

Spring 2010

Victor's Justice: Selecting "Situations" at the International Criminal Court, 43 J. Marshall L. Rev. 535 (2010)

William A. Schabas

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Comparative and Foreign Law Commons](#), [Criminal Law Commons](#), [Human Rights Law Commons](#), [International Humanitarian Law Commons](#), [International Law Commons](#), [Jurisprudence Commons](#), [Legal History Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

William A. Schabas, Victor's Justice: Selecting "Situations" at the International Criminal Court, 43 J. Marshall L. Rev. 535 (2010)

<https://repository.law.uic.edu/lawreview/vol43/iss3/3>

This Symposium is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

VICTOR'S JUSTICE: SELECTING "SITUATIONS" AT THE INTERNATIONAL CRIMINAL COURT

WILLIAM A. SCHABAS*

The great ruling of the International Military Tribunal (IMT), perhaps better known to non-specialists as the Nuremberg judgment,¹ has often been criticized as an exercise in "victor's justice." The charge has two somewhat different dimensions. First, procedural shortcomings in the trial and in the application of substantive norms, including a rather flexible approach to the rule against non-retroactivity of criminal law, are said to be the consequence of a conviction-oriented framework imposed by the four great powers that established the court. A very early ruling of the International Criminal Tribunal for the former Yugoslavia (ICTY) said that in devising their Rules of Procedure and Evidence, "the Judges were conscious of the need to avoid some of the flaws noted in the Nuremberg and Tokyo proceedings."² But it is unrealistic to assess trials in 1945 and 1946 by human rights standards that prevail six decades later, and that have evolved progressively. On balance, the proceedings certainly met the highest standards of the time on a procedural level. Many contemporary critics disliked the Nuremberg process because its flexible rules of evidence offended their own rather narrow vision of fairness. These had been conditioned by common law concepts about the admissibility of hearsay and similar issues. As for the retroactivity issue, although the *nullum crimen sine lege* norm is now presented as a more rigorous and absolute proposition than perhaps it was in the 1940s, no longer subject to limitation or derogation, as a practical matter even today's judges adopt a fairly broad approach aimed at defeating impunity and meting out punishment to those who deserve it.³ The latest word on this

* Professor of Human Rights Law, National University of Ireland, Galway and Director, Irish Centre for Human Rights.

1. France v. Göring, (1948) 22 IMT 203.

2. Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 21 (Aug. 10, 1995).

3. CR v. United Kingdom, 335 Eur. Ct. H.R. (ser. A) ¶ 41 (1995); SW v. United Kingdom, 335 Eur. Ct. H.R. (ser. A) ¶ 36 (1995); Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ¶ 58 (Nov. 12, 2002); Prosecutor v. Norman, Case No. SCSL-

subject is an authoritative decision by the Grand Chamber of the European Court of Human Rights that upholds the legitimacy of the Nuremberg trial.⁴

The second critique is more substantial: the IMT breached fundamental principles of justice because it only judged one side. War crimes and other atrocities perpetrated by the victors, ranging from the Katyn massacre to the dreadful bombings of cities in Germany and Japan, including the nuclear destruction of Hiroshima and Nagasaki, remain unpunished. It is the point that is featured in a recent study of the Nuremberg trial by notorious Holocaust denier David Irving.⁵ This sort of moral equivalence takes an especially obnoxious form in slogans of some German neo-Nazis: Auschwitz + Dresden = 0.

But such a dismissive view of Nuremberg is not limited to extremists, and finds much currency in the academic literature of international criminal justice. Recently, in proceedings before the European Court of Human Rights, Latvia argued that the prosecution in the 1990s of an anti-Nazi partisan “helped to make up for the inadequacies of the Nuremberg trial, a trial that had to a large extent been an example of justice for the victors, punishing crimes perpetrated by the Nazis, while allowing notorious criminal acts by the Allies to go unpunished.”⁶ Similar critiques were made of the International Military Tribunal for the Far East (IMTFE), also known as the “Tokyo Trial.” They were dramatically highlighted in the famous dissent by Judge Pal. He was concerned both about the retroactivity issue and the one-sided nature of the proceedings. For Judge Pal, the European allies in the Pacific conflict were just as egregious as the Japanese, and he consequently voted to acquit all of the defendants.⁷

When the post-war trials were concluded, international criminal justice went into a long period of hibernation. Most observers attribute this to the tensions of the Cold War. With a growing emphasis in the human rights movement on accountability for atrocity crimes, and an altered political climate that came with the fall of the Berlin Wall, proposals for an international criminal court began to revive during the 1980s. The first manifestation of changing attitudes was the establishment of

2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶ 25 (May 31, 2004); Prosecutor v. Milutinović, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, ¶ 37 (May 21, 2003).

4. See generally Kononov v. Latvia, App. No. 36376/04 [GC], Judgment (May 17, 2010).

5. See generally DAVID IRVING, NUREMBERG: THE LAST BATTLE (Focal Point 1996).

6. Kononov v. Latvia, App. No. 36376/04, Judgment, ¶ 92 (July 24, 2008).

7. NEIL BOISTER & ROBERT CRYER, DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL 811-930 (Oxford University Press 2008).

the ICTY in May 1993.⁸ Although its substantive law faithfully reflected the post-Second World War precedents, mainly out of a concern to avoid charges of retroactive punishment, the new court was held out as a progressive development over Nuremberg because it had been created by the United Nations Security Council ("Security Council"), acting in the name of the "international community," rather than by one or more of the victors. At that time, in any event, there were no victors in the Balkan wars. An early decision of the Tribunal said

[t]he Nuremberg and Tokyo trials have been characterized as 'victor's justice' because only the vanquished were charged with violations of international humanitarian law and the defendants were prosecuted and punished for crimes expressly defined in an instrument adopted by the victors at the conclusion of the war. Therefore, the International Tribunal is distinct from its closest precedents.⁹

The Statute of the ICTY specified that the Prosecutor was to "act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source."¹⁰ By contrast, there was no similar requirement imposed upon the four prosecutors at Nuremberg. They were designated by their governments and, presumably, took instructions from them regarding the selection of defendants.¹¹

But while this independence of the ICTY seemed a significant development compared with Nuremberg, the institution was in fact an emanation of the Security Council. As such, its political agenda was set by what at Nuremberg were still referred to as the "great powers" but by 1993 were labeled with the perhaps less pejorative term of the "permanent five." In substance, nevertheless, the creators of the ICTY were not all that different than those who established the Nuremberg Tribunal, although the institution was not destined for those whom they had vanquished. Serbs in particular were not overly impressed by claims that this was a neutral product of the "international community."¹²

8. S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993).

9. Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, ¶ 21, (Aug. 10, 1995).

10. Statute of the International Criminal Tribunal for the Former Yugoslavia art. 16(2), May 25, 1993, U.N. Doc. S/RES/827.

11. MICHAEL SALTER, NAZI WAR CRIMES, US INTELLIGENCE AND SELECTIVE PROSECUTIONS AT NUREMBERG: CONTROVERSIES REGARDING THE ROLE OF THE OFFICE OF STRATEGIC SERVICES (Routledge-Cavendish 2007).

12. See generally, for example, ALEKSANDAR JOKIĆ, WAR CRIMES AND COLLECTIVE WRONGDOING (Blackwell 2001); Robert M. Hayden, *Biased*

The debate has been even more acute at the International Criminal Tribunal for Rwanda (ICTR). Until today, the Prosecutor resisted entreaties that he prosecute the “flip side” cases, that is, atrocities committed by the Tutsi-dominated Rwandese Patriotic Front (RPF) in the aftermath of the genocide. The non-governmental organization Human Rights Watch charged that the ICTR would not properly complete its mandate if it did not mete out justice to both sides. A letter from the organization to the Prosecutor states:

It would be a failure of justice—not merely victor’s justice—if you do not vigorously investigate and prosecute senior RPF officials because they are currently senior officials or military leaders in Rwanda.¹³ [Moreover,] [f]ailure to do so will taint perceptions of the Tribunal’s impartiality and undermine its legitimacy for years to come.¹⁴

The architects of the International Criminal Court (ICC) were very conscious of these issues. In the negotiations on the Rome Statute of the International Criminal Court (“Rome Statute”), the debate about political interference in prosecutorial discretion took place principally in the context of the triggering mechanisms. Unlike Nuremberg, Tokyo, and the *ad hoc* tribunals, the ICC is a permanent body that cannot automatically exercise its jurisdiction; it must be “triggered.”¹⁵ In this sense, the earlier institutions were already “triggered” by the political bodies that created them. The situations over which the tribunals could exercise jurisdiction were determined at the time of their establishment, leaving the prosecutors to select the cases within this narrow ambit. Perhaps the clearest example takes us back to the start of it all: Versailles.

In the 1919 Treaty of Peace, the Allied and Associated Powers publicly arraigned William II of Hohenzollern, formerly the German Emperor, for a supreme offence against international morality and the sanctity of treaties.¹⁶ Had the proposed

“Justice:” Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia, 47 CLEV. ST. L. REV. 549 (1999).

13. Letter from Kenneth Roth, Executive Director of Human Rights Watch, to Hassan Jallow, Chief Prosecutor of the International Criminal Tribunal of Rwanda (Aug. 14, 2009) available at <http://www.hrw.org/en/news/2009/08/14/letter-ictr-chief-prosecutor-hassan-jallow-response-his-letter-prosecutio-n-rpf-crim>. See also *Rwanda: Tribunal Risks Supporting ‘Victor’s Justice’*, HUMAN RIGHTS WATCH (June 1, 2009), <http://www.hrw.org/en/news/2009/06/01/Rwanda-tribunal-risks-supporting-victor-s-justice> (arguing that failure to prosecute RPF officials is conveying the message that the ICC is another version of “victor’s justice”).

14. Letter from Kenneth Roth to Hassan Jallow, *supra* note 13.

15. See generally HÉCTOR OLÁSULO, *THE TRIGGERING PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT* (Martinus Nijhoff Publishers 2005).

16. Treaty of Peace Between the Allied and Associated Powers and

international tribunal actually been established following the First World War, its prosecutor would have had no discretion whatsoever in either the selection of a "situation" or the choice of the defendant. By contrast, at Nuremberg, the four prosecutors were free to pick the accused persons, provided the latter could be credibly described as "major war criminals of the European Axis," which was the expression used in the Charter of the IMT. The statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda also allow the prosecutors to select the defendants, to the extent that the crimes themselves fell within the territorial and temporal jurisdiction established by the Security Council.¹⁷ It is on this very key aspect where the ICC represents such a departure from previous models.

At the ICC, the triggering of jurisdiction was originally conceived by the International Law Commission to lie with either the Security Council or the States Parties.¹⁸ According to its 1994 draft, even triggering by States Parties was subject to a restriction to the extent that the situation was being considered by the Security Council. In practice, then, the initial proposal that constituted the starting point for negotiations under the auspices of the United Nations General Assembly gave the Security Council effective control over the selection of situations. Such a court would be no different in substance from its predecessors, to the extent that the selection of situations would lie with a political body. For that matter, it wasn't just any political body, but the Security Council, dominated by the five permanent members. In effect, then, it would be Nuremberg all over again, except a permanent and not a temporary version. The "great powers" would decide the targets of prosecutions, secure that their own special interests would be protected by the veto.

In the negotiations that followed, resulting in adoption of the Rome Statute, the domination of the Court by the Security Council was significantly weakened. To a great extent, small and medium powers attempted to do indirectly what they could not do directly: create an institution that had a degree of independence from the Security Council and that could act without its approval. Although much of this was both inspired and driven by

Germany art. 227, June 28, 1919, TS 4 [hereinafter Treaty of Versailles].

17. There may have been some limitation on this imposed by the Rules of Procedure and Evidence as a result of the completion strategy. See, for example, Rule 28(A) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, as amended on April 6, 2004. The Special Court for Sierra Leone has its jurisdiction limited to "those who bear the greatest responsibility" for international crimes.

18. ILC, *Report of the Int'l Law Comm'n to the General Assembly*, 15-73, 43-45, delivered to the General Assembly, U.N. Doc. 1/49/10 (July 22, 1994), reprinted in [1994] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1994/Add.1.

unhappiness with the Security Council as the organ of control, the debate was usually framed as being about the independence and impartiality of the proposed court. In other words, the issue was not conceived of as one of replacing the Security Council with a more democratic and legitimate body empowered to select the situations over which the Court would exercise jurisdiction. Rather, it was argued that Security Council involvement be rejected because of the alleged impermissibility of any form of political control over the selection of situations. In this way, it was thought that such a purely judicial institution would constitute a major improvement on the "victor's justice" stigma that had afflicted international prosecution since Nuremberg.

This primarily manifests itself in two provisions of the Rome Statute, Articles 15 and 16. Article 15 allows the Prosecutor to select situations on his own initiative, without any form of control by a political body. His action is subject only to approval by a Pre-Trial Chamber composed of three judges, who are to assess the selection of a situation in light of purely judicial criteria. There was nothing comparable to Article 15 in the draft statute adopted by the International Law Commission. Its proposal and eventual adoption were part of the process of weakening the Security Council's control over the Court.

Article 16 allows the Security Council to intervene and stop a prosecution, but only temporarily. It is a much diluted version of the provision in the International Law Commission draft that effectively required the Security Council to provide a green light before the Court could proceed to deal with a situation.¹⁹ In its final form, Article 16 still allows the Security Council the right to impose a red light, by means of an affirmative resolution, but this must be renewed annually. Most states would have preferred that Article 16 disappear altogether. Its inclusion in the Rome Statute was a compromise whose success was largely due to the fact that there was a breaking of ranks among the permanent members themselves, with the United Kingdom agreeing to accept the revised provision in the months prior to the Rome Conference.²⁰

The legality of Article 16 remains a matter of debate, given that by purporting to fetter the authority of the Security Council, it is contrary to the Charter of the United Nations. In the event of conflict, it is beyond doubt that the Charter takes precedence over any incompatible treaty, such as the Rome Statute. Although they do not make a point of saying so, perhaps in order not to offend the

19. *Id.*

20. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15 – July 17, 1998, *Proposal by the United Kingdom of Great Britain and Northern Ireland on Article 54 Quater*, U.N. Doc. A/CONF.183/C.1/WGPM/L.3 (June 23, 1998).

sensibilities of many states, the five permanent members of the Security Council probably believe that, despite Article 16, they have the power to suspend proceedings indefinitely.

Thus, the ICC is not entirely free of external political control in the selection of situations,²¹ but it nevertheless represents a considerable development in this respect even when measured against the *ad hoc* tribunals for the former Yugoslavia and Rwanda. Control by the Security Council remains, but in a weakened form, and its prior authorization is not a *sine qua non* for the beginning of investigations and prosecutions. The Prosecutor may still be directed to deal with a situation by the Security Council, or by a State Party, but he may exercise his own discretion in refusing to do so. Article 53 of the Rome Statute says he may refuse such triggering by the Security Council or a State Party "in the interests of justice," a vague expression that effectively leaves him with a free hand. In theory, the Security Council or the State Party, as the case may be, may challenge the Prosecutor's decision before the Court. In practice, it is hard to imagine how even the judges will be able to force the Prosecutor to proceed where he chooses not to, given that this requires an allocation of scarce resources that only the Prosecutor can make. The Prosecutor could simply respond to an order from the Court with which he disagreed by assigning responsibility over the situation or the case to the international equivalent of Inspecteur Jacques Clouseau, confident that there would be no effective result.

Consequently, the authority for the selection of situations lies, for all intents and purposes, with the Prosecutor of the Court. He may either select situations himself, acting *proprio motu* pursuant to Article 15, as is the case with the first three situations to come before the Court, or he may instigate States Parties to make the referral in accordance with Article 15. Thus, for the first time, we have an international criminal tribunal where the choice of situations for prosecution is the prerogative of a judicial official within the institution and not a political body outside it. For most supporters of the Court, this is viewed as its great strength. The Court is largely, if not purely, "depoliticized." The "victor's justice" charge is thereby defeated.

21. According to a Pre-Trial Chamber, "[s]ituations, which are generally defined in terms of temporal, territorial and in some cases personal parameters, such as the situation in the territory of the Democratic Republic of the Congo since 1 July 2002, entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such." ICC, *Situation in the Democratic Republic of the Congo: Decision on Applications for Participation in the Proceedings of VPRS-1, VPRS-2, VPRS-3, VPRS-4, VPRS-5, VPRS-6*, ¶ 65, ICC-01/04 (Jan. 17, 2006).

Thinking in this respect is often coloured by analogies with domestic justice systems, where the idea of a politicized prosecutor is quite repulsive. In a functional justice system displaying the attributes of the rule of law, all serious crimes against the person will be prosecuted. Case law has confirmed that this is an obligation that flows from international human rights treaties as an entitlement of victims.²² Many states whose legislation permits the exercise of universal jurisdiction over international atrocity crimes committed abroad often require a form of political authorization (really, "triggering") before a prosecution may be undertaken,²³ but this is an exception to the general rule. Mechanistic extrapolation based upon the model of the national prosecution to the context of international criminal tribunals is fundamentally flawed because there is no expectation that all perpetrators of serious international crimes will be brought to justice by such institutions.

One simple and adequate reason explaining why international criminal tribunals do not aspire to prosecute all international crimes within their jurisdiction when these go unpunished by national courts is that there are simply not enough resources. The Prosecutor of the ICC recently set out a three-year strategic plan in which he expected to complete the three trials now underway or about to begin, and to start "at least one new trial."²⁴ In addition, he said he intended to continue ongoing investigations in seven cases, and conduct "up to four new investigations of cases."²⁵ Assuming he fulfils these goals, that will mean that in its first nine years of operation the ICC will have completed trials of four people, started the trial of another individual, and investigated cases involving a further eleven individuals, for a total of sixteen. By comparison, the ICTY had *completed* twenty-three cases after nine years of operation. Coincidentally, the Nuremberg tribunal also judged twenty-three people, completing its trial less than fourteen months after its work began.²⁶ The purpose of this observation is not to criticize

22. See, e.g., *MC v. Bulgaria*, 2003-XII Eur. Ct. H.R. ¶¶ 102-107 (2003) (applying relevant modern standards in international law).

23. See, e.g., *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, § 9(3) (stating that an action can only proceed with written consent from the Attorney General or Deputy Attorney General of Canada).

24. ICC, *Office of the Prosecutor, Prosecutorial Strategy, 2009 – 2012*, 2 (Feb. 1, 2010) available at <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPPProsecutorialStrategy20092013.pdf>.

25. *Id.*

26. U.N. S.C. Rep. of the Int'l Crim. Trib. for the Prosecution of Persons Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugo. since 1991, Aug. 1, 2002 – July 31, 2003, 72-79 U.N. Doc. A/58/297/S/2003/829 (Aug. 20, 2003).

the output of the Office of the Prosecutor, but rather to show the effective limits on the workload of the Court. With 113 States Parties, and credible allegations of crimes falling within the jurisdiction of the Court in a variety of situations around the globe, the Prosecutor obviously has to make choices. The question is on what basis does he make them?

In one sense, the reality is not unlike that which confronted previous international prosecutors. At Nuremberg, for example, the international prosecutors selected twenty-four cases for trial, but many more defendants could have been considered. The goal was to provide a representative sample of Nazi evil. Arguably, the Nuremberg prosecutors succeeded in doing so. At the ICTY, the rationale has evolved. In the early years, the prosecutors seemed to settle for any villain they could get their hands on, no matter how insignificant the individual might have been in the general scheme of atrocity. Over time, the choice of defendants became more focussed, concentrating on leaders. At the Special Court for Sierra Leone (SCSL), the Prosecutor identified representatives of three different combatant factions. Nobody would suggest that every individual deserving of prosecution was actually charged at Nuremberg, or by the *ad hoc* tribunals. Many have gone unpunished, and will remain so. The United Nations accepts the situation to the extent that it limits the work of the tribunals through allocation of resources.

But there is a big difference between the Prosecutor of the ICC and the prosecutors of the *ad hoc* tribunals. The former not only selects the individual defendants, he must also pronounce on the choice of the "situation." At the *ad hoc* tribunals, the selection of the situation was a preliminary, a fundamental policy choice made by political bodies. The Security Council never tried to justify an exhaustive approach, whereby it has established an international tribunal in every crisis where impunity reigns. The reasons why it elected to focus on the former Yugoslavia, Rwanda, Sierra Leone, and, much later, Lebanon, are inscrutable to the extent that they represent compromises by government negotiators acting on the basis of national interests. They certainly do not respond to any consistent and coherent criteria that could be subjected to judicial scrutiny.

Perhaps the most recent *ad hoc* institution, the Special Tribunal for Lebanon, provides the starkest example. It was established to deal with a single assassination committed in Lebanon in February 2005, yet the Tribunal is without jurisdiction to adjudicate credible allegations of war crimes perpetrated on the very same territory the following year during the conflict between Israel and Hezbollah. When questioned about such inconsistency, most observers merely shrug their shoulders. The double standard is a fact of life about which we may grumble but do little else.

Our hopes for the Prosecutor of the ICC are much higher, however. The independent *proprio motu* Prosecutor was held out as the answer to charges of politically motivated trials. However, he cannot act the way a national prosecutor would because the resources to prosecute all serious international crimes within the Court's jurisdiction do not exist. Like the prosecutors at the *ad hoc* tribunals, he can only select a handful of cases within any given situation. But unlike those same prosecutors, he must also select a handful of situations from among many that cry out for the Court's attention. The Rome Statute offers no real guidance on the criteria that the Prosecutor is to apply in making determinations about which situations to pursue and which ones to ignore. Perhaps it was assumed that a wise Prosecutor would know what to do. Although no international prosecutor has ever been so prolix as Luis Moreno-Ocampo, on this most difficult of issues the Prosecutor has provided little clarification with respect to the factors that he considers in exercising his discretion. In practice, does he also select situations based upon political factors?

Most of the attempts at explanation by the Office of the Prosecutor focus on "gravity." The website of the Office of the Prosecutor explains that "[i]n 2004, the Office independently selected the situations in the Democratic Republic of the Congo ("DRC") and Northern Uganda as the gravest admissible situations under the jurisdiction of the Court."²⁷ This statement seems to confirm the fact that the so-called "self-referrals" of these situations were an exercise of Article 14 of the Statute in name only. The application to open an investigation in Kenya sets out a number of reasons justifying the gravity of the situation, including the impact on victims.²⁸ But there is nothing in the application to indicate why the situation in Kenya is more compelling than other situations elsewhere in the world that may fall within the jurisdiction of the Court. Perhaps the Prosecutor did not feel he needed to justify this aspect of his discretion in an application to the Pre-Trial Chamber under Article 15. Still, he needs to justify it to the general public.

In February 2006, the Prosecutor addressed selection criteria when he explained his decision not to proceed on the basis of complaints filed concerning the behaviour of British troops in Iraq since the 2003 invasion. This is about as close as he has come to providing criteria for selection of situations in a concrete case:

Even where there is a reasonable basis to believe that a crime has

27. INTERNATIONAL CRIMINAL COURT – INVESTIGATIONS, <http://www.icc-pi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Investigations/> (last visited Aug. 20, 2010).

28. ICC, *Situation in the Republic of Kenya: Request for authorization of an investigation pursuant to Article 15*, ¶¶ 56-59, ICC-01/09 (Nov. 26, 2009).

been committed, this is not sufficient for the initiation of an investigation by the International Criminal Court. The Statute then requires consideration of admissibility before the Court, in light of the gravity of the crimes and complementarity with national systems.

While, in a general sense, any crime within the jurisdiction of the Court is "grave", the Statute requires an additional threshold of gravity even where the subject-matter jurisdiction is satisfied. This assessment is necessary as the Court is faced with multiple situations involving hundreds or thousands of crimes and must select situations in accordance with the Article 53 criteria.

For war crimes, a specific gravity threshold is set down in Article 8(1), which states that "the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". This threshold is not an element of the crime, and the words "in particular" suggest that this is not a strict requirement. It does, however, provide Statute guidance that the Court is intended to focus on situations meeting these requirements.

According to the available information, it did not appear that any of the criteria of Article 8(1) were satisfied.

Even if one were to assume that Article 8(1) had been satisfied, it would then be necessary to consider the general gravity requirement under Article 53(1)(b). The Office considers various factors in assessing gravity. A key consideration is the number of victims of particularly serious crimes, such as wilful killing or rape. The number of potential victims of crimes within the jurisdiction of the Court in this situation—4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment—was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes.

Taking into account all the considerations, the situation did not appear to meet the required threshold of the Statute.

In light of the conclusion reached on gravity, it was unnecessary to reach a conclusion on complementarity.²⁹

29. Office of the Prosecutor, Letter dated Feb. 9, 2006, from Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, 8-9 *available at* http://www.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

The Prosecutor's comments appear to muddle the distinction between a "situation" and a "case." Was he in fact talking about the specific cases of wilful killing and inhuman treatment in Iraq, which he said were not very significant in terms of quantity? Perhaps, except that he was comparing them, for the sake of assessing whether to launch an investigation into a "situation," with "the three situations under investigation" in Africa, each of which "involves thousands of wilful killings as well as intentional and large-scale sexual violence and abductions." Leaving aside the fact that quantity alone is not adequate as a measurement of "gravity," something the Prosecutor later acknowledged,³⁰ and a Pre-Trial Chamber has confirmed,³¹ it is common knowledge that the human suffering in Iraq resulting from war crimes related to the invasion by the United Kingdom exceeds fifteen or twenty victims!

Very early in the work of the Office of the Prosecutor, draft regulations were prepared and circulated.³² The Prosecutor is required to put in place regulations to govern the operation, management and administration of the Office of the Prosecutor.³³ These draft regulations approached the matter of selection of situations in a manner that suggested the Prosecutor would proceed with everything that was admissible. There was a complex procedure, involving "evaluation teams" and a "draft investigation plan," leading to a decision by the Prosecutor:

Upon conclusion of the preliminary examination or article 53(1) evaluation, the decision to start an investigation under article 53(1) or to request authorisation to commence an investigation from the Pre-Trial Chamber pursuant to article 15(3) is made by the Chief Prosecutor, taking into consideration the draft investigation plan, the recommendation by the Deputy Prosecutor (Investigations) and the Deputy Prosecutor (Prosecutions) and all other information available to him or her on the given situation.³⁴

The accompanying footnote 77 said:

According to rule 11, the *inherent* powers of the Prosecutor under articles 15 and 53 cannot be delegated to any member of the Office

30. ICC, *Situation in Darfur, Sudan: Summary of the Prosecutor's Application under Article 58*, ¶ 7, ICC 02/05 (Nov. 20, 2008).

31. ICC, *Situation in the Republic of Kenya: Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ¶ 62 ICC 01/09 (Mar. 31, 2010).

32. See generally ICC-OTP, *Draft Regulations of the Office of the Prosecutor* (annotated), ICC-OTP (June 3, 2003) [hereinafter *Draft Regulations*].

33. ICC-ASP, *Rules of Procedure and Evidence*, Rule 9, ICC Doc. ICC-ASP/1/3 (2002). See also ICC, *Regulations of the Court*, reg. 7(1)(e), ICC-BD/01-01-04 (2004).

34. *Draft Regulations*, *supra* note 32, reg. 12.1 (reference omitted).

other than to a Deputy Prosecutor.³⁵

This was the height of absurdity. How could a court with such limited resources—incapable, as time has shown, of finishing a single trial in seven years—possibly be in a position to contemplate investigation and prosecution of *every* admissible situation? And yet the draft Regulations provided nothing to indicate on what basis the Prosecutor would exercise his discretion—what the footnote called his “inherent powers”—in determining to which of the many potentially admissible situations he should devote his attention. Much later, in 2009, the Regulations were finally adopted. This was in a much abbreviated form by comparison with the original draft. Regulation 29 governs the selection of situations:

Regulation 29. Initiation of an investigation or prosecution

1. In acting under article 15, paragraph 3, or article 53, paragraph 1, the Office shall produce an internal report analysing the seriousness of the information and considering the factors set out in article 53, paragraph 1 (a) to (c), namely issues of jurisdiction, admissibility (including gravity), as well as the interests of justice, pursuant to rules 48 and 104. The report shall be accompanied by a recommendation on whether there is a reasonable basis to initiate an investigation.
2. In order to assess the gravity of the crimes allegedly committed in the situation the Office shall consider various factors including their scale, nature, manner of commission, and impact.
3. Based on the report, the Prosecutor shall determine whether there is a reasonable basis to proceed with an investigation.³⁶

The emphasis on gravity was an important addition. The word had been used only once in the 2003 version of the draft regulations, in what was essentially a reprise of Article 53.³⁷ Probably at that time, nobody in the Office of the Prosecutor thought that the concept of “gravity” was very significant in the selection of situations or of cases. For that matter, the term “gravity,” which appears in the Statute in two places relevant to the selection of cases and situations,³⁸ had not figured in any significant manner in the early pronouncements of the Office of the Prosecutor.

That changed in late 2005, when the Prosecutor invoked the gravity issue in order to explain his decision to proceed against the leaders of the Lord's Resistance Army in Uganda rather than

35. *Id.* (emphasis in original).

36. ICC-BD, *Regulations of the Office of the Prosecutor*, ICC-BD/05-01-09 (Apr. 23, 2009).

37. Draft Regulations, *supra* note 32, reg.12.2(c).

38. Rome Statute of the International Criminal Court arts. 17(1), 53, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

against those of the government forces.³⁹ A few months later, as noted above, “gravity” also formed the centrepiece of his explanation concerning the situation in Iraq. Although it has never been officially released, in June 2006 a draft document entitled “Criteria for Selection of Situations and Cases” was circulated. It implied that the selection of situations by the Prosecutor would be based upon “gravity.” The “Criteria” stated that “[i]n the view of the [Office of the Prosecutor], factors relevant to assessing gravity include: a) the scale of the crimes; b) the nature of the crimes; c) the manner of commission of the crimes; d) the impact of the crimes.”⁴⁰ The draft document said that “these factors should be considered jointly: no fixed weight should be assigned to the criteria, but rather a judgment will have to be reached on the facts and circumstances of each situation.”⁴¹ From virtual silence in 2003, the notion of “gravity” has now become quite central to the Prosecutor’s discourse about selection of situations.

Does it really make sense that an objective application of the gravity criteria proposed in materials from the Office of the Prosecutor leads inexorably to five contiguous states in Central Africa? Can this be a simple coincidence, the unintended conjuncture of the objective application of selection criteria? Is there possibly some sort of policy determination that is involved? Certainly, many states, especially States Parties in the global north, and particularly the non-party state that has become one of the keener supporters of the Court in the last few years, the United States of America, seem very comfortable with such a focus. There is much interest in the warming of the United States to the Court, which many attribute to the new administration. Actually, the process was underway well before the 2008 election. It seems to be as much related to the fact that the Court’s priorities correspond to the strategic interests of the United States, and most certainly do not threaten them, as it is to the more progressive multilateralism of President Obama and Secretary of State Clinton.

The Prosecutor regularly insists that his actions and decisions are based on judicial and not political factors. But if this is really the case, then we need a better explanation for the current choice

39. ICC, *Office of the Prosecutor, Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court at an Informal meeting of Legal Advisors of Ministries of Foreign Affairs*, 7 (Oct. 24, 2005); ICC, *Office of the Prosecutor, Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court at the Fourth Session of the Assembly of States Parties*, 2 (Nov. 28, 2005).

40. ICC, *Office of the Prosecutor, Int’l Crim. Ct., Criteria for Selection of Situations and Cases*, 5 (June 2006) (unpublished draft document).

41. *Id.*

of situations. The “gravity” language strikes the observer as little more than obfuscation, a contrived attempt to make the determinations look objective and judicial. The seriousness of the situations in Central Africa is unquestioned. However, there are many serious situations in the territories of the 113 States Parties to the Rome Statute, or elsewhere in the world but involving nationals of States Parties. Nor are these observations meant to attack the good faith of those involved in these determinations who have undoubtedly convinced themselves that they have found a legalistic formula enabling them to do the impossible, namely, to make what is inexorably a political decision but without making it look political.

What does all of this have to do with the “victor’s justice” issue? It has been the label attached to international trials allegedly tainted with the politics of those who established them. The critique suggests that matters partially improved at the *ad hoc* tribunals, compared with Nuremberg and Tokyo. Only with the ICC, and its *proprio motu* Prosecutor, has the problem been solved, goes the explanation. But has it? In reality, what we have at the ICC is a political determination but with less transparency, not more. This is not to suggest that the Prosecutor receives instructions from some clandestine committee of political advisors and foreign intelligence agencies, only that he is compelled to select situations where objective, judicial criteria alone do not suffice. The discretion of the Prosecutor in selecting situations under Article 15, and in agreeing to proceed with selections that have already been referred by the Security Council or by States Parties, pursuant to Articles 13(b) and 14 respectively, has an inherently political dimension. Even when the situation has been selected, political choices are also made in terms of which parties to a conflict are to be targeted for prosecution.

The quest for the judicial Prosecutor, one who is above politics, and one who is modelled on domestic prosecutors where all serious crimes against the person are addressed regardless of political considerations, is like looking for the Emerald City. It is as elusive as the search for the end of the rainbow. For this reason, the Rome Statute is incomplete. The thesis in this article is that the Prosecutor does, in fact, make political choices. He does not seriously consider for prosecution all admissible situations that fall within the jurisdiction of the Court. There is, in fact, a coterie of advisers based in what is called the “Jurisdiction, Complementarity and Cooperation Unit,” who assist with this political guidance. Possibly external experts are also consulted from time to time. Often, spokespersons for the Office of the Prosecutor acknowledge the role of political considerations in the selection of situations.

But on his own—and the Statute makes this a matter of pure

discretion—the Prosecutor is not selected for his political skills or judgment, nor does his personal experience and training suggest this is his strong suit. The problem here is not only transparency but also accountability. By contrast, the Security Council, which is responsible for the political triggering and guidance of the *ad hoc* tribunals, operates somewhat in the open, and its members are responsible not only to the international community as a whole but also to their national political constituencies.

The challenge of political guidance may be one factor that explains the lacklustre performance of the Court in its first seven years of activity. The *ad hoc* tribunals, and Nuremberg and Tokyo before them, succeeded not only because of the political forces that established them, but also due to the political consensus that supported their work. The most famous of the cases, Milosevic and Taylor, were only able to proceed because of widespread political backing in the regions affected by the conflicts for the idea that they be brought to justice. In the most celebrated case to come before the ICC, that of Omar Al-Bashir, such support is weak or entirely absent in the part of the world where it is most needed.

The ICC continues to plod along, consistently failing in the targets that it has itself set. Six years ago, the Prosecutor proposed a budget that was based upon the proposition that “[i]n 2005, the Office plans to conduct one full trial, begin a second and carry out two new investigations.”⁴² A flow chart derived from the Prosecutor’s forecasts indicated that the first trial before the Court would be completed by August 2005.⁴³ He became somewhat less ambitious in 2006, when a three-year strategic plan proclaimed the expectation that the Court would *complete* two “expeditious trials [by 2009], and . . . conduct four to six new investigations.”⁴⁴ In fact, by 2009 not even one trial was even close to completion.

Given that holding trials is the core activity of the Court, these projections reflect an unrealistic assessment of the difficulties facing the institution. Indeed, such fanciful evaluations of the Court’s present and its future continue. The upcoming Review Conference will devote considerable time to “stocktaking.” But there is no traction for using the occasion to undertake a critical assessment that attempts to fathom the causes of the Court’s inadequacies. Rather, the “stocktaking” is likely to be an exercise in self-congratulation, with inadequate cooperation by States being labeled as the main culprit responsible for the Court’s current malaise. It is submitted in this article that it is the lack of political direction to the Prosecutor that has contributed

42. ICC-ASP, *Assembly of States Parties, Draft Programme Budget for 2005*, ¶ 159, ICC-ASP/3/2 (July 26, 2004).

43. *Id.* at 49.

44. ICC, *Office of the Prosecutor, Report on Prosecutorial Strategy*, 3 (Sept. 14, 2006).

significantly to making the work of the Court so complicated. Precisely for this reason, at least in part, it is a poor performer when compared with the other international criminal tribunals.

There is a solution to the problem of political direction in the Rome Statute, but it is an unacceptable one. Article 16 allows for political factors to intervene, in the form of the Security Council staying proceedings before the Court. When the African Union (AU) requested that the Court hold back on a prosecution of the Sudanese president, the answer from the supporters of the Court was that this matter should be addressed pursuant to Article 16. Those who invoked the argument may have forgotten that Article 16 remained in the Statute during the negotiations as a concession to buy the acquiescence of the permanent members of the Security Council. It was never intended to provide a scheme for the exercise of political discretion where a situation or a case is otherwise admissible. The AU proposal to amend Article 16 to add a reference to the General Assembly strikes at the heart of this conundrum. Some claim it will only "further politicize" the Court. But if the Court is already politicized, why should the Security Council have the monopoly? At a minimum, the AU amendment fingers the problem of political control, even if it does not solve it. Certainly an answer has to be found, so that the selection of situations by the Prosecutor rests on solid political judgment that finds support from States Parties and, preferably, the broader international community, rather than on the pretence that this is a judicial matter devoid of politics.

Does this mean that the ICC, like its predecessors, is condemned to the taint of "victor's justice"? Only if we are not prepared to contest some rather widely accepted misconceptions about prior experiments in international justice. The charge that Nuremberg was flawed because the victors judged those they had defeated must be challenged. It is true that war crimes committed by the Allied Forces during the Second World War went unpunished, but they cannot be in any way compared with the atrocities for which the Nazis were responsible. To make such a statement is, of course, a reflection of the author's world view. There is no pretence that political considerations are absent in such an assessment.

Those who complain that Nuremberg was unfair should be asked to describe what they think the proceedings should have looked like. Given that there was one trial of twenty-three Nazi leaders, does this mean there should also have been another trial of twenty-three American leaders and twenty-three British leaders? That would be an even greater distortion of history than any message that might emerge from the Nuremberg trial suggesting the Allies were innocent of any wrongdoing. But how, then, are we to get the correct proportions? The same problem

arises today, when Human Rights Watch claims the Prosecutor of the ICTR risks the stigma of “victor’s justice” if he does not prosecute Tutsi generals. How many is he supposed to charge in order to cleanse himself of the charge, and to restore the Tribunal’s credibility and restorative function? There have been approximately seventy indictments at the Tribunal to date, all of them directed against alleged *génocidaires*. Should an equal number of Tutsi be charged, or perhaps a much smaller number in order to reflect the disparity in the number of victims (and possibly the greater gravity of genocide)?

So-called problems of even-handed prosecution, where all sides in a conflict bear the brunt of prosecutorial attention, are not actually resolved because a sampling of suspects from one party is pursued in order to defeat the allegation of victor’s justice. The debates continue, and when one side feels that the correct proportions have been reached, the other will complain that the strategy is abusive and unfair. Sometimes, proponents of this quest for balance explain that it is a pre-requisite to reconciliation. But this is a speculative hypothesis, based upon intuition rather than evidence. Using courts to demonstrate that both sides in a conflict were at fault may just as easily aggravate tensions and perpetuate a sense of injustice rather than promote the idea that justice has been done. Did the one-sided prosecutions of Nazis produce a negative result? Actually, the Nuremberg trial probably contributed to a shared narrative, one common to victor and vanquished alike, that has promoted the building of a modern Europe that is democratic, pluralist, and, above all, peaceful. Following the example of the IMT, German domestic courts have pursued justice for Nazi offenders, a process that continues to this day. It has never been seriously suggested that German courts prosecute British airmen for bombing their cities, although there would not be any real legal obstacle. The German authorities, like those of the victors in 1945, have made a wise policy choice. For these reasons, justice in such areas cannot be the preserve of the courts, the way it is at the domestic level. Inevitably, it is a mixture of the judicial and the political. The challenge for those involved in the judicial wing of this process is to ensure the greatest legitimacy without at the same time encouraging the myth that what they are doing is devoid of any political dimension.