

# More Candour about Criteria

## The Exercise of Discretion by the Prosecutor of the International Criminal Court

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### Abstract

*In its short life, the International Criminal Court (ICC) has issued public warrants of arrest for 14 persons, launched two trials and provoked controversy across the globe. Much unease about the Court boils down to one issue: how should the Prosecutor decide, among thousands of crimes and perpetrators within his jurisdiction, which ones to charge? To date, considerable discussion about the ICC has taken place in an atmosphere of unreality ill-served to educate and inform. While critics paint a picture of justice as one-sided and politically determined, embattled defenders offer a pristine notion of 'law in a vacuum' that, at its extreme, stretches credibility. If the ICC is eventually to command sustained public support, we must move beyond platitudes in explaining the nuanced nature of the Prosecutor's discretion: grounded in law and evidence, but, of necessity, taking into account broader considerations of institutional strategy and policy, while refraining from partisanship or bias.*

### 1. Introduction: ICC Prosecutorial Discretion in Context

The International Criminal Court (ICC or the Court), as its President, Sang-Hyun Song, has rightly said, is 'a judicial institution operating in a

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political world'.<sup>1</sup> The Court's experience to date suggests that the distinction between these two spheres is not always clear.<sup>2</sup>

Since its establishment little more than a decade ago, the ICC has been subjected to a barrage of commentary, second-guessing and evaluation, much of it critical, concerning the extent to which its decisions — and particularly those of its most public face, the Prosecutor — have insufficiently, imperfectly or excessively taken account of criteria other than the facts on the ground and the language of the Rome Statute.

In Uganda, the ICC has been criticized for having given insufficient attention to local voices that prioritized peace and reconciliation over Rome Statute justice.<sup>3</sup> In the Democratic Republic of the Congo (DRC), human rights groups have 'accuse[d] the prosecution of looking to secure quick convictions, rather than striving to capture a representative range of crimes committed' during conflicts in that country.<sup>4</sup> In the Central African Republic (CAR), some have suggested that 'the prosecutor's decision to open an investigation in the CAR in May 2007, nearly three years after the CAR referred the situation there to the ICC, was to pursue a political rival of DRC President Kabila'.<sup>5</sup>

Since 4 March 2009, when judges in The Hague issued a warrant of arrest for President Omar Al Bashir of Sudan for, among other crimes, seeking to exterminate entire ethnic groups in Darfur, the Court has confronted open rebellion on the African continent, home to more ICC member states than any other. Libyan President Muammar Al-Qaddafi, who holds the African Union's rotating chair, branded the indictment 'First World terrorism'.<sup>6</sup> In July, African Union members, expressing 'regret' that the Security Council had not

- 1 'Remarks of Judge Sang-Hyun Song', Seminar on International Criminal Justice: The Role of the International Criminal Court, United Nations, New York, 19 May 2009.
- 2 Many have noted the challenges for international prosecutors of reconciling the legal and the political. See e.g. M.H. Arsanjani and W.M. Reisman, 'Developments at the International Criminal Court: The Law-in-Action of the International Criminal Court', 99 *American Journal of International Criminal Law (AJIL)* (2005) 385–386 ('The ICC is the archetypal *ex ante* tribunal. The responsibilities of *ex ante* tribunals may create conflicting pressures on both the tribunals and the agencies and actors responsible for resolving the security problem. The conflicting pressures may produce a stalemate .... Thus, a formidable challenge falls on the prosecutors ... who must determine whether and how to set priorities among their curial responsibilities and the inevitable political consequences of their actions').
- 3 See e.g. Josefine Volqvartz, 'ICC Under Fire over Uganda Probe', CNN, 23 February 2005, available at <http://www.cnn.com/2005/WORLD/africa/02/23/uganda.volqvartz/> ('"There is a feeling in the region that the ICC has ignored important messages from local leaders .... [T]he ICC is undermining traditional local justice mechanisms that have been shown to work," [stated] Christian Aids Gemma Houldey').
- 4 K. Glassborow, *DRC: ICC Investigative Strategy Under Fire*, Institute for War and Peace Reporting, 17 October 2008, available at <http://www.ictj.org/en/news/coverage/article/2075.html#> (visited 5 March 2010).
- 5 Human Rights Watch, *ICC Hearing Against Former Vice-President of DR Congo Jean-Pierre Bemba*, 7 January 2009, available at <http://www.hrw.org/en/news/2009/01/07/icc-hearing-against-former-vice-president-dr-congo-jean-pierre-bemba> (visited 5 March 2010).
- 6 See e.g. 'Darfur, Ghaddafi: ICC are terrorists', *Africa Times*, 9 March 2009, available at <http://www.africa-times-news.com/2009/03/darfur-ghaddafi-international-criminal-court-terrorist/> (visited 5 March 2010).

responded to its prior request to defer prosecution, pledged not to cooperate in the execution of Bashir's arrest warrant.<sup>7</sup> For the first time, the possibility of states withdrawing from the Rome Statute was seriously floated. Among other concerns, observers have taken issue with the timing of the arrest warrant application against President Bashir, its public nature, the propriety of charging genocide, the failure to consider the humanitarian backlash, and, perhaps most repeatedly, the alleged exclusive focus on Africa.<sup>8</sup>

In late January 2010, at a summit in Addis Ababa, the African Union formally recommended that, inter alia, (i) Article 16 of the Rome Statute be amended to allow the UN General Assembly to defer cases for one year where the Security Council fails to act on a request for deferral within a specified time period; and (ii) the Office of the Prosecutor be requested to review its internal guidelines on the exercise of prosecutorial powers 'to include factors of promoting peace and submit them to the Assembly of States Parties in order to ensure more accountability'.<sup>9</sup>

A few days later, the African Union Commission publicly denounced the 3 February 2010 judgment of the Appeals Chamber in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir* ('Al-Bashir').<sup>10</sup> Declining to resolve Bashir's responsibility for genocide, the decision addressed a question of procedural law — i.e. whether the Pre-Trial Chamber applied the correct standard of proof when disposing of the Prosecutor's application for an arrest warrant. In holding that the Pre-Trial Chamber had not applied the correct standard of proof,<sup>11</sup> the Appeals Chamber rejected the Prosecutor's request to find that there were reasonable grounds to believe that Bashir acted with genocidal

7 Assembly/AU/Dec.245 (XIII) Rev.1, 7 July 2009, available at <http://www.google syndicated-search.com/u/UAAU?q=July+3+2009+resolution> (visited 5 March 2010).

8 See e.g. Conor Foley, 'This Darfur Prosecution is Deadly', *The Guardian*, 27 May 2009, available at <http://www.guardian.co.uk/commentsfree/2009/may/27/hay-festival-icc-darfur-sudan> (visited 5 March 2010). This criticism commenced almost immediately after the 14 July 2008 application by the Prosecutor for an arrest warrant for President Bashir. See e.g. Mohau Pheko, 'It seems the West's war crimes tribunals are reserved for Africans', *Sunday Times* (South Africa), 27 July 2008, 'Vow to pursue Sudan over "crimes"', *BBC News*, 27 September 2008, available at <http://news.bbc.co.uk/2/hi/africa/7639046.stm> (while reportedly confirming that '[the AU] is not against international justice', African Union Commission Jean Ping lamented that "[i]t seems that Africa has become a laboratory to test the new international law"); M. Mamdani, *The New Humanitarian Order*, available at <http://www.thenation.com/doc/20080929/mamdani> ('[i]ts name notwithstanding, the ICC is rapidly turning into a Western court to try African crimes against humanity. It has targeted governments that are US adversaries and ignored actions the United States doesn't oppose, like those of Uganda and Rwanda in eastern Congo, effectively conferring impunity on them').

9 See *Decision on the Report of the Second Meeting of States Parties to the Rome Statute of the International Criminal Court*, Assembly/AU/8 (XIV), issued 31 January 2010 at the 14th ordinary session of the Assembly of the African Union: 'Recommendations of the Ministerial Meeting on the Rome Statute of the International Criminal Court', 6 November 2009.

10 Judgment on the appeal of the Prosecutor against the Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, *Al-Bashir* (ICC-02/05-01/09-73), Appeals Chamber, 3 February 2010.

11 The judgment held, 'A Pre-Trial Chamber acts erroneously if it denies to issue a warrant of arrest under article 58 (1) of the Statute on the basis that "the existence of [...] genocidal

intent, and instead directed the Pre-Trial Chamber to decide anew whether or not the arrest warrant should be extended to cover the charge of genocide. Notwithstanding the limited nature of the Appeals Chamber judgment, the African Union Commission declared that ‘the search for justice should be pursued in a manner not detrimental to the search for peace’, and warned that ‘[t]he latest decision by the ICC runs in the opposite direction.’<sup>12</sup>

Many, though by no means all, of the attacks on the Court come from powerful political actors who have never reconciled themselves to the Court’s mission of securing legal accountability for mass atrocities. Such persons, opposed to the very idea of justice for international crimes, have every reason to characterize the Court, and its Prosecutor, as a political institution serving illegitimate ends.<sup>13</sup> Their criticism simply confirms that the Court is doing its job. But other voices — some of which reflect confusion and/or discontent among victim communities — cannot be so easily dismissed.

In attempting to rebuff repeated accusations of politicization, it is perhaps understandable that the Court and some of its defenders have sought to underscore the Prosecutor’s apolitical functions. Thus, it has been said, the role of the Prosecutor is to ‘apply the law. Nothing more. Nothing less.’<sup>14</sup> Similarly, prominent human rights organizations contend that ‘political factors [do not] constitute a legitimate basis’ for the Prosecutor’s decision to initiate an investigation or prosecution.<sup>15</sup>

Appealing as they are, such formulations are incomplete; they may not sufficiently explain the complexity of the decisions the Office of the Prosecutor (OTP) is asked to make in practice. However powerful the aspiration for neutral

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intent is only one of several reasonable conclusions available on the materials provided by the Prosecution”. *Ibid.*, § 1.

- 12 African Press Organization, ‘AU Response to ICC Appeals Chamber Decision’, 5 February 2010.
- 13 See e.g. ‘Al-Bashir Says ICC Made Up Evidence Against Him’, *SRS - Sudan Radio Service*, 10 December 2009, available at <http://www.sudanradio.org/al-bashir-says-icc-made-evidence-against-him> (discussing the arrest warrant issued for President Omar al-Bashir and quoting him as saying ‘We refute these allegations and are trying to explain that this is just a political act and it’s not legal — the aim is political and not aimed at establishing the truth’); ‘Bashir in Doha before start of Arab summit’, Reuters, 29 March 2009, available at <http://www.france24.com/en/20090329-al-bashir-qatar-before-start-arab-summit-icc-doha-sudanese> (‘Libyan leader Muammar Gaddafi on Sunday described the indictment of Bashir as “First World terrorism”. “The ICC warrant to arrest President Bashir is an attempt by (the West) to re-colonise their former colonies”, Gaddafi, the current chairman of the African Union (AU), told reporters in the Ethiopian capital Addis Ababa.’); Marlise Simons and Neil MacFarquhar, ‘Court Issues Arrest Warrant for Sudan’s Leader’, *New York Times*, 5 March 2009, at A6 (“‘We strongly condemn this criminal move,” said Abdalmahmood Abdalhaleem, the Sudanese ambassador to the United Nations ... “It amounts to an attempt at regime change. We are not going to be bound by it.”).
- 14 Luis Moreno Ocampo, ‘Statement’, Commemoration of the 10th Anniversary of the Adoption of the Rome Statute of the ICC, 17 July 2008, at 4. See Luis Moreno Ocampo, ‘Keynote Address’, Council on Foreign Relations, Washington, D.C., 4 February 2010 (‘I shall not be involved in political considerations ... I apply the law without political considerations’).
- 15 Human Rights Watch, *The Meaning of ‘The Interests of Justice’ in Article 53 of the Rome Statute* (June 2005), at 14.

principles, experience and common sense suggest that law can never be entirely divorced from its surrounding environment.<sup>16</sup>

Too much discussion about the Court has taken place at the level of caricature, ill-served to educate and inform. While the Court's opponents paint a picture of justice as one-sided and politically determined, many of its defenders have responded with a pristine notion of 'law in a vacuum' that, at its extreme, stretches credibility. This divide echoes the two poles of opinion that characterized the debate leading up to Rome concerning the role of the prosecutor, between those who feared the consequences of genuine independence and others who considered an independent prosecutor with discretion to initiate investigations and choose targets an essential guarantor of a non-political Court. To date, few have sought to describe the Prosecutor's discretionary function as it is: grounded in law and evidence, but, of necessity, taking into account broader considerations of strategy and policy, even while refraining from 'politics' in the sense of partisanship and/or bias for or against any interest external to the Court.<sup>17</sup> It may be helpful, if we are to encourage a better understanding of the Court and of the Prosecutor's role, to confront this reality head on.<sup>18</sup>

- 16 Thus, one leading human rights campaigner recently characterized the issue: 'When I told the Prosecutor that the ICC needed to engage in [country X] in a balanced way, like a good lawyer he said, "We will follow the evidence." That is true but as we all know, you can follow the evidence in a balanced way and get where you want to go.' Statement made at Consultative Conference on International Criminal Justice, New York, September 2009. Cf. C. Gosnell, 'Editorial Comment: The Request for an Arrest Warrant in Al Bashir: Idealistic Posturing or Calculated Plan?' 6 *Journal of International Criminal Justice (JICJ)* (2008) 841, 845 (deciding whether to have sought an arrest warrant for President Bashir under seal or not 'is an intensely political decision. The chance of a successful arrest in a cooperative state (which is best facilitated by a secret warrant) has to be weighed against the chances of engineering a change of policy in a currently uncooperative state (for which the more publicity, the better). These kinds of political considerations are intrinsic to international justice, which relies on state enforcement;' and yet, '[t]he Prosecutor's effectiveness depends, paradoxically, precisely on claims of objectivity and impartiality — indeed, the utter disregard of political considerations. ... the Prosecutor is on a tightrope between two contrary imperatives').
- 17 See Art. 42(1) ICCSt. (providing that the OTP 'shall act independently as a separate organ of the Court' and that members of the OTP 'shall not seek or act on instructions from any external source'). The Regulations of the Office of the Prosecutor similarly underscore the obligation of 'the Office and its members to maintain their full independence' in the sense that they 'do not seek or act on instructions from any external source.' (Regulation 13, April 2009).
- 18 The ICC is hardly the only judicial institution which confronts the challenge of articulating in a persuasive manner the dividing line between its judicial function and the political ramifications of its decisions. The Special Tribunal for Lebanon declined to bow to pressure from the Lebanese government to delay its April 2009 decision releasing from custody four high-ranking Lebanese security officers in connection with the 2005 killing of former Prime Minister Rafik Hariri. Court officials 'sa[id] they could not take political considerations into account'. That did not apparently disabuse the 'political opposition' in Lebanon from 'see[ing] the Court] more as a political weapon aimed at their Syrian ally'. Robert F. Worth, 'Assassination Suspects Freed in Lebanon', *New York Times*, 30 April 2009, at A6. See also L. Côté, Chief of Prosecutions, Special Court for Sierra Leone, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law', 3 *JICJ* (2005) 162, at 170–171 ('International prosecutors often state publicly that their decision to indict is only legal, "based on evidence only" or

I address these issues as follows: First, to recall briefly the principle of prosecutorial discretion; secondly, to examine the role of prosecutorial discretion under the Rome Statute; thirdly, to suggest a number of areas where it may be not just possible, but inevitable, that the Prosecutor move beyond the mechanical application of law to facts, to the consideration of strategic policy questions, without jeopardizing OTP's institutional independence and, finally, to suggest how both Court officials and supportive voices outside the Court may assist in fostering improved public understanding of the exercise of prosecutorial discretion, and thereby of the Court itself.<sup>19</sup>

## 2. The Nature of Prosecutorial Discretion

International standards governing the duties of criminal prosecutors provide only the most general guidance. Thus, all can agree that 'prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with' human rights and fundamental freedoms.<sup>20</sup>

In delineating the contours of that role, international guidelines stipulate that 'prosecutors shall (a) carry out their functions impartially' and '(b) act with objectivity'.<sup>21</sup> At the same time, prosecutors are expected to 'pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect'.<sup>22</sup> Where 'prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions ...'.<sup>23</sup>

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is part of a purely academic exercise. But these statements should not conceal the eminent political dimension of ... prosecutorial discretion, particularly on the international scene, where conflicts are ongoing ... It is not the political dimension of these decisions that is cause for concern ... . What is really disturbing is their occult or secret nature. Their concealed practice based upon unknown criteria gives rise to criticism and casts doubt on their legitimacy and impartiality').

19 This paper does not attempt a comprehensive comparative analysis, but, where appropriate, makes reference to examples from other tribunals. There is an extensive literature on the subject of prosecutorial discretion in international criminal tribunals, including the ICC. See e.g. W. Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', 6 *JICJ* (2008) 731; H.B. Jallow, 'Prosecutorial Discretion and International Criminal Justice', 3 *JICJ* (2005) 145; Côté, *supra* note 18; D.D. Ntanda Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals', 3 *JICJ* (2005) 124; M.R. Brubacher, 'Prosecutorial Discretion within the International Criminal Court', 2 *JICJ* (2004) 71; A. Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', 97 *AJIL* (2003) 10.

20 'Guidelines on the Role of Prosecutors', Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 1990.

21 *Ibid.*, § 13.

22 *Ibid.*

23 *Ibid.*, § 17.

In virtually all systems where it is employed, prosecutorial discretion — to choose whether or not to launch investigations, to bring charges, and to select which crimes and who is to be charged — is an essential means of rationalizing the use of scarce law enforcement resources and/or accommodating individual circumstances (such as age or prior criminality of accused) in a manner which assures that crimes of greatest priority are investigated and prosecuted.<sup>24</sup>

This is all the more true for an ICC whose jurisdiction extends over thousands of potential crimes and perpetrators. Indeed, Louise Arbour has observed, '[in] the international context, particularly in a system based on complementarity with state jurisdiction, the discretion to prosecute is considerably larger, and the criteria upon which such prosecutorial discretion is to be exercised are ill-defined, and complex .... [T]he real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention ...'.<sup>25</sup>

Prosecutorial discretion is generally defined as the authority *not* to assert power, or not to assert it to the full extent authorized by law.<sup>26</sup> Some of the discussion concerning the ICC has echoed this concern — by critiquing the failure to bring charges (i) against one side in a conflict (e.g. in Uganda, where some have argued that the Prosecutor should have, but has not, charged government forces) or (ii) outside of a particular region (i.e. it is said that the Prosecutor should have extended his active investigations to include venues beyond Africa). But it is illustrative of the breadth of discretion he uniquely enjoys that the ICC Prosecutor has been criticized not only for charges he has failed to bring, but also — e.g. in the case of President Bashir — for those he has brought.

In any context, prosecutorial discretion demands that, in considering whether to bring charges at all in response to reported crimes, a prosecutor must decide the essentially political question of the extent of society's interest in seeking criminal punishment. This is hard enough in a national setting. But the articulation of a common interest in ICC prosecution is particularly difficult, in so far as (i) the crimes at issue are often perpetrated by leading political and military figures, and (ii) the Prosecutor is selected by representatives of more than 100 states purporting to act on behalf of an amorphous 'international community'.<sup>27</sup>

24 *Ex ante* standards can, at least in certain circumstances, also foster greater predictability, help the prosecutor explain the basis for certain decisions which may come under public scrutiny or criticism and shield the prosecutor from pressure to address cases which fall outside the standards.

25 L. Arbour, 'The Need for an Independent and Effective Prosecutor in the Permanent International Criminal Court', 17 *Windsor Yearbook of Access to Justice* (1999) 207, at 212.

26 K. Stith, 'The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion', 117 *Yale Law Journal* (2008) 1420, at 1422 ('In the context of the criminal law, to exercise discretion means, most simply, to decide not to investigate, prosecute, or punish to the full extent available under the law.').

27 The Rome Statute grants the ICC 'jurisdiction over the most serious crimes of concern to the international community as a whole'. (Preamble).

In the context of the ICC, the exercise of discretion is thus simultaneously essential to making the Court work, and controversial. If not exercised with care, it leaves the Court open to accusations of arbitrariness and unfairness. It has been said that 'The greatest threat...to the legitimacy of the [International Criminal] Court would be the credible suggestion of political manipulation of the Office of the Prosecutor, or of the Court itself, for political expediency.'<sup>28</sup> Discretion must thus be preserved, employed and explained in a manner which avoids giving rise to such a credible suggestion.

### 3. The Contours of Prosecutorial Discretion under the Rome Statute — Legal Requirements

Prosecutorial discretion has been seen as a critical component of independent prosecutorial decision-making in international criminal justice since Nuremberg.<sup>29</sup> In more recent years, the jurisprudence of the Yugoslav and Rwandan ad hoc tribunals has generally afforded their respective prosecutors ample room to exercise discretion with limited judicial interference.<sup>30</sup> Thus, in *Delalić et al.*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber pronounced it 'beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments.'<sup>31</sup> The International Criminal Tribunal for Rwanda (ICTR) has similarly observed, 'The Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments.'<sup>32</sup> This is so, even though the ICTY and ICTR have lately operated pursuant to completion strategies which have expressly prioritized prosecution of the most senior leaders.<sup>33</sup>

28 Arbour, *supra* note 25, at 213.

29 To be sure, as many have noted, prosecutors at Nuremberg were 'not "independent" prosecutors but rather representatives of their own governments, and their role, at least in part, was surely to ensure that the interests of their respective states were protected.' Schabas, *supra* note 19, at 732. Nonetheless, '[p]rosecutors at Nuremberg selected the accused and issued the indictment without any real judicial oversight.' *Ibid.*

30 'Whilst no discretion is absolute or unfettered, the jurisprudence so far [of the ICTY and ICTR] reveals a justified reluctance by the courts to interfere with the exercise of prosecutorial discretion, except where a clear inference can be drawn that it was exercised for impermissible motives.' Jallow, *supra* note 19, at 161. See also Schabas, *supra* note 19, at 733 (the ICTY created 'an independent Prosecutor whose hands were free to select cases for prosecution, albeit within the tight jurisdictional framework of the ad hoc institution').

31 Judgment, *Delalić et al.* (IT-96-21-A), Appeals Chamber, 20 February 2001, § 602.

32 Judgment, *Akayesu* (ICTR-96-4-A), Appeals Chamber, 1 June 2001, § 95. See also Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council, *Ndindilimana* (ICTR-2000-56-I), Trial Chamber, 26 March 2004, § 22 ('the breadth of discretion of the Prosecutor, and the fact of [his] statutory independence, imply a presumption that the prosecutorial functions ... are exercised regularly').

33 See C. Angermaier, 'Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia', in M. Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases* (Oslo: International Peace Research Institute, 2009)



The Rome Statute grants the Prosecutor broad discretion in a number of respects, if subject to more extensive judicial supervision than at the ICTR or ICTY. With respect to the selection of which situations to investigate — a question which arises in a court of general, as opposed to ad hoc, jurisdiction — the Rome Statute creates three well-known trigger mechanisms: Security Council referral (Article 13), State Party referral (Article 14) and *proprio motu* action (Article 15).<sup>34</sup> Within a given situation, the Prosecutor may decide (i) whether offences committed by anyone — rather than a particular party to a conflict — should be investigated and prosecuted; (ii) which individuals to charge with which crimes as a result of his investigations and (iii) whether to challenge a state's assertion of inadmissibility.<sup>35</sup>

The Statute does make clear that the ICC is intended to prosecute only 'the most serious crimes of international concern'.<sup>36</sup> It also defines in detail the crimes within the Court's jurisdiction, and it establishes a series of procedural hurdles overseen by judges which the Prosecutor must surmount in presenting his case.<sup>37</sup>

Thus, once the Prosecutor has received a referral — from a state or the Security Council — he must initiate an investigation unless he determines that 'there is no reasonable basis to proceed'.<sup>38</sup> If a Prosecutor receives a communication, from an individual or a non-governmental organization (NGO), the test is the same but the starting point is reversed: the Prosecutor shall not seek to initiate an investigation without first concluding that there is a reasonable basis to proceed.<sup>39</sup>

In deciding whether to initiate an investigation, the Prosecutor must consider three factors: whether

- (a) the crime is within the jurisdiction of the Court;
- (b) the case is or would be admissible under Article 17; and

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29, at 35–36; A. Obote-Odora, 'Case Selection and Prioritization Criteria at the International Criminal Tribunal for Rwanda', in Bergsmo (ed.), *ibid.*, 41, at 47.

34 It has been suggested that '[t]he Prosecutor has a broad discretion in selecting 'situations', to the extent that crimes within the jurisdiction of the Court have been committed. If there is no referral, he can simply unleash his *proprio motu* authority.' Schabas, *supra* note 19, at 753. On 31 March 2010, the Court upheld the first test of such authority, when Pre-Trial Chamber II approved the Prosecutor's request to initiate an investigation into the situation in Kenya. Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Kenya* (ICC-01/09), Pre-Trial Chamber II, 31 March 2010.

35 Arts 15, 53 and 54 ICCSt.

36 Preamble, Art. 1 ICCSt.

37 Parts II, III, V ICCSt.

38 Arts 13, 14, and 53(1) ICCSt.

39 Arts 15 and 53(1) ICCSt.

(c) taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.<sup>40</sup>

If the Prosecutor decides solely on the grounds of interest of justice not to investigate, he must report that to the Pre-Trial Chamber.<sup>41</sup> Following investigation, the Prosecutor may conclude that there is not a sufficient basis for a prosecution after analysing the same three factors, i.e. because:

(a) he has no jurisdiction — there is not a sufficient legal or factual basis to seek a warrant or summons under Article 58;

(b) the case is inadmissible under Article 17; or

(c) a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.<sup>42</sup>

In all such cases where he declines prosecution, the Prosecutor must report this to the Pre-Trial Chamber, which may review his decision, either on the request of the referring state or the UN Security Council or, where the Prosecutor has declined on the basis of interests of justice, on its own motion.<sup>43</sup>

Notwithstanding these and other statutory provisions mandating judicial oversight<sup>44</sup> and/or providing for institutional accountability<sup>45</sup> for prosecutorial decision-making, and in spite of what may have been intended by many states at Rome, the Statute imposes relatively few practical restraints on the exercise of prosecutorial discretion with respect to the selection of situations (beyond the three trigger mechanisms), cases and accused.

Although there has been much debate about its meaning, the phrase 'interests of justice' (a key criterion mentioned in Article 53 as the basis for deciding whether to initiate an investigation, and then to prosecute) is elastic. It provides the Prosecutor a great deal of latitude, except for certain clear-cut abuses — e.g. vindictive prosecution (a decision to charge someone in order

40 Art. 53(1) ICCSt.

41 *Ibid.*

42 Art. 53(2) ICCSt.

43 *Ibid.*

44 Art. 19 ICCSt. also provides that the Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may determine the admissibility of a case in accordance with Art. 17 on its own motion or upon the motion of an accused, a state having jurisdiction over the case or a state from which acceptance of jurisdiction is required under Art. 12.

45 Part 4 of the Statute on the composition and administration of the Court, provides for the selection, accountability and if necessary removal of the Prosecutor and Judges. While in theory these provisions restrict the Prosecutor's discretion, in practice they will not be applied except in the cases of the most egregious misconduct.

to retaliate for the exercise of legal rights) or selective prosecution (motivated solely or primarily by, e.g. a person's race or political opinion).

And to date, the Court has not had much opportunity to address the scope of prosecutorial discretion in the course of its evolving jurisprudence.<sup>46</sup> In short, what limits the Rome Statute does impose on the Prosecutor's exercise of discretion with respect to the selection of situations, cases and accused must be developed in the formulation and application of policy.

#### 4. The Contours of Prosecutorial Discretion — Questions of Policy

In light of the underlying rationale for discretion and the limited constraints imposed on its exercise by the terms of the Rome Statute, what factors may the Prosecutor properly take into account in deciding whether, where, whom, what and when to charge?

Some factors seem beyond dispute. Thus, the Prosecutor has stated that his Office will 'focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes'.<sup>47</sup> To his credit, the Prosecutor has noted that '[i]n some cases, the focus of an investigation ... may go wider than high-ranking officers if, for example, investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case.'<sup>48</sup>

46 Several rulings have indirectly addressed the question of prosecutorial discretion. In the course of the pre-trial litigation in *Lubanga*, the Appeals Chamber overturned a Pre-Trial Chamber decision that would have narrowed the Prosecutor's power to decide which category of persons to charge. The Appeals Chamber ruled that the position within an organizational hierarchy of the person named in an arrest warrant application is not a relevant criterion in determining the gravity of a crime. The Chamber agreed with the OTP that such a requirement would limit the Court's potential deterrent impact by effectively bestowing immunity from prosecution upon all but a small circle of very senior commanders. Judgment, *Lubanga* (ICC-01/04-169), Appeals Chamber, 23 September 2008 (issued *ex parte* 13 July 2006), at §§ 73–79. More recent rulings have concerned the power of chambers to modify charges proposed by the Prosecutor. Thus, at the conclusion of the confirmation hearing in *Lubanga*, the Pre-Trial Chamber added the charges of enlistment, conscription and active use of child soldiers in an international armed conflict, although the Prosecutor had sought confirmation only of charges relating to a non-international armed conflict. Decision on the Confirmation of Charges, *Lubanga* (ICC-01/04-01/06), Pre-Trial Chamber I, 29 January 2007. Leave to appeal was refused. Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, *Lubanga* (ICC-01/04-01/06), 24 May 2007, at § 41. The Appeals Chamber subsequently made plain that, while Art. 61(9) enables the Prosecutor to amend charges following confirmation, that Art. should not be read to suggest that the Prosecutor retains the *exclusive* authority to do so: Judgment, *Lubanga* (ICC-01/04-01/06), Appeals Chamber, 7 December 2009, at § 77.

47 OTP, *Paper on Some Policy Issues before the Office of the Prosecutor* (2003), at 7.

48 *Ibid.*

As a matter of policy, the Prosecutor has indicated that gravity is 'one of the most important criteria for the selection of situations and cases.' Thus, in explaining the focusing of his investigation in Uganda on crimes committed by the Lord's Resistance Army, the Prosecutor has said that those crimes 'were much more numerous and of much higher gravity than alleged crimes committed by' the national army.<sup>49</sup>

Similarly, it would seem hard to quibble with a decision to take into account the sufficiency of the evidence,<sup>50</sup> the challenges involved in gathering evidence and/or the relative difficulty of protecting victims and witnesses.<sup>51</sup>

But other factors are not so straightforward. Even where the more 'objective' indicia of jurisdiction, admissibility and gravity are satisfied, a number of factors raise complex questions of prosecutorial strategy and policy which are often difficult to ignore, let alone resolve.

### A. Prospect of Arrest

The official explanation of the decision to charge Thomas Lubanga Dyilo as the first suspect in the DRC situation noted that he was facing 'imminent release' from prison — suggesting, without stating directly, that securing custody of

49 Gravity is simultaneously a statutory requirement of admissibility, see Art. 53, and a consideration of prosecutorial policy. See e.g. M. de Guzman, 'Gravity and the Legitimacy of the International Criminal Court', 32 *Fordham International Law Journal* (2009) 1400, at 1449. OTP has identified four elements of gravity to be considered: the scale of the crime in question including the numbers of victims and possible consideration of temporal and geographic intensity, the nature of the crime, the manner of the crime (taking into account especially aggravating factors such as particular cruelty, targeting of especially vulnerable victims, the abuse of authority), and the impact of the crime. OTP, *Draft Policy Paper*, June 2006. The paper explicitly states that the Office will not attempt to attribute specific weights to each of the elements to generate an arithmetic calculus upon which to ground selection. Some observers have questioned the consistency in application of the gravity criterion. See e.g. Schabas, *supra* note 19, at 736–748.

50 And yet, even sufficiency evaluations may be more complicated at the ICC than in other courts. In the ICTR, evidentiary sufficiency for conviction is assessed 'after selection and proofing of witnesses rather than being based merely on the written witness statements'. Jallow, *supra* note 19, at 152. At the present time, the ICC Prosecutor cannot perform a similarly searching enquiry, given that the proofing of witnesses has been severely limited under rulings of both the Pre-Trial and Trial Chambers. See Decision on the Practices of Witness Familiarisation and Witness Proofing, *Lubanga* (ICC-0/04-01/06), Pre-Trial Chamber I, 8 November 2006; Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, *Lubanga* (ICC-0/04-01/06), Trial Chamber, 30 November 2007.

51 See Arts 54(1)(b) ('the Prosecutor shall take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court ...'), 54(3)(f) ('The Prosecutor may ... [take] necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence') and 68(1) ('The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. ... The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes') ICCSt.

the accused was a paramount consideration.<sup>52</sup> A number of commentators have criticized the Prosecutor for placing what they consider excessive weight on this criterion, and have suggested that it may have led to narrowly focusing the charges on recruitment and use of child soldiers — charges which, while worthy of sanction, do not purport to reflect the full scale of criminality in the DRC.<sup>53</sup> Indeed, in certain circumstances, the likelihood of arrest may bear an inverse correlation with the degree of responsibility — those most responsible may be the most difficult to arrest.

And yet, particularly at a stage in the Court's life when it has few indictees in custody, and is trying to demonstrate its practical viability, it would be difficult to contend that the feasibility of executing an arrest ought not to be considered in any way by the Prosecutor in deciding whom to charge.<sup>54</sup> A number of observers have suggested that 'the prospect for arresting the suspect' is a proper factor to be weighed.<sup>55</sup> Given such considerations, why not acknowledge, in the case of Lubanga, that both the target and the nature of the charge were convenient, even attractive, not only because conscripting child-soldiers is a heinous act worthy of sanction, but also because Lubanga's detention in the DRC enabled the ICC to secure custody over its first defendant?

52 OTP, *Report on Activities Performed during the First Three Years* (June 2003–June 2006), 12 September 2006, at 8, available at <http://www.iccnw.org/documents/3YearReport%2006Sep14.pdf> (visited 5 March 2010).

53 International Federation for Human Rights (FIDH), *DRC/ICC: Fourth ICC arrest warrant in the DRC situation*, 30 April 2008, available at <http://www.fidh.org/Fourth-ICC-arrest-warrant-in-the-DRC> (visited 5 March 2010).

54 A similar issue arose early in the life of the ICTY, when Duško Tadić, commander of the Omarska detention camp, was arrested in February of 1994, and was brought unexpectedly to the tribunal in April of 1995, forcing the hand of the ICTY Prosecutor to prosecute a camp commander as the first case. ICTY, Case Information Sheet: Dusko Tadic, at 1, available at <http://www.icty.org/x/cases/tadic/cis/en/cis.tadic.en.pdf> (visited 5 March 2010); see P. Caine, 'The International Criminal Tribunal for the former Yugoslavia: planners and instigators or foot soldiers?' 11 *International Journal of Police Science & Management* (2009) 345, at 347, 351–354.

55 See e.g. Côté, *supra* note 18, at 169–170 (At the ICTY and ICTR, 'a great deal of criticism was directed at the Prosecutor for [] indicting lower perpetrators, ... particularly in the first cases of Tadić at the ICTY and Akayesu at the ICTR. The decisions to indict those suspects, who were already detained *proprio motu* by third states, were taken by the Prosecutor primarily on the basis of the urgent need to prove to the international community that these first attempts at international justice after Nuremberg could work ... [that is] on arguably legitimate political considerations about the mandate of international criminal justice and the survival of the new judicial institutions'); M. Bergsmo, C. Cissé and C. Staker, 'The Prosecutors of the International Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared', in L. Arbour, A. Eser, K. Ambos and A. Sander (eds), *The Prosecutor of a Permanent International Criminal Court* (Max Planck Institute, Freiburg, 2000) 121, at 135 (listing as factors to be considered by a Prosecutor the prospect of arrest, along with 'nature and seriousness of the crime, the military rank or the governmental position of an alleged perpetrator, the significance of the legal issues involved in the case ... and the impact of the cases on the resources of [the] Office:').

## B. State Cooperation

What about the desirability of securing state cooperation for the Court's actions? OTP has suggested that 'the duty of independence' in Article 42(1) 'goes beyond not seeking or acting on instructions. It also means the selection is not influenced by the presumed wishes of any external source, nor the importance of the cooperation of any party, or the quality of cooperation provided.'<sup>56</sup>

It seems hard to dispute this principled position. But how adequately does it respond to the reality that the ICC Prosecutor is substantially more dependent on state cooperation than his ICTY and ICTR counterparts? The ICC Prosecutor has little capacity to carry out investigations on his own.<sup>57</sup> Only under very limited circumstances may he execute requests directly on the territory of a state without that state's consent.<sup>58</sup> And particularly in situations of ongoing conflict, where governments are trying to defend territory or withstand armed attack, they are unlikely to be able to offer the Prosecutor much investigative assistance.<sup>59</sup>

Notwithstanding the command of the Statute, and the idealistic posture of the OTP position paper, can the ICC Prosecutor help but take into consideration his dependence on states for his own effectiveness in deciding whether, when and whom to charge?<sup>60</sup>

56 OTP Draft Policy Paper, *Criteria for Selection of Situations and Cases*, June 2006, at 3.

57 See e.g. Arbour, *supra* note 25, at 217–219 (noting a number of obstacles in draft Rome Statute limiting powers of Prosecutor to carry out independent investigation, such that 'the very purpose of the Statute will be defeated'). Many requests — for the execution of search warrants or arrest warrants — will require the state to carry out compulsory measures. These requests are governed by the law of the requested state itself, rather than any provision of the Rome Statute. See Art. 99(1) ICCSt. ('Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State...'). Art 86 ICCSt. provides that 'States Parties shall... cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.' But, in practice, securing such cooperation is fraught with difficulty.

58 The Pre-Trial Chamber may authorize the Prosecutor to investigate within the territory of a state party absent that state's consent only once the chamber has determined that the state is unable to cooperate 'due to the unavailability of any authority or any component of its judicial system competent to execute the request' (Art. 57(3)(d)) — a situation which would appear to restrict such cases to a complete breakdown of public order. See F. Guariglia, K. Harris and G. Hochmayr, 'Article 57: Functions and Powers of the Pre-Trial Chamber', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2d edn., Hart Publishing, 2008) 1117, at 1129.

59 Even where a request can be fulfilled without compulsory measures, such as a request to interview a person who wishes to speak with the OTP voluntarily, the Prosecutor may do so without state consent only 'following all possible consultations with the requested state party' (Art. 99(4) ICCSt.)

60 A related question is whether it is appropriate for the Prosecutor to accept, let alone, generate, self-referrals, 'as a way of getting things going', given the reality that, to date, no self-referral has resulted in an investigation of officials of the referring state. Cf. 'Discussion', 6 JICJ (2008) (citing Ken Roth of Human Rights Watch arguing that 'there is a certain pragmatism that is required in the early days of a tribunal just to secure some business'), with Schabas, *supra* note 19, at 751 (the attention to non-state actors in conjunction with relative inattention to state actors 'is closely related to the concept of "self-referral", which has the practical

Some have gone so far as to argue that the Prosecutor's dependence on the state where crimes occur to carry out his investigations is not just inevitable, it is also desirable, precisely because such dependence 'can motivate the Prosecutor to be sensitive to the political implications of his prosecutorial decision-making, especially on the regions involved in the ICC's cases.'<sup>61</sup> On this view, international criminal prosecutions must be sensitive to 'local conditions'<sup>62</sup> and 'local attitudes and concerns'<sup>63</sup> — including the political predilections of state actors and others — in order to ensure that they resonate as intended.<sup>64</sup> To be sure, a Prosecutor can presumably remain sensitive to political implications without having them drive the decision process.

### C. Peace

What about the prospect of peace during a situation of armed conflict? It has been suggested that, in view of the Rome Statute's objective to end impunity in the interest of peace and security,<sup>65</sup> the very decision whether to prosecute requires the Prosecutor to consider the impact of his decision on the prospects for peace.<sup>66</sup> In certain contexts, the ICC Prosecutor has been said not sufficiently to have taken into account the impact of his charging decisions on the

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consequence of establishing a degree of complicity between the Office of the Prosecutor and the referring state').

61 Marston Danner, *supra* note 19, at 531.

62 *Ibid.*

63 *Ibid.*, at 532.

64 Politics and law are thus seen by some as not diametrically opposed, but rather interrelated: '[T]hat the ICC allows various points of entry for politics may actually facilitate the attainment of even the most sacred of the ICC's mandates — the promotion of retribution and reconciliation in ways that preserve order and stability in the international community.' G.M. Gallarotti, and A.Y. Preis, 'Politics, International Justice, and the United States: Toward a Permanent International Criminal Court', 4 *UCLA Journal of International Law and Foreign Affairs* (1999) 1, at 31. But who is to say which local attitudes the Prosecutor should heed? What if there are numerous local attitudes, going in different directions? What if, as is often the case, the attitude of the government is different from the attitude of many people living in the respective state? Indeed, what if the attitude of the government is, please prosecute the rebels, and the attitude of many people is, please prosecute the government?

65 See, Rome Statute, Preamble ('... grave crimes threaten the peace, security and well-being of the world ...').

66 D.E. Goldstone, 'Comment: Embracing Impasse: Admissibility, Prosecutorial Discretion, and the Lessons of Uganda for the International Criminal Court', 22 *Emory International Law Review* (2008) 761, at 788–789 ('one of the Prosecutor's first considerations in a case must be a political one: how ICC engagement will contribute to cessation of ongoing violations'; in this sense, 'political sensitivities are inevitable in the Prosecutor's own decision-making process').

prospects for peace in countries at issue.<sup>67</sup> By contrast, others suggest that ICC investigations and prosecutions have positively contributed to peace.<sup>68</sup> While OTP has not precluded consideration of issues of peace and security under the ‘interests of justice’ prong of Article 53(1), its informal policy paper reasons that, under Article 16 of the Rome Statute, primary responsibility for broader matters of international peace and security rests with the UN Security Council.<sup>69</sup>

In practice, the impact of any charging decision on conflict resolution is hard to discern in retrospect, let alone forecast in advance. By way of comparative reference, the experience of the ICTY may be illustrative. On 25 July 1995, when the ICTY Prosecutor first indicted Radovan Karadžić, it was criticized as a provocative act likely to prolong the Bosnian war. In retrospect, some have suggested that the indictment helped bring about an end to the conflict by de-legitimizing the Bosnian Serb political leader and sidelining him from active political life.<sup>70</sup> Similarly, in May 1999, when the ICTY Prosecutor indicted Slobodan Milošević in the midst of the Kosovo war, many feared it would derail the peace process.<sup>71</sup> More recently, it has been suggested that the indictment actually helped bring about peace by contributing to Milošević’s political decline.<sup>72</sup>

The true contribution, if any, of charging decisions to political developments is probably impossible to determine with any precision.<sup>73</sup> While it would surely be foolish for any prosecutor to bring criminal charges *for the purpose* of ending a war, many remain sceptical that the OTP does not, in practice,

67 See e.g. P. Corrigan, ‘Why the ICC Must Stop Impeding the Juba Process’, *Daily Monitor, Kampala*, 27 July 2007, available at <http://www.globalpolicy.org/component/content/article/164/28641.html> (visited 5 March 2010). See Volqvartz, *supra* note 3, quoting Bryn Higgs, Ugandan Program Development Officer for Conciliation Resources (OTP’s choice to ‘[start] war crimes investigations ... at a time when northern Uganda sees the most promising signs for a negotiated settlement of the violence, risks having in the end neither justice nor peace delivered’).

68 OTP Weekly Briefing, 15–22 September 2009, at 3 (suggesting that on occasion prosecution ‘efforts have contributed to better managing violence in Northern Uganda and Darfur ... In the Darfur case, the peace process had collapsed by June 2008 ...; since the Prosecution’s application on 14 July 2008 against President Al Bashir, peace talks have resumed, peacekeepers’ deployment is near complete’).

69 OTP, *Policy Paper on the Interests of Justice* (September 2007), at 1 (‘there is a difference between the concepts of the interests of justice and the interests of peace and ... the latter falls within the mandate of institutions other than the Office of the Prosecutor’), at 8 (‘The Statute recognizes a role for the UN Security Council to defer ICC action where it considers it necessary for the maintenance of international peace and security’).

70 See e.g. Richard Holbrooke’s reflections in Foreign Policy Online, ‘Seven Questions: Richard Holbrooke on Radovan Karadzic’, July 2008, available at <http://www.foreignpolicy.com/story/cms.php?storyid=4401> (visited 5 March 2010).

71 See e.g. UN Wire, ‘Will Indictment Derail Peace Process?’ 27 May 1999, available at <http://www.unwire.org/unwire/19990527/2855.story.asp> (visited 5 March 2010).

72 See e.g. T. Carothers, ‘Ousting Foreign Strongmen: Lessons from Serbia’, Carnegie Endowment Policy Brief, vol. 1, no. 5 (May 2001).

73 A.K. Greenawalt, ‘Justice Without Politics? Prosecutorial Discretion and the International Criminal Court’, 39 *NYU Journal of International Law and Politics* (2007) 583, at 661–663.



give *any* consideration to the impact of its decisions on the prospect of continued conflict.<sup>74</sup>

#### D. Perception of the Court — Legitimacy and Relevance

A related question is whether it is proper for the Prosecutor, in deciding whether, what and whom to charge, to take into consideration the impact of his decision on the public perception of his Office and of the Court as a whole. Particularly in the Court's first years, may the Prosecutor make charging decisions influenced in part by what he believes will contribute to the Court's legitimacy?<sup>75</sup> And may he appropriately consider the need to insure that his actions are not ignored by the international community, in order to prevent the Court from being consigned to irrelevance?

To take a concrete example, some have criticized the Prosecutor on the Darfur matter for moving directly from the mid-level indictees charged in 2007 to the July 2008 arrest warrant application against President Bashir.<sup>76</sup> Would it have been proper for the Prosecutor, in considering how to proceed, to have taken into account the concern of many that the 2007 warrants had

74 The tension between 'peace' and 'justice' arose as well in the context of the Special Court for Sierra Leone, when, on 4 June 2003, the Prosecutor unsealed the indictment of then-President of Liberia Charles Taylor while he was attending preliminary peace talks in Accra, Ghana, aimed at ending Liberia's civil war. See e.g. V. Lasch, 'Liberian President indicted for war crimes', Crimes of War Project, 16 June 2003, available at <http://www.crimesofwar.org/onnews/news-liberian.html> (visited 5 March 2010) ('The executive secretary [of the Organization of West African States], Mohamed Ibn Chambas, said that announcing the charges against Charles Taylor [on the morning of the peace talks] ... had "put a damper on the negotiations" where President Taylor was making helpful offers "opening up tremendous opportunities" to end the Liberian conflict.').; but see Priscilla Hayner, 'Seeking Justice as War Crimes Rage On', *Chicago Tribune*, 16 June 2008 ('Peace talks for Liberia, for example, were directly strengthened and invigorated by an indictment of Liberia's president, Charles Taylor. The UN-backed Special Court for Sierra Leone made the indictment public on the opening morning of the talks, ... diplomats hosting the peace conference were furious and immediately provided a plane for Taylor's rapid return to Liberia. But virtually everyone present at those talks now agrees that the indictment of Taylor single-handedly changed the peace conference into a serious affair of peacemaking, with real prospects for success. Taylor, then the most powerful man in Liberia, had often manipulated previous efforts to secure a peace settlement. This time, though, he was effectively delegitimized, marginalized and removed from any role in a future political settlement. After 2 1/2 months, the Ghana peace talks produced a comprehensive agreement.').

75 Cf. T. Ginsburg, 'The Clash of Commitments at the International Criminal Court', 9 *Chicago Journal of International Law* (2008–2009) 499, 502–503 ('New institutions such as the ICC are subject to great scrutiny, and need to establish their own credibility to accomplish their assigned tasks. The challenge is similar to that facing other international tribunals').

76 See e.g. A. Natsios, 'Waltz With Bashir: Why the Arrest Warrant Against Sudan's President Will Serve Neither Peace nor Justice', *Foreign Affairs* (23 March 2009), available at <http://www.foreignaffairs.com/articles/64904/andrew-natsios/waltz-with-bashir> (visited 16 March 2010); J. Flint and A. de Waal, 'Case Closed: A Prosecutor Without Borders', *World Affairs* (Spring 2009), available at <http://www.worldaffairsjournal.org/articles/2009-Spring/full-DeWaalFlint.html> (visited 16 March 2010).

been ignored by individual states and the UN Security Council, and the belief of some that, only by charging a very senior official for crimes where the evidenced warranted, could the international community be persuaded not to ignore the question of accountability for crimes in Darfur?

### E. Perception of the Court — Impartiality

What about the effort to deflect accusations of bias? Is it proper for the Prosecutor to take into consideration the reality that, in the course of an ongoing conflict that has yet to be resolved, any action he takes will likely be seen by one or other of the contending sides primarily from the vantage point of how that action favours or disfavors the particular side? In the former Yugoslavia, for instance, many Serbs, Croats and Bosniaks viewed ICTY actions largely through the lens of the extent to which each decision was 'biased' or not in favour of their respective community.<sup>77</sup> In Rwanda, the failure of the ICTR to charge members of the Rwandan Patriotic Front has been criticized as impairing the Court's public image of independence.<sup>78</sup> Is it permissible for the ICC Prosecutor to acknowledge this reality and, in order to promote the Court's legitimacy among all communities across a situation, take it into account in his charging decisions (assuming that the more 'objective' indicia of jurisdiction, admissibility and gravity are satisfied)?<sup>79</sup> To take one hypothetical

77 The Deputy Prosecutor of the ICTY has acknowledged that the Court 'tried to get ... out before Dayton' the indictments of Bosnian Croat leaders in order 'to defuse accusations of anti-Serb bias'. G.J. Bass, *Stay the Hand of Vengeance: the Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000), at 244. Cf. Jallow, *supra* note 19, at 153 (arguing that 'a conscious effort has to be made to ensure that target selection takes into account the need to cover all the administrative divisions of the country', in part, to 'avoid[] any possible impressions of bias').

78 See e.g. A. Garrison, 'ICTR legacy risked by failure to charge Rwandan Patriotic Front', *Digital Journal* (29 January 2010), available at <http://www.digitaljournal.com/article/286640> (visited 16 March 2010). The Prosecutor of the Special Court for Sierra Leone made a point of prosecuting all three armed groups in the Sierra Leone conflict, leading the Trial Chamber in the trial of CDF leaders — seen by many as 'war heroes' seeking to restore democracy — to impose significantly reduced sentences, which were later adjusted upward on appeal. See T. Cruvellier, *From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test*, International Center for Transitional Justice and Sierra Leone Monitoring Programme, 2009, at 23-28, available at <http://ictj.org/static/Publications/ICTJ.SLE.TaylorTrialtoLastingLegacy.pb2009.pdf> (visited 5 March 2010).

79 OTP expressly declines to pursue a policy of 'even-handedness' for its own sake. See OTP, Draft Policy Paper, June 2006, at 4 ('In situations involving multiple groups with potential responsibilities, the OTP conducts its selection analysis in impartial manner, applying the same methodology and standards for all groups. Impartiality or even-handedness does not mean "equivalence of blame" or that all groups must be prosecuted regardless of the evidence. It means that the Office will apply the same methods, the same criteria and the same thresholds for all crimes, regardless of the group concerned, in determining whether the level of criminality meets the thresholds warranting investigation or prosecution').

example, would it be proper for the Prosecutor, having charged leaders of non-government rebel groups in the DRC in three successive cases, to choose a case, supported by the evidence, in which DRC government officials are implicated, in part to counter the apparently widely held perception that the Court is one-sided and biased?

Indeed, some observers have already suggested this policy animates the charges brought to date: 'The ICC picked warlords in Ituri for some of its first indictments in part to demonstrate that justice for war crimes can be impartial: Thomas Lubanga ... the principal leader of the Hema,' was charged in one case while 'two Lendu warlords' — Matthieu Ngudjolo Chui and Germain Katanga — were charged in another.<sup>80</sup> Relatedly, many have noted that the Prosecutor's own actions in presenting a case to the public may impact the perception of (im)partiality.<sup>81</sup>

### E. Highlight Particular Crimes

Indeed, even the seemingly unambiguous and purely quantitative measurement of the gravity of crimes may not be non-controversial. Who is to say that 1000 killings is more or less grave a crime than 5000 rapes? Or that for some communities looting is not the most serious crime?<sup>82</sup> Is it proper for the Prosecutor to decide that, in a particular case, he wishes to highlight rape as a means of focusing public attention on the scale and gravity of sexual violence in conflict situations, in view of the fact that sexual violence crimes are 'traditionally-under-prosecuted?'<sup>83</sup>

80 A. Hochschild, 'The Trial of Thomas Lubanga', *The Atlantic* (December 2009), at 4. See Côté, *supra* note 18, at 176 ('it has become an open secret that international prosecutors, in selecting a potential indictee, may take into account criteria related to their belonging to or affiliation with a certain group in order to present in court more balanced cases involving all parties to the conflict').

81 See Goldstone, *supra* note 66, at 772–773 ('In a move that most observers have considered, at best, an unfortunate intimation of partiality, ICC Prosecutor Luis Moreno-Ocampo appeared side-by-side with Museveni at a press conference in January 2004 as they announced the ICC's first case'), citing A. Ross and C.L. Sriram, *Catch-22 in Uganda: The LRA, the ICC, and the Peace Process*, *Jurist*, 17 July 2006, available at <http://jurist.law.pitt.edu/forumy/2006/07/catch-22-in-uganda-lra-icc-and-peace.php> (visited 5 March 2010) ('By accepting Museveni's invitation to investigate the LRA ... Moreno-Ocampo appeared to the people in Northern Uganda as having taken Museveni's side. As such, the ICC became viewed locally as a protagonist in the conflict rather than a promoter of peace.').

82 See P. Seils, 'The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court', in Bergsmo (ed.), *supra* note 33, 55, at 57–58.

83 S. SaCouto and K. Cleary, Symposium: Prosecuting Sexual and Gender-Based Crimes before Internationalized Criminal Courts: The Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court, 17 *American University Journal of Gender Social Policy and Law* (2009) 337, at 344.

### G. *Initial Conclusions*

Few of these questions lend themselves to easy resolution. And yet, adhering rigorously to the Rome Statute's requirements of gravity and admissibility will not, by itself, sufficiently narrow the range of possible crimes and perpetrators in any given situation. It is often necessary to consider other factors which implicate questions of institutional strategy and policy, if not politics as such. Particularly at a stage in the Court's evolution when its very existence is still under challenge, and many of its actions unprecedented, such factors might include the need to demonstrate the Court's *viability* (e.g. by charging at a level or in a manner that commands attention from states, and/or prevents states from simply ignoring the Court's orders), its *efficacy* (including by charging persons who may readily be apprehended), its *efficiency* (by limiting the number of charges, and thereby the length of trials) and/or its *independence* (e.g. in appropriate circumstances, by charging officials of governments who have referred situations to the Court). These matters are all relevant to public perceptions of the Court's legitimacy. Taking one or more into account is not 'political.' To the contrary, it may be necessary, and it demands of the ICC prosecutor the same quality of sound judgment (only, perhaps more of it) expected of prosecutors the world over.

## 5. The Contours of Prosecutorial Discretion — the Need for More Candour

Since a number of issues beyond, strictly, the law and evidence will, in one way or another, be considered by the Prosecutor, should that be more clearly conveyed to the public? Both the Court and its defenders might contribute, in different ways.

### A. *Prosecutorial Guidelines*

Several observers have recommended that the OTP develop and publish guidelines to clarify the factors that the Prosecutor will consider when exercising discretion in rendering decisions under Article 53.<sup>84</sup> Setting forth the process to be followed in reaching decisions and the substantive criteria to be taken into account will, it has been suggested, foster both accountability and legitimacy by affording victim communities, NGOs and the public at large a set of measurable benchmarks against which to gauge the Prosecutor's actions. At a minimum, it might help bridge the yawning gap between the Hague-based Court and its constituencies across the world trying to balance their hopes for justice against their often-uncertain knowledge of the Court's operations and limitations.

84 See e.g. Marston Danner, *supra* note 19.

To date, OTP has sponsored a number of consultations with a variety of outside actors on its discretionary function, generated a series of draft papers and, appropriately, circulated them for public discussion.<sup>85</sup> Perhaps there is merit in going further. After several years of learning through empirical experience, and gaining a more realistic sense of the issues at stake, it is perhaps time for the OTP to set forth in broad terms the contours which guide its exercise of discretion, and/or delineate further the various factors which may come into play. Such guidelines are common in domestic systems; they would seem all the more warranted where, as in the case of the ICC, the jurisprudence concerning the crimes at issue is still relatively undeveloped, the impact of prosecutorial decisions on affected societies is potentially vast, and there is little directly analogous precedent upon which the Prosecutor may rely in reaching charging decisions.<sup>86</sup>

And yet, any such guidelines must be just that — they should guide, but not prescribe, decision-making. They cannot purport to dictate in advance the substance of each and every prosecutorial decision. After all, prosecutorial discretion is valued in part because of its role in affording the Prosecutor a substantial degree of independence. Its exercise requires the application of judgment, not science. Much as making more explicit the factors the Prosecutor should take into account in charging decisions would contribute to public understanding of the Court and its work, one should not over-emphasize their likely value in assisting case-specific decision-making by line prosecutors.<sup>87</sup> Efforts to generate guidelines for the exercise of prosecutorial discretion

85 See e.g. OTP, *Policy Paper*, September 2003; OTP, *Draft Policy Paper on Selection and Prioritization of Cases*, June 2006; OTP, *Policy Paper on the Interests of Justice*, September 2007, at 8; OTP, *Regulations of the Office of the Prosecutor*, April 2009.

86 One example of public criteria for the exercise of international prosecutorial discretion comes from the International Criminal Tribunal for Rwanda, which, as part of its completion strategy, published the following criteria for determining 'those who, according to the Prosecutor, bear the greatest responsibility for genocide ...

- the alleged status and extent of participation of the individual during the genocide
- the alleged connection an individual may have with other cases
- the need to cover the major geographical areas of Rwanda in which the crimes were allegedly committed
- the availability of evidence with regard to the individual concerned
- the concrete possibility of arresting the individual concerned
- the availability of investigative material for transmission to a State for national prosecution.'

*Completion strategy of the International Criminal Tribunal for Rwanda*, Annex to Letter dated 30 April 2004 from the President of the ICTR addressed to the President of the Security Council, UN Doc. S/2004/341, 3 May 2004, §14.

87 Cf. M. de Guzman, 'Gravity and the Legitimacy of the International Criminal Court', 32 *Fordham International Law Journal* (2009) 1400, at 1459–1462 ('[The Prosecutor's] mandate is not simply to prosecute all violations of the law above a de minimis threshold, but rather to select among a wide array of potential situations and cases those that most merit the Court's attention. This task requires ... prioritizing among [the ICC's] goals ... .The majority of cases that present themselves as viable prosecutorial options will score high on some of the gravity factors

are often of mixed benefit. Even as they commit a prosecutor 'to apply its discretion in ways and for reasons the legitimacy of which can be defended and debated', they often reveal the limits to which they can foster accountability, given the myriad, complex legitimate factors involved in most decisions, and the case- and context-specific nature of the judgments at issue.<sup>88</sup>

Finally, in some cases it will be impossible for a Prosecutor to acknowledge every consideration that led to a particular decision. This may be true, e.g. when a decision is based in part on sensitive information provided by one or more states.<sup>89</sup>

But if guidelines are to be developed, it should be for the OTP to do so. In recent months, various proposals have circulated suggesting, inter alia, that (i) States Parties gathering at the 2010 ICC Review Conference in Kampala might amend the Rome Statute to 'include the addition of other factors that the Prosecutor should consider when exercising his discretion not to investigate or prosecute in the interests of justice under Article 53,'<sup>90</sup> or alternatively that the Assembly of States Parties might simply

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and low on others. In those cases, the Prosecutor must decide which factors and goals he considers most important. In so doing he will often be prioritizing the legitimacy of some perspectives over others...The Prosecutor must decide whether in his view a case involving a large number of victims is more important than one involving a very high-level perpetrator with a particularly heinous intent, or one involving a traditionally under-prosecuted crime, or one involving few direct victims but a substantial environmental impact').

88 See G. Lynch, 'Prosecutorial Discretion - Published Standards and Internal Review Mechanisms', available at <http://law.jrank.org/pages/1868/Prosecution-Prosecutorial-Discretion-Published-standards-internal-review-mechanisms.html> (visited 5 March 2010) (In the United States, 'the standards are generally quite vague and admit of numerous and often subjective exceptions and qualifications. The principles are proclaimed for internal use only, and provide no rights of judicial enforcement. Even if they were enforceable, however, there would be little grip for judicial review. For example, in determining whether there is a "substantial federal interest" in a prosecution, the prosecutor is instructed to "weigh all relevant considerations," including, but evidently not limited to, federal law enforcement priorities, the nature and seriousness of the offense, the deterrent effect of prosecution, the person's culpability in connection with the offense, the person's history with respect to criminal activity, the person's willingness to cooperate in the investigation or prosecution of others, and the probable sentence or other consequences if the person is convicted. Though some might question one or another of these factors, most people would agree that these are relevant factors. Merely to list them, however, and to consider that these various incommensurable factors are somehow to be "weighed" against each other, is to demonstrate how complex, subtle, and subjective a judgment is being called for'). Case-selection criteria developed by the ICTY OTP in 1995 included close to 50 different factors grouped in five categories ('person', 'serious violation', 'policy considerations', 'practical considerations' and 'other relevant considerations'). Arguably, a focused case selection policy on the basis of this catalogue could hardly have been implemented.' Angermaier, *supra* note 33, at 31–33.

89 An example might be a decision to seek an arrest-warrant application for a perpetrator, in part, on the basis that he is presently located in a country where he can reasonably be apprehended, and he may soon move to another country where apprehension would be considerably more problematic.

90 See African Union, 'Concept Note for the Preparatory Meeting of Ministers on the Rome Statute of the International Criminal Court', November 2009, § 21 [hereinafter 'AU Concept Note'].

'promulgat[e] ... guidelines ... which the Prosecutor is obliged to take into account in making decisions regarding investigation or prosecution.'<sup>91</sup>

These suggestions are misguided and would undermine the objectives of the Statute. First, delegating to the Assembly of States Parties the power to define the scope of prosecutorial discretion, beyond the limited contours the Statute already provides, risks undermining the very independence of the Office that was so carefully agreed upon at Rome.<sup>92</sup> Second, particularly in the early years of the Court, any guidelines must be flexible and susceptible to regular adjustment in the light of accumulating experience. Subjecting them to the approval of states would unhelpfully rigidify and formalize a process that should for the foreseeable future remain fluid. Third, to the extent that the proposal for guidelines is motivated by concerns about the undue influence of politics on the Court, it is hard to see how granting the Assembly of States Parties (ASP) — a political body — decision power over guidelines would help. Finally, there is nothing to suggest that the state representatives who compose the ASP bring any greater 'expertise' to the challenge of articulating guidelines for the exercise of prosecutorial discretion than the OTP itself.<sup>93</sup>

To be sure, it might well be appropriate for the Prosecutor both (i) to solicit the comments of states, NGOs and the public in generating guidelines (as has been done with the prior policy papers developed) and (ii) welcome and respond to the declarations of states and others on the guidelines once promulgated. In addition to other fora, the periodic reports by the Prosecutor on his activities to the ASP might offer a regular opportunity for interchange on the guidelines. But the ultimate decision on the content of any prosecutorial guidelines should remain with the Prosecutor.

### ***B. The Role of NGOs in Public Education***

To date, the public pronouncements of the Court have, perhaps for understandable reasons, oversimplified the division between law and politics and what is involved in the exercise of prosecutorial discretion.<sup>94</sup> The promulgation of

<sup>91</sup> *Ibid.*

<sup>92</sup> As the AU Concept Note acknowledges, '[T]he ICC Prosecutor retains a significant amount of discretion in deciding on whether to initiate investigations or bring prosecutions. However, this prosecutorial discretion in the ICC Statute has not arisen by accident. It was intentionally placed in the Rome Statute as part of the independence of the prosecutor.' *Ibid.*, § 16.

<sup>93</sup> The AU Concept Note suggests that, unlike in domestic systems, where prosecutors 'have the necessary expertise in making decisions regarding the standards to be applied in making prosecutorial decisions, ... [i]nternational prosecutors will often be faced with decisions which have an impact not merely on individuals but also on whole societies ...' *Ibid.*, § 19. While conceding that 'it is probably appropriate for the prosecutor to make those decisions independent of political considerations and of political actors, the standards to be used should be those which have some legitimacy in that they are approved by those with responsibility for the potentially affected parties, i.e., by governments.' *Ibid.*

<sup>94</sup> Thus, the Prosecutor has said: 'My duty is to apply the law without political considerations.' Address at International Conference on 'Building a Future on Peace and Justice', Nuremberg, 25 June 2007.

guidelines by the OTP would go some way towards fostering greater public understanding of the myriad factors involved in charging decisions and the often-nuanced, context-specific manner in which the factors are applied. And once published, court officials should, within the constraints of what can be said about decision-making in public settings, incorporate explanations of the criteria and how they are applied in public outreach programmes.

But the Court should not bear the burden of acting alone. The global community of civil society actors who helped create the Court and, in various ways, support it has a major role to play in contributing to more enlightened public discussion and understanding. NGOs, academics and others outside the Court can and should speak as well. It is no doubt true that 'the prosecutor should always attempt to steer clear of [the] politicization of his role.'<sup>95</sup> But such characterizations, even where intended to immunize the Prosecutor from allegations of political motivation, don't adequately describe the reality of what is at stake. And in the end, they have not forestalled accusations that the Prosecutor mixes law and politics.

It should be possible for supporters outside the Court to move beyond platitudes and make clear that the Prosecutor does, and should, take into account in his decision-making factors that, while not strictly limited to the evidence and the Statute, nonetheless do not impair the Prosecutor's independence. In explaining for public discussion some of the factors that legitimately form part of the Prosecutor's decision calculus, NGOs might acknowledge the internal tensions in some of their own positions. To date, few have described the challenges facing the Prosecutor and the Court in all their nuanced complexity. But if the Court is eventually to command more sustained support, all those interested in promoting an effective ICC must come to understand and accept that the exercise of prosecutorial discretion implies just that — the Prosecutor does and should have the freedom to make decisions which will not command universal agreement. Although such decisions cannot always be explained to the full satisfaction of all parties, greater efforts are needed, both by the Court and its allies, to do so.

The prosecution of international crimes under the Rome Statute is an intensely challenging and still-novel task. In striving to satisfy, and manage, public expectations, all parties will be best served by greater candour about the prosecutor's capacity, mission and constraints.

95 Human Rights Watch, *supra* note 15.