



## **Closing ICC Investigations: A Second Bite at the Cherry for Complementarity?**

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## Closing ICC Investigations: A second bite at the cherry for complementarity?

Rebecca J. Hamilton\*

When the founding prosecutor of the International Criminal Court (ICC), Luis Moreno Ocampo, took office in June 2003, his first order of business was to find situations to investigate.<sup>1</sup> He began his work against an inauspicious backdrop. The U.S. government, under the first term of the Bush administration, had shown active hostility towards the court.<sup>2</sup> The legacy of the ill-fated League of Nations was ever-present; the survival of the newly minted court was far from assured.<sup>3</sup>

Fast-forward to the end of 2011 however, and the court finds itself in a very different situation. The U.S. position has warmed to a stance that is best described as neutral, and 119 countries have joined the court. While 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.

Until 2005, the Office of the Prosecutor (OTP) only had investigations in two countries, and in both instances the respective governments had themselves asked for the court's involvement.<sup>4</sup> But in March 2005, the Bush administration, then in its second term,

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<sup>1</sup> 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 *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE*, VOL. II, 989 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011)

<sup>2</sup> See, e.g. *American Service Members Protection Act of 2002*, (cutting economic and military aid to countries who had joined the ICC without signing a bilateral immunity agreement with the U.S.); *Draft UN Security Council Resolution, S/2002/712*, 30 June, 2002 (the proposal to extend the UN peacekeeping force in Bosnia-Herzegovina vetoed by the U.S. on the grounds the immunity for UN actors who were national of states not party to the ICC had not been granted immunity in the draft resolution).

<sup>3</sup> The U.S. had also refused to join The League of Nations, founded in January 1920. The multi-lateral body, a precursor to the United Nations, ceased to exist by the unanimous agreement of its members in April 1946. See The United Nations Office at Geneva, *The End of the League of Nations*, available at <http://www.unog.ch/80256EE60057D930/%28httpPages%29/02076E77C9D0EF73C1256F32002F48B3?OpenDocument>

<sup>4</sup> INTERNATIONAL CRIMINAL COURT, President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, ICC press release, Jan. 29, 2004, available at [http://www.iccpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord\\_s%20resistance%20army%20\\_lra\\_%20to%20the%20icc?lan=en-GB](http://www.iccpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc?lan=en-GB) (last accessed Oct. 5, 2011); “Prosecutor receives referral of the situation in the Democratic Republic of Congo,” ICC press release, Apr. 19, 2004, available at <http://www.iccpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo?lan=en-GB> (last accessed Oct. 5, 2011);

defied expectations and abstained from vetoing a referral by the UN Security Council that asked the OTP to investigate the situation in Darfur, Sudan.<sup>5</sup> Since then, the OTP has opened investigations in a further four situations,<sup>6</sup> including one by way of another UN Security Council referral, which asked it to investigate alleged crimes in Libya during the so-called Arab Spring.<sup>7</sup> The OTP also has ongoing preliminary examinations in eight countries,<sup>8</sup> bringing the geographic spread of its current operations to a total of 15 countries. This rapid expansion however, has not been met by a comparable growth in the court's operating budget.

The court's budget is determined by the Assembly of States Parties (ASP), the body of nations that have joined the court and are responsible for funding it. In the 2011 budget, the OTP was allocated 26.6M Euro.<sup>9</sup> Notwithstanding the fact that between 2009 – 2011 the OTP opened investigations in three more situations and increased its caseload by ten suspects, its 2011 budget amounted to just four percent more than its 2009 budget.<sup>10</sup> Heading into the 2012 budgetary discussions, the court has asked for a 13 percent increase over the 2011 budget, however member states have warned that they are seeking "zero growth."<sup>11</sup> Moreover, in neither UN Security Council referral did the council allocate any UN funds to the court.<sup>12</sup>

Given these funding constraints, the OTP's expanding caseload has not been matched by increases in staffing levels. In 2009, the office's 218 professional staff were prosecuting 8 cases, investigating 4 situations, and monitoring 6 situations.<sup>13</sup> In 2011, the same number of staff have been prosecuting 18 cases, investigating 7 situations, and monitoring 8 situations.<sup>14</sup> As can be seen, the current growth rate in terms of situations under investigation is unsustainable absent a significant shift in budgetary approach by the ASP. Such an eventuality seems unlikely given the current global economic climate. As a result, a core challenge facing the court's second prosecutor – due to be elected in December 2011 - will be to align the OTP's workload with its resources.

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5 S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

6 Central African Republic (May 2007); Republic of Kenya (March 2010); Libya (March 2011); Cote d'Ivoire (Oct. 2011).

7 S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

8 Colombia, Afghanistan, Georgia, Palestine, Guinea, Honduras, Korea and Nigeria. See OFFICE OF THE PROSECUTOR, *Communications, Referrals and Preliminary Investigations*, available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/> (last accessed Oct. 5, 2011);

9 ASSEMBLY OF STATES PARTIES, *Programme Budget for 2011*, ICC-ASP/9/Res.4 (Dec. 10, 2010), available at <http://www.icc-cpi.int/Menus/ASP/Resolutions/Sessions/2010+-+9th+Session.htm> (last accessed Oct. 5, 2011).

10 ASSEMBLY OF STATES PARTIES, *Programme Budget for 2009*, ICC-ASP/9/Res.4 (Nov. 21, 2008), available at <http://www.icc-cpi.int/Menus/ASP/Resolutions/Sessions/2008+-+7th+Session.htm> (last accessed Oct. 5, 2011).

11 Robbie Corey-Boulet, *Concern Over ICC Funding*, INTER PRESS SERVICE, Sept. 28, 2011, available at <http://ipsnews.net/news.asp?idnews=105279>

12 See S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005); S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

13 ASSEMBLY OF STATES PARTIES, *Programme Budget for 2009*, *supra*, note 10.

14 ASSEMBLY OF STATES PARTIES, *Programme Budget for 2011*, *supra*, note 9.

*Part I* of this article considers the ways in which in the new prosecutor could meet this workload-resource challenge. Three basic options are presented. The prosecutor could: (i) decide not to open any new investigations; (ii) decide to open new investigations by redeploying resources already assigned to existing investigations without formally closing those investigations; (iii) decide to open new investigations by closing existing investigations. Of the three options explored, *Part I* concludes that the final option is the most viable.

Closing investigations, however, entails its own set of complications. *Part II* begins to explore a conceptual framework for thinking about how to close investigations in a principled and transparent manner that reflects the intent of the drafters of the Rome Statute. A non-exhaustive set of considerations are proposed for assessing whether to close a given investigation, recognizing that these suggestions reflect contestable philosophical assumptions about the purpose of international criminal justice.

Although the challenges of developing a framework for closing investigations are significant, *Part III* makes the case that the imperative to close investigations should also be seen as an opportunity. Under the term of the first prosecutor, complementarity - a core principle of the Rome Statute - has been espoused more often in theory than in practice. The closure of investigations represents a new opportunity for the court and, crucially, actors outside the court, to help make the complementarity principle meaningful in practice. Moreover, the new prosecutor has the experiences of the ad hoc international tribunals to draw on; within this sphere the lessons from the so-called Category Two cases of the International Criminal Tribunal for the Former Yugoslavia (ICTY) are discussed.

Finally, *Part IV* suggests that if the success of the first prosecutor will ultimately be measured on his ability to open investigations and pursue cases within them, his successor is likely to be assessed in terms of his or her ability to close investigations. Success in this regard will require the establishment of a transparent framework for closure following significant levels of consultation. And if the opportunity of a 'second bite at the cherry' of complementarity is to be maximized, actors outside the court will have to commit significant human and financial resources to the development of justice mechanisms in domestic jurisdictions.

## I. Options for aligning workload with resources

In broad terms, the incoming prosecutor will have three options through which to align the OTP's workload with its resources. The new prosecutor could decide to: not open new investigations; open new investigations by redeploying staff assigned to existing investigations without formally closing those existing investigations; or open new investigations by closing existing investigations.

### (i) *No new investigations*

Article 13 of the Rome State 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 UN Security Council, or the prosecutor can initiate an investigation, *proprio motu*, under article 15. Thus although the prosecutor can decide not to initiate any new investigations on his or her own initiative, state parties and the UN Security Council can continue to request that the prosecutor investigates the situations that they refer. They cannot, however, force the prosecutor to do so.<sup>15</sup>

The prosecutor's discretion not to open investigations into situations that political actors have referred to the court<sup>16</sup> (and to open investigations into situations that political actors have not referred to the court)<sup>17</sup>, is one of the factors that distinguishes the ICC from the ad hoc tribunals.<sup>18</sup> The prosecutor at the ICTY, for instance, is constrained at the situation level to alleged crimes committed inside the territory of the former Yugoslavia as per the UN Security Council resolution that established the tribunal.<sup>19</sup> While the ICTY prosecutor has discretion (subject to the parameters of the ICTY Statute) over what cases to bring within the situation, he cannot refuse to investigate the situation (nor can he decide to investigate a situation other than the one the UN Security Council defined).

Nonetheless, the ICC prosecutor's discretion not to open an investigation into a situation that has been referred to the court is far from unfettered.<sup>20</sup> For both legal and political reasons, it is difficult to imagine that the new prosecutor could avoid opening investigations into statutorily viable situations referred to the court.

As a legal matter, Article 53(1) of the Rome Statute establishes the factors that the prosecutor must consider in deciding whether to open an investigation. The article is constructed on the presumption that the prosecutor "shall" initiate an investigation, subject to these three considerations:

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims,

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<sup>15</sup> Article 53(3)(a) does permit the state (or UN Security Council) that made the referral to ask the pre-trial chamber to review a decision by the prosecutor open an investigation (or not to prosecute after having opened an investigation), and the pre-trial chamber may 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.

<sup>16</sup> ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, July 17, 1998, 37 I.L.M. 999, Article 53 (1998) [hereinafter ROME STATUTE].

<sup>17</sup> ROME STATUTE, Article 15.

<sup>18</sup> See ROME STATUTE, Article 42(1); see also 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) (describing the level of discretion granted to the ICC prosecutor as a "fundamental departure" from that of the prosecutors at the ad hoc tribunals).

<sup>19</sup> STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, May 25, 1993, S.C. Res. 827, U.N. Doc. S/RES/827, Articles 1, 8 (1993) [hereinafter ICTY STATUTE].

<sup>20</sup> Likewise, the Prosecutor's discretion to open an investigation into a situation that has not been referred to him is also not unfettered. As per Article 15 of the Rome Statute, the prosecutor must receive authorization from the pre-trial chamber for an investigation to proceed.

there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

For a prosecutor looking to avoid new investigations, this means that as long as the situation referred to the court provides a reasonable basis to believe that a crime within the jurisdiction of the court has been/is being committed, and a future case is/would be admissible, then the only rationale the prosecutor can give for deciding not to open an investigation is that it would not serve the interests of justice.

The current prosecutor, Luis Moreno Ocampo, has made clear that “only in exceptional circumstances” would he conclude that opening an investigation would not serve the interests of justice.<sup>21</sup> However because he has never invoked this provision of the Statute it remains unclear what, in concrete terms, such exceptional circumstances might be. If the new prosecutor decided not to open an investigation solely on the basis of interests of justice considerations, he or she would have to inform the pre-trial chamber which, under Article 53(3)(b), could review the decision. If the judges did decide to review, then the prosecutor’s decision not to open an investigation could only be maintained with the pre-trial chamber’s confirmation.

One could certainly try to make the case that as a consequence of resource constraints it would not be in the interests of justice to open a new investigation. Perhaps the argument would be that properly staffing a new investigation 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>22</sup> But it would be up to three judges to decide whether resource constraints satisfied the interests of justice exception to the presumption in favor of opening investigations that in all other respects meet the statutory requirements.

In addition to this significant legal hurdle, the new prosecutor would be likely to have political difficulty maintaining a decision not to open any new investigations until additional funds were allocated. Presumably whenever a political actor – a state or the UN Security Council – refers a situation to the court, it has a strong interest in seeing the prosecutor open an investigation, and would complain loudly about a decision not to do so. In and of itself, this would not necessarily be a significant problem for the prosecutor; indeed the Statute was designed to shield the prosecutor from such external political pressure. However were the prosecutor to cite to resource constraints as the grounds for refusing to undertake new investigations on a repeated basis this would inevitably cause conflict between the prosecutor and the ASP which is, after all, responsible for financing the court’s work.

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21 Policy paper, ICC Office of the Prosecutor, *Interests of Justice* (Sept. 2007), available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIterestsOfJustice.pdf>

22 *See e.g.*, International Covenant on Civil and Political Rights art. 27, opened for signature Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171, Article 14(c) (right to be tried without undue delay).

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 of existing situations. But such a dispute could also go in the opposite direction.<sup>23</sup> In addition, there are informal accountability checks on the prosecutor through non-signatory states and especially through non-governmental organizations.<sup>24</sup> NGOs in particular are likely to object to a prosecutor that repeatedly refuses to open new investigations.<sup>25</sup>

In sum, even if the new 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 suffering legitimacy challenges in the world outside the court.

(ii) *New investigations by redeploying staff from existing ones*

A second approach that the incoming prosecutor could take to align the OTP's workload and resources is to pull staff from existing investigations without formally closing those investigations. This is the approach that the current prosecutor appears to have taken in a context where the number of situations under investigation has increased by 75% since 2009 while there has been a budgetary increase of just 4% over the same period. This policy, described by the OTP as "the flexible use of resources through expanding or reducing joint teams in accordance with needs", sounds sensible on paper.<sup>26</sup> However the situation in Uganda illustrates the potentially negative impact of this approach in practice.

The OTP opened its investigation into the situation in Uganda 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.<sup>27</sup> The prosecutor's December 2003 joint appearance with Museveni in

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<sup>23</sup> 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, Article 46(1)(b). It would be perverse, to say the least, for the any member of the ASP to try to have the prosecutor removed for failure to open investigations 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.

<sup>24</sup> See generally, Alison Danner, *Enhancing the Legitimacy and of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L LAW 510, 525 - 534 (2003).

<sup>25</sup> 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. Moreover if new investigations are repeatedly demanded, and denied, in relation to a specific geographic region – say Latin America - then it seems reasonable to imagine that Latin American NGOs in favor of investigations would not hesitate to challenge the prosecutor for prioritizing ongoing investigations in Africa over new investigations in Latin America.

<sup>26</sup> ASSEMBLY OF STATES PARTIES, *Proposed Budget for 2012*, ICC-ASP/10/10 (July. 21, 2011), table 12, available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-10-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-10-ENG.pdf), ¶ 94, (last accessed Oct. 5, 2011).

<sup>27</sup> ICC press release, January 29, 2004, available at [http://www.icc-cpi.int/menu/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord\\_s%20resistance%20army%20\\_lra\\_%20to%20the%20icc?lan=en](http://www.icc-cpi.int/menu/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc?lan=en)

London to announce that Uganda had given the ICC its first referral led human rights organizations to questions the prosecutor's impartiality and fuelled concerns that the court was being used by Museveni as a tool to persecute his opponents.<sup>28</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>29</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>30</sup> However with the first, and to date only, arrest warrants issued solely for members of the LRA,<sup>31</sup> allegations of partisanship have continued. <sup>32</sup> The prosecutor's consistent response has been to deny these allegations, explaining that the LRA warrants arose from the fact that the OTP investigated allegations against all groups, but that "the crimes allegedly committed by the LRA were of higher gravity than alleged crimes committed by any other group."<sup>33</sup> 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. <sup>34</sup>

Whether the investigation actually is ongoing has been questioned, including by the judges of the pre-trial chamber. Referring to a 2005 statement by the prosecutor that the Uganda investigation was "nearing completion"<sup>35</sup>, Pre-Trial Chamber II convened a status conference under Article 53 of the Rome Statute, seeking to establish whether the

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-GB (accessed Nov. 2, 2011).

28 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).

29 See, e.g. HUMAN RIGHTS WATCH, *ICC: INVESTIGATE ALL SIDES IN UGANDA*, Feb. 4, 2004, available at <http://www.hrw.org/news/2004/02/04/icc-investigate-all-sides-uganda> (last accessed, Nov. 1, 2011).

30 "Prosecutor of the International Criminal Court opens an investigation into Northern Uganda," OTP press release, July 29, 2004, available at <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20northern%20uganda?lan=en-GB> (accessed Nov. 1, 2011).

31 See Situation in the Uganda, No. ICC-02/04-01/05-53, Warrant of arrest for Joseph Kony (Int'l Crim. Court, July 8, 2005); Situation in the Uganda, No. ICC-02/04-01/05-54, Warrant of arrest for Vincent Otti (Int'l Crim. Court, July 8, 2005); Situation in the Uganda, No. ICC-02/04-01/05-56, Warrant of arrest for Okot Odhiambo (Int'l Crim. Court, July 8, 2005); Situation in the Uganda, No. ICC-02/04-01/05-57, Warrant of arrest for Dominic Ongwen (Int'l Crim. Court, July 8, 2005); Situation in the Uganda, No. ICC-02/04-01/05-57, Warrant of arrest for Dominic Ongwen (Int'l Crim. Court, July 8, 2005); Situation in the Uganda, No. ICC-02/04-01/05-55, Warrant of arrest for Raska Lukwiya (Int'l Crim. Court, July 8, 2005).

32 See, e.g. Matthew Happold, *International Criminal Court and the Lord's Resistance Army*, 8(1) MEL. J. INT'L LAW 160, 171 - 172 (2007).

33 "Report on the activities performed during the first three years (June 2003 – June 2006)," OTP report, Sept. 12, 2006, 14 available at [http://www.icc-cpi.int/NR/rdonlyres/70CB178C-15C7-4BDB-B09E-9E93CEF0E165/143610/3yearreport20060914\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/70CB178C-15C7-4BDB-B09E-9E93CEF0E165/143610/3yearreport20060914_English.pdf) (accessed Nov. 1, 2011).

34 *Id.*

35 The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, 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 (Int'l Crim. Court, Dec. 2, 2005).



prosecutor had closed the Uganda investigation.<sup>36</sup> 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 prosecute under Article 53(2).<sup>37</sup> It 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.”<sup>38</sup> 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.<sup>39</sup>

As of the time of writing, there is one full-time staff member left<sup>40</sup> on a team that was originally 15 strong.<sup>41</sup> According to the OTP this is explainable by the fact that the earliest stages of an investigation invariably demand more resources than the later stages because the OTP builds institutional knowledge of a situation over time.<sup>42</sup> But even taking that appropriate level of attrition into account, it is hard to see how just one full-time staff member can be responsible for what the OTP still officially describes as an ongoing investigation.<sup>43</sup> In the absence of either an acknowledgment by the prosecutor that he has closed the Uganda investigation or, if he has not closed it, an explanation as to why there have been no arrest warrants since those sought against LRA members in 2005 despite claims by his office that Ugandan government forces are being investigated, allegations of partisanship seem certain to continue.<sup>44</sup>

The controversy that the Uganda situation has attracted from the outset perhaps renders it an extreme example of the risks of the redeployment approach. Nonetheless the detrimental impact that the emasculation of the OTP’s capacity to continue an ongoing investigation can have on the perceived legitimacy of the prosecutor, and the court as a whole, is a cautionary tale for the incoming prosecutor to pay attention to.

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36 Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, No. ICC-02/04-01/05-68, Decision to Convene a Status Conference in the Investigation in the Situation in Uganda Under Article 53, (Int’l Crim. Court, Dec. 2, 2005).

37 Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen, 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, (Int’l Crim. Court, Jan. 11, 2006).

38 *Id.*, ¶ 7.

39 See, e.g. Prosecutor’s Speech 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> (last accessed Oct. 30 2011); Statement of the ICC Prosecutor to the Assembly of State Parties, Dec. 6, 2010, p. 6, available at <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement%20of%20the%20icc%20prosecutor%20to%20the%20assembly%20of%20state%20parties> (last accessed Nov. 1, 2011) (mentioning 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).

40 ASSEMBLY OF STATES PARTIES, *Proposed Budget for 2012*, *supra*, note 26, at table 12.

41 *Supra*, note 33, at 14.

42 See ASSEMBLY OF STATES PARTIES, *Proposed Budget for 2012*, *supra*, note 26, at ¶ 23.

43 OTP website, listing Uganda as a current investigation, available at: <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/> (last accessed, Nov. 5, 2011)

44 For a recent example see Phil Clark, *Chasing Cases: The politics of state referral*, in THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE, VOL. II, 1201 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011)

(iii) *New investigations by closing existing ones*

For the incoming prosecutor to refuse to take on new investigations until additional funding is provided would entail significant legal and political challenges that he or she may be reluctant to tackle at the outset of his or her term. 45 Yet the potential damage to the court's reputation were the new prosecutor to continue the approach of the current prosecutor by moving staff off an existing investigation to the point of functional closure while publicly maintaining that the existing investigation is ongoing, is also a fraught path to pursue. The only alternative then, is to be transparent about the need to close existing investigation/s in order to take on new ones.

Putting this final approach into practice, however, is not without its own complications. In order to avoid arbitrariness in the decision of which among existing investigations to close, the incoming prosecutor will need to follow an established set of guidelines. Without such guidelines, the prosecutor leaves the OTP open to allegations of poor judgment or worse by whoever disagrees with his or her decisions. Yet the formulation of guidelines will itself be a contested process given that such guidelines will necessarily reflect underlying policy judgments and philosophical positions about the role of international justice more generally. It is to these issues that the next part of the paper now turns.

## II. Towards a framework for the closure of investigations

Soon after the Rome Statute came into force, commentators noted that the statute itself provided minimal guidance on what criteria should drive the prosecutor's considerable discretion over what situations and cases to investigate. 46 Against this backdrop, the importance of the ICC prosecutor consistently applying transparent criteria to determine whether to open a new investigation and who to prosecute within that investigation was acknowledged by both commentators,<sup>47</sup> and by the prosecutor himself.<sup>48</sup>

The same dearth of guidance from the statute is apparent in reference to the prosecutor's discretion regarding the closure of investigations. To date however, there has been little evidence of awareness, by either the OTP or by those involved in international justice more broadly, that prosecutorial discretion with respect to the closure of investigations would also benefit from consistent adherence to a transparent set of guidelines.<sup>49</sup>

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45 See *infra*, Part I (i).

46 See e.g., Leila Nadya Sadat & Richard S. Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 408 (2000).

47 See e.g., Danner, *supra*, note 24, at 525 - 534 (2003) ("By providing a transparent standard by which outside entities can judge his decision making, guidelines serve as a focal point for critical evaluation of the Prosecutor's actions") ADD

48 See *Paper on some policy issues before the Office of the Prosecutor*, OTP report, Sept. 2003, p. 6-7, 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)

49 Shortly prior to the publication of this paper, Human Rights Watch made a first effort in this general direction with a report about further cases it believes should be prosecuted in existing investigations. See HUMAN RIGHTS WATCH, UNFINISHED BUSINESS: CLOSING GAPS IN THE SELECTION OF ICC CASES, Sept.

This section begins with what guidance the Rome Statute does provide, then moves to discuss other possible criteria to supplement this guidance for a prosecutor looking to decide, in a principled manner, which of competing existing investigations is the best candidate for closure.

i. Statutory constraints

It is clear that Article 53(3)(b) of the statute gives the pre-trial chamber authority to review the prosecutor's decision, under article 53(1)(c), not to open a new investigation.<sup>50</sup> It is less clear, however, whether the same article, by way of article 53(2)(c), also gives the pre-trial chamber authority to review the prosecutor's decision to end an investigation in which prosecutions have already been undertaken, or if it only authorizes the court to review the prosecutor's decision not to undertake any prosecutions at all following the opening of an investigation.<sup>51</sup> The drafting history of the article also fails to clarify this point.<sup>52</sup>

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,<sup>53</sup> 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. <sup>54</sup> The portion of the prosecution's response that is publicly available did not address directly whether the court has authority under article 53(3)(b) to scrutinize a decision not to prosecute further cases within an existing investigation. Instead, it simply denied that the OTP had made any decision not to prosecute under article 53(2). By omission this could be read to suggest that the prosecution does not contest the court's position that article 53(2) considerations do apply even after prosecutions are underway. However it would be

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15, 2011, 18, available at <http://www.hrw.org/node/101560>

<sup>50</sup> See *infra*, Part I (i).

<sup>51</sup> Article 53(3)(b) grants the pre-trial chamber *proprio motu* power to review a decision by the prosecutor not to proceed if that decision is based solely on article 53(2)(c) of the statute. Article 53(2) (c) provides: [If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:] A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; [the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.]

Thus article 53(2)(c) replicates the language of article 53(1)(c), except that instead of describing the pre-investigation stage that article 53(1) refers to, article 53(2) refers to a time period that follows the formal opening of an investigation.

<sup>52</sup> See Morten Bergsmo and Pieter Kruger, *Article 53*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES ARTICLE BY ARTICLE, 1073 (Otto Triffterer ed., 2008) (2<sup>nd</sup> ed.)

<sup>53</sup> See *infra*, Part II(ii).

<sup>54</sup> 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 (Int'l Crim. Court, Dec. 2, 2005). The record of the status conference itself has not been made public.

unwise to read any conclusion into their decision not to challenge the court on this publicly without further indications from the OTP that support this understanding.<sup>55</sup> As a result, it remains unclear whether the prosecutor's decision to close an existing investigation must involve consideration of the three sub-paragraphs of article 53(2) and accordingly whether the prosecutor's decision is subject to review by the pre-trial chamber.

There are other provisions of the Rome Statute, specifically article 17 and article 21(3), which do give the prosecutor clear guidance on when a particular prosecution cannot be pursued. Of course these provisions alone could only provide guidance on the question of whether to close an investigation in the unlikely event that all the remaining possible prosecutions within a given situation fall afoul of these provisions. However it is nonetheless worth briefly highlighting these articles and the aspects of them that are not always straightforward to apply in practice.

The ICC Appeals Chamber has provided clear direction on how to assess whether a particular case is admissible on all but one sub-paragraph of article 17,<sup>56</sup> and if an admissibility challenge was ever accepted by the court in a given situation, the OTP would need to stop investigating. However the interpretation of article 17(d) ("the case is not of sufficient gravity to justify further action by the court") remains unsettled.

In the Lubanga case in the situation in the Democratic Republic of the Congo, Pre-Trial Chamber I tried to establish a highly prescriptive interpretation of what constituted a

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<sup>55</sup> The only other potential indicator of the OTP's position on this stems from a policy paper on preliminary examinations, the OTP makes clear it does not believe that the decision to pursue further prosecutions in a situation where prosecutions were already underway fall under the purview of article 53(1). See Draft policy paper, ICC Office of the Prosecutor, Preliminary Examinations (Oct. 4 2010), available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Draft+Policy+Paper+on+Preliminary+Examinations.htm> ("It should be noted in this regard that ... the selection of further case hypotheses within the situation (e.g. Katanga & Ngufromedjolo) are not new decisions to initiate an investigation within the meaning of article 53(1).") Although the paper made no such rejection of the application of article 53(2) to such a situation it could be inaccurate to read this *e contrario* given that the policy paper was primarily focused on articles applicable to the stage prior to the commencement of prosecutions. See also, See, e.g. HÉCTOR OLÁSULO, THE TRIGGERING PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT, 159, note 239 (Martinus Nijhoff 2005). (Taking the view that the term "case" in Art. 53 (2) is misused because the article refers to the situation stage before any "case" has been identified. Such a reading would generate the conclusion that article 53(2) considerations do not apply once one or more cases have already been prosecuted, and that therefore the pre-trial chamber does not have the authority to review a decision by the prosecutor to close an existing investigation at any time after the first prosecution in the situation has been undertaken.)

<sup>56</sup> Prosecutor v. Katanga and Ngudjolo, No. ICC-01/04-01/07-1497, 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, ¶ 16, (Int'l Crim. Court, 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 Darryl Robinson, *The Inaction Controversy*, in THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE, VOL. II, 460-502 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011) cf. William Schabas, *Prosecutorial Discretion v. Judicial Activism*, 6 J. INT'L CRIM. JUSTICE, 731 (2008).

sufficiently grave case under Article 17(d), delineating criteria for the assessment of the gravity of both the alleged crime and responsibility of the alleged perpetrator. 57 However this decision was overturned by the Appeals Chamber, which rejected the criteria proposed by the lower chamber for the assessment of the gravity of a crime, and also found that the determination of the responsibility of an alleged perpetrator cannot be made on “excessively formulistic grounds.” 58

The court does, however, suggest that the guidelines given by the Rules on Evidence and Procedure with respect to the determination of sentence might be relevant in a gravity analysis.<sup>59</sup> As such, it opens the door to considerations of “the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour 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” within the Article 17(d).<sup>60</sup>

The principle of impartiality, which flows from article 21(3) of the Statute, 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>61</sup> Thus if the

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57 Prosecutor v. Lubanga, No. ICC-01/04-01/06-8-US-Corr Decision concerning Pre-Trial Chamber I’s Decision of 10 February 2006 concerning the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, ¶ 63 (Int’l Crim. Court, 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?)

58 Situation in the DRC, 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, (Int’l Crim. Court, July 13, 2006) (The Appeals Chamber criticized the lower chamber’s reasoning that the court’s deterrent effect would be strengthened by only prosecuting those in positions to issue orders; “It seems 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,” ¶ 73. The Appeals Chamber also found the Pre-Trial Chamber’s proposed test was inconsistent with a contextual reading of the Statute as a whole. For instance, only prosecuting on those who issue orders would render superfluous the need for Art. 33 of the Statute, which states that superior orders are no defense. ¶ 78.)

59 See, e.g. Prosecutor v. Bahar Idriss Abu Garda, No. ICC-02/05-02/09, Decision on the Confirmation of Charges, ¶ 31-33 (Int’l Crim. Court, Feb. 8, 2010)

60 RULES OF EVIDENCE AND PROCEDURE, ICC-ASP/1/3, Sept. 2002, Rule 145(1)(c) (2002)

61 Policy Paper, International Criminal Court, Office of the Prosecutor, Policy Paper on Preliminary Examinations, *supra* note 55 at ¶ 38. 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., Universal Declaration of Human Rights, art. 7, opened for signature Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810; International Covenant on Civil and Political Rights, art. 14, opened for signature Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171.

prosecutor was ready to close an investigation but wanted first to prosecute someone of a given political party purely to show that he had prosecuted someone from that party, the prosecution would violate article 21(3).<sup>62</sup>

Any framework developed to guide decisions over what existing investigation/s to close as a consequence of limited resources would have to take the requirements of articles 17, 21 (3) and, perhaps, 53(2) into account. However, as indicated above, these provisions alone are unlikely to be enough. One can readily imagine a situation in which all of the OTP's existing investigations involve current and future cases that continue to satisfy all of the statutory requirements, and yet still a decision on closure must be taken. The need to search for other criteria therefore becomes unavoidable.

ii. Additional guidelines derived from the purposes of international justice

The proposition of guidelines to direct the decision of when the ICC should cease its involvement in an existing investigation is intimately connected to the question of what the purpose of the ICC's involvement in the situation is perceived to be. Or, more broadly, what is the purpose of international criminal justice? Common contenders in response include prevention, retribution, establishing an accurate historical record, serving the victims, and advancing the rule of law. <sup>63</sup>

Every actor involved in the international criminal justice realm is likely to have their own views about which one or combination of these goals makes the most sense. Among these competing views there is an important question over 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.<sup>64</sup> And yet victims are no more a monolith than any other groups of actors in this realm. Who 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 in establishing the criteria for when international criminal justice should exit a situation. The point here is not to answer any of these questions definitely, but rather to lay out some of the core issues that cannot be avoided if the decisions of what investigations to close when are going to be dealt with in a

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<sup>62</sup> 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, Delic, and Landžo ("Celebici case")*, No. IT-96-21-A, Judgment, ¶ 611 (Int'l Crim. Trib. for the Former Yugoslavia, Feb. 20, 2001).

<sup>63</sup> For similar lists *see*, Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 *HUM. RTS. Q.* 573, 586 (2002) (truth telling, punishing perpetrators, promoting healing for victims, advancing the rule of law, and facilitating national reconciliation); MARK DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW*, (2007) 149-180 (retribution, deterrence, expressivism).

<sup>64</sup> This is not always as straightforward as it sounds. In Darfur, for instance, many victims want to see the death penalty for the Sudanese President, Omar Al-Bashir, for whom the ICC has issued an arrest warrant for the crimes of genocide, war crimes and crimes against humanity. Yet the harshest sentence the ICC can impose is life imprisonment. When this is explained, many Darfuris report that such a sentence would not satisfy their quest for justice. Author interviews, Al Fasher, Nyala, Sept. 2009 (notes on file with author).

principled manner.<sup>65</sup>

Over the coming months, interested parties should seek to propose their own standards, derived from the spirit of the Rome Statute and the purposes of international justice more broadly, for the incoming prosecutor to take into consideration. The guidelines already issued by the OTP with respect to the opening of investigations are a useful jumping off point,<sup>66</sup> but the considerations regarding the closure of investigations are still distinct enough to warrant their own set of guidelines.

In terms of drawing on guidance the OTP has already developed, one principle seems clearly relevant, which is that while “the [OTP] mandate does not include production of comprehensive historical records for a given conflict, incidents are selected to provide a sample that is reflective of the gravest incidents and the main types of victimization.”<sup>67</sup> However, applying this “gravest incidents” prong to the closure of investigations is by no means simple. In addition to the ambiguity that already exists around the gravity standard,<sup>68</sup> how should the OTP think about similarly grave incidents that occur in different time periods or geographic locations?<sup>69</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 their record have failed to provide a representative sample of the gravest

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65 At this stage, in reference to the ICC, Human Rights Watch appears to be the only group to have tried to publicly propose a standard to drive the assessment of how to think about the court’s role in relation to its existing investigations. In a paper released in September 2011, HRW cited the goal of “meaningful justice” which it described as ensuring the ICC “try those most responsible for the most serious crimes on charges representative of the underlying patterns of ICC crimes.” *Supra* note 49, at 4. It is, to a large degree, the same standard that the OTP currently uses to think about how to select cases in new investigations. *See e.g., supra* note 33. The purpose of the HRW paper was to argue that the OTP should continue to advance new prosecutions that would “close the gap” in terms of reaching the goal of meaningful justice. As such, its standard was used to justify increased engagement, whereas a standard that gives practical guidance to a prosecutor with limited resources will have to push towards a point of disengagement.

66 *See* Policy Paper, International Criminal Court, Office of the Prosecutor, Policy Paper on Preliminary Examinations, *supra* note 55.

67 Policy Paper, International Criminal Court, Office of the Prosecutor, Prosecutorial Strategy 2009 - 2012, ¶ 20, (Feb. 1, 2010), available at <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>

68 *See infra*, Part III(i)

69 The experience 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*, 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) (where the prosecution argued 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 judgement.”) 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 to those committed by *Galic*. *Prosecutor v. Milošević*, 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, Jul. 8, 2005).

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. However one might consider supplementing this prong to ensure that the main types of perpetrators are also prosecuted before the OTP closes its investigation. The policy of the current prosecutor is that “parity within a situation between rival parties” is not relevant to the selection of cases.<sup>70</sup> That principle is entirely appropriate and necessary to avoid Article 21(3) concerns that no one be prosecuted solely on account of the party to which they belong. But there is a vast difference between a lack of parity and a distorted representation of which types of actors committed serious crimes.<sup>71</sup> Concern for representing the main types of victimizers before exiting a situation would preclude closing the Uganda investigation, for instance, until some serious crimes committed by the Ugandan government forces in northern Uganda have been prosecuted.

The OTP does not have the resources to prosecute every serious crime by every party in a conflict; even for those who believe that creating a complete historical record should be a goal of international criminal justice, the reality is that the OTP was not designed to take on this role. Nonetheless, the record that the OTP leaves when it exits a situation should not suggest that only one party committed serious international crimes if in fact more than one party did, since that would amount to the court sending a signal to whichever party was not prosecuted that they have internationally-sanctioned immunity for their crimes. Similarly, the record the court leaves should not suggest that gender-based violence, for instance, was not a feature of the criminality if it was, since failing to prosecute a given category of crimes would amount to signaling that the perpetration of such crimes is not of concern to the international community.

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<sup>70</sup> *Supra* note 55 at ¶ 39.

<sup>71</sup> The situation in Rwanda illustrates this point. There is no question that there is any 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 the problem; “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*, No. ICTR-97-34-I, Decision on Defence Motion Seeking Supplementary Investigation, ¶ 19-22 (Int’l Crim. Trib. for Rwanda, June 1, 2000).



The applicability of domestic deterrence theory to international criminal prosecutions is strongly debated.<sup>72</sup> But to the extent that the model is applicable, the fact that selectivity has been found to undermine deterrence means that failing to prosecute particular kinds of crimes or groups of perpetrators would undermine the goal of crime prevention.<sup>73</sup> Moreover a distorted record of past conflict risks building cycles of vengeance into the future.<sup>74</sup>

One could imagine trying to avoid selectivity concerns by proposing that the lowest-level prosecution that the OTP takes in a given situation forms a floor, above which all those who are as or more responsible for crimes of equal or greater seriousness would also be prosecuted. Thus if the OTP started with the prosecution of a mid-level commander for a given crime, it would not close the investigation without also prosecuting the senior commander.<sup>75</sup> In practice, however, the OTP is only ever going to be able to prosecute a handful of all those who are implicated in the kinds of crimes over which the court has jurisdiction, which means that this criteria must necessarily be modified.

One suggestion, proposed recently by Human Rights Watch, is that the OTP has a particular responsibility to take on those cases “least likely to be addressed by national authorities, because, for example, of the high level of defendants, or because of limited national capacity to prosecute serious international crimes.” Yet even this is likely to leave the net cast too wide for the resources at the OTP’s disposal if the actions of national authorities are only considered in terms of criminal justice. One might instead consider exiting situations where those who the OTP has not prosecuted will be held accountable by domestic authorities in much broader terms, such as traditional justice mechanisms or truth commissions. But again, this is just one approach.

In sum, if the OTP reaches a point where the cases it has brought in a given situation reflect a representative sample of the serious criminality in that situation, and where all those as or more responsible for crimes of equal or greater seriousness than the ones prosecuted are likely to be held accountable – in the broadest sense of the word, then perhaps the OTP should close its investigation, even in a world of unlimited resources.

This criterion is not perfect. It reflects a particular emphasis on the importance of a fair accounting of the conflict with the belief that such an accounting can help prevent cycles of violence in the future – an assumption that is certainly arguable. Yet even

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<sup>72</sup> See e.g., JUDITH SHKLAR, *LEGALISM: LAW, MORALS AND POLITICAL TRIALS*, 187 (rev. ed., 1986); Drumbl, *supra* note 63 at 169-170; cf. KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS*, 162-189 (2011).

<sup>73</sup> See Drumbl, *supra* note 63 at 169 (“Selectivity is especially corrosive to the deterrent value of prosecution and punishment”), citing to JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* 69 (1989); DAVID CHUTER, *WAR CRIMES: CONFRONTING ATROCITY IN THE MODERN WORLD* 271 (2003); Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 *STAN. L. REV.* 37, 52 (2005).

<sup>74</sup> See generally, MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* (1998).

<sup>75</sup> Comparing relative levels of responsibility is not an easy task either. If comparable crimes are committed by local and national militia, does the commander of a localized militia have more responsibility than a mid-level commander of the national militia? See e.g. *Prosecutor v. Milošević*, *supra* note 69 at ¶ 12.

supplementing the statutory provisions with the above criterion may leave multiple investigations open where resource constraints necessitate closure. Additional filters may still be needed.

If multiple investigations remain open after consideration of both the first-level statutory requirements and the second-level purpose-of-justice requirements, then a third filter might have to factor in pragmatic questions, such as input versus return across those investigations. Does it make sense to keep for the OTP to continue prosecuting cases in an investigation where none of the arrest warrants issued to date have been executed?

Another consideration might be the opportunity cost of not opening a new investigation, relative to the benefits of further prosecutions in an existing investigation. Here the notion of diminishing marginal returns could be relevant. While difficult to quantify, one can imagine the deterrent value of going from seven to eight cases in an existing situation would be less than the value of opening an investigation into a situation where no actor has yet begun to tackle impunity.

Weighed against this though is what might best be described as economies of scale. 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 deterrence value of the first case in a new situation might be greater than the eighth case in an existing situations, the costs will be greater too.

### III.

As the preceding section makes clear, the assessment of when to close a situation is complex enough in purely theoretical terms, let alone in practice. However the incoming prosecutor should be alert not only to the substantial challenges, but also the potential opportunities that investigation closure might offer, especially in terms of revitalizing the principle of complementarity.

As set out in the preamble of the Rome Statute, the ICC seeks to contribute to the prevention of future crimes by bringing an end to impunity.<sup>76</sup> However the Rome Statute was not drafted with a view to having the ICC be the primary forum through which to achieve this goal; it was designed to make the ICC “complementary to national criminal jurisdictions.”<sup>77</sup>

The first prosecutor, Luis Moreno Ocampo, fleshed out the implications of this principle of complementarity in his earliest speeches and this interpretation continues through into the latest OTP paper on prosecutorial strategy; “[T]he number of cases that reach the Court is not a positive measure of effectiveness. Genuine investigations and prosecutions

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<sup>76</sup> ROME STATUTE, Preamble, ¶ 5.

<sup>77</sup> ROME STATUTE, Preamble, ¶ 10. *See also, Id.* ¶ 4 (“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured *by taking measures at the national level* and by enhancing international cooperation) (emphasis added).

of serious crimes at the domestic level may illustrate the successful functioning of the Rome system.”<sup>78</sup> This policy notwithstanding, the court’s actual success in stimulating domestic prosecutions has so far been limited.<sup>79</sup>

In the 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 strengthened and sustained.”<sup>80</sup> Within the academic community as well, much commentary has been dedicated to analyzing what complementarity could, or should, mean for the ICC.<sup>81</sup> There are views along a spectrum on whether the prosecutor should be in a competitive or cooperative relationship with domestic jurisdictions.<sup>82</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 arms’ length from domestic jurisdictions<sup>83</sup> while others argue that the OTP should “motivate and assist” national judiciaries.<sup>84</sup> What is not in dispute is that national jurisdictions have a vital role to play in working towards the goal of ending impunity.

In a recent report urging the OTP to open more cases in its existing investigations, Human Rights Watch warned that if the ICC prosecutes too few in a situation, “there is very little incentive for national authorities to expand the circle of accountability.”<sup>85</sup> Exactly what the right number of cases is will always be a context-specific judgment, but there is no doubt that the ICC will never be able to prosecute all those who are likely to be responsible for serious crimes in the situations they investigate,<sup>86</sup> indeed the court

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<sup>78</sup> Policy Paper, International 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>

<sup>79</sup> See Seils, *supra* note 1.

<sup>80</sup> Report of the Bureau on stocktaking: complementarity, *Taking stock of the principle of complementarity: bridging the impunity gap*, UN Doc. ICC-ASP/8/51 (18 March 2010), ¶ 49 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) (last accessed Nov. 1, 2011)

<sup>81</sup> See e.g. John T. Holmes, *Complementarity: National Courts versus the ICC*, in *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, 667–685 (Antonio Cassese et al., eds. 2002); Mohamed El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, MICH. J. INT’L L. 869 (2002); 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); Kevin J. Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L. FORUM 255 (2006); William Schabas, *Complementarity in Practice: Some uncomplimentary thoughts*, 19 CRIM. L. FORUM, 5 (2008); Carsten Stahn, *Complementarity: A tale of two notions*, 19 CRIM. L. FORUM, 87 (2008); William Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice*, 49(1) HARVARD INT’L L. J. (2008)

<sup>82</sup> See e.g. Schabas, *supra* note 81 at 5-33, cf. Stahn, *supra* note 81 at 87-113.

<sup>83</sup> See e.g. Seils, *supra* note 1 at 1012 (“There are very good reasons for the OTP not to be involved in anything to do with national prosecutions.”)

<sup>84</sup> See e.g. *supra* note 81 at 57 (“the ICC could participate more directly in efforts to encourage national governments to prosecute international crimes themselves”).

<sup>85</sup> Human Rights Watch, *supra* note 49 at 18.

<sup>86</sup> As the OTP explained in its 2012 budget, it has already collected enough information over the course of its existing investigations to prosecute at least 100 people. ASSEMBLY OF STATES PARTIES, *Proposed Budget for 2012*, *supra* note 26 at ¶ 92.

was never designed to take on this role.<sup>87</sup> Rather than relying on the OTP to expand the circle of accountability by taking on ever-more cases, more thought must be given to ways of increasing the incentives for national authorities to pursue accountability themselves, and the need to close investigations presents an opportunity to develop this thinking.<sup>88</sup>

Here, the incoming prosecutor could look to the experience of the processes involved in winding down the ad hoc tribunals.<sup>89</sup> Of course the lessons learned from these tribunals are not always applicable to the ICC, and the primacy that the UN tribunals have over domestic jurisdictions places them in a different relationship to national courts than the ICC. But one example from the closing strategy of the ICTY does seem particularly relevant to the closure of ICC investigations, namely the so-called Category Two cases.

Unlike cases where the ICTY has issued indictments before the tribunal has handed the case over to domestic prosecutors (mostly in Bosnia and Herzegovina) under Rule 11*bis*,<sup>90</sup> Category Two cases are those which the tribunal undertook investigations but never actually issued indictments. In an effort to close the ICTY on the timeline desired by its UN funders, while still trying to achieve maximum accountability for crimes committed in the former Yugoslavia, the ICTY began passing Category Two case information, gathered in the course of its investigation, over to the domestic authorities.

Article 93(10) of the Rome Statute provides for exactly this kind of information sharing, stating that 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 that such assistance shall include “[t]he transmission of statements, documents or other types of evidence obtained in the court of an investigation . . . by the Court.”<sup>91</sup> The process only works if one has a receptive domestic jurisdiction, thus it is not an opportunity that will be realized in all instances. But where a state is interested, or could be incentivized to become interested, in using material gathered by the ICC to further accountability, the incoming prosecutor might consider adopting this Category Two type approach as part of an overall closing strategy.

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<sup>87</sup> See Luc Côte' [FIX ON A PC?], *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L. CRIM. J. (2005)

<sup>88</sup> As one commentator warns, 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 *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE*, VOL. II, 1204 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

<sup>89</sup> See e.g. OSCE Office for Democratic Institutions and Human Rights, *Supporting the Transition Process: Lessons learned and best practice sin knowledge transfer*, (2009), <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CC0OFjAC&url=http%3A%2F%2Fwww.osce.org%2Fodihr%2F68108&ei=xMK6TviCO-f00gHk4LzeCO&usg=AFQjCNFBq5NzHDQOClOGoIECzJ9O8Zw6Jw> (last accessed Nov. 2 2011)

<sup>90</sup> ICTY, *Rules of Procedure and Evidence*, R. 11 *bis*, U.N. Doc. IT/32/Rev.44 (Dec. 10, 2009) (providing guidelines for the transfer of cases from the International Criminal Tribunal for the Former Yugoslavia to domestic courts).

<sup>91</sup> ROME STATUTE, Article 93(10)(b)(i).

This raises some questions however. 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 to international standards?

Once a defendant is brought to the ICC he or she can rely on “international law and internationally recognized laws and standards” to protect their rights.<sup>92</sup> There is a strong argument to be made that once an arrest warrant is issued by the ICC then the court has a responsibility to ensure that, regardless of where that defendant is actually prosecuted, they receive the same level of international rights protections they would have received at the ICC. This has been the approach taken by both the ICTY and ICTR in their 11 *bis* cases.<sup>93</sup>

Yet if the OTP were to adopt only a process analogous to the ICTY Category Two cases, where the defendants were never indicted at the international level in the first place, then the case for an extended period of responsibility would be less clear.<sup>94</sup> If the ICC were to follow the path of the ICTY on this, 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 put it with respect to Category Two cases, “The national

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<sup>92</sup> ROME STATUTE, Article 21(1)(c) (1998).

<sup>93</sup> 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, *Rules of Procedure and Evidence*, R. 11 *bis* (B), U.N. Doc. IT/32/Rev.44 (Dec.10, 2009) (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.”) The same wording appears in ICTR, *Rules of Procedure and Evidence*, R. 11 *bis* (C), U.N. Doc. IT/32/Rev.19 (Feb.9, 2010). Until recently, the ICTR had consistently denied the prosecutor’s requests to refer cases to Rwanda. See e.g., *The Prosecutor v. Yussuf Munyakazi*, No. ICTR-97-36-R11*bis*, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11 *bis*, (Int’l Crim. Trib. for Rwanda, Oct. 9 2008), ¶ 38 (upholding 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 Munyakazi’s right to obtain the attendance of, and to examine, Defence witnesses under the same conditions as witnesses called by the Prosecution, cannot be guaranteed at this time in Rwanda.”); *The Prosecutor v. Ildephonse Hategekimana*, No. ICTR-00-55B-E11*bis*, Decision on the Prosecution’s Appeal Against Decision on Referral Under Rule 11 *bis*, (Int’l Crim. Trib. for Rwanda, Dec. 4 2008), ¶ 38 (upholding 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 this year the trial chamber permitted a referral to Rwanda for the first time *The Prosecutor v. Jean Uwinkindi*, No. ICTR-2001-75-R11*bis*, Decision on Prosecutor’s Request for Referral to Republic of Rwanda, (Int’l Crim. Trib. for Rwanda, June 28 2011). That decision is currently under appeal.

<sup>94</sup> 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 who 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. See Frédéric Mégret, *Too much of a good thing?: Implementation and the uses of complementarity*, in THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE, VOL. I, 361-386 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011)

prosecuting authorities are on their own, for good or ill.”<sup>95</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 answer for the ICC should probably be the same. This is not to say, however, that other actors outside the court could not take on an oversight role. Indeed, as organizations like the Organisation for Cooperation and Security in Europe have done with respect to Category Two cases in Bosnia Herzegovina, such oversight should be encouraged.

#### IV.

This article has argued that while the success of the first prosecutor will likely be measured on his ability to open investigations and pursue cases within them, the legacy of his successor is likely to be assessed in terms of his or her ability to close investigations. As discussed above, if the decision to close an investigation is done in a thoughtful manner, it will necessarily raise questions that go to the very core of the debate over what the purpose of international criminal justice is, or should be.

The incoming prosecutor has the option of framing the resource-driven necessity of investigation closure as an opportunity, consistent with the principle of complementarity, to further the goal of ending impunity by creating a process, akin to the ICTY Category Two case system, whereby the OTP can transfer information gathered in the course of its investigation to the relevant domestic authorities upon completion. However the extent to which the provision of information succeeds in furthering accountability, whether narrowly or broadly defined, will depend largely on actors outside the OTP.

Unlike the ICTY, the closure of any ICC investigation will not be imposed on the OTP by any political actors, at least not directly.<sup>96</sup> For the ICC prosecutor this brings both costs and benefits. The experience from Bosnia and Herzegovina suggests that the success of advancing accountability in the shadow of the ICTY depends to a large degree on political actors being willing to put resources into supporting rule-of-law development at the domestic level.<sup>97</sup> When political actors have instigated the closure of an investigation, one can assume a greater degree of willingness to provide these resources than had they not initiated the process. For the potential of closure-as-opportunity to be fulfilled, the incoming prosecutor would need to encourage external actors to take ownership of a process that they themselves did not initiate.

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<sup>95</sup> David Tolbert and Aleksander Kotic' [FIX ON A PC?], *ICTY: Lessons in Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE*, VOL. II, 912 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

<sup>96</sup> Through their control of the budget the ASP of course does exert control over the absolute amount of resources the OTP has at its disposal, but this form of pressure is qualitatively different from the role that political actors played in the ICTY and ICTR completion strategies. See S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003); S.C. Res. 1534, U.N. Doc. S/RES/1534 (Mar. 26, 2004).

<sup>97</sup> See Fidelma Donlon, *Rule of Law: From the International Criminal Tribunal for the Former Yugoslavia to the War Crimes Chamber of Bosnia and Herzegovina*, in *DECONSTRUCTING THE RECONSTRUCTION: HUMAN RIGHTS AND THE RULE OF LAW IN POSTWAR BOSNIA AND HERZEGOVINA* (D.F. Haynes, ed., 2008).

Regardless of whether the incoming prosecutor adopts this opportunity-based view, he or she will certainly benefit from developing transparent guidelines for the closure of investigations. In this respect, a process initiated by the first prosecutor, Luis Moreno Ocampo, when he took office might be worthy of replication. Moreno Ocampo requested a series of informal expert papers to provide the OTP with advice on some of the key challenges facing the new office.<sup>98</sup> In preparation for the development of the 2013-2016 prosecutorial strategy, the incoming prosecutor could convene working groups consisting of a range of stakeholders implicated in the closure of investigations to seek their input before adopting guidelines. The prosecutor would be under no obligation to adopt the recommendations arising from such consultations, but given the multiple layers of considerations to be factored into the closure of investigations, the more views available from which to formulate these guidelines the better.

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<sup>98</sup> See e.g. INFORMAL EXPERT PAPER, *The Principle of Complementarity in Practice*, ICC-01/04-01/07-1008-AnxA (2003); INFORMAL EXPERT PAPER, *Fact-finding and investigative functions of the office of the Prosecutor, including international co-operation*, (2003).