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Front cover: *Alberto Gandolfi inspects his fresco of Hugo Grotius in Florence. Trained for years in fresco painting and restoration, including at the Accademia di Belle Arti di Firenze, he employs the fresco techniques used since the 1400s in Florence, including preparing ingredients such as the lime plaster himself. An exceptional level of quality control of the preliminary stages is required for the paintings to stand the test of time. Photograph: © CILRAP 2017.*

Back cover: *Section of a Roman street close to where the Statute of the International Criminal Court was negotiated, paved with 'sampietrini' cobblestones of trimmed, black basalt-cubes. When each stone is precisely cut and placed, they make up a robust and attractive whole, with the ability to withstand pressure and inundation. Preliminary examination is similarly made up of numerous small steps, each of which should be undertaken with proper quality control. Photograph: © CILRAP 2018.*

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Prosecutorial Ethics and Preliminary Examinations at the ICC

Alexander Heinze and Shannon Fyfe*

18.1. Introduction

The increased power and independence of the Office of the Prosecutor ('OTP', or the 'Office'), especially in the preliminary examination phase, has brought more attention to the ways in which prosecutors can exercise discretion in choosing which situations warrant investigation by the International Criminal Court ('ICC').[1] Under Article 15 of the ICC Statute, the Prosecutor has the authority to initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. There

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1 See Carsten Stahn, "Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, pp. 413–34.

are no specific requirements as to where the Prosecutor is to get this information or how she is to analyse the seriousness of the information received. Similar concerns are raised with regard to other trigger mechanisms. Although the requirement that the Pre-Trial Chamber ('PTC') must grant an authorization for a *proprio motu* investigation constrains the Prosecutor's discretion, there are generally no checks on her determination that there is (or is not) a reasonable basis to proceed with an investigation. The regulations of the OTP entered into force in 2009 and the OTP's Code of Conduct only entered into force in September 2013, largely as a reference to the staff rules of the ICC.

We argue that the influence of political considerations is most apparent in prosecutorial discretion exercised during the preliminary examination phase, and that the permissible invocation of these political considerations generates significant concerns about fairness. Evaluations of selection decisions are much more important for the ICC's legitimacy than for that of most national criminal law systems, where prosecutors' discretionary decisions not to prosecute very rarely spark a challenge to the legitimacy of the entire criminal justice system. In contrast, since the ICC can only prosecute a handful of cases, each decision can be seen as a statement about how the Court views its role in the world.

In this chapter, we begin with a discussion of the normative foundations of prosecutorial ethics. We acknowledge that in most stages of a criminal trial, deontological constraints on the prosecution should be primary, but that consequentialist considerations should play a larger role in the pre-trial phase of a criminal trial. In the third section, we turn to prosecutorial ethics in international law, analysing the normative considerations that should underpin the ethical rules and accountability mechanisms that currently govern the OTP. Then, we turn to the preliminary examination phase – a form of a pre-investigation that precedes the actual 'formal' investigation of a situation and subsequently a case before the ICC[2] – and

[2] Kai Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure*, Oxford University Press, Oxford, 2016, pp. 335–36; Héctor Olásolo, *Corte Penal Internacional: ¿Dónde Investigar?: Especial Referencia a la Fscalía en el Proceso de Activación*, Tirant lo Blanch, Valencia, 2003, pp. 118–19; Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*, Duncker & Humblot, Berlin, 2011, p. 57; Ignaz Stegmiller, "The ICC and Mali: Towards more Transparency in International Criminal Law Investigations", in *Criminal Law Forum*, 2013, vol. 24, no. 4, pp. 485 ff.

analyse the OTP's use of prosecutorial discretion pursuant to Article 53(1). We argue that the Prosecutor's discretion to invoke political considerations when analysing whether a case is in the "interests of justice" should be limited by both deontological and consequentialist constraints, and that consequentialist political considerations should sometimes be prioritized to ensure the functioning of the ICC. Finally, we offer several broad suggestions regarding changes to the ethical rules governing the OTP, and argue that the OTP must be accountable to more specific ethical standards applicable at the preliminary examination phase to ensure the legitimacy and fairness of the Court, both in terms of perception and actual practice.

18.2. Prosecutorial Ethics

In this section, we consider the broad normative foundations of prosecutorial ethics, briefly exploring the relationship between law and morality, the concepts of justice and fairness[3] in criminal trials, and the normative ethical theories that inform different kinds of prosecutorial obligations.

18.2.1. The Relationship between Law and Morality

When we say we are 'obligated'[4] to do something, we generally mean this in one of two ways. First, we might mean that we are legally obligated to do something. We may have a positive duty to act in a certain way based on a contract we have signed, or we may have a negative duty not to act in a certain way based on the existence of a law that constrains our behaviour. The other way we might use the term 'obligation' is with respect to a moral duty.[5] Moral obligations can also be positive or negative, demanding or prohibiting certain actions, but a failure to abide by a purely moral obligation does not result in legal sanctions. Moral failures may result in community-based, social, or interpersonal sanctions.

Both moral and legal obligations usually correspond to rights: if one has a right to something, then there is a corresponding obligation on the part of someone, or some entity or institution. So to say that one has a right to the performance of a contract means that someone else has an

3 About the role of fairness in legal ethics, see Paolo Moro, "Rhetoric and Fair Play: The Cultural Background of Legal Ethics", in *US-China Law Review*, 2017, vol. 14, no. 2, pp. 72 ff.

4 We use the terms 'duty' and 'obligation' interchangeably.

5 For the purposes of this article, we use the terms 'ethical' and 'moral' interchangeably.

obligation to perform under that contract, and to say that one has a right to medical care means that some institution has an obligation to provide such medical care.

There is no consensus as to how to distinguish the law as a system of norms from morality as a system of norms.[6] There are two main conceptual theories about how to understand legal norms: those who affirm that there is a necessary conceptual relationship between law and morality, and those who deny it. The former – natural law theorists going back to the Greek philosophers and Aquinas – argue that a concept of law cannot be fully articulated without some reference to morals ("*lex injusta non est lex*").[7] William Blackstone gives the argument for natural law by claiming that it is "binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original".[8] Two modern legal theorists, Lon Fuller and Ronald Dworkin, maintain that the concept of law is imbued with morality of a certain kind (Dworkin) or contains an inner morality (Fuller).

Positivists argue that because law and morality are conceptually distinct, a legal system with no moral constraints on legal validity could exist.

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6 This is given that these systems are relatively autonomous as promoted by Niklas Luhmann and Gunther Teubner. See Niklas Luhmann, *Soziologische Aufklärung 1: Aufsätze zur Theorie sozialer Systeme*, 8th edition, Springer, Cham, 2009, p. 226; Gunther Teubner, *Recht als autopoietisches System*, Suhrkamp, Frankfurt am Main, 1989; Niklas Luhmann, "Introduction to Autopoietic Law", in Niklas Luhmann (ed.), *Autopoietic Law: A New Approach to Law and Society*, De Gruyter, Berlin, 1988, pp. 1, 3; Niklas Luhmann, *Einführung in die Systemtheorie*, 4th edition, Carl-Auer, Heidelberg, 2008, pp. 50 ff. (6th edition, 2011, p. 111); Brian H. Bix, *Legal Theory*, Oxford University Press, Oxford, 2004, p. 18; Roger Cotterrell, "Law in Social Theory and Social Theory in the Study of Law", in Austin Sarat (ed.), *The Blackwell Companion to Law and Society*, Blackwell, Malden, 2007, pp. 16, 22; Clemens Mattheis, "The System Theory of Niklas Luhmann and the Constitutionalization of the World Society", in *Goettingen Journal of International Law*, 2012, vol. 4, no. 2, pp. 626 ff.

7 See Plato, Thomas L. Pangle (trans.), *The Laws of Plato*, University of Chicago Press, Chicago, 1980, book IV; Marcus Tullius Cicero, Clinton Walker Keyes (trans.), *De Re Publica: De Legibus; with an English Translation by Clinton Walker Keyes*, Harvard University Press, Cambridge (MA), 1988; Augustine, Thomas Williams (trans.), *On Free Choice of the Will*, Hackett Publishing Company, Indianapolis, 1993; St. Thomas Aquinas, *The Summa Theologica of St. Thomas Aquinas*, Burns Oates & Washbourne, London, 1912.

8 William Blackstone, *Commentaries on the Law of England*, The University of Chicago Press, Chicago, 1979, p. 41.

John L. Austin claims that there is a difference between what law is and what it ought to be, that "the existence of law is one thing; its merit or demerit is another".[9] H.L.A. Hart notes that law and morals are certainly related in some ways, but he disputes the idea that "a legal system *must* exhibit some specific conformity with morality or justice, or *must* rest on a widely diffused conviction that there is a moral obligation to obey it".[10] Instead, he argues that the criteria for what makes a law valid does not have to include a "reference to morality or justice".[11] Realists also argue that law and morality are conceptually distinct, but they challenge the idea that legal decision-making can be explained purely by reference to positive law. Instead, realists draw from social interests and public policy when determining what constitutes the law.[12]

Whether or not we can explain or justify the law without morality, there is definitely a relationship between the professional obligations[13] of lawyers and morality. Lawyers are expected to abide by laws, professional rules, and informal professional norms, and in many jurisdictions, they are also required to abide by a professional code of conduct.[14] Professional legal ethics involve a recognition that the lawyers are often confronted with ethical dilemmas. Criminal lawyers in particular face "conflicting

9 John Austin, *The Province of Jurisprudence Determined*, Library of Ideas edition, Weidenfeld and Nicolson, London, 1954, p. 184.

10 H.L.A. Hart, *The Concept of Law*, 2nd edition, Clarendon Press, Oxford, 1994, p. 185.

11 *Ibid.*

12 See, for example, Myres S. McDougal, "Law and Power", in *American Journal of International Law*, 1952, vol. 46, no. 1, pp. 102–14; Harold D. Lasswell and Myres S. McDougal, "Criteria for a Theory About Law", in *Southern California Law Review*, 1970, vol. 44, no. 2, pp. 362–94; Brian Leiter, "Rethinking Legal Realism: Toward a Naturalized Jurisprudence", in *Texas Law Review*, 1997, vol. 76, no. 2, pp. 267–315; Anja Matwijkiw and Bronik Matwijkiw, "A Modern Perspective on International Criminal Law: Accountability as a Meta-Right", in Leila Nadya Sadat and Michael P. Scharf (eds.), *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni*, Martinus Nijhoff, Leiden, 2008, pp. 19–79.

13 See David Luban and W. Bradley Wendel, "Philosophical Legal Ethics: An Affectionate History", in *Georgetown Journal of Legal Ethics*, 2017, vol. 30, pp. 337-364; see also Hugh Breakey, "Building Ethics Regimes: Capabilities, Obstacles and Supports for Professional Ethical Decision-Making", in *University of New South Wales Law Journal*, 2017, vol. 40, no. 1, pp. 322–52.

14 See Donald Nicolson, "Making Lawyers Moral? Ethical Codes and Moral Character", in *Legal Studies*, 2005, vol. 25, no. 4, pp. 601–26.

values, aims and interests".[15] They are expected, however, to separate the "morality in their representation" from the "morality of the client's cause".[16] A criminal lawyer is expected to vigorously argue for her side of the case, whether as a defence lawyer or a prosecution lawyer, and whether or not she thinks that she in fact has the most compelling argument. But this vigour remains limited by ethical constraints, such as the moral requirement to respect the dignity of all persons involved in a criminal trial, and the moral prohibition on lying to advance a client's interests. While a defence lawyer may have little control over criminal justice proceedings other than determining how best to advocate for his client, a prosecutor has additional ethical obligations due to her ability to select defendants for trial and determine the scope of the criminal justice process.[17]

There is one final point to make about the relationship between legal obligations and moral obligations, specifically in the realm of legal ethics. A lawyer's moral obligations may in fact be legally binding, if they are also legal obligations, and these obligations may correspond with legal accountability mechanisms. But even in cases where a moral obligation has been clearly violated by a prosecutor, the legal obligation may be too vague to ensure that the legal accountability mechanisms can prevent or punish the violation. So while we will identify legal accountability mechanisms at points throughout the chapter, our focus will remain on prosecutorial ethics as moral and legal obligations.

18.2.2. Justice and Fair Trials

The normative foundations of prosecutorial ethics consist of two main concepts: a prosecutor's general duty to seek justice,[18] and the moral theories that inform the corresponding, specific ethical obligations of the pros-

[15] Richard Young and Andrew Sanders, "The Ethics of Prosecution Lawyers", in *Legal Ethics*, 2004, vol. 7, no. 2, pp. 190–209.

[16] David Luban, *Legal Ethics and Human Dignity*, Cambridge University Press, New York, 2007, p. 20.

[17] This of course applies more to the criminal justice process in the legal tradition of the common law than to a civil-law criminal process, cf. Alexander Heinze, *International Criminal Procedure and Disclosure*, Duncker & Humblot, Berlin, 2014, pp. 107 ff.

[18] See Fred C. Zacharias, "Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?", in *Vanderbilt Law Review*, 1991, vol. 44, no. 1, pp. 45 ff.

ecutor. In both adversarial and inquisitorial systems of law,[19] regardless of other specific duties, the prosecutor is expected to seek justice.[20] While the particular features of what constitutes justice vary between, and sometimes within, criminal legal systems, we adopt the view that it is always tied to the concept of fairness.[21]

There are three main types of fairness that we will consider in this chapter: substantive, procedural, and distributive. First, substantive fairness involves the protection of substantive rights, such as the right to bodily autonomy, liberty from confinement, or a trial that does not result in a mistaken conviction.[22] A trial that results in an absurd outcome or one that is intuitively immoral or arbitrary would be considered substantively un-

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19 About the meaning of terms 'inquisitorial' and 'adversarial' in more detail, see Heinze, 2014, pp. 117 ff., see *supra* note 17; Kai Ambos and Alexander Heinze, "Abbreviated Procedures in Comparative Criminal Procedure: A Structural Approach with a View to International Criminal Procedure", in Morten Bergsmo (ed.), *Abbreviated Criminal Procedures for Core International Crimes*, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. 27, 28 ff. (http://www.toaep.org/ps-pdf/9-bergsmo).

20 Shawn Marie Boyne, *The German Prosecution Service*, Springer, Berlin, Heidelberg, 2014, p. 5 ("[P]rosecutors possess an ethical obligation to pursue justice"). The fact that the search for truth in inquisitorial systems is a constitutive feature (Heinze, 2014, p. 107, see *supra* note 17) does not render justice as an ethical obligation of the prosecutor less relevant. In inquisitorial systems too, truth is a means to the end of justice, as Karl Peters famously pointed out in his seminal work about the German criminal process (Karl Peters, *Strafprozeß*, C.F. Müller, Heidelberg, 1985, p. 82 ("Das Strafverfahren kann das Ziel der Gerechtigkeit nur erreichen, wenn es die Wahrheit findet")). In the same vein, see Theodore L. Kubicek, *Adversarial Justice: America's Court System on Trial*, Algora, New York, 2006, p. 37 with further references. See also Barton L. Ingraham, *The Structure of Criminal Procedure*, Greenwood Press, New York, 1987, p. 13.

21 See, for example, ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 37 (http://www.legal-tools.org/doc/1505f7/): "Where fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped". See also Catherine S. Namakula, "The Human Rights Mandate of a Prosecutor of an International Criminal Trial", in *International Criminal Law Review*, 2017, vol. 17, no. 5, pp. 935, 936.

22 See, for example, Larry Alexander, "Are Procedural Rights Derivative Substantive Rights?", in *Law and Philosophy*, 1998, vol. 17, no. 1, p. 19.

fair.[23] Second, procedural fairness can be assessed on the basis of a system's rules.[24] Rights that are guaranteed by procedures "allow for a system of law to emerge out of a set of substantive rules and […] minimize arbitrariness".[25] If the same established rules and procedures are applied to all defendants and (potential) suspects without bias, then a system could be said to be procedurally fair, regardless of outcomes. Third, distributive fairness in a criminal justice system involves who is actually tried for crimes, out of the group of all those who could possibly be tried before the court system.[26] We might think that a criminal justice system is fair with respect to distribution if it is willing and able to try all parties who deserve to be tried. It seems that we should care at least somewhat about all three types of fairness, yet sometimes they will be at odds with one another. We return to our concerns with justice and fairness later in the chapter, when we consider the system of international criminal law and its particular aims. But for now, we will use a broad concept of fairness as the main goal of a criminal prosecutor.

18.2.3. Normative Foundations for Specific Prosecutorial Duties

The prosecutor's specific obligations for guaranteeing fair trials can be thought of in terms of deontological norms and consequentialist norms.[27]

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[23] Larry May, "Habeas Corpus and the Normative Jurisprudence of International Law", in *Leiden Journal of International Law*, 2010, vol. 23, no. 2, pp. 297-299; Lon L. Fuller, *The Morality of Law (Revised Edition)*, Yale University Press, New Haven (CT), 1969, pp. 152 ff.

[24] See, for example, *ibid.*; Yvonne McDermott, *Fairness in International Trials*, Oxford University Press, New York, 2016, pp. 22 ff. Lon Fuller and others argue that procedural fairness contains substantive requirements as well, but for the moment we will consider each type of fairness in isolation. See Fuller, 1969, *supra* note 23.

[25] Larry May, *Global Justice and Due Process*, Cambridge University Press, Cambridge, 2011, p. 52.

[26] Frédéric Mégret, "The Anxieties of International Criminal Justice", in *Leiden Journal of International Law*, 2016, vol. 29, no. 1, p. 211.

[27] Some have argued that virtue theory can and should inform prosecutorial ethics. See, for example, R. Michael Cassidy, "Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to Seek Justice", in *Notre Dame Law Review*, 2006, vol. 82, no. 2, p. 635. We would argue that virtue ethics and its focus on the *character* of a prosecutor, rather than her decisions, does not provide clear deontic verdicts for how to act. We also assume that the duty to act with integrity is incumbent upon all participants in a criminal justice system. Therefore, we will only consider the tension between consequentialist and deontological norms here.

Consequentialism "takes the good to be primary and identifies right action as action that promotes value".[28] Right actions are determined solely by the outcomes they produce, so with respect to consequentialist norms, they evaluate end-states independent of the path by which the end-states were achieved. For purposes of this chapter, we will adopt a broad version of consequentialism, a theory which holds that the right action is the action that maximizes the good. The promotion of 'the good', however, requires a conception of what is good and therefore worthy of promotion. In a criminal trial, we would probably conceive of goodness in terms of the substantive results of the trial. We might think a criminal trial was 'good', or fair, if the person who committed a crime is correctly convicted through the criminal trial process. So a prosecutor who attempts to reach the correct substantive outcome in every case, and considers this to be the standard of what constitutes a fair trial, adopts a purely consequentialist view of her ethical obligations.

Deontology, conversely, "takes right action to be the primary evaluative notion; it recognizes various actions as obligatory, prohibited, or permitted on the basis of their intrinsic natures and independently of the value they produce".[29] Unlike consequentialism, a deontological ethical theory may permit, and even require, that agents sometimes not maximize the good.[30] Rather, deontological constraints identify what actions are impermissible because they violate duties, in the form of prohibitions on what we may do, specifically prohibiting harming people in various ways.[31] For instance, Kant argues that one should: "[a]ct so that you use humanity, as much in your own person as in the person of every other, always at the same time as end and never merely as means".[32] We may incur particular responsibilities due to special relationships, which may require us to take actions that do not maximize the good.[33] Beyond the

[28] David O. Brink, "Some Forms and Limits of Consequentialism", in David Copp (ed.), *The Oxford Handbook of Ethical Theory*, Oxford University Press, New York, 2006, p. 381.

[29] *Ibid*.

[30] David McNaughton and Piers Rawling, "Deontology", in David Copp (ed.), *The Oxford Handbook of Ethical Theory*, Oxford University Press, New York, 2006, p. 424.

[31] *Ibid*., p. 425.

[32] Immanuel Kant, Allen W. Wood (ed., trans.), *Groundwork for the Metaphysics of Morals*, Yale University Press, New Haven (CT), 2002, G4:429.

[33] *Ibid*., G4:425.

actions that are specifically required by duty, deontology allows for freedom of choice in our actions.[34] For a strict deontologist, there is no general duty to 'do good' beyond the duties we have to abide by the constraints and duties of special relationships. A moderate deontologist, on the other hand, will be willing to forgo some duties, in service of good outcomes, when abiding by strict deontology will result in a disastrous outcome. In a criminal trial, deontological constraints on a prosecutor will align more with considerations of procedural fairness. A prosecutor who is focused on deontological norms will be concerned with the way choices are made, defendants' rights are respected, and trials are conducted, independent of the end-states the trials produce.

Deontological constraints are well suited to play the primary role in shaping prosecutorial ethics and promoting fair trials. Allison M. Danner has argued that prosecutorial decisions will be both actually legitimate and perceived as such if they are taken in a principled, reasoned, and impartial manner.[35] As we shall see, the OTP has adopted this approach in several policy papers. The duty to treat every individual as an end in herself and thus apply the same rules without bias or concern about outcomes lends itself to ensuring procedural fairness. The prosecutor is constrained by "rules which apply in an all-or-nothing, categorical manner without reference to the particular context or consequences of the prohibited or required behaviour".[36] The impartiality demanded by deontological constraints applies "separately to every relation between persons", which means that no one's rights may be violated, even if the violation could be "offset by benefits that arise elsewhere" in the justice system.[37] Deontological considerations support the view that: "as the prosecutor has abided by a number of sign posts, and even if the results may, with the benefit of hindsight, look less than ideal, then s/he is effectively considered to have acted ethically".[38] These signposts can be part of the criminal procedure

[34] *Ibid.*, G4:426.

[35] Allison M. Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", in *American Journal of International Law*, 2003, vol. 97, no. 3, pp. 536–37.

[36] Nicolson, 2005, p. 606, see *supra* note 14.

[37] Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age*, Princeton University Press, New York, 2010, p. 7.

[38] Frédéric Mégret, "International Prosecutors: Accountability and Ethics", in *Leuven Centre for Global Governance Studies*, Working Paper No. 18, 2008, p. 8.

of the justice system, but they can also involve internal constraints on prosecutors, such as formal or informal policies, strategies, standards, or regulations.[39] Deontological constraints can also support certain substantive rights, such as *habeas corpus*. We see these deontological constraints as crucial to the foundations of prosecutorial ethics and procedural fairness. While strict deontological lines cannot always be drawn, we agree that the rights of individual defendants should not be violated in service of achieving a particular outcome.

On the other hand, concerns about the substantive outcomes of criminal trials, the overall performance or record of a prosecutor, or the social and political impacts of criminal trials will likely involve more consequentialist considerations.[40] A prosecutor with an impeccable record of respect for defendants' rights, faced with the prospect of removal due to her failure to convict several of these defendants, must consider whether she should treat a few defendants as means to her end of staying employed. Another prosecutor, tasked with determining which members of a large criminal enterprise should be indicted and which should receive plea deals, will certainly take the results of his decisions into account – and will likely be unable to achieve a 'distributively' fair result.

Here we can see the tension between deontological and consequentialist considerations, as well as the varying types of justice, as it will not always be possible for a prosecutor to abide by strict deontological duties while also striving to convict every defendant who is guilty. Consequentialist considerations will be inappropriate at many points in a criminal trial, because they will constitute an impermissible failure of procedural fairness. A prosecutor who has been prevented by the applicable criminal procedure from presenting the most compelling evidence at a murder trial cannot go on to bribe a judge to rule in her favour, even if the murder conviction would serve an important social purpose in consoling the murder victim's family. We maintain that consequentialist considerations should be impermissible during a criminal trial phase when they are incompatible with deontological constraints.

Yet in most criminal justice systems, including the ICC, there are specific sites of prosecutorial discretion, and some of these are appropri-

39 *Ibid.*, p. 7.

40 *Ibid.*, p. 8.

ate sites for the influence of consequentialist ethical considerations. In an ideal system of criminal justice, each suspect is subject to a fourth kind of justice – retributive justice – in line with the wrongfulness of the respective conduct and the ensuing blame (*culpa*) to be accorded to her. Yet the uniform delivery of this classical, retributive justice is not possible in any criminal justice system. There are simply too many individuals who could be investigated and tried for prosecutors to take on every single situation or case. In practically all domestic criminal justice systems, justice is distributed selectively according to certain, often policy-based, criteria.[41] As we will see in the next section, this is also the case at the ICC.

Prosecutorial discretion may be appropriate in other parts of a trial as well. In the sentencing phase, for instance, it may be appropriate to consider a defendant's particular circumstances before determining the best method and duration of punishment. This offers an opportunity for the prosecutor to respond to concerns about general deterrence, as well as deterring the specific individual, and it can also allow for a prosecutor to mitigate or intensify the political impact of the criminal conviction within the community.

We argue, however, that the most appropriate site for an expanded use of consequentialist considerations is prior to the trial. A prosecutor's office might have a deontological aim of prosecuting all crimes that are of the same gravity, and attempt to seek distributive justice. Yet resources are always limited, in terms of time, money, personnel, and access to evidence. It is impossible for a prosecutor to treat every *potential* defendant equally, even if it is possible to treat every *actual* defendant equally.[42] While a prosecutor's conduct should always be limited by deontological constraints prohibiting bias and the use of individuals as means rather

[41] See Jörg-Martin Jehle and Marianne Wade, *Coping with Overloaded Criminal Justice Systems: the Rise of Prosecutorial Power across Europe*, Springer, Berlin, 2006, pp. 24, 60–61; see also Mirjan R. Damaška, "What is the Point of International Criminal Law?", in *Chicago Kent Law Review*, 2008, vol. 83, no. 1, pp. 362–63, referring to the discrimination from a historical perspective; from a comparative perspective, with a view to mandatory prosecution or prosecutorial discretion (principle of opportunity), see Hanna Kuczyńska, The *Accusation Model before the International Criminal Court*, Springer, Cham, 2015, pp. 94–106.

[42] See, in a similar vein, Andre Vartan Armenian, "Selectivity in International Criminal Law: An Assessment of the 'Progress Narrative'", in *International Criminal Law Review*, 2016, vol. 16, no. 4, p. 646.

than respecting them as ends, it is appropriate, and perhaps even obligatory in some instances, for a prosecutor to consider the potential consequences of the decisions she makes regarding which situations to investigate and which individuals to prosecute. In Sections 18.3. and 18.4., we expand this argument and apply it to the preliminary examination phase at the ICC.

18.3. Prosecutorial Ethics in International Criminal Law

In the previous section, we explored prosecutorial ethics generally, as it might play out for domestic prosecutors in a well-established criminal justice system. There are, however, at least two reasons why we might have more to consider when we turn to the specific ethical issues facing international prosecutors.

First, the institutions that purport to carry out international criminal law remain in their early stages. There are still concerns about both internal and external acceptance of the institutions, and so prosecutors will sometimes need to take into account how their decisions will influence the system of international criminal justice as a whole. This is also a concern for prosecutors in States with fledgling domestic criminal legal systems, in that the system must be seen as legitimate by a State's people for it to function effectively.[43]

Second, international criminal law exists as a complement to domestic criminal law, and therefore it cannot simply claim jurisdiction over any situation or case without considering the interests and positions of sovereign States. Domestic criminal law is often tiered as well, in States containing both federal and local laws and systems of accountability. Yet in most States, the federal jurisdiction takes priority over any local or regional jurisdictional claims. This is not necessarily so in the relationship between domestic and international criminal law, and thus international prosecutors have additional ethical factors to consider when exercising discretion.

Additionally, there are a variety of domestic criminal laws and principles that underlie international criminal law, so it is not always easy to identify what principles should prevail when international criminal prosecutors are asked to balance competing values or interests. In this section,

[43] *Ibid*., pp. 644–45.

we will explore the particular features of ethics in international criminal law. We begin by exploring the system of international criminal law generally, in terms of the purpose of and power to punish. We then turn to foundational moral and political questions of international criminal law, namely how we should conceive of the shared jurisdiction between domestic and international criminal legal systems. Finally, we turn to the OTP at the ICC and analyse the specific ethical rules that govern this particular body's functioning.

18.3.1. *Ius Puniendi* and Purpose of Punishment in International Criminal Law

As we have seen, the prosecutor's work necessarily interferes with the rights of suspects and accused persons. The power of the prosecutor as a State agent/organ can only be justified by the State's power to punish (*ius puniendi*) and eventually by certain purposes of punishment. We lean towards translating *ius puniendi* as 'power' and not 'right' to punish, to avoid confusion with *ius poenale*. Reinhard Maurach and Heinz Zipf distinguish *ius poenale* and *ius puniendi* as the objective and subjective right to punish, respectively.[44] *Ius poenale* describes the sum of rules about offences, sentences and other forms of punishment; *ius puniendi* is the State power to punish, that is, the State's capacity – resulting from its sovereignty – to declare certain conduct as punishable and to determine a sentence.[45] Thus, *ius poenale* is the result of *ius puniendi*.[46]

Others also distinguish between the subjective and objective right to punish, but for them, the subjective right to punish is more of a right and less of an inherent power.[47] Their premise is different from ours: while we believe that *ius poenale* presupposes *ius puniendi*, for Franz von Holtzen-

[44] See Reinhard Maurach and Heinz Zipf, *Strafrecht – Allgemeiner Teil, Vol. 1: Grundlehren des Strafrechts und Aufbau der Straftat*, 8th edition, C.F. Müller, Heidelberg, 1992, p. 3.

[45] *Ibid*.

[46] See, in a similar vein, Hans-Heinrich Jescheck, *Lehrbuch des Strafrechts*, 3rd edition, Duncker & Humblot, Berlin, 1978, p. 8: "Das Strafrecht beruht auf der **Strafgewalt** ('ius puniendi') des Staates, und diese ist wiederum Teil der Staatsgewalt" (emphasis in the original, footnote omitted).

[47] See Hilde Kaufmann, *Strafanspruch und Strafklagerecht*, Otto Schwartz & Co, Göttingen, 1969, pp. 71–72 with further references.

dorff, for example, it is the other way around.[48] In other words, only when there exists a body of rules about offences, sentences, and other forms of punishment, does the State have the *right* to punish. This goes to Wesley Hohfeld's classical analysis of 'right' that includes – among other things – a power. More concretely, that is to say that the right to punish comprises both the normative power and the State's permissibility to punish.[49] Especially a State's jurisdiction – and eventually universal jurisdiction, as we elaborate in more detail below – stems from a State's power to punish and only indirectly from a right.[50]

For three reasons, however, the emanation of a power to punish (*ius puniendi*) from a right to punish (*ius poenale*) is not convincing. First, the Hobbesian 'right' to punish should not be confused with a Hohfeldian 'right' to punish.[51] According to Hobbes, State punishment stems from the right to self-preservation.[52] Even though, strictly speaking, this right be-

48 Franz von Holtzendorff, "Einleitung in das Strafrecht", in Franz von Holtzendorff (ed.), *Handbuch des deutschen Strafrechts in Einzelbeiträgen: Vol. 1: Die geschichtlichen und philosophischen Grundlagen des Strafrechts*, Lüderitz'sche Verlagsbuchhandlung, Berlin, 1871, p. 3: "Jedes staatliche Recht auf Bestrafung (jus puniendi) ist an das Vorhandensein eines positiven Rechtssatzes (jus poenale) geknüpft, durch welchen eine Handlung als verbrecherisch erklärt und die darauf anzuwendende Strafe bestimmt wird"; Kaufmann, 1969, p. 72, see *supra* note 47.

49 Alejandro Chehtman, "Jurisdiction", in Markus D. Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal Law*, Oxford University Press, Oxford, 2014, p. 402.

50 Permanent Court of International Justice, *The Case of the S.S. "Lotus" (France v Turkey)*, Judgment, 7 September 1927, para. 45: "Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a *permissive rule* to the contrary – it may not exercise its *power* in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention". (emphasis added) (http://www.legal-tools.org/doc/a6fa72/). This was overlooked by Anthony R. Reeves, "Liability to International Prosecution: The Nature of Universal Jurisdiction", in *European Journal of International Law*, 2018, vol. 28, no. 4, pp. 1047–1067.

51 Alice Ristroph, "Respect and Resistance in Punishment Theory", in *California Law Review*, 2009, vol. 97, no. 2, p. 603, footnote 8.

52 Thomas Hobbes, *Leviathan*, Richard Tuck (ed.), Cambridge University Press, Cambridge, 2003, p. 214: "[E]very man had a right to every thing, and to do whatsoever be thought necessary to his own preservation; subduing, hurting, or killing any man in order thereunto. And this is the foundation of that right of Punishing, which is exercised in every Commonwealth. For the Subjects did not give the Soveraign that right; but onely in laying down theirs, strengthned him to use his own, as he should think fit, for the preservation of them all: so that it was not given, but left to him, and to him onely; and (excepting the limits set

longs to all natural, mortal humans, the sovereign possesses it through the State's existence in a specific state of nature *vis-à-vis* a natural person.[53] Second, especially at an extraterritorial and/or international level, beyond a right to punish, "we must also account for a specific body having the authority to exercise that right".[54] Third, should *ius puniendi* really presuppose *ius poenale*, the question of why a State has the right to punish is obsolete – a classical vicious cycle.[55]

Here, the development of the term '*ius puniendi*' deserves closer consideration. It originally only described the power to punish, also known as '*potestas criminalis*', and included the State's power to punish, resulting from superiority (*Selbstherrlichkeit*, *Imperium*), a superior right and duty to protect (*hoheitliches Schutzrecht mit Schutzpflicht*) or *ius eminens*, comparable with Hobbes' right to self-preservation.[56] The power to punish had a pre-positive origin[57] and became successively intertwined with the positive right to punish as result of the triumph of liberal criminal law,[58] constructing juridical relationships between the State as a (criminal law) legislator, and the State as possessing the right to punish.[59] This, however, ignores that *ius poenale* can hardly have the function of being both the criminal law (right), which is addressed to the citizens, and the basis of punishment (power), at the same time.

Nevertheless, both theoretical elements – *ius puniendi* and the purpose of punishment – are highly disputed on an international level. International criminal law lacks a consolidated punitive power in its own right, since it does not operate pursuant to a legislative body, but instead claims

him by naturall Law) as entire, as in the condition of meer Nature, and of warre of every one against this neighbour"; see also *ibid.*, pp. 613–14.

53 Ristroph, 2009, p. 615, see *supra* note 51.

54 Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment*, Oxford University Press, Oxford, 2010, p. 6.

55 In the same vein, see Peter Klose, "'Ius puniendi' und Grundgesetz", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 1974, vol. 86, p. 36.

56 *Ibid*.

57 Heinrich Luden, *Handbuch des teutschen gemeinen und particularen Strafrechts*, vol. 1, Friedrich Luden, Jena, 1847, p. 6.

58 Klose, 1974, pp. 39–41, see *supra* note 55.

59 Karl Binding, *Handbuch des Strafrechts*, Duncker & Humblot, Berlin, 1885, p. 191.

the ability to punish without the status of a sovereign nation.[60] This alone renders the OTP's broad discretionary power theoretically unfounded. In fact, what we have said earlier about the definition of law might well be used as arguments against prosecutorial discretion on an international level: (a) at the international level, a normative order is absent where norms are recognized by the society as a whole and determine social communication, which is required for the power to punish (Günther Jakobs);[61] (b) law cannot exist without the State (Thomas Hobbes);[62] and (c) law cannot exist without a public power to enforce it (Immanuel Kant) – for Kant, law implies the *Rechtsstaat* and "a republican form of governance",[63] which is not necessarily limited to the institutional form of a nation State but "allows for the creation, interpretation, and, where necessary, enforcement of law".[64]

However, a more fundamental question arises as to whether it makes sense at all to apply the theories of validity of norms, developed with classical sovereign nations in mind, to a supranational order that follows different rules of organization.[65] Here, the enforcement of fundamental human rights by international criminal law comes to the rescue of the international community's *ius puniendi*, eventually blurring the lines

60 Kai Ambos, "Punishment without a Sovereign? The Ius Puniendi Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law", in *Oxford Journal of Legal Studies*, 2013, vol. 33, no. 2, p. 298.

61 Günther Jakobs, "Untaten des Staates – Unrecht im Staat", in *Goltdammer's Archiv für Strafrecht*, 1994, pp. 13–14. Jakobs *expressis verbis* refers to the state's 'power' and not 'right' to punish, since a power to punish is a necessary requirement for the right to punish. In Jakobs' own words: "Ohne staatliche Gewalt gibt es kein staatliches Recht" (p. 13). See also Kenneth Anderson, "The ICC Would Increase Its Prevention Ability If the Prosecutor's Discretion Were More Visibly Limited", in Richard H. Steinberg (ed.), *Contemporary Issues Facing the International Criminal Court*, Brill Nijhoff, Leiden, Boston, 2016, p. 188 ("Since I do not regard what passes for the international community as constituting a social order – a society, in Weber's sense – it seems to me mere metaphor and analogy to consider that the ICC can play a role globally that criminal courts play domestically"). See generally Ambos, 2013, pp. 299–300, see *supra* note 60 with further references.

62 Thomas Hobbes, *Leviathan*, J.C.A. Gaskin (ed.), 1998 (1651) Oxford University Press, London, pp. 114 ff.

63 Immanuel Kant, Mary J. Gregor (trans.), *The Metaphysics of Morals*, Cambridge University Press, Cambridge, 1991, p. 124 [313].

64 Interpretation by Patrick Capps and Julian Rivers, "Kant's Concept of International Law", in *Legal Theory*, 2011, vol. 16, p. 229, 234.

65 Ambos, 2013, p. 303, see *supra* note 60.

between the community's obligation to protect human rights abuses and its power to punish.

As previously mentioned, it was Immanuel Kant who had the idea of human dignity as a source of fundamental human (civil) rights[66] that, ultimately, must be enforced by a supra- or transnational (criminal) law.[67] Kant's conception of human dignity is complemented by his view of 'perpetual peace'.[68] Klaus Günther follows from Kant's Third Definitive Article ("Cosmopolitan Right shall be limited to Conditions of Universal Hospitality (principle of cosmopolitan right)"), that the application of public human rights is a necessary precondition for a permanent peace.[69]

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66 Immanuel Kant, Mary J. Gregor (ed., trans.), *Groundwork of the Metaphysics of Morals*, Cambridge University Press, Cambridge, 1997, p. 15 [402]. See also Marie E. Newhouse, "Two Types of Legal Wrongdoing", in *Legal Theory*, 2017, vol. 22, pp. 59 ff.; Ulfried Neumann, "Das Rechtsprinzip der Menschenwürde als Schutz elementarer menschlicher Bedürfnisse. Versuch einer Eingrenzung", in *Archiv für Rechts- und Sozialphilosphie*, 2017, vol. 103, p. 293; Thomas Gutmann and Michael Quante, "Menschenwürde, Selbstbestimmung und Pluralismus: Zwischen sittlicher Vorgabe und deontologischer Konstruktion", in *Archiv für Rechts- und Sozialphilospie*, 2017, vol. 103, no. 3, pp. 322 ff.; Laura Valentini, "Dignity and Human Rights: A Reconceptualisation", in *Oxford Journal of Legal Studies*, vol. 37, no. 4, p. 867.

67 Ambos, 2013, p. 304, see *supra* note 60.

68 The structure of his work *Toward Perpetual Peace* is as follows: six "Preliminary Articles" ban treacherous dealings among States, including preparation for war (Immanuel Kant, "Perpetual Peace", in Hans Reiss (ed.), H.B. Nisbet (trans.), *Immanuel Kant, Political Writings*, Cambridge University Press, Cambridge, 1991, pp. 93 ff.). They describe steps that can be taken to 'wind down' a war and avoid armed conflict. Kant's preliminary articles basically "seek to ground the federation on measures of good faith, self-determination and non-interference" (interpretation by Garrett Wallace Brown, "Kantian Cosmopolitan Law and the Idea of a Cosmopolitan Constitution", in *History of Political Thought*, 2006, vol. 27, pp. 661, 678). Three "Definitive Articles" establish actions and institutions deemed necessary for a cosmopolitan system to sustain itself over time and end a war: 1. The Civil Constitution of Every State shall be Republican (principle of civil right); 2. The Right of Nations shall be based on a Federation of Free States (principle of international right); 3. Cosmopolitan Right shall be limited to Conditions of Universal Hospitality (principle of cosmopolitan right) (Kant, *ibid*., p. 98). Compared to the Preliminary Articles, the Definitive Articles present "stronger terms for membership [in the federation] and the normative conditions upon which the federation stands" (Brown, *ibid*., p. 681). For a both historical and conceptual account of Kant's understanding of war and peace see Philipp Gisbertz, "The Concepts of 'War' and 'Peace' in the Context of Transnational Terrorism", in *Archiv für Rechts- und Sozialphilosophie*, 2018, vol. 104, no. 1, pp. 3, 9.

69 Klaus Günther, "Falscher Friede durch repressives Völkerstrafrecht?", in Werner Beulke *et al*. (eds.), *Das Dilemma des rechtsstaatlichen Strafrechts*, Berliner Wissenschafts-Verlag, Berlin, 2009, p. 84.

Kant justifies this precondition through a two-step argument: First, "[The] universal law of Right [*Rechtsgesetz*], so act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law, *is indeed a law [Gesetz]*, which lays an obligation on me, but it does not at all expect, far less demand, that I myself should limit my freedom to those conditions just for the sake of this obligation; […]".[70] Second, "if (as must be the case in such a constitution) the agreement of the citizens is required to decide whether or not one ought to wage war, then *nothing is more natural* than that they would consider very carefully whether to enter into such a terrible game, since they would have to resolve to bring the hardships of war upon themselves […]".[71] In sum, with this conception, Kant laid the foundations for all current conceptions of human dignity and world peace, an "international rule of law".[72]

This not only gives the world community *ius puniendi* – it also affects the purposes of punishment and eventually the theoretical basis of the prosecutor's ethical obligations. The argument goes thus: prosecutorial ethics at the ICC are shaped by both the justification of the world community's *ius puniendi* and the mandate of the ICC, that is, its goals and purposes of punishment.[73] The justification of *ius puniendi* can have either a deontological (human dignity as a source of fundamental human (civil) rights) or consequentialist (confirmation and reinforcement of fundamental human rights norms) aspect. The same applies to the mandate of the ICC. While retribution as a purpose of punishment has a moral dimension, it is fair to say that most of the ICC's goals are consequentialist in nature.

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70 Immanuel Kant, Mary J. Gregor (trans.), *The Metaphysics of Morals*, Cambridge University Press, Cambridge, 1991, p. 56 [231], emphasis added.

71 Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, Yale University Press, London, 2006, [8:351], emphasis added.

72 Wade L. Huntley, "Kant's Third Image", in *International Studies Quarterly*, 1996, vol. 40, pp. 45, 49; Alec Stone Sweet, "A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe", in *Global Constitutionalism*, 2012, vol. 1, pp. 53, 58; Jorrik Fulda, "Eine legitime Globalverfassung? Die US-Hegemonie und die weltgesellschaftlich gerechte Vollendung des Kantischen Projektes", in *Archiv des Völkerrechts*, 2016, vol. 54, pp. 334, 345. About the role of human dignity in International Human Rights Law and International Criminal Law, see Stefanie Schmahl, "Human Dignity in International Human Rights, Humanitarian and International Criminal Law: A Comparative Approach", in Eric Hilgendorf and Mordechai Kremnitzer (eds.), *Human Dignity and Criminal Law*, Duncker & Humblot, Berlin, 2018, pp. 79 ff.

73 See, in a similar vein, Reeves, 2018, p. 1047, *supra* note 50.

This is especially true for the expressivist purpose of punishment.[74] Moreover, the mere existence and work of the Court help to promote human rights by: creating a historical record for past wrongs;[75] offering a forum for victims to voice their opinions and receive satisfaction and compensation for past violations;[76] creating judicial precedent; and deterring potential violators of the gravest crimes[77] while punishing past offenders.[78] Thus, human rights norms in the ICC Statute "provide a blueprint for the common good of a community".[79]

18.3.2. Ethics and International Criminal Law

18.3.2.1. Normative Moral Foundations for International Criminal Law

Hugo Grotius and other early natural law theorists drew a distinction between voluntary law (*ius dispositivum*) and obligatory law (*ius scrip-*

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74 See, for example, David Luban, "Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law", in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, p. 576; Diane Marie Amann, "Group Mentality, Expressivism, and Genocide", in *International Criminal Law Review*, 2002, vol. 2, no. 2, p. 117.

75 Statement of Judge Claude Jorda, U.N. SCOR, 55th session, 4161st meeting, UN Doc. S/PV.4161, 20 June, 2000, p. 3; Jens D. Ohlin, "A Meta-Theory of International Criminal Procedure, Vindicating the Rule of Law", in *UCLA Journal of International Law and Foreign Affairs*, 2009, vol. 14, no. 1, pp. 86 ff.; in more detail Heinze, 2014, pp. 218 ff., see *supra* note 17.

76 Bert Swart, "Damaska and the Faces of International Criminal Justice", in *Journal of International Criminal Justice*, 2008, vol. 6, no. 1, p. 100; Minna Schrag, "Lessons Learned from ICTY Experience", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 2, p. 428. For Ralph, this helps to constitute a world society, Jason Ralph, "International Society, the International Criminal Court and American Foreign Policy", in *Review of International Studies*, 2005, vol. 31, no. 1, pp. 28, 39.

77 Kai Ambos, *Treatise on International Criminal Law: vol. 1: Foundations and General Part*, Oxford University Press, Oxford, 2013, p. 71.

78 ICTR, *Prosecutor v. Omar Serushago*, Trial Chamber, Sentence, 5 February 1999, ICTR-98-39-S, para. 20 (http://www.legal-tools.org/doc/e2dddb/); ICTR, *Prosecutor v. Rutaganda*, Trial Chamber, Judgement, 6 December 1999, ICTR-96-3-T, para. 455 (http://www.legal-tools.org/doc/f0dbbb/); ICTR, *Prosecutor v. Ndindabahizi*, Trial Chamber, Judgement, 15 July 2004, ICTR-2001-71-I, para. 498 (http://www.legal-tools.org/doc/272b55/); ICTR, *Prosecutor v. Karera*, Trial Chamber, Judgement, 7 December 2007, ICTR-01-74-T, para. 571 (http://www.legal-tools.org/doc/7bc57f/).

79 John M. Czarnetzky and Ronald J. Rychlak, "An Empire of Law: Legalism and the International Criminal Court", in *Notre Dame Law Review*, 2003, vol. 79, no. 1, p. 110.

tum).[80] Hugo Grotius claimed that the necessary principles of natural law were "the dictate of right reason involving moral necessity, independent of any institution – human or divine".[81] As John Finnis notes, Grotius and his counterparts believed that a determination of right or wrong "depends on the nature of things (and what is *conveniens* to such nature), and not on a decree of God; but the normative or motivating significance of moral rightness and wrongness".[82] Grotius saw that there was an international community of sovereign States for whom these necessary principles were non-voluntary laws.[83] He and his contemporaries "laid down unreservedly that Natural Law is the code of states, and thus put in operation a process which has continued almost down to our own day, the process of engrafting on the international system rules which are supposed to have been evolved from the unassisted contemplation of the conception of Nature".[84] One particularly important aspect of this natural law doctrine was the idea that since men are, by nature, all equal, so too are the "independent communities, however different in size and power", that make up the international order.[85]

An additional concept is the creation of a *civitas maxima* – which Christian Wolff described as an organic whole uniting all nations on the basis of the universal natural law[86] – that lies within the so-called revolu-

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80 Evan J. Criddle and Evan Fox-Decent, "A Fiduciary Theory of Jus Cogens", in *Yale Journal of International Law*, 2009, vol. 34, no. 2, p. 334.

81 Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status*, Coronet Books Inc., Helsinki, 1988, p. 30.

82 John Finnis, *Natural Law and Natural Rights*, 2nd edition, Oxford University Press, Oxford, 2011, p. 44. Italics in original.

83 Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres*, 1625, 1, chap. 1, sect. X, para. 5; see also Rafael Nieto-Navia, "International Peremptory Norms (Jus Cogens) and International Humanitarian Law", in Lal Chand Vohrah *et al.* (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, International Humanitarian Law Series, Kluwer Law International, The Hague, 2003, pp. 595–640.

84 Henry Sumner Maine, *Ancient Law*, CreateSpace Independent Publishing Platform, Lexington, 2013, p. 30.

85 *Ibid.*

86 Christian L.B. Wolff, *Institutiones Juris Naturae et Gentium in Quibus ex Ipsa Hominis Natura Continuo Nexu Omnes Obligationes et Jura Omnia Deducuntur*, Apud F. ex N. Pezzana, Venetiis, 1769, part IV, cap. I, sect. 1090: "Quemadmodum vero lex naturae praestat consensum in civitatem maximam; ita eadam quoque eumdem supplet in condendis legibus". This rather rough translation was provided by Armin von Bogdandi

tionist tradition, for which Kant is identified as a forerunner,[87] although both concepts – Grotius' and Kant's – overlap in certain regards.[88] The revolutionist view of a "world society" is "identified by those rights claims of individuals and non-State groups that are asserted by 'a third image of international [or cosmopolitan] law' and enforced by global institutions when states are unwilling and unable to do so".[89] The different notions of the international community are mirrored in the ICC Statute.

For legal positivists, the existence of a legal system depends on the procedures and structures that created the legal system, not on the content of the laws. In the realm of international law, this means that law could only exist as part of a system with accepted procedures and structures. Alberico Gentili, one of the earliest scholars of international law, argued that international law was based on the consent of States and attempted to show that "the [codified] Roman law was valid in the extra-European domain and between sovereign polities and empires".[90] He claimed that "it was possible to apply rules taken from the Roman law of the *Institutes* and the *Digest* to the relations between different European polities and to some relations beyond Europe".[91] Jeremy Bentham talked of "international jurisprudence" in reference to "mutual transactions between sovereigns",[92] and other positivists who followed pointed to State recognition of customs and treaty obligations.

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and Sergio Dellavalle, "Universalism and Particularism", in Stefan Kadelbach *et al.* (eds.), *System, Order, and International Law*, Oxford University Press, Oxford, 2017, p. 489.

87 Ralph, 2005, p. 34, see *supra* note 76; Barry Buzan, "The English School: An Underexploited Resource in IR", in *Review of International Studies*, 2001, vol. 27, no. 3, p. 475.

88 Andrew Hurrell, "Kant and the Kantian Paradigm in International Relations", in *Review of International Studies*, 1999, vol. 16, no. 3, p. 200.

89 Ralph, 2005, p. 34, see *supra* note 76, citing Andrew Hurrell, "Conclusion International Law and the Changing Constitution of International Society", in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, Oxford University Press, Oxford, 2000, p. 337.

90 Benedict Kingsbury and Benjamin Straumann, "State of Nature Versus Commercial Sociability as the Basis of International Law: Reflections on the Roman Foundations and Current Interpretations of the International Political and Legal Thought of Grotius, Hobbes, and Pufendorf", in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, p. 38.

91 *Ibid*. Italics in the original.

92 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, Batoche Books, Kitchener, 1999, p. 236.

Although legal positivism has overshadowed natural law theory since the seventeenth and eighteenth centuries, it remains the case that we think, even without international positive law, that States cannot avoid certain obligations to the international community. Natural law theories remain the most straightforward way to justify an international legal system, especially one that has expanded to include claims of authority over a much wider range of issues, including criminal law and mass atrocity. The moral underpinnings of international criminal law reflect the continuing influence of natural law theory at least through the twentieth century. In the wake of World War II, as the international community sought to impose accountability for atrocities on individual actors, there was no positive international criminal law to assist with such an undertaking. Thus, one of the main justifications for the International Military Tribunal ('IMT') was a shared understanding within the international community that the atrocities of World War II were exceptionally serious. The individual trials were an expression of the universal moral judgment of the wrongness and seriousness of the crimes. While positive international criminal law has proliferated in the years since the IMT, the purported universal condemnation of genocide and crimes against humanity remains a source of respect for both the positive law and the norms against such crimes.

Moreover, contrary to the Nuremberg International Military Tribunal, the Tokyo International Military Tribunal for the Far East, and the Iraqi Special Tribunal (before it was turned into a national tribunal),[93] 'ordinary' international criminal tribunals[94] depend, as a general rule, on the co-operation of the relevant territorial State(s), with regard to both the investigation and prosecution of the crimes committed on the State territo-

[93] Annalisa Ciampi, "Other Forms of Cooperation", in Antonio Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 2, Oxford University Press, Oxford, 2002, pp. 1711–12.

[94] Generally on the ICC's approach to co-operation, see Rod Rastan, "The Responsibility to Enforce – Connecting Justice with Unity", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Nijhoff, Leiden, 2009, pp. 171 ff.; Karin N. Calvo-Goller, *La Procédure et la Jurisprudence de la Cour Pénale Internationale*, Gazette du Palais, Paris, 2012, p. 133.

ry, and the enforcement of the respective sentences.[95] States are and remain the key actors in co-operation with respect to criminal matters.[96] In this regard, the ICC Statute promotes the Grotian solidary international society.[97]

Some claim that legal positivist theories are unable to pass moral judgment on 'bad' State or individual actors, and that we should instead rely on these natural law theories. But as international criminal law has grown over the last half century, positive law theorists have gained force in passing legal judgments on such 'bad' actors. Many of the documents creating international criminal law are filled with moral language, reflecting expressions of the global community as to the wrongness of certain types of heinous crimes. This influence on the positive law seems to deny that positive law has to be free of moral judgment, but even if the moral language in the documents is ignored, States remain in a position to pass moral judgment as individual States while working within the international criminal justice systems to pass legal judgment.

18.3.2.2. Universal Jurisdiction

From the time of the IMT, holding individuals accountable under international criminal law has been related to the idea that those who commit international crimes do so not just against individuals, or ethnic groups, or States, but against humanity (the political community/global public) as a whole.[98] The concept of universal jurisdiction is premised on the moral argument that some crimes are "so calculated, so malignant, and so devastating, and civilization cannot tolerate their being ignored, because it can-

[95] See, generally, Claus Kreß and Kimberly Prost, "Part 9 – Preliminary Remarks", in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd edition, C.H. Beck, Munich, 2016, marginal no. 1.

[96] Darryl Robinson, "Inescapable Dyads: Why the International Criminal Court Cannot Win", in *Leiden Journal of International Law*, 2015, vol. 28, no. 2, p. 339.

[97] Ralph, 2005, p. 37, see *supra* note 76.

[98] See Luigi D.A. Corrias and Geoffrey M. Gordon, "Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public", in *Journal of International Criminal Justice*, 2015, vol. 13, no.1, pp. 98 ff.; Anthony Duff, "Authority and Responsibility in International Criminal Law", in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, 2010, pp. 595 ff.; see also Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin Books, New York, 2006, p. 251.

not survive their being repeated".[99] When the whole of civilization or humanity is identified as the relevant entity who has been harmed by a crime, some argue that this should correspond with universal jurisdiction, which allows any State to prosecute individuals, no matter where the crime was committed.[100] Grotius, for instance, argued that every State should have jurisdiction over "gross violations of the law of nature and of nations, done to other States and subjects".[101] The concept of universal jurisdiction has foundations in natural law, but with the proliferation of positive international criminal law, it can be defended (and challenged) by theorists in both camps.[102]

18.3.2.3. Normative Moral Foundations for the ICC

The ICC was established with the concepts of universal jurisdiction in mind, although some of the parties who worked on the ICC Statute rejected the idea.[103] The Preamble of the Statute notes that the purpose of the ICC was to have jurisdiction over "the most serious crimes of concern to the international community as a whole", and that the aim of the ICC is to "guarantee lasting respect for and the enforcement of international jus-

99 As noted in Justice Robert Jackson's opening statement before the Nuremberg Tribunal, speaking on behalf of the prosecution team. Justice Jackson's opening statement is published in *Trial of the Major War Criminals before the International Military Tribunal*, vol. 2, International Military Tribunal, Nuremberg, 1947, pp. 98–155. About the moral basis of universal jurisdiction in more detail, see Jochen Bung, "Naturrecht – Völkerrecht – Weltrecht: Der Code des Hugo Grotius", in *Archiv des Völkerrechts*, 2017, vol. 55, no. 2, pp. 126 ff.

100 See Hans-Peter Kaul and Claus Kreß, "Jurisdiction and Cooperation in the Statute of the International Criminal Court", in *Yearbook of International Humanitarian Law*, 1999, vol. 2, pp. 143–75; see also Claus Kreß, "Universal Jurisdiction over International Crimes and the *Institut De Droit International*", in *Journal of International Criminal Justice*, vol. 4, no. 3, 2006, pp. 561–85.

101 Hugo Grotius, Archibald C. Campbell (trans.), *The Rights of War and Peace, Including the Law of Nature and of Nations*, Elibron Classics reprint, M. Walter Dunne, Washington and London, 1901, book II, chap. XX, para. XL, p. 247.

102 This diversity of the concept is overlooked by Reeves, 2018, pp. 1047-1067, see *supra* note 50, whose attempt to combine the *ius puniendi* question with the justification for universal jurisdiction is laudable but both lacks an examination of the literature on the *ius puniendi* of the international community (Reeves uses the rather anodyne term of "prerogative" [to prosecute] and superelevates it metaphysically) and demonstrates a rather selective analysis of the existing views on universal jurisdiction.

103 See Kaul and Kreß, 1999, *supra* note 100.

tice".[104] The ICC Statute is not only the "culmination of international law-making".[105] Rather, it codifies the customary international humanitarian laws,[106] and the jurisprudence of previously established international or internationalised tribunals such as the ICTY and the ICTR.[107] Thus, the law with regard to grave international crimes, customary and treaty-based international law, the applicable general principles of law and internationally recognised human rights, "consolidated over a century's worth of jurisprudence and customary law", have been 'constitutionalized' by the ICC Statute.[108]

These declarations are significant, but they are vague in terms of how they should inform the specific ethical commitments of institutions like the ICC. If seeking justice is the aim of all adversarial, inquisitorial, and international criminal justice systems, then we need to know more about what the ICC is seeking when it seeks justice. We return to this question when we explore the parameters of the prosecutor's discretionary powers during the preliminary examination phase in Section 18.4. The most important thing to identify at this point is that it is necessary for the OTP to exercise these discretionary powers within a system of prosecutorial ethical obligations.

18.3.3. Ethical Obligations for the OTP

The OTP at the ICC is governed by several different sets of ethical rules relating to professional conduct and ethics. We focus on the ICC Statute and the OTP Code of Conduct, the latter of which was adopted in 2013, but the OTP is also bound by the Rules of Procedure and Evidence, the Regulations of the Court, and the Prosecution Regulations.[109] While we

[104] Rome Statute of the International Criminal Court, adopted 17 July 1998, entry into force 1 July 2002, Preamble ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

[105] Marc Weller, "Undoing the Global Constitution: UN Security Council Action on the International Criminal Court", in *International Affairs*, 2002, vol. 78, no. 4, p. 693.

[106] Errol P. Mendes, *Peace and Justice at the International Criminal Court*, Elgar, Cheltenham, 2010, p. 22.

[107] *Ibid*., p. 24.

[108] *Ibid*., pp. 15, 21–22.

[109] The applicable provisions in each of these documents were identified by the Trial Chamber V(B) in ICC, Situation in the Republic of Kenya, *Prosecutor v. Uhuru Muigai Kenyatta*, Trial Chamber, Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, 31 May 2013, ICC-01/09-02/11-747, para. 10 (http://www.

briefly identify some of the corresponding external accountability mechanisms, such as disciplinary measures and judicial review, our focus is on specific obligations of the OTP. Therefore, the only accountability mechanisms that we discuss in any detail are those that create new obligations on the part of the OTP.

18.3.3.1. General Ethical Rules

18.3.3.1.1. The ICC Statute

The ICC Statute contains specific ethical requirements[110] of the OTP in several sections of the Statute. Article 42(2) gives the Prosecutor "full authority over the management and administration of the Office, including the staff, facilities and other resources thereof",[111] while Article 42(3) notes that the "Prosecutor and the Deputy Prosecutors shall be persons of high moral character".[112] This kind of institutional independence of the OTP, supported by a strong administrative autonomy, is a novelty.[113] Its purpose is to prevent a factual dependency of the OTP on the Registry, which occurred in the early stages of the ICTR.[114]

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legal-tools.org/doc/d27ea0/). The case also referred to ICC Staff Rules and Regulations, which we have not considered here due to the high-level nature of the ethical obligations we are considering.

110 On the ethical obligations of all legal professionals in international criminal courts and tribunals, see Chandra Lekha Sriram, in Vesselin Popovski (ed.), *International Rule of Law and Professional Ethics*, Ashgate Publishing, 2014, pp. 171-188.

111 ICC Statute, Article 42(2), see *supra* note 104. See, in detail, Hector Olásolo, "Issues Regarding Article 42", in Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. 423 ff. (http://www.toaep.org/ps-pdf/24-bergsmo-rackwitz-song).

112 ICC Statute, Article 42(3), see *supra* note 104.

113 See also John R.W.D. Jones, "The Office of the Prosecutor", in Antonio Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1, Oxford University Press, Oxford, 2002, p. 273; Jan Wouters, Sten Verhoeven and Bruno Demeyere, "The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability", in *International Criminal Law Review*, 2008, vol. 8, no. 1, p. 277; William A. Schabas, *An Introduction to the International Criminal Court*, 5th edition, Cambridge University Press, Cambridge, 2017, p. 372; Namakula, 2017, pp. 937-938, see *supra* note 21.

114 See Report of the Secretary-General on the Activities of the Office of Internal Oversight Services (Annex), UN Doc. A/51/789, 6 February 1997, para. 8 ("The Registrar has declined to meet administrative requests from the judges or the Office of the Prosecutor

The Court's internal dimension of independence is complemented by the rule according to which no OTP member[115] shall "seek or act on instructions from any *external* source".[116] Similar provisions can be found in the law of the *ad hoc* and mixed international criminal tribunals.[117] They reaffirm that the OTP shall exercise its authority on its own behalf and without external influence or pressure from governments, international organizations, NGOs or individuals.[118]

where in his judgement they were insufficiently justified. […] Because of this perception, almost no decision can be taken by the other organs of the Tribunal that does not receive his review and agreement or rejection."); in more detail Luc Côté, "Independence and Impartiality", in Luc Reydams, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford, 2012, pp. 335–36, see also Jones, 2002, p. 273, see *supra* note 113; Héctor Olásolo *et al.*, *Assessing the Role of the Independent Oversight Mechanism in Enhancing the Efficiency and Economy of the ICC*, Universiteit Utrecht, Utrecht, 2011, p. 54; Philipp Ambach and Klaus Rackwitz, "A Model Of International Judicial Administration? The Evolution of Managerial Practices at the International Criminal Court", in *Law and Contemporary Problems*, 2013, vol. 76, no. 3 and 4, p. 142.

115 This provision applies to the Prosecutor, the Deputy Prosecutors, staff and gratis personal; see William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd edition, Oxford University Press, Oxford, 2016, p. 740.

116 ICC Statute, Article 42(1) clause 3, see *supra* note 104 (emphasis added). cf. also Yvonne McDermott, "Article 42", in Mark Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2017, para. 1 (https://www.legal-tools.org/doc/aa0e2b/).

117 Statute of the International Tribunal for the former Yugoslavia, adopted 25 May 1993 by Security Council resolution 827, Article 16(2) ('ICTY Statute') (https://www.legal-tools.org/doc/b4f63b/); Statute of the International Tribunal for Rwanda, adopted 8 November 1994 by Security Council resolution 955, Article 15(2) ('ICTR Statute') (http://www.legal-tools.org/doc/8732d6/); Statute of the United Nations Mechanism for International Criminal Tribunals, adopted 22 September 2010 by Security Council resolution 1966, Article 14(2) ('UNMICT Statute') (http://www.legal-tools.org/doc/30782d/); Statute of the Special Court for Sierra Leone, enacted 16 January 2002, in force 1 July 2002, Article 15(1) ('SCSL Statute') (http://www.legal-tools.org/doc/aa0e20/); Statute of the Residual Special Court for Sierra Leone, in force 12 August 2012, Article 14(2) ('RSCSL Statute'); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia, 27 October 2004, Article 19 ('ECCC Law') (http://www.legal-tools.org/doc/9b12f0/); Statute of the Special Tribunal for Lebanon, adopted 30 May 2007 by Security Council resolution 1757, Article 11(2) ('STL Statute') (http://www.legal-tools.org/doc/da0bbb/).

118 ICC, Situation in the Democratic Republic of the Congo, Pre-Trial Chamber, Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp, 15 August 2005, ICC-01/04-84, para. 32 (http://www.legal-tools.org/doc/4aa811/); in a similar vein Fabricio Guariglia, "The Selection of Cases by the Office of the Prosecutor of the International Criminal Court", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Nijhoff, Leiden, 2009, p. 212; Côté, 2012, p. 337, see *supra*

As to the OTP's external independence, the Prosecutor and the Deputy Prosecutors must refrain from engaging in any activity that is likely to interfere with their prosecutorial functions or to affect confidence in their independence.[119] Moreover, they must not engage "in any other occupation of a professional nature".[120] These requirements are deontological, in that they require that the OTP hold itself to a high standard of self-respect and refuse to permit others to bias their decisions. Yet they also reflect a consequentialist concern about the likely result, unfairness, of permitting such biases to influence the OTP.

Article 44 provides for the appointment of staff, including the requirement that the OTP "shall ensure the highest standards of efficiency, competency and integrity" in its employment of staff.[121]

Article 54(1) relates to the investigations phase and requires that the Prosecutor "investigate incriminating and exonerating circumstances equally",[122] take measures to "respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in Article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children" in the investigations,[123] and "[f]ully respect the

note 114. See also ICC, Staff rules of the International Criminal Court, adopted 21 April 2005, entry into force 3 December 2005, Rule 101.3(a) ("Staff members shall ensure their independence from any person, entity or authority outside the Court.") ('ICC Staff Rules') (http://www.legal-tools.org/doc/10f5c7/); Wu Wei, *Rolle des Anklägers eines internationalen Strafgerichtshofs*, Lang, Frankfurt am Main, 2007, p. 13; Hilde Farthofer, "The Prosecutor", in Christoph Safferling (ed.), *International Criminal Procedure*, Oxford University Press, Oxford, 2012, p. 151; Margaret M. deGuzman and William A. Schabas, "Initiation of Investigations and Selection of Cases", in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, Oxford, 2013, p. 167. Article 42(1)(3) of the ICC Statute does not, of course, forbid the Prosecution to seek assistance from external sources, in particular from member states, see SCSL, *Prosecutor v. Sesay et al.*, Trial Chamber, Judgment, 2 March 2009, SCSL-04-15-T, para. 44 (http://www.legal-tools.org/doc/7f05b7/).

119 ICC Statute, Article 42(5), see *supra* note 104.

120 See also Stefanie Bock, *Das Opfer vor dem Internationalen Strafgerichtshof*, Duncker & Humblot, Berlin, 2010, p. 215; Schabas, 2016, p. 741, see *supra* note 115; Isabelle Moulier, "Article 42", in Julian Fernandez and Xavier Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale*, vol. 1, Editions A. Pedone, Paris, 2012, p. 1024.

121 ICC Statute, Article 44(2), see *supra* note 104.

122 *Ibid.*, Article 54(1)(a).

123 *Ibid.*, Article 54(1)(b).

rights of persons arising under this Statute".[124] Article 54(1)(a) draws on the jurisprudence of the *ad hoc* Tribunals in making impartiality and objectivity statutory obligations.[125] In particular, the Prosecutor's duty to search actively for exonerating information may be regarded as a measure to achieve factual equality of arms between the prosecution and defence, since the latter may lack the necessary resources and powers to conduct extensive investigations on its own.[126] The obligations under Article 54(1) are deontological, where they correspond to specific procedural requirements or the rights of individuals. Yet they also involve some amount of discretion, which means that the OTP should consider the results of their decisions when balancing deontological obligations to defendants with deontological obligations to victims and witnesses.

[124] *Ibid.*, Article 54(1)(c).

[125] See, in more detail, Fabricio Guariglia, "Policy and Organisational Questions", in Bergsmo, Rackwitz and SONG (eds.), 2017, pp. 286 ff., *supra* note 111. See also Bock, 2010, p. 216, see *supra* note 120; Côté, 2012, pp. 359–60, see *supra* note 114; Heinze, 2014, pp. 257–58, see *supra* note 17.

[126] See also Caroline Buisman, "The Prosecutor's Obligation to Investigate Incriminating and Exonerating Circumstances Equally – Illusion or Reality?", in *Leiden Journal of International Law*, 2014, vol. 27, no. 1, p. 206; Vanessa Thalmann, "The Role of the Judge and the Parties in Proceedings", in Robert Kolb and Damien Scalia (eds.), *Droit International Pénal*, 2nd edition, Helbing Lichtenhahn, Bâle, 2012, p. 467; Hanna Kuczyńska, 2015, p. 52, see *supra* note 41. This appears to resemble more a civil law ('inquisitorial') than a common law ('adversarial') type of prosecutor. For, although the prosecution in the adversarial system is also obliged to follow the principles of truth and objectivity, the adversarial two-case approach entails that the submission of evidence by the prosecution is separated from the one by the defence, thereby forcing the prosecutor more in a partisan party position; cf. Mirjan R. Damaška, "Problematic Features of International Criminal Procedure", in Antonio Cassese (ed.), *The Oxford Companion of International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 176, arguing that "it becomes difficult" for the Prosecutor "to refrain from using […] evidence selectively, focusing only on information favourable to their allegations"; see also Håkan Friman, "Investigation and Prosecution", in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley (NY), 2001, p. 537; Vladimir Tochilovsky, "Legal Systems and Cultures in the ICC", in Horst Fischer *et al.* (eds.), *International and National Prosecution of Crimes under International Law: Current Developments*, Berlin-Verlag Spitz, Berlin, 2001, p. 637; Christoph Safferling, *Towards an International Criminal Procedure*, Oxford University Press, Oxford, 2003, pp. 79, 86; Kai Ambos and Stefanie Bock, "Procedural Regimes", in Luc Reydams, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford, 2012, p. 489; Heinze, 2014, pp. 250, 253, see *supra* note 17.

Some critics argue that the Prosecution has so far "largely ignored its obligation under Article 54(1)(a)", "failed to investigate any of its cases with the thoroughness expected from a diligent prosecutor", and failed to acknowledge the weaknesses of certain cases.[127] In *Gbagbo*, the PTC, quite straightforwardly, expressed doubts whether the Prosecutor really had followed "all relevant incriminating and exonerating lines of investigation in order to establish the truth".[128] The *Mbarushimana* PTC characterised the OTP's interrogation technique, which involved manipulative feedback on witness testimony with frequent leading questions, as "utterly inappropriate when viewed in light of the objective, set out in Article 54(1)(a) of the Statute, to establish the truth by 'investigating incriminating and exonerating circumstances equally'".[129] Seeking the truth is a strict deontological obligation on the part of the OTP, and these cases demonstrate ethical failures on the part of the OTP.[130] Kant demanded that respect for the dignity of oneself and the dignity of others could never

[127] Buisman, 2014, pp. 223, 226, see *supra* note 126. See also ICC, Situation in the Democratic Republic of Congo, *Prosecutor v. Lubanga*, Trial Chamber, Closing Submission of the Defence, 15 July 2011, ICC-01/04-01/06-2773, para. 13 (http://www.legal-tools.org/doc/ca1fcd/), arguing that the OTP has seriously failed to fulfil its obligation to investigate exculpatory circumstances. Similar complaints were made in ICC, Situation in the Republic of Kenya, *Prosecutor v. Muthaura et al.*, Pre-Trial Chamber, Public Redacted Version of Final Written Observations of the Defence Team of Ambassador Francis K. Muthaura on the Confirmation of Charges Hearing, 2 December 2011, ICC-01/09-02/11-374, paras. 71–72 (http://www.legal-tools.org/doc/be93c9/); ICC, Situation in Darfur, Sudan, *Prosecutor v. Abu Garda*, Pre-Trial Chamber, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, paras. 46–47 (http://www.legal-tools.org/doc/cb3614/); ICC, Situation in the Republic of Kenya, *Prosecutor v. Ruto et al.*, William Samoei Ruto Defence Brief following the Confirmation of the Charges Hearing, 24 October 2011, ICC-01/09-01/11-355, paras. 19–23 (http://www.legal-tools.org/doc/3977e1/); Antonio Cassese *et al.*, *Cassese's International Criminal Law*, Oxford University Press, Oxford, 2013, p. 344 ("the prosecutor is every bit as partisan as his counterparts at the ICTY and ICTR").

[128] ICC, Situation in the Republic of Côte d'Ivoire, *Prosecutor v. Gbagbo*, Pre-Trial Chamber, Decision adjourning the hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, 3 June 2013, ICC-02/11-01/11-432, para. 37 (http://www.legal-tools.org/doc/2682d8/).

[129] ICC, Situation in the Democratic Republic of Congo, *Prosecutor v. Mbarushimana*, Pre-Trial Chamber, Decision on the Confirmation of Charges, 16 December 2011, ICC-01/04-01/10-465, para. 51 (http://www.legal-tools.org/doc/63028f/).

[130] For a psychological, legal and sociological account of truth and international fact-finding, see Shiri Krebs, "The Legalization of Truth in International Fact-Finding", in *Chicago Journal of International Law*, 2017, vol. 18, no. 1, pp. 83 ff.

permit lying.[131] He does, however, limit this unconditional duty to explicit lies, or "intentionally untrue declaration[s] to another".[132] Failures to disclose to the truth may be permissible unless they are intentional deceptions. It is clear that under Article 54, there is a specific obligation to explore and disclose "all relevant incriminating and exonerating lines of investigation",[133] and any failure to do so would constitute a violation of a strict deontological duty.

There are other specific ethical obligations that the OTP incurs indirectly, such as those from sections of the ICC Statute that grant rights on other parties. Article 55, for instance, provides for specific rights on the part of persons during an investigation. These rights create corresponding deontological obligations on the part of the OTP, such as the obligation that the OTP not subject an individual "to arbitrary arrest or detention", nor deprive an individual "of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute".[134]

18.3.3.1.2. The OTP Code of Conduct

Like the ABA Model Rules for Professional Conduct in the United States,[135] the ICC also has Codes of Conduct that ensure the compliance of trial participants with ethical rules and values. The ICC has three Codes of Conduct: the Code of Judicial Ethics, the Code of Professional Conduct for counsel, and the Code of Conduct for the OTP ('OTP Code'). The Code of Judicial Ethics was adopted by the judges pursuant to Regulation 126 of the Regulations of the Court.[136] The Code of Professional Conduct

131 Immanuel Kant, Mary Gregor (ed., trans.), *The Metaphysics of Morals*, Cambridge University Press, New York, 1996, 6:429; see also Immanuel Kant, "On a Supposed Right to Lie from Philanthropy", in Mary Gregor (ed., trans.), *Practical Philosophy*, Cambridge University Press, New York, 1996, 8:427.

132 Kant, 1996, *supra* note 131.

133 ICC Statute, Article 54(1)(a), see *supra* note 104.

134 *Ibid.*, Article 55(1)(d).

135 See Heinze, 2014, pp. 432 ff., see *supra* note 17.

136 ICC Code of Judicial Ethics, 9 March 2005, Article 1 (http://www.legal-tools.org/doc/383f8f/). ICC, Regulations of the Court, 26 May 2004, Regulation 126 ('RegCourt') (http://www.legal-tools.org/doc/2988d1/) reads: "1. The Presidency shall draw up a Code of Judicial Ethics, after having consulted the judges. 2. The draft Code shall then be transmitted to the judges meeting in plenary session for the purpose of adoption by the majority of the judges".

for Counsel was adopted by the Assembly of States Parties ('ASP') and applies "to defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses practising at the International Criminal Court".[137] Since the Prosecutor was given the authority to set up his own office,[138] the Code of Professional Conduct for Counsel does not apply to the OTP.[139] Furthermore, Rule 9 of the ICC Rules of Procedure and Evidence ('RPE') provides that it is the Prosecutor's responsibility to "govern the operation of the office", including whether or not he would have a code of conduct and regulations.[140] Therefore, when the OTP started working, it had neither regulations nor a code of conduct (which was still the case when the first stay of the proceedings was imposed by the Trial Chamber in the *Lubanga* case in June 2008).[141] The OTP eventually published regulations on 23 April 2009, and one can only assume that it is linked to the disclosure failures in the *Lubanga* case.

On 5 September 2013, the OTP Code was adopted to regulate the ethical conduct of the individuals working at the OTP.[142] Prior to 2013, there was no set of ethical standards "specifically regulat[ing] the conduct of members of the OTP".[143] Many of the rules and regulations listed in the following sub-sections, which were in place prior to the adoption of the OTP Code, were "general in scope and not tailored to apply to the specific

137 Cf. Code of Professional Conduct for Counsel, 2 December 2005, Article 1.

138 Cf. ICC Statute, Article 42(2), see *supra* note 104.

139 See also Theresa Roosevelt, "Ethics for the Ethical: A Code of Conduct for the International Criminal Court Office of the Prosecutor", in *Georgetown Journal of Legal Ethics*, 2011, vol. 24, no. 1, p. 840, who also provides an interesting reason for this: "The Prosecutor may have been given the responsibility to set up his own office as a carrot to take the job. Negotiations over how to set up the OTP took a great deal of time at the conference where the ICC Statute was drafted. It was difficult to recruit someone for the position of Prosecutor because there were many uncertainties about how much support he or she would have from states. This would mean the Prosecutor would be operating in a new, international arena, possibly without a government behind him or her." (footnote omitted).

140 *Ibid*.

141 See Heinze, 2014, pp. 454 ff., see *supra* note 17.

142 *Ibid.*

143 Lawrence Pacewicz, "Introductory Note to International Criminal Court Code of Conduct for the Office of the Prosecutor", in *International Legal Materials*, 2014, vol. 53, no. 2, p. 397.

role that the OTP plays at the ICC and the specific obligations and duties which that role entails".[144]

The OTP Code was drafted by the OTP and provides for internal enforcement of its provisions.[145] It involves many general deontological constraints on the conduct of the OTP that are also applied to other counsel acting before the ICC, such as those related to faithfulness, conscientiousness, impartiality, independence, confidentiality, and conflicts of interest.[146] The OTP Code includes ethical obligations related to the duty to establish the truth under Article 54(1)(a) of the ICC Statute, which are deontological as they relate to procedural requirements for a fair trial and the investigation of incriminating and exonerating circumstances equally.[147] But it also includes the requirement to consider all relevant circumstances, and the requirement that investigations be conducted "with the goal of establishing the truth, and in the interests of justice", each of which involves discretion and potentially consequentialist considerations.[148] The OTP Code contains other deontological constraints on the effective investigation and prosecution practices of the OTP, including the requirements to:

1. act with competence and diligence, make impartial judgments based on the evidence and consider foremost the interests of justice in determining whether or not to proceed;
2. fully respect the rights of persons under investigation and the accused and ensure that proceedings are conducted in a fair manner;
3. refrain from prosecuting any person whom they believe to be innocent of the charges;
4. refrain from proffering evidence reasonably believed to have been obtained by means of a violation of the Statute or internationally recognised human rights if the violation casts substantial doubt on the reliability of the evidence or the admission of evidence would

144 *Ibid.*

145 *Ibid.*

146 ICC, *Code of Conduct for the Office of the Prosecutor*, 5 September 2013, chap. 2 ('OTP Code') (http://www.legal-tools.org/doc/3e11eb/).

147 *Ibid.*, chap. 3, Section 1.

148 *Ibid.*

be antithetical to and would seriously damage the integrity of the proceedings.[149]

The OTP Code also contains deontological provisions related to disclosure,[150] handling of information and evidence,[151] and security.[152] It has been argued that while the OTP Code contains a more comprehensive set of ethical guidelines for the OTP, it is still too vague to account for significant ethical concerns.[153] We will address this question in Section 18.5., when we present our recommendations for ensuring prosecutorial ethics in the preliminary examination phase.

18.3.3.1.3. Strategy and Policy Papers

Regulation 14 of the Regulations of the OTP obliges the OTP to make public its strategy and make use of policy papers that reflect the key principles and criteria of this strategy.[154] The OTP currently combines strategy papers, which clarify the Office's strategic objectives for a time period of three to four years, with policy papers addressing particular fundamental issues on which the Office wants to provide more clarity and transparency. We address these papers within the context of the OTP's application of Article 53, regarding the initiation of an investigation during the preliminary examination phase. The strategy papers are useful working agendas,

[149] *Ibid*., chap. 3, Section 2.

[150] *Ibid*., chap. 3, Section 3.

[151] *Ibid*., chap. 3, Section 4.

[152] *Ibid*., chap. 3, Section 5.

[153] See Pacewicz, 2014, p. 398, see *supra* note 143; see also Anna Oriolo, "The 'Inherent Power' of Judges: An Ethical Yardstick to Assess Prosecutorial Conduct at the ICC", in *International Criminal Law Review*, 2016, vol. 16, no. 2, p. 307. About vagueness and prosecutorial discretion from a domestic (US) perspective, see George D. Brown, "McDonnell and the Criminalization of Politics", in *Virginia Journal of Criminal Law*, 2017, vol. 5, no. 1, pp. 8–11.

[154] This corresponds to No. 17 of the UN Guidelines on the Role of Prosecutors ("In countries 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 in the prosecution process, including institution or waiver of prosecution."). A good example in this regard is ICC-OTP, *OTP Report on Preliminary Examination Activities 2013*, 25 November 2013 (http://www.legal-tools.org/doc/dbf75e/) setting out the principles and criteria of preliminary examinations (paras. 1 ff.) and aiming to promote transparency (para. 15). See recently ICC-OTP, *Strategic Plan 2016-2018* (2015), especially para. 36, referring to the policy paper on preliminary examinations and to case identification and prioritisation within a formal investigation.

which – due to their temporal limitation – also give the OTP the opportunity to critically evaluate and, if necessary, adjust its strategy on a regular basis. The policy papers clarify key issues such as the "interests of justice",[155] victim's participation,[156] preliminary examinations[157] and the prosecution of sexual and gender based crimes.[158] The OTP recently published policy papers on children[159] and 'case selection'.[160] This practice involves a broad ethical obligation on the part of the OTP, which could be considered deontological in that the duty might be seen as reflective of an obligation to be transparent with the international community, the general public, and all possible defendants that could come before the ICC. This commitment to transparency can also be seen as consequentialist, as one of its aims might be to support the appearance of the legitimacy of the ICC.[161]

18.3.3.2. Accountability Mechanisms

In this section, we analyse internal accountability mechanisms, including those previously identified in Section 18.3.2.1, and briefly identify some of the external accountability mechanisms that serve an important legal

[155] ICC-OTP, *Policy Paper on the Interests of Justice*, September 2007 (http://www.legal-tools.org/doc/bb02e5/).

[156] ICC-OTP, *Policy Paper on Victims' Participation*, 12 April 2010 (http://www.legal-tools.org/doc/3c204f/).

[157] ICC-OTP, 2013, see *supra* note 154; on the respective draft paper, see Kai Ambos and Ignaz Stegmiller, "Prosecuting International Crimes at the International Criminal Court: Is there a Coherent and Comprehensive Prosecution Strategy?", in *Crime, Law and Social Change*, 2012, vol. 58, no. 4, pp. 397–99; see also the OTP's annual reports on Preliminary Examination Activities 2011-2016.

[158] ICC-OTP, *Policy Paper on Sexual and Gender-Based Crimes*, 6 June 2014 (http://www.legal-tools.org/doc/7ede6c/).

[159] ICC-OTP, *Policy on Children*, 15 November 2016 (http://www.legal-tools.org/doc/c2652b/).

[160] ICC-OTP, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016 (http://www.legal-tools.org/doc/182205/). For a detailed analysis see Nadia Bernaz, "An Analysis of the ICC Office of the Prosecutor's Policy Paper on Case Selection and Prioritization from the Perspective of Business and Human Rights", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, pp. 527-542.

[161] Stahn, too, seems to view transparency (including publicity) as involving consequentialist considerations, when he points out: "Publicity is in line with the public nature of criminal proceedings. It may facilitate the alert effect and strengthen prevention", Stahn, 2017, p. 18, see *supra* note 1.

purpose in encouraging OTP compliance with ethical obligations. As noted previously, we do not go into any detail about external accountability mechanisms.

18.3.3.2.1. Internal Accountability Mechanisms

It is first and foremost the Prosecutor herself[162] who has to ensure that the OTP staff respect the legal rules and the principles of good professional practice.[163] The OTP Code provides for internal measures to ensure ethical behaviour within the OTP Rule 74 addresses the disciplinary measures that may be taken in light of prosecutorial misconduct within the OTP, noting that such instances shall be addressed "in accordance with Staff Rule 110.1, or listed as unsatisfactory in Section 5(3) of the *Code of Conduct for Staff Members*".[164] Disciplinary measures can also be directed against the OTP pursuant to the Staff Rules of the ICC. The Staff Rules are directed especially at alleged wrongdoing within the Prosecutor's office and situations when this wrongdoing falls within the Prosecutor's own disciplinary powers.[165] Since neither the ICC Statute nor the RPE specifically define a violation of the Staff Rules as "serious misconduct" or "a serious breach of duty", a violation of the Staff Rules alone cannot serve as a basis for the ASP to remove the Prosecutor or the Deputy Prosecutor.[166] However, the Prosecutor is responsible for determining whether

[162] On external, civil society control (by NGOs), see Carsten Stahn, "Judicial Review of Prosecutorial Discretion", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Nijhoff, Leiden, 2009, p. 261; on informal sanctions/control mechanisms, see Jenia I. Turner, "Accountability of International Prosecutors", in Carsten Stahn (ed.), *Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 402–04.

[163] Frédéric Mégret, "Accountability and Ethics", in Luc Reydams, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford, 2012, p. 457; see also Milan Markovic, "The ICC Prosecutor's Missing Code of Conduct", in *Texas International Law Journal*, 2011–12, vol. 47, no. 1, p. 206; Jenia I. Turner, "Policing International Prosecutors", in *New York University Journal International Law & Political Sciences*, 2012, vol. 45, no. 1, p. 256; Turner, 2015, pp. 386–87, see *supra* note 162; Olásolo *et al.*, 2011, p. 65, see *supra* note 114. The Prosecutor, however, must delegate his or her disciplinary powers if s/he has a personal interest in the case, see *Mr C.P. v ICC*, Judgement No. 2757 of the ILO Administrative Tribunal, 9 July 2008, para. 19 (http://www.legal-tools.org/doc/73bd48/).

[164] OTP Code, chap. 5, Section 2, Rule 74, see *supra* note 146 (italics added).

[165] Cf. Mégret, 2012, p. 477, see *supra* note 163 (italics added).

[166] Markovic, 2011–12, p. 207, see *supra* note 163.

OTP staff members have violated the Staff Rules and what disciplinary measures should be imposed.[167] Disciplinary proceedings can be instituted in case a staff member fails to act "in accordance with any official document of the Court governing rights and obligations of staff members" or fails "to observe the standards of conduct expected of an international civil servant", which amounts to "unsatisfactory conduct".[168]

These internal mechanisms for discipline are related to the Prosecutor's obligation to respect her staff in her dealings with them, but the obligations they create are not deontological in the sense that we generally associate deontology with retributive punishment. Disciplinary measures are not like criminal punishment, where a retributive view would tell us that each individual should get the punishment they are owed, in accordance with the wrongfulness of their conduct. They may involve some sorts of deontological fairness considerations, so that similar actors receive similar punishments. But disciplinary measures likely involve more consequentialist considerations, aimed at preventing future misconduct and ensuring a respectful and efficient work environment. These goals will support the larger OTP aims of seeking justice and fair trials.

18.3.3.2.2. External Accountability Mechanisms

The OTP is subject to external accountability mechanisms, in the form of disciplinary measures and judicial review, which do not generate new ethical obligations on the part of the OTP. Article 70 of the ICC Statute gives the ICC jurisdiction over intentional offences against the ICC's administration of justice,[169] while Article 71 provides for sanctions against persons who commit misconduct related to proceedings before the ICC.[170] Article 47 of the ICC Statute and Rule 25 of the RPE provide that Prosecutors and Deputy Prosecutors, among others, are subject to disciplinary measures for: "(i) Interfering in the exercise of the functions of a person referred to in Article 47; or (ii) Repeatedly failing to comply with or ignoring requests made by the Presiding Judge or by the Presidency in the

[167] *Ibid*., p. 206.

[168] ICC Staff Rules, Rule 110.1, see *supra* note 107.

[169] ICC Statute, Article 70, see *supra* note 104.

[170] *Ibid*., Article 71.

exercise of their lawful authority".[171] The aforementioned disclosure failures in *Gbagbo* and *Mbarushimana* certainly meet the threshold for failure in Rule 25(1)(a)(ii) of the RPE. Rule 26 of the RPE directs complaints about Article 47 misconduct to the Presidency, which has the discretion to either initiate proceedings against an individual or set aside complaints.[172]

Arguably, the only new ethical obligation that this complaint procedure places on the OTP is in the case of misconduct by a Deputy Prosecutor. If disciplinary measures against a Deputy Prosecutor are requested by the Presidency, "[a]ny decision to give a reprimand shall be taken by the Prosecutor"[173] and "[a]ny decision to impose a pecuniary sanction shall be taken by an absolute majority of the Bureau of the Assembly of States Parties upon the recommendation of the Prosecutor".[174] This obligation mirrors other mixed deontological and consequentialist general obligations on the part of the Prosecutor in her role as the leader of the OTP. She must treat all of her staff impartially, with respect and dignity, and use her best judgment about the expected consequences of using formal or informal mechanisms to discipline and redirect her staff.

Another external tool to investigate the alleged misconduct of staff and elected officials of the ICC is the Independent Oversight Mechanism ('IOM'), which was established by the ASP[175] in accordance with Article 112(4) of the ICC Statute.[176] The IOM "may receive and investigate reports of misconduct or serious misconduct" on the part of ICC staff and elected officials, including OTP staff.[177] The results of investigations con-

[171] ICC, *Rules of Procedure and Evidence*, 9 September 2002, Rule 25 ('ICC RPE') (http://www.legal-tools.org/doc/8bcf6f/).

[172] *Ibid*., Rule 26(2).

[173] *Ibid*., Rule 30(3)(a).

[174] *Ibid*., Rule 30(3)(b).

[175] Official Records of the Assembly of States Parties to the ICC Statute of the International Criminal Court, Eighth session, The Hague, 18–26 November 2009 (ICC-ASP/8/20), vol. 1, part II, ICC ASP/8/Res.1.

[176] "The Assembly may establish such subsidiary bodies as may be necessary, including an independent oversight mechanism for inspection, evaluation and investigation of the Court, in order to enhance its efficiency and economy."

[177] Including "staff subject to the Staff and Financial Regulations and Rules of the Court […] and all contractors and/or consultants retained by the Court and working on its behalf", see ASP, Resolution ICC-ASP/9/Res.5, adopted at the fifth plenary meeting (10 December 2010), Annex, para. 2. Interestingly, the term 'contractor' or 'consultant' does not include an 'intermediary', see ASP, Resolution ICC-ASP/9/Res.5, adopted at the fifth plenary

ducted by the IOM related to the OTP include "recommendations for consideration of possible disciplinary or jurisdictional action".[178] Interestingly, the IOM has the power to "recommend that the Court refer [a] matter for possible criminal prosecution to relevant national authorities, such as those of the State where the suspected criminal act was committed, the State of the suspect's nationality, the State of the victim's nationality and, where applicable, of the host State of the seat of the Court".[179] Thus, the IOM may have the ability to sanction prosecutorial misconduct through domestic criminal prosecution, although the ASP has taken steps to limit the independence of the IOM.[180] The IOM does not generate any specific ethical obligations on the part of the OTP.

Now that we have explored the general ethical rules and corresponding accountability mechanisms that apply to the OTP, we turn to the crux of the chapter, namely the ethical considerations for the OTP as they play out in the preliminary examination phase.

18.4. Prosecutorial Discretion and Preliminary Examinations at the ICC

18.4.1. Legal Principles of Prosecutorial Discretion

Given the high number of international crimes committed in crises, it is not possible to prosecute all potential perpetrators at the international level. After more than 10 years, it has become clear that not even those who are most responsible for mass atrocities will all face international criminal justice.

As we noted earlier, domestic criminal justice systems face similar challenges. There are different methods of dealing with the case overload, by balancing procedural principles like the search for the objective or

meeting (10 December 2010), Annex, para. 2 with fn. 3. About intermediaries and disclosure in more detail see Heinze, 2014, pp. 458 ff., see *supra* note 17.

178 *Ibid*., Annex, para. 4.

179 *Ibid*., Annex, para. 31. In that case, the IOM is also entitled to recommend that "privileges and immunities be waived", see *ibid*., Annex, para. 32.

180 Turner, 2012, pp. 181, 243–44, see *supra* note 163; see also ASP, Resolution ICC-ASP/9/Res.5, adopted at the fifth plenary meeting (10 December 2010), Annex, paras. 21–22.

material truth, the principle of full judicial clarification of the facts,[181] the principle of legality (*legalité de poursuites* – mandatory prosecution) and the principle of opportunity (*opportunité des poursuites* – prosecutorial discretion). Thus, some legal systems rest on the idea of 'legality' or 'compulsory/mandatory prosecution', whereby the relevant official agencies are expected to act upon a formal standard when dealing with all breaches of criminal law that come to their knowledge.[182]

In some countries, like Italy, the principle of legality (*principio di legalità*) is primarily related to the substantive (material) criminal law, thus prohibiting the punishment of a crime that was not explicitly punishable at the time it was committed.[183] The (procedural) principle of legality is either subject to important exceptions or qualified by prosecutorial discretion.[184] Thus, most countries operate in practice on both legality and opportunity principles, as they each have advantages and disadvantages. The opportunity principle "allows prosecutors to target resources for serious offences; it is effective against organised crime by facilitating charge-bargaining and opens up opportunities for diversionary[185] disposal of of-

[181] See Strafprozessordnung (The German Code of Criminal Procedure), 12 September 1950, Section 244(2) ('StPO') (http://www.legal-tools.org/doc/741f12/; http://www.legal-tools.org/doc/19df38/): "In order to establish the truth, the court shall, *proprio motu*, extend the taking of evidence to all facts and means of proof relevant to the decision" (translated to English in Brian Duffett and Monika Ebinger (trans.), authorised by the German Federal Ministry of Justice).

[182] See generally Kuczyńska, 2015, pp. 94–106, see *supra* note 126; Christopher Harding and Gavin Dingwall, *Diversion in the Criminal Process*, Sweet and Maxwell, London, 1998, p. 1. About the application of the principles of mandatory prosecution and discretion on the level of International Criminal Justice see Kai Ambos, "The International Criminal Justice System and Prosecutorial Selection Policy", in Bruce Ackerman, Kai Ambos and Hrvoje Sikirić (eds.), *Visions of Justice: Liber Amicorum Mirjan Damaška*, Duncker & Humblot, Berlin, 2016, p. 30; Kuczyńska, 2015, pp. 106–11, see *supra* note 41.

[183] Ferrando Mantovani, *Diritto Penale, Parte Generale*, 6th edition, CEDAM, Padova, 2009, p. 3; however, there are procedural forms of the principle of legality in Italy, namely 'the principle of the legitimate judge' and the 'principle of legality'. On the distinction between legality in substantive and procedural law, see also Michele Caianiello, "Disclosure before the ICC: The Emergence of a New Form of Policies Implementation in International Criminal Justice?", in *International Criminal Law Review*, 2010, vol. 10, no. 1, p. 98.

[184] Harding and Dingwall, 1998, p. 1, see *supra* note 182.

[185] For a detailed analysis of 'diversion' see Kai Ambos and Alexander Heinze, "Abbreviated Procedures in Comparative Criminal Procedure: A Structural Approach with a View to International Criminal Procedure", in Morten Bergsmo (ed.), *Abbreviated Criminal Proce-*

fenders".[186] On the other hand, there is a danger of "inappropriate government interference" and the risk of "corrupt decision-making".[187] While the legality principle does not share these disadvantages, when considered with the principle of full clarification of the facts, the legality principle can be seen as a kind of luxury in an overloaded criminal justice system, generating "a backlog of cases, which can be destructive of the right to a fair and speedy trial"[188] and effectively impeding alternative procedures that may expedite trial proceedings.[189]

The rational and transparent selection and prioritization of cases at the ICC, accompanied by a coherent prosecution strategy, is of utmost importance for the success and legitimacy of any international criminal tribunal,[190] and the international criminal justice system as a whole.[191]

dures for Core International Crimes, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. 77 ff. (http://www.toaep.org/ps-pdf/9-bergsmo).

186 Richard Vogler and Barbara Huber, *Criminal Procedure in Europe*, Duncker & Humblot, Berlin, 2008, p. 25; see also Kuczyńska, 2015, p. 94, see *supra* note 41.

187 *Ibid*.

188 *Ibid*.

189 Gerhard Fezer, "Inquisitionsprozess ohne Ende? Zur Struktur des neuen Verständigungsgesetzes", in *Neue Zeitschrift für Strafrecht*, 2010, vol. 30, no. 4, p. 177.

190 For an instructive comparative evaluation of the selection policies and practices of international criminal tribunals, see Guariglia, 2017, pp. 284 ff., see *supra* note 125; Christopher Keith Hall, "Prosecutorial Policy, Strategy and External Relations", in Bergsmo, Rackwitz and SONG (eds.), 2017, pp. 293 ff., see *supra* note 111. About various forms of selectivity Celestine Nchekwube Ezennia, "The of the International Criminal Court System: An Impartial or a Selective Justice Regime?", in *International Criminal Law Review*, 2016, vol. 16, no. 3, pp. 450 ff.; Frederick de Vlaming, "Selection of Defendants", in Luc Reydams, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford, 2012, pp. 547–70; deGuzman and Schabas, 2013, pp. 133–54, see *supra* note 118; also Jeffrey Locke, "Indictments", in Luc Reydams, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford, 2012, pp. 607–12; specifically on the ICTY, see Claudia Angermaier, "Case Selection and Prioritization Criteria in the Work of the International Criminal Tribunal for the Former Yugoslavia", in Morten Bergsmo (ed.), *Criteria for Prioritizing and Selecting Core International Crimes Cases*, 2nd edition, Torkel Opsahl Academic EPublisher, Oslo, 2010, pp. 27–43 (http://www.toaep.org/ps-pdf/4-bergsmo-second); on the ICTR, see Alex Obote-Odora, "Case Selection and Prioritization Criteria at the International Criminal Tribunal for Rwanda", in *ibid.*, pp. 45–67.

191 See previously Ambos and Stegmiller, 2012, p. 392, see *supra* note 157. See also Human Rights Watch, *The Selection of Situations and Cases for Trial before the International Criminal Court*, 2006, p. 7 (http://www.legal-tools.org/doc/753e9b/); Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, 2011, pp. 4, 46 (http://

This holds particularly true for the ICC, given that its Prosecutor[192] has not only the power to select individual defendants, but also – for the first time in history – entire situations for investigation.[193] Accordingly, the complex process of selecting defendants and concrete charges[194] can be divided into two main steps: first, the primary selection of situations, and

www.legal-tools.org/doc/738f10/); Morten Bergsmo, "The Theme of Selection and Prioritization Criteria and Why it Is Relevant", in Bergsmo (ed.), 2010, pp. 8, 12, 14, *supra* note 190; Vlaming, 2012, pp. 542–43, see *supra* note 190; Locke, 2012, p. 614, see *supra* note 190; Côté, 2012, pp. 354–55, see *supra* note 114; deGuzman and Schabas, 2013, pp. 131–32, see *supra* note 118; from a victims' perspective, see Richard Dicker, "Making Justice Meaningful for Victims", in Bergsmo (ed.), 2010, pp. 267–68, *supra* note 190; Bock, 2010, p. 606, see *supra* note 120; Thompson, "The Role of the International Prosecutor as a Custodian of Global Morality", in Charles C. Jalloh and Alhagi B.M. Marong (eds.), *Promoting Accountability under International Law for Gross Human Rights Violations in Africa: Essays in Honour of Prosecutor Hassan Bubacar*, Brill Nijhoff, Leiden, 2015, p. 54.

192 See also ICC, Situation in the Central African Republic, *Prosecutor v Bemba*, Pre-Trial Chamber, Decision on Request for Leave to Submit Amicus Curiae Observations Pursuant to Rule 103 of the Rules of Procedure and Evidence, 17 July 2009, ICC-01/05-01/08-453, para. 10, leaving the "issue of selection of cases" to the Prosecutor (http://www.legal-tools.org/doc/351d29/).

193 Ambos and Stegmiller, 2012, p. 392, see *supra* note 157; see also Ambos and Bock, 2012, pp. 532, 541, see *supra* note 126; Alette Smeulers, Maartje Weerdesteijn and Barbora Hola, "The Selection of Situations by the ICC – An Empirically Based Evaluation of the OTP's Performance", in *International Criminal Law Review*, 2015, vol. 15, no. 1, p. 2.

194 In the case against Lubanga, the Prosecutor decided to concentrate on the recruitment and use of child soldiers and suspended investigations concerning other alleged crimes, in particular sex crimes; ICC, Situation in the Democratic Republic of Congo, *Prosecutor v Lubanga*, Prosecutor's Information on Further Investigations, 28 June 2006, ICC-01/04-01/06-170, para. 7 (http://www.legal-tools.org/doc/e668a0/). As expected the OTP did not bring additional charges in the course of the appellate proceedings. Thus, the first case finished at the ICC has already shown that the selection of charges entails another discretionary decision that might enlarge the impunity gap; see Bock, 2010, pp. 322–23, see *supra* note 120; Ambos and Bock, 2012, p. 538, see *supra* note 126; also Paul Seils, "The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court", in Bergsmo (ed.), 2010, pp. 73–75, *supra* note 190; generally on the OTP's failure to charge Lubanga with sex crimes, see Kai Ambos, "The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): Comprehensive Analysis of the Legal Issues", in *International Criminal Law Review*, 2012, vol. 12, no. 2, pp. 137–38 with fn. 156; on its impact on the reparation decision, see Stefanie Bock, "Wiedergutmachung im Völkerstrafverfahren vor dem Internationalen Strafgerichtshof nach Lubanga", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2013, vol. 8, no. 7–8, pp. 302–03.

second, the subsequent extraction of cases from these situations.[195] We focus on the latter, which is a core issue for prosecutorial coherence.

It follows from the principles of equality before the law and non-discrimination[196] that selection decisions must not be "based on impermissible motives such as, *inter alia*, race, colour, religion, opinion, national or ethnic origin".[197] Accordingly, the Prosecutor is required to investigate, as a rule,[198] all sides of a conflict without favour or bias toward any person or groups.[199] This is, in fact, necessary to overcome the stigma of victor's justice, which has been attached to international criminal justice since the Nuremberg and Tokyo tribunals.[200] Apart from these con-

195 ICC, *Regulations of the Office of the Prosecutor*, entry into force 23 April 2009, Regulations 34–35 ('RegOTP') (http://www.legal-tools.org/doc/a97226/); see Smeulers, Weerdesteijn and Hola, 2015, p. 3, see *supra* note 193.

196 ICC Statute, Articles 21(3), 67(1) see *supra* note 104.

197 ICTY, *Prosecutor v Delalić et al.*, Appeals Chamber, Judgment, 20 February 2001, IT-96-21-A, para. 605 (http://www.legal-tools.org/doc/051554/); see also ICTR, *Prosecutor v Bizimungu et al.*, Decision on Defence Motions for Stay of Proceedings and for Adjournment of the Trial, including Reasons in Support of the Chamber's Oral Ruling delivered on Monday 20 September, 24 September 2004, ICTR-2000-56-T, para. 26 (http://www.legal-tools.org/doc/cf6400/); Côté, 2012, pp. 364, 366–70, see *supra* note 114; deGuzman and Schabas, 2013, pp. 146, 167, see *supra* note 118; also Thompson, 2015, p. 55, see *supra* note 191.

198 An exception is that the investigation is limited to the alleged perpetrators if jurisdiction is based on active personality pursuant to Article 12(2)(b) ICC Statute; thereto Rod Rastan, "Jurisdiction", in Carsten Stahn (ed.), *Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, p. 152 and generally Ambos, 2016, pp. 244 ff., see *supra* note 2.

199 Côté, 2012, p. 370, see *supra* note 114; deGuzman and Schabas, 2013, p. 167, see *supra* note 118; see also Mégret, 2012, p. 439, see *supra* note 163; Hitomi Takemura, "Prosecutorial Discretion in International Criminal Justice: Between Fragmentation and Unification", in Larissa J. van den Herik and Carsten Stahn (eds.), *The Diversification and Fragmentation of International Criminal Law*, Nijhoff, Leiden, 2012, p. 643. Against this background, the decision of the ICTY Prosecution not to investigate alleged war crimes committed by NATO Forces during 'Operation Allied Forces' was heavily criticized; see Ambos and Bock, 2012, p. 502 with further references, see *supra* note 126. In general, on the difficulty and necessity of prosecuting peacekeepers on the international level, see Melanie O'Brien, "Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court", in *Journal of International Criminal Justice*, 2012, vol. 10, no. 3, p. 525.

200 Côté, 2012, p. 370, see *supra* note 114. In more detail on the limited competencies of the IMT and the IMTFE which had no jurisdiction over alleged war crimes of the Allies, see Ambos and Bock, 2012, pp. 491–92, 497–98 with further references, see *supra* note 126.

straints, which are drawn from human rights norms, the Prosecutor is largely free to develop her own prosecutorial policy.

18.4.2. Preliminary Examinations and Article 53(1)

We briefly explain the legal framework of Article 53(1) and the OTP's approach to preliminary examinations in this sub-section. The two sub-sections that follow focus on the specific ethical obligations related to Article 53(1)(c) and the "interests of justice", and the judicial review that aims to hold the OTP accountable for following through on its ethical obligations, respectively.

The preliminary examination phase at the ICC is solely directed toward determining whether there are sufficient grounds (a "reasonable basis") to commence a formal investigation.[201] Thus, it acts as a kind of procedural filter for the OTP.[202] While the OTP has recently added a separate section on preliminary examinations to its website,[203] this phase still lacks transparency, and it is impossible for an 'outsider' to know about or evaluate the fate of the thousands of communications sent to the OTP. Although the term 'preliminary examination' is only explicitly referenced in Article 15(6) of the ICC Statute and Regulations 25-31 of the Regulations of the OTP,[204] all proceedings contain a preliminary examination, regardless of the trigger mechanism used to bring the situation before the ICC, that is, whether it comes through a referral by a State Party, referral by the UN Security Council, or by a *proprio motu* initiation of the Prosecutor.[205]

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[201] Ambos, 2016, p. 336, see *supra* note 2; Stefan van Heeck, *Die Weiterentwicklung des formellen Völkerstrafrechts: Von den ad hoc Tribunalen der Vereinten Nationen zum ständigen Internationalen Strafgerichtshof unter besonderer Berücksichtigung des Ermittlungsverfahrens*, Duncker & Humblot, Berlin, 2006, pp. 181–82; deGuzman and Schabas, 2013, p. 144, see *supra* note 118, stressing the reasonable basis requirement; Kuczyńska, 2015, p. 74, see *supra* note 41.

[202] Stegmiller, 2013, p. 486 ("procedural filtering tool"), see *supra* note 2.

[203] ICC, "Office of the Prosecutor: Preliminary Examinations" (available on its web site).

[204] Cf. Stahn, 2017, p. 2, see *supra* note 1.

[205] Ambos, 2016, pp. 336–37, see *supra* note 2; ICC-OTP, *Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications"*, p. 7 (http://www.legal-tools.org/doc/5df43d/); Wouters, Verhoeven, and Demeyere, 2008, p. 294, see *supra* note 113; Jan Wouters, Sten Verhoeven, and Bruno Demeyere, "The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability?", in José Doria, Hans-Peter Gasser and M. Cherif Bassiouni (eds.), *The*

The OTP's Policy Paper on Preliminary Examinations[206] explains the structure of a preliminary examination in four phases.[207] *Phase 1* is concerned with the evaluation of the 'communications', that is, the information submitted on alleged crimes received in accordance with Article 15(1) ("information on alleged crimes").[208] *Phase 2* represents the formal commencement of a preliminary examination[209] and consists of the thorough assessment of the preconditions of jurisdiction pursuant to Article 12 of the ICC Statute, and an inquiry as to whether the alleged crimes fall within the Court's subject-matter jurisdiction. *Phase 3* is concerned with the admissibility of 'potential' cases – since defined cases do not exist at this stage[210] – in terms of complementarity and gravity according to Arti-

Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko, Nijhoff, Leiden, 2009, p. 365; Karel de Meester, Kelly Pitcher, Rod Rastan and Göran Sluiter, "Investigation, Coercive Measures, Arrest and Surrender", in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, Oxford, 2013, p. 182; David Bosco, "Discretion and State Influence at the International Criminal Court: The Prosecutor's Preliminary Examinations", in *American Journal of International Law*, 2017, vol. 111, no. 2, pp. 395-414; Ambos and Stegmiller, 2012, pp. 420 ff., see *supra* note 157; on the three trigger mechanisms, see Ambos, 2016, pp. 255 ff., see *supra* note 2.

206 ICC-OTP, 2013, paras. 77–84, see *supra* note 154; summarising ICC-OTP, *Report on Preliminary Examination Activities*, 2013, para. 14, see *supra* note 142; see also RegOTP, Regulations 25–31, see *supra* note 195; for a detailed analysis see Ambos, 2016, pp. 337 ff., see *supra* note 2; see also Stegmiller, 2013, p. 487, see *supra* note 2. On the OTP's previous practical approach, see Kai Ambos, "Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik", in Wolfgang Kaleck *et al.* (eds.), *International Prosecution of Human Rights Crimes*, Springer, Berlin, 2006, pp. 56 ff.; Kai Ambos, "The Structure of International Criminal Procedure", in Michael Bohlander (ed.), *International Criminal Justice: a Critical Analysis of Institutions and Procedures*, Cameron May, London, 2007, pp. 435 ff.; Kai Ambos, "Die Rolle des Internationalen Strafgerichtshofs", in *Aus Politik und Zeitgeschichte*, 2006, vol. 42, pp. 14–15; Stegmiller, 2013, pp. 486–87, see *supra* note 2.

207 See also the analysis by Stahn, 2017, p. 16 with further references, see *supra* note 1.

208 ICC-ASP, *Report of the Court on the Basic Size of the Office of the Prosecutor*, 17 September 2015, ICC-ASP/14/21 (http://www.legal-tools.org/doc/b27d2a/).

209 *Ibid.*

210 ICC, Situation in the Republic of Kenya, Pre-Trial Chamber, Request for Authorisation of an Investigation pursuant to Article 15, 26 November 2009, ICC-01/09-3, paras. 51, 107 (http://www.legal-tools.org/doc/c63dcc/); and ICC, Situation in the Republic of Kenya, Pre-Trial Chamber, Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, paras. 50, 182, 188 (assessment of admissibility "against certain criteria defining a 'potential case'") (http://www.legal-tools.org/doc/338a6f/).

cle 17 of the ICC Statute.[211] *Phase 4* analyses the "interests of justice" pursuant to Article 53 (1)(c),[212] and results in an 'Article 53(1) report'.[213] This report contains an "initial legal characterization of the alleged crimes" and a preliminary summary of the basic facts, indicating the temporal and geographical circumstances of the alleged commission, and the persons and/or groups involved.[214] It serves as a basis to determine whether to commence a formal investigation in accordance with Article 53(1), or to stop proceedings based on the "interests of justice".[215]

The OTP recently issued a Policy Paper on Case Selection and Prioritisation,[216] which states that the Prosecutor is only bound by the general principles of equality before the law and non-discrimination, that is, she must act independently, impartially[217] and objectively investigating all parties to a conflict without favouring or discriminating against any of them.[218] Otherwise, she has a broad discretion that may be guided by policy criteria regarding selection and prioritization.[219] "Broad discretion" is a phrase the OTP itself used in a previous draft of the Policy Paper: "Nonetheless, the Office has broad discretion in selecting individual cases for

211 ICC-ASP, 2015, p. 39, see *supra* note 208; ICC-OTP, *Report on Preliminary Examination Activities 2016*, 14 November 2016, para. 15 (http://www.legal-tools.org/doc/f30a53/); about this report, see also Stahn, 2017, p. 3, see *supra* note 1. Sa. Andre V. Armenian, "Selectivity in International Criminal Law: An Assessment of the 'Progress Narrative'", in *International Criminal Law Review*, 2016, vol. 16, no 4, pp. 642 ff.; Celestine N. Ezennia, "The Modus Operandi of the International Criminal Court System: An Impartial or a Selective Justice Regime?", in *International Criminal Law Review*, 2016, vol. 16, no. 3, pp. 448 ff.

212 ICC-ASP, 2015, p. 40, see *supra* note 208; ICC-OTP, 2016, para. 15, see *supra* note 211.

213 Cf. RegOTP, Regulation 29(1), see *supra* note 195; also referring to ICC Statute, Article 15(3).

214 Ambos, 2016, p. 339, see *supra* note 2.

215 Cf. RegOTP, Regulations 29, 31, see *supra* note 195.

216 ICC-OTP, 2016, see *supra* note 160.

217 'Impartiality' can be understood, however, in either procedural or political terms. See Sophie T. Rosenberg, "The International Criminal Court in Côte d'Ivoire: Impartiality at Stake?", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, pp. 471-490.

218 *Ibid.*, para. 16–23.

219 On the governing principles of the selection process by the OTP, see also Fabricio Guariglia and Emeric Rogier, "Selection of Situations and Cases by the OTP of the ICC", in Carsten Stahn (ed.), *Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 358–59; Kuczyńska, 2015, pp. 112–15, see *supra* note 41.

investigation and prosecution".[220] However, this sentence does not appear in the final version of the Policy Paper.[221] The relevant criteria, with respect to case selection and prioritization, include focusing on those who are "most responsible";[222] focusing on specific crimes with a special international/public interest/expressivist function (for example, sexual and gender-based crimes and crimes against children);[223] focusing on gravity of the crimes;[224] focusing on certain qualitative considerations; focusing

[220] ICC OTP, 2016, para. 4 *in fine*, see *supra* note 160.

[221] See *ibid.*

[222] Cf., for example, ICC, Situation in the Republic of Kenya, Pre-Trial Chamber, Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, para. 188, see *supra* note 210; RegOTP, Regulations 34(1), see *supra* note 195. This may include "lower level-perpetrators where their conduct has been particularly grave or notorious", ICC-OTP, 2016, para. 42, see *supra* note 160. See also, regarding other tribunals, ICTY, Rules on Procedure and Evidence, adopted on 11 February 1994, Rule 28(A) ('ICTY-RPE') (http://www.legal-tools.org/doc/02712f/) (additional screening of indictment, introduced as part of completion strategy in 2004, to ensure that it "concentrates on one or more of the most senior leaders suspected of being most responsible […]"; thereto Håkan Friman, Helen Brady, Matteo Costi, Francisco Guariglia and Carl-Friederich Stuckenberg, "Charges", in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, Oxford, 2013, p. 385) and SCSL Statute, Article 1(1), see *supra* note 117 (limiting the mandate to "persons who bear the greatest responsibility"); Guariglia and Rogier, 2015, pp. 351–52 (regarding ICTY), 360–61, see *supra* note 219.

[223] Cf. ICC-OTP, *Strategic Plan 2012-2015*, 11 October 2013, paras. 58–63; as well as OTP, *Strategic Plan 2016-2018*, 6 July 2015, paras. 40, 49 ff.; and Annex I, paras. 22 ff. regarding the results of the *Strategic Plan 2012-2015*. About the *Strategic Plan 2012-2015*, see also Fatou Bensouda, "The Sexual and Gender-Based Crimes Policy Paper of the Office of the Prosecutor of the International Criminal Court", in Charles C. Jalloh and Alhagi B.M. Marong (eds.), *Promoting Accountability under International Law for Gross Human Rights Violations in Africa: Essays in Honour of Prosecutor Hassan Bubacar*, Brill Nijhoff, Leiden, 2015, pp. 329 ff.; critics on "thematic prosecution of sex crimes", that is, the primary selection and prioritization of these crimes over others: Kai Ambos, "Thematic Investigations and Prosecution: Some Critical Comments from a Theoretical and Comparative Perspective", in Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, Torkel Opsahl Academic EPublisher, 2nd edition, Brussels, 2018, pp. 301 ff. (http://www.toaep.org/ps-pdf/13-bergsmo-second); critics of the ICC practice so far, but optimistic because of the new course under Prosecutor Bensouda as evidenced by the OTP policy paper: Niamh Hayes, "La Lutte Continue: Investigating and Prosecuting Sexual Violence at the ICC", in Carsten Stahn (ed.), *Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 801 ff.

[224] Cf. RegOTP, Regulation 29(2), see *supra* note 195; ICC-OTP, 2013, paras. 9, 59 ff., see *supra* note 206; ICC-OTP, *Report on Preliminary Examinations Activities 2014*, 2 December 2014, para. 7 (http://www.legal-tools.org/doc/3594b3/); Guariglia and Rogier, 2015, pp.

on incidents that are "most representative of the scale and impact of the crimes" and on "crimes that have been traditionally under-prosecuted";[225] balancing the interests of justice within the meaning of Article 53; and identifying practical considerations.[226] The ultimate selection or prioritization decision remains in the hands of the Prosecutor and is subject to only limited judicial review.[227]

18.4.3. Prosecutorial Discretion and the "Interests of Justice"

18.4.3.1. The OTP and Article 53(1)(c)

Article 53(1)(c) contains the main site of discretion that invokes our previously outlined argument for including consequentialist considerations in the ethical obligations of the OTP during the preliminary examination

359–60, see *supra* note 219; ICC, Situation in the Republic of Kenya, Pre-Trial Chamber, Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, para. 188, see *supra* note 210; ICC, Situation in the Republic of Kenya, *The Prosecutor v. Francis Kirimi Muthaura et al.*, Pre-Trial Chamber, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, No. ICC-01/09-02/11-382-Red, para. 50, referring to sentencing RPE, Rule 145(1)(c) (http://www.legal-tools.org/doc/4972c0/). For a discussion, see Ambos, 2016, pp. 284 ff., see *supra* note 2. The OTP points out that it "may apply a stricter test when assessing gravity for the purposes of case selection than that which is legally required for the admissibility test under article 17", see ICC-OTP, 2016, para. 36 see *supra* note 160. With regard to the gravity test, in its recent policy paper on case selection, the OTP deviated from its November 2013 policy paper by adding a reference to crimes committed "by means of, or that result in […] the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land" (*ibid*., para. 41). See thereto Bernaz, 2017, p. 528, see *supra* note 160.

225 RegOTP, Regulation 34(2), see *supra* note 195; ICC-OTP, 2016, para. 45–46, see *supra* note 160.

226 Cf., for example, ICC-OTP, 2003, p. 1 ("feasibility of conducting an effective investigation in a particular territory"), see *supra* note 160; ICC-OTP, *Paper on Some Policy Issues Before the Office of the Prosecutor*, 5 September 2003, p. 2 (availability of the necessary cooperation) (http://www.legal-tools.org/doc/f53870/).

227 Only pursuant to legal regulation, especially Article 53(3) ICC Statute. It is however questionable to interpret Article 53(1)(a) and (b) as providing for "exacting legal requirements" (ICC, Situation on the Vessels of Comoros, Pre-Trial Chamber, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, 16 July 2015, ICC-01/13-34, para. 14 (http://www.legal-tools.org/doc/2f876c/)); on the criticism regarding the trigger and scope of the judicial review, see Guariglia and Rogier, 2015, pp. 362–63, see *supra* note 219.

phase.[228] There is no other clause in the ICC Statute allowing so explicitly for policy considerations.[229] The concept of the "interests of justice" within the meaning of Article 53(1)(c) and (2)(c) is nowhere defined in the ICC's legal framework. The OTP understands the concept as "a potential *countervailing* consideration that might produce a reason *not* to proceed" even where jurisdiction and admissibility are satisfied.[230] Thus, "interests of justice" is a negative requirement that may exclude an investigation (or prosecution), even if the positive requirements of Article 53(1) and (2) are

[228] Our argument is only for the expanded influence of consequentialist considerations. About the so-called "consequentialist approach" as a way to address preliminary examinations (*vis-à-vis* the "gateway approach") see Stahn, 2017, pp. 7 ff., see *supra* note 1. For the consequentialist approach, "there is a certain virtue in the conduct of a preliminary examination as such, irrespective of whether or not it leads to investigation at the ICC" (p. 7 with further references). According to the narrower "ICC-centric" gateway approach, "preliminary examinations are investigation-centred", which means that "they mainly serve as a means to deciding whether or not to open an ICC investigation and are essentially a filter that determines the pathway towards investigations" (p. 6).

[229] Cf. Ali Arsanjani, "The International Criminal Court and National Amnesty Laws", in ASIL, *Proceedings of the Ninety-Third Annual Meeting of the American Society of International Law*, ASIL, Washington, D.C., 1999, p. 67 ("broad range of possibilities"); Richard J. Goldstone and Nicole Fritz, "In the Interests of Justice and Independent Referral: The ICC Prosecutor's Unprecedented Powers", in *Leiden Journal of International Law*, 2000, vol. 13, no. 3, pp. 662–63; Matthew R. Brubacher, "Prosecutorial Discretion within the International Criminal Court", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 1, pp. 80 ff. (p. 81: "broader interests of the international community"); Talita de Souza Dias, "'Interests of justice': Defining the scope of Prosecutorial discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court", in *Leiden Journal of International Law*, vol. 30, no. 3, pp. 731-751; Maria Varaki, "Revisiting the 'Interests of Justice' Policy Paper", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, pp. 455-470; Paul Seils and Marieke Wierda, *The International Criminal Court and Conflict Mediation*, Occasional Paper, International Center for Transitional Justice, New York, 2005, p. 12; Frank Meyer, "Complementing Complementarity", in *International Criminal Law Review*, 2006, vol. 6, no. 4, p. 580. Christ Gallavin, "Article 53 of the Rome Statute of the ICC: In the Interests of Justice?", in *King's College Law Journal*, 2003, vol. 14, no. 3, pp. 195, 197, draws a comparison to the 'public interest' criterion in English and Welsh law arguing that while the Prosecutor must be independent she must at the same time be aware of the political realities; on this parallel, see also Brubacher, 2004, p. 80, see *supra* note 217. On the public interest criterion in English and Welsh law in general see Antony Duff, "Discretion and Accountability in a Democratic Criminal Law", in Máximo Langer and David Alan Sklansky (eds.), *Prosecutors and Democracy*, Cambridge University Press, Cambridge, 2017, pp. 9, 24-32.

[230] ICC-OTP, 2007, pp. 2–3 (emphasis in the original), see *supra* note 155.

met. It will only be utilised "in exceptional circumstances" as a kind of last resort.[231]

18.4.3.2. Whose Justice?

The notion of '*justice*' involves a broader assessment that just a single situation or case[232] and is not limited to what we might think of as typical criminal justice considerations,[233] but rather it includes alternative forms of justice, and entails an overall assessment of the situation.[234] As we noted previously in Section 18.2.2., the particular features of what constitutes justice vary, and while we do not aim to construct a theory of justice in this chapter, we adopt the view that it always has something to do with fairness. Again, this can involve the protection of substantive rights, or the protection of procedural rights through strict adherence to rules, or ensuring that all potential defendants are treated the same before the law. Because they will sometimes be in conflict, we see justice as a balancing of various fairness considerations.

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231 *Ibid*., p. 3. See also Rohrer, *Legalitäts- oder Opportunitätsprinzip beim Internationalen Strafgerichtshof*, Heymann, Köln, 2010, pp. 253–54, 313.

232 Jessica Gavron, "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court", in *International and Comparative Law Quarterly*, 2002, vol. 51, no. 1, p. 110.

233 Namely, considerations which concern the proper administration of justice, for example, the admission of additional evidence on the basis of "interests of justice", cf. ICTY, *Prosecutor v Kupreškić et al.*, IT-95-16-A, paras. 52–54, 61–69 (on former Rule 115(B) RPE ICTY); for more examples, see Stegmiller, 2011, p. 367, see *supra* note 2; also ICC-OTP, 2007, p. 8 (to be understood more broadly "than criminal justice in a narrow sense"), see *supra* note 155.

234 Ambos, 2016, p. 387, see *supra* note 2. See also Goldstone and Fritz, 2000, p. 662, see *supra* note 229; Darryl Robinson, "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court", in *European Journal of International Law*, 2003, vol. 14, no. 3, p. 488; Meyer, 2006, p. 579, see *supra* note 229; Kenneth A. Rodman, "Is Peace in the Interest of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court", in *Leiden Journal of International Law*, 2009, vol. 22, no. 1, pp. 101 ff., 108 ff.; Stegmiller, 2011, pp. 358, 367–68, 378–79, see *supra* note 2; Rohrer, 2010, pp. 314 ff., see *supra* note 231. On judicial intervention in ongoing atrocities and the assumption that justice can be pursued neutrally during conflicts, see Leslie Vinjamuri, "The ICC and the Politics of Peace and Justice", in Carsten Stahn (ed.), *Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 20–25; on the interests of justice in conjunction with the principle of positive complementarity, see Justine Tillier, "The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?", in *International Criminal Law Review*, 2013, vol. 13, no. 3, pp. 542–45; Stahn, 2017, p. 9, see *supra* note 1.

To analyse whether or not an investigation (or a possible corresponding prosecution) serves the "interests of justice", we have two threshold questions to answer. The first is what counts as justice, and whether and which alternative justice mechanisms count as justice. Domestic criminal justice can be thought of as strictly procedural in nature, in that justice has been served if the domestic criminal procedures have been followed. Or we might think of domestic criminal justice as serving a more social purpose, albeit still local, in allowing a community to take ownership over crimes of mass atrocity and use transitional justice mechanisms to repair and reconcile. Some authors consider "interests of justice" as the most explicit gateway of the ICC Statute for the recognition of alternative processes of national reconciliation, including the granting of amnesties or other exemption measures for the sake of achieving peace.[235] Whether or not it should be primary, the domestic situation should be an important consideration in assessing the "interests of justice". Even with *ius puniendi* firmly established, it will be quite difficult to justify punishing defendants if the ICC acts completely counter to the interests of the domestic criminal justice systems.

Global criminal justice, on the other hand, might look more like an objective practice of holding individuals accountable for crimes of mass atrocity. This is one way of thinking about universal jurisdiction, where a crime is subject to prosecution in *any* jurisdiction in the world, because it

[235] John Dugard, "Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?", in *Leiden Journal of International Law*, 1999, vol. 12, no. 4, p. 1014; John Dugard, "Possible Conflicts of Jurisdiction with Truth Commissions", in Antonio Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. 1, Oxford University Press, Oxford, 2002, p. 702; Goldstone and Fritz, 2000, pp. 656, 662, see *supra* note 229; Robinson, 2003, p. 486, see *supra* note 234; Héctor Olásolo, "The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-judicial or a Political body?", in *International Criminal Law Review*, 2003, vol. 3, no. 3, p. 111 (referring to a TRC); Brubacher, 2004, pp. 81–82, referring to post-conflict reconciliation processes, see *supra* note 229; Seils and Wierda, 2005, p. 12 ("most direct significance to mediators"), see *supra* note 229; Meyer, 2006, p. 579, see *supra* note 229; Rodman, 2009, pp. 101 ff., 108 ff., considering the goal of peace at the core of his broad, consequentialist approach, see *supra* note 234; Marta Valiñas, "Interpreting Complementarity and Interests of Justice in the Presence of Restorative: Based Alternative Forms of Justice", in Carsten Stahn and Larissa J. van den Herik (eds.), *Future Perspectives on International Criminal Justice*, TMC Asser Press, The Hague, 2010, pp. 277–78; Stegmiller, 2011, pp. 358, 367–68, 378–79, see *supra* note 2; less emphatic, Scharf, "The Amnesty Exception to the Jurisdiction of the International Criminal Court", in *Cornell International Law Journal*, 1999, vol. 32, no. 3, p. 524.

is a crime against the people in *every* jurisdiction in the world, and *ius puniendi* and *ius poenale* create the normative authorization for universal prosecutions. A commitment to universal jurisdiction reflects a cosmopolitan view of justice, which contains three important moral elements. First, "the ultimate units of concern are *human beings* or *persons* – rather than, say, family lines, tribes, ethnic, cultural, or religious communities, nations, or states. The latter may be units of concern only indirectly, in virtue of their individual members or citizens".[236] Second, "the status of ultimate unit of concern attaches to *every* living human being *equally* – not merely to some subset".[237] Finally, "persons are ultimate units of concern *for everyone* – not only for their compatriots, fellow religionists, or suchlike".[238] Some argue that the object and purpose of the ICC Statute (the fight against impunity) and the use of "interests of justice" in other provisions of the ICC and other Statutes[239] indicate that the non-investigation/prosecution cannot be based on transitional justice considerations.[240] While we would disagree with the idea that transitional justice

[236] Thomas W. Pogge, "Cosmopolitanism and Sovereignty", in *Ethics*, 1992, vol. 103, no. 1, p. 48. Italics in original. See also Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, Polity, Cambridge, 2002, p. 169; Immanuel Kant, "Metaphysics of Morals: Doctrine of Right, § 43–§ 62", in Pauline Kleingeld (ed.) and David L. Colclasure (trans.), *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, Yale University Press, New Haven, 2006, p. 139, 6:343–44; Derek Heater, *World Citizenship: Cosmopolitan Thinking and Its Opponents*, Continuum, London, 2002, pp. 13–14; Simon Caney, *Justice Beyond Borders: A Global Political Theory*, Oxford University Press, Oxford, 2005, p. 4; Andrea Sangiovanni, "Global Justice, Reciprocity, and the State", in *Philosophy & Public Affairs*, 2007, vol. 35, no. 1, p. 3; Gillian Brock, *Global Justice: A Cosmopolitan Account*, Oxford University Press, Oxford, 2009, p. 12; Roland Pierik and Wouter Werner (eds.), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory*, Cambridge University Press, Cambridge, 2010, pp. 131–32; David Held, *Cosmopolitanism: Ideals and Realities*, Polity, 2010, p. 15.

[237] Pogge, 1992, p. 48, see *supra* note 236; see also Pogge, 2002, p. 169, see *supra* note 236; Sangiovanni, 2007, p. 3, *supra* note 236; Brock, 2009, p. 12, see *supra* note 236; Held, 2010, pp. 15–16, see *supra* note 236.

[238] Pogge, 1992, p. 48, see *supra* note 236; see also Pogge, 2002, p. 169, see *supra* note 236; Sangiovanni, 2007, p. 3, *supra* note 236; Brock, 2009, p. 12, see *supra* note 236; Held, 2010, pp. 15–16, see *supra* note 236.

[239] See Human Rights Watch, *Interests of Justice*, 2005, p. 6 referring to Articles 55(2)(c), 61, 65, 67, ICC Statute, and (in fn. 17) to Statutes of earlier international criminal tribunals where the notion was always understood in the sense of a fair administration of justice.

[240] See *ibid.*, pp. 4 ff. stating that "the prosecutor may not fail to initiate an investigation or decide not to proceed with the investigation because of national efforts, such as truth

considerations should never play a role, it also seems clear that the demands of cosmopolitan justice should be a factor in an assessment of justice. The concept of universality is central for the ICC.

The second, related question is who counts as a victim for purposes of the justice analysis. Immediate victims of mass atrocity are clearly included in this group. It may be that the OTP is only allowed to consider these immediate victims with respect to Article 53 and the interests of justice. But if we think of mass atrocity as a crime against humanity as a whole, the group of victims grows much larger. Universal (or nearly universal) jurisdiction could require us to factor all of humanity into an assessment of what would be in the interests of justice. Again, we might find that the interests of local and global 'victims' do not align.[241]

We argue that deontological obligations do not permit the OTP to pursue one form of justice to the serious detriment of the other form of justice. Since these different understandings of justice may conflict with one another, it may be impossible for the Prosecutor to make decisions that will maximize the justice interests of all the relevant constituencies. It remains within the purview of the Prosecutor to strike the right balance and decide, on a case-by-case basis, whether the formal initiation of an investigation or prosecution[242] would jeopardize justice interests.[243] In

commissions, national amnesties, or traditional reconciliation methods, or because of concerns regarding an ongoing peace process" (at pp. 4–5).

241 For a recent account of the discussion of how the ICC has failed victims, see Gaelle Carayon and Jonathan O'Donohue, "The International Criminal Court's Strategies in Relation to Victims", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, pp. 567-591.

242 ICC Statute, Articles 53(1) and (2), see *supra* note 104.

243 See, for example, Carsten Stahn, "Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court", in *Journal of International Criminal Justice*, 2005, vol. 3, no. 3, p. 698, arguing that abstinence from (immediate) prosecution may be allowed if otherwise reconciliation would be seriously put a risk; or Helmut Gropengießer and Jörg Meißner, "Amnesties and the Rome Statute of the International Criminal Court", in *International Criminal Law Review*, 2005, vol. 5, no. 2, p. 296, arguing that it is "possible to suspend the punishment even of serious offences in favour of higher-priority-interests" (similarly Karlijn van der Voort and Marten Zwanenburg, "From 'Raison d'État' to 'Ètat de Droit International': Amnesties and the French implementation of the Rome Statute", in *International Criminal Law Review*, 2001, vol. 1, no. 3, pp. 329–30) or, at p. 297 that the Prosecutor makes "his *own* decision on prognosis and balance" (emphasis in the original). For considerations governing the timing of indictments, see ICTJ, *UN Guidelines Meeting*, 2005, pp. 3 ff.

light of the fact that the ICC claims to have the goals of ending impunity for individual criminals and protecting the global community from the harms of mass atrocities, it seems that neither of these aims or constituencies can be ignored altogether.

18.4.3.3. Political Considerations and Article 53(1)(c)

The possibility of adverse State reactions to the investigation or prosecution of its officials must not subject the Prosecutor or the Court as a whole to intimidation by powerful States. Otherwise, the Court would rightly face criticism that it only prosecutes weak States, and thus undermine its legitimacy. International prosecutors have always been subject to pressure to achieve results, as was even admitted by the Trial Chamber in the *Lubanga* Judgment, which referred to the "degree of international and local pressure, once it was known that officials from the Court had arrived in the country".[244] The completion strategies at the *ad hoc* tribunals had a similar effect, as noted in Judge David Hunt's dissenting opinion to an admissibility decision of the ICTY in the *Milošević* case, in which he complained about a "consequential destruction of the rights of the accused", the "desire to assist the prosecution to bring the Completion Strategy to a speedy conclusion", and that it was "improper to take Completion Strategy into account […] at the expense of those rights"; in sum: "Completion Strategy has been given priority over the rights of the accused".[245]

[244] ICC, Situation in the Democratic Republic of Congo, *Prosecutor v Lubanga*, Trial-Chamber, Judgment pursuant to Article 74 of the Statute, 14 March 2012, ICC-01/04-01/06-2842, para. 142 (http://www.legal-tools.org/doc/677866/); on the "natural tendency of the prosecutors to sympathize with victims of crimes at the expense of ICC defendants", see Markovic, 2011–12, p. 209, see *supra* note 163. See generally Ambos, 2012, p. 127, see *supra* note 194.

[245] ICTY, *Prosecutor v Milošević*, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence-in-Chief in the Form of a Written Statement, 21 October 2003, IT-02-54-AR73.4, para. 20–22 (http://www.legal-tools.org/doc/41554b/). See also ICTR, *Prosecutor v Nyiramasuhuko*, Decision in the Matter of Proceedings Under Rule 15*bis*(D), Dissenting Opinion of Judge David Hunt, 24 September 2003, ICTR-97-21-T, para. 17 (http://www.legal-tools.org/doc/c56e1a/) (the completion strategy in Resolution 1503 should not be interpreted as an encouragement by the Security Council to the *ad hoc* Tribunals to "conduct its trials so that they would be other than fair trials"). About this dissent Fidelma Donlon, "The Judicial Role in the Definition and Implementation of the Completion Strategies of the International Criminal Tribunals", in Shane Darcy and Joseph Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press, Oxford, 2010, p. 360.

In a similar vein, Kevin J. Heller opined that completion strategies have often "(1) promoted impunity, (2) undermined OTP independence, (3) damaged the OTP's legitimacy, and (4) complicated post-closure projects".[246] In fact, the consequentialist tendencies go back to Nuremberg, where the prosecutor found himself in a structurally and procedurally superior position *vis-à-vis* the defence,[247] and some scholars and observers complained that inconsistent rulings favoured the prosecution.[248] Fair trial guarantees are considered to have been rather weak.[249] The separation of powers principle was diluted,[250] and a violation of the legality principle – the retroactivity element, to be concrete – has always been a matter of some dispute, not only with regard to the Nuremberg trials, but also the international criminal trials that followed.[251]

The ICC certainly depends on State co-operation, yet it must still ensure that it makes decisions about which situations and cases to pursue from a critical distance, especially with respect to the States in which the criminal situations take place. It would delegitimise the Court if the ICC had a practice of making political concession to States in terms of the

[246] Kevin J. Heller, "Completion", in Luc Reydams, Jan Wouters and Cedric Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford, 2012, p. 900. But see Lovisa Bådagård and Mark Klamberg, "The Gatekeeper of the ICC – Prosecutorial Strategies for Selecting Situations and Cases at the International Criminal Court", in *Georgetown Journal of International Law*, 2017, vol. 48, pp. 639-733 (arguing that the OTP should be more, not less focused on the goals of the Court in selection decisions).

[247] Hans Laternser, "Looking Back at the Nuremberg Trials with Special Consideration of the Processes Against Military Leaders", in Guénaël Mettraux (ed.), *Perspectives on the Nuremberg Trial*, Oxford University Press, Oxford, 2008, p. 480.

[248] See Bernard V.A. Röling, *The Tokyo Judgment*, APA-University Press, Amsterdam, 1977, pp. 633–34; Telford Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir*, Back Bay Books, Boston, 1992, p. 321.

[249] See, generally, Patricia M. Wald, "Running the Trial of the Century: The Nuremberg Legacy", in *Cardozo Law Review*, 2005–06, vol. 27, no. 4, pp. 1596–97; Ron Levi, John Hagan and Sara Dezalay, "International Courts in Atypical Political Environments: The Interplay of Prosecutorial Strategy, Evidence, and Court Authority in International Criminal Law", in *Law and Contemporary Problems*, 2016, vol. 79, no. 1, p. 297.

[250] Christoph Safferling and Philipp Graebke, "Strafverteidigung im Nürnberger Hauptkriegsverbrecherprozess: Strategien und Wirkung", in *Zeitschrift für die gesamte Strafrechtswissenschaft*, 2011, vol. 123, no. 1, p. 67.

[251] H.L.A. Hart, "Positivism and the Separation of Law and Morale", in *Harvard Law Review*, 1958, vol. 71, no. 4, p. 619; Andrew Ashworth and Lucia Zedner, "Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions", in *Criminal Law and Philosophy*, 2008, vol. 2, no. 1, pp. 65 ff.

investigation and prosecution of the States' officials.[252] Rather, the "interests of justice" clause can only be invoked if the reason(s) that cause the Prosecutor to abstain from investigation and prosecution can really be traced back or are linked to justice interests, that is, if the abstention really serves the interests of justice.[253] It is here that we can see how deontological constraints on the OTP remain crucial for ensuring that the OTP seeks justice. The OTP must never treat potential defendants, or regions, or States, as mere means to serve a political end, whether it is personal or institutional. But these deontological constraints leave space for prosecutorial discretion and freedom of action, and it is here that we will see how consequentialist considerations may in fact be necessary to fill an ethical gap.

The "interests of justice" at the preliminary examination phase are not focused on whether or not a particular individual can receive a fair trial at the ICC. Justice at this phase is considering a constituency of victims, whether local or global, and not just a particular defendant. Because of the scope of this inquiry, we acknowledge that prosecutorial discretion with respect to analysing the "interests of justice" will involve political considerations. As noted above, political decisions based on bias or blackmail will never be appropriate. But as Frédéric Mégret has argued, while international criminal justice has tried to distance itself from any "blatantly political decision", the project of international criminal justice "cannot come about without some political power".[254] The factors in Article 53 make it clear that the Prosecutor has to take a legally substantiated decision on a case by case basis and cannot just invoke general policy considerations in their own right; otherwise, she could indeed "risk being mired in making political judgements that would ultimately undermine his [her] work" (or more exactly: her authority) and be subjected "to enormous political pressures and attempted manipulations by governments

[252] Ambos, 2016, p. 388, see *supra* note 2.

[253] Contrary to Human Rights Watch, *Interests of Justice*, 2005, pp. 19–20, the victims' justice interests cannot be limited to the interests of a criminal prosecution excluding *a limine* their possible interests in peace, traditional reconciliation etc. It is equally unconvincing to adduce as an additional factor in favour of criminal prosecution the victims' interest in the memory since this can normally be better preserved by a TRC.

[254] Frédéric Mégret, "The Anxieties of International Criminal Justice", in *Leiden Journal of International Law*, 2016, vol. 29, no. 1, p. 201.

and rebel groups".[255] The Prosecutor must always 'judicialize the politics' without being a political actor herself.[256] So we agree with Mégret that these political considerations are inevitable, and we further argue that these political considerations constitute consequentialist ethical obligations on the part of the OTP.

One important aspect of these political considerations that the OTP should be obligated to consider is the continued existence and functioning of the ICC as a legitimate international institution. This is especially so since the existence of a political community – here: the 'humanity' – to authorise international criminal adjudication has frequently been rejected.[257] If humanity fails to constitute a political community to legitimize an international criminal tribunal, "legitimacy must rest on the fairness [of this tribunal's] procedures".[258] Some have recently advanced a strategic view of the "interests of justice" concept, arguing that it should be used against the opening of an investigation – despite the existence of a reasonable basis within the meaning of Article 53(1)(a) – if such an investigation were detrimental to the Court's 'viability'.[259] This strategic approach goes too far, in our view, because we do not see the "interests of justice" as way for the Court to avoid its obligations to seek global and domestic justice. However, there may be instances in which Article 53(1)(c) is necessary to avoid the dissolution of the Court altogether. It may be reasonable, for instance, to take into account whether or not a region perceives the ICC as a fair institution before initiating another investigation into a situation from that region, especially if the region suggests that it may pull out of the ICC Statute altogether if it believes the ICC to be unfair and

255 Human Rights Watch, *Interests of Justice*, 2005, p. 14.

256 Stegmiller, 2011, p. 379, see *supra* note 2; see, in a similar vein, Brubacher, 2004, p. 95, arguing that prosecutorial "discretion must exclude partisan politics, but not the more statesmanlike politics of persuading state compliance", see *supra* note 229.

257 David Luban, "A Theory of Crimes Against Humanity", in *Yale Journal of International Law*, 2004, vol. 29, no. 1, pp. 124–41.

258 Antony Duff, "Authority and Responsibility in International Criminal Law", in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, Oxford, 2010, p. 591.

259 Cale Davis, "Political Considerations in Prosecutorial Discretion at the International Criminal Court", in *International Criminal Law Review*, 2015, vol. 15, no. 1, pp. 172, 174, 188–89.

biased.[260] In this situation, a strict deontological/retributive constraint on the OTP would require the investigation of the situation without considering the overall impact on the ICC or the region. Whether or not the ICC should continue with the investigation in this hypothetical situation is not immediately obvious without more information. What is obvious is that the OTP should have an ethical obligation to take its own continued existence into account when assessing the "interests of justice".

18.4.3.4. Deontological and Consequentialist Obligations under Article 53(1)(c)

Accordingly, we argue that there are some situations in which the OTP should be required to use consequentialist considerations to consider the moral weight of their discretionary decisions under Article 53(1)(c). We find that the continued existence of the ICC, or the maintenance of some particular global order, cannot be the only aims of the OTP unless the OTP ignores all of its deontological obligations related to treating all people as ends, never as mere means. Prosecutions cannot come about for purely consequentialist reasons, and we recognize that since we can't predict the future, the best we can hope for in our invocation of consequentialist considerations is that prosecutors will make decisions based on what is expected to be the best outcome.[261] Yet we would argue that the OTP is obligated to consider the continued existence of the ICC alongside these deontological constraints, because the deontological constraints are insufficient to account for the global politics that affect the ICC and its legitimacy, both perceived and actual. The ICC might never be popular, and we should not use the ICC's popularity as a metric for its successfulness, but the ICC's perception in the world is important because it relies

[260] Jonathan Hafetz argues that the ICC should focus more on distributive considerations in order to ensure legitimacy. See Jonathan Hafetz, "Fairness, Legitimacy, and Selection Decisions in International Criminal Law", in *Vanderbilt Journal of Transnational Law*, 2017, vol. 50, pp. 1133-1172.

[261] In less cautious language Anderson, 2016, p. 192, see *supra* note 61: "[T]he Jack of predictability in a system in which the resources of the Prosecutor are so small in relation to the whole world that intervention looks like a lightning strike turns belief in the system into something no longer about legitimacy, or even about rational deterrence. lt looks like just plain bad luck. A system for going after the world's worst crimes and worst international criminals that has a feeling of simple misfortune to the participants will not fulfil very adequately either legitimacy or rational deterrence".

on the co-operation of States in order to function.[262] If the OTP relies solely on deontological constraints to ensure that trials are fair, but the substantive focus of investigations remains largely focused on the African continent, the ICC may not be able to sustain the kind of support it has enjoyed from many African countries thus far,[263] if only due to the *perception* of unfairness rather than actual unfairness.

A flat-footed consequentialist or utilitarian theory might suggest that we should forgo procedural fairness considerations and corresponding deontological constraints in favour of purely substantive aims, seeking to prosecute only those individuals with overwhelming evidence against them, or attempting to ensure convictions even where the evidence is lacking. Such a simplistic consequentialist theory might even seek to justify the use of the OTP's prosecutorial discretion under Article 53(1)(c) in service of creating or sustaining a particular global order. This sort of theory could allow the OTP to refrain from investigating situations in any African countries, until the perception of the ICC has changed throughout the African continent. We do not endorse such a use of consequentialist

[262] Larry May and Shannon Fyfe, *International Criminal Tribunals: A Normative Defense*, Cambridge University Press, Cambridge, 2017, p. 188.

[263] See, for example, Charles Chernor Jalloh, "The African Union, the Security Council, and the International Criminal Court", in Charles Chernor Jalloh and Illias Bantekas (eds.), *The International Criminal Court and Africa*, Oxford University Press, Oxford, 2017, pp. 185-188. For a general discussion of the (now decreasing) support of (some) African states see Mandiaye Niang, "Africa and the Legitimacy of the in Question", in *International Criminal Law Review*, 2017, vol. 17, no. 4, pp. 615-624; Sanji Mmasenono Monageng, "Africa and the International Criminal Court: Then and Now", in Gerhard Werle, *et al*. (eds.), *Africa and the International Criminal Court*, Asser, Springer, The Hague, 2014, pp. 13 ff.; Sanji Mmasenono Monageng and Alexander Heinze, "The Rome Statute and Universal Human Rights", in Evelyn A. Ankumah (ed.), *The International Criminal Court and Africa*, Intersentia, Cambridge, Antwerp, Portland, 2016, pp. 63 ff.; Jean-Baptiste Jeangene Vilmer, "The African Union and the International Criminal Court: Counteracting the Crisis", in *International Affairs*, 2016, vol. 92, no. 6, pp. 1319-1342; Sarah Leyli Rödiger, Leonie Steinl and Valérie V. Suhr, "Das Völkerstrafrecht in Krisenzeiten", in *Kritische Justiz*, 2018, vol. 51, no. 1, 7 ff.; Jide Nzelibe, "The Breakdown of International Treaties", in *Notre Dame Law Review*, vol. 93, no. 3, pp. 1219 ff. About South Africa's and especially the African National Congress' (ANC) support and commitment international humanitarian and human rights law is well-documented, see Gerhard Kemp, "South Africa's (Possible) Withdrawal from the ICC and the Future of the Criminalization and Prosecution of Crimes Against Humanity, War Crimes and Genocide Under Domestic Law: A Submission Informed by Historical, Normative and Policy Considerations", in *Washington University Global Studies Law Review*, vol. 16, no. 3, p. 428.

considerations by the OTP. Rather, we argue that the OTP is obligated to consider the political implications of investigations during the preliminary examination phase as part of a more complex, institutional consequentialist theory. This sort of theory would not assess the consequences of each individual investigation or prosecution carried out by the OTP and the ICC. Maintaining the institution of the ICC becomes primary if we think of the world in which the ICC exists and functions as the scenario that is likely to create the best outcomes. Thus, this type of consequentialist analysis aims at ensuring the continued existence of the institution, rather than at attempting to predict the consequences of pursuing any one situation in particular. On this view, procedural justice remains the central type of fairness consideration, and deontological and consequentialist ethical considerations can (and must) co-exist in the OTP as they seek the same goals.

18.4.4. Accountability Mechanisms and Judicial Review

We focus in this sub-section on the internal accountability mechanisms and the ways they apply specifically to prosecutorial discretion during the preliminary examination phase, before outlining the external accountability mechanism of judicial review of the OTP.

Recall from Section 18.3.3.2.1. that the Prosecutor's ability to impose disciplinary measures on her staff applies at any phase. So the Prosecutor can use this power to prevent her staff from disrupting trial proceedings, or to chastise them for failing to act in an appropriately professional manner. Ethical failures at the level of prosecutorial discretion may be much more serious than conduct warranting a dismissal or a complaint or a mere slap on the wrist. Given the seriousness of these decisions, it seems unlikely that a lower-level staffer at the OTP would be in a position to influence the exercise of prosecutorial discretion under Article 53(1)(c). But it is certainly possible that a lower-level individual at the OTP could have failed to meet an ethical obligation in terms of information gathering or disclosure, and this could have played an important role in influencing the Prosecutor's assessment of the political considerations surrounding a situation. Thus, the Prosecutor and the OTP benefit from the Prosecutor's ability to threaten or utilize disciplinary procedures to establish a certain kind of respectful professional environment, but also to prevent large or small-scale misconduct.

The OTP's institutional independence, and the prosecutorial discretion that exists with respect to Article 53, is subject to limited judicial review,[264] drawing from the supervisory powers of the Chambers.[265] This judicial review serves as the corresponding legal accountability mechanism for the ethical obligations on the part of the OTP in exercising prosecutorial discretion. It does not create a new ethical obligation on the part of the OTP. In the case of a *proprio motu* investigation,[266] the Prosecutor must seek permission from the PTC if she wants to continue with the investigation.[267] The OTP may only commence the formal investigation if the PTC is satisfied that there is a reasonable basis to conduct such an investigation.[268] Otherwise, the OTP may submit a new request based on

[264] Morten Bergsmo, Frederik Harhoff and ZHU Dan, "Article 42", in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd edition, C.H. Beck, Munich, 2016, mn. 8–9; Côté, 2012, p. 328, see *supra* note 114; Heinze, 2014, pp. 251–52, see *supra* note 17; see also ICC, Situation in the Democratic Republic of Congo, Pre-Trial Chamber, Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp, 15 August 2005, ICC-01/04-84, para. 32, see *supra* note 118; ICTR, *Prosecutor v Ndindiliyimana*, Pre-Trial Chamber, Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council, 26 March 2004, ICTR-2000-56-I, paras. 22–25 (http://www.legal-tools.org/doc/f8de3d/); SCSL, *Prosecutor v Sesay et al.*, Trial Chamber, Decision on Sesay Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor, 2 May 2005, SCSL-04-15-T, para. 22 (http://www.legal-tools.org/doc/fde087/); Daniel D. Ntanda Nsereko, "Prosecutorial Discretion before National Courts and International Tribunals", in *Journal of International Criminal Justice*, 2005, vol. 3, no. 1, pp. 136, 138; Peter C. Keen, "Tempered Adversariality: The Judicial Role and Trial Theory in the International Criminal", in *Leiden Journal of International Law*, 2004, vol. 17, no. 4, p. 797; Hakan Friman, "Procedures of International Criminal Investigations and Prosecutions", in Robert Cryer *et al.* (eds.), *Introduction into International Criminal Law and Procedure*, 3rd edition, Cambridge University Press, Cambridge, 2014, p. 430; Thalmann, 2012, p. 473, see *supra* note 126; Vladimir Tochilovsky, *The Law and Jurisprudence of the International Criminal Tribunals and Courts: Procedure and Human Rights Aspects*, 2nd edition, Intersentia, Cambridge, 2014, p. 470; Kuczyńska, 2015, pp. 40–42, see *supra* note 41; from a comparative perspective, Kai Ambos, "The Role of the Prosecutor", in Stephen Livingstone (ed.), *Towards a Procedural Regime for the International Criminal Court*, London, 2002, pp. 16–21, 63.

[265] From a comparative perspective, see Kai Ambos, "The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports", in *European Journal of Crime, Criminal Law and Criminal Justice*, 2000, vol. 8, no. 2, p. 116.

[266] ICC Statute, Article 15(1), see *supra* note 104.

[267] Cf. *ibid.*, Article 15(3).

[268] *Ibid.*, Article 15(4). See also Ambos, 2016, p. 340, see *supra* note 2

new facts or evidence,[269] or it must drop the investigation. In the case of State or Security Council referrals,[270] the PTC can formally review the OTP decision "to initiate an investigation",[271] after the preliminary examination is concluded. The PTC is entitled to review OTP non-investigation or non-prosecution decisions under Article 53(1) and (2) pursuant to Article 53(3) of the ICC Statute. However, there generally is no possibility of judicial review in cases of prosecutorial inaction. Thus, a decision not to initiate an investigation under Article 15 cannot be reviewed.[272] After all, the decision to investigate or prosecute belongs to the realm of the Prosecutor, being the *dominis litis* over this part of the proceedings, and thus cannot be substituted by a judicial organ.[273]

Now that we have argued for our normative understanding of how prosecutorial discretion should be influenced by consequentialist ethical considerations during the preliminary examination phase, and identified the related OTP obligations and accountability mechanisms, Section 18.5. will outline policy recommendations that support our normative claims.

18.5. Specific Recommendations for OTP Ethics in the Preliminary Examination Phase

In this penultimate section, we argue that the OTP must be accountable to more specific ethical standards applicable to the preliminary examination phase in order to ensure the legitimacy and fairness of the Court, both in terms of perception and actual practice. We address both direct ethical duties and internal accountability mechanisms.

18.5.1. Suggested Ethical Obligations

18.5.1.1. Revisions to the OTP's Policy Guidelines

Our first recommendation is that the OTP should generate a more concrete set of policy guidelines to defend and explain the normative foundations of prosecutorial ethics, especially with respect to prosecutorial discre-

269 ICC Statute, Article 15(5), see *supra* note 104.

270 Cf. *ibid.*, Article 13(a) and (b).

271 *Ibid.*, Article 53(1).

272 Cf. Stahn, 2009, p. 255, see *supra* note 162.

273 See, in a similar vein, Stahn, 2009, p. 255, *supra* note 162; Friman, Brady, Costi, Guariglia and Stuckenberg, 2013, p. 390 (Chamber "not empowered to substitute a negative decision with its own prosecution"), see *supra* note 222.

tion.[274] We do not think that relying on a common-sense understanding of morality is sufficient to ensure that individuals from a wide range of backgrounds pursue the same ethical aims. Rather, we suggest that the OTP should clearly identify when, which, and how deontological and consequentialist considerations should play a role in its selection and prioritization strategy, especially considering the mandate and purpose of the ICC. The OTP should be obligated to make selection decisions in accordance with the following theoretical underpinnings related to punishment.

18.5.1.1.1. Retribution

Retribution and deterrence[275] are of limited relevance at the international level.[276] It is therefore acceptable, that high selectivity undermines the

[274] In a similar vein, see Nicholas Cowdery, "The Exercise of the Powers of the Porsecutor", in Bergsmo, Rackwitz and SONG (eds.), 2017, pp. 421–22, see *supra* note 111. But see Bruce A. Green, "Prosecutorial Ethics in Retrospect", in *Georgetown Journal of Legal Ethics*, vol. 30, no. 1, pp. 461-484 (arguing that holding prosecutors more accountable may require developing alternatives to formal discipline or restructuring the process by which ethics rules for prosecutors are created and enforced).

[275] Roberto Bellelli, "The Establishment of the System of International Criminal Justice", in Roberto Bellelli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to Its Review*, Ashgate, Farnham, 2010, pp. 5, 13; Bradley E. Berg, "The 1994 I.L.C. Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure", in *Case Western Reserve Journal of International Law*, 1996, vol. 28, no. 2, pp. 254 ff. For ICTR jurisprudence, see, for example, ICTR, *Prosecutor v. Serushago*, Trial Chamber, Sentence, 5 February 1999, ICTR-98-39-S, para. 20 (http://www.legal-tools.org/doc/e2dddb/); ICTR, *Prosecutor v. Rutaganda*, Trial Chamber, Judgment, 6 December 1999, ICTR-96-3-T, para. 455 (http://www.legal-tools.org/doc/f0dbbb/). For ICTY jurisprudence, see, for example, ICTY, *Prosecutor* v. *Erdemović*, Trial Chamber, Sentencing Judgment, 29 November 1996, IT-96-22-T, para. 65 (http://www.legal-tools.org/doc/eb5c9d/); ICTY, *Prosecutor* v. *Aleksovski*, Trial Chamber, Judgement, 24 March 2000, IT-95-14/1-A, para. 185 (http://www.legal-tools.org/doc/176f05/). Cautioning against the application of quantitative methods to determine the preventive effect of international criminal trials Anderson, 2016, p. 189, see *supra* note 61; Tomer Broude, "The Court Should Avoid all Considerations of Deterrence and Instead Focus on Creating a Credible and Legitimate Normative Environment in Which Serious Crimes are Not Tolerated", in Richard H. Steinberg (ed.), *Contemporary Issues Facing the International Criminal Court*, Brill Nijhoff, Leiden, Boston, 2016, p. 194 ("[S]pecific and general deterrence are empirically intangible – in the international criminal realm they can neither be proved nor disproved in a methodologically meaningful manner, beyond conjecture. Deterrence, therefore, cannot, and should not, serve as an appreciable objective to be achieved by the Court"). See, however, David Scheffer, "Maximizing Opportunities to Deter Further Atrocity Crimes", in *ibid*., p. 220: "Recent empirical research demonstrates the deterrence value of international

Court's capacity to achieve retributive justice.[277] As Mark Drumbl remarks: "The retributive function is hobbled by the fact that only some extreme evil gets punished, whereas much escapes its grasp, often for political reasons anathema to Kantian deontology".[278] Thus, retribution cannot justify the selection of some suspects over others.[279] Ranking potential suspects in terms of their relative desert is impractical.[280] Deontological retributivists have provided theoretical tools to measure desert.[281] For instance, 'harm-ratings' which examine the consequences of a crime under consideration of certain assumed social situations and evaluate the "consequences in the light of certain assumed basic values";[282] or by the

and domestic prosecutions of human rights violators, including perpetrators of atrocity crimes").

276 Ambos, 2013, p. 68, see *supra* note 77; Leslie P. Francis and John G. Francis, "International Criminal Courts, the Rule of Law, and the Prevention of Harm: Building Justice in Times of Injustice", in Larry May and Zachary Hoskins (eds.), *International Criminal Law*, Cambridge University Press, Cambridge, 2010; Deirdre Golash, "The Justification of Punishment in the International Context", in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2010, pp. 201 ff.; Berg, 1996, p. 254, see *supra* note 275.

277 This criticism has been voiced in Mark A. Drumbl, *Atrocity, Punishment and International Law*, Cambridge University Press, Cambridge, 2007, pp. 151–54, 156–57 (citing Letter "Hannah Arendt to Karl Jaspers 17.8.1946", in Hannah Arendt and Karl Jaspers, *Briefwechsel 1926-1969*, R. Piper GmbH, Munich, 1985, p. 4 (translated to English in Lotte Köhler & Hans Saner (eds., trans.), *Correspondence 1926-1969*, Harcourt, 1992). See also Margaret M. deGuzman, "Choosing to Prosecute: Expressive Selection at the International Criminal Court", in *Michigan Journal of International Law*, 2012, vol. 33, no. 2, p. 302.

278 Drumbl, 2007, p. 151, see *supra* note 277.

279 deGuzman, 2012, p. 303, see *supra* note 277; Michael T. Cahill, "Retributive Justice in the Real World", in *Washington University Law Review*, 2007, vol. 85, no. 4, p. 870.

280 deGuzman, 2012, p. 303, see *supra* note 277; Cahill, 2007, p. 852, see *supra* note 279.

281 These theoretical tools may even comprise utilitarian approaches, as the so-called retributarianism does, see Hadar Dancig-Rosenberg and Netanel Dagan, "Retributarianism: A New Individualization of Punishment", in *Criminal Law and Philosophy*, 2018, Advance Article, p. 1 ("These retributarian approaches are characterized by the individualization of retributivism. On one hand, retributarianism shares with classic retributivism the rhetoric of justice, a focus on the moral evaluation of the severity of the offense, and the primary importance ascribed to maintaining proportionality. On the other hand, it shares with utilitarianism the possibility of taking into account, in addition to the severity of the offense, the offender's personal circumstances, with a future-oriented perspective that also considers developments subsequent to the commission of the offense").

282 Andrew von Hirsch and Nils Jareborg, "Gauging Criminal Harm: A Living-Standard Analysis", in *Oxford Journal of Legal Studies*, 1991, vol. 11, no. 1, pp. 6–7.

impairment of personal interests such as 'welfare interests',[283] which comes close to the (rather consequentialist) German *Rechtsgutslehre*[284] and might – in our view – not be a deontological tool at all. Whether these tools can be applied in practice, however, especially in context of the ICC, seems doubtful.

Efficiency has been at the core of reform efforts within and outside of the ICC.[285] It is clear from these efforts that the necessary reforms can be more easily and quickly achieved by changes in practice (via practice manuals like the Chambers Practice Manual) than by – usually more cumbersome – normative reforms (via amendments of the RPE or even

283 Joel Feinberg, *Harm to Others*, Oxford University Press, New York, 1987, pp. 41 ff.

284 See in more detail Kai Ambos, "The Overall Function of International Criminal Law: Striking the Right Balance Between the *Rechtsgut* and the Harm Principles", in *Criminal Law and Philosophy*, 2015, vol. 9, no. 2, pp. 301–29; Kai Ambos, "Rechtsgutsprinzip und harm principle: theoretische Ausgangspunkte zur Bestimmung der Funktion des Völkerstrafrechts", in Mark A. Zöller (ed.), *Gesamte Strafrechtswissenschaft in internationaler Dimension: Festschrift für Jürgen Wolter zum 70 Geburtstag am 7 September 2013*, Duncker & Humblot, Berlin, 2013, pp. 1285–310.

285 See, on the one hand, ICC, *Chambers Practice Manual*, May 2017 (http://www.legal-tools.org/doc/f0ee26/). About the creation of the Manual, see, for example, Hirad Abtahi and Shehzad Charania, "Expediting the ICC Criminal Process: Striking the Right Balance between the ICC and States Parties", in *International Criminal Law Review*, 2018, Advance Article, pp. 35 ff.; the various Reports of the Study Group on Governance (2011–15), especially the most recent Report of the Working Group on Lessons Learnt in ICC-ASP, *Report Study Group on Governance*, 2015, Annex II, 29 ff. and, last but not least, ICC, *Second Court's report on the development of performance indicators for the ICC*, 11 November 2016, p. 12–13 (formulating as an autonomous second goal '[T]he ICC's leadership and management are effective'); for a comprehensive overview of this Court-led initiative since its inception see Philipp Ambach, "A Look towards the Future: The ICC and 'Lessons Learnt'", in Carsten Stahn (ed.), *Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 1284 ff.; Philipp Ambach, "The 'Lessons Learnt' Process at the ICC: a Suitable Vehicle for Procedural Agreements?", in *Zeitschrift für internationale Strafrechtsdogmatik*, 2016, vol. 11, no. 12, pp. 857 ff.; Birju Kotecha, "The ICC's Office of the Prosecutor and the Limits of Performance Indicators", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, pp. 543-565. On the other hand, see Guénaël Mettraux, Shireen A. Fisher, Dermot Groome, Alex Whiting Gabrielle McIntyre, Jérome de Hemptinne, and Göran Sluiter, *Expert Initiative on Promoting Effectiveness at the International Criminal Court*, 2 December 2014 (http://www.legal-tools.org/doc/3dae90/) and the summary by Jürg Lindenmann, "Stärkung der Effizienz der Verfahren vor dem Internationalen Strafgerichtshof", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2015, vol. 10, no. 10, p. 529.

the ICC Statute).[286] The ensuing management needs to not only concern the judges but also the Prosecutor who bears the main responsibility for the conduct of the preliminary and investigation stage.[287] Given the Prosecutor's broad discretion at this procedural stage, with virtually no judicial supervision[288] and great freedom to select situations and cases,[289] a coherent and transparent prosecution strategy with the respective policies is required as a counterbalance.[290]

18.5.1.1.2. Deterrence

Deterrence is also unable to provide the theoretical basis for concrete selection criteria[291] – even though deterrence emanates from utilitarian moral philosophy. However, read together with other utilitarian goals of the ICC, such as strengthening the protections of international humanitarian law; creating a historical record of atrocities; providing satisfaction to the victims of crimes committed by an offender; and to promoting a process of reconciliation,[292] it might still be a better option for grounding punish-

[286] Cf. *ibid*. (calling for "changes of practice", and only subsidiary for normative changes); see also Ambach, 2016, p. 862 (referring to "practice adjustments short of the 'article 51 threshold'", that is, "internally" without an amendment of the RPE) and pp. 847–-64 (on the amendments of the RPE via Article 51(2)(a) and (3), especially highlighting the smoother avenue for the judges pursuant to Article 51(3)), see *supra* note 285.

[287] For a critical discussion of the management structures of the OTP, see Mettraux, Fisher, Groome, Whiting McIntyre, de Hemptinne and Sluiter, 2014, p. 51 (paras. 4 ff.) (recommending, among other things, a streamlining of the prosecutorial investigations, pp. 65–66 para. 55), see *supra* note 285.

[288] Cf. Ambos, 2016, pp. 381 ff., see *supra* note 2. From a policy perspective against judicial oversight during investigation, see Mettraux, Fisher, Groome, Whiting McIntyre, de Hemptinne and Sluiter, 2014, p. 8, para. 8, p. 11, para. 36, see *supra* note 285.

[289] Cf. Ambos, 2016, pp. 376 ff., see *supra* note 2; Ambos, 2016, pp. 33 ff., see *supra* note 182. With a special focus on fairness see also May and Fyfe, 2017, pp. 177 ff., see *supra* note 262.

[290] See now – long expected – ICC-OTP, 2016 (establishing general principles, repeating the legal criteria and – most importantly – proposing case selection [gravity of the crime, degree of responsibility of the accused and representativity of charges, para. 34 ff.] and prioritisation criteria [cf. especially para. 50–51]), see *supra* note 160.

[291] In this vein also deGuzman, 2012, pp. 306 ff., see *supra* note 277; Anderson, 2016, pp. 189 ff, see *supra* note 61. For a nuanced account of deterrence see Broude, 2016, pp. 194 ff., see *supra* note 275.

[292] Heinze, 2014, pp. 216 ff., see *supra* note 17; John D. Jackson and Sarah J. Summers, *The Internationalisation of Criminal Evidence*, Cambridge University Press, Cambridge, 2012, pp. 111–12 (using the term 'purpose'); Jens D. Ohlin, "Goals of International Criminal Jus-

ment, since it includes the Court's mandate. After all, a prosecutorial strategy must always be measured against the legitimacy and effectiveness of the ICC; the effectiveness of an institution – in turn – depends on the execution of its mandate.[293] This mandate serves as the purpose or the goals of an institution. These goals cannot be assigned or determined *a placere*. They are established by the mandate provider or stakeholder,[294] especially in a rule-based international order.[295] In case of the *ad hoc* tribunals, the mandate provider is the UN Security Council.[296] Since the UN is bound by human rights norms based on its Charter, so are those tribunals and their prosecutors.[297] This, of course, also has an impact on the prosecutors' understanding of the tribunals' goals and purposes when selecting suspects. Thus, human rights law-related goals, such as satisfac-

tice and International Criminal Procedure", in Göran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, Oxford, 2013, pp. 55, 58–60; Jenia I. Turner, "Plea Bargaining", in Linda Carter and Fausto Pocar (eds.), *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, Edward Elgar, Cheltenham, 2013, pp. 34, 51; Douglas Guilfoyle, *International Criminal Law*, Oxford University Press, Oxford, 2016, p. 89; Nerida Chazal, *The International Criminal Court and Global Social Control: International Criminal Justice in Late Modernity*, Routledge, London, 2016, p. 2 (albeit claiming that providing satisfaction and reparation to victims is of secondary importance, which might not reflect the Statute's *telos*). See also – albeit with regard to the ICTY – Minna Schrag, "Substantive and Organisational Issues", in Bergsmo, Rackwitz and SONG (eds.), 2017, pp. 392 ff., *supra* note 111. For arguments for restorative justice or healing, See, for example, Mark J. Osiel, "Ever Again: Legal Remembrance of Administrative Massacre", in *University of Pennsylvania Law Review*, 1995, vol. 144, no. 2, pp. 471–78, 512.

293 Yuval Shany, "Assessing the Effectiveness of International Courts: A Goal-Based Approach", in *American Journal of International Law*, 2012, vol. 106, no. 2, p. 237.

294 *Ibid*., p. 240.

295 Ohlin, 2013, p. 61, see *supra* note 292.

296 Security Council Resolution 827 (1993), UN Doc. S/RES/827(1993), 25 May 1993; Security Council Resolution 955 (1994), UN Doc. S/RES/955(1944), 8 November 1994; Iain Bonomy, "The Reality of Conducting a War Crimes Trial", in *Journal of International Criminal Justice*, 2007, vol. 5, no. 2, p. 353.

297 Masha Fedorova and Göran Sluiter, "Human Rights as Minimum Standards in International Criminal Proceedings", in *Human Rights and International Legal Discourse*, 2009, vol. 3, no. 1, p. 21; Krit Zeegers, *International Criminal Tribunals and Human Rights Law*, Springer, The Hague, 2016, p. 57; Lorenzo Gradoni, "International Criminal Courts and Tribunals: Bound by Human Rights Norms … or Tied Down?", in *Leiden Journal of International Law*, 2006, vol. 19, no. 3, p. 849.

tion and restitution,[298] have arguably a more prominent position within the system of the *ad hoc* tribunals than at the ICC due to the different mandate providers.[299] In other words, 'core goals' of the ICTY/ICTR and the ICC do not necessarily have to coincide. At the ICC, the States Parties determine the mandate of the Court, and although international treaties or other instruments creating international courts will always be the result of a diplomatic compromise in which the framing of a text is a part of the bargaining process, this mandate is first and foremost consequentialist.

18.5.1.1.3. Expressivism and Communication

We are well aware that selection and prioritization criteria written in the ink of consequentialism risk widening the power of the Prosecutor to the detriment of fairness and justice. Both the expressivist and communicative purpose of punishment,[300] in particular and in its several variants, cannot

298 Krešimir Kamber, *Prosecuting Human Rights Offences*, Brill, Leiden/Boston, 2017, pp. 186–87.

299 Stahn, 2017, p. 9 with further references, see *supra* note 1, who views the "consequentialist approach" (in more detail *supra* note 228) of the OTP to preliminary examinations as carrying the potential of turning the ICC "into a human rights monitoring body or even cast[ing] irreversible shadows of incrimination on individuals prior to investigations".

300 We understand expressivism as the expression of condemnation and outrage of the international community, where the international community in its entirety is considered one of the victims, see also Kai Ambos, "Review Essay: Liberal Criminal Theory", in *Criminal Law Forum*, 2017, vol. 28, pp. 589, 601 with further references. Even though expressivism can be traced back to Hegel's theory of punishment (for Hegel punishment is the "cancellation [*Aufheben*] of crime", which "is *retribution* in so far as the latter, by its concept, is an infringement of an infringement [of right] and in so far as crime, by its existence [*Dasein*], has a determinate qualitative and quantitative magnitude, so that its negation, as existent, also has a determinate magnitude", Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, Allen W. Wood (ed.), H.B. Nisbet (trans.), Cambridge University Press, Cambridge, 1821/1991, § 101, emphases in the original; see Antje Du Bois-Pedain, "Hegel and the Justification of Real-world Penal Sanctions", in *Canadian Journal of Law & Jurisprudence*, 2016, vol. 29, no. 1, pp. 37, 42; see also the analysis of Thom Brooks, *Hegel's Political Thought*, 2nd edn, Edinburgh University Press, Edinburgh, 2013, p. 172), Feinberg is usually named as its proponents, especially by authors from the common law system (for more references see May and Fyfe, 2017, pp. 61 ff., see *supra* note 262). What is commonly overlooked is that Feinberg speaks of "expression" rather than "communication" of punishment: "[P]unishment is a conventional device for the expression of attitudes of resentment and indignation. […] Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties", Joel Feinberg, *Doing and Deserving*, Princeton University Press, Princeton, New Jersey, 1974, p. 98, emphasis in the original. There are several attempts to distinguish expressivist and communicative theories of punishment, evolving around the existence of a recipient (for our purposes, this admittedly

be transferred beyond the domestic realm, where the recognition of valid criminal laws can be empirically proven, to an area where these criminal laws do not exist. Here, international criminal law is not only "educating society about its past" through the truth-telling function of international criminal trials;[301] it also very bluntly aims to *create* an awareness of the existence of a norm, instead of strengthening this norm's perception. This, however, arguably bestows upon criminal law the function of *creating* morality, which is neo-colonialism par excellence.[302] Especially the OTP's policy of "positive complementarity"[303] – "a concept aimed at encourag-

rough and almost simplistic identification of a common criterion needs to suffice): Expressivist theories too are based on communication but that communication does not require a recipient and is audience-independent while communicative theories are based on an communicative act that is aimed at a certain recipient and is audience-dependent (see, for example, Andy Engen, "Communication, Expression, and the Justification of Punishment", in *Athens Journal of Humanities and Arts*, 2014, vol. 1, no. 4, pp. 299, 304 ff.; Bill Wringe, "Rethinking expressive theories of punishment: why denunciation is a better bet than communication or pure expression", in *Philosophical Studies*, 2017, vol. 174, no. 3, pp. 681-708). Communicative punishment theories therefore recognise the social communication between offender, victim and society through punishment (Ambos, *ibid*., p. 601 with further references). This stems from the idea that a communication *with* (instead of about) the offender is both possible and necessary (*ibid*., p. 602). Beyond that, through punishment society not only communicates with the offender, but also "with itself" (Klaus Günther, "Criminal Law, Crime and Punishment as Communication", in Andrew P. Simester *et al*. (eds.), *Liberal Criminal Theory*, Hart, Oxford, 2014, p. 131). In the words of Anthony Duff: "In claiming authority over the citizens, it [that is, criminal law] claims that there are good reasons, grounded in the community's values for them to eschew such wrong […]. It speaks to the citizens as members of the normative community." (Antony Duff, *Punishment, Communication and Community*, Oxford University Press, Oxford, 2001, p. 80).

301 Mina Rauschenbach, "Individuals Accused of International Crimes as Delegitimized Agents of Truth", in *International Criminal Justice Review*, 2018, Advance Article, p. 3 with further references.

302 Cornelius Prittwitz, "Die Rolle des Strafrechts im Menschenrechtsregime", in Arno Pilgram *et al.* (eds.), *Einheitliches Recht für die Vielfalt der Kulturen? Strafrecht und Kriminologie in Zeiten transkultureller Gesellschaften und transnationalen Rechts*, LIT, Wien, 2012, pp. 23, 31.

303 Ambos, 2016, p. 327 with further references, see *supra* note 2; Cedric Ryngaert, "Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations", in Morten Bergsmo (ed.), *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, Torkel Opsahl Academic EPublisher, Oslo, 2010, pp. 165, 172 ff. (http://www.toaep.org/ps-pdf/7-bergsmo); Olympia Bekou, "The ICC and Capacity Building at the National Level", in Carsten Stahn (ed.), *Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 1245, 1252 ff.; William W. Burke-White, "Maximizing the ICC's Crime Prevention Impact Through Positive Complementarity and Hard-Nosed Diplomacy", in Richard H. Steinberg (ed.), *Contempo-*

ing domestic criminal justice systems to conduct their own criminal proceedings" – has been subjected to such a criticism.[304] Yet we see this consequentialist dimension of prosecutorial discretion as Larry May understands it, invoking an 'international harm principle', or a moral argument for thinking that group-based rather than individualized harms are the proper subject of international prosecutions.[305] May focuses on humanity's interest rather than individual interests, claiming: "One interest of humanity is that its members, as members, not be harmed. This is similar to the claim that a club has an interest that its members, as members, not be harmed. For when the club's members are harmed in this way, the harms adversely affect the reputation of the club, and even the ability of the club to remain in existence".[306] This mirrors an objective understanding of legal goods, as promoted by Feinberg with his understanding of harm (see above). Thus, according to May, "justified international prosecutions require either that the harm must be widespread in that there is a violation of individuality of a certain sort epitomized by group-based harmful treatment that ignores the unique features of the individual victim, or the harm must be systematic in that it is perpetrated in pursuance of a plan by an agent of a State or with active involvement from a State or State-like entity".[307] These purposes of punishment (and their respective limitations) should be more clearly reflected in the OTP policies.

18.5.1.2. Concretization of the OTP's General Ethic Rules (Especially its Code of Conduct)

Second, we follow Morten Bergsmo in our argument for more precise obligations on the part of the OTP with respect to their conduct, pursuant

rary Issues Facing the International Criminal Court, Brill Nijhoff, Leiden, Boston, 2016, pp. 203 ff.

304 Stahn, 2017, p. 9 with further references, see *supra* note 1.

305 Larry May, *Crimes Against Humanity: A Normative Account*, Cambridge University Press, Cambridge, 2005, p. 81. In support of and applying May's harm principle (especially within the context of the IMT), see Andrew Altman and Christopher Heath, "A Defense of International Criminal Law", in *Ethics*, 2004, vol. 115, no. 1, pp. 40 ff. But see Reeves, 2018, p. 1060, see *supra* note 50, who denies that we should treat the harm of crimes against humanity as a "precondition of legitimate prosecution" and instead claims that universal jurisdiction should not require special standing. Again, we disagree with his conflation of questions about universal jurisdiction with those of *ius puniendi*.

306 May, 2005, p. 82, see *supra* note 305.

307 *Ibid*., p. 90.

to the OTP Code. In 2003, Morten Bergsmo, Senior Legal Advisor at the ICC-OTP Legal Advisory Section at the time, led a team which drafted a Prosecutorial Code of Conduct ('Draft Code'), which appeared on the ICC's website.[308] In comparison to the then-existing Professional Conduct for Prosecution Counsel at the *ad hoc* tribunals, Bergsmo's draft was much more specific.[309] The draft is not available at the ICC's website anymore, but was kindly provided to the authors by Bergsmo himself and has recently been reprinted.[310] The Draft Code begins by identifying a moral obligation that is not legally enforceable, yet it is one that may go a long way toward cultivating an impressive sort of professional environment at the OTP. Regulation 5.1 of Chapter 2 of the Draft Code explains that the Prosecutor "promulgates this Code of conduct to inculcate and uphold the standard of excellence expected from all members of the Office".[311] Similarly, Regulation 6.2 of Chapter 2 proposes that members of the OTP "shall establish and promote a unified international legal culture within the Office, rooted in the principles and purposes of the Statute, without bias for the rules and methods of any one national system or legal tradition".[312] A written expectation of excellence and a certain professional culture could serve to generate pride and determination on the part of the OTP staff in their approach to other ethical obligations. A more explicit demand for the deontological obligations of self- and other-respect could only improve the culture of the OTP. Regulations 7 through 12 also provide for more precise parameters of the sort of character and conduct that should be expected of someone at the OTP, with respect to standards of independence,[313] honourable and professional conduct,[314] faithful con-

[308] Theresa Roosevelt, "Ethics for the Ethical: A Code of Conduct for the International Criminal Court Office of the Prosecutor", in *Georgetown Journal of Legal Ethics*, 2011, vol. 24, no. 3, p. 844.

[309] *Ibid*., p. 846.

[310] Salim A. Nakhjavani, "The Origins and Development of the Code of Conduct", in Bergsmo, Rackwitz and SONG (eds.), 2017, Annex 1, pp. 964 ff., see *supra* note 111.

[311] Draft Code, Chapter 2, Regulation 5.1.

[312] *Ibid*., Regulation 6.2. About this "legal culture" in more detail, see Christopher Staker, "Observations on Legal Culture, Legal Policy and the Management of Information", in Bergsmo, Rackwitz and SONG (eds.), 2017, pp. 637–38.

[313] Draft Code, Chapter 2, Regulation 7.

[314] *Ibid*., Regulation 8.

duct,[315] impartial conduct,[316] contentious conduct,[317] and confidentiality.[318] Again, there should be more than a reliance on commonsense morality in establishing constructive ethical obligations for the OTP.

In terms of more specific issues relating to prosecutorial discretion, Regulation 6.3 of Chapter 2 of the Draft Code obligates all members of the OTP to: "in all their dealings with and relations to the Court and in all matters arising in the performance of their duties or the exercise of their powers, (a) maintain the independence of the Office and refrain from seeking or acting on instructions from any external source; (b) conduct themselves honourably, professionally, faithfully, impartially and conscientiously; […] (d) endeavour to establish the truth in preliminary examinations, investigations and prosecutions, in accordance with Article 54 of the Statute and Regulation 13; (e) promote the effective [and expeditious] investigation and prosecution of crimes within the jurisdiction of the Court". Regulation 6.3(e) in particular obligates the OTP to work fairly, but also effectively, which is important for maintaining the ICC as an international criminal justice institution. If the OTP cannot function effectively, the wheels of the ICC will grind to a halt.

A possible objection by the OTP to the focus on substantive truth-finding is that it is overly utopian. The OTP Code in fact counters the draft in its footnote to the corresponding provision: "This standard of *truth-seeking* is excerpted from the statement of purpose supporting the duty of the Prosecutor to investigate all relevant facts and evidence, that is, 'In order to establish the truth…' (Article 54(1)(a)). As the search for truth cannot be an obligation of result, the term 'strive' is used to convey an obligation of means of central importance for individual choices of conduct".[319] Yet we would argue that the language should not be modified to reflect a less stringent obligation.

Regulation 13 provides for useful, specific standards of 'truth-seeking', among other things: first, "to provide the factual and evidentiary basis for an accurate assessment of whether there may be criminal respon-

315 *Ibid*., Regulation 9.

316 *Ibid*., Regulation 10.

317 *Ibid*., Regulation 11.

318 *Ibid*., Regulation 12.

319 Reprinted in Nakhjavani, 2017, Annex 1, p. 840, see *supra* note 310.

sibility under the Statute"; second, the "investigation of both incriminating and exonerating circumstances as a matter of equal priority and with equal diligence"; and third, "prompt reporting of concerns which, if substantiated, would tend to render a previous conviction made by the Court unsafe, bring the administration of justice into disrepute or constitute a miscarriage of justice; and full conformity to the applicable rules on disclosure of new evidence".[320] The second and third standards are especially compelling. The second standard does not only highlight the (policy-implementing) feature of investigating both incriminating *and* exonerating evidence, but also stresses the importance of the word "equally" in a footnote: "The Statute requires that incriminating and exonerating circumstances be investigated 'equally'. This standard interprets 'equally' as equality in priority, diligence and resource-allocation, and thus relevant to several professions and levels of seniority within the Office".[321]

The investigation of exonerating evidence, as an element of truth finding that a prosecution team may find particularly challenging to demand of itself, is further specified in Regulation 46 of the Draft Code: "During evidence collection, all care shall be taken to identify exonerating evidence […] If any material points to further potentially exonerating material, this potential shall be recorded. If the lead is not pursued further, the reasons for this decision shall be recorded on the Evidence Registration Form".[322] It is useful that there is no discretion available here, where the obligation is strict and straightforward.

Our final recommendation for adoption from the Draft Code is Regulation 14, which establishes the "standard of effective investigation and prosecution".[323] This regulation uses the modifier "reasoned" to limit what counts as an acceptable "evaluation of facts, evidence, and law, particularly in preparing and conducting the tests of reasonable basis, *prima facie* admissibility, interests of justice and reconsideration, considering applicable factors and criteria and taking into account the interests protected in the Statute in each case".[324] It is necessary that the OTP not be in

[320] Draft Code, Chapter 2, Regulation 13.

[321] Reprinted in Nakhjavani, 2017, Annex 1, p. 840, see *supra* note 310.

[322] Draft Code, Chapter 2, Regulation 46.

[323] *Ibid*., Regulation 14.

[324] *Ibid*., Regulation 14(b).

a position to shy away from clear expectations for upstanding conduct in associated with the preliminary examination phase, and one way to do that is to be more precise about the standard of evaluation that is acceptable. This standard means reasons must be available for any exercise of prosecutorial discretion, and this seems more than reasonable given the stakes of ICC investigations.

18.5.2. Suggested Internal Accountability Mechanisms

In line with our argument throughout this chapter that the Prosecutor should act in accordance with deontological constraints and also in light of consequentialist considerations, we find that the existing internal accountability mechanisms give her suitable discretion in determining how to hold her staff accountable for failed ethical obligations. There is little that can be done internally to ensure that the Prosecutor herself is held legally accountable for her purely ethical obligations, other than the passage and revision of the OTP, which constitutes the basis for several internal accountability mechanisms. We thus rely on the suggestions revisions to the OTP Code listed in Section 18.5.1. above, and would insist that external bodies who play a role in selecting the Prosecutor are obligated to ensure that the Prosecutor is of the highest moral calibre.

18.6. Conclusion

We have argued that the foundations of prosecutorial discretion, particularly in the OTP at the ICC, cannot be mere platitudes about doing one's job with honour and avoiding serious misconduct in carrying out one's duty. We have analysed the normative foundations of prosecutorial ethics in international criminal law and argued for the necessity of relying on consequentialist considerations during the preliminary examination phase at the ICC, as carefully constrained by deontological obligations. In particular, we have argued that in Article 53, the concept of the "interests of justice" should include both global and local concerns and victims, which will sometimes require the OTP to balance conflicting interests and make decisions that promote the 'expectably best' outcome for all interested parties.

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