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Positive Complementarity: How to Fix a Failed ICC

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Preliminary Statement of the Issue

Eighteen years after its highly anticipated inception, the International Criminal Court ("ICC" or the "Court") has failed to live up to the high expectations attached to it. This paper will analyze the ICC's role in relation to domestic courts, and how the principle of complementarity impacts the Court's role in international justice. This paper will argue that the Court needs to embrace the concept of "Positive Complementarity" in practice, and not just in principal, in order to fulfill the goals of the ICC. Specifically, the ICC must re-evaluate its' role as an institution for international justice and transition from a passive to a positive approach to complementarity. This cannot be done through continued discussions by the Court, and legal scholars, on positive complementarity generally. To the contrary, this paper will advance the argument that the ICC must firmly and unambiguously adopt a policy of positive complementarity going forward if it is committed to achieving the goals set forth at its inception.

Description of Problem

The Preamble to the Rome Statute declares that State Parties of the ICC are "[d]etermined to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community] and thus to contribute to the prevention of such crimes."[1] However, international criminal law scholars have reflected that, "in reality, an offender has 'about as much chance of being prosecuted as winning the lottery.'"[2] The ICC's ineffectiveness is likely due to a

[1] Rome Statute of the International Criminal Court, Preamble [hereinafter Rome Statute].
[2] Lisa J. Laplante, *The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence*, 43 J. MARSHALL L. REV. 635, 640 (2010) (citing Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MIL. L. REV. 156, 188 (2001)).

combination of factors, including a lack of resources, state's unwillingness or inability to prosecute international crimes within their judicial system, and the court's complementary jurisdiction.

Statement of the Thesis

In order to maximize its effectiveness in the prevention of crimes, the ICC should adopt a formal policy and apply the principles of positive complementarity with greater force to encourage and assist States to undertake meaningful domestic prosecutions of international crimes. Under this approach, "the ICC would cooperate with national governments and use political leverage to encourage states to undertake their own prosecutions of international crimes."[3]

Analysis

I. Introduction

A. The ICC

The idea of an international tribunal for peace and justice has a long history.[4] After decades of conferences and discussions, the General Assembly of the United Nation's tasked the International Law Commission to consider establishing an international criminal court.[5] In April 1998, a final draft to establish the ICC was completed, which became the basis for the Rome Conference.[6] On July 17, 1998, the Rome Statute was adopted by a vote of one-hundred and twenty

[3] William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 54 (2008) (discussing positive complementarity).
[4] KRISTINA MISKOWIAK, THE INTERNATIONAL CRIMINAL COURT: CONSENT, COMPLEMENTARITY AND COOPERATION 12-13 (2000) (explaining that numerous attempts have been made since the 1870s to establish and international criminal court but all failing).
[5] *Id.* at 13.
[6] *Id.*

to seven, with twenty-one countries abstaining.[7] The Rome Statute entered force on July 1, 2002 and the ICC was formally established.[8]

The ICC was established to prosecute the most serious crimes of international concern.[9] While this is a laudable goal, the ICC limited its ability to prosecute these crimes to only three situations: (1) where a state party refers the situation to the ICC; (2) where the U.N. Security Council refers the situation to the ICC; or (3) where the Prosecutor initiates an investigation of such a crime.[10] This grant of jurisdiction is further limited by Article 17 of the Rome Statute, which states that a situation is inadmissible to the ICC if it is already being investigated or prosecuted by a State that has jurisdiction over it.[11] This inadmissibility requirement is not absolute, because the ICC regains jurisdiction over an issue if the State is unwilling or unable to genuinely carry out the investigation or prosecution.[12]

B. Complementarity

Article 1 of the Rome Statute articulates that the ICC will be complementary to national jurisdictions.[13] The Court's complementary approach reflects the core belief that it must respect state sovereignty and must not intrude on a nation's control of the prosecution of crimes that occur within their borders.[14] Luis Moreno-Ocampo, the first prosecutor of the ICC, further explained the theory of complementarity in one of his first speeches to the Court; "[t]he Court is complementary

[7] Press Release, United Nations, UN Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Criminal Court (July 20, 1998).
[8] Coalition for the International Criminal Court, Our Story (http://coalitionfortheicc.org/about/our-story).
[9] Rome Statute, Article 5. (Under this Article, the ICC has jurisdiction over: (1) crimes of genocide; (2) crimes against humanity; (3) war crimes; and (4) aggression.).
[10] Rome Statute, Article 13.
[11] Rome Statute, Article 17.
[12] *Id.*
[13] Rome Statute, Article 1.
[14] This approach also derives from the court's recognition of its own limitations to investigate and prosecute the most serious international crimes due to limited resources. *See generally,* Hitomi Takemura, *Positive Complementarity*, MAX PLANCK ENCYCS. OF INT'L L., (2018).

to national systems. This means that whenever there is genuine State action, the court cannot and will not intervene…. The effectiveness of the [ICC] should not be measured by the number of cases that reach it. On the contrary, complementarity implies that the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."[15]

Complementarity was imagined as something more than a procedural requirement for the Court; it was to be the very practice that enabled the ICC to work with its State Parties. "Complementarity is not only a formal legal requirement of admissibility limiting the power of the [Office of the Prosecutor ("OTP")] but also a broader principle that allocates authority among concurrently empowered institutions with differing levels of governance authority within the international justice system."[16] This concept embraces a two-tiered approach: (1) States have the initial responsibility to investigate and prosecute crimes identified in the Rome Statute within their jurisdiction, while; (2) the ICC acts as a back-up court of last resort. This two-tiered approach respects national sovereignty and places control of the judiciary within each sovereign. However, the ICC's role as a "back-up" weakens it as an institution to prosecute the most serious international crimes. In fact, the very nature of complementarity has limited the ICC, and led to many of its shortcomings in achieving its goals.

C. Goals and Shortcomings of the ICC

The ICC was created with aspirations that far exceeded its potential given the limited legal mandate of the Rome Statute and lack of resources. At its inception, the Court was said to

[15] Luis Moreno-Ocampa, Prosecutor, International Criminal Court, Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court, at 3 (June 16, 2003).
[16] Burke-White, *supra* note 3, at 79. *See generally*, Mohamed El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869 (2002).

represent, "the hope of governments from all around the world that the force of international law can restrain the evil impulses that have stained history with the blood of innocent victims."[17] The Court was established "not simply on the goal of giving particular defendants their deserved punishments, but also on the broader aspirations that international trials will facilitate society-wide transformation by breaking cycles of violence, delegitimizing criminal regimes and fostering peaceful societies rooted in the rule of law."[18] ICC Judge Philippe Kirsch explained to the U.N. General Assembly that "[t]he [ICC] was created to break the vicious cycle of crimes, impunity and conflict. It was set up to contribute to justice and the prevention of crimes, and thereby to peace and security… and to guarantee lasting respect for the enforcement of international justice."[19] However, due to self-imposed restrictions as a complementary court, and the ability to handle only a limited set of cases, the ICC has failed to live up to these expectations.[20]

II. Why the ICC as it Currently Stands, is an Empty Promise of International Justice.

The ICC began with laudable intentions and high expectations; it offered hope, on the international stage, to end impunity and bring justice to those effected by the most heinous crimes committed. However, after almost two decades since its' inception, the ICC has failed to establish a record of holding people accountable. Worse, it has failed to bring meaningful change to countries that are most affected by these acts. While it was unrealistic to believe that the ICC would live up to all of its expectations, it was not unrealistic to believe that the ICC would establish itself

[17] Lieutenant Colonel Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 23 (2001).
[18] Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT'L L. 107, 128 (2009) (citing RUTI G TEITEL, TRANSITIONAL JUSTICE 28 (2000)).
[19] Philippe Kirsch, Address to the U.N. General Assembly, U.N. Doc. 3 (Nov. 1, 2007).
[20] It should be noted that in regard to the cases that the ICC does take, there the ICC has contributed to deterrence. However, when compared to the lofty goals at its inception, the ICC has not been able to have the impact once imagined due to the limited cases it has heard.

as a strong force on the international scale. Even this lower standard has proved too much.[21] The ICC has been hampered by a multitude of factors, including limited funding, political pressures, and a lack of U.S. support. However, this paper will focus on the limiting principle of complementarity, and how the Court's current approach to complementarity has led to its failure to reach its goals to date.

One of the inherent problems with the ICC's complementary approach is that it can be preempted by national jurisdictions.[22] Thus, complementarity functions as a powerful tool for states to "maintain control of criminal matters and the limit the reach of the ICC."[23] However, it also functions as a powerful tool to keep the ICC out, and thus, prevent the prosecution of criminals who are perpetrating crimes within a sovereign's borders. For example, after the ICC announced its' intention to investigate crimes committed in Darfur, the Sudanese government established a Court to prosecute the perpetrators of crime. While this could have been a significant step in the direction of meaningful positive complementarity, "the Government's own special court had produced 'discouraging results.'"[24] "Given the timing of the creation of the new Sudanese domestic courts and the government's rhetoric, the new institutions appear to be a direct response to the ICC's investigation in an effort to block the admissibility of cases pursuant to Article 12

[21] *See e.g.*, Human Rights Watch, *Human Right Watch Briefing Note for the Eighteenth Session of the International Criminal Court Assembly of State Parties* (Nov. 2019). Even the Human Rights Watch, a strong supporter of the ICC, has stated, "performance gaps due to various factors have become very evident, underscoring the need for changes in policy, practice, and state support."
[22] *See* Linda E. Carter, *The Future of the International Criminal Court: Complementarity as a Strength or a Weakness?*, 12 WASH. U. GLOBAL STUD. L. REV. 451 (2013).
[23] *Id. See also* Christine Bjork & Juanita Goebertus, *Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya*, 14 YALE HUM. RTS. & DEV. L.J. (2011) ("As a permanent international mechanism of justice, the ICC is meant only to complement, not supersede, national jurisdiction, and the principle of complementarity is the procedural safeguard that ensures that the Court does not limit the sovereign rights of the State Parties.").
[24] UN NEWS, Sudan's Special Court on Darfur Crimes not satisfactory, UN Genocide Expert Says (Dec. 16, 2005) https://news.un.org/en/story/2005/12/163972-sudans-special-court-darfur-crimes-not-satisfactory-un-genocide-expert-says.

through a domestic prosecution."[25] This has been one of the key factors for why the ICC has been so unsuccessful, and the basis for much of its criticism.[26]

Due to only a vague reference of complementarity in the preamble, with no further reference or definition in the Articles, complementarity was originally interpreted to be applied in the negative. Such an approach is reflected in the admissibility requirements of Article 17.[27] This negative approach creates a high barrier for admission before the Court, and a "relatively unambitious vision of the Court."[28] This approach, stemming from States' desires to protect their sovereignty, turned the ICC into "an enforcement regime based on overlapping power between territorial sovereigns (states) and non-territorial sovereigns (the international community as a whole, represented by the ICC prosecutor)."[29] The result of this approach has been an ICC with no intention of engaging States.[30] The Court's negative approach to complementarity has also been called "passive" complementarity.[31] "Passive complementarity suggests that the ICC would step in to undertake its own prosecutions only where national governments fail to prosecute and where the Court has jurisdiction."[32] Notably, this approach stems from, among other things, the United

[25] See Burke-White, *supra* note 3, at 72.
[26] *Id.* at 54 ("The Court's failure to use consciously its power to catalyze national prosecutions is a potentially dangerous mistake. Neglecting the ICC's political and legal power to encourage national prosecutions of international crimes may well undermine the institution's best hope to meet expectations and enhance accountability.").
[27] Rome Statute, Article 17.
[28] Laplante, *supra* note 2, at 643 (citing Allen J. Dickerson, *Who's in Charge Here? International Criminal Court Complementarity and the Commander's Role in the Courts-Martial*, 54 NAVAL L. REV. 141, 141 (2007).
[29] *Id.* (citing Newton, *supra* note 17 at, 26.
[30] Ada Sheng, *Analyzing the International Criminal Court Complementarity Principle Through a Federal Court Lens*, 13 ILSA J. INT'L & COMP. L. 413, 424 (2006) ("the Court can stay on the sidelines while the national courts feel the burden of the Court's watchful eye exhorting the State to do its best.").
[31] See Burke-White, *supra* note 3, at 56.
[32] *Id.*

States' reservations of creating a strong international court.[33] Unfortunately, such an approach will continue to limit the ICC's reach. If the Court continues to take a passive approach, it will continue to weaken its stature on the international stage, and eventually become completely ineffective.

As noted above, the ICC has jurisdiction over crimes of genocide; crimes against humanity; war crimes; and aggression.[34] Such atrocities are unfortunately most common in states with weak or failing institutions. These states are often unable to maintain control of crime, or prosecute crimes committed, due to events such as ongoing conflicts, widespread collapse of institutions, and re-occurring atrocities. Unfortunately, complementarity – and the ICC generally – have offered little opportunity for these countries.[35] In 2016, six of the states under investigation by the ICC were listed on the Fund for Peace's Fragile States Index's top twenty-five failing states; additionally, two other states under investigation were on the "most worsened" list.[36] All eight of these states still remain on the Fragile States Index in 2020.[37] Thus, the ICC has failed to strengthen states who need it the most, those with failing institutions. This is due to the reserved role the ICC and OTP have taken in regard to complementarity; the ICC dismisses cases from failing States to be heard before the ICC under the relevant article of the Rome State,[38] without making any attempt to capacity build or strengthen the judicial institutions needed for justice within these States.

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[33] *See* Lawrence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for an ICC, in* UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 85 (Sarah B. Sewall & Carl Kaysen eds., 2000) (describing the compromise pushed by the United States that resulted in a weaker Court).
[34] See Rome Statute, Article 13.
[35] *See generally, The Fragile States Index,* The Fund for Peace.
[36] Jacob N. Foster, *A Situational Approach to Prosecutorial Strategy at the International Criminal Court* 47 Geo. J. Int'l L. 439, 469 (2016).
[37] *The Fragile States Index,* The Fund for Peace (2020).
[38] See e.g., Rome Statute, Articles 5, 13, 17.

This was seen in the case of Libya regarding Abdullah Al-Senussi, the head of Libya's military intelligence.[39] Since the Arab Spring in 2011, Libya has consistently ranked among the worst states on the Weak and Fragile States Index.[40] Through a referral by the U.N. Security Council, the ICC began an investigation into Al-Senussi. However, the ICC Pre-Trial Chamber ultimately ruled that the case was not admissible before the ICC under the Rome Statute's complementarity principle.[41] The Court's ruling denied the argument made by the government of Libya that this case presented "a unique opportunity for the Court to embrace the concept of positive complementarity and to encourage other States emerging from conflict and mass atrocities in pursuit of genuine national proceedings."[42] However, the Court declined to hear the case, concluding that Libya was investigating "substantially the same conduct" as the ICC.[43] The Court's failure to hear the case, and subsequent failure to engage Libya in capacity building, has resulted in numerous other cases being submitted to the ICC from Libya.[44] Thus, the ICC's passive approach to complementarity perpetuates international crime in weak and failing states.[45]

However, adopting a principle of positive complementarity in these states – and all states impacted by international crime – will enable the ICC to encourage the development of the rule of law, provide these States with judicial resources, and allow failing states to start holding their leaders accountable.[46] Further, positive complementarity offers a long-term solution; while change

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[39] Patricia Hobbs, *The Catalyzing Effect of the Rome Statute in Africa: Positive Complementarity and Self-Referrals*, 31 CRIM. L. F. 345, 368 (2020).
[40] *See generally*, *The Fragile States Index,* The Fund for Peace.
[41] *See* Takemura, *supra* note 14.
[42] *Id.* citing (*Prosecutor v. Gaddafi and Al-Senussi*, Application on behalf of the Government of Libya, 2013, 90-91, para. 200).
[43] Hobbs, *supra* note 37, at 369.
[44] INTERNATIONAL CRIMINAL COURT, The Situation in Libya, https://www.icc-cpi.int/libya
[45] It is noteworthy that Al-Senussi's trial before the Libyan judicial system resulted in a death sentence in 2015. Such a sentence does nothing to strengthen domestic institutions and exemplifies the flaws inherent in the ICC's passive approach to complementarity.
[46] Katharine A. Marshall, *Prevention and Complementarity in the International Criminal Court: A Positive Approach*, 17 No. 2 HUM. RTS. BRIEF 21, 21 (2010) ("By proactively engaging with and

may not occur immediately, building a State's domestic institutions will allow them to grow from the ground up, and avoid future conflicts.[47]

III. The ICC Must Embrace Positive Complementarity to Transform the Court from a Toothless Institution, to a Tool for Global Justice.

Adopting a policy of positive complementarity would allow the ICC to re-assess its position as a weak international tribunal, and instead become a more effective legal institution aimed towards bringing actors of international crime to justice and ending the impunity gap. While positive complementarity raises concerns over resources and jurisdictional over-reach, a well-tailored approach will allow the ICC to act within its legal mandate, allocate resources more efficiently, and re-align the ICC to achieve the lofty goals the international community has set for it. It should be noted, that nothing in this paper suggests that the ICC should outgrow its mandated role on the international scale. Instead, the ICC needs to better adjust existing policies, in accordance with its mandate, to implement a policy of positive complementarity.[48]

A. Positive Complementarity

Shortly after the inception of the ICC, the OTP recognized that it is a limited institution in terms of the number of prosecutions it can handle.[49] As a result, in 2003, the ICC articulated a new

assisting domestic legal institutions, the ICC will be able to strengthen the rule of law in nations suffering from violent conflict and instability.").

[47] *Id.* ("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.").

[48] Any outgrowth of its current role would drastically expand its mandate, resources, and the will of State Parties. This would be completely contrary to the vision that gave rise to the ICC in the first place, and is not what this Paper suggests.

[49] *See generally* Morten Bergsmo, *The Jurisdictional Regime of the International Criminal Court*, 4 EUR. J. OF CRIME, CRIM. L., AND CRIM. JUST. (1998).

approach to complementarity, one that has become known as positive complementarity.[50] The ICC's commitment to positive complementarity was again reinforced by the 2006-2009 Prosecutorial Strategy Paper.[51] In its 2009-2012 Prosecutorial Strategy Policy Paper, the OTP identified positive complementarity as a "proactive policy of cooperation aimed at promoting national proceedings."[52] Thus, based on the ICC's early reports of Prosecutorial Strategy, positive complementarity, as viewed by the OTP in its early stages meant, "that the OTP will encourage genuine national proceedings where possible, relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance."[53]

Due to the limitations of the ICC, the Court correctly realized that national investigations and prosecutions would be the most efficient means to bring justice to perpetrators of international crime.[54] Unlike a passive approach to complementarity, positive complementarity "recognizes that the ICC can and should encourage, and perhaps even assist, national governments to prosecute international crimes."[55] This approach was articulated in the Office of the Prosecutor ("OTP")'s

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[50] See Office of the Prosecutor, *Paper on some policy issues before the office of the Prosecutor September 2003*, which recognizes that domestic investigations and prosecutions are normally more effective and efficient than ICC prosecutions.

[51] Office of the Prosecutor, *Report on Prosecutorial Strategy* 14 September 2006 (announcing a "positive approach to complementarity" whereby the OTP "encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.") (citing Frederica Gioi, *'Reverse Cooperation' and the Architecture of the Rome Statute: A Vital Part of the Relationship Between States and the ICC? In* ICC AND INTERNATIONAL COOPERATION IN LIGHT OF THE ROME STATUTE 75 (Maria Chiara Malaguti ed., 2007).

[52] Milton Owuor, *The International Criminal Court and Positive Complementarity: ASP Institutional Framework*, (2017) (citing Office of Prosecutor, *Report on Prosecutorial Strategy*, 1 February 2010).

[53] *Id.* (citing R.S. Clark, *Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court*, 2 GOETTINGEN J. OF INT'L L., 687-711 (2010).

[54] Burke-White, *supra* note 3, at 53 ("As a potential solution to this misalignment of expectations, mandate, and resources, the ICC could participate more directly in efforts to encourage national governments to prosecute international crimes themselves. This solution, predicated upon the ICC's ability to motivate and assist national judiciaries, could be termed 'proactive complementarity.'"). Note also that while Burke-White uses the term "proactive" complementarity, the term is often used interchangeably, and for the purposes of this paper will also be used interchangeably.

[55] *Id.* at 56.

Paper on Some Policy Issues, which subsequently gave rise to the concept of "positive complementarity."[56] Thus, the theory of positive complementarity is the idea that the ICC should encourage state parties to engage in national prosecutions for international crimes where possible.[57] Under the theory of positive complementarity, the ICC's preliminary investigations, or threat to investigate, can serve as a catalyst for State Parties to comply with their obligations under the Rome Statute to investigate and prosecute international crimes.[58] Positive complementarity would not just be a procedural principle governing admissibility, but a practical tool to strengthen domestic judicial systems.[59] It would allow the ICC to work alongside State's to ensure successful trials. Further, positive complementarity would develop State institutions; this would enable State's to effectively prosecute such crimes in national trials, as opposed to relying on the ICC.

If properly implemented, a policy of positive complementarity would "confer[] upon the ICC a dual function."[60] Such a policy recognizes, as the Prosecutor's Policy Paper discussing positive complementarity did, that States are best suited to prosecute perpetrators of international criminal law in domestic jurisdictions. Not only do the domestic courts have the best access to

[56] OTP *Paper on Some Policy Issues*. This positive approach to complementarity was again articulated in the 2006-2009 OTP's Prosecutorial Strategy Paper whereby the OTP "encourages genuine national proceedings where possible; relies on national and international networks; and participates in s system of international cooperation." Gioia, *supra* note 42.

[57] *See* Assembly of States Parties, Report of the Bureau on Stocktaking: Complementarity, ICC-ASP (Mar. 18, 2010) ("[P]ositive complementarity refers to all the activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the *Rome Statute* without involving the [ICC] in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis.").

[58] Bjork, *supra* note 23, at 205. *See also* Carter, *supra* note 22, at 451 ("complementarity will prove to be a strength if it leads to increased national capacity to adjudicate international crimes.").

[59] *Id.*

[60] Burke-White, *supra* note 3, at 68. This dual function would be first for the ICC to encourage States to undertake prosecutions themselves; but second, to directly prosecute crimes where States are unable or unwilling.

evidence and witnesses,[61] and can offer the most cost-effective strategy for the ICC,[62] but national prosecutions have a greater potential to contribute to restorative justice.[63] Thus, national courts are simply better suited for prosecutions of international crimes. In recognizing the efficiency of domestic judiciaries, and therefore utilizing the resources of national criminal courts, the ICC would be able to focus on international crimes where it would be most effective, or where their admissibility requirements are triggered when States are unwilling or unable to prosecute themselves.[64] This policy would not alter the ICC's position as a court of last resort. Instead, positive complementarity would still complement domestic jurisdictions, but would act to prevent impunity gaps by proactively encouraging nations to undertake trials of lesser offenders.[65]

Colombia offers insight into how the ICC can successfully utilize positive complementarity to encourage States to prosecute crimes where they are best suited. Colombia ratified the Rome Statute in 2002; however, upon ratification, the Colombian government included a provision that it would not accept ICC jurisdiction for war crimes for a seven-year period. [66] This provision provided generous protection to paramilitary leaders in exchange for cooperation with the government.[67] As a result of these protections, the OTP informed the Colombian government of the ICC's potential interest in ongoing situation; however, the ICC did not open up a formal

[61] ICC, OTP, *Paper on Some Policy Issues before the Office of the* Prosecutor, at 2 (Sept. 2003).
[62] Burke-White, *supra* note 3, at 69.
[63] Neil Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice, in* POST-CONFLICT JUSTICE (M. Cheriff Bassiouni ed., 2002). See also BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 87 (2003) (explaining that national proceedings have greater legitimacy among local populations and have "the greatest impact in the eyes of society most immediately interested in them").
[64] See Burke-White, *supra* note 3, at 75-75.
[65] Ideally, without a need for the ICC to step in.
[66] Hobbs, *supra* note 37, at 366 (2020) (noting Colombia ratified the Rome Statute in 2002, adding a provision, however, that it would not accept the jurisdiction of the ICC for seven years).
[67] *See* Burke-White, *supra* note 3, at 89 (discussing the laws passed in Colombia giving paramilitary leaders generous protections in exchange for cooperation).

investigation.[68] As a result of this communication, the Colombian Constitutional Court struck down the provision offering protections to perpetrators of international criminal law "to better address various human rights concerns."[69] Thus, through communication with government officials, the ICC was able to catalyze domestic action in Colombia through the threat of further investigations. This interaction exemplifies the power the ICC has to encourage domestic prosecutions and avoid having to prosecute crimes at the ICC.[70] In January, 2020, the ICC concluded its' mission in Colombia, without bringing a case to the ICC, but ensuring Colombia was equipped to handle prosecutions going forward.[71]

i. Legal Framework

There is no explicit legal basis for positive complementarity in the Rome Statute.[72] In fact, the legal admissibility requirements of Article 17 imply a passive approach to complementarity.[73] However, nothing in Article 17 restricts or limits the prosecutor from taking a more positive approach to complementarity.[74] Thus, due to an absence of any statutory bar from engaging in positive complementarity, the ICC can and should take a more positive approach to national prosecutions.

[68] *Id.* at 90.
[69] *Id.*
[70] *See* Hobbs, *supra* note 37 ("This initial OTP interest in the Colombian situation was followed by the country's credible attempts to conduct their own investigations and prosecutions, which in turn led the ICC to carefully scrutinize the legislative changes introduced by Colombia. This was followed by years of discussion and interaction between the OTP and Colombia, as well as an evaluation into whether Colombia was doing enough to secure the prosecution of the alleged perpetrators.").
[71] Press Release, *The Office of the Prosecutor concludes mission to Colombia*, THE INTERNATIONAL CRIMINAL COURT, Jan. 23, 2020).
[72] *Contra* complementarity generally.
[73] Rome Statute, Article 17.
[74] Rome Statute, Article 17. Instead, the plain text simply limits the ICC from prosecuting when a genuine national investigation or prosecution has already begun (or concluded).

Article 53 also offers insight into the potential for incorporating a positive complementarity approach. Article 53(4) allows the Prosecutor to re-evaluate his or her decision to initiate an investigation based on new facts.[75] Thus, Article 53 exemplifies that if positive complementarity were to work properly, then the ICC would be able to decide against an investigation if the State at issue took the threat of an investigation seriously.[76] Conversely, if the ICC decided against a prosecution, and the state's national prosecution was a sham trial, the ICC would be able to reconsider its position in order to force a domestic prosecution by threatening an ICC investigation or prosecution. Article 54 also provides a legal basis for positive complementarity.[77] Article 54 vests within the Prosecutor the power to seek the cooperation of the State under threat of investigation and to enter into agreements with the state to ensure such cooperation.[78] This grant of power to seek cooperation affirms the Rome Statute's legal basis for positive complementarity to encourage domestic prosecutions of international crimes through ICC support.

The legal basis for positive complementarity is also implied from Article 93 of the Rome Statute. Specifically, Article 93(10)(a) allows the ICC to "cooperate with and provide assistance to a State Party conducting an investigation into, or trial in respect of, conduct which constitutes a crime within the jurisdiction of the Court or which constitutes a serious crime under the national law of the requesting State."[79] This Article, although usually left out of the conversation about positive complementarity, offers the strongest support for the ICC to embrace the concepts discussed in this paper. Under Article 93, the ICC should work to strengthen domestic jurisdictions

[75] Rome Statute, Article 53(4).
[76] *See* Burke-White, *supra* note 3, at 81. ("To the degree that this evaluative process by the ICC has an impact on the willingness or ability of a national government to undertake genuine prosecutions, it would be a hallmark example of proactive complementarity with clear statutory authority.").
[77] *See generally* Rome Statute, Article 54.
[78] Rome Statute, Article 54(3).
[79] Rome Statute, Article 93(10).

by actively engaging with States where international crimes have occurred. This will give the ICC a more prominent role in the prosecution of these crimes, while also supporting States to build judicial capacity. If done properly, and consistently, then this approach will position the ICC as a catalyzing force for domestic prosecutions, as opposed to a mere back up court.

ii. Institutional Framework

Given the implicit legal framework for the ICC to adopt a stronger policy of positive complementarity, an analysis of the Court's institutional framework is also warranted. Such an analysis shows that a policy of positive complementarity is directly in line with the ICC's goals, and would enable the ICC and OTP to achieve these goals. "The benefit of [positive] complementarity is that it can leverage the Court's limited resources to fulfill the purposes of the Rome Statute and more fully meet expectations through the activation of national judiciaries."[80] The legal mandate given to the OTP, expressed in Article 12,[81] and Article 17,[82] indicate that investigating and prosecuting international crimes where States fail to do so themselves is the ICC's primary mandate.[83] The ICC is statutorily restricted in reach to what it can legally prosecute. However, the ICC, as an institution, has the capability to catalyze domestic trials, which would have the indirect effect of ensuring that State parties prosecute criminals not within the reach of the ICC, thus closing the impunity gap in accordance with the ICC's preamble.

The limited resources given to the ICC poses a second institutional problem which has resulted in the Court's failure to achieve its goals. However, positive complementarity offers a solution to this problem. Positive complementarity allows the OTP to encourage national trials, which shifts the cost of prosecution from the ICC to the State. Further, by limiting its docket, the

[80] Burke-White, *supra* note 3, at 82.
[81] Rome Statute, Article 12. (discussing jurisdiction).
[82] Rome Statute, Article 17. (discussing admissibility).
[83] *See also* Rome Statute, Article 11 (further limiting this mandate with a gravity requirement).

ICC would also reduce costs associated with trying multiple case. While investigations and trials before the ICC inherently cost money, the threat of investigations and trials does not. Direct lines of conversation with states, as provided for in Article 54, would enable the ICC to utilize its institutional power to force domestic trials. This approach would also allow the ICC to reduce its costs and therefore utilize its resources for cases where States are truly unable or unwilling to prosecute. Thus, it would not only strengthen domestic judiciaries by encouraging them to prosecute crimes themselves but strengthen the ICC by allowing it to more adequately utilize its resources to prosecute trials where necessary.

Positive complementarity also allows the ICC to act in a more situational role, as opposed to attempting to achieve its mandate with broader actions. A situational approach to positive complementarity will prevent the ICC from expending resources in situations where the State is unlikely to provide accountability. To the contrary, the ICC would be able to prioritize its resources in situations where national proceedings are a viable option. Where national proceedings are a viable option, positive complementarity offers its strongest chance of positive change.[84]

iii. Reluctance to Fully Embrace Positive Complementarity

Despite the growing trend amongst legal scholars to embrace positive complementarity as an effective tool to strengthen the ICC, it should be noted that it is not universally endorsed. In fact, the Court itself has stated that it should not "become a development organization or an implementing agency."[85] The Court echoed these concerns in the Bureau's 2012 Report on

[84] Foster, *supra* note 34, at 463 ("Positive complementarity is most likely to reduce the OTP's caseload in situations where the territorial state is willing to conduct national proceedings and is supported by the international community.").

[85] Report of the Bureau on Stocktaking: Complementarity to the 8th Session of the Assembly of States Parties, Mar. 22-25, 2010 (Mar. 18, 2010). But note that the report also suggested that the Court should be a "catalyst of direct State-to-State assistance and indirect assistance through relevant international and regional organizations and civil society."

complementarity.[86] Thus, the Court recognizes its strong interest in developing national capacity, but believes it should facilitate, as opposed to being a primary actor, in promoting these developments.[87] Two considerations underly the ICC's reluctance to engage in a more proactive role. First, the Court is concerned that doing so would compromise the impartial nature of the ICC.[88] Second, more involvement means more costs, and the ICC and ASP have both been hesitant to expand their operations to more costly endeavors.[89] Despite these considerations, there is sufficient reason to believe that the Court can truly become a model for positive complementarity. In doing so, it would apply an even-handed approach to State parties, thus limiting any concerns of impartiality.[90] Further, positive complementarity is not in conflict with the ICC's resource limitations, because it recognizes that enabling and eventually catalyzing State parties to prosecute crimes in domestic courts will allow the ICC to expend less resources.

B. How to Successfully Implement Positive Complementarity

Although the OTP and ASP have endorsed the idea of positive complementarity, the ICC has yet to actively embrace and pursue this approach.[91] However, there are several approaches the ICC should adopt in order to implement a policy of positive complementarity, and thus align the ICC's strategy with its lofty goals.[92]

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[86] Report of the Bureau on Complementarity to the 11th Session of the ASP, Nov. 14-22, 2012 (Nov. 7, 2012). However, the Report also noted the ICC's role to coordinate international cooperation.
[87] Carter, *supra* note 22, at 468. (citing Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT'L L.J. 82, 106 (2012) (commenting that "the ICC has essentially outsourced responsibility for upgrading national legal systems to states and NGOs")). *See also* Marshall, *supra* note 37, at 24 (suggesting the ICC could facilitate outside organizations).
[88] Carter, *supra* note 22, at 468. *See also* Burke-White, *supra* note 3, at 98-99 (discussing potential conflicts of interest for the OTP if a State that had been previously assisted by the ICC then challenges ICC jurisdiction on admissibility issues by arguing it is moving forward with an investigation due to the help of the OTP).
[89] *Id.*
[90] But note, this "even-handed approach" would be directed towards States who are hosts of such crimes. Therefore, it would target states with weak and failing institutions.
[91] Burke-White, *supra* note 3, at 55.
[92] To date, none of these recommendations have been embraced by the ICC.

First, the ICC can help developing nations who are willing to prosecute criminals but may not have the best legal systems in place, by providing access to information. This option is cost effective, and within the ICC's mandate. In fact, the ICC has already started the Legal Tools Project, an online database with legal documents and research that is available to the public.[93] This project was highlighted at the stocktaking exercise during the Review Conference of the Eighth Session of the Assembly of States Parties.[94] There, the conference noted that such a tool would work to strengthen national jurisdiction and enable them to address core international crimes, two key goals of positive complementarity.[95] This approach would be especially helpful in states that have limited resources.[96] Starting with the Legal Tools Project, the ICC should work to expand State's access to resources. One problem with domestic judiciaries in weak and failing states is their lack of resources to actually prosecute criminals due to failing legal institutions. If the ICC were to provide all States parties with adequate legal resources, then states would have a stronger baseline level of knowledge to prosecute individuals, thus strengthening their ability to conduct trials.

Second, the ICC should formally adopt – and promote – a policy of positive complementarity. This would allow the ICC to create a track record of investigating and

[93] ICC Legal Tools Project. See also Morten Bergsmo et al., *New Technologies in Criminal Justice for Core International Crimes: The ICC Legal Tools Project*, 10 HUM. RTS. L REV. 715, 724 (Dec. 2010) (explaining that the purpose of the project is "to level the playing field in the documentation, investigation, prosecution and adjudication of core international crimes and in the defense of persons accused of them, allowing national judicial institutions to process international crimes involving their nationals or committed on their territory that may otherwise have lacked the means to do so.").
[94] Report of the Bureau on Stocktaking: Complementarity to the 8th Session of the Assembly of States Parties, Mar. 22-25, 2010 (Mar. 18, 2010).
[95] *Id.*
[96] Morten Bergsmo et al., *Complementarity After Kampala: Capacity Building and the ICC's Legal Tools*, 2 GOETTINGEN J. OF INT'L L. (2010) ("Use of the information contained within the Legal Tools may allow States that would not have been able to engage in investigations and prosecutions to fulfil the role that has been attributed to them by the principle of complementarity under Article 17 of the Rome Statute.").

prosecuting crimes within the court's jurisdiction. Thus, the threat of investigation would strengthen the ICC's reputation, and create the catalyzing effect that is currently lacking.[97] This strategy, while potentially in conflict with the ICC's budgetary limitations, would impose non-financial costs on the State at issue that would increase the catalyzing effect of a threat to investigate.[98] Therefore, when these non-financial costs outweigh the political costs of domestic prosecution "the threat of ICC intervention may encourage domestic judicial systems to prosecute international crimes themselves."[99] If implemented properly, the Court would strengthen its position on the international scale by impacting a State's decision to fulfil its obligations to prosecute international crimes under the Rome Statute. This would in turn create a deterring effect, preventing future atrocities from happening again.[100]

This approach is exemplified by the ICC's intervention in Sudan. In 2005, the U.N. Security Council referred the situation in Sudan to the OTP. Thereafter, the OTP announced he would begin an investigation into the allegations.[101] Immediately following this announcement, the Sudanese government announced the establishment of special domestic tribunals to prosecute

[97] Burke-White, *supra* note 3, at 57. *See Id.* ("As a result, the Court would not have to undertake prosecutions of at least some cases itself and could focus its energy and resources on those cases in which there is no available domestic alternative, thereby maximizing its contribution to the statutory goal of ending impunity.").

[98] *Id.* at 69. These include negative publicity for a state and a diminished ability for a State to control their own judicial proceedings, such as charges brought. Also note, if done properly, this would create a cycle that would not be in conflict with the ICC's budgetary limitations, because the threat of an investigation would then allow them to save resources going forward

[99] *Id.*

[100] Marshall, *supra* note 37 ("By adopting a strategy of positive complementarity and using both increased pressure and communication between the ICC and States Parties, [] 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.").

[101] Press Release, ICC, the Prosecutor of the ICC Opens Investigation in Darfur (June 6, 2006).

perpetrators of international criminal law in Darfur.[102] Less than one year later the Darfur Special Court was created, and committees tasked with prosecuting these crimes were formed.[103]

Such an approach would also legitimize the ICC, and international criminal law as a body of law. Instead of being an obscure legal institution with a weak track record of successfully closing the impunity gap, the ICC can become a model of international criminal law and governance. If a track record of prosecutions – both at the domestic and ICC level – through the policy of positive complementarity is developed, the ICC will be viewed as an institution that can empower states with a history of international crime to prosecute crimes domestically. This will indirectly allow the ICC to encourage states to institute change not just within their judicial systems, but with their core institutions.[104] "In this way, the ICC [will become] 'a political tool to cultivate national responses, rather than a rigid enforcement mechanism.'"[105] While this approach does risk the ICC overstepping its mandate, it could be done in a way to avoid this issue. The clearest example of how this can be done is simply through a threat of prosecution. If the ICC establishes a strong record of prosecuting crimes, then simply threatening States with an investigation will allow the ICC to influence national responses to international crimes because countries will be more likely to prosecute crimes nationally, as opposed to allowing the ICC to take over the prosecution, if they know that the ICC's threat is not baseless.[106] Additionally, if the State does initiate a prosecution, but the ICC later deems it to be insufficient, the OTP can re-

[102] Burke-White, *supra* note 3, at 71.
[103] *Id.*
[104] See Laplante, *supra* note 2, at 675-76 ("In essence, the internalization of international norms through a social and political process plays a critical – if often overlooked – role in domesticating international rights norms.").
[105] *Id.* (quoting Jacqueline Kiggondu, *How Can the International Criminal Court Influence National Discourse on Sexual Violence? Early Intimations from Uganda*, 4 EYES ON THE ICC 45, 62 (2007).
[106] *Id.* ("The ICC does not even need to hear a case to shift social and political perceptions so as to permit the type of cultural changes and norm creation needed for its overarching aim of combating impunity.").

evaluate the Court's position pursuant to Article 53(4).[107] Thus, this approach would allow the ICC to utilize a catalyst method, but also ensure legal recourse if it is not successful. Further, this approach recognizes that the ICC must adopt a long-term strategy in regard to positive complementarity, because it cannot exert this level of influence immediately.[108]

Unfortunately, the most heinous crimes of international law occur in states that are unwilling or unable to prosecute international crimes due to the failing institutions of the State, and where the ICC is unable to intervene. In such a situation, the threat of an ICC investigation is unlikely to provide meaningful results because the State is not in a position to actively partake in a domestic trial. This situation is both the most-resource-intensive and offers the highest possibility for failed assistance. Despite these risks, the ICC's ability to influence these states through positive complementarity would become its greatest accomplishment to date because it would end the cyclical need for monitoring states that are continuous violators of international crime. Here, the ICC could consider resource sharing initiatives, such as the Legal Tools Project discussed above; adopting best practices to be applied to judicial systems with re-occurring violations; or more hands on approaches, such as providing direct assistance to these States, or engaging in domestic judicial reform.

While these approaches could potentially produce meaningful change to States that are repeat violators of international crimes, an alternative approach to positive complementarity [109] – mobilizing existing networks such as NGOs and State Parties – could enable the ICC to effect

[107] *See generally* Rome Statute, Article 53(4).
[108] Laplante, *supra* note 2, at 675-76 ("It is likely that a total revision will take time and concerted indigenous activism. In this way, the ICC acts as a socio-psychological catalyst of sorts. Interaction, dialogue, mutual assistance, and communication between the OTP and State Parties allows the ICC's presence to be felt and perceived by the general population, especially if reported on by the media.").
[109] Yet one that is still considered Positive Complementarity.

permanent change. This role would position ICC as an indirect source of catalyzation by organizing NGOs and other actors to help capacity build within failing nations.[110]

While States and NGOs have positioned themselves at the forefront of capacity building, the ICC should engage in a more positive approach to complementarity to further this endeavor.[111] Capacity building "is understood as the strengthening of national jurisdictions in order to be able to oversee national investigations and prosecutions at a suitable level, and to cooperate with the court."[112] Under this view, capacity building and positive complementarity seek to achieve a similar goal – strengthen domestic institutions so national judiciaries become capable of prosecuting crimes of international law within their judicial systems, as opposed to the ICC. In fact, forms of positive complementarity, "may entail legislative assistance, technical assistance and capacity building, and assistance in terms of constructing physical infrastructure."[113] Moreover, if the ICC's success is to be measured by fewer cases as a result of more domestic prosecutions, as the first Prosecutor endorsed,[114] then the ICC must embrace the idea of capacity building as a policy of positive complementarity. This approach would be similar to that employed by the International Criminal Tribunal for the Former Yugoslavia and the Special Court for Sierra Leone.[115] It would involve the ICC taking a more engaged approach, including both outreach and capacity building simultaneously with its traditional mandates under the Rome Statute.

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[110] Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 MICH. L. REV. 985 (2007). See also Luis Moreno-Ocampo, Prosecutor of the ICC, Statement to the Diplomatic Corps, The Hague, Netherlands (Feb. 12, 2004) (stating that the OTP will begin to rely on networks of States, Multilateral Institutions, NGOs and the private sector to enable the OPT to benefit from a wider range of ideas).

[111] Carter, *supra* note 22, at 473 ("One way in which the ICC could establish a greater role in positive complementarity is through the creation of an Institute or Center dedicated to its work on national capacity building.").

[112] Takemura, *supra* note 14.

[113] *Id.*

[114] *See* Moreno-Ocampa, *supra* note 16.

[115] *See generally* ICTY Outreach, http://www.icty.org/sections/Outreach (last visited Nov. 8, 2020); The Special Court for Sierra Leone, http://sc-

C. Positive Complementarity and the Impunity Gap

In April 2002, after the Rome Statute was officially ratified, the Secretary General of the United Nations, Kofi Annan declared that, "the long-held dream of a permanent international criminal court will now be realized. Impunity has been dealt a decisive blow."[116] However, eighteen years later, the ICC has failed to live up to these expectations.[117] Article 1 of the Rome Statute states that the ICC "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern."[118] However, absent from this mandate is the power to prosecute lesser offenders. An impunity gap arises where an international court, such as the ICC or other tribunals, successfully prosecutes those who are most responsible for the core international crimes; however, lesser offenders, who still should face prosecution under the Rome Statute and other international treaties, are left unpunished.[119] Thus, the issue of the impunity gap is inherent within the ICC's structure. This is due to the fact that the ICC's mandate only addresses the prosecution of the most serious actors.[120] There is no mention of how the ICC should approach lesser actors. Notwithstanding this problem inherent in the Rome Statute, a system of positive complementarity, where the ICC undertakes the prosecution of high-level offenders, while domestic trials prosecute lower-level offenders, would offer a strong solution to this problem.[121]

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sl.org/ABOUT/CourtOrganization/TheRegistry/OutreachandPublicAffairs/tabid/83/Default.aspx (last visited Nov. 8, 2020).

[116] Press Release, Office of the Secretary-General, Transcript of Press Conference with President Carlo Ciampi of Italy and Secretary-General Kofi Annan in Rome and New York by Videoconference, U.N. Doc. SG/SM/8194 (Apr. 11, 2002). *See also* Rome Statute, Preamble (the Court should help to "put an end to impunity for the perpetrators of [international] crimes").

[117] *See* Burke-White, *supra* note 3, at 54 ("Neither the legal mandate of the ICC nor the resources available to it are sufficient to allow the Court to fulfill the world's high expectations.").

[118] Rome Statute, Article 1.

[119] *See generally*, Carla Del Ponte, Prosecutor of the ICTY, Address to the Permanent Council of the OSCE (Sept. 7, 2006).

[120] Rome Statute, Article 1.

[121] *See e.g.*, Burke-White, *supra* note 3, at 68. (explaining that to help close this gap, positive complementarity encourages "domestic prosecutions of international crimes, including those that may not meet the gravity threshold for prosecution by the ICC").

Thus, while the ICC has focused only on the crimes within its mandated authority, positive complementarity would allow national judiciaries to prosecute those responsible for lesser crimes at a more effective rate. Additionally, given the ICC's nearly global mandate, and the limited resources it has been given, it will be impossible for the Court to prosecute even a small minority of individuals who commit the four core jurisdictional international crimes. Thus, a system of positive complementarity relieves the court of such a heavy burden and can lead to a larger prosecution rate.

The ICC's failure to close the impunity gap despite its mission to do just that, has not gone unnoticed. However, despite the ICC's shortcomings thus far, it still remains best suited to confront such an ambitious goal.[122] While the approaches noted above would indirectly lead to a lesser impunity gap, other approaches directly focused on this goal have also been advanced. For example, the ICC could establish an impunity index, to allow States to focus their resources on where impunity arises, what causes it, and successful cases of States combatting this problem.[123] While the ICC has not, to date, established such an index, it has begun to compile information on these topics. However, it still lacks a clear direction to implement resources to close the impunity gap.

The ICC has failed to build upon Secretary General Kofi Annan's bold declaration in 2002 that impunity "has been dealt a decisive blow."[124] This failure is in part due to the language in the

[122] Laplante, *supra* note 2, at 647 (citing Burke-White, *supra* note 3, at 54) ("By effectively harnessing national jurisdictions in the pursuit of accountability, the policy of [positive] complementarity [] has the potential to make a considerable contribution toward ending impunity without the need for a substantial expansion of the Court's resources and capacity.").
[123] *Id.* at 668 (2010). Amnesty International has also suggested that the OTP adopt an "anti-impunity index." Summary of recommendations received during the first Public Hearing of the Office of the Prosecutor; *see also* Christopher Keith Hall, *Suggestions concerning International Criminal Court Prosecutorial Policy and Strategy and External Relations*.
[124] *See supra* note 97.

Rome Statute, that creates an inherent basis for the impunity gap to exist. However, adopting a formal policy of positive complementarity will help fill the gap. Such a policy will enable the ICC to focus on the most serious criminals of international crimes, in accordance with their mandate, while encouraging domestic judiciaries to prosecute lesser perpetrators. This will effectively close the impunity gap, while working around the inherent flaws of the Rome Statute.

IV. Conclusion

A policy of positive complementarity would require the ICC to actively engage domestic jurisdictions through various means, ultimately catalyzing State parties to prosecute international crimes in domestic trials. This approach offers the ICC the strongest avenue for achieving the goals it has thus far failed to accomplish. Additionally, by encouraging State parties to engage in more domestic prosecutions, the ICC would position itself to fulfill one of its core missions, ending the impunity gap. This can best be achieved by collectively working with States in a shared manner that will allow the ICC to prosecute the worst offenders while domestic jurisdictions agree to prosecute those who should not go unpunished. By developing a strong track record of prosecutions, the ICC will be able to achieve these goals with the threat of an investigation where States are able but unwilling to prosecute.

While this Paper lays out multiple ways to implement positive complementarity, not one is capable of achieving the goals set by the ICC and the expectations given to it. Taken together, the ICC should adopt a wide range of policies that further the capabilities of positive complementarity.