Prevention and Complementarity in the International Criminal Court: A Positive Approach

*by Katharine A. Marshall**

Introduction

Since its creation, the International Criminal Court (ICC or Court) has been at the heart of some of the oldest and most complex debates in international law — debates over practical issues like enforcement and state sovereignty and questions of ideology such as the relative values of peace and justice. A crucial question throughout all of this has been prevention: the ICC's ability to end impunity and prevent future atrocities. The Court's supporters have consistently emphasized its potential preventative impact and stated this as a central goal of the Court's activities.[1]

These lofty goals have made it difficult for the ICC to meet expectations, and a multitude of concerns and criticisms have arisen over the years regarding its ability to make any meaningful contributions to prevention and, perhaps, peace. Some argue that the Court is paralyzed by political considerations, while others assert that political considerations actually play too small a role. At the time of Sudanese President Omar al-Bashir's indictment, many predicted that the ICC's involvement would actually worsen the conflict and lead to a violent backlash. Others suggest that the threat of prosecution simply will not deter international crimes, and that the Court will only serve to delay and hinder peace negotiations.

The idea of justice and punishment as a deterrent to crime has been debated and discussed throughout legal history. However, applying the theoretical framework of this discussion to mass atrocities is not a simple task. Mass atrocities are committed at a time when reality is significantly altered and societal norms are all but suspended. Whether or not the leader of a nation on the brink of genocide may be considered a rational actor who would take into account the risk of an ICC indictment is highly debated, and with good reason.

While the threat of an indictment itself may not have the immediate deterrent effect hoped for in a domestic criminal setting, the ICC's preventative potential goes far beyond the debate over deterrence. Individual prosecutions at the international level of those most responsible for atrocities are essential to the interest of justice and have a great symbolic value for the international community as a whole, but the ICC's greatest contribution to prevention is not likely to arise from such prosecutions. The prosecutions themselves may serve to bring parties to the negotiating table, as in the case of Uganda, but the greater impact of the ICC with respect to prevention will be in its interaction with domestic systems.

The ICC exists as a model institution, upholding the ideal standards for prosecution of international crimes. The ICC will undoubtedly have an impact on changing norms and the way we think about international criminal law and accountability, simply as a result of its existence.[2] However, to single-handedly spur a sea change in the way we react to and deal with atrocities would be nearly impossible. The ICC only has the capacity to provide the example, but the cooperation of other international institutions, NGOs, and most importantly States Parties to the Rome Statute, is essential to implementing this example more broadly. What the ICC *can* do is take a more active role in engaging these groups, in particular States Parties.

Complementarity, a concept that has evolved significantly since it was first introduced and ultimately included in the Rome Statute,[3] presents a way by which the ICC can increase its potential positive impact on both domestic and international criminal justice and, in the long-term, prevention. By proactively engaging with and assisting domestic legal institutions, the ICC will be able to strengthen the rule of law in nations suffering from violent conflict and instability. Mass atrocities are committed when reality has been altered such that recognized moral imperatives and norms no longer bind members of a society. The altered reality of war and conflict creates an environment in which crimes such as genocide are more likely to be committed with impunity. A society that has, on the other hand, strong legal institutions and a strong sense of the rule of law, may be less likely to come to this brink.

The first section of this article will focus on complementarity and the emergence of the idea of positive complementarity in recent years, and will analyze various provisions of the Rome Statute relating to positive complementarity and the ICC's relationship to States Parties and other institutions. The second section will discuss in some detail the current policy of the ICC Office of the Prosecutor (OTP) and how some aspects of positive complementarity have already been implemented. Next, the article will address the theoretical underpinnings of prevention and how positive complementarity may play a role in deterring future crimes by strengthening the rule of law both domestically and internationally. Finally, the paper will conclude with a brief discussion of the situation in Uganda and the potential impact of positive complementarity on such a situation.

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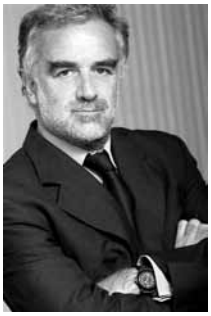
Creating the ICC: The Rome Statute and Complementarity

Both the Preamble and Article 1 of the Rome Statute note that the jurisdiction of the ICC "shall be complementary to national criminal jurisdictions."[4] National courts remain the primary venue for trying cases of mass atrocity. Only in particularly defined circumstances, enumerated in Article 17 of the Rome Statute, are cases admissible in the ICC.

At its inception, the idea of complementarity was meant to balance the competing interests of those who sought a court with universal jurisdiction and those who placed a priority on state sovereignty.[5] A case is admissible in the ICC only when the state with original jurisdiction is "unwilling or unable genuinely to carry out the investigation or prosecution."[6] In all other cases, national courts are meant to retain jurisdiction, not to be superseded by the ICC.[7]

The details of complementary jurisdiction are not explicitly described in the Rome Statute. Article 17 provides the framework for understanding complementarity, but lacks detail about use of the concept in practice. For the ICC to obtain jurisdiction, a state must be either unwilling *or* unable to genuinely investigate or prosecute.[8] The Appeals Chamber has held that, when determining admissibility, the Court must first look to whether there are ongoing investigations or trials, or whether the state conducted such investigations in the past.[9] Only if one or both of these things have occurred does the Court then look to questions of unwillingness or inability.[10] If the state with jurisdiction over an alleged crime has not attempted to conduct an investigation or trial, the case is deemed admissible without consideration of willingness or ability.[11]

Evolution of the ICC and Positive Complementarity



Courtesy of the ICC.

ICC Prosecutor Luis Moreno Ocampo.

At its inception, the ICC was saddled with a number of tasks and by the time the Rome Statute went into force in 2002, expectations for the impact the ICC might have on the international community and rule of law were exceptionally high.[12] As the Court has navigated early investigations and cases, the challenges to fulfilling these lofty expectations have become increasingly clear. To address a number of concerns, members of the international community, including at times Chief Prosecutor Luis Moreno-Ocampo, have suggested that the OTP may be able to resolve some of the current issues by interacting more closely and actively with national courts, embracing a policy that has come to be called positive complementarity or, occasionally, proactive complementarity.[13]

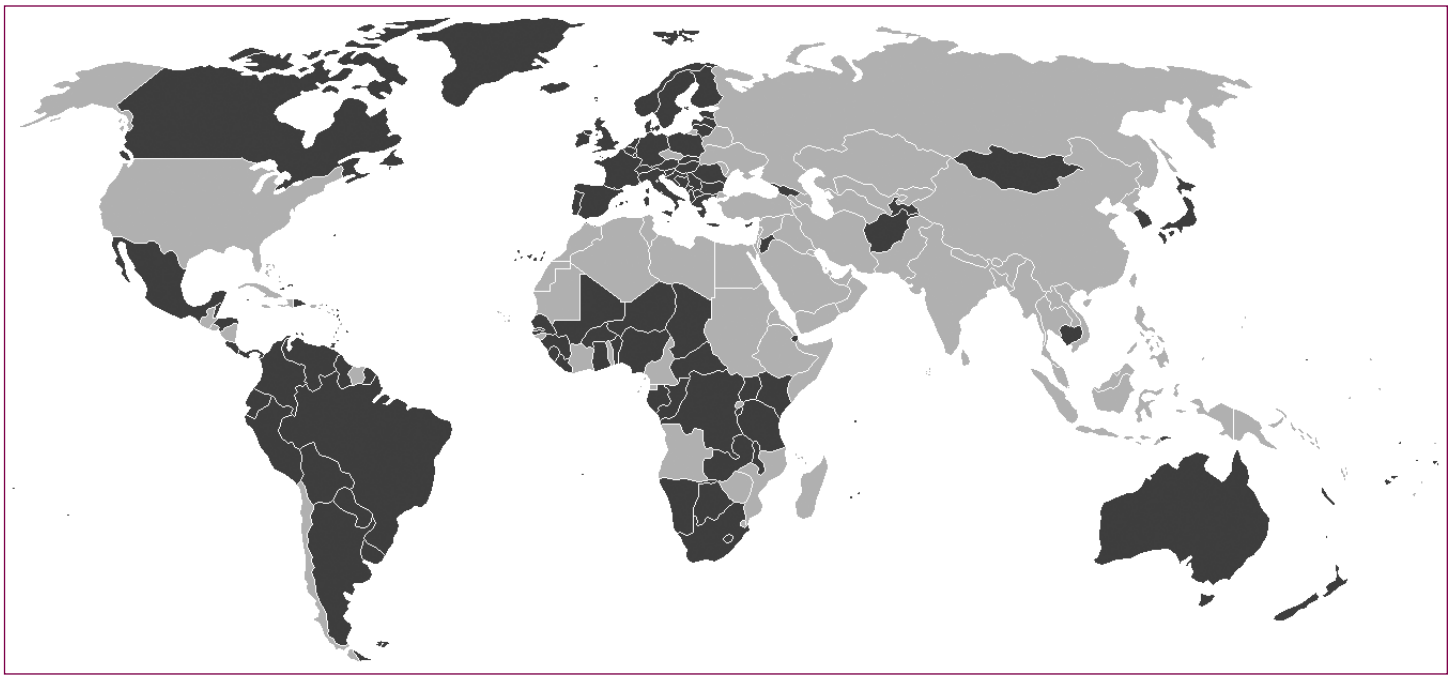
What is Positive Complementarity?

Positive complementarity is, generally, the idea that the Court, and particularly the OTP and Chief Prosecutor, should work to engage national jurisdictions in prosecutions, using various methods to encourage states to prosecute cases domestically whenever possible.[14] The ultimate goal of such a policy is to strengthen domestic capacity,[15] which arguably will have a significant positive impact on prevention of future atrocities. Positive complementarity suggests that a more active and cooperative relationship between States Parties and the ICC is crucial to the Court's success, particularly with respect to its long-term preventative impact.

Where traditional complementarity was meant to protect state sovereignty and was built on the idea that states would carry out national prosecutions as a result of the threat of international intervention by the ICC, positive complementarity envisions a more cooperative relationship between national jurisdictions and the Court.[16] While this might mean, most simply, a more proactive "carrot-and-stick" approach, it could also mean that the ICC would act to "enhance the ability of states to undertake genuine investigations and prosecutions."[17] This activity could encompass anything from communicating with states in which atrocities may be occurring to establishing "legal and judicial training and cooperation mechanisms to bolster a weak justice system, and then monitor[ing] local judicial processes undertaken for crimes that would otherwise fall under ICC jurisdiction."[18]

Approaches to Positive Complementarity

The "carrot-and-stick" approach is most similar to the original conception of complementarity, based on the idea that the threat of ICC intervention will motivate states to conduct their own national level prosecutions. The difference with respect to positive complementarity is that the OTP would engage more directly with States Parties, using diplomatic and other public channels to express concern about a particular situation, thus encouraging the state to take action.[19] This is likely to be most effective in cases of states that are unwilling, rather than unable, to prosecute. Opening the channels of communication and



By St. Krekeler.

ICC Member States as of July 2009.

engaging in dialogue with the state regarding the situation could spur the state to act.[20]

Positive complementarity may mean, in certain circumstances, working to actively enhance a state's ability to carry out investigations and prosecutions that meet international standards.[21] This type of approach may be most useful in cases in which a state is willing but unable to prosecute. This method is likely to be resource-intensive, and given the ICC's limited resources, the OTP will need to look to other States Parties and international organizations for assistance. The ICC and the OTP could in fact be instrumental in establishing and strengthening a transnational network geared towards enforcement of international criminal law.[22]

Positive Complementarity and the OTP

Chief Prosecutor Luis Moreno-Ocampo has recognized the importance of complementary domestic prosecution, saying, "[A]s a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, an absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."[23] A 2003 OTP Policy Paper on complementarity describes the general rule of complementarity as "tak[ing] action only where there is a clear case of failure to take national action." The paper goes on to note that "a major part of the external relations and outreach strategy of the Office of the Prosecutor will be to encourage and facilitate States to carry out their primary responsibility of investigating and prosecuting crimes."[24] This indicates that the OTP began early on to develop the idea of what has since been deemed positive complementarity.[25]

In its 2006 Policy Paper on Prosecutorial Strategy, the OTP notes that it will take a positive approach to complementarity. The paper defines such an approach as meaning that the OTP "encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation."[26] In a positive complementarity model, the Court communicates openly with states regarding situations of concern and works to assist those states in strengthening their judicial systems in order to carry out domestic prosecutions. The OTP recognizes in this paper that the support of States Parties as well as "international networks" will be crucial to the success of such an approach.

Part of the OTP's approach to positive complementarity is the policy of soliciting self-referrals.[27] In a self-referral case,

> the Court and a territorial state incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach. Groups bitterly divided by conflict may oppose prosecutions at each others' hands and yet agree to a prosecution by a Court perceived as neutral and impartial.[28]

While the drafters of the Rome Statute likely did not envision such a policy, self-referrals present an important tool by which to create a partnership between the Court and States Parties, as opposed to a competitive relationship.

The Role of Outside Institutions

Two main challenges the ICC faces at this point are a lack of resources and a lack of credibility, both of which are concerns that may be overcome with the aid of outside institutions. Positive complementarity urges the ICC to act in concert with States Parties; in order to provide the necessary resources and support, the Court will need to work closely with international institutions and organizations as well as gain the cooperation of States Parties.

The arena of international criminal law remains a developing field,[29] and the participation of States Parties is crucial to its evolution. As commentators have noted, "Where a state acts in such a situation of legal vulnerability its dual role as subject

and creator of international law becomes most visible. As such, states in transition apply existing law and, in so doing, contribute to its refinement."[30] States are more likely to rely on and follow the ICC if it is viewed not as an institution operating on its own, but as a part of the international community that supports a body of accepted international norms.

Lack of Resources

With respect to positive complementarity, the more ambitious goal of actually assisting domestic systems with capacity building seems to only exacerbate the problem of lack of resources.[31] In order to truly make progress with respect to positive complementarity, the ICC, and at this stage specifically the OTP, must seek assistance and support from States Parties as well as NGOs and the international community. As mentioned above, the ICC could serve to facilitate a transnational network of organizations working in the area of international criminal law. Dozens of NGOs focus on rule of law and transitional justice. By working in coordination with such groups, the ICC can help NGOs to focus their work where it is most needed and draw international attention to conflicts that might otherwise be overlooked. This will draw resources and support to situations that need attention but which the ICC may not be able to address without assistance.

The OTP has already indicated that it recognizes the value of relationships with outside institutions. The 2006 Report on Prosecutorial Strategy notes that "the Office will continue expanding its network of contacts with non-States Parties, international organisations and NGOs aimed at fostering a supportive environment." The report also mentions solidifying the Court's relationship with the UN and crafting a specific plan of outreach to regional organizations such as the European Union and the African Union.[32] The 2006 Report on Prosecutorial Strategy lists as its Fifth Objective the goal of establishing "forms of cooperation with states and organizations to maximize the Office's contribution to the fight against impunity and the prevention of crimes."[33]

Cooperation with other institutions will be crucial to the ICC's success, particularly with respect to resource-intensive assistance to national judicial systems. By engaging States Parties through positive complementarity, the OTP may expect and encourage states to draw upon their own resources and those of supporting NGOs in the region in order to comply with international standards and OTP requests and suggestions. The support of NGOs and other institutions will not only provide additional resources, but may also lend much-needed credibility to the ICC's and the OTP's actions.[34] It is from NGOs and States Parties that the Prosecutor will receive the support necessary to legitimate his actions and thus enhance the credibility of the Court.[35]

Credibility and National Prosecutions

A consistent criticism of the ICC is a lack of credibility stemming from multiple issues. As noted above, one approach to addressing some of this criticism is to enlist the support of States Parties and other institutions in order to more concretely establish both the place of the ICC in international law, as well as enforcement of international criminal law in general. Another credibility concern relates to the fact that trials in international courts and tribunals have been criticized as being too far-removed from the conflict itself, both geographically and ideologically. States have different approaches to justice, and some critics of the ICC note that it may not be able to take into account such differences, weakening its credibility in their eyes and the eyes of both perpetrators and victims in some states.[36]

On an immediate level, national courts are in many ways the most efficient and effective venue for trying cases of mass atrocity that have occurred within a state's territory. The benefits range from practical — access to evidence and witnesses — to more abstract — trying perpetrators in the affected state may be a more effective transitional justice method, as the trials are closer to the victims and others affected by the crimes in question, thus providing a greater connection for states and citizens working towards peace and reconciliation.[37] Adopting a positive approach to complementarity and thus encouraging domestic trials could undercut the criticism that the Court is too far-removed for effective prosecution and prevention.

Positive Complementarity and Prevention

By encouraging national courts to establish systems by which to try international crimes as defined in the Rome Statute, the ICC is making an essential contribution to the prevention of atrocities. Positive complementarity encourages states to build and strengthen their domestic judicial systems. A state with strong judicial institutions and respect for the rule of law is arguably less likely to reach the level of societal upheaval in which international crimes are most often committed.

Deterrence and Prevention in an International Setting

The concept of prevention in the context of mass atrocities is necessarily different from the idea of deterrence in a domestic setting. The value of punishment as a deterrent is debated even at the national level, with frequent disagreement over issues such as whether certainty or severity of punishment has a greater impact on deterrence.[38] When applying this type of theory to international crimes such as genocide and crimes against humanity, one must also take into account the specific situations in which such crimes occur.

Mass atrocities occur at times when normal societal order has broken down: as one scholar writes, "[C]ivil conflict is, by definition, coterminous with the collapse of public order."[39] Given that the norms of daily life have all but disappeared in such situations, the arguments for deterrence with respect to individual crimes such as theft or even murder necessarily shift.

Traditional notions of deterrence are based on the idea that the prospect of punishment will prevent an individual from taking unlawful action. Deterrence theory falls into two categories: general and specific deterrence, with specific deterrence focusing on the individual and general deterrence on preventing crime in society at large.[40] A main criticism of the ICC is that the assumption that potential perpetrators involved in an armed conflict are weighing the consequences of their actions and may be deterred by the threat of prosecution seems less than likely. In other words, "the assumption of perpetrator rationality in the

chaos of massive violence, incendiary propaganda, and upended social order" is something of a leap.[41]

While individual prosecutions are not without merit since they may in certain cases (such as Uganda) spur negotiations and serve as an important tool for establishing much-needed precedent, the ICC may have the greatest ability to prevent on a larger scale through its impact on national judicial systems.

By adopting a strategy of positive complementarity and using both increased pressure and communication between the ICC and States Parties, as well as facilitating ICC-supported transnational networks dedicated to international criminal law, the OTP together with the ICC as a whole can foster greater respect for the rule of law both domestically and internationally. Strong judicial institutions will stabilize societies, fostering respect for both judicial and governmental structures, which may strengthen a democratic form of government. This in turn will reduce the likelihood that such atrocities will occur down the road, as it is arguably less likely that society will again reach such a point of collapse. As Diane Orentlicher notes, "[B]y demonstrating that no sector is above the law, prosecutions of state crimes can foster respect for democratic institutions and thereby deepen a society's democratic culture."[42]

Experts suggest there are "conditions precedent to mass violence" such as "the silence of the majority, the acquiescence of the bystander, and the complicity of those neighbors who avert their gaze."[43] By working with various international bodies — from the UN to NGOs to other States Parties — the OTP and the ICC as a whole may be able to make these conditions more and more difficult to create. Drawing international attention to a situation could inspire neighboring states to apply diplomatic pressure or encourage individuals to speak up about certain violations that they might otherwise have ignored.

Were the OTP to implement a policy of positive complementarity, thus engaging with states and drawing the attention of both States Parties and outside organizations to specific situations and crises, this could actually "turn some erstwhile bystanders into gatekeepers."[44] These bystanders may act to prevent atrocity not because they themselves fear prosecution, but because of a moral imperative to act. In the long term, this urge could be strengthened if the ICC were to support and pressure States Parties to follow through with prevention and prosecution of grave international crimes, helping to create stronger institutions and in the long run strengthening the rule of law.

Thus, the ICC's greatest contribution may not be an individual prosecution:

> [T]he critical moment may not come when the Court first begins to investigate and pursue charges. Instead, it may come later, after which the ICC's work may already have helped to stigmatize the wrongdoers, draw international attention to a difficult situation, and catalyze increased political pressure that is conducive to negotiation.[45]

This in turn could spur the state to act, to seek assistance from organizations working on rule of law issues, and to work closely with an ICC that embraces the notion of positive complementarity.

Courtesy of USAID.

New arrivals at a camp for internally displaced persons in northern Uganda.

The Example of Uganda

The ICC is only in its early stages of operation, and the emergence of positive complementarity as a policy choice for the OTP is younger still. Given the short time the policy has been in place, it is difficult to measure its effectiveness. It will be nearly impossible to determine when an atrocity has been prevented, as there will be little evidence of an event that has not occurred. The case of Uganda, however, provides an example of early benefits associated with a positive complementarity approach.

In December 2003, Ugandan President Museveni requested that the ICC investigate and prosecute the Lord's Resistance Army (LRA) for serious violations of international law, and in January 2004, Chief Prosecutor Moreno-Ocampo officially opened an investigation in the region.[46] The LRA had been operating in northern Uganda since the late 1980s. Led by Joseph Kony, the rebel group originally claimed to be fighting for greater political power for northern Uganda and generally in protest of the government's alleged ill-treatment of northern Ugandans. The LRA has also claimed religious motivations, including the goal of implementing as law the Ten Commandments. In the early 1990s, the LRA began to focus their attacks on civilians in northern Uganda in order to eliminate those who supposedly supported the government over the LRA.[47]

After years of failed peace negotiations,[48] President Museveni referred the case to the ICC in 2004. This was the first situation of self-referral to the Court,[49] representing an early success of the Prosecutor's policy encouraging self-referrals in lieu of using his *proprio motu* powers.[50] Article 15 of the Rome Statute gives the Prosecutor the power to "initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court." Thus, *proprio motu* powers allow the Prosecutor to act on his own volition, as opposed to waiting for a State Party or the Security Council to refer a situation to the Court.[51]

Throughout the peace process, observers have suggested that ICC involvement has served to bring the LRA to the negotiating table when the rebel group might not otherwise have done so.[52] The positive involvement and encouragement of the ICC has thus contributed to the progress of difficult peace negotiations. Although a peace agreement has yet to be signed, the violence has decreased in Northern Uganda since the ICC referral.[53]

As a result of ICC involvement and demands from LRA leaders in negotiations that they not be prosecuted abroad, the Government of Uganda has begun to implement a method by which to try domestically the international crimes enumerated in the Rome Statute.[54] The process thus far has engaged a significant number of government and civil society leaders. Based on the involvement of these leaders as well as concerted outreach efforts within the local legal communities and particularly with leaders in Gulu, the creation of these institutions may contribute to greater respect for the institution and trials that result. The envisioned war crimes division of the Ugandan High Court will be the product of a collaborative process between local leaders and international advisors, and ideally will reflect both Ugandan and international standards and incorporate traditional justice mechanisms. Indeed, Uganda is so highly engaged with the process that Kampala was selected to be the site of the ICC Review Conference from May to June 2010.[55]

The full impact these activities will have on Uganda in the future remains to be seen. The OTP's policy of active engagement with States Parties and the new approach of positive complementarity seem to have played a role in moving Uganda forward in its peace process, and in both expanding the judicial system and engaging various parts of society in the process. If the war crimes division does succeed, it will likely face many challenges and criticisms, but the fact of its existence will be a positive development, much like the existence of the ICC, and the new division's existence over time may strengthen respect for the rule of law in Uganda.

The emerging field of international criminal law remains in its nascent stages. States such as Uganda and institutions such as the ICC have the potential to move the field forward and further clarify and establish both domestic and international norms and standards. Uganda's war crimes division and the discussions and interest in rule of law that its establishment inspires may be the first step toward a more stable judicial system, and ultimately, a more stable government in a country that has struggled with violence, corruption, and instability since independence.

Conclusion

Prevention of atrocities is a simultaneously much debated and highly championed part of the ICC's mandate. Not only is prevention a debated issue, it also proves nearly impossible to measure. While the Court's existence and operation will serve as an example and help to create necessary standards in the developing field of international criminal law, perhaps the most direct contribution it can make towards prevention is through engagement with States Parties to strengthen domestic judicial institutions.

Article 17 of the Rome Statute allows the ICC, and the OTP in particular, the flexibility necessary to adopt a policy of positive complementarity, working to encourage and support states to pursue domestic prosecutions. States Parties may take ownership of the process and tailor it to the needs of a particular situation, which in the long run may lead to a more lasting peace and stronger rule of law.

By working with states to strengthen their domestic institutions, the ICC can foster respect for the rule of law and governmental institutions, creating a more stable society which in turn would be less likely to fall into mass violence in the future. Through cooperation with other institutions and NGOs, the ICC may be able to provide the support necessary to states seeking assistance. While individual prosecutions are valuable in what they represent, and the model they set forth, the long-term impact of the ICC on prevention will likely be seen most clearly in its interaction with domestic jurisdictions. ***HRB***

ENDNOTES: Prevention and Complementarity in the International Criminal Court

1 *See, e.g.,* Rome Statute of the International Criminal Court Preamble, July 12, 1998, 2187 U.N.T.S. 900 ("Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes") [hereinafter Rome Statute]; Denine Walters, *The ICC in Practice: Its Ability to Prevent the Future Occurrence of Mass Atrocity*, Consultancy Africa Intelligence, http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=324&Itemid=220 (exploring the ICC's role in preventing future mass atrocities).

2 *See* Payam Akhvan, *Justice in The Hague, Peace in the Former Yugoslavia*, 20 Hum. Rts. Q. 737, 741 (1998) ("Thus, the prevention of future crimes is necessarily a long-term process of social and political transformation, entailing internalization of ideals in a particular context or 'reality,' or the gradual penetration of principles into given power realities").

3 *See* Mahnoush H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 Am. J. Int'l L. 385, 387 (Apr. 2005) (discussing the original idea that the ICC would step in only when states were uncooperative, not envisioning that there might be a more positive relationship between the Court and state parties).

4 Rome Statute, *supra* note 1, preamble; *see also* Rome Statute, *supra* note 1, art. 17 (Emphasizing that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions").

5 Benjamin N. Schiff, Building the International Criminal Court 73 (Cambridge Univ. Press 2008).

6 Rome Statute, *supra* note 1, art. 17.

7 *Id.*

8 *Id.*

9 Prosecutor v. Germain Katanga, Case No. ICC-01/04-01/07 OA 8, 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, ¶ 78 (Sept. 25, 2009).

10 *Id.* at ¶ 78.

Endnotes continued on page 82