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COMMENT ON VICTOR'S JUSTICE & THE VIABILITY OF *EX ANTE* STANDARDS

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This Article offers some observations on the papers presented by the panelists on the topic of situation and case selection before the International Criminal Court (ICC). Professor William Schabas offers a thought provoking piece seeking to stimulate debate on the manner in which situations are identified for investigation and cases selected for prosecution. He questions the abiding disquiet reflected in the critique of victor's justice arising from Nuremberg and Tokyo, since he considers contemporary choices to investigate certain situations or indict particular individuals derive similarly from political assessments adopted under the guise of legal norms and prosecutorial discretion. He suggests we should not be surprised by such an outcome, as it is, in fact, inherent to the function of any prosecution service when it has to decide among a pool of available prosecutorial targets. He argues that political considerations appear to be particularly prevalent at the ICC, where the Prosecutor gets to decide not just who to prosecute (cases), but when and where to investigate (situations). In the light of his critique that decision-making in such matters is driven by political rather than legal calculus, Schabas suggests that it would be best if they were, in fact, left in the hands of political authorities, bearing in mind also that the enforcement of justice anyway relies on political support. The result of the overall analysis is to question the premise for an independent Prosecutor acting *proprio motu* at the ICC and to suggest, in its place, the need for prior political sanction and guidance before proceeding with investigations and prosecutions.

The thesis put forward by Professor Schabas is intriguing, coming as it does from a pioneer of the discipline rather than a *realpolitik* sceptic. The allegations of political selectivity in particular warrant careful consideration. The comment below suggests that while provocative, Professor Schabas' thesis is ultimately speculative based, in his own words, "upon intuition

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rather than evidence."[1] The Article compares this wholesale dismissal of the exercise (toward the identification of *ex ante* standards for the initiation of investigations and prosecutions) with an approach based on the exposition of legal and policy standards, in the light of Professor Brian Lepard's article on the role of fundamental ethical principles in the formulation of prosecutorial guidelines. A final section examines the central concern of both articles, on the extent to which politics infiltrates the legal process.

I. A CRITIQUE OF SELECTION

A. Opening of Situations

The exercise of prosecutorial discretion in the selection of individual cases for prosecution is not new. The reality of selection is inherent in any accountability response to situations of mass atrocity where there will typically be a large universe of crimes committed by numerous perpetrators against countless victims. What is unique before the ICC is the role of the Prosecutor in identifying, in the first instance, the parameters of the Court's jurisdiction, that is, the overall situation. This involves, subject to judicial oversight, the establishment of the Court's material, temporal, territorial, and/or personal jurisdiction.[2] The situation frames in objective terms the theatre of investigations within which the Prosecutor collects evidence in order to identify cases for prosecution.

As Professor Schabas observes in his article, the ICC model represents a departure from previous international courts and tribunals where the formal decision to institute proceedings was taken by states or a collection thereof (the Allied Powers or the United Nations Security Council).[3] These courts were by nature *ad hoc*, designed to deal with pre-defined situations. By contrast, the ICC is a permanent body that is empowered to act in relation to future, as yet undetermined situations. Moreover, it can act autonomously even where states did not request its intervention. Specifically, Article 15 empowers the Prosecutor to open investigations on his or her own initiative, subject to judicial authorisation, where there is a reasonable basis to believe ICC crimes have been committed in the territory or by the national of

1. William A. Schabas, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 539 (2010).

2. Such judicial oversight occurs at the Article 15 stage where the Prosecutor seeks to initiate an investigation *proprio motu*, as well as in the context of proceedings under Article 17, 18, 53, 58, and 61. Rome Statute of the International Criminal Court arts. 15, 17, 18, 33, 58, 61, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

3. Schabas, *supra* note 1, at 539.

any State Party.[4] Within the confines of the Court's treaty-jurisdiction,[5] thus, the Prosecutor can independently identify when and where crimes warrant investigation without separate political approval. At the same time, the scope for such *proprio motu* authority cannot be held to constitute an infringement on state sovereignty as it flows from a sovereign decision to accept the Court's treaty jurisdiction and to be bound by its judicial framework.[6] The Rome Statute thereby invests the Prosecutor with a mandate that is subject to clear legal parameters. The Rome Statute also vests the ICC with independence of action where a State Party or the Security Council refers a situation: whereas situation-specific courts operated on the assumption that investigations would proceed and cases would be brought forward once they were established, the ICC can decline to act. In particular, if the Prosecutor or the Court is not satisfied that the statutory factors related to jurisdiction, admissibility, and the interests of justice have been satisfied, an investigation or prosecution can be rejected.[7]

In his article, Professor Schabas questions whether the political direction that tainted past incarnations of international criminal jurisdiction with the adage of victor's justice has in fact been remedied by the provision of *proprio motu* powers to the ICC

4. Rome Statute, *supra* note 2, art. 12(2). This may extend to any other state that accepts the jurisdiction of the Court by a declaration lodged to that effect; Rome Statute, *supra* note 2, art. 12(3).

5. The term "treaty-jurisdiction" is used herein to refer to the competence the Court enjoys by virtue of Article 12—as contrasted with jurisdiction conferred by a Security Council referral pursuant to Article 13(b) of the Rome Statute, which may extend to any Member State of the UN Charter. *Id.* arts. 12, 13(b).

6. It could be argued that the ICC does not have such consent where it exercises jurisdiction over nationals of non-party states for ICC crimes committed on the territory of States Parties. *Id.* art. 12(2)(a). However, the exercise of domestic jurisdiction by a state over crimes committed by foreigners on its territory is no novelty—it represents one of the most traditional prerogatives of state sovereignty. The only exception that may apply is where such a foreigner enjoys immunity from legal process in the territorial state, for example, by way of diplomatic immunity or through a Status of Forces Agreement. The ICC applies the same principles of jurisdiction, which are delegated to it by States Parties. *Id.* arts. 12, 13(a), 14, 98.

7. *Id.* art. 53(1)(a)–(c); International Criminal Court, Rules of Procedure and Evidence, Rule 48, ICC. Doc. ICC-ASP/1/3 (Part II-A) (Sept. 9, 2002) [hereinafter ICC RPE]. Although the Pre-Trial Chamber (PTC) can request, at the initiative of the referring body, a reconsideration of such a decision, the Prosecutor cannot be forced to investigate or prosecute. The only exception is where, despite meeting jurisdictional and admissibility requirements, the Prosecutor decides not to proceed based solely of the interests of justice, in which case the decision will only be effective if confirmed by the PTC. Rome Statute, *supra* note 2, art. 53(3)(b).

Prosecutor.[8] This is because Schabas believes the Prosecutor also makes political decisions: "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 . . . "[9] and "[t]he thesis in this Article is that the Prosecutor does, in fact, make political choices."[10] To support the thesis, Schabas traces examples of where apparently political choices appear to have been made under the guise of legal criteria.[11]

The issues Schabas sets out in his article revisit well-trodden debates between states during the negotiation of the Rome Statute that ultimately settled on the decision to create an independent prosecutorial authority.[12] Of note, both proponents and opponents of *proprio motu* powers referred to the risks of politicised selectivity, as illustrated by the records of 1995 Ad Hoc Committee and 1996 Preparatory Committee meetings:

> Some delegations felt that the role of the prosecutor should be more fully elaborated and expanded to include the initiation of investigation or prosecution in the case of serious crimes under general international law that were of concern to the international community as a whole in the absence of a complaint. These delegations were of the view that this expanded role would enhance the independence and autonomy of the prosecutor, who would be in a position to work on behalf of the international community rather than a particular complainant State or the Security Council. In this regard, attention was drawn to the limited role played by state complaints in the context of certain human rights conventions.[13]
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> Some delegations found the role of the Prosecutor, under article 25, too restricted. In their view, States or the Security Council, for a variety of political reasons, would be unlikely to lodge a complaint. The Prosecutor should therefore be empowered to initiate investigations ex officio or on the basis of information obtained from

8. Schabas, *supra* note 1, at 549.

9. *Id.*

10. *Id.*

11. *See generally id.*

12. *Id.*; Silvia Fernandez de Gurmendi, *The Role of the International Prosecutor*, *in* THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 177-78 (Roy S. Lee ed., 1999); Philippe Kirsch & Darryl Robinson, *Initiation of Proceedings by the Prosecutor*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 657-63 (Antonio Cassese et al. eds., 2002); Morten Bergsmo & Jelena Pejic, *Article 15*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 581-93 (Otto Triffterer ed., 2008).

13. *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, ¶ 113, 50th Sess., Supp. No. 22, U.N. Doc. A/50/22 (1995).

any source.[14]

While conversely:

> Some other delegations could not agree with the notion of an independent power for the Prosecutor to institute a proceedings before the Court. In their view, such an independent power would lead to politicization of the Court and allegations that the Prosecutor had acted for political motives. This would undermine the credibility of the Court. This power could also lead to overwhelming the limited resources of the Prosecutor with frivolous complaints. A view was expressed that the complaint lodged by the Prosecutor on his or her own initiative lacking the support of the complainant State would be ineffective.[15]

Many of these themes are repeated by Schabas who argues in different places throughout his article that the ICC Prosecutor is either too independent or partisan; that he either takes political decisions or conversely fails to listen sufficiently to political actors; that he lacks political direction from states or takes too much of it when deciding who to prosecute; that an impartial prosecutor need not prosecute all sides, but failure to do so politicizes his office.[16]

The starting point for the article appears to be the concern that "[t]he 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."[17] For Schabas, attempts to formulate *ex ante* standards toward a prosecutorial policy that focuses on persons bearing the greatest responsibility for the most serious crimes[18] or for the interpretation of the statutory notions of the interests of justice[19] and gravity[20] are described as "little more than obfuscation, a

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14. *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, ¶ 35, U.N. GAOR, 51st Sess., Supp. No. 22, Vol. I, U.N. Doc. A/51/22 (1996).

15. *Id.*

16. *See generally* Schabas, *supra* note 1.

17. *Id.* at 544. The factors set out in Article 53(1)(a)-(c) of the Rome Statute require the establishment of a reasonable basis to believe a crime within the jurisdiction of the Court has been or is being committed (material, temporal, and either territorial or personal jurisdiction); the forming of a preliminary determination on admissibility, involving an assessment of complementarity and gravity; and consideration of whether the interests of justice militate against the opening of investigations. Rome Statute, *supra* note 2, art. 53(1)(a)-(c). Rule 48 specifies that the same factors are to be considered at the Article 15 stage. ICC RPE, *supra* note 7, Rule 48.

18. ICC-OTP, *Paper on some policy issues before the Office of the Prosecutor*, 6-7 (Sept. 2003); ICC-OTP, *Report on Prosecutorial Strategy*, 5 (Sept. 14, 2006); ICC-OTP, *Prosecutorial Strategy*, 5-6, 9-10, 14-15, 18 (Feb. 1, 2010).

19. *See generally* ICC-OTP, *Policy Paper on the Interests of Justice* (Sept. 2007).

20. *See* ICC, *Regulations of the Office of the Prosecutor*, Reg. 29(2), ICC-BD/05-01-09 (Apr. 23, 2009) [hereinafter OTP Regulations] (stating "[i]n order

contrived attempt to make the determinations look objective and judicial."[21] The Prosecutor is described as disingenuous, taking spurious political decisions in the name of the legal process.[22] The critique stems from an examination of where the Office has opened situations and where it has not:

> 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

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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."). Schabas' discussion of gravity, in this regard, is problematic for two reasons. The suggestion that gravity only became significant for the Office of the Prosecutor (OTP) in 2006 appears to overlook the fact that some of the earliest OTP documents from 2003 already refer to the centrality of considerations of gravity. *See, e.g.*, ICC-OTP, *Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo*, (Sept. 8, 2003), (explaining the reason for focusing on the situation in the Democratic Republic of the Congo (DRC) by reference to reports indicating the particular gravity of the crimes in terms of their scale and nature (an estimated 5,000 civilian deaths as a consequence of the violence since 2002); their manner of commission (the use of summary executions, the burning of people alive, physical mutilation, and the specific targeting of vulnerable groups, in particular women and children); and their impact (noting the upsurge in crimes has caused massive displacement, exacerbated poverty, famine, and disease, and severely impacted on local economies and means of subsistence as a result of the widespread looting and destruction of farms, mines and commercial centres)). Moreover, Schabas places emphasis on an illustration contained in the 2006 *OTP response to communications received concerning Iraq* to discern a general policy position toward the use of a comparative assessment of gravity across situations, but overlooks a more reasoned explanation of the OTP's approach to gravity at the preliminary examination stage as spelled out in its Article 15 application (and in the Pre-Trial Chamber's decision) in the Situation in Kenya, which refers to the admissibility assessment at the situation stage in terms of an examination of the "potential cases" that would arise from an investigation of the situation, based on the stated prosecutorial strategy of focusing on persons bearing the greatest responsibility and the most serious criminal incidents. Schabas, *supra* note 1, at 544; ICC, *Situation in the Republic of Kenya: Request for authorisation of an investigation pursuant to Article 15*, ¶¶ 51, 107, ICC Doc. ICC-01/09-3 (Nov. 26, 2009); 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*, ¶¶ 50, 182, 188, ICC Doc. ICC-01/09-19-Corr (Mar. 31, 2010).

21. Schabas, *supra* note 1, at 549.

22. *Id.*

> 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.[23]

While the analysis is certainly provocative, it also appears highly speculative. The suggestion is, variously, that the Prosecutor has intentionally chosen five situations in Africa not because they satisfy all of the legal criteria established by the ICC Statute, but rather because of what it is not—an investigation into other situations. The fact that the five states border each other also appears relevant, suggesting something more than coincidence. This leads to a critique of the global north versus the global south and the supposed interest of the ICC to pander to the new U.S. administration—an outcome that must have presumably been foreseen with some insight in 2003 when the Office first started its activities. Absent from the inquiry is an assessment of why either the opening of investigations in those five situations is irreconcilable with the statutory scheme or why the decision not to investigate other situations is driven by political considerations.[24] The observation offered in support lacks elaboration: "there are many serious situations on the territories of the 113 States Parties to the Rome Statute, or elsewhere in the world but involving nationals of States Parties."[25] The statement reflects one of the weaknesses of Professor Schabas' critique. Irrespective of the merits of his thesis, it is thin on the facts, drawing several strands of thought to support an agenda of politicised selectivity (not a light charge) based more often than not on what appears to be observer bias rather than rigorous objective analysis. To borrow a phrase coined by Schabas himself, "this is a speculative hypothesis, based upon intuition rather than evidence."[26]

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23. *Id.*

24. *See id.* (stating that "[t]he 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 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. But there are many serious situations on the territories of the 113 States parties to the Rome Statute, or elsewhere in the world but involving nationals of States parties.").

25. *Id.*

26. *Id.* Other examples of what appears to be a speculative approach include Schabas' description of a division responsible, according to the OTP Regulations, for the conduct of legal and factual analysis for preliminary examinations in accordance with Article 53 and for processing request for judicial assistance in accordance with Part 9 of the Statute as staffed with "a

A central concern for Professor Schabas appears to be the question why in practice to date, the Prosecutor's Office has opened investigations in five situations within Africa,[27] dismissed a large number of others,[28] and subjected a number of other situations from Latin America to the Middle East, Caucasus, Central Asia, and Africa to further preliminary examination without yet initiating investigations.[29] Are these, in fact, outcomes that can be justified by the impartial application of *ex ante* standards, or rather, do they suggest politicized selectivity?

Because the ICC has potentially global reach, this often translates into the rather unsophisticated demand that it have cases from all parts of the world. However, unless one is asked to apply the human resource assumptions of international organisation, in terms of equitable geographic and gender balance in staff recruitment, to the identification of situations for investigation, it is not clear how one necessarily follows from the other. One response to the Court's current presence in Africa is to observe that all of the situations opened before the ICC represent some of the most serious crimes committed anywhere in the world, involving large-scale acts of wilful killing, sexual violence, and forced displacement. As has often been recalled, the Court's intervention in these situations is not against Africa, but rather for the benefit of African victims: three of the five situations were

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coterie of advisers . . . who assist with this political guidance." He also speculates that "[p]ossibly external experts are also consulted from time to time," while observing, "[o]ften, spokespersons for the office of the Prosecutor acknowledge the role of political considerations in the selection of situations," but does not provide examples. *Id.* Other assertions appear unreasonable: for example, when suggesting that (i) the Prosecutor is being deceptive in stating that his decision are legal and not political, but (ii) his staff, who provide the legal and factual underpinnings for such decisions, are either unaware of this or are misguided: "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." *Id.*

27. That is, Democratic Republic of the Congo (DRC), Uganda, Central African Republic (CAR), Darfur Sudan, and Kenya.

28. The Secretary-General, *Annual Report of the International Criminal Court to the United Nations*, ¶ 44, U.N. Doc. A/64/356 (Sept. 17, 2009) [hereinafter *ICC Annual Report*]:

> As at 30 June 2009, the Office had received a total of 8,242 communications relating to article 15 of the Rome Statute, 4,870 of which were received between 1 August 2008 and 30 June 2009. Of these new communications, 3,823 related to the situation in South Ossetia, Georgia. Of the remaining 1,047, 58 per cent (608) were considered as not providing any basis for the Office of the Prosecutor to take further action.

Id.

29. Situations currently under preliminary examination include Colombia,

referred by African states themselves (Uganda, Democratic Republic of the Congo (DRC), and Central African Republic (CAR)), one by the Security Council determining the situation constituted a threat to international peace and security (Darfur), and one with the express co-operation and support of another African state, with the backing of regional organisations and the urging of the African Union Panel of Eminent African Personalities (Kenya). The largest regional constituency among ICC States Parties is Africa—comprising thirty-one African states, while five judges of the eighteen-member bench are African, as is the Deputy Prosecutor. Above all, the ICC serves as a court of redress for African victims, who have called for more ICC intervention, not less. Looking at the legal criteria established by Article 53(1)(a)-(c) of the Rome Statute, the situations subjected to investigation do, in fact, appear to relate to organised violence or armed conflict constituting serious crimes within the jurisdiction of the Court; there has been little or no domestic judicial response to the crimes alleged in the resultant cases; and there have been no apparent reasons not to proceed based on the interests of justice.

Others have argued that while these situations may deserve investigation, the Court should have also opened investigations elsewhere: suggesting its limited regional presence undercuts its aspiration to universality.[30] Implicit in the view is a demand that the next situation must be outside of Africa. The implication, however well intentioned, appears fraught with tension. It implies, for example, that when the Prosecutor's Office determined that there was a reasonable basis to proceed with an investigation into the situation in Kenya, but not another situation, it should have deferred or declined to act because there were already four situations from Africa before the Court. Apart from the ethically troubling nature of such a proposition, it would have sent a particularly chilling message to Kenyan victims who may well have questioned the relevance for them the fact that the ICC was also investigating other crimes in other African countries. In an era of fundamental human rights and equal dignity of each individual, moreover, an institution restraining the application of the law based on a regional quota system does not appear to be a valid response to mass killings, rape, and forced displacement.[31]

30. *See, e.g.*, Schabas, *supra* note 1, at 549 (stating that "[t]he seriousness of the situations in Central Africa is unquestioned. But there are many serious situations on the territories of the 113 States parties to the Rome Statute, or elsewhere in the world but involving nationals of States parties.").

31. It is also not evident that declining to investigate another situation in Africa would serve the interests of justice pursuant Article 53(1)(c), which forms the sole legal criteria for the Prosecutor not to proceed if the other statutory criteria are met. Rome Statute, *supra* note 2, art. 53(1)(c).

The focus of the debate should arguably re-orientate itself back toward the crimes and whether potential cases warrant investigation, not on geographic distribution and regional balance.[32]

It might also be contended that a pre-occupation with the location of ICC investigation derives from a mindset constrained by the prevalent political discourse, rather than the requirements of justice. If the statutory criteria are met, a principled approach would require the Court to proceed, irrespective of whether the short-term outcome is another situation in Africa. By contrast, succumbing to the political pressures to which the Court is undoubtedly exposed would tend to undermine the application of the fundamental rule of law principles that are its essential guide and guarantor. To the extent that this might cause perception problems for the ICC, arguably this is something that should elicit more effective public information activities, not the adjustment practice to suit perception. Thus, while allowing perception-based considerations to steer core decision-making processes might remedy concerns relating to universality, it creates acute normative ambiguity by calling into doubt the objectivity of prosecutorial conduct and the integrity of the judicial process.[33]

The next question this raises is why other situations under preliminary examination—some on other continents, some others in Africa—have not yet yielded a determination to open investigations. Is this guided by political considerations or legal criteria? One difference that immediately emerges is that in all of the investigations currently underway, issues of jurisdiction, admissibility, and interests of justice appear to have been relatively clear. In addition to satisfying jurisdiction and the interests of justice, admissibility assessments rendered to date indicate the competent authorities were either inactive or otherwise unwilling or unable to constitute genuine domestic

32. Thus Schabas states in relation to the application to open investigations in Kenya that "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 the application to the Pre-Trial Chamber under Article 15," without explaining why this is either a requirement of the Statute or relevant to an Article 15 application. Schabas, *supra* note 1, at 544. Presumably such an explanation would not be necessary if the Prosecutor had applied to open the situation in Colombia or Afghanistan. While the need for communicating prosecutorial decisions to the general public is valid, Professor Schabas appears to turn this into a legal test. *Id.*

33. *See infra* Part II (outlining Professor Brian Lepard's discussion on recourse to fundamental ethical principles to guide prosecutorial decisions); *see also infra* note 70 (discussing the scope for tension between different legitimacy claims, for example, between sociological legitimacy and normative legitimacy).

proceedings.[34] The situations that remain under preliminary examination appear to have presented more complex parameters: either relating to the focus and/or genuineness of ongoing national proceedings; the difficulty of obtaining clear and credible information in the midst of ongoing armed conflict; the analysis of large quantities of data submitted by rival national authorities on the conduct of hostilities; or complex questions relating to jurisdictional competence.[35]

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34. Although admissibility has only been considered by the Court at the situation stage in the Kenya situation in the context of an Article 15 application, admissibility assessments in the different proceedings before the Court to date have either indicated the *prima facie* admissibility of cases or rendered a final determination on the issue. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-8-Corr, Decision on the Prosecutor's Application for a Warrant of Arrest, ¶¶ 30-40 (Feb. 24, 2006); Prosecutor v. Katanga, Case No. ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 78 (Sept. 25, 2009); Prosecutor v. Kony, Case No. ICC-02/04-01/05-377, Decision on the admissibility of the case under article 19(1) of the Statute, ¶ 46 (Mar. 10, 2009); Prosecutor v. Harun, Case No. ICC-02/05-01/07-1, Decision on the Prosecution Application under Art. 58(7) of the Statute, ¶ 24 (May 1, 2007); Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ¶ 50 (Mar. 4, 2009); Prosecutor v. Garda, Case No. ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, ¶ 30 (Feb. 8, 2010); 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*, ¶¶ 181-87, ICC Doc. ICC-01/09-19-Corr (Mar. 31, 2010); Prosecutor v. Bemba, Case No. ICC-01/05-01/08-802, Trial Chamber III, Decision on the Admissibility and Abuse of Process Challenges (June 24, 2010).

35. *ICC Annual Report*, *supra* note 28, ¶¶ 44-51. Perhaps the nearest Schabas comes to substantiating allegations of politicised situation selection is in relation to the OTP's response on Iraq, where the jurisdiction of the Court is limited to nationals of States Parties. Schabas, *supra* note 1, at 549; ICC, *OTP response to communications received concerning Iraq*, at 3, 6 (Feb. 9, 2006), *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 [hereinafter *OTP response to Iraq*]. Schabas argues that the OTP's conclusions indicate political bias, but he does not seriously engage with the specific factual and legal analysis conducted. Schabas, *supra* note 1, at 549. A review of the OTP response, for example, indicates that it declined to comment on the legality of the war itself in the absence of an operative provision on aggression. *OTP Response to Iraq*, *supra*, at 4. In relation to the targeting of civilians and disproportionate attacks, it stated that it had examined the use of cluster munitions, which are not prohibited per se under the Statute, but which could be analysed in accordance with Article 8(2)(b)(i) and (iv). *Id.* at 5; *see* Rome Statute, *supra* note 2, art. 8(2)(b)(i), (iv). Examining sixty-four incidents of potential relevance, the OTP observed that the available information established that while a considerable number of civilians died or were injured during the military operations, the available information did not indicate intentional attacks on a civilian population. *OTP response to Iraq*, *supra*, at 6. With respect to proportionality, in turn, it stated that the available material was characterized by (1) a lack of information indicating

Another, more general challenge affecting the Court's perception and its aspiration to universality, not directly addressed in Professor's Schabas' article, is the fact that many situations may remain unaffected by the existence of the ICC because they simply remain beyond its jurisdictional reach.[36] Many of the petitions to the ICC, for example, relate to request for it to act beyond its treaty-jurisdiction in instances where decisions over situation assignment remain in the first place in the hands of states, that is, non-party states or the Security Council.[37] As is known, outside of its treaty-jurisdiction, the Court can only act if a state not party to the Rome Statute chooses to opt-in on an *ad hoc* basis by declaring that it accepts the exercise of jurisdiction by the Court (Article 12(3)) or if the Security Council refers a situation

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clear excessiveness in relation to military advantage and (2) a lack of information indicating the involvement of nationals of States Parties, noting that the available information converged in indicating that ninety-four to ninety-six percent of air sorties were carried out by non-States Parties. *Id.* at 6, n.14. The response also stated that it had examined legal arguments that States Party nationals may have been accessories to crimes committed by nationals of non-parties, but it ultimately found that the reasonable basis standard for any form of individual criminal responsibility under Article 25 had not been established. *Id.* at 3. The OTP found a reasonable basis to believe that acts of wilful killing and inhuman treatment of civilians within the jurisdiction of the Court had been committed by nationals of States Parties. *Id.* at 8. The Prosecutor's response stated that based on the credible information available at the time, the information available supported a reasonable basis for an estimated four to twelve victims of wilful killing and a limited number of victims of inhuman treatment attributable to nationals of States Parties, totaling less than twenty persons. *Id.* In the light of the gravity of the crimes alleged as well as the existence of complementary national proceedings in relation to each of those incidents, it decided to decline opening an investigation, while emphasising its ability to reconsider its conclusions in the light of new facts or evidence in relation to the alleged facts or to the alleged forms of direct or indirect participation in war crimes. *Id.* at 9. Schabas' observation in relation to the above is to remark "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!" Schabas, *supra* note 1, at 546. Arguably, irrespective of the correctness of the OTP's conclusions, an issue of such fundamental importance to his underlying thesis would appear to deserve a more rigorous analysis.

36. Because the ICC is set up by treaty, its scope is limited to the territorial and personal parameters established by the consent of states. This may be expressed by their joining the Statute (Article 12(2)), by declaring their *ad hoc* consent (Article 12(3)), or vicariously by the Security Council referring a situation to the Court (Article 13(b)). Rome Statute, *supra* note 2, arts. 12(2)–(3), 13(b). The consent of a non-party state in the latter case is provided by virtue of its membership of the United Nations Charter, which includes their agreement to carry out the decisions of the Security Council, pursuant to Article 25 and Article 103 of the Charter. U.N. Charter arts. 25, 103.

37. *See* ICC-OTP, *Report on the activities performed during the first three years (June 2003–June 2006)*, at 9-10 (Sept. 12, 2006) (discussing referrals, communications, analysis, and investigations of the OTP over the three-year period).

(Article 13(b)). In regions such as the Middle East, where the referral of the Darfur situation has been criticised by some, the debate is partly directed at the political assessment of the Security Council in referring one situation over another. At the same time, it is equally apparent that states of the region have themselves proved reluctant to bypass such considerations by directly conferring jurisdiction on the ICC. Because the Security Council and states are not required to follow any legal criteria in choosing which situation to refer from the global pool of possible situations, the resort to accountability via political sanction in these circumstances has remained conditioned by a set of extra-legal variables that has rendered the scope for consistency in such essential processes anxiously imprecise. As the UN Secretary-General has stated:

> [T]here remain serious challenges in pursuing accountability. Some situations which, by any objective analysis, would have warranted some form of action by the Security Council, have faced serious obstacles or languished entirely. This has eroded the Council's credibility. There is a need to address this problem, and to bring some consistency to the effort.[38]

Thus, the issue here affects the political choices of states with respect to situations that are outside of the ICC's treaty jurisdiction, not the exercise of jurisdiction by the Court itself.

B. Case Selection

The thesis Schabas sets out in *Victor's Justice* suggests politics also infiltrates individual case selection: "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."[39] The statement occurs in reference to the fact that cases have been brought against members of armed groups within some situations and against members of national armed forces in others. Does the prosecution of rebels in "self-referred" situations compared to prosecution of government officials following a Security Council referral indicate political bias, suggesting victor's justice?[40] Schabas' analysis, while certainly sensational, appears somewhat perfunctory. It seems plausible that these results can

38. The Secretary-General, *Honouring Geneva Conventions, Secretary-General Says Debate 'No Longer between Peace and Justice but between Peace and What Kind of Justice'*, SG/SM/12494, L/T/4417, HR/5002 (Sept. 26, 2009).

39. Schabas, *supra* note 1, at 549.

40. *Id.* at 544. *See also* William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 751 (2008) (stating that "[t]he attention to non-state actors is closely related to the concept of 'self-referral', which has the practical consequence of establishing a degree of complicity between the Office of the Prosecutor and the referring state.").

also be explained by the factual pattern of allegations in each situation and a policy of focussing on persons bearing the greatest responsibility for the most serious crimes: bearing in mind the allegations of large-scale crimes committed by non-state armed groups in the DRC, Uganda, and CAR, compared to Darfur where allegations primarily relate to the conduct of the Sudanese armed forces and the Militia/Janjaweed. At the same time, rebel crimes have also been prosecuted in Darfur,[41] and the conduct of national armed forces examined in other situations.[42] In relation to Kenya, the assumptions of victor's justice are altogether challenged since the stated objective is to prosecute individuals associated with both ruling parties, based on the factual pattern of allegations arising from the post-election violence: in Kenya there is no vanquished, both victors are, in fact, being investigated.[43] Thus, although the Court may need to contribute to greater public understanding of its work, it is not clear it is being guided by political calculus.[44]

By contrast, other criteria for the opening of situations that

41. *See generally* Prosecutor v. Garda, Case No. ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges (Feb. 8, 2010) (involving one of the most deadly and large-scale attacks on African Union Mission in Sudan (AMIS) peacekeepers during the conflict involving rebel fighters on the AMIS base at Haskanita).

42. The ICC Annual Report notes, for example, current investigations in Kivu provinces focussing on alleged crimes against a multiplicity of perpetrators and groups, including the Forces Démocratiques de Libération du Rwanda (FDLR), the Congrès National pour la Défense du Peuple (CNDP), the national armed forces (FARDC), and the Mai-Mai. ICC *Annual Report*, *supra* note 28, ¶ 28.

43. *See generally* ICC, *Situation in the Republic of Kenya: Request for authorisation of an investigation pursuant to Article 15*, ICC Doc. ICC-01/09-3 (Nov. 26, 2009); 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*, ICC Doc. ICC-01/09-19 (Mar. 31, 2010) (indicating that persons associated with both governing political parties would be investigated).

44. It could be argued that political considerations might have guided relevant states to refer these situations to the ICC in the first place in anticipation that cases would focus on rebels; that the decision of Sudan not to co-operate with the ICC was based on its assessment that the cases would focus on its own conduct; or that the decision of coalition government in Kenya not to refer but rather accept the exercise of *proprio motu* powers was due to the expectation that cases would focus on both their ruling parties. *See, e.g.*, William Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. OF INT'L L. at 557–590 (2005) (discussing self-referral to the ICC). At most, states here might be predicting the investigative focus of the Prosecutor. This is different, however, from the suggestion that there has been an agreement to shield certain actors from accountability, since discretion surrounding case selection rests with the Prosecutor as guided by the evidence and the ongoing conduct of the different armed groups and armed forces.

have been put forward by some would bring political calculus directly into the equation: positing, for example, the need for less situations in Africa; more balance between cases against non-state and state actors; avoidance of politically complicated prosecutions against sitting heads of state or other senior officials; prosecution of cases involving Western powers to garner legitimacy; or the adjustment of the legal process to peace negotiations.[45] Schabas, while noting the dangers of such subjective assessments, appears ambivalent on the issue: questioning, for example, the appropriateness of an equivalence of blame approach to prosecutions before the IMT at Nuremberg and Tokyo or the ICTR,[46] but suggesting that such an approach might be necessary to vindicate the legitimacy of the ICC in Uganda and DRC without explaining the difference; as well as expressing doubt over the wisdom of prosecuting a head of state in conditions where the political support for such a case may be uncertain.[47]

As recognised in both articles, case selection criteria, impartially applied, may in fact require uneven outcomes.[48] In situations of mass atrocity, there will often not be equal culpability between groups. Situations may comprise serious crimes committed by one side, by both sides, or by a variety of non-state and state actors. Decisions on case selection in such situations arguably should be driven by the evidence and the impartial application of prosecutorial policy, irrespective of how the outcome

45. In relation to the interests of justice under Articles 53(1)(c) and 53(2)(c), the Office of the Prosecutor has stated that as a matter of interpretation and policy it does not define this statutory criteria to include the "interests of peace," suggesting considerations over the impact of its decisions on other political processes is a task entrusted under the Statute to other institutions, notably the Security Council pursuant to Article 16 of the Rome Statute, and not the Court. *Policy Paper on the Interests of Justice*, *supra* note 19, at 1. Nonetheless, the Prosecutor has also referred to the capacity for investigations and prosecutions to contribute to prevention and forestall future violence, in recognition of one of the goals of the preamble to the Rome Statute. *See, e.g.*, Press Release, Office of the Prosecutor, ICC Prosecutor: Kenya Can Be an Example to the World (Sept. 18, 2009), http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/pr452 (emphasizing that Kenya would prove to be an example of "how to work together with the international community and the Court to end impunity and prevent future crimes.").

46. *See* Schabas, *supra* note 1, at 552 (stating "[s]o-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 are pursued in order to defeat the allegation of victor's justice. The debates continue . . . .").

47. *Id. See also infra* Part III (analyzing the political as well as legal ramifications of prosecuting political leaders).

48. Schabas, *supra* note 1, at 537-40; Brian D. Lepard, *How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles*, 43 JOHN MARSHALL L. REV. 553, 556-58 (2010).

will be perceived. Impartiality may also require different outcomes for different groups based on complementarity: if national authorities are genuinely investigating persons from one group, the ICC may be required to exclusively focus on the other.[49] This is not victor's justice, but rather, it is the statutory framework. We might instinctively prefer, perhaps, for the ICC to investigate all sides or nothing at all, but the law dictates a more nuanced system-wide approach: the goal of the Rome Statute is ensure the enforcement of criminal liability, whether at the national or international level, not to necessarily ensure litigation before the ICC. The object is for cases to be genuinely prosecuted and accountability impartially applied across the system. The breadth and depth of this impact across all territories will depend on the rate of universal adherence to the Statute as well as the consistency of Security Council referrals in relation to non-parties. Its influence in adjusting behaviour, moreover, will be linked to the regularity of the law enforcement functions performed by states on the Court's behalf and the predictability of sanctions for perpetrators.[50]

C. Political Guidance

Having presented the argument that the ICC Prosecutor takes political decision, Professor Schabas asserts that the major weakness confronting the Court is not the absence of arrests by states or the challenge of holding trials in the complex procedural framework of the ICC, but rather the Prosecutor himself: he is too independent and lacks political guidance.[51] This is contrasted with "[t]he *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."[52] As Schabas observes:

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49. *See infra* Part II (outlining a more detailed discussion on *ex ante* standards).

50. *See infra* Part III (analyzing the political as well as legal ramifications of prosecutions under the ICC).

51. Professor Schabas previously argued that the ICC Prosecutor was not independent enough, suggesting that, for all the battles fought in Rome over prosecutorial independence, the exercise of *proprio motu* powers had become an "issue that has thus far proved to be of little importance." William Schabas, *The enigma of the International Criminal Court's success*, http://www.opendemocracy.net/globalizationinstitutions_government/icc_3278jsp (last visited Sept. 17, 2010). In the present paper Schabas appears to argue the reverse: recognising the significant role played by Article 15 powers to incentivise state co-operation and referrals and in determining whether to proceed on the basis of a Security Council referral, but asserting that the problem is that the Prosecutor is too independent and needs to be reined in. Schabas, *supra* note 1, at 541-42.

52. *Id.* at 550.

> 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.
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> . . .
>
> It is submitted in this Article that it is the lack of political direction to the Prosecutor that has contributed 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.[53]

Notwithstanding the statutory authority for the Prosecutor to proceed *proprio motu* within the confines of the Court's treaty jurisdiction, the Darfur situation and its resultant cases, recalled by Schabas above, actually follow the framework he proposes. The situation in Darfur was not opened by the Prosecutor on his own initiative, but rather was referred by the Security Council acting under Chapter VII of the UN Charter, the same basis upon which the ICTY and ICTR were established. As with the *ad hoc* Tribunals, individual case selection decisions were determined by the Prosecutor's Office, not the Security Council.[54] The Council has not determined thereafter that the cases selected by the Prosecutor constitute a threat to international peace and security warranting suspension of proceedings pursuant to Article 16 of the Rome Statute. The Darfur referral was, in fact, adopted under Chapter VII as a measure contributing to international peace and security, and the Security Council later recalled the need for full co-operation with the Court.[55] In terms of ventilation of expectations and promotion of predictability, moreover, the Prosecutor reports to the Security Council on the progress of its activities every six months.[56] Contrary to the above, the major

53. *Id.* at 550-51.

54. More generally, the paper at times appears to mix issues affecting situations and cases interchangeably. *See generally id.*

55. S. C. Res. 1593, U.N. Doc. No. S/RES/1593 (Mar. 31, 2005); *see Statement by the President of the Security Council*, U.N. Doc. S/PRST/2008/21 (June 16, 2008) (stating that "[t]he Security Council recalls its decision, under Chapter VII of the United Nations Charter, in resolution 1593 (2005) that the Government of Sudan and all other parties to the conflict in Darfur shall co-operate fully with and provide any necessary assistance to the International Criminal Court and the Prosecutor pursuant to that resolution, while stressing the principle of complementarity of the International Criminal Court" and "urges the Government of Sudan and all other parties to the conflict in Darfur to cooperate fully with the Court, consistent with resolution 1593 (2005), in order to put an end to impunity for the crimes committed in Darfur.").

56. S. C. Res. 1593, ¶ 8, U.N. Doc. No. S/RES/1593 (Mar. 31, 2005).

challenge appears to be and remains the responsibility of states in effecting the arrest of persons sought by the Court: a challenge common to other international criminal courts and tribunals.[57]

Although the Council has not questioned the investigations and prosecutions by the Prosecutor in relation to Darfur, Professor Schabas focuses on the position adopted by the African Union (AU), whose approach toward the Court is reportedly driven by several notable detractors of the Court, including the Sudan and Libya.[58] The article appears to suggest that the Prosecutor should take political guidance from the AU as much as from the Security Council, the reason being: "why should the Security Council have the monopoly?" The statement ignores several obvious points, not least of which is the fact that the exceptional availability of Article 16 under the Rome Statute reflects the Security Council's role in determining a threat to international peace and security under the UN Charter system.[59] The AU position, moreover, appears to reflect political rather than legal rhetoric, masking as the differing views of individual African states over their statutory obligations toward the ICC that remain unaffected by the decisions of the AU.[60] Calls for the AU or the UN General Assembly to be given

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57. Professor Schabas does not explain why the alleged lack of political guidance results in the slow performance of the ICC. While political support will be critical to enforce arrest warrants, it is not clear how it bears relevance to the pace of judicial proceedings inside the courtroom, which instead to date has been affected by issues related to disclosure, witness protection and victims participation, a unique confirmation process, prosecution and defence litigation strategies, and interlocutory appeals. *See infra* Part III (analyzing the political as well as legal ramifications of prosecuting political leaders).

58. Schabas, *supra* note 1, at 551. *See generally* Sixteenth Ordinary Session of the Executive Council of the African Union, *Report on the Ministerial Preparatory Meeting on the Rome Statute of the International Criminal Court (ICC)*, Assembly/AU/Dec.245(XIII), EX.CL/568 (XVI) (Jan. 25-29, 2010).

59. Rome Statute, *supra* note 2, art. 16.

60. As one commentator has observed:

> Africa is not united behind al-Bashir. While there are powerful interests within the AU willing to protect Sudan's President, the 'African position' on the ICC is contested and by no means monochromatic. The most strident backbencher is Botswana—it has made it clear that Gabarone remains committed to assisting the ICC and to honouring the country's obligations to arrest al-Bashir if he comes to its territory. South Africa too—with urging from civil society—has stressed on more than one occasion that it will honour its legal obligations to the ICC if al-Bashir were to land here, going so far as to confirm that an arrest warrant for al-Bashir has been issued by a Pretoria Magistrate in compliance with our treaty duties. A failure to recognise the various shades of the relationship between the Court and Africa's capitals is unhelpful. This oversimplification, reminiscent of a general predisposition within the West to treat Africa en bloc, should be resisted: it plays directly into the hands of certain African politicians who are keen to present the ICC as anti-Africa, and Africa as anti-ICC.

Max du Plessis, *The African Union, the International Criminal Court and al-*

the same powers as the Security Council, moreover, appear to be less about democratizing the Article 16 process, and more about restricting the ability of the ICC to pursue cases against certain high officials, having as their origin discussions over mechanisms to stay the *Bashir* case.[61]

While acknowledging the unacceptable nature of the proposal, Professor Schabas nonetheless asserts, "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." The answer appears to be located in the Rome Statute and the UN Charter, namely, either: (i) within the confines of the Court's treaty-based jurisdiction, the Prosecutor can proceed via a State Party referral or *proprio motu* because ICC States Parties (or non-party states lodging a declaration) have given their prior consent to the exercise of jurisdiction by accepting the treaty regime;[62] or (ii) the Prosecutor can proceed on the basis of a Security Council referral adopted under Chapter VII of the UN Charter, which creates mandatory obligations for affected Member States by virtue of their membership of the Charter system.[63] In the situation in Darfur there is no more compelling system for the establishment of international jurisdiction. Unless we would want the Security Council to also select the cases for prosecution, an outcome that was roundly rejected during the negotiations of the Rome Statute,[64] it appears evident that individual case selection decisions must be taken by an independent prosecutor on the basis of the available evidence.[65]

Bashir's visit to Kenya, INST. FOR SECURITY STUD., http://www.iss.co.za/iss_today.php?ID=1025. *See, e.g.*, Republic of South Africa Department of International Relations and Cooperation, *Notes following the Briefing of Department International Relations and Cooperation's Director—General, Ayanda Ntsaluba*, http://www.dfa.gov.za/docs/speeches/2009/ntsa0731.html (noting in answer to questions: "If today President Bashir landed in the country, in terms of the provisions of our law he would have to be arrested.") (last visited Oct. 17, 2010).

61. *Id.*

62. Rome Statute, *supra* note 2, art. 12(2)–(3); ICC RPE, *supra* note 7, Rule 44.

63. U.N. Charter arts. 25, 39–51, 103.

64. The only way in which the Security Council could potentially affect case selection decisions is by adopting a resolution pursuant Article 16; although this would only suspend proceedings for renewable twelve-month period, it would not deprive the Court of jurisdiction *per se*. Rome Statute, *supra* note 2, art. 16.

65. The premise of U.N. Security Council Resolution 1593 is that the Court will exercise its jurisdiction pursuant to Article 13(b) and will apply the legal regime set out under the Rome Statute, meaning that case selection decisions are left within the purview of the ICC. *See generally* S.C. Res. 1593. At the same time, the Security Council would have been conscious of the possible

II. *EX ANTE* STANDARDS

Rather than politics, Professor Brian Lepard approaches the issues from the perspective of *ex ante* standards: examining the role of fundamental ethical principles in guiding decisions over the initiation of situations for investigation and cases for prosecution. Professor Lepard identifies certain key principles logically related to the preeminent principle of "unity in diversity," which he finds reflected in the preamble of the Rome Statute.[66] Principle among these is respect for the law, which requires the Prosecutor to be faithful to those standards laid down in the Statute itself for the exercise of his discretion and evaluation, particularly in relation to terms that enjoy only marginal definition in the treaty text, such as "gravity," "the interests of justice," and "the interests of victims." Outlining a four-step methodology toward treaty interpretation, the last step favours, in case of remaining ambiguity, interpretations that best help to implement the fundamental ethical principles identified.[67] Application of these principles leads him to propose that the ICC Prosecutor should focus on incidents of violence related to the most serious commission of crimes with the jurisdiction of the Court. It also suggests an approach to gathering information and evidence based on the principle of open-minded consultation, meaning seeking out information and opinions from diverse sources without preconceived notions in relation to crimes, and ascertaining the perspectives of different constituencies on selection decisions. Lepard argues that the consultation principle, moreover, implies the transparent communication of prosecutorial decision to the general public in order to build and sustain political trust and enhance the Court's legitimacy, thereby tempering suspicions over political bias. The article suggests credence should be given to the linkage between peace and justice, both for the purpose of defining the interests of justice and in considering the deterrent potential of prosecutions. Finally, he suggests the statutory duties of independence and impartiality should lead the Prosecutor to determine case selection decisions not on the basis of perceptions, for example, the concern to balance prosecutions between rival

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levels of criminal responsibility resulting from an investigation by the ICC given its prior examination of the report of the International Commission of Inquiry on Darfur (S/2005/60), which is recalled in the opening paragraph of the resolution; S.C. Res. 1593.

66. Lepard, *supra* note 48, at 560.

67. The four step methodology Lepard outlines requires recourse by: (1) teleological and literal interpretations of the treaty provisions; (2) supplementary means, including by resort to the *travaux*; (3) the existence of new generally accepted understandings; and (4) interpretations of treaties that best help to implement fundamental ethical problems if ambiguities remain. *Id.* at 561.

groups, but rather in light of their impact on fundamental ethical principles: suggesting recourse should be made to ethics in particular to explain prosecutorial decisions where the judicial criteria appear indeterminate.[68]

The discussion over *ex ante* standards with which Lepard's article engages arises from the demands of selection. Faced with a situation of mass atrocity, the factual crime base may involve widespread acts of murder, rape, torture, destruction of property, and forced displacement. The gamut of criminal liability may run from foot soldiers who physically perpetrated the crime, to the superior who directed the operation, to the military commander or political and business elite who masterminded and controlled their overall commission. Liability may also attach to support networks materially assisting perpetrators or contributing to the commission of crimes and fugitive flight. Victims may number in the tens or hundreds of thousands or, in the case of displacement, millions. Since comprehensive capture is impossible, selection becomes necessary.

Such questions do not normally arise in the same manner at the national level. Notwithstanding the scope for prosecutorial discretion domestically, there is normally the expectation that a serious crime reported to the police will be investigated and, evidence permitting, suspects will be brought to justice. In the face of large-scale violence, by contrast, it remains an uncomfortable reality that not every act of killing, rape, or torture will be investigated or face judicial sanction, even where evidence is readily available and perpetrators identifiable. In this sense, the need for selection in the prosecution of atrocity crimes represents the most pressing and ethically challenging imperative in the task of bringing law to bear on situations of massive violence. International courts and tribunals must decide when and where they will direct the focus of their activities and be prepared to explain how they arrived at those choices.[69] Although differences of opinions will perforce persist over the selection of individual prosecution targets, to garner legitimacy the process and methodology must be applied in a manner that is reasonable, based on established legal and policy criteria, and subject to overarching principles that demonstrate fairness. Selection must not lead to selectivity, resulting in arbitrariness or bias.[70]

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68. Lepard, *supra* note 48, at 566-67.

69. No international court will carry the entire burden of course, since it will always exercise concurrent jurisdiction with national courts. International institutions will also not bear a corollary human rights obligation to that owed by states to provide victims with a right to an effective remedy.

70. Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L

Looking at the practice of international courts and tribunals they have, either as a matter of law, policy, or evolving practice, tended toward a prosecutorial focus on the top echelons of criminal activity and on the most serious criminal episodes.[71] Practice has

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L. 510 (2003); Fabricio Guariglia, The *selection of cases by the Office of the Prosecutor of the International Criminal Court, in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 209-17 (Carsten Stahn & Göran Sluiter eds., 2009); James Goldston, *More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT'L CRIM. JUSTICE 383, 383-406 (2010); Lepard, *supra* note 48, at 564-65.

71. Thus, the proceedings before the International Military Tribunals at Nuremberg focussed on "major criminals whose offences have no particular geographical location and who will be punished by the joint decision of the Governments of the Allies," while others "responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein." Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, *available at* http://avalon.law.yale.edu/imt/imtconst.asp [hereinafter Nuremberg Charter]; Agreement for the Prosecution and Punishment of the Major War Criminal of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 280, *available at* http://avalon.law.yale.edu/imt/imtchart.asp; Declaration Concerning Atrocities Made at the Moscow Conference, Oct. 30, 1943, *available at* http://avalon.law.yale.edu/wwii/moscow.asp; Charter of the International Military Tribunal for the Far East art. 1, Jan. 19, 1946, TIAS No. 1589, 4 Bevans 20 (as amended Apr. 26, 1946, 4 Bevans 27), *available at* http://www.jus.uio.no/treaties/04/4-06/military-tribunal-far-east.xml [hereinafter Tokyo Charter]. Also, see S. C. Res. 1534, ¶¶ 5-6, U.N. Doc. No. S/RES/1534 (Mar. 26, 2004), adopted as part of completion strategies of the ICTY and ICTR, calling on both Tribunals to concentrate pending indictments on "the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal . . ." and to proceed with "the transfer of cases involving intermediate and lower rank accused to competent national jurisdictions . . . ." The majority of perpetrators from these situations are today being proceeded against at the national level in Bosnia and Herzegovina, Croatia, Serbia, and Rwanda. *See also* Statute for the Special Court of Sierra Leone art. 1, S.C. Res. 1315, U.N. Doc. S/RES/915 (Aug. 14, 2000) (stating that "[t]he Special Court shall . . . have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone."); Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 art. 1, NS/RKM/1004/006 (Oct. 27, 2004) (stating that "[t]he purpose of this law is to bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979."); *see generally* Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, F. FOR INT'L AND HUMANITARIAN L., Publication No. 4 (2009) (comparing case selection criteria).

famously varied, of course, in the treatment of opposing parties to the conflict. The epitaph of victor's justice at Nuremberg was only partly redeemed by Justice Jackson's opening statement that the law must be applied in the cases before it with detachment and intellectual integrity.[72] The exclusion of Allied crimes before the Nuremburg and Tokyo Tribunal was less a matter of prosecutorial policy, but of law, this being ruled-out as a matter of jurisdiction.[73] Contemporary international courts have typically been established on a more level playing field: substantive decisions on case selection being left to the exercise of prosecutorial discretion rather than being dictated *a priori* by the legislator.[74] Nonetheless, the choice of individual cases has continued to stoke controversy: criticism at various times accusing international courts of either engaging in uneven and biased prosecutions or, conversely, of painting with too broad a brush by suggesting an equivalence of blame between rival parties, thereby blurring relative levels of culpability.

Both articles by Schabas and Lepard raise fundamental questions over how international prosecutors should select cases for prosecution from a large universe of potential cases. The results of selection will always be unsatisfactory because not every crime will be prosecuted. The question is whether consensus can be generated on the most appropriate criteria and methodology to be applied. Should every side be prosecuted, as broadly attempted before the Special Court for Sierra Leone (SCSL) and to some extent the International Criminal Tribunal for the former

72. Robert H. Jackson, Chief of Counsel for the United States, *Opening Statement Nuremberg Trials*, PUB. BROAD. SERV., http://www.pbs.org/wnet/supremecourt/personality/sources_document12.html (last visted Oct. 17, 2010).

73. Nuremberg Charter, *supra* note 71, arts. 6-12; Tokyo Charter, *supra* note 71, art. 5.

74. The Special Tribunal for Lebanon appears to be an exception given that it was established to hear primarily a single case, namely "persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons." Statute of the Special Tribunal for Lebanon art. 1, U.N. Doc. S/RES/1757 (2007). Debates over the selection of temporal scope for the ICTR and SCSL, moreover, demonstrate that determinations on jurisdictional parameters may also result from political choices as to the period of history that is subjected to judicial scrutiny. Before the ICC, although the Rome Statute does not allow a referring party to limit jurisdiction to particular cases or parties to a conflict, some situations may be circumscribed as a matter of jurisdiction, meaning that the Court may only have jurisdiction with respect to certain nationals (Article 12(2)(b)), certain categories of crimes (Article 124), or certain temporal parameters (Articles 11, 12(3), 13(b)). Rome Statute, *supra* note 2, arts. 12(2)(b), 124. For a more detailed discussion see Rod Rastan, *Situation and Case: Defining the Parameters*, *in* THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE (Carsten Stahn & Mohamed El Zeidy eds., forthcoming 2011).

Yugoslavia (ICTY), or should a distinction be made based on relative culpability, as before the International Criminal Tribunal for Rwanda (ICTR)? Should the critical factor in fact be the impartial application of selection criteria irrespective of outcomes? This might result in persons from Group A being prosecuted to the exclusion of individuals from Group B who do not meet the same criteria. Should an international court be concerned at all with appearance of bias and its impact on its perceived legitimacy?[75] If so, should such considerations influence case selection policy? As with any serious high profile case at the national level, the effects of legal determinations will be felt in the political arena. Should a court, while alive to such realities, be shaped by them? If we adjust legal criteria to accommodate political considerations, where should it stop? How does a judicial body avoid the risk of engaging in politics? If we reject the relevance of political impact on prosecutorial discretion how should a court respond to legitimate expectations for universal redress?

The resolution of these issues revolves to some extent around our expectations of the judicial process. We want international courts to dispense justice according to sound ethical principles. This suggests that prosecutorial policy should be based on objective criteria that examine the evidence in each case on its own merits. At the same time, due to the traditional prevalence of a culture of impunity, the uniqueness of leadership trials in situations of mass atrocities endows them with profound sociological import. Individual prosecutions resonate beyond the factual parameters of the specific case. They frame historical events in normative parameters. For societies brutalized by the accumulated patterns of violence, trials can serve vital expressive functions by identifying and individualising guilt and reaffirming ingrained instincts toward justice. The representational function of leadership trials may be undermined if some, but not all, parties to a conflict are prosecuted, even if some groups warrant trial but not others.

Which is the valid response? Should prosecutors focus solely on the law and follow wherever the evidence leads them, or should they consider the broader narrative of which they will inevitably

75. On the functions of legitimacy, see Danner, *supra* note 70 (demonstrating how the ICC Court and its Prosecutor can operate in ways that will enhance their legitimacy); Alexander Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 583-673 (2007) (proposing a pragmatic model of prosecutorial discretion that seeks to satisfy conditions of legitimacy and to reconcile the concerns of the Court's supporters and detractors); Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L. L.J. 1400, 1435-49 (2009) (demonstrating accounts of legitimacy to demonstrate the relationship between gravity and the ICC's actual and perceived legitimacy).

form a part? The issue is not simply one of fairness, but fairness toward which value: toward the impartial application of the law and the objective evidence-gathering process, or toward the will and needs of society? In view of the volatile contexts in which international criminal proceedings occur, should other factors be considered? What of the impact of prosecutions on peace and security or the incentive for negotiators to arrive at a mediated settlement? Will trials inflame tensions or contribute toward prevention? How should the goals of international criminal justice be prioritised in view of retribution, deterrence, persuasion, rehabilitation, and restoration? The exercise of prosecutorial discretion in these areas will inevitably be highly contested and be subject to competing value claims. While consensus might more easily galvanise against blanket selectivity, case-by-case assessments will inevitably generate differences over the appropriate application of selection criteria. The question of selection relates also to the overall effectiveness of a global criminal justice regime that relies on complementary action by national courts. So long as an international court remains the only practically effective forum to hear crimes arising from a situation of mass atrocity, choices over case selection will attract particularly intense scrutiny. Part of the challenge, therefore, is to operationalise the ever-present need for complementary mechanisms involving other international and state-level institutions to enable more complex and multifaceted responses to crimes.[76]

Professor Lepard suggests that prosecutorial policy should be guided by *ex ante* standards founded on sound ethical principles rather than the shifting sands of the political process. The application of such standards should, in turn, elicit public articulation over how they have been implemented in practice.[77] As demonstrated by Professor Schabas' article, the reasoning process is nonetheless likely to invite its own critique: by either creating an expectation that every determination must be publicly justified or, conversely, that the public elaboration of *ex ante* standards and explanations of their implementation may be received as disingenuous.[78] The value of such an exercise, therefore, should be considered for its own intrinsic worth—as guidelines for internal prosecutorial policy and to promote external transparency.

Examining the fundamental ethical principles articulated in

76. Rod Rastan, *Complementarity—Contest or Collaboration?*, *in* COMPLEMENTARITY AND THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES, FICHL Publication Series No. 7 (M. Bergsmo ed., 2010).

77. Lepard, *supra* note 48, at 564-65.

78. Schabas, *supra* note 1, at 549.

Professor Lepard's article, a number find support in the governing text of the Rome Statute. The principle of independence, for example, requires the Office of the Prosecutor not to seek or act on instructions from any external source.[79] It would arguably also require that it is not influenced by the presumed or known wishes of any party or by the co-operation seeking process (that is, concern over the maintenance of ongoing co-operation from a particular national authority).[80] Independence, moreover, means that the case selection decisions should remain unaffected by the manner in which a situation is triggered, whether by a State Party or Security Council referral or *proprio motu*. Thus, for example, where a referral or its accompanied supporting documentation identifies potential suspects or the responsibility of particular parties to a conflict, this should have no bearing on the direction of any future investigations and on case selection decisions.[81]

Impartiality, also identified by Lepard, would require the Office of the Prosecutor to extend its investigations to cover all facts and evidence relevant to an assessment of criminal responsibility, and, in doing so, investigate incriminating and exonerating circumstances equally.[82] It also suggests that the Prosecutor should apply consistent methods and criteria irrespective of the persons or groups concerned. Thus, an initial case hypothesis that forms the basis for a particular line of inquiry should be continuously revised in light of evidence collected, the evolution of the case theory and attendant modes of liability, and the sufficiency of crime base and linkage evidence.[83] As noted in both articles and as discussed above, impartiality does not mean "equivalence of blame," and may, in fact, require different outcomes for different actors within a situation. The concept of impartiality, moreover, is linked to non-discrimination and

79. Rome Statute, *supra* note 2, art 42(1).

80. Guariglia, *supra* note 70, at 212-13.

81. Thus, for example, while the Government of Uganda defined the scope of its referral as related to the Lord's Resistance Army, the Office of the Prosecutor clarified with the Government of Uganda that it would examine allegations concerning all parties to the conflict. *See* ICC, *Situation in Uganda: Decision Assigning the Situation in Uganda to Pre-Trial Chamber II*, ICC-02/04-1 (July 5, 2004) (annexing a letter from the Prosecutor to the President of the Court on the scope of the referral). The same independence would apply with respect to the lists of suspects submitted to the Office of the Prosecutor by the United Nations International Commission of Inquiry for Darfur and by the Commission of Inquiry into the Post-Election Violence in Kenya. *See generally* ICC RPE, *supra* note 7, Rule 44 (rectifying the uncertainty created by the inconsistent drafting of Articles 12(2)-(3) by clarifying that the exercise of jurisdiction by the Court applies with respect to all crimes of relevance to the situation); Rome Statute, *supra* note 2, art. 12(3); ICC PRE, *supra* note 6, Rule 44.

82. Rome Statute, *supra* note 2, art 54(1).

83. *See* OTP Regulations, *supra* note 20, Reg. 35(4).

equality before the law, meaning that the Office of the Prosecutor should consider all persons equally regardless of their background or affiliation, and not draw any adverse distinction founded on grounds prohibited under the Rome Statute.[84]

The principle of open-minded consultation as identified by Professor Lepard resonates with the duty of the Prosecutor to obtain the interests of victims when considering the interests of justice pursuant to Article 53(1)(c). It also forms a necessary corollary to the power of the Prosecutor at the preliminary examination stage to seek additional information from states, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources.[85]

At the same time, it should be recalled that any prosecutorial guidelines for the selection of cases will be dependent also on a number of practical considerations aimed at ensuring effective investigations and prosecutions. Thus, an initial case hypothesis may need to be adjusted in order to limit the number of counts or incidents that are the subject of investigations based on the availability of evidence as well as strategic decisions aimed at securing arrest and surrender.[86] The exercise of discretion in such matters will be dependent therefore on the facts and circumstances of each case.

Looking more broadly at the preliminary examination stage, as emphasised in both articles, the fact that the ICC can determine not only cases but also situations heightens by several orders of magnitude the import of prosecutorial independence and the Court's supervisory powers. This responsibility and the potential scope of the Court's jurisdiction elicits from Professor Schabas a profound disbelief over the viability of legal criteria or *ex ante* policy standards to regulate situation assignment or case selection.[87] It is nonetheless worth recalling that the goal of the Rome Statute is not for the ICC to respond to all serious crimes. The treaty creates a model for complementary enforcement by an assumption of shared responsibilities between the ICC and national criminal jurisdictions.[88] As the preamble of the Statute provides, "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes," while the ICC is established to be "complementary to national criminal

84. Rome Statute, *supra* note 2, art 21(3). This should be distinguished from situations where the Court's jurisdiction may be based solely on the nationality of the persons concerned pursuant to Article 12(2)(b) of the Statute. *Id.* art. 12(2)(b).

85. Rome Statute, *supra* note 2, art 15(2); ICC RPE, *supra* note 7, Rule 104.

86. *See* Rod Rastan, *What is a 'case' for the purpose of the Rome Statute?*, 19 CRIM. L.F. 435, 446-48 (2008).

87. *See generally* Schabas, *supra* note 1.

88. Rome Statute, *supra* note 2, art. 1.

jurisdictions."[89] In this sense, complementarity is not just about states preserving their right to investigate and prosecute crimes domestically within the strict meaning of Article 17, but also their primary responsibility to do so in line with the broader goals of the preamble.[90] Thus, while the ICC has vast territorial and personal reach, the goal of the Statute is not to necessarily secure proceedings before the ICC, but to put an end to impunity for such crimes, preferably through genuine efforts being undertaken at the national level.[91]

Thus, the relationship established between the ICC and national authorities under the Rome Statute differs fundamentally from compliance models under previous treaty regimes, such as the traditional system of self-regulation exemplified by the Hague Regulations or the grave breaches regime of the Geneva Conventions. Rather than relying on the reciprocal interests of the contracting parties for the fulfillment of their treaty obligations, a model that relied principally on symmetrical warfare between relatively homogeneous states, the Rome Statute creates a system of incentives and coercion whose principal strength lies in is its capacity to catalyse domestic compliance. The authority of the Court to assert jurisdiction where a state fails to genuinely exercise it pre-existing duty to investigate and prosecute can serve as a powerful incentive for domestic activism. Evidence for this assertion comes from the statements of governments during their own internal adoption process expressly declaring their intention to exhaustively capture the requirement of the Rome Statute so as to ensure the successful assertion of national jurisdiction whenever required.[92] It is also apparent from the position of the

89. Rome Statute, *supra* note 2, pmbl. ¶¶ 4, 6, art. 1.

90. *See, e.g.*, ICC Review Conference, *Complementarity*, 9th plen. mtg. at ¶¶ 1-2, RC/Res.1 (June 8, 2010) (stating that the Review Conference"*[r]ecognizes* the primary responsibility of States to investigate and prosecute the most serious crimes of international concern" and "*[e]mphasizes* the principle of complementarity as laid down in the Rome Statute and stresses the obligations of States Parties flowing from the Rome Statute.") (emphasis in original).

91. Rome Statute, *supra* note 2, pmbl. ¶¶ 5, 10-11.

92. See, for example, the explanation by the Solicitor-General on the International Criminal Court Bill before the UK House of Commons Standing Committee, H.C., Standing Committee D (May 3, 2001) *available at* http://www.publications.parliament.uk/pa/cm200001/cmstand/d/st010503/pm/10503s04.htm (stating that "[w]e want to ensure that United Kingdom courts can always investigate allegations against a British national so that the ICC cannot have jurisdiction."). Realists could argue that powerful states have designed international rules and procedures to preserve their own flexibility, by ensuring that complementarity will always favour deference to the domestic courts of well functioning developed states, while weaker, less-developed states will be penalised by the "genuineness" standard. This, however, looks only to the issue of forum selection; it disregards the fact that actual compliance will nonetheless be necessary by states to whom jurisdiction

competent authorities in situations currently under preliminary examination, referring to their intention to institute genuine domestic proceedings.[93] The catalytic presence of the Court on the international stage thus offers the possibility to alter incentive structures at the national level, thereby increasing prospects for actual compliance.

Clearly, the ICC will not be able to catalyse genuine domestic proceedings in all situations. States may be unwilling, unable, or simply inactive.[94] The task of selecting which situations to open for investigation will therefore fall back on the statutory criteria established by Article 53(1) of the Rome Statute, requiring the establishment of a reasonable basis to believe a crime within the jurisdiction of the Court has been or is being committed (material, temporal, and either territorial or personal jurisdiction); the forming of a preliminary determination on admissibility, involving an assessment of complementarity and gravity; and consideration of whether the interests of justice militate against the opening of investigations. If these criteria are fulfilled, the Statute asserts that the Prosecutor "shall initiate an investigation."[95] The main discretionary outlet that applies at the situation stage is if the

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has been deferred, and that the genuineness of such proceedings will be subject to ICC oversight.

93. *See, e.g.*, Press Release, Office of the Prosecutor, Guinea Minister visits the ICC—Prosecutor Requests Information on National Investigations into 28 September Violence (Oct. 21, 2009) (quoting Guinean Foreign Minister Alexandre Cece Loua that he is "ready and willing" to proceed with the OTP in investigating alleged crimes).

94. *See* Prosecutor v. Katanga, Case No. ICC-01/04-01/07-1497, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶ 78 (Sept. 25, 2009) (establishing a two-stage approach to assessing complementarity, involving first the question of State inaction, followed by an assessment of unwillingness or inability only where national proceedings exist); Darryl Robinson, *The Mysterious Mysteriousness of Complementarity*, 21 CRIM. L.F. 1, 67–102 (2010) (discussing the inactivity scenario).

95. "The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute." Rome Statute, *supra* note 2, art. 53(1). "If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected." Rome Statute, *supra* note 2, art. 15(3). *See also* ICC RPE, *supra* note 7, Rules 48, 104 (remedying the apparent difference in wording between Article 15 and Article 53 by clarifying that the Prosecutor is to apply the same factors and conduct its evaluation in the same manner at the Article 15 and Article 53 stage); John Holmes, *Jurisdiction and Admissibility*, *in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 331 (Roy Lee ed., 2001); Hakan Friman, *Investigation and Prosecution*, *in* THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 494-96 (Roy Lee ed., 2001).

Prosecutor decides that an investigation is not in the interests of justice. The discretionary quality of this assessment is pronounced by the last sentence of Article 53(1) and Article 53(3)(b) that stipulate that decisions taken on the sole basis of the interests of justice may be reviewed by the Pre-Trial Chamber on its own initiative and may be overturned.[96] By contrast, determinations with respect to the other stipulated factors (jurisdiction and admissibility) do not appear to be discretionary—if they are fulfilled, the Prosecutor is required to proceed.[97] This institutional design appears to have been crafted to establish an objective process leading to the opening of investigations based on the fulfillment of *ex ante* criteria. Thus, compared to case selection where the Office of the Prosecutor is presumed to enjoy broad discretion in identifying cases from a large pool of possible suspects and conduct,[98] the selection function at the situation stage is more narrowly circumscribed and the discretion outlet more closely regulated.[99]

Any decision taken by the ICC to open a situation or to

96. It should be recalled that the ability of the PTC to review a decision based solely on the interests of justice is limited to referrals, pursuant to the last sentence of Article 53(1), and does not apply to a decision taken under Article 15(6). Rome Statute, *supra* note 2, art. 53(1). This is why Rule 48 segregates "the factors set out in article 53, paragraph 1 (a) to (c)" and does not replicate Article 53, ¶ 1 in its entirety. ICC RPE, *supra* note 7, Rule 48. This differentiation in review powers is also borne out by the Rule 105, which distinguishes between the procedure following a decision not to proceed with an investigation pursuant to a referral compared to the procedure following a decision under Article 15(6). *See* Friman, *supra* note 95, at 496-98 (noting in the drafting history the lengthy discussions and ultimate rejection of the possibility for review powers over negative *proprio motu* decisions).

97. Such a reading suggests that, notwithstanding the apparent difference in wording between Article 53(1) and Article 15(3), which was largely harmonized during the drafting of the rules, a unitary standard should be applied across Article 53 and Article 15 with respect to the duty to open investigations once the statutory criteria have been met, meaning this would apply in equal manner irrespective of the triggering procedure. Rome Statute, *supra* note 2, arts. 53(1)(a)–(c); *compare* Morten Bergsmo & Jelena Pejic, *Article 15*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Otto Triffterer ed., 2008) *and* Morten Bergsmo and Pieter Kruger, *Article 53*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Otto Triffterer ed., 2008) *with* deGuzman, *supra* note 75, at 1410-1411.

98. *See, e.g.*, Prosecutor v. Bemba, Case No. ICC-01/05-01/08-453, Decision on Request for Leave to Submit *Amicus Curiae* Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, ¶ 10 (July 17, 2009) (observing that issues of case selection and prosecutorial policy are not matters that are dealt with by the Chamber).

99. To the extent that this evaluation will nonetheless continue to require the exercise of prosecutorial discretion in defining what is "gravity" for the purpose of Article 53(1)(b) or the "interests of justice" under Article 53(1)(c), this will tend to narrow through the elaboration of *ex ante* standards and/or the consolidation of guiding jurisprudence.

pursue a particular case will of course resonate beyond the confines of the Court. As to its impact on the political arena, it should be recognised that the fact that an issue has political implications should not affect the legal quality of a determination or cast doubt on the judicial process itself. As the International Court of Justice (ICJ) recently observed, "that a question has political aspects does not suffice to deprive it of its character as a legal question," going on to recall "in determining the jurisdictional issue of whether it is confronted with a legal question, it is not concerned with the political nature of the motives which may have inspired the request or the political implications which its opinion might have."[100] The ICJ has, moreover, rejected suggestions that it should refuse to rule on a legal issue on the grounds that its opinion might lead to adverse political consequences.[101] As the articles presented by Professors Schabas and Lepard both discuss prosecutorial independence in opposition to political manipulation, the final section below considers the nature of the relationship between law and politics within the ICC system.

III. LAW AND POLITICS

At the international level, the ordinary assumptions over the enforcement of criminal law come up against several obvious structural flaws. Whereas domestic courts enjoy the routine expectations that orders for the search of premises, freezing of assets, and warrants of arrest will be effected by law enforcement agencies, no such automaticity adheres at the global level. Instead, the execution of decisions issued by international courts is entrusted to states, who serve as the proximate source of compliance.[102] Philippe Kirsch, first President of the ICC, described this relationship in terms of a two-pillar system: a judicial pillar represented by the Court itself and an enforcement pillar that relies on national authorities.[103] Within the judicial pillar, the Court conducts its activities and the proceedings according to the legal procedures set out in the Statute and Rules: rights of the accused, due process, fair and impartial trials. Under

100. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 141, ¶ 27 (July 22).

101. *Id.* ¶ 35.

102. Rod Rastan, *The Responsibility to Enforce: connecting Justice with Unity, in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 167-69 (Carsten Stahn & Goran Sluiter eds., 2009).

103. Judge Phillipe Kirsch, President of the ICC, Address to the United Nations General Assembly 4 (Nov. 1, 2007), *available at* http://www.icc-cpi.int/NR/rdonlyres/754F8043-22DB-4D78-9F8C-67EFBFC4736A/278573/PK_20071101_ENG.pdf.

the enforcement pillar, in turn, states undertake to comply with their legal obligations to cooperate with the Court—pursuant either to Part 9 of the Statute or, in the case of a Security Council referral, such duties as may be imposed on any UN Member State pursuant to Chapter VII of the UN Charter.[104] The interoperability of law and politics within the ICC system arguably revolves more around this interplay between judicial and enforcement pillars, rather than the question of whether politics infiltrates the legal process.

The challenge of a twin-pillar system is that while the Court is independent of states and does not act on instructions from any external source, states are also independent of the Court and cannot be compelled by it. The task is therefore one of coordination and the assumption of the legal obligations. Thus, a finding by the Court of non-compliance by a state, for example, is to be referred back to the Assembly of States Parties or the Security Council for enforcement.[105] In practice, nonetheless, this also means that in the absence of judicial powers to directly compel state co-operation under threat of penalty, and without the availability of the Security Council as a routine enforcement agent, compliance will tend to fall back on the discrete decisions of individual states or the Security Council to uphold the law. The effective operation of the enforcement pillar, therefore, will depend on the degree to which the collective community of states chooses to lend support to the execution of judicial orders in order to promote compliance.[106]

Officials of all of the international courts and tribunals routinely call on states or the Security Council to increase support toward their institutions, to undertake arrest operations, and to provide effective responses to non-co-operation. We may not expect to see a domestic prosecutor or judge lobby the local police to arrest a suspect, but an international court, as a consequence of the twin pillar design, may often have to appeal to states to ensure compliance. The question arises whether, bearing in mind the two pillar system and the need for effective co-operation, an

104. *See generally* Rod Rastan, *Testing Co-operation: The International Criminal Court and National Authorities*, 21 LEIDEN J. INT'L L. 431, 431–56 (2008).

105. Rome Statute, *supra* note 2, arts. 87(5), (7).

106. Such processes would seek to promote an enabling environment for the Court by increasing the political effects of non-compliance and its impact on a state's overall reputation in the international sphere. In this manner, the adoption of issue-linkage strategies would seek to link a state's record of co-operation in one area (ICC co-operation) to its ability to participate in other spheres of international activity (political, trade, development etc); Rastan, *supra* note 102. On compliance theories, *see generally* George W. Downs & Andrea W. Trento, *Conceptual Issues Surrounding the Compliance Gap*, *in* INTERNATIONAL LAW AND ORGANIZATION: CLOSING THE COMPLIANCE GAP 19 (Edward C. Luck & Michael W. Doyle eds., 2004).

international prosecutor should factor in the likely political support for arrests and trials when deciding which situations and cases to investigate.[107] While practice demonstrates that justice has been most effective where there has been a confluence between law and politics—between the demands of justice and the appetite for its enforcement—should the law bend to politics, or is there evidence that politics may also be shaped by law? Arguably, to abandon the law to the political process, resulting in the institution of criminal proceedings only where there is widespread executive backing, would overlook the influence that the legal process has been shown to exercise in shaping domestic compliance. Debates over the wisdom and viability of indicting Sudanese President Omar al Bashir, a sitting head of state, or Joseph Kony, leader of the Lord's Resistance Army, viewed from the perspective of peace and security, for example, echo in familiar refrain the political disquiet that greeted the indictments by the ICTY of the Bosnian Serb leader Radovan Karadzic in view of negotiations leading up to Dayton, or the indictment of President Slobodan Milosevic in the midst of the Kosovo conflict and ongoing Rambouillet talks; or the unsealing of the SCSL indictment against Charles Taylor, President of Liberia, as he arrived for peace talks in Ghana.[108] In each instance, the judicial process was initially seen as a threat to efforts to end the bloodshed and, in the case of Taylor, of triggering renewed violence. There was no political consensus at the time for these cases to proceed: they were driven forward not by political support, but by the assertion of prosecutorial independence and the evidentiary trail. Ultimately, the international community adjusted to the new legal realities shaped by these tribunals: as these erstwhile leaders became marginalised fugitives and their responsibility for the instigation of violence became a matter of judicial record, they increasingly came to be viewed as spoilers to the mediation process and post-war recovery, not peacemakers.[109] This created a convergence between international peace and security and the delivery of justice: resulting in issue-linkage strategies being applied at the political level to secure compliance with court orders. Although political support had to coalesce to secure the timing of their eventual surrender, this relates to the operation of the enforcement pillar, not the judicial pillar. Crucially, case selection decisions were made by an independent prosecutor, not

107. *See* Schabas, *supra* note 53 and accompanying text.

108. Goldston, *supra* note 70, at 397-99; PRICILLA HAYNER, NEGOTIATING PEACE IN LIBERIA: PRESERVING THE POSSIBILITY FOR JUSTICE (Henry Dunant Centre for Humanitarian Dialogue Nov. 2007).

109. Hayner, *supra* note 108; Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 HUM. RIGHTS Q. 624-54 (2009).

by states.

Conversely, the failure of political actors to uphold the shared community values will tend to weaken the pillars of justice. A prevalence of disunity toward the judicial process will result in irregularity, unpredictability, and the disordering of the overall scheme,[110] increasing the prospect for perpetrators to avoid apprehension and undermining efforts to end impunity. If selection decisions are left to the mercy of politics, practice suggests that, more often than not, *realpolitik* will pull in the direction of non-engagement and non-confrontation; toward balancing perceived evils against one another and by thus negating the possibility for value judgments, removing the moral imperative to act or intervene. As recurrent discussions within the Security Council, General Assembly and Human Rights Council suggest, the fluctuating assessments that inform national interests at any given time means that states may not be able to generate the desired consensus to act, or to maintain consensus previously achieved.

It might be argued that limiting ICC activity to instances where there is political sanction will result in the Court enjoying better rates of compliance as a result of widespread support. However, it also runs the risk of inviting passivity and inertia, while providing no guarantee that any backing that is granted would persist in the face of the alternating demands of the political process. By reverse, attempting to subject politics to the influence of an independent judicial actor might risk inadequate support to the determent of successful enforcement.[111] But practice also demonstrates the capacity of the legal process to influence state behaviour. The answer to the paradox thrown up by the two-pillar system is not more politics, but more law.

110. Rastan, *supra* note 104 (citing Kiser Barnes, paper delivered at the Conference on Law, De Poort, Neth., Dec. 14–17, 2006). *See also* BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 81-82 (Cambridge Univ. Press 2010) (discussing the principle of "unity in diversity").

111. *See supra* Part I.A. (outlining a similar range of views ventilated during the negotiations of the Rome Statute).