on the Court's ability to access in-country witnesses as well as fulfill its Article 68 obligation to protect witnesses.

There is scope for the ''interests of justice'' concept to be developed further, particularly with respect to Security Council referrals which are primarily political in nature. Greater reflection by the Prosecutor on whether all Security Council referral resolutions, especially those adopted with the limitations and exclusions discussed earlier, serve the interests of justice is important. This would enable the Prosecutor to be independent and to maintain the perception of political independence from the Security Council. At present, concern has been expressed over the speed at which the Office of the Prosecutor has launched investigations following the two Security Council referrals. In 2011, the Prosecutor launched the Libya investigation within days of receiving the referral—a record with regards to any of the investigations conducted by the Prosecutor's Office.

Although a decision not to proceed with investigations or prosecutions in the interests of justice is discretionary, such a decision is subject to appropriate review by the Pre-Trial Chamber pursuant to Article 53(1) of the Rome Statute. This oversight function prevents arbitrariness. The Pre-Trial Chamber would ensure a balance between the interests of justice and the Prosecutor's obligation or expectation to investigate and prosecute every situation referred.

The process of concluding multilateral treaties is steeped in politics and the individual interests of the states involved. Diplomacy and compromise are central to the success of a treaty regardless of its subject matter. As William Schabas wrote, ''At the international level policy and politics seem to sit much closer to the centre of the justice agenda.''[1] The Security Council operates within the political domain, and the ICC is required to function in this context. This recognition should cause neither fear nor alarm, but rather should result in the Court, particularly the Office of the Prosecutor, taking charge of the dynamics of the ICC-Security Council relationship.

Effectiveness Considerations Between Legitimacy and Prosecutorial Discretion

By Maria Varaki[*]

Following its adoption in 1998, the Rome Statute[1] was characterized by the then UN Secretary General as ''a gift of hope for future generations.''[2] Twelve years later, the current Secretary General of the United Nations reiterated this belief, stating that the ''[t]he Rome Statute represents the best that is in us, our most noble instinct . . . the instinct for peace and justice.''[3] Despite this initial triumphant acceptance, the Court and in particular the Office of the Prosecutor (OTP) has completed its first decade of operation, being subjected

[1] William Schabas, Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals 3 (2012).

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[1] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[2] Kofi Annan, Former Secretary General of the United Nations, Address at the Rome Conference (July 18, 1998).

[3] The Secretary General, Address at the Review Conference on the International Criminal Court Kampala: An Age of Accountability (May 31, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/Statements/ICC-RC-statements-BanKi-moon-ENG.pdf.

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to scathing critique by academics, experts, and policymakers.[4] The policy of self-referrals, the selection of the first situations and cases, the non-selection of others, the slow and controversial judicial progress,[5] the lack of state cooperation, the accusation of being solely an ''African Court,''[6] and the tension between judicial intervention and so-called ''peace,'' have put an end to the initial euphoric era, triggering scepticism even from the side of the most persistent proponents of the Court.[7] Within this context, this paper will attempt to examine the exercise of prosecutorial discretion during the first prosecutorial term of the Court, applying the normative goal-oriented framework of the effectiveness project in which I have been involved.[8] It does not examine the overall performance of the International Criminal Court.[9] Instead it assesses the adopted prosecutorial policies and practices via the normative auspices of the ultimate end of regime legitimization. This is is due not only to the significant role played by the quest for legitimacy in the function of international courts and tribunals,[10] but also because the specific goal of regime legitimization may shed more light on misconceptions and narrow approaches to prosecutorial legitimacy, which will open the path to a less polarized critique and a more open dialogue. In this attempt, the generic goal of regime legitimization provides a two-fold tool, both for assessment of the prosecutorial term and for a more nuanced understanding of the notion of legitimacy within the realm of prosecutorial discretion.

Assessment of Effectiveness Via Regime Legitimization

The project on the effectiveness of international adjudication appears to be the logical evolution of the initial scholarship on the typology and proliferation of international

[4] *See* Human Rights Watch, Unfinished Business, Closing the Gaps in the Selection of the ICC Cases (Sept. 2011) [hereinafter HRW Policy Paper]; International Federation for Human Rights (FIDH), The International Criminal Court, 2002–2012; International Bar Association, Enhancing Efficiency and Effectiveness of ICC Proceedings: A Work in Progress (Jan. 2011).

[5] Prosecutor v. Ntaganda Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (Mar. 14, 2012); Prosecutor v. Mathieu Ngudjolo, Case No. ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute (Dec. 18, 2012); Le Procureur v. Germain Katanga, Case No. ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute (Mar. 7, 2014), with the very strong minority opinion of Judge Van den Wyngaert regarding violation of fair trial standards.

[6] Charles Jallow, *Regionalising International Criminal Law*, 9 Int'l Crim. L. Rev. 445–99 (2009).

[7] Mahnoush H. Arsanjani & W. Michael Reisman, *The Law in Action of the International Criminal Court,* 99 AJIL 385 (2005); Claus Kreβ, *'Self-Referrals' and 'Waivers of Complementarity'*, 2 J. Int'l Crim. Just. 944, 946 (2004); William Schabas, *First Prosecutions at the International Criminal Court,* 27 Hum. Rts. L.J. (2006); M. Cherif Bassiouni, *The ICC—Quo Vadis?*, 4 J. Int'l Crim. Just. (2006). *But see* Payam Akhavan, *Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?* 21 Crim. L.F. (2010); Daryl Robinson, *The Mysterious Mysteriousness of Complementarity*, 21 Crim. L.F. (2010); Rod Rastan, *Comment on Victor's Justice and the Viability of Ex Ante Standards*, 43 J. Marshall L. Rev. 569–602 (2010). More recently, the *Journal of International Criminal Justice* published a special issue devoted to the performance of international criminal justice from a critical perspective. *See* William A. Schabas, *The Banality of International Justice*, 11 J. Int'l Crim. Just. (2013); Mireille Delmas-Marty, *Ambiguities and Lacunae: The International Criminal Court Ten Years On*, 11 J. Int'l Crim. Just. 553 (2013); Payam Akhavan, *The Rise, and Fall, and Rise of International Criminal Justice,* 11 J. Int'l Crim. Just. 527 (2013); David Luban, *After the Honeymoon: Reflections on the Current State of International Criminal Justice,* 11 J. Int'l Crim. Just. 505 (2013).

[8] See http://www.effective-intl-adjudication.org for a thorough analysis of the normative framework of the project. *See* Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AJIL 225 (2012); Yuval Shany, Assessing the Effectiveness of International Courts (2014).

[9] See instead Sigall Horovitz, Gilad Noam & Yuval Shany, *The International Criminal Court, in* Shany, *supra* note 8, at 223–52 (2014), for an extensive application of the normative effectiveness framework to the overall performance of the ICC.

[10] *See, e.g.,* Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 Geo. Wash. Int'l. L. Rev. 107 (2010); Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 Temp. L. Rev. 61 (2013); 14 Theoretical Inquiries in Law 2 (2013) (special issue dedicated to international courts and the quest for legitimacy).

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courts and tribunals.[11] The unpredictable rise, during the last twenty years, of international dispute settlement mechanisms triggered an initial round of questions in both the disciplines of international law and international relations. International legal scholars focused mainly on the potential perils facing the unity of the international legal system,[12] whereas political scientists explored the phenomenon of legalization or juridification[13] of international politics and subsequently the prevalence of judicialization[14] as a form of global governance. The subsequent round of academic research both in international law and international relations focused, with a critical view this time, on a series of meta-ontological issues such as the goals and functions of the various international tribunals while exercising public authority; the limits of judicialization contrary to the flexibility of diplomatic action and also in promoting a liberal ideology of the rule of law; the disproportionate development of judicialization in certain areas of law; and the judicial impact on the ground and its quest for legitimacy and effectiveness.[15]

Within this framework, the particular research project, while assessing the effectiveness of international dispute settlements, departs decisively from previous theories of judicial effectiveness, which link effectiveness to compliance[16] with court judgments or norms,

[11] Martin Shapiro, Courts: A Comparative and Political Analysis (1981); Yuval Shany, The Competing Jurisdictions of International Courts and Tribunals 3–7 (2003); Cesare P. Romano, *The Proliferation of International Judicial Bodies*: *The Pieces of the Puzzle*, 31 N.Y.U. J. Int'l L. & Pol. 709 (1999); Jenny S. Martinez, *Towards an International Judicial System*, 56 Stan. L. Rev. 429 (2003); José E. Alvarez, International Organizations as Law-Makers (2005); Cesare P.R. Romano, *The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent,* 39 N.Y.U. J. Int'l L. & Pol. 791, 797–98 & n.18 (2007); Cesare P.R. Romano, *A Taxonomy of International Rule of Law Institutions*, 2 J. Int'l Disp. Settlement (2011); Garry Born, *A New Generation of International Adjudication,* 61 Duke L.J. 775 (2012); Karen Alter, The New Terrain of International Law: Courts, Politics, Rights (2014); The Oxford Handbook of International Adjudication (Cesare P.R. Romano, Karen Alter & Yuval Shany eds., 2013).

[12] *See* 31 N.Y.U. J. Int'l L. & Pol. (1999) (special issue with contributions by leading scholars such as Benedict Kingsbury, Pierre-Marie Dupuy, Jonathan Charney, Tullio Treves, and Georges Abi-Saab on the question of fragmentation).

[13] *See* Kenneth W. Abbott et al., *The Concept of Legalization, in* Legalization and World Politics 17–18 (Judith Goldstein et al., 2001); Benedict Kingsbury, *International Courts: Uneven Judicialization in Global Order, in* The Cambridge Companion to International Law 203 (James Crawford & Martti Koskenniemi eds., 2012).

[14] Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 Comp. Pol. Stud. 147 (1999); Martin Shapiro & Alec Stone Sweet, On Law, Politics and Judicialization (2002); Ran Hirschl, *The Judicialization of Politics, in* The Oxford Handbook of Law and Politics (Gregory A. Caldeira, R. Daniel Kelemen & Keith E. Whittington eds., 2008); Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (2004).

[15] *See* Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273 (1997); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 Calif. L. Rev. 173–79 (2005); Laurence Helfer & Anne-Marie Slaughter, *Why States Create International Courts and Tribunals: A Response to Professors Posner and Yoo*, 93 Calif. L. Rev. (2005); Thomas Skouteris, *The New Tribunalism: Strategies of De-Legitimization in the Era of Adjudication,* 17 Finn. Y.B. Int'l L. 307 (2006); The International Judge: An Introduction to the Men and Women Who Decide the World's Cases 11–14 (Daniel Terris, Cesare P.R. Romano & Leigh Swigart eds., 2007); Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis,* 157 U. Pa. L. Rev. 171, 188 (2008); Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 Eur. J. Int'l L. 73 (2009). *But see* Kingsbury, *supra* note 13 (who concludes that the project of judicialization has not been subjected to severe critique and that the current status of attitude is more reformist rather than rejectionist).

[16] For the concept of compliance and its limits, see Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 Mich. J. Int'l L. 345 (1997–1998); George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?*, 50 Int'l Org. 379 (1996); Kal Raustalia & Anne Marie-Slaughter, *International Law, International Relations and Compliance, in* The Handbook of International Relations (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2002); Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 Global Pol'y 127 (2010).

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usage rates, and impact on the conduct of the state.[17] Instead, it adopts a series of distinctive normative premises applying the model of ''intellectual borrowing'' by other social science disciplines, particularly those of organizational and institutional studies.[18] Thus, in order to define effectiveness, it follows the rational system approach, which holds that ''an action is effective if it accomplishes its specific objective aim.''[19] In that sense, goal attainment within particular time frames becomes the determinant parameter for assessing the effectiveness of an international court.[20]

The key constituency, which defines and settles the goals of the courts, is the mandate providers (the states), whereas the goals are diversified between generic and specific or idiosyncratic goals.[21] The four common generic goal of ICTs, for the purposes of the project, have been identified as (1) norm support, (2) dispute settlement, (3) regime support, and (4) regime legitimization,[22] and the assessment of the judicial outcomes (actual ends) versus goals (desired ends) is done by applying structural and procedural indicators (variables), which by ''reverse engineering'' may provide a relative understanding of effectiveness.[23]

The current paper explores only one generic goal: regime legitimization.[24] The proliferation of international dispute mechanisms as either agents or trustees of public authority,[25] and the expanding judicialization of politics as a form of global governance, generated consensus regarding the legitimization function of judicial institutions. It is well accepted now that international courts and tribunals confer legitimacy upon the public authority exercised by various institutional structures.[26] For the purposes of the current contribution, the ultimate end of regime legitimization is understood in a higher abstraction, reflecting

[17] *See* Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) (although they later reversed their claim); Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis,* 157 U. PA. L. REV. 171, 188 (2008); Kal Raustalia, *Compliance & Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387 (2004); Posner & Yoo, *supra* note 15; Raustalia & Slaughter, *supra* note 16.

[18] For a thorough analysis of the normative framework of the project, see Shany, *supra* note 8; YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS (2014).

[19] *See* Shany, *supra* note 8, at 225, 230, and his further sources.

[20] The rational-system approach is compared in organizational theory to the open-system and system-resource approach. The normative advantages of the rational system approach outweighed the other two theories.

[21] Shany, *supra* note 8, at 240–48. A comprehensive analysis of the entire normative framework of the project is beyond the scope of this paper. For this reason, there is no analysis on relevant issues such as goal ambiguity, the difference between goals and motives, or the justification for the predominant role of the mandate providers.

[22] Note that similar goals have been identified by other scholars who explore ICTs. Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 EUR. J. INT'L L. 7–41 (2012); Armin von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of the Burgeoning Public Authority,* 26 LEIDEN J. INT'L L. 49–72 (2013); Karen Alter, *The Multiple Roles of International Courts and Tribunals, Enforcement, Dispute Settlement, Constitutional and Administrative Review, in* INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013); Kingsbury, *supra* note 13.

[23] The project acknowledges the difficult task of proving causation between the operation of the courts and the specific state's conduct.

[24] The generic goal of regime legitimization pertains both to the relevant institutions and the norms they generate.

[25] *See, e.g.,* Karen Alter, *Agents or Trustees? International Courts in Their Political Context,* 14 EUR. J. INT'L REL. 1 (2008); Ingo Venzke, *International Bureaucracies from a Political Science Perspective—Agency, Authority and International Institutional Law*, 9 GER. L.J. 1401 (2008); Armin von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of the Burgeoning Public Authority,* 26 LEIDEN J. INT'L L. 9–72 (2013).

[26] *See* ROBERT HOWSE, THE WTO SYSTEM: LAW, POLITICS AND LEGITIMACY 213 (2007); YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 44–46 (2014) (claiming that legitimization is the raison d'être for preferring judicial avenues to other institutional approaches to certain policy problems).

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also the other three generic goals of norm support, dispute settlement, and regime support.[27] Apart from that, the regime legitimization goal is considered to include both the external legitimization function of the court, as well as the internal legitimization.[28] The former refers to the legitimacy conferred upon norms and institutions,[29] whereas the latter addresses the ability the court generates via its perceived legitimacy by the different constituencies to address the other judicial goals.[30] The attainment of internal legitimization becomes an intermediate goal for international courts to achieve the other ultimate ends, and in that sense the concept of legitimacy functions as a normative umbrella for the overall assessment of judicial effectiveness.[31]

Prosecutorial Discretion and Legitimacy—The State of Art

The concept of prosecutorial discretion is of paramount importance for the overall function and legitimacy of the International Criminal Court.

On one hand, several scholars suggest the adoption of *ex ante* guidelines and ''essential ethical principles'' that would objectify the selection process, add transparency and clarification in the work of the main figure, the Prosecutor, and thus enhance the legitimacy of the Court.[32] Mainly, they suggest the pursuit of legitimacy via right process.[33] On other hand, on several occasions during his term, the former Chief Prosecutor of the International Criminal Court, Luis Moreno Ocampo, repeatedly declared that he is not a political actor and that instead he simply applies the law.[34] Similarly, he supported that he is not interested in perceptions of his office on the ground since his main assigned priority is the preservation of legality in the sense of an objective application of the Rome Statute. As he emphasized, ''[W]e have no police and no army, but we have legitimacy. We will prevail.''[35]

Still, the natural response to this is, ''Legitimacy in the eyes of whom?'' The International Criminal Court functions among an array of relevant constituencies such as the state parties, the international community as a whole, a legal elite, the civil society, and the directly affected communities—the victims. Additionally, the diverse angles of legitimacy—legal, moral, and subjective—add a second level of normative and policy uneasiness and subject the statement of the former Prosecutor to further evaluation and critique.

The last goal of regime legitimization, as I mentioned earlier, not only serves as an ultimate goal of external legitimization but also as an intermediate goal of internal legitimization, in order for the institution itself to be conducive to the attainment of the

[27] Shany, *supra* note 8, at 265–66.

[28] Yuval Shany, Assessing the Effectiveness of International Courts 137–38 (2014).

[29] Hersch Lauterpacht, The Function of Law in the International Community 426 (1933); Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 Geo. Wash. Int'l L. Rev. 107, 148–52 (2010).

[30] Andreas Paulus, *International Adjudication, in* The Philosophy of International Law 216 (Samantha Besson & John Tasioulas eds., 2010).

[31] Shany, *supra* note 8, at 265–66.

[32] *See, e.g.,* Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court,* 97 AJIL 510 (2003); James A. Goldston, *More Candor About Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court,* 8 J. Int'l Crim. Just. (2010); Brian D. Lepard, *How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles*, 43 J. Marshall L. Rev. 553–67 (2010).

[33] Danner, for example, while acknowledging the perceived angle of legitimacy, insists on the procedural legal one and applies the model developed by Chayes.

[34] Luis Moreno Ocampo, *The International Criminal Court: Seeking Global Justice*, 40 Case W. Res. J. Int'l L. 215, 224 (2007–2008).

[35] *Id.* at 225.

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other ultimate goals. Building upon this conceptual construction, the adopted prosecutorial policies advance the intermediate goal[36] of internal legitimization that operates as a mean to the particular ultimate end, which in our case is the legitimization of the regime.[37] Those prosecutorial policies are supposed to trigger internal legitimization via the perceived legitimacy of the particular practices. However, here the acknowledgment of the various audiences, apart from the mandate providers, reflects a more dialectic understanding of legitimization that touches upon sociological perspectives which, for the most part, are overlooked by the legal scholarship. This sociological perspective reflects the internal legitimization process that was analyzed above and focuses on the perceived legitimacy of the court by the relevant constituencies. This is contrary to the adopted position by the Office of the Prosecutor to focus on the legal or procedural legitimacy, which contributes to a predominantly external legitimization. It is not enough for the OTP to address solely source/input legitimacy and process/procedural legitimacy. In order to achieve a holistic form of legitimization the OTP should also be concerned with so called result-based legitimacy, the one that can be identified with outcomes that influence state conduct. In an audacious note, this later form of legitimacy goes beyond legal/procedural justice and touches upon the concept of fairness as common sense.

In that sense it can be argued that the notion of legitimacy operates in a two-tiered framework. The various dimensions of legitimacy interact and interrelate in a supple way, reinforcing each other. Thus, the initial ''capital'' legitimacy of the Court, which is established as legal source/structure-based through the consent of the mandate providers, is affected by the existence of moral legitimacy (process/procedural) through the applied specific practices, and finally enhanced or diminished by the relevent audience outcome.[38] Similarly in this process, the various constituencies, despite their own preferences and perceptions, are forced to acknowledge the diversification of perceptions and enhance further the initial overall legitimacy of the Court via cooperation and interconnection.[39] This is an open-ended dialectic process that requires a more nuanced and flexible attitude towards the multilayered concept of legitimacy. Pure legalistic-process-oriented approaches can provide only a limited insight, missing the actual impact of the Court. On the other hand, sociological perceptions must be assessed through the eyes and expectations of the various audiences. The conceptual framework of the effectiveness project can become a valuable tool for a more dialectic and open analysis of the legitimization process in which the concept of legitimacy is explored in its totality and used for a sincere and audacious compehension of the social reality in which the ICC operates.

In October 2013, the Office of the Prosecutor issued a new prosecutorial strategy covering the period June 2012–2015. There are significant departures in the new strategic plan, such as shifting from focused to in-depth investigations and promoting organizational adjustment to new challenges and lessons learned from the very first period.[40] The new strategic plan highlights the need for adoption of performance indicators to assess the

[36] The specific goals advanced in the various prosecutorial policies could also be considered as operative goals in comparison to the official goals of the Court as a whole. YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 17 (2014).

[37] Shany, *supra* note 8, at 233–35.

[38] *Id.*

[39] *Id.*

[40] ICC-OTP, Strategic Plan June 2012–2015 (Oct. 11, 2013).

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efficiency, quality, and cost-effectiveness of the Office and its staff while pursuing its six strategic goals such as:

1. Conduct impartial, independent, high-quality, efficient, and secure preliminary examinations, investigations and prosecutions;
2. Further improve the quality and efficiency of the preliminary examinations, the investigations, and the prosecutions;
3. Enhance the integration of a gender perspective in all areas of our work and continue to pay particular attention to sexual and gender-based crimes and crimes against children;
4. Enhance complementarity and cooperation by strengthening the Rome System in support of the ICC and of national efforts in situations under preliminary examination or investigation;
5. Maintain a professional office with specific attention to gender and nationality balance, staff quality and motivation, and performance management and measurement; and
6. Ensure good governance, accountability, and transparency.

I would add a seventh goal: be conducive to critique and understanding of the ''other'' aspects of society that could cast a doubt on adopted and applied policies, because, as Thomas Franck wrote in a different context, ''[l]aw . . . does not thrive when its implementation produces *reductio as absurdum*: when it grossly offends most persons' common moral sense of what is *right*.''[41]

[41] Thomas M. Franck, Recourse to Force 178 (2002).

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