementation and the Uses of Complementarity*, in 1 *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE*, *supra* note 1.

their own, for good or ill.”<sup>160</sup> With an eye both to resource constraints and to fears of a perceived or actual loss of independence if the OTP engaged too closely with domestic prosecutions, the ICC’s approach should probably be the same. This is not to say, however, that other actors outside the Court could not take on an oversight role.<sup>161</sup>

#### CONCLUSION

The first decade of scholarship on the ICC devoted much attention to issues related to the Court’s entry into new situations. This scholarship reflected the focus of the Court itself and its need to garner a caseload to establish its viability in the face of much skepticism about whether the newly minted institution would actually work in the real world. But as the Court enters its second decade of operations, it is time to shift this focus to the new challenges that loom for the Court.

This Article has described the reasons for the ICC to start thinking about when and how to exit situations in which it is currently active. The driving concern is that for the ICC to stay in any situation without developing an exit strategy risks creating a moral hazard scenario that undermines complementarity, one of the key principles upon which the Court was founded.

Beyond this “complementarity imperative” toward exit, the *de facto* permanent presence of the Court in any given situation may ultimately breed concerns over the Court’s efficiency, especially among the states that fund the Court. This would further strain what is already a precarious scenario for the Court, which is entirely dependent upon states for the resources needed to conduct its operations. Already, current resource constraints have meant that, in order to enter new situations, the ICC prosecution is under-staffing existing situations. This approach is having a detrimental effect on the quality of its work and, in turn, the reputation of the Court. This Article has argued that the best way to address this resource squeeze would be for the Court to consider exiting

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160. David Tolbert & Aleksander Kontic, *ICTY: Lessons in Complementarity*, in 2 *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE*, *supra* note 1.

161. Indeed, this is what the Organisation for Cooperation and Security in Europe is doing with respect to Category Two cases in Bosnia- Herzegovina.

some situations before entering new ones. Yet, even in a world of unlimited resources, the complementarity imperative would stand alone as a compelling reason for exit planning.

While this Article has argued for the need to consider exit, it has also noted the risk that if such exit decisions are handled poorly, the Court will suffer reputational costs that will undermine its ability to carry out its mandate in the future. Yet, the question of how to handle exit decisions raises an immediate problem for the ICC, namely the complete dearth of guidance from existing statutory sources about how to make an exit decision.

Filling this void, this Article has developed a framework to guide exit decisionmaking. While centered around a working definition of success, developed from both statutory and policy parameters, the framework recognizes that the ICC may need to exit situations under circumstances of only partial success or, indeed, failure. Even under these sub-optimal outcomes, however, there is the possibility that exit, signaled in advance, could have a catalytic effect on the activities of states, advancing the statutory principles of cooperation and complementarity. Thus, as much as exit is a problem for the ICC, this Article has shown that exit may also have a salutary side, presenting the Court with an elegant means of aligning its resource management with its statutory goals.

As the first work to focus on the question of exit for the ICC, this Article has made the need for further scholarly attention to this previously unexplored issue clear. But, although the question of exit is a novel one for the ICC, several of the dimensions involved in exit, such as prosecutorial discretion and complementarity, are issues that the ICC has been grappling with since its inception. Seen in this light, the question of exit provides scholars of international criminal law an opportunity to revisit the literature written in the first decade of the ICC's existence and to assess the extent to which expectations and assumptions within that body of work have been met.