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HOW SHOULD THE ICC PROSECUTOR EXERCISE HIS OR HER DISCRETION? THE ROLE OF FUNDAMENTAL ETHICAL PRINCIPLES

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I. INTRODUCTION

As the International Criminal Court (ICC) continues to develop its work, the question of the exercise of discretion by the ICC Prosecutor, a post currently held by Mr. Luis Moreno-Ocampo, is assuming great importance. Decisions made now by the Prosecutor are helping to shape both the jurisprudence of the Court and its political future.[1]

In this Article I suggest that "fundamental ethical principles" should guide the exercise of discretion by the ICC Prosecutor in determining which situations to investigate and which cases to prosecute. I define fundamental ethical principles as all of those ethical principles apparent in contemporary international law that are logically related to a preeminent ethical principle of "unity in diversity."[2] The principle of unity in diversity maintains that all human beings should seek to be unified as members of one human family while respecting one another's right to diversity of language, religion, and culture and individual freedom of thought, conscience, belief, and expression.[3]

In the balance of the Article I explore the relevant provisions of the Rome Statute of the ICC ("Rome Statute"), which necessarily govern the exercise of discretion by the Prosecutor,

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1. On the ICC, see generally THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Carsten Stahn & Göran Sluiter eds., 2009).

2. For a more detailed definition, see BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 81 (2010) [hereinafter CUSTOMARY INTERNATIONAL LAW].

3. *See id.* at 78-81 (defining and reviewing support for unity in diversity).

highlighting certain ambiguities in these provisions. I briefly review the Prosecutor's recent decisions to date concerning which situations to investigate and cases to prosecute, various scholarly critiques of those decisions, and his own efforts to establish criteria for the exercise of the Prosecutor's discretion. I then identify certain fundamental ethical principles related to the Prosecutor's responsibilities and explain why these are appropriate means to channel the Prosecutor's exercise of discretion. Finally, I explore particular challenging issues faced by the Prosecutor and indicate how fundamental ethical principles can assist the Prosecutor in resolving them.

II. RELEVANT PROVISIONS OF THE ROME STATUTE

First, it is critical to understand the framework established by the Rome Statute of the ICC itself for exercise of discretion by the Prosecutor.[4] The Rome Statute gives the Prosecutor wide discretion over the launching of investigations into situations that could involve crimes within the Court's jurisdiction as well as in the bringing of cases against particular suspects. The Prosecutor enjoys the greatest degree of discretion under Article 15, which provides that the Prosecutor "may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court."[5]

According to Article 15, the Prosecutor must "analyse the seriousness of the information received," and in doing so "may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court."[6] If the Prosecutor "concludes that there is a reasonable basis to proceed with an investigation," he or she must submit a request for authorization of an investigation to a Pre-Trial Chamber of the Court.[7] That chamber may then authorize the commencement of an investigation if it believes there is such a reasonable basis and the case appears to fall within the jurisdiction of the Court.[8]

Even when a state party refers a situation to the Prosecutor

4. On the Rome Statute of the International Criminal Court and its drafting history, see generally COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE (Otto Triffterer ed., 2d ed. 2008).

5. Rome Statute of the International Criminal Court art. 15, ¶ 1, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute] (emphasis in original).

6. *Id.* art. 15, ¶ 2. *See* also ICC-ASP, Rules of Procedure and Evidence, Rule 104, ICC Doc. ICC-ASP/1/3 (Sept. 9, 2002) (prescribing the process by which the Prosecutor evaluates information).

7. Rome Statute, *supra* note 5, art. 15, ¶ 3.

8. *Id.* ¶ 4.

under Article 14, or the Security Council does so under Article 13(b), the Prosecutor must determine whether the situation merits investigation or particular individuals should be charged.[9] This determination also involves significant judgment and discretion.

Article 53 lays down standards to guide the Prosecutor in deciding whether to initiate an investigation of a situation or the prosecution of a particular individual. It provides generally:

> 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. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
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> (a) The information available to the Prosecutor provides a reasonable basis to believe that *a crime within the jurisdiction of the Court has been or is being committed*;
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> (b) The case is or would be *admissible* under article 17; and
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> (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*.[10]

Article 17 indicates that a case is not admissible (1) if it is being investigated or prosecuted by a state with jurisdiction over it, "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution"; (2) if the case has been investigated by a state with jurisdiction that has decided not to prosecute the person concerned, "unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute"; or (3) if the person concerned has already been tried for the relevant conduct, and a trial by the Court is not permitted under Article 20, paragraph 3.[11] Importantly, Article 17 also states that a case is inadmissible if it is "not of sufficient *gravity* to justify further action by the Court."[12]

Article 17 and the abovementioned provisions of Article 53 thus suggest a number of factors that may warrant a prosecutorial decision to decline to prosecute. Furthermore, the Prosecutor must also inform the pre-trial chamber and either the state making a referral or the Security Council, if it has made a referral, of any decision that there is not a sufficient basis for a prosecution and the reasons for that decision.[13]

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9. *See generally id.* art. 53.
10. *Id.* ¶ 1 (emphasis added).
11. *Id.* art. 17, ¶ 1(a), (b), and (c).
12. *Id.* ¶ 1(d) (emphasis added).
13. *See id.* art. 53, ¶ 2 (requiring the Prosecutor to provide the indicated information).

III. SITUATIONS CURRENTLY UNDER INVESTIGATION BY THE PROSECUTOR

Currently there are four situations that are being investigated by the Office of the Prosecutor and have resulted in formal charges: Uganda, the Democratic Republic of the Congo, Darfur in the Sudan, and the Central African Republic. In November 2009, the Prosecutor sought authorization from a pre-trial chamber to open an investigation into the situation in Kenya relating to post-election violence there in 2007 and 2008. A two-judge majority of Pre-Trial Chamber II granted the authorization on March 31, 2010.[14] One member of the chamber, Judge Hans-Peter Kaul, dissented on the ground that the alleged acts, while crimes, did not rise to the level of organized "crimes against humanity" within the meaning of Article 7(2)(a) of the Rome Statute.[15]

The states parties of Uganda, the Democratic Republic of the Congo, and the Central African Republic referred the situations in those countries to the Prosecutor pursuant to Article 14. The Security Council, in Resolution 1593 dated March 31, 2005, referred the situation in Darfur to the Prosecutor under Article 13(b).[16] Importantly, the situation in Kenya is the first to have been approved for investigation by a pre-trial chamber pursuant to the Prosecutor's *proprio motu* powers under Article 15. It represents a historical "test case" involving delineation of the boundaries of the Prosecutor's discretion to launch an investigation under that article.

IV. CRITIQUES OF THE EXERCISE OF DISCRETION BY THE ICC PROSECUTOR AND EFFORTS TO DEVELOP GUIDELINES FOR THE EXERCISE OF HIS OR HER DISCRETION

There is no question, of course, that the ICC Prosecutor, handicapped by limited resources and confronting a myriad of situations throughout the globe that may involve crimes within the Court's jurisdiction, faces challenging dilemmas in selecting situations and cases. And the work of the Court is still in its embryonic stages. Nevertheless, a number of commentators have critiqued the exercise of discretion by the current ICC Prosecutor. Some scholars, such as William Schabas, have argued that the Prosecutor has allowed states parties and the Security Council to

14. 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*, 83, ICC-01/09 (Mar. 31, 2010).

15. *See id.*, Dissenting Opinion of Judge Hans-Peter Kaul, at 78, ¶ 150 (finding that there was not an "organization" that established a policy to attack the civilian population, as required under Article 7(2)(a)).

16. S.C. Res. 1593, ¶ 1 (Mar. 31, 2005).

control the selection of situations and cases meriting prosecution, rather than forcefully exercising his *proprio motu* powers to bring grave cases before the Court.[17] They have, moreover, criticized him for declining to investigate allegations of crimes that arguably are more serious than other crimes that he has investigated.[18] Judge Kaul, in his dissent to Pre-Trial Chamber II's authorization of an inquiry into the situation in Kenya, implicitly faulted the Prosecutor for overstepping the bounds of his authority under the Rome Statute by seeking to investigate crimes that more closely resembled ordinary crimes than crimes against humanity.[19]

More broadly, many critics have observed that all of the situations under investigation to date have occurred on the continent of Africa. This lends support to suspicions that the Prosecutor is biased against developing countries and in favor of Western countries—that the ICC is, in the words of Professor Schabas' Article written for this symposium, a twenty-first century agent of "victor's justice."[20] Commentators have also expressed concern, notwithstanding the filing of charges against President Omar Hassan Ahmad Al Bashir of the Sudan, that the ICC Prosecutor has tended to bring charges against leaders of rebel groups.[21] Such critiques have been accompanied by calls for the Prosecutor clearly to indicate what factors he will rely upon in exercising his discretion—what one scholar has called "*ex ante*" criteria for the exercise of "structured discretion."[22]

Toward this end, the Office of the Prosecutor has published regulations, which entered into force in April 2009, laying down the factors that the Prosecutor will consider in deciding whether to launch a *proprio motu* investigation under Article 15 or to prosecute particular cases under Article 53. For example,

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17. *See, e.g.*, William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 749-53 (2008) [hereinafter *Prosecutorial Discretion*] (critiquing the practice of "self-referral" by states).

18. *See, e.g., id.* at 747-48 (arguing that the Prosecutor should give greater weight to the objective gravity of a crime as opposed simply to the number of victims).

19. Dissenting Opinion of Judge Hans-Peter Kaul, *supra* note 15, at 3-4, ¶¶ 4-6; *id.* at 5, ¶ 10.

20. *See generally* William A. Schabas' article in this symposium issue, *Victor's Justice: Selecting "Situations" at the International Criminal Court*, 43 J. MARSHALL L. REV. 535 (2010) [hereinafter *Victor's Justice*] (arguing that the ICC risks being viewed as an agent of "victor's justice" through the Prosecutor's politicized but nontransparent selection of situations and cases).

21. *See* Schabas, *Prosecutorial Discretion*, *supra* note 17, at 749-53 (criticizing the Prosecutor's record of directing his attention to rebel groups rather than state authorities).

22. Philippa Webb, *The ICC Prosecutor's Discretion Not to Proceed in the "Interests of Justice"*, 50 CRIM L.Q. 305, 324-25 (2005) [hereinafter *The ICC Prosecutor's Discretion*].

Regulation 29 states:

> In acting under article 15, paragraph 3, or article 53, paragraph 1, the Office shall produce an internal report analysing the seriousness of the information and considering the factors set out in article 53, paragraph 1 (a) to (c), namely issues of *jurisdiction*, *admissibility* (including *gravity*), as well as the *interests of justice*, pursuant to rules 48 and 104. The report shall be accompanied by a recommendation on whether there is a reasonable basis to initiate an investigation.[23]

The same regulation affirms that "in order to assess the gravity of the crimes allegedly committed in the situation the Office shall consider various factors including their *scale*, *nature*, *manner of commission*, and *impact*."[24] Based on the above-mentioned report, the Prosecutor "shall determine whether there is a reasonable basis to proceed with an investigation."[25]

The Prosecutor has also issued a policy paper on the meaning of the "interests of justice." In that paper the Prosecutor takes the position, among others, that "there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor."[26] These regulations and guidelines represent important progress in delineating the most important factors that should guide the Prosecutor's exercise of discretion. At the same time, they could be informed by a more comprehensive policy concerning how the Prosecutor should select situations for investigation and cases for prosecution. Moreover, there are grounds to raise more searching questions about the criteria that the Prosecutor has proposed.

V. THE ROLE OF FUNDAMENTAL ETHICAL PRINCIPLES

I suggest that it is both appropriate and essential to turn to fundamental ethical principles as the basis for such a comprehensive policy. As I have explored in my writings, a number of ethical principles today find expression in international law and are logically related to a foundational principle of unity in diversity. Among those fundamental ethical principles relevant to the exercise of the Prosecutor's functions are:

- the equal dignity of all human beings;
- universal human rights and universal human duties to respect human rights;

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23. ICC, *Regulations of the Office of the Prosecutor*, Reg. 29, ¶ 1, ICC-BD/05-01-09 (Apr. 23, 2009) (emphasis added).

24. *Id.* ¶ 2 (emphasis added).

25. *Id.* ¶ 3.

26. Office of the Prosecutor, *Policy Paper on the Interests of Justice*, 1 (Sept. 2007).

- a trust theory of government and limited state sovereignty;
- the right to life, to physical security, and to subsistence;
- the right to freedom of moral choice, including freedom of thought, conscience, religion, opinion, and expression;
- open-minded consultation;
- individual moral responsibility for criminal behavior;
- the reformative, deterrent, and protective purposes of punishment of criminal behavior, without vengeance;
- respect for governments and law;
- the interdependence between peace and human rights;
- the fostering of peaceful methods of dispute resolution;
- the observance of humanitarian rules in military action; and
- a definition of "impartiality" as adherence to fundamental ethical principles.[27]

To give one example of evidence supporting these principles in international law, the Universal Declaration of Human Rights announces in Article 1 that "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[28] This statement affirms a preeminent ethical principle of the unity of the human family, while also declaring that human beings are morally equal and entitled to equal rights on the basis of their common membership in that single family.

It is appropriate to use these principles as a "background" ethical value system that can inform the ascertainment and interpretation of international law—and the exercise of discretion by actors such as the U.N. Security Council or the ICC Prosecutor established by broad, multilateral treaties like the UN Charter or the Rome Statute—for a number of reasons. Most importantly, states themselves have endorsed these ethical principles through these treaties. These principles have not been plucked from "thin air," or derived from philosophical theories with no connection to international law. On the contrary, they are immanent in contemporary international law and the vast majority of states in

27. *See* BRIAN D. LEPARD, RETHINKING HUMANITARIAN INTERVENTION: A FRESH LEGAL APPROACH BASED ON FUNDAMENTAL ETHICAL PRINCIPLES IN INTERNATIONAL LAW AND WORLD RELIGIONS 39-98 (2002) [hereinafter RETHINKING HUMANITARIAN INTERVENTION] (elaborating on these fundamental ethical principles). *See also* LEPARD, CUSTOMARY INTERNATIONAL LAW, *supra* note 2, at 77-94 (similarly describing various fundamental ethical principles).

28. Universal Declaration of Human Rights art. 1 [hereinafter Universal Declaration], *available at* http://www.un.org/en/documents/udhr/index.shtml.

the global community of states have given rhetorical assent to them.[29]

Indeed, the Rome Statute itself articulates and reflects many of these principles. For example, it acknowledges the preeminent principle of unity in diversity by asserting, in the very first preambular paragraph, that its parties are "conscious that all peoples are united by common bonds."[30] The second and third paragraphs of the preamble declare that "grave crimes" involving "unimaginable atrocities that deeply shock the conscience of humanity . . . threaten the peace, security and well-being of the world," thus drawing an important linkage between peace and human rights.[31] The Rome Statute furthermore recognizes the reformative, deterrent, and protective purposes of punishment of criminal behavior, without vengeance. The fifth preambular paragraph affirms in this connection the determination of states parties to "put an end to impunity for the perpetrators" of serious international crimes "and thus to contribute to the prevention of such crimes."[32] Articles 5, 6, 7, and 8 self-evidently approve of the observance of humanitarian rules in military action.[33]

I have suggested elsewhere that these fundamental ethical principles can be classified in descending order of importance as "essential," "compelling," and "fundamental."[34] It is likewise possible to rank human rights as "essential," "compelling," and "fundamental."[35] These terms relate to the relative importance of a right in relation to the preeminent principle of unity in diversity and the permissible scope of limitations on the right. For example, I define "essential" human rights as those that are very closely related to unity in diversity and should, because of their moral importance, preempt any possible reasons for not respecting them in all, or virtually all, cases.[36] Freedom from genocide, to take one illustration, is an essential human right because the right to life is of supreme importance and there can be no grounds for infringing

29. For a more detailed explanation of why these principles deserve to be the foundation for a new approach to customary international law as well as treaty law, see LEPARD, CUSTOMARY INTERNATIONAL LAW, *supra* note 2, at 92-94.

30. Rome Statute, *supra* note 5, pmbl.

31. *Id.*

32. *Id.*

33. *See id.*, art. 5, ¶ 1 (providing that the ICC has jurisdiction over genocide, crimes against humanity, and war crimes, in addition to the crime of aggression, all of which can occur during the conduct of military action). *See also id.*, arts. 6-8 (defining the crimes of genocide, crimes against humanity, and war crimes that are within the jurisdiction of the ICC).

34. LEPARD, CUSTOMARY INTERNATIONAL LAW, *supra* note 2, at 81-82. *See also id.* at 83, Fig. 5.1 (depicting this classification of ethical principles).

35. *Id.* at 82-86. *See also id.* at 85, Fig. 5.2 (depicting this classification of human rights).

36. *Id.* at 84.

upon its exercise.[37] On the other hand, broader limitations are permissible in relation to compelling and fundamental rights.[38]

The fundamental ethical principle of respect for law initially underscores the importance of the Prosecutor being faithful to those standards for the exercise of his or her discretion laid down in the Rome Statute itself as the governing treaty establishing the Prosecutor's powers. As we have seen, these standards require an evaluation of the "gravity" of the crime, the "interests of victims," and whether a prosecution would not serve "the interests of justice." Unfortunately, however, many of these terms are fraught with ambiguity. For example, what is a "grave" crime? How can the degree of gravity be assessed? And what does it mean to say that a prosecution would not serve the interests of "justice," a notoriously malleable term?

It is appropriate, of course, in interpreting a treaty such as the Rome Statute, to give deference to established principles of treaty interpretation, including reference to the *travaux préparatoires* where the text is ambiguous, as called for by Article 32 of the Vienna Convention on the Law of Treaties.[39] In my other writings I have proposed a method of treaty interpretation that is based on, but also extends, these traditional rules. This method involves four steps:

1. Ascertain whether a treaty provision has an ordinary meaning in light of the objects and purposes of the treaty.
2. Refer to various supplementary means of interpretation including, but not limited to, the views expressed by states during the preparation of the treaty (the *travaux préparatoires*) to ascertain the parties' true shared understandings of their obligations at the time the treaty was adopted.
3. Consider the possible existence of new generally accepted understandings of treaty terms that alter either the ordinary meaning of the treaty text or the parties' original understandings. These new shared understandings should prevail to the extent they are equally or more consistent with fundamental ethical principles.
4. If there are remaining ambiguities, favor interpretations of the treaty that best help to implement fundamental ethical principles.[40]

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37. *See id.* at 138-39, 254, 341.

38. *Id.* at 84-85.

39. *See* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (1969), art. 31, ¶ 1 (stating that a treaty should be interpreted in accordance with the ordinary meaning of its terms in their context and "in the light of its object and purpose"); *id.* art. 32 (identifying supplementary means of interpreting a treaty, including recourse to its preparatory work).

40. LEPARD, CUSTOMARY INTERNATIONAL LAW, *supra* note 2, at 196. *See*

This method can be applied to the interpretive problems raised above concerning relevant terms in Articles 17 and 53 of the Rome Statute. I am not able in the space available here to apply this method rigorously to all of these. However, certain preliminary observations can be made with respect to some of them, and in particular "gravity" and "the interests of justice."

Article 53 refers to the "gravity" of an offense. The ordinary meaning of "gravity" in this context is "importance" or "seriousness."[41] The *travaux* fail to shed more light on the meaning of the term. However, Morten Bergsmo and Pieter Kruger in their expert commentary on the Rome Statute have noted that "preambular paragraph nine refers to 'the most serious crimes of concern to the international community as a whole,' whilst article 1 confirms that the Court's jurisdiction covers 'the most serious crimes of international concern'"—thus also implying that the drafters had in mind a notion of "seriousness."[42]

What standard should be used to measure seriousness? Even considering the objects and purposes of the Rome Statute, of which a primary one is to ensure that "the most serious crimes of concern to the international community as a whole" do "not go unpunished,"[43] it is not clear exactly what criteria should be employed. Should the focus be on the nature of the crime itself, regardless of the extent of harm inflicted on victims? On the nature of the harm inflicted on victims, such as loss of life, regardless of the number of victims? On the absolute number of victims? Or on some combination of these factors? Many other criteria are also plausible. Because of this ambiguity, it is appropriate to refer to fundamental ethical principles in the ways just outlined, both to interpret the concept of "gravity" and to determine how the Prosecutor should exercise the wide discretion that the Statute gives him or her to assess gravity.

The term "interests of justice" is pregnant with similar, if not greater, ambiguities. There is no widely agreed upon "ordinary meaning" of the term, as longstanding philosophical debates testify, nor is there any evidence from the *travaux* of the meaning assigned to this term by the crafters of the Rome Statute. Again, Bergsmo and Kruger point out the inherent imprecision of the phrase and the lack of guidance from the Statute's drafters,

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also LEPARD, RETHINKING HUMANITARIAN INTERVENTION, *supra* note 27, at 113-18 (developing a method for interpreting treaties).

41. *See* THE OXFORD DICTIONARY AND THESAURUS: AMERICAN EDITION 642 (1996) (defining "gravity" at entry 3a as "importance; seriousness; the quality of being grave").

42. Morten Bergsmo & Pieter Kruger, *Article 53: Initiation of an Investigation, in* COMMENTARY ON THE ROME STATUTE, *supra* note 4, at 1065, 1071, sec. 19.

43. Rome Statute, *supra* note 5, pmbl.

observing that "the exact content of 'interests of justice' is not defined."[44] They argue only that "the Prosecutor must exercise [his or her] discretion in a reasonable manner and be able to substantiate a decision not to proceed."[45] Under the method I have described, fundamental ethical principles can assist in resolving some of these challenging interpretational dilemmas. They can also serve as guides for decision making by the Prosecutor within the capacious margin of discretion the Statute gives him or her, even if they do not point to determinate conclusions or alleviate the need for the Prosecutor to make difficult choices.

VI. SOME IMPLICATIONS OF FUNDAMENTAL ETHICAL PRINCIPLES FOR THE PROSECUTOR'S EXERCISE OF DISCRETION

In the balance of this Article I will offer some examples of the implications of fundamental ethical principles for future investigations or prosecutions undertaken by the Prosecutor. A careful evaluation in light of these principles of already-initiated investigations and prosecutions pursued by the current ICC Prosecutor is also warranted, but I am not able to engage in such a rigorous review here.

First, the proposed classification of human rights as essential, compelling, and fundamental may assist the Prosecutor in making relative evaluations of the gravity of particular crimes infringing on human rights and in assessing the "interests of justice." Essential human rights include the right to life and to physical security, the right to subsistence, the right to freedom of moral choice, and the right to protection from illegitimate uses of force that are likely to or do result in death or injury to civilians.[46]

While all crimes within the jurisdiction of the ICC are serious, as emphasized in the Rome Statute's preamble, some more directly infringe on these and other essential human rights than others. For example, it seems fair to conclude that the commission of genocide by killing members of a particular national, ethnical, racial, or religious group, recognized as a crime within the jurisdiction of the ICC under Article 6(a) of the Rome Statute,[47] is a more direct assault on essential human rights than the indirect transfer by an Occupying Power of parts of its own civilian population into the territory it occupies, which is defined as a war crime within the jurisdiction of the ICC under Article 8(2)(b)(viii)

44. Bergsmo & Kruger, *Article 53, supra* note 42, at 1072, sec. 22.

45. *Id.*

46. *See* LEPARD, CUSTOMARY INTERNATIONAL LAW, *supra* note 2, at 86, Fig. 5.3 (listing selected essential human rights); *id.* at 341-42 (also giving examples of essential human rights). *See also* LEPARD, RETHINKING HUMANITARIAN INTERVENTION, *supra* note 27, at 59, Fig. 3 (listing the right to protection from illegitimate uses of force as an essential human right).

47. Rome Statute, *supra* note 5, art. 6, ¶ (a).

of the Rome Statute, if committed as part of a plan or policy.[48] While both crimes are serious, the former is more "grave," within the meaning of Article 53 of the Rome Statute, when measured by its impact on the enjoyment of essential human rights.

Second, the ethical principle of open-minded consultation can inform the Prosecutor's policies and actions. This principle maintains that truth and justice can best be served through a process of seeking out information and opinions from diverse sources without preconceived notions. This principle is implicit in many international constitutional documents, including the U.N. Charter, which establishes the General Assembly and Security Council as forums in which free discussion of global issues can take place with a view to the reaching of unified decisions wherever possible.[49]

The ethical principle of open-minded consultation highlights the importance of the Prosecutor not only seeking out *information* from victims, nongovernmental organizations, intergovernmental organizations, governments, and other actors,[50] but also soliciting their *perspectives* on how justice in particular situations or cases can best be achieved. This does not mean that the Prosecutor objectively should relinquish his or her independent judgment to any such group, or that the Prosecutor does not need to take care to avoid perceptions of becoming a "tool" of groups with particular agendas. But it does imply that the Prosecutor must, with an open mind, seek out a wide variety of viewpoints on the desirability of implementing particular proceedings before making any final decisions on those proceedings.

The principle of open-minded consultation also indicates that the Prosecutor has certain ethical obligations to share his or her own line of reasoning not only with relevant ICC institutions, but also with the general public. Transparency is an important ethical value. It furthermore naturally helps to build and sustain political trust of the Court and enhance its legitimacy. It is important that

48. *Id.* art. 8, ¶ 2(b)(viii).

49. *See generally* Charter of the United Nations arts. 10, 13, 24, 39, June 26, 1945, 59 Stat. 1031, 3 Bevans 1153 (entered into force Oct. 24, 1945). For more comprehensive explorations of the principle of open-minded consultation, and endorsement of it by states as well as the world's great religious and philosophical traditions, see LEPARD, CUSTOMARY INTERNATIONAL LAW, *supra* note 2, at 90-91; LEPARD, RETHINKING HUMANITARIAN INTERVENTION, *supra* note 27, at 68-71. *See also* Brian D. Lepard, *Jurying Humanitarian Intervention and the Ethical Principle of Open-Minded Consultation*, *in* HUMANITARIAN INTERVENTION: NOMOS XLVII 217 (Terry Nardin & Melissa S. Williams eds., 2006) (elaborating on the principle of open-minded consultation and applying it to decision-making concerning humanitarian intervention).

50. *See, e.g.*, Rome Statute, *supra* note 5, art. 15, ¶ 2 (stating that the Prosecutor may obtain additional information from "states, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources").

the Prosecutor carefully justify publicly his or her decisions concerning why or why not particular situations merit investigation. He or she may not be able to lay out comprehensive criteria *ex ante*, but at least particular decisions ought to be fully explained. Full and public explanations can furthermore help temper suspicions about political bias on the part of the Prosecutor.

Third, fundamental ethical principles highlight the intimate connection between peace and human rights, a link already acknowledged, as noted above, in the preamble to the Rome Statute.[51] They recognize that enduring social unity and peace cannot be achieved without respect for human rights. At the same time, they indicate that unity and peace among people, groups, and nations are a prerequisite for the full enjoyment of human rights. Indeed, war and civil conflict pose some of the greatest threats to human rights. This mutual interdependence is also articulated, for example, in the preamble to the Universal Declaration of Human Rights, which asserts that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."[52]

"Justice" is an inherently vague and contentious term, even in the passage I have just quoted, but one reasonable interpretive perspective is to consider "justice" the outcome of application of an ensemble of relevant ethical principles in any particular situation. To do what is just is to do what is ethical.[53] Under this conception, which finds support in international law texts, both peace and human rights are essential components of "justice." This understanding lends a richer meaning to the concept of "justice" in assessing what the "interests of justice" may demand under the Rome Statute. It may not be warranted for the Prosecutor to adopt, as he has in his policy paper on the "interests of justice," a narrow definition of justice that excludes peace.[54]

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51. *See id.* pmbl. (explaining that States Parties recognize that grave crimes threaten the peace of the world).

52. Universal Declaration, pmbl.

53. *See, e.g.*, Robert C. Solomon & Mark C. Murphy, *Introduction*, *in* WHAT IS JUSTICE? CLASSIC AND CONTEMPORARY READINGS 3, 4 (Robert C. Solomon & Mark C. Murphy eds., 1990) (observing that the question "what is justice?" is an invitation to answer such broad philosophical inquiries as "What is our essential relationship to our fellow beings, and what obligations do we have to one another?").

54. *See, e.g.*, Office of the Prosecutor, *Policy Paper on the Interests of Justice*, *supra* note 26, at 8 (stating, "The concept of the interests of justice established in the Statute, while necessarily broader than criminal justice in a narrow sense, must be interpreted in accordance with the objects and purposes of the Statute. Hence, it should not be conceived of so broadly as to embrace all issues related to peace and security.") *See id.* at 1, 8-9.

Indeed, a natural way to read the reference to "the interests of justice" in Article 53 of the Rome Statute, whose meaning is not clarified by the *travaux*, is that the drafters had in mind consideration of a panoply of factors beyond the basic principle that criminal justice demands that crimes be prosecuted. It is hard to see how any prosecution could not be in "the interests of justice" if justice is defined narrowly to include only criminal justice and if the crime is sufficiently grave otherwise to merit prosecution. As others have persuasively argued, the Prosecutor must give some consideration to the impact of a prosecution on reconciliation and peace-building in a country, which in turn can affect the enjoyment of human rights.[55] For example, if a prosecution is likely to stall settlement efforts and thereby result in many more future civilian deaths, then "justice" may not be served in this larger sense, even if it is served by reference to a narrow concept of criminal justice focusing only on the gravity of the particular past crime being charged.

Of course, the Prosecutor must also weigh the likelihood that prosecution will deter future human rights violations[56] and must give significant weight to the ethical principle that crimes morally must be punished in some fashion and that violators must be held to account. Indeed, enforcement of criminal responsibility may legitimately be viewed as a constituent element of long-lasting peace. The Prosecutor must bear in mind in this regard that the foundational purpose of the Rome Statute is to prevent impunity.[57] Nevertheless, the Prosecutor can also take into account that there may be indigenous justice or reconciliation mechanisms that themselves further the ethical principle of preventing impunity, and allowing these to operate may be in the "interests of justice."[58]

Finally, Article 42 of the Rome Statute requires the Prosecutor to act "independently" and "impartially."[59] The terms "independent" and "impartial" may be subject to varying interpretations. I propose that from the perspective of

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55. *See, e.g.*, Schabas, *Prosecutorial Discretion*, *supra* note 17, at 749; Webb, *The ICC Prosecutor's Discretion*, *supra* note 22, at 338-40.

56. Some empirical work by political scientists has confirmed such an effect. *See, e.g.*, Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 3 (unpublished paper presented on Oct. 21, 2009, at the "Hauser Globalization Colloquium Fall 2009: Interdisciplinary Approaches to International Law"; manuscript *available at* http://www.iilj.org/courses/documents/Sikkink-Kim.HC2009Oct21.pdf) (finding that "transitional countries with human rights prosecutions are less repressive than countries without prosecutions").

57. *See* Rome Statute, *supra* note 5, pmbl.

58. On this point, see, e.g., Webb, *The ICC Prosecutor's Discretion*, *supra* note 22, at 338-40.

59. Rome Statute, *supra* note 5, art. 42, ¶¶ 1, 7. See also *id.* art. 45 (requiring the Prosecutor to exercise his or her functions "impartially and conscientiously").

fundamental ethical principles "impartiality" may best be defined as adherence to these principles.[60] This does not mean "neutrality" or a tit-for-tat balancing of the number of prosecutions of members of one group with an equal number of prosecutions of members of a rival group, as Professor Schabas aptly emphasizes in his Article.[61] It does not preclude the possibility that the Prosecutor will determine, upon searching and thoughtful review of a situation, that the cases most deserving of prosecution happen to involve individuals who are members of only one group engaged in conflict. But it does require the Prosecutor to assess, in a clear and transparent way, which situations are most deserving of investigation and which cases most merit prosecution before the ICC in light of their impact on the realization of fundamental ethical principles. Indeed, the Prosecutor should endeavor to explain his or her decisions by reference to ethics, and not solely on the basis of juridical criteria, which, we have seen, the Rome Statute often leaves vague.

In short, fundamental ethical principles—in turn rooted in a common recognition today by the international community of the fundamental unity of the human family—can, and should, be used by the Prosecutor to make many of the challenging, and often wrenching, decisions that he or she confronts. The Prosecutor can thereby help the Court develop an ethically grounded jurisprudence that will also enhance its credibility and legitimacy. Most importantly, these principles can assist the Prosecutor and the Court in providing more effective redress for victims of "unimaginable atrocities that deeply shock the conscience of humanity."[62]

60. For an elaboration of this concept, see LEPARD, RETHINKING HUMANITARIAN INTERVENTION, *supra* note 27, at 93-95. *See also id.* at 202-219.

61. *See* Schabas, *Victor's Justice*, *supra* note 20, at 551-52.

62. Rome Statute, *supra* note 5, pmbl.