



Policy Research Paper

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THE ICC AND THE PRINCIPLE OF COMPLEMENTARITY



HOW DENMARK CAN HELP STRIKE A BALANCE BETWEEN  
INTERNATIONAL AND DOMESTIC JUSTICE MECHANISMS

## **KENDAL · HUMAN RIGHTS CONSULTING**

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**EXECUTIVE SUMMARY:** *Denmark's strong support for the ICC has been a visible contribution to the fight against impunity and has, despite numerous challenges, helped give the ICC a sound footing in the complex international institutional framework that addresses issues of international peace, security and justice. Reliance on the ICC to provide justice for mass atrocities should, however, not deflect attention from the fact the ICC is only one part of what is commonly referred to as the Rome Statute System. National courts and other domestic justice sector institutions make up another part of this System. The ICC and national jurisdictions are not counterparts but components of the same structure. This is reflected in the fact that the international treaty that establishes the ICC, the Rome Statute, is based on the principle of complementarity, meaning that the ICC only takes up cases when a state is genuinely unable or unwilling to carry out the investigation or prosecution of these crimes. The ICC is, thus, a court of last resort.*

*Operationalizing the complementarity principle and striking a balance between international and national prosecutions has long been an aim in Danish foreign policy. But challenges remain in reaching these goals, which, if realized, would not only serve to close the impunity gap between international and national accountability institutions, but could also help boost the legitimacy of the ICC and dispel allegations of neocolonialism and overreach which the ICC and its supporters are too often subjected to.*

*This Policy Research Paper presents some options for how Denmark can best promote the Rome Statute System, and further the ideas underlying the principle of complementarity through its foreign policy and development assistance. It seeks to refine the basis for the Danish decision-making process on how to fight impunity when confronted with potential or ongoing mass atrocities.*

*After briefly setting out some fundamentals regarding the ICC and complementarity, the paper - through the prism of three scenarios - addresses some of the challenges facing the accountability agenda and suggests possible action and policy initiatives for Denmark.*

*The first scenario relates to Danish policy choices within development assistance, and the possibility of strengthening domestic institutions to address impunity for international crimes. It concerns both country situations where there are no ongoing (or very recent) atrocities and situations where the issue of building domestic capacity to address atrocity crimes is a central theme in a transition process from conflict to peace. Reference is made to international initiatives that have already started promoting such capacity building in domestic justice institutions and potential next steps for Danish development assistance are suggested. The second scenario encompasses situations where atrocities have recently taken place or are unfolding and there is an acute need to make policy choices regarding how institutionally to address accountability. Three options relating to investigation and prosecution by the ICC, by hybrid/internationalized courts and by domestic institutions are presented, and a number of principles are set out to suggest how these options could be prioritized – and possibly combined. The third scenario deals with situations where a case is already before the ICC, and the issue of complementarity has been or will be under consideration by ICC judges. In situations where a state or individuals challenge the jurisdiction of the ICC in order to have the a case declared inadmissible with reference to ongoing domestic prosecutions, this can raise precarious issues for countries like Denmark in their cooperation, also within the field of development assistance, with the state in question. The paper suggests that it is primarily where an admissibility challenge has been rejected by the Court and the state in question persists in pursuing complementarity before domestic courts of the same case that Denmark needs to show restraint in cooperating with that state.*

*In conclusion the recommendations made throughout the paper are summarized.*

## I. INTRODUCTION

The fight against impunity for the most serious international crimes has long been an important Danish foreign policy goal, and features prominently in the Governing Document (“Regeringsgrundlaget”) from 2011.<sup>1</sup> Since its establishment in 1998 the International Criminal Court (ICC) has been at the centre of Danish policy efforts in this regard, and has often been called upon by decision makers and commentators – sometimes as a preventive tool to put potential perpetrators on notice, sometimes in an effort to engage the ICC in the investigation and prosecution of crimes committed.

Denmark’s strong support for the ICC has been a visible contribution to the fight against impunity and has helped give the ICC a sound footing in the complex international institutional framework that addresses issues of international peace, security and justice. The controversies surrounding the ICC and the very real political challenges the Court faces cannot mask the fact that during its brief existence the ICC has gained great prominence and for many serves as the best hope for bringing accountability to victims of mass atrocities. The reliance on the ICC has, however, also sometimes been at the risk of ignoring that accountability for crimes can be pursued through other means, and that the ICC is only one part of what is commonly referred to as the Rome Statute System. National jurisdictions make up another part of that system.<sup>2</sup> The ICC and national jurisdictions are thus not counterparts, but components of the same structure.

The international treaty that establishes the ICC, the Rome Statute, is based on the principle of complementarity, meaning that the ICC only takes up cases when a state is genuinely unable or unwilling to carry out the investigation or prosecution of these crimes. It is states themselves that have the primary responsibility to investigate, prosecute and punish perpetrators suspected of genocide, war crimes and crimes against humanity.<sup>3</sup> It follows that the ICC is a court of last resort. This is so for both practical and political reasons. Practical, because the ICC does not and should not have the capacity to prosecute all perpetrators of international crimes. Political, because the issue of prosecution and punishment of a state’s nationals, particularly for crimes committed in that state’s territory, goes to the heart of sovereignty and is highly sensitive for all states.

Operationalizing the complementarity principle and striking the balance between international and national prosecutions will thus not only contribute to closing the impunity gap. It can also boost the legitimacy of the ICC and help dispel allegations of neocolonialism and overreach which the ICC and its supporters are too often subjected to. At a time when countries around the world are seeking to transition from autocratic regimes to democracy there will be an increasing need for domestic justice systems to address crimes committed during conflict or repression. These transitional justice processes are highly complex and sensitive – politically, institutionally and

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1 “Regeringsgrundlag”, Prime Minister’s Office, October 2011, [http://www.stm.dk/\\_a\\_1619.html](http://www.stm.dk/_a_1619.html)

2 By “international criminal justice” this paper refers both to international institutions dealing with criminal justice, but also to international crimes, i.e. crimes of such gravity that they by definition are considered to be the concern of the entire international community such as genocide, crimes against humanity and war crimes, which are also the crimes typically under the jurisdiction of international criminal courts and tribunals. These crimes are often referred to collectively as “atrocities crimes” though this concept may also include other crimes. The international crime of aggression is by its character somewhat different from the other core crimes and will not be addressed in the present paper.

3 These are the three crime categories that the ICC can presently exercise jurisdiction over, cf. Rome Statute articles 6 – 8.

technically – and require careful consideration of a host of factors to determine how an outside actor like Denmark can contribute.

This Policy Research Paper presents some options for how Denmark can best promote the Rome Statute System, and further the ideas underlying the principle of complementarity through its foreign policy and development assistance. It seeks to refine the basis for the Danish decision-making process on how to fight impunity when confronted with potential or ongoing mass atrocities, and lays out some of the instruments, political, legal and developmental, that can be deployed in specific situations where issues of accountability arise.

It should be noted that this paper does not in any detail address the perennial issue normally referred to as “peace vs. justice”, i.e. should one refrain from promoting efforts to address impunity because it may risk disturbing ongoing or potential peace negotiations to end a conflict. This paper starts from the premise that this is not in fact a genuine dilemma, since ensuring criminal accountability and justice is a structural condition for sustainable peace. That is not to say that only prosecutions, rather than, for example, truth and reconciliation commissions, are relevant in a conflict/post-conflict scenario, or that justice mechanisms cannot be gradually implemented in order to facilitate mediation efforts to end conflicts. Some of these issues will be addressed below.

Furthermore, this paper addresses Danish policy on complementarity in the context primarily of developing states. Atrocities are, of course, not limited to developing nations, but in recent years the tendency has been for the vast majority of atrocity crimes to be committed in those countries, which has thereby also raised questions for Denmark regarding the interplay between foreign policy and development assistance.

## **II. STRUCTURE**

Section III of the paper provides a brief background on the key institutional characteristics of the ICC and clarifies certain concepts regarding complementarity. Sections IV – VI analyse three scenarios where issues of complementarity may emerge and set out what challenges may arise in such contexts. Each section concludes with a set of recommendations, in bold case, suggesting possible action and policy initiatives for Denmark. The content of the three scenarios can briefly be summarized as follows:

The first scenario relates to Danish policy choices within development assistance, and the possibility of strengthening domestic institutions to address impunity for international crimes. It concerns both country situations where there are no ongoing (or very recent) atrocities and situations where the issue of building domestic capacity to address atrocity crimes is a central theme in a transition process from conflict to peace. The focus for Denmark in this scenario should be on long-term contributions to capacity building through development assistance programs that strengthen national institutions within the justice sector. Although choices regarding accountability mechanisms are naturally politically controversial and require close dialogue with all relevant actors, the challenges in this context are also very much those of design and implementation of rule of law programs that specifically strengthen the ability of domestic institutions to deal with atrocity crimes. It is thus related to, but also different from, general strengthening of the judicial sector in assistance programs, and presents particular issues regarding the distinction between general rule of law efforts and programs with the specific aim of atrocity prevention.

The second scenario encompasses situations where atrocities have recently taken place or are unfolding and there is an acute need to make policy choices regarding how to address accountability. Where the state in question is an ICC State Party the prosecutor has discretion to start investigations; where not, the ICC can potentially be engaged through a Security Council referral to the Court. But there is also the option that national authorities can show, or be persuaded to show, that domestic institutions are capable of handling prosecutions, either in their present form or through creating special courts. Or hybrid courts can be established where a combination of domestic and international investigators, prosecutors and judges works towards ensuring stronger local ownership and greater legitimacy but also ability to withstand domestic pressures and interests. Here the challenges for Denmark and like-minded countries are to decide which of these options to promote, possibly several in parallel, what formal limitations may exist for proposing specific actions, how to start a dialogue on these issues with the constituent groups of the country in question, and how to utilize political influence and financial (dis)incentives to promote viable solutions. In other words, how to ensure that the principle of the ICC being complementary to national courts is respected without compromising the fight against impunity for the most serious crimes.

The third scenario deals with situations where a case is already before the ICC, and the issue of complementarity has been under consideration by ICC judges. Such a complementarity challenge is not rare and the Rome Statute in fact makes explicit mention of it: a state or individuals can challenge the jurisdiction of the ICC and have a case declared inadmissible if it is shown that the state in question is willing and able to prosecute the same persons for the same crimes as the ICC is seized with.<sup>4</sup> Recent history shows that such situations raise particularly precarious issues for countries like Denmark which are under a general obligation to promote other State Parties' compliance with decisions by the Court. Denmark has generally taken a strong stance against cases of non-cooperation with the ICC and while this clear Danish policy position is highly encouraging (and to some extent flows from being an ICC State Party), it does not answer all questions as to how Denmark should interact with the states concerned. How, for example, should Denmark approach issues of development assistance to the justice sector in a country under investigation by the ICC, and what are the limitations on Denmark's cooperation within the field of capacity building with the authorities of a State which has been found in breach of its obligation to cooperate with the ICC?

As will be clear, these three scenarios are closely interwoven, and raise a number of the same issues and challenges. For example, questions regarding Danish support for domestic tribunals and what should be the guiding criteria when Denmark engages in such a process are relevant to both Scenarios 1 and 2. Thus, if the policy choice is made in Scenario 2 to support national prosecutions rather than an ICC referral, the question then arises as to whether Denmark should provide assistance to building domestic capacity. Likewise, engagement with states where mass atrocities may be ongoing raises some of the same difficult political issues under both scenarios 2 and 3.

It is therefore important to underscore that the present distinction between the three scenarios should primarily be seen as a method for highlighting particular issues facing Denmark in a complementarity context, rather than well-defined boxes in which particular situations will necessarily fit neatly.

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4 See Rome Statute articles 17-19.

### III. THE ROME STATUTE AND THE COMPLEMENTARITY PRINCIPLE – SOME FUNDAMENTALS

*Evolution of international criminal justice.* After the Nuremberg and Tokyo tribunals had addressed Axis power crimes committed during the Second World War, international criminal law was pretty much dormant during the Cold War. It was only in the early 1990s that the conflicts in the Balkans and Rwanda made the international community act to address the atrocities committed during those conflicts through the establishment of the ad hoc tribunals for Yugoslavia and Rwanda. These tribunals were established by Security Council resolutions in 1993 and 1994 respectively, and had a limited geographic and temporal scope. Their origin in Security Council resolutions led to allegations of lack of independence and politicized justice. Although these allegations were rightfully rejected by the tribunals themselves,<sup>5</sup> the ad hoc character of the tribunals led to continued questions regarding their legitimacy and objectiveness.

The ambition of creating a permanent criminal court had been the subject of much debate when the ICC finally came into being in 2002 after 60 countries, including Denmark, had ratified the Rome Statute – ICC’s constituent document – so named because it was negotiated in Rome in 1998. ICC is the first universal, permanent international criminal court, although the treaty basis for the ICC means that true universality has to be realized through states’ ratification. Although 122 states have today joined the ICC, the reluctance of a number of major and medium powers to ratify the Statute continues to be a cause for concern, and campaigns to expand ratifications are being pursued both by groups of states and by civil society organizations.<sup>6</sup>

State consent through ratification is the primary basis for the ICC’s exercise of jurisdiction. The Court can exercise jurisdiction over crimes if they are committed on the territory of a State Party or by nationals of a State Party. State consent to the ICC’s exercise of jurisdiction can also be expressed through *an ad hoc declaration* by a non-State Party regarding alleged crimes on its territory or committed by its nationals. In addition, the ICC can exercise jurisdiction over situations referred to it by the UN Security Council under Chapter VII of the UN Charter.

Among the 8 situations presently before the ICC, two are the result of Security Council referrals (Sudan was referred in 2005 and Libya in 2011), one of an ad hoc declaration by a non-State Party (Côte D’Ivoire made declarations both in 2003 and 2010) and five concerned States Parties (Uganda (2004), Democratic Republic of the Congo (2004), Central African Republic (2005), Kenya (2010) and Mali (2012)). Among the last category only the Côte D’Ivoire and Kenya investigations were started at the initiative of the ICC Prosecutor (“proprio motu”) whereas the other four States Parties “self-referred” their situations to the ICC, requesting the Prosecutor to initiate investigations.<sup>7</sup>

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5 Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, Prosecutor V. Dusko Tadic A/K/A “Dule”, (Case No. IT-94-1-T), Decision of October 2, 1995.

6 The EU regularly approaches potential new States Parties and promotes ratifications through a combination of diplomatic pressure and offering technical assistance on implementing legislation. Also organizations like the CICC and Parliamentarians for Global Action conduct intensive ratification campaigns. See e.g. <http://www.iccnw.org/?mod=universalcourt>

7 For an overview of ICC situations and cases, see [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx)



It should be noted that the 8 countries mentioned in the preceding paragraph are not the only countries being looked into by the ICC. A number of other situations are under preliminary examination by the ICC Prosecutor, meaning that the Office of the ICC Prosecutor (OtP) is analyzing the facts and law pertaining to ICC jurisdiction, and considering whether or not there is sufficient basis to proceed by requesting the ICC Pre-Trial Chamber for leave to open a formal investigation. The countries presently under analysis include Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea and Nigeria.<sup>8</sup>

Among the questions to be answered by the ICC OtP in the process of analyzing the facts and law of each situation is whether there are genuine investigations already taking place in the situations concerned. In other words whether the state in question is able and willing to prosecute these crimes. This is primarily a technical legal process focused on particular individuals, the result of which is used in deciding whether to proceed with a given case and, if so, to convince ICC judges of the merits of that analysis. But it also by definition entails the OtP to some extent analyzing the domestic criminal justice system in potential situation countries.

*ICC organs and complementarity.* The OtP thereby gains insight not only into the possible prosecution of specific crimes but also into structural strengths and weaknesses in the justice sector of those countries. Likewise, where the ICC is engaged in actual prosecutions, the collaboration with domestic authorities both by the OtP as well as by the ICC Registrars' office will typically provide these organs with detailed knowledge of domestic criminal justice issues such as that state's capacity for witness protection, engagement with victim communities, etc. Court organs produce a joint, yearly report to the ASP on the potential for the Court to promote complementarity.<sup>9</sup>

ICC organs thus potentially have significant knowledge concerning the domestic institutions within the field of justice and rule of law in particular countries; an insight which can be of great value in a possible future task of strengthening local capacities within the justice sector.

Apart from the potential contribution of ICC court organs, the ICC's governing body, the Assembly of States Parties (ASP), has also been engaged with issues concerning complementarity. The ASP, where the 122 Rome Statute countries have a seat, meets once a year. The executive work of the ASP is conducted by the ICC Bureau, consisting of 16 States Parties elected among ASP members.

As part of this political oversight and management of the Court, the ASP and ICC Bureau decide on particular issues that require further focus and can decide to delegate work on these issues, respectively, to its The Hague or New York Working Groups. Typically one or two States Parties are appointed to take the lead on a specific issue in between sessions of the ASP and report back to the ASP/Bureau with proposals for action.

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8 For the most recent overview of preliminary investigations, see ICC Office of the Prosecutor, Report on preliminary investigation activities 2012, <http://www.icc-cpi.int/NR/rdonlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf>

9 Report of the Court on complementarity, ICC-ASP/11/39, Assembly of States Parties, October 16, 2012, [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP11/ICC-ASP-11-39-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-39-ENG.pdf)

*Denmark and complementarity.* Thus, in 2009 Denmark and South Africa were given the task of promoting what was initially termed “positive complementarity”, understood as the support to domestic jurisdictions to strengthen their capacity to prosecute ICC crimes. The work on complementarity within the ASP has not been without complications. Partly because complementarity inevitably touches on sensitive questions regarding State actions which might later become subject to Court proceedings and thus potentially risks interfering with Court proceedings.<sup>10</sup> Partly because a number of countries have initially been reluctant to have the Court engage in what they feared would direct the ICC’s resources away from its primary aim of prosecuting and adjudicating cases and thereby turn the ICC into a development agency. The latter reasoning perhaps also reflected the fact that the state delegates traditionally engaged in ICC work originated from the legal services of States Parties, rather than development. For many the broader rule of law/development aspects of complementarity were thus not well understood, nor did they have the requisite knowledge of the potential for synergy between the ICC’s work and ongoing justice sector reform programs undertaken by their own development departments.

Despite these concerns work has progressed steadily at and in between the meetings of the ASP, leading to the adoption of the Kampala Resolution on complementarity<sup>11</sup> during the first ICC Review Conference in 2010. This document set out a number of tasks and future actions for both the Court and States Parties. The Danish and South African lead role on complementarity has been renewed repeatedly since then, most recently when Denmark and South Africa were appointed Country Focal Points for complementarity by the ICC Bureau on 12 February 2013. Furthermore, a dedicated focal point for complementarity has been appointed within the ASP Secretariat.<sup>12</sup>

In parallel to leading the work on complementarity in the ASP, Denmark and South Africa have also partnered with the International Centre for Transitional Justice (ICTJ) and UNDP in the organizing of a series of yearly retreats at Greentree, New York between 2009 and 2012. ICTJ has utilized its unrivalled expertise and network within the field of transitional justice in bringing development assistance experts together with actors from the field of international criminal law in an attempt at getting these two communities to work better together in promoting complementarity at the national level. Crucial in this regard has also been UNDP’s willingness to engage in this process. The engagement of one of the primary multilateral development agencies, which has a central role in aid coordination and implementation across the globe, has helped bring even greater know-how, relevance and legitimacy to the gatherings at Greentree.<sup>13</sup>

This series of meetings (known as the Greentree Process) has been quite successful in bridging the gap between those, on the one hand, who may have thought that addressing atrocity crimes in development assistance is too sensitive; and those, on the other, who believe that fighting impunity for international crimes is merely a question of more prosecutions in The Hague.

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10 Rome Statute provisions regarding independence and impartiality require particular care for ICC organs when contemplating activities regarding (potential) situation countries.

11 RC/Res.1 (Complementarity), adopted at the 9th plenary meeting of the ICC Kampala Review Conference, June 8, 2010.

12 The work of the ASP Secretariat Focal Point and further initiatives within the ASP context can be found at the ICC ASP homepage. [http://www.icc-cpi.int/en\\_menus/asp/complementarity/Pages/default.aspx](http://www.icc-cpi.int/en_menus/asp/complementarity/Pages/default.aspx)

13 A synthesis report of the most recent Greentree meeting in October 2012 can be found here: <http://ictj.org/publication/synthesis-report-supporting-complementarity-national-level-theory-practice>

Moving towards making the process more operational, the most recent meetings have focused on particular country situations and elaborating pilot programs for promoting complementarity in particular situations.

The leading role of, and cooperation between, Denmark and South Africa in both the work of the ASP as well as the Greentree Process have meant a possibility of cross-fertilization between the two forums. Through side-events at the ASP, the progress made at Greentree meetings has been shared with all States Parties; and this has conversely also helped sensitize the Greentree Process to the policy framework of the ASP and the views on complementarity from more reluctant actors. Strong engagement and support from civil society in promoting the complementarity agenda at the ASP have contributed significantly to the progress made. The keynote speech by UNDP Administrator Helen Clarke at the 2012 meeting of the Assembly of States Parties may arguably be seen as a high point of the integration of these two processes<sup>14</sup> and bodes well for the future work on complementarity. Engaging more states in promoting complementarity, however, remains a challenge as many states are still struggling with ensuring a “whole of government” approach to complementarity. This results in a lack of cross-fertilization between policy priorities within the field of development assistance and criminal justice.

**Denmark should continue to support an increased focus on complementarity work by the Court organs. Recognizing that the Court is not a development institution and that the Rome Statute may set certain limits on both ICC and States Parties complementarity work in particular situations, Denmark should work with ICC organs and other states to promote ICC’s contribution to the strengthening of national justice sectors. Synergies between ICC and development assistance actors should be expanded, and ICC analysis and insight into national justice sectors should to the greatest possible extent be shared with other actors.**

**Avenues for strengthening the work of the ASP Secretariat Focal Point should be explored, and dedicated resources as part of the ICC budget should be sought prioritized to increase the impact of the work of the Focal Point. Maintaining complementarity on the ASP agenda and expanding time devoted to complementarity discussions should be prioritized, as should integrating results from informal processes like the Greentree Process into the work of the ASP. Denmark should actively seek to engage more States Parties in the ASP’s work on complementarity, ensuring a smooth transition of the Danish Focal Point role to others.**

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14 UNDP Administrator Helen Clark, Keynote Address to the 11th Session of the Assembly of States Parties to the International Criminal Court, “Human Development and International Justice”, November 19, 2012. [http://icc-cpi.int/NR/rdonlyres/E10A5253-DA2D-46CE-90B8-7497426E9C39/0/ICCASP11\\_COMPKeynote\\_Remarks\\_HCENG.pdf](http://icc-cpi.int/NR/rdonlyres/E10A5253-DA2D-46CE-90B8-7497426E9C39/0/ICCASP11_COMPKeynote_Remarks_HCENG.pdf)

#### **IV. CAPACITY BUILDING OF DOMESTIC JUSTICE INSTITUTIONS (Scenario 1)**

After thus briefly setting out some of the main characteristics of the ICC and developments relating to Denmark's engagement in promoting complementarity, this paper will now consider how Denmark in practice best can contribute to strengthening complementarity through consideration of the three above mentioned scenarios.

As noted, the first scenario relates to Danish policy choices within development assistance and concerns situations where there is sufficient "space" to focus on medium- to long-term contributions to capacity building through development assistance programs that strengthen national institutions within the justice sector. The challenges for donors and the host country will often be of a political nature due to the sensitive issues attaching to prosecutions of atrocity crimes, but are very much also technical and concern the design and implementation of rule of law programs that specifically bolster the ability of domestic justice institutions to deal with atrocity crimes. This scenario may arise, for example, in post-conflict recovery, in situations where atrocities may have been committed several years previously but have never been addressed, where there are changes in government policy as part of a democratic development in state concerned, or where a state is preparing to ratify the Rome Statute, which requires passing implementing legislation. (Such legislation is required for that state to be able to cooperate with the ICC, but states about to ratify the Rome Statute will typically also review their substantive criminal law provisions and structures to ensure that they are in a position to exercise complementarity, should the need arise).

Addressing complementarity in regard to atrocity crimes in the context of development assistance programs has, as mentioned above, gained some traction through the international community's increased recognition that rule of law and justice are central components of sustainable development.<sup>15</sup> In September 2012 the first UN High-Level meeting on the Rule of Law at the National and International Levels was held at the General Assembly. Also in September 2012 UN Secretary-General Ban Ki-moon appointed the Department of Peacekeeping Operations (DPKO) and UNDP as the UN Global Focal Point for Justice, Police, and Corrections Areas in the Rule of Law in Post-Conflict and other Crisis Situations. Other multilateral institutions and processes have similarly placed rule of law high on the agenda and provided venues for addressing complementarity in their development assistance.<sup>16</sup>

Also Denmark has in recent policies and strategies augmented its focus on rule of law and good governance and the linkage between a functioning justice sector and peace and security. In the most recent overall strategy for Danish development assistance, "The Right to a Better Life" from 2011, justice and rule of law are key priorities, and a rights-based approach to development is being implemented in Danish assistance.<sup>17</sup>

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15 An extensive compilation of UN Rule of Law activities can be found at: <http://www.unrol.org/>. Another key UN agency that has done extensive programmatic and normative work on transitional justice is the Office of the High Commissioner on Human Rights.

16 World Bank, World Development Report, 2011.

17 Regeringens Udviklingspolitiske Prioriteter 2012, November 2011, <http://um.dk/da/~media/UM/Danish-site/Documents/Danida/Det-vil-vi/Prioritet/Regeringens%20udviklingspolitiske%20prioriteter%202012.ashx>

However, the challenge in this context remains how to further operationalize the strengthening of domestic capacity to investigate and prosecute ICC crimes. Addressing these international crimes requires particular capacities and expertise and thus to some extent differs from general strengthening of the justice sector. Among the reasons why instruments distinct from justice sector reform are required for atrocity crimes can be mentioned: difficulties in incorporating international crimes in the legislative framework, security risks related to investigations of international crimes where perpetrators are often politically influential and may even control state entities, the challenging complexity of atrocity crimes for judges, prosecutors and defence, the difficult political environment that atrocity trials will almost always take place in and requirements of outreach to general public regarding large-scale crimes.

There are already a number of ongoing initiatives aimed towards creating operational tools in development assistance for addressing international crimes. As noted, the UNDP has sought to take the lead among multilateral development agencies in promoting complementarity through policy action and has also identified more operational approaches.<sup>18</sup> The European Commission and staff from the High Representative of the EU for Foreign Affairs and Security Policy have jointly developed a toolkit on complementarity in order to provide guidance to EU institutions and member states in the design and implementation of complementarity-related programs.<sup>19</sup> Also civil society organizations have taken steps to elaborate guidelines and identify best practices for promoting complementarity at the national level.<sup>20</sup> All in all, there is a quite substantial body of work that can inspire and guide development practitioners in promoting complementarity.

These initiatives share a number of similarities and provide useful overviews of areas of intervention. Central tasks in this context are those aimed at restructuring institutions to promote integrity and legitimacy by providing accountability, building independence, ensuring representation, and increasing responsiveness. Vetting of justice officials prior to employment and strong oversight of the justice sector are other general priorities. More specifically UNDP, for example, has identified a number of programming elements that need to be made available:

- “Legislative assistance, including drafting of legislation incorporating Rome Statute crimes into the domestic legal order and ensuring appropriate implementation of that law;
- Strengthening specialized police investigation and prosecutorial services skills;
- Training and capacity development generally and in specialized areas (gender-based violence);
- Court management and registry functions;
- Development of capacity to ensure that detention and police facilities comply with international standards;
- Victim support and witness protection as well as protection of adjudicators;
- Establishing channels of communication and cooperation with relevant regional and international courts;

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18 UNDP Discussion Paper: Complementarity and Transitional Justice, November 16, 2012, [http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access\\_to\\_justiceandruleoflaw/complementarity-and-transitional-justice/](http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/complementarity-and-transitional-justice/)

19 Joint Staff Working Document on Advancing the Principle of Complementarity, Toolkit for Bridging the Gap between International and National Justice, Brussels, January 31, 2013 SWD(2013) 26 final. [http://eeas.europa.eu/human\\_rights/icc/docs/joint\\_staff\\_en.pdf](http://eeas.europa.eu/human_rights/icc/docs/joint_staff_en.pdf)

20 See e.g. Open Society Justice Initiative, *International Crimes, Local Justice – A Handbook for support* (2011).

- Public outreach and communications;
- Coordination and support for relevant civil society organisations working with victims and witnesses;
- Legal awareness and legal aid services for both victims and defendants;
- Strengthening of forensic capacities, documentation and archives;
- Compensation and reparations programs;
- Establishing channels of communication and cooperation with relevant regional and international courts;
- Physical infrastructure, including:
  - Construction of courtrooms and prison facilities and security of detention cells;
  - Court management systems to safeguard and ensure access to evidence on record;
  - Creation of archives storage area and systems capable of keeping access to material without risk of this material being destroyed over time.<sup>21</sup>

As it is clear, this list of elements runs through the entire justice chain, which underscores that although it will not always be possible to address all elements in every program, it is important that particular efforts are not introduced in isolation. Thus, well-functioning judicial bodies that have the capacity to adjudicate complex cases regarding international crimes may not have much positive impact if there is insufficient police and investigative capacity to build a credible case and bring charges. In Kenya, for example, the establishment of a new International Crimes Division is being considered to address, inter alia, atrocity crimes. Notwithstanding the host of other political and practical challenges the Kenya situation poses, cf. below Section VI, there is a separate set of issues related to strengthening just one element of the justice link while others (police and prosecutions) are arguably too weak to provide such a judicial body with adequately prepared cases.<sup>22</sup>

The above list points to a number of elements that need to be addressed in a development context to promote complementarity. As noted, sometimes the particular characteristics of ICC crimes will markedly distinguish a complementarity intervention from regular capacity building in the justice sector. In other cases, strengthening complementarity may be a matter of merely accentuating particular elements in a regular justice sector program, which will then have positive spillover effect on the capacity of the host country to prosecute ICC crimes.

It is also important to note that the complementarity principle gives significant leeway for retaining domestic criminal law practices. There is no standard “ICC criminal law system” that needs to be applied. While it is, of course, a judicial decision to determine admissibility in particular instances when a case is before the ICC, it can generally be presumed that there is a broad array of models for national institutions addressing complementarity.

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21 UNDP Discussion Paper: Complementarity and Transitional Justice, November 16, 2012, [http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access\\_to\\_justiceandruleoflaw/complementarity-and-transitional-justice/](http://www.undp.org/content/undp/en/home/librarypage/democratic-governance/access_to_justiceandruleoflaw/complementarity-and-transitional-justice/)

22 ICTJ Briefing, “Prosecuting International and Other Serious Crimes in Kenya”, April 2013 <http://ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf>

For example, even when it comes to whether or not ICC crimes (genocide, war crimes and crimes against humanity) need to be implemented as international crimes in the national system, rather than those crimes being dealt with through regular penal code provisions (murder, rape, etc.), the general understanding is that there is no requirement of incorporating international crimes as such.<sup>23</sup> That said, the national legislation needs to provide the basis for prosecuting the same acts as the Rome Statute for a country to be successful in an admissibility challenge in which it is claimed that the state itself will exercise jurisdiction rather than the ICC.<sup>24</sup> There is also a, so far, unresolved issue of the precise content of the procedural guarantees that need to be in place in a given country for the ICC to accept national prosecutions as sufficient to replace ICC jurisdiction, although the above cited recent decision in the Al-Senussi case would indicate that the threshold is rather low.<sup>25</sup>

*Complementarity in Danish development assistance – options.* For Denmark the challenge is to find ways of promoting complementarity in Danish development assistance in ways consistent with the comparative strengths, capacity and resources of Danida and Denmark's commitment to fighting impunity for atrocities. A starting point could be to survey the relevant Danish justice sector programs in partner countries and identify where transitional justice issues have already been addressed in Danish development assistance and what lessons they provide. Danish development programs are routinely reviewed, and the Danida Evaluation Department publishes a series of Evaluation Studies which contain valuable information on programs relevant to complementarity. Besides formal reviews, other publications shed light on activities relevant to complementarity. For example, the Danida publication *Governance for Development, Five Years support to democracy, human rights, justice and peace building in Uganda, 2011*, provides an interesting overview over the substantial Danish aid to the Ugandan justice sector in recent years. This report deals, inter alia, with important transitional justice issues, not least the establishment of a special International Crimes Division of the Ugandan High Court and support to traditional justice mechanisms.

Such a general examination of Danish justice/good governance programs may also reveal opportunities for addressing complementarity issues within the broader framework of the justice sector program, possibly through the design and implementation of new programs, possibly through the tweaking of existing programs. In this process, the above-mentioned guidelines/toolkits in the field of complementarity could be sought integrated into the tool box of Danish design and implementation of assistance programs. A dedicated training effort by rule of law experts/consultants in integrating complementarity into programs could be undertaken, perhaps in cooperation with relevant partners that have experience with, or offer, such training.<sup>26</sup>

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23 This principle was recently affirmed in Pre-Trial Chamber I, Decision on the admissibility of the case against Abdullah Al-Senussi , ICC-01/11-01/11-466, October 13, 2013. See further: Kevin Jon Heller, "A Sentence-Based Theory of Complementarity", Harvard International Law Journal, Volume 53, Number 1, Winter 2012.

24 For a critical view of the Danish Penal Code in relation to the Rome Statute, see Andreas Laursen: "Internationale forbrydelser i dansk ret." Jurist- og Økonomforbundets Forlag, 2011, ed.: Iryna Marchuk & Jørn Vestergaard. This article raises serious questions whether Denmark has sufficiently "covered" ICC crimes in its Penal Code or whether it would be advisable for Denmark to incorporate international crimes; a step that a number of other Nordic countries, which have criminal law systems similar to that of Denmark, have taken in recent years.

25 Kevin Jon Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process", Melbourne Law School, Criminal Law Forum, Vol. 17, 2006.

26 Among these can be mentioned the Open Society Foundations which have engaged in training in a number of areas. See generally <http://www.opensocietyfoundations.org/>

Networks could be established among rule of law experts from other development cooperation agencies in order to share best practices on promoting complementarity.

**Denmark should consider ways of further operationalizing complementarity in its development assistance programs through strengthening domestic capacity building to investigate and prosecute ICC crimes. There is a need to develop existing toolkits for building complementarity and to integrate these instruments into Danish development assistance as appropriate. With a view to disseminating knowledge about complementarity in development assistance, Danish rule of law experts/consultants should be trained in addressing atrocity crimes in assistance programs. It could also be considered whether it would be appropriate to design and implement pilot programs which could serve as models for complementarity work in Danish assistance. Engaging development practitioners from other development agencies and organizations in complementarity discussions could help build a “complementarity community” among development experts. This could happen both at capital level as well as in local donor networks among rule of law experts. Complementarity work should also be sought integrated into other Danish priority areas such as fragile states and conflict prevention, while respecting that complementarity issues will typically only relate to a rather narrow part of such programs. It is essential that the recipient states are closely involved in developing the above initiatives and specific programs to ensure ownership and acceptance of complementarity being given a more prominent role in such programs.**

## **V. PROMOTING ACCOUNTABILITY IN THE FACE OF ONGOING CRISES (Scenario 2)**

The second scenario concerns situations where atrocities have recently taken place, or are unfolding, and there is an acute need to address impunity issues. Partly to ensure that justice is done, for restorative reasons, but also with a preventive aim, i.e. sending a message to actual and potential perpetrators that they are being watched and that crimes will not go unpunished.

The challenge for Denmark in this context is to find ways of engaging with other countries, civil society and international organizations in order to help identify the best justice options to be promoted. These are policy choices that cut across the Danish Foreign Service, and although they can have financial impact on development assistance programs, they concern classic foreign policy/diplomatic tasks of interacting with other stakeholders and building coalitions.

In these types of crisis situation, there is typically a general consensus in the international community that accountability needs to be addressed. But there is also a tendency for various actors to propose widely differing justice solutions, and have varying views on the priority that should be given to accountability. These proposals are, of course, governed by the policy preferences, strategic interests and practical purposes of each state, but would also sometimes seem to be motivated by more short-term political imperatives, such as being seen to be proactive in crisis situations where other options for action may be more limited. This section discusses ways of ensuring that calls for justice mechanisms are as coherent and thought-through as possible, and that the complementary nature of the various mechanisms is fully exploited.

*Justice does not have an off/on switch.* A preliminary point regarding the promotion of accountability mechanisms would be cautioning against believing that the issue of justice for atrocities in



developing countries is in the hands of outside states like Denmark. This is important both for what could be termed the “idealist” and “pragmatic” approach. The idealist must recognize that justice solutions should reflect local political, legal and cultural needs. Fighting impunity is ultimately about providing justice for the victims of crime, and taking their views into account is crucial to finding sustainable justice solutions.<sup>27</sup> Conversely, the pragmatist must relinquish the notion that justice is just another bargaining chip that can be thrown onto the table in order to negotiate an end to hostilities, or that can be “traded” in exchange for other priorities at a later stage during peace negotiations. Such an approach would not only be morally unacceptable, but is also legally unsound. States are under an international law obligation to investigate and punish international crimes like genocide and war crimes. And where the ICC is engaged in a case and prosecutions are ongoing, this process cannot just be switched off because arrest warrants and prosecutions may become inconvenient for policy makers.<sup>28</sup> Under article 16 of the Rome Statute the Security Council can suspend an investigation for 12 months under Chapter VII of the Charter, but other than that, ICC cases are processes of law governed by the Rome Statute.

*Options for pursuing justice.* Through a crude division of justice mechanisms three basic options for promoting accountability in conflict/post-conflict settings can be listed. It is noted that the focus here is on options that can provide formal justice through prosecutions:

- *The International Criminal Court (ICC)* – Where the state in question is an ICC State Party, the ICC Prosecutor has discretion to start an investigation if certain conditions are met. Under article 53 of the Rome Statute this requires that there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed or is being committed, and a determination that these crimes are of a certain gravity.<sup>29</sup> As noted above, the Prosecutor also needs to determine if genuine investigations or prosecutions are ongoing (complementarity). Because the ICC Prosecutor is an independent organ of the ICC, it is for the Prosecutor to determine if the above mentioned criteria are fulfilled and whether there is basis to request authorization from the Pre-Trial Chamber to open an investigation.<sup>30</sup>

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27 This is not an attempt at relativizing justice or changing the universal right to remedies against gross violations, but merely to emphasize the need to ensure that transitional justice is rooted in local society. See further: Office of the United Nations High Commissioner For Human Rights, “Rule-Of-Law Tools For Post-Conflict States, National Consultations on Transitional Justice,” New York and Geneva, 2009. [http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ\\_EN.pdf](http://www.ohchr.org/Documents/Publications/NationalConsultationsTJ_EN.pdf)

28 The extent to which such obligations provide room for amnesties is a controversial issue, but legally it is generally recognized that amnesties for a number of international crimes would be inconsistent with international law, see Office of the United Nations, High Commissioner For Human Rights, “Rule-Of-Law Tools For Post-Conflict States, Amnesties”, New York and Geneva, 2009. For example the Libya situation led to suggestions from some that exile was an option for Gaddafi, see The Guardian, Diplomats discuss Libya’s future as Italy plots Gaddafi’s escape route, March 29, 2011, <http://www.theguardian.com/world/2011/mar/28/diplomats-meet-italy-gaddafi-escape>

29 Factors used to assess gravity include the scale of the crimes; their nature; the manner in which they were committed; and their impact, cf. Rome Statute article 42.

30 Cf. Rome Statute article 15. Where states have self-referred there is no requirement for authorization from the ICC Pre-Trial Chamber.

States Parties, like Denmark may call for accountability in particular situations, but attempts at giving specific advice/directions as to whether certain acts should lead to action by the ICC Prosecutor may be seen as incompatible with the Prosecutor's independence and the Rome Statute. Similarly, restraint should be shown in relation to determinations of whether or not particular acts constitute crimes, which is ultimately a judicial decision.<sup>31</sup>

For situations in non-State Parties, the ICC can be engaged through a Security Council referral of the situation to the Court. This requires a majority of 9 of the 15 members of the Security Council, acting under Chapter VII of the UN Charter concerning international peace and security, and the absence of a veto from any of the five permanent members. It is thus not specific cases that are referred, but the situation in a given country or part of a country.<sup>32</sup> Within the parameters of Chapter VII (and the Rome Statute) this decision by the Council is in principle a political decision, and one which Denmark may have a view on, irrespective of whether or not Denmark is on the Council at that particular time.<sup>33</sup>

- *Hybrid criminal courts* – Hybrid criminal courts and tribunals fit somewhere between true international bodies and regular domestic courts. Through their constituent documents, typically an international agreement between the host country and the UN, hybrid courts have a mixed composition of international and domestic judges and prosecutors; they have jurisdiction over international crimes but also certain domestic crimes committed in the country in question, and are funded largely by the international community. Examples of such hybrids that share all or some of the above characteristics are the Lebanon Special Tribunal, the Extraordinary Chambers in the Courts of Cambodia, and the Special Court for Sierra Leone.<sup>34</sup> The mix of national and international staff, the constituent role of the UN and the local setting and accessibility for victims is aimed at ensuring local ownership and legitimacy of the proceedings, while at the same time bolstering the ability of the criminal process to withstand domestic pressures and interests. It is important to emphasize that there is no particular model for such hybrids. They are tailor-made to reflect the particular circumstances of the country concerned, including the balance between sovereignty of local authorities and the priorities of the international community.

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31 UN Security Council Resolution 1970 (2011) of February 26, 2011 which referred the situation in Libya to the ICC provides an interesting example. In the preamble it is stated: "Considering that the widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population may amount to crimes against humanity". The conditional "may" seems to strike the balance, but interestingly the determination of the attacks as being widespread and systematic smacks of a judicial determination which it is not uncontroversial for the Council to make.

32 The possible limitations on a Council referral, including how geographically or incident-specifically the Council can define a referral to the ICC, have been discussed in a number of contexts, more recently regarding the situation in Syria: Kevin Jon Heller, *Opinio Juris*, Could the Security Council Refer Only Assad's Use of Chemical Weapons?, August 28 2013, <http://opiniojuris.org/2013/08/27/security-council-refer-assads-use-chemical-weapons/>

33 See e.g. letter of January 14, 2013 from 57 countries, including Denmark, to the Security Council calling for a referral of the situation in Syria to the ICC. <http://www.hrw.org/news/2013/01/14/un-security-council-heed-call-justice-syria>

34 A variant hereof is "domestic courts" established by a local UN administration. These include the East Timor Special Panels of Dili District Court and the War and Ethnic Crimes Courts, created by the UN administration in Kosovo. See further regarding hybrid courts: International Centre for Transitional Justice, *Rule-of-Law Tools for Post-Conflict States: Maximizing the legacy of hybrid courts*, January 1, 2008 <http://ictj.org/publication/rule-law-tools-post-conflict-states-maximizing-legacy-hybrid-courts>

- *Domestic courts of the situation country* – As detailed above under Section IV, atrocity crimes may be dealt with by the regular criminal justice system in a given country. In some countries special judicial and prosecutorial divisions for international crimes have been set up as part of the domestic system, with officials having received dedicated training in handling such cases.<sup>35</sup> There is a certain overlap between such special divisions in domestic courts and in-country hybrid courts, but for present purposes the distinction is deemed useful.

Broadly speaking, these are the three main avenues available to address atrocity crimes.<sup>36</sup> It should be noted that truth and reconciliation commissions are not mentioned among these options. Not because they are not relevant in a justice context; on the contrary, they have become an essential part of transitional justice processes in many countries. Truth commissions give victims a voice, and can furthermore have important investigative functions such as protecting evidence, compiling archives, interviewing victims and key political actors, and producing reports and recommendations. But typically such commissions often do not have authority to refer cases to prosecution, and will seldom ultimately satisfy a requirement of investigation or prosecution of the most responsible perpetrators of ICC crimes to the exclusion of ICC jurisdiction (complementarity).<sup>37</sup> Similarly informal or traditional justice mechanisms, which often play an important role in developing societies and may have a positive effect on reconciliation efforts, typically do not contain judicial mechanisms which from a complementarity perspective are suitable for dealing with those most responsible for serious international crimes.<sup>38</sup> It is emphasized that the exclusion here of truth commissions and traditional justice from the key accountability options is in no way meant to signal that these instruments should not be part of the tool box for promoting reconciliation and justice.

A brief mention should also be made of the potential of regional criminal courts. Although there are presently no such courts in operation there has been some discussion especially of the possible establishment of an African Criminal Court and the AU governing bodies have directed its subsidiary bodies to pursue this option further.<sup>39</sup>

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35 Prosecution in third states under the principle of universal jurisdiction can potentially also contribute to addressing impunity. Although such prosecutions will seldom be of a scale to significantly address mass atrocities, but can nevertheless be important underpinnings of the fight against impunity. Prosecutions on the basis of universal jurisdiction will, however, not be discussed in any detail here.

36 Ad hoc tribunals like the ICTY or ICTR are not listed as it would seem unlikely, and probably inadvisable, that the Security Council should establish such an organ again. Ad hoc tribunals are still in principle legally available instruments for the Council, but have not for a number of years been a practical option, already because veto-wielding countries like Russia or China seem to have no appetite whatsoever for the creation of such subsidiary bodies to the Council.

37 More than 40 official truth commissions have been created globally to provide an account of past abuses. Apart from non-judicial commissions, truth-seeking initiatives can take many forms including freedom of information legislation, declassification of archives, investigations into cases concerning missing and disappeared persons. Generally on truth and reconciliation commissions, see ICTJ <http://ictj.org/gallery-items/truth-commissions>. Another useful compilation can be found in: Office Of The United Nations, High Commissioner For Human Rights, “Rule-Of-Law Tools For Post-Conflict States, Truth Commissions,” New York and Geneva, 2006 <http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf>

38 Regarding informal justice systems, see Danish Ministry of Foreign Affairs, Danida, How to Note – Informal Justice Systems, June 2010, which provides technical guidance and inspiration for programming choices in Danish development cooperation.

39 Most recently: Decision on the African Union’s Relationship with the ICC, Extraordinary Summit, African Union, Addis Abeba, Ethiopia, 11-12 October 2013, <http://www.au.int/en/content/extraordinary-session-assembly-african-union>

Such a court could in principle exercise complementarity in the sense of the ICC statute. It is probably too early to judge whether or not this will become a realistic option, and caution should be observed not to give undue weight to such future mechanisms. Furthermore, with the establishment of such a court there are real risks of duplication of ICC efforts and such institutions being used to divert specific cases from the ICC.

With these caveats concerning other possible venues for justice and reconciliation focus will in the following be on the three options mentioned above (ICC, hybrid courts, domestic justice institutions.) Prioritization among these will obviously be highly dependent on the specific legal, political and factual circumstances surrounding the concrete situation. Often significant material will be available through commissions of inquiry, monitoring by international organizations and civil society, and such information will necessarily assist Danish policy choices and cooperation with partners. In some cases, this type of information will, however, be lacking. Denmark should take a proactive role in supporting the establishment of fact-finding missions and commissions of inquiry. Ensuring that such bodies produce objective and comprehensive documentation is of great importance. Denmark should also seek to promote membership of Danish experts on these bodies, which are typically appointed by the UN Secretary-General or relevant UN bodies, e.g. as the Human Rights Council.

Despite the fact-specific conditions that will determine Danish policy choices some general observations, organized under four headings, can nevertheless be made:

*If possible, go local* – The starting point for addressing issues of impunity should virtually always be domestic justice authorities. It is the state on whose territory and by whose citizens atrocities are committed that has the primary responsibility under international law to investigate and prosecute such crimes. Denmark should remain focused on insisting that states fulfil that obligation, while at the same time being ready to provide assistance to domestic investigations and trials where feasible. Shifting focus to international mechanisms too early may have the effect of being seen to release domestic authorities from political pressure and legal obligations to investigate and prosecute cases themselves. And it may have the effect of shifting the debate to one regarding outside intervention, rather than the state's obligations.

The situation in Kenya following the post-election violence in 2007/08 is illustrative in this regard. The ICC's involvement flowed from the peace agreement brokered by former UN Secretary-General, Kofi Annan between the Kenyan parties to the post-election conflict.. As part of that agreement crimes committed during the post-election violence were to be self-referred by Kenya to the ICC, if Kenyan authorities did not address the atrocities.<sup>40</sup> Limited pressure was applied to ensure such domestic proceedings and focus eventually shifted to the ICC. But rather than Kenya self-referring, the Prosecutor acted *proprio motu*, and the debate ultimately centered on what was perceived as ICC's illegitimate meddling in Kenyan affairs – a discussion that continues until this day.<sup>41</sup>

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40 ICC Press Release: Kenyan High-Level Delegation meets ICC Prosecutor, March 7, 2009, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/Pages/pr431.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/Pages/pr431.aspx)

41 Decision on the African Union's Relationship with the ICC, Extraordinary Summit, African Union, Addis Abeba, Ethiopia, October 11-12, 2013, <http://www.au.int/en/content/extraordinary-session-assembly-african-union>

Obviously, in conflict situations domestic courts are often not functioning effectively, or they are under the control of a regime that is (partly) responsible for crimes and rejects accountability. But this does not mean that some of the groundwork for domestic prosecutions cannot be carried out. As a precursor to domestic prosecutions, initiatives can be taken to collect documentation of crimes and prepare case files for future prosecutions. An example of such an initiative is the Syria Justice and Accountability Centre (SJAC), which documents violations of international criminal, humanitarian, and human rights law in Syria. The aim is to provide data and expertise to serve as a deterrent to continuing abuses and for future accountability and transitional justice efforts in Syria.<sup>42</sup>

Furthermore, even where an ongoing conflict situation on the ground does not make holding trials a realistic option in the near future, other initiatives can be undertaken. These include drawing up draft legislation for reform the domestic judicial system in a post-conflict situation, training domestic prosecutors and judges possibly outside the country in question as well as building domestic public support for prosecutions. The groundwork for domestic prosecutions can also be laid through seeking to insert provisions regarding impunity into peace agreements and excluding amnesties for international crimes.

*Be creative* – The lesson from transitional justice initiatives over the past 20 years is that there is significant room for applying different justice mechanisms simultaneously, and for tailoring such mechanisms to the particular circumstances. For example, the interplay between ICTY and the Bosnia War Crimes Chamber illustrates how international crimes stemming from the same conflict can be prosecuted in different forums.<sup>43</sup> Although the specific jurisdictional and procedural rules for this division of labour between ICTY and domestic courts in the Balkans differ from those for the ICC’s interaction with domestic courts, this precedent potentially holds important lessons for the future. Support for an ongoing ICC investigation in a particular situation can in principle be provided simultaneously with support for domestic prosecutions and investigations.<sup>44</sup> The focus of the ICC on “those most responsible” already indicates that there could be space for a division of labour between various institutions, and where particular capacities are lacking in a country, these can be offered by the international community. As discussed below under Section VI, this requires great sensitivity to the interplay between the ICC and domestic prosecutions in order to ensure that well-intentioned outside interventions do not undermine the ICC’s work.

*Be ready to stay the course, also politically* – As with many other issues, the politics of international criminal justice change. What may have seemed a politically expedient drive to fight impunity at one point may at a later stage become an awkward issue that some states would rather ignore. There are, however, reasons why this is particularly problematic when it comes to international justice initiatives. First of all, of course, the victims of mass atrocities have a right to justice that can and should not be suppressed. But a challenge is presented by the particular dynamics of criminal court cases. Once judicial institutions take on a case, the handling of these is to a large extent governed by specific rules and procedures which cannot “be done away with”.

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42 Syria Justice and Accountability Center <http://www.syriaaccountability.org>

43 Human Rights Watch, “Bosnia: Key Lessons From War Crimes Prosecutions, Court’s Experience Offers Insights for Domestic Prosecutions of Atrocities”, March 12, 2012, <http://www.hrw.org/news/2012/03/12/bosnia-key-lessons-war-crimes-prosecutions>.

44 The example of Uganda is illustrative. While Denmark voiced support for the ICC case, it simultaneously supported the establishment of the International Crimes Division of Uganda’s High Court.

The system of indictments, arrest warrants, institutional structures, etc. stays in place and runs according to the statute of the court in question. When Denmark as a donor engages with an accountability process, it thus often means a long-term commitment of political support.

Also when it comes to Security Council referrals to the ICC there is a danger of promoting such referrals without adequate focus on how future cases may play out politically – and without the requisite commitment to these processes. The two existing referrals are illustrative of these problems. In relation to Darfur, referred in 2005, the Sudanese authorities, with the backing of the AU, have now for several years refused to cooperate with the ICC. Some may question the prosecutorial strategy in relation to Sudan, but the fact remains that there has been limited political will to see through the referral. The ICC Prosecutor reports to the Security Council every 6 months, but without the Council so far having taken meaningful action in the face of Sudanese non-cooperation. Similarly with regard to the referral to the ICC of the situation in Libya in 2011, which – like the Sudan situation – was heralded as a great victory for international criminal justice, the political appetite for ensuring cooperation with the ICC and for enforcing its arrest warrant seems to be waning.

Both these situations are obviously very complex, politically and legally, and there are no simple solutions for ensuring progress in the cases. But the situations nevertheless illustrate how vulnerable the ICC can be made to seem when left to fend for itself. The Court has no enforcement mechanisms of its own and relies squarely on states to exert pressure to ensure cooperation. When such pressure does not come from the Security Council or other powerful regional organizations/individual states, the Court loses credibility and integrity. Clearly, Denmark's actual role and influence in decision making will often be limited in these situations, particularly when Denmark is not on the UN Security Council. But this makes it all the more important for Denmark to ask the tough questions of partners, and itself, both to ensure adequate support for the ICC, where the Court is faced with non-cooperation, but also when considering whether or not to promote an ICC referral by the Council. Referrals may at first seem to be the international community's vote of trust in the ICC, but can later turn out to be much more problematic for the Court.

*Ensure adequate resources for the duration of the process* – Post-conflict trials typically take a long time and often take turns which are exceedingly difficult to foresee. Because criminal trials are adversarial processes and because judges are independent, the duration and costs of trials vary greatly. Particularly hybrid tribunals like The Special Court for Sierra Leone, The Lebanon Tribunal and the Extraordinary Chambers in the Courts of Cambodia, which have relied on voluntary funding, have faced, and continue to face, serious funding problems that have threatened the completion of trials. This means that these bodies are often on the verge of insolvency and their staff end up devoting an extraordinary amount of time and energy to petitioning donors for support. When considering setting up such hybrid or internationalized courts, every effort should be made to ensure a sound financial basis for the operation of these institutions.

Despite the ICC being funded by assessed contributions from its member states, budgetary challenges are also very real at the ICC and the Court is already operating at the limit of its financial capacity, which in turn is defined by the yearly budget. Funding is thus a real issue for the ICC, and it is increasingly becoming clear that the ICC is a resource-driven, not a case-driven court, i.e. that it is the resources available to the Court that to a large degree determine how many investigations and prosecutions it will initiate, and how quickly and thoroughly it can do so.

Also when it comes to referrals by the Security Council to the ICC there are real issues of finance, which have increasingly come into focus in recent years. In early 2013, 57 U.N. Member States, including Denmark, from Africa, Asia, Europe and Latin America, coordinated by Switzerland, sent a letter requesting the U.N. Security Council to refer the situation in Syria to the International Criminal Court for investigation and prosecution. Interestingly the letter includes language to the effect that the financial burden flowing from such a possible referral should also be addressed by the Council. This notion has not gained much traction yet, but should be pursued further.

The above considerations are obviously only some of the factors which should be taken into account when considering possible institutional options for accountability. The list could be expanded further, and the complex interplay between the ICC, hybrid tribunals and domestic courts provides a host of possibilities for utilizing the instruments that best fit the circumstances.

**When mass atrocities occur, Denmark should engage with other countries, international organization and NGOs to consider institutional options for ensuring accountability and redress for victims. The degree of Danish involvement will necessarily vary with the relationship Denmark has to the country in question, including factors such as strategic interests, development cooperation, historical ties, etc. But as a matter of policy, addressing atrocities should be considered a legitimate and important priority for Denmark no matter where the atrocities take place. Accountability should be raised as a Danish priority at the earliest stage of Danish engagement in conflict resolution, and support should be given to the establishment of fact-finding commissions and commissions of inquiry to ensure public awareness. Denmark should also seek to promote membership of Danish experts on such bodies, which are typically appointed by the UN Secretary-General or relevant UN bodies, e.g. the Human Rights Council.**

**In determining what avenues for justice Denmark should support in the face of ongoing atrocities Denmark should look to a variety of options spanning domestic justice institutions, hybrid and internationalized courts and the International Criminal Court. The starting point should be emphasis on incentives for and political pressure on domestic authorities to provide justice, as well as assessments of domestic justice capabilities and possible support mechanisms. Even where domestic institutions may not be a viable option because of lack of political will or because of the intensity of conflict, the groundwork for domestic prosecutions in a post-conflict scenario can be carried out in the form of (out-of-country) training of prosecutors and judges, gathering of evidence, drafting of constitutional/criminal legislation, etc. The potentially simultaneous activation of several justice institutions for the same situation should be creatively considered with an emphasis on finding a division of labour that draws on the particular strengths of the particular options. Before lending political and/or financial support to particular justice programs and institutions Denmark should to the greatest possible extent ensure that the necessary financial resources will be made available in order to ensure sustainability and credibility of these programs/institutions. Caution should be exercised towards embracing justice options which may seem attractive in the present, but whose implementation in the long risks lacking sufficient political support.**

## **VI. PROMOTING COMPLEMENTARITY IN CASES PENDING BEFORE THE ICC (Scenario 3)**

This section briefly deals with what has been termed Scenario 3 above: the question of how Denmark should approach situations where the issue of complementarity is, or clearly can be expected to be, the subject of decisions by the ICC. The challenges here are manifold and span issues from how politically to handle calls for the ICC to reinterpret its understanding of complementarity to the day-to-day interaction with the authorities of states with pending complementarity issues before the Court.

The interplay between national jurisdictions and the ICC has come to a head in recent months with the AU making charges of ICC bias against African leaders and putting forward demands for the UN Security Council to defer the case against the Kenyan president.<sup>45</sup> The situation is rapidly developing and this paper would not seem to be the most suitable forum for addressing these fluid issues. The focus here will instead be on whether, and to what extent,<sup>46</sup> countries like Denmark should support domestic justice institutions and prosecutions that are subject to complementarity proceedings, and whether such support can be seen to be incompatible with or undermining the ICC.

In these instances complicated issues arise, not so much because of a risk of breaching specific provisions of the Rome Statute on cooperation with the Court, but primarily because such support could be seen as adversarial to the Court's effort towards combating impunity and effectively ensuring prosecutions of those responsible for mass atrocities. The issues are thus to a larger extent political than legal, although where failed complementarity challenges lead to decisions of non-cooperation and arrest warrants these must of course be complied to in accordance with Rome Statute obligations.

As noted above, the basic principle of the Rome Statute is that a case will be declared inadmissible before the ICC if a state which has jurisdiction over a case is investigating or prosecuting the case unless that state is unwilling or genuinely unable to carry out the investigation or prosecution. The starting point clearly is that where the trial phase has not yet started and there are no decisions of the Court regarding complementarity and/or lack of cooperation by the state in question, Denmark and other donor countries are free to provide support to domestic institutions and prosecutions. That is in principle also the case when there is a stated view by the situation country, with which Denmark cooperates, that the strengthening of justice institutions is meant to bolster an actual or future complementarity challenge.<sup>47</sup>

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45 BBC News, "African Union urges ICC to defer Uhuru Kenyatta case", October 12, 2013. <http://www.bbc.co.uk/news/world-africa-24506006>

46 The extent to which such obligations provide room for amnesties is a controversial issue, but legally it is generally recognized that amnesties for a number of international crimes would be inconsistent with international law, see Office Of The United Nations, High Commissioner For Human Rights, "Rule-Of-Law Tools For Post-Conflict States, Amnesties," New York and Geneva, 2009. [http://www.ohchr.org/Documents/Publications/Amnesties\\_en.pdf](http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf)

47 There may be particular circumstances regarding a given situation that should lead to caution in engaging with the host country, e.g. where required witness protection is inadequate or perhaps even non-existent or there are other indications of bad faith on the part of the country in question.



However, where there has been a complementarity challenge raised by the situation country in question and the Court has rejected it, the situation is somewhat more complex. In practice, such situations have already arisen in the sense that complementarity challenges have been rejected by the ICC while the states in question have persisted in arguing that national prosecutions should take place to the exclusion of the ICC cases.

On 20 August 2011 the Appeals Chamber of the ICC adopted a judgment<sup>48</sup> dismissing an appeal brought by the Republic of Kenya challenging the admissibility of the case in the light of national investigations into the 2007/08 post-election violence. The Kenyan government argued that the Court should relinquish jurisdiction because of on-going investigations in Kenya. When considering the Kenyan arguments the Court found that it was not merely a question of ‘investigation’ in the abstract, but whether the same case was being investigated by both the Court and a national jurisdiction. The Court determined that the national investigation must cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.<sup>49</sup> That was not found to be the case in the Kenya-situation.

In the Libya situation a challenge was similarly made by the Libyan government regarding the cases of both Saif Gaddafi and Abdullah Al-Senussi, respectively the son and former intelligence chief of Muammar Gaddafi, against whom arrest warrants had been issued by the Court. In the case of Saif Gaddafi, Pre-Trial Chamber I on May 31, 2013 rejected Libya’s challenge to the admissibility of the case and reminded Libya of its obligation to surrender the suspect to the Court. However, on October 12, 2013 the ICC accepted that the Libyan authorities were genuinely seeking to prosecute Al-Senussi.<sup>50</sup> In the Al-Senussi case the Chamber found that there were no indications that the proceedings against Al-Senussi were being undertaken for the purpose of shielding him from criminal responsibility such as would warrant a finding of “unwillingness” within the meaning of article 17(2)(a) of the Statute. In accordance with earlier jurisprudence the Chamber applied the “same individual for substantially the same conduct” test, although perhaps in a rather more generous manner than earlier decisions. The Chamber also concluded that the national proceedings were not unjustifiably delayed and recognized the security challenges that had slowed down the domestic proceedings in Libya.

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48 The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali ICC-01/09-02/11 OA, decision of August 30, 2011.

49 The Court also clearly stated that it is for the state challenging the jurisdiction of the Court to prove that such genuine investigations are under way. That the burden of proof in such cases clearly rests on the situation country is not always clear from the rhetoric surrounding such cases. The ICC is often called on to “refer cases back” thereby insinuating that it is for the ICC to take such an initiative when in fact that is not the case, see e.g. “African Leaders Support Call to Refer ICC Case Back to Kenya,” AllAfrica, May 27, 2013 <http://allafrica.com/stories/201305281153.html>

50 Pre-Trial Chamber I, Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-466, October 13, 2013.

Of particular interest in a complementarity context is that the Chamber also found that the international support to the Libyan justice institutions was of relevance, as it was noted that UN has been providing assistance for the Libyan government to formulate a prosecutorial strategy, as well as providing training for public prosecutors on screening and criminal investigations.<sup>51</sup>

On the one hand, these cases show that international assistance can help support a complementarity challenge. The Al-Senussi case illustrates how the Court will give positive consideration to such outside support. But where the complementarity challenge fails and the arrest warrant stands (Saif Gaddafi) or the cases continue before the ICC (the Kenya cases), the role of outside donors can be more problematic.

Firstly, it is important to note that complementarity challenges cannot just be repeated. As set out above, the possibility of launching admissibility challenges is governed by article 19, which in paragraph (4) determines that a challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of a trial, but this option is basically limited to situations where the person in question has been tried for the same conduct and a case cannot continue before the ICC, cf. Rome Statute art. 17. In essence these provisions limit the possibility of making complementarity challenges to once during the pre-trial phase. There is no practice as of yet indicating how to understand the “exceptional circumstances” that may lead the Court to allow a second challenge, but the statute itself leaves very little room for a second challenge.

That in turn means that the chances of domestic jurisdictions “taking over” a specific case, once a complementarity challenge has been rejected by the Court, are extremely limited. The reason for article 19 being drafted in this fairly narrow way is to avoid ICC cases being delayed and complicated by repeated complementarity challenges once the issue has been settled. It is neither in the interest of the ICC or the accused that a given trial is repeatedly postponed for lengthy determinations of (the same) complementarity issue.

For foreign donors this, however, raises the question of how to design possible support programs for domestic justice institutions where these institutions have the explicit aim of, or could potentially be employed to, undermine ongoing ICC prosecutions. The basic guideline should probably be that donor states should not support justice programs or specific trials in ICC situation countries where there are substantial reasons to believe that such initiatives would directly be used to undermine outstanding arrest warrants or otherwise serve as legal and political justification for non-cooperation with the ICC. This obviously requires a context-specific evaluation of each individual situation and often it will not be possible to foresee how justice programs that donors agree to support will be developed in the future. However, it provides strong reasons for donors to exhibit caution and awareness towards engaging with domestic authorities in these situations.

Taking the examples of Kenya and Libya might prove illustrative although the following comments should be seen as general considerations rather than as in-depth analysis of the developing situation

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51 The decision also clarifies that the procedural guarantees in a domestic trial do not have to be identical to those before the ICC, and deals, perhaps less convincingly, with the issue of the Libyan authorities failing to appoint a counsel to Al-Senussi. See also *Opinio Juris* Blog, “Pre-Trial Chamber I’s Inconsistent Approach to Complementarity and the Right to Counsel,” Kevin Jon Heller, <http://opiniojuris.org/2013/10/12/ptc-inconsistent-approach-right-counsel/>

in the respective countries. Concerning Kenya it can be noted that an International Crimes Division (ICD) is under establishment although progress is slow and the outlook for the ICD actually coming into existence uncertain.<sup>52</sup> This ICD would potentially have jurisdiction over a host of international crimes, including ICC crimes. As noted above there is in principle nothing to hinder domestic prosecutions of crimes committed during a particular conflict from take place in parallel with ICC prosecutions. On the contrary, there are structural reasons why the ICC would not be able to undertake all relevant prosecutions in post-conflict situations with thousands of victims, and a perhaps correspondingly great number of perpetrators. Thus, in for example the Kenya situation outside donors may provide support to the ICD even in a situation like the present where, despite having had a complementarity challenge rejected by the ICC in the Ruto and Kenyatta-cases, the Kenyan authorities continue to argue generally in favour of ICC relinquishing jurisdiction. There is, as of yet, no direct link between the ICD and the ICC cases.

The situation in Libya is somewhat different. The Libyan authorities' intent of taking specific action to charge and convict Saif Ghadafi in Libyan courts while his arrest warrant is still pending before the ICC is more controversial. Outside support directly related to prosecutorial or judicial initiatives concerning Saif Gadaffi could come under criticism and be seen as undermining the outstanding arrest warrants against Gadaffi. That said, the specific factual circumstances relating to Saif Gadaffi's situation makes the issue somewhat more complicated as he is presently not in the custody of the Libyan central authorities. Furthermore, there would seem to be little doubt of the Libyan authorities' willingness to prosecute Saif Gadaffi, although the crimes for which he would stand trial are not entirely clear.

Another area where such issues of complementarity might arise could be in the context of the establishment of a regional African criminal court to address atrocity crimes. In the recent communiqué from the AU Summit on the ICC in Addis Ababa in October 2013 strong calls were made by African leaders for accelerating the establishment of such an African criminal court. It can be foreseen that outside financial support will be required and also here the relation between ongoing cases before the ICC and the potential case load for such a court should be part of donors' considerations. Strong engagement in the establishment of such new structures may be utilized politically to undermine the cooperation obligations towards the ICC.

In conclusion, the above leads to the perhaps somewhat ironic situation of donors having to show greater care in providing support for justice sector programs, where there is an active but under the ICC Statute insufficient, attempt at prosecuting ICC indictees before domestic courts. The risk of donors "interfering" in the concrete cases before the ICC is less immediate where no such cases are ongoing at the domestic level. In those cases, though, broader issues of reactions to non-cooperation with the ICC may come up, which would lead donor countries to consider other adjustments to their development cooperation efforts in the country in question.

As a final note it should be added, that the above considerations do not, of course, address the more general question of whether the Rome Statute, and the Court's interpretation hereof, have indeed struck the right balance between the interest of states in retaining jurisdiction and interest

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52 See letter to the President of the UN Security Council from Fergal Gaynor, Legal Representative of Victims, *The Prosecutor v Uhuru Muigai Kenyatta*, ICC, November 3, 2013, as well as ICTJ Briefing, "Prosecuting International and Other Serious Crimes in Kenya", April 2013 <http://ictj.org/sites/default/files/ICTJ-Briefing-Kenya-Prosecutions-2013.pdf>

in bringing trials before the ICC. The complementarity standard in the Statute and the ability to bring challenges, as presently applied in the Court's jurisprudence, could be altered through an amendment to the Statute if it was felt that there is a genuine need.

**Complementarity challenges to the jurisdiction of the ICC may raise a number of issues for Danish developments assistance to domestic justice institutions in the situation country in question. Depending on the stage in a complementarity challenge at which such support is provided, actions of donors may undermine the credibility of the ICC and be seen as supportive of (potential) non-cooperation by the situation country. As a starting point it may be assumed that there are generally few restrictions on providing technical support for the domestic justice system of a situation country which has expressed the intent to challenge or is in the process of challenging the admissibility of a case before the ICC, save for instances where there are clear indications that such proceedings have the effect or purpose of undermining a potential case before the ICC, or instances where the proceedings are not credible. Where a situation country has had an admissibility challenge rejected by the ICC but continues pursuing such options politically/institutionally, caution should be observed in providing assistance to such domestic proceedings. This is particularly the case where these proceedings are explicitly aimed at supporting a continued/renewed complementarity challenge which under the Rome Statute would be highly unlikely to succeed.**

## **VII. CONCLUDING REMARKS**

This Policy Research Paper has attempted to describe certain situations where the issue of complementarity comes up in Danish foreign policy and development assistance. Under three headings the focus has been on 1) strengthening complementarity in Danish development assistance through support for domestic capacity building, 2) choosing the right justice options to pursue in the face of ongoing atrocities, and 3) managing support for domestic justice institutions in situations where a complementarity challenge regarding the country in question has been or will be brought before the ICC.

The recommendations made throughout the paper are briefly summarized below.

- Denmark should continue to support an increased focus on complementarity work by the ICC organs. Recognizing that the Court is not a development institution and that the Rome Statute may set certain limits on both ICC and States Parties complementarity work in particular situations, Denmark should work with ICC organs and other states to promote ICC's contribution to the strengthening of national justice sectors. Synergies between ICC and development assistance actors should be expanded, and ICC analysis and insight into national justice sectors should to the greatest possible extent be shared with other actors.
- Denmark should support that avenues for strengthening the work of the ASP Secretariat Focal Point is explored, and should for the dedication of resources to increase the impact of the work of the Focal Point. Maintaining complementarity on the ASP agenda, and expanding time devoted to complementarity discussions should be prioritized, as should integrating results from informal processes like the Greentree Process into the work of the ASP. Denmark should

actively seek to engage more States Parties in the ASP's work on complementarity, ensuring a smooth transition of the Danish Focal Point role to others.

- Denmark should consider ways of further operationalizing complementarity in its development assistance programs through strengthening domestic capacity building to investigate and prosecute ICC crimes. Developing existing toolkits for building complementarity and integrating these instruments into Danish development assistance should be considered. With a view to disseminating knowledge about complementarity in development assistance, Danish rule of law experts/consultants should be trained in addressing atrocity crimes in assistance programs. Denmark should consider engaging development practitioners from other development agencies and organizations in complementarity discussions in order to help build a “complementarity community” among development experts. It could also be considered whether it would be appropriate to design and implement pilot programs which could serve as models for complementarity work in Danish assistance. Denmark should consider the feasibility of such initiatives both at capital level as well as in local donor networks among rule of law experts.

Denmark should, in accordance with existing guidelines and policies on ownership, continuously work to ensure that the recipient states are closely involved in developing the above initiatives.

- When mass atrocities occur, Denmark should engage with other countries, international organization and NGOs to consider institutional options for ensuring accountability and redress for victims. The degree of Danish involvement will necessarily vary with the relationship Denmark has to the country in question, including factors such as strategic interests, development cooperation, historical ties, etc. But as a matter of policy addressing atrocities, no matter where they take place, should be considered a legitimate and important priority for Denmark. Accountability should be raised as a Danish priority at the earliest stage of Danish engagement in conflict resolution, and support should be given to the establishment of fact-finding commissions and commissions of inquiry to ensure public awareness.

In determining what avenues for justice Denmark should support in the face of ongoing atrocities Denmark should look to a variety of options spanning domestic justice institutions, hybrid and internationalized courts, and the International Criminal Court. The starting point should be emphasis on incentives for and political pressure on domestic authorities to provide justice, as well as assessments of domestic justice capabilities and possible support mechanisms. Even where domestic institutions may not be a viable option because of lack of political will or the intensity of conflict, the groundwork for domestic prosecutions in a post-conflict scenario can be carried out in the form of (out-of-country) training of prosecutors and judges, gathering of evidence, drafting of constitutional/criminal legislation, etc.

The potentially simultaneous activation of several justice institutions for the same situation should be creatively considered with an emphasis on finding a division of labour that draws on the particular strengths of the particular options. Before lending political and/or financial support to particular justice programs/institutions Denmark should to the greatest possible extent ensure that the necessary financial resources will be made available in order to ensure sustainability and credibility of these programs/institutions. Caution should be observed towards embracing justice options which may seem attractive in the present, but whose implementation in the long run risks lacking sufficient political support.

- Complementarity challenges to the jurisdiction of the ICC may raise a number of issues for Danish developments assistance to domestic justice institutions in the situation country in question. Depending on the stage in a complementarity challenge at which such support is provided, actions of donors may undermine the credibility of the ICC and be seen as supportive of (potential) non-cooperation by the situation country. As a starting point it may be assumed that there are generally few restrictions on providing technical support for the domestic justice system of a situation country which has expressed the intent to challenge, or is in the process of challenging the admissibility of a case before the ICC, save for instances where there are clear indications that such proceedings have the effect or purpose of undermining a potential case before the ICC or instance when the proceedings are not credible. Where a situation country has had an admissibility challenge rejected by the ICC but continues pursuing such options politically/institutionally, caution should be exercised in providing assistance to such domestic proceedings. This is particularly the case where these proceedings are explicitly aimed at supporting a continued/renewed complementarity challenge which under the Rome Statute would be highly unlikely to succeed.

These recommendations are meant to inspire further debate and action by Danish authorities in relation to the investigation and prosecution of mass atrocities. While particular situations will be fact specific, it would seem important that states like Denmark both internally and with partners continue the principled discussions of how to address accountability in the context of rising tensions between traditional notions of sovereignty and international criminal law norms. It is the hope that this paper can help further refine Denmark's contribution to this dialogue and ultimately assist in promoting the approach that best deliver justice to victims of mass atrocities.