Pace International Law Review

Volume 29 | Issue 1 Article 3

January 2017

Context at the International Criminal Court

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CONTEXT AT THE INTERNATIONAL CRIMINAL COURT

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ABSTRACT

In this article, I propose a contextual approach to ICC jurisdiction normatively to be adopted by the Court's Office of the Prosecutor and Pre-Trial Chamber in investigating and eventually prosecuting crimes under the Rome Statute. Under this contextual approach, I contend that both the Prosecutor and Pre-Trial Chamber are able to consider evidence outside the traditional notions of territorial and temporal jurisdiction to conceptualize a conflict in its entirety. The totality of cross-border and inter-temporal evidence should be considered when deciding whether to investigate attacks that the Prosecutor has a reasonable basis to believe fall within the Court's jurisdiction. Procedurally, the multi-step jurisdictional framework, the "Funnel Approach,"—beginning with the preliminary examination of a situation and proceeding to issuing an arrest warrant—provides flexibility to admit extra-jurisdictional evidence. Textually, the open-ended 'gravity' threshold does not limit the Prosecutor in considering evidence within the Rome Statute's territorial or temporal limitations.

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I. Introduction

In his seminal work *The Changing Structure of International Law*, Wolfgang Friedmann argued that "it is . . . possible to work for the strengthening of international law and authority from the standpoint of 'enlightened national interest,' as being the best or even the only way of ensuring national survival."[1] State actors within the Westphalian system bound by territorial integrity have, over the 70 years since the end of World War II, made various efforts to strengthen the international legal regime.[2] One of those methods in recent decades has been the International Criminal Court ("ICC" or "Court").

The ICC has been in existence for about two decades and, given this timespan, a body of jurisprudence has accumulated. From the Court's decisions, patterns can be discerned with regard to the scope of the Court's jurisdiction. The ICC is a Court of last resort. Admissibility of a case, therefore, depends on whether a national legal system is unable or unwilling to prosecute, and whether the case is of sufficient gravity.[3]

The *Rome Statute* ("Statute") and its supplementary documents govern the Court.[4] Given its complementary

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[1] WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 48 (1964); *see also* William Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo,* 18 LEIDEN J. INT'L L. 557 (2005) (explaining that the relationship between the International Criminal Court and the Democratic Republic of Congo exhibited an inter-connected multi-leveled governance structure whereby the Court altered the DRC's domestic politics and strengthened its judiciary).

[2] *See* LESLIE JOHNS, STRENGTHENING INTERNATIONAL COURTS: THE HIDDEN COSTS OF LEGALIZATION (2015) (arguing that a court's legitimacy and stability increase with heightened delegation (authority of a third party to adjudicate disputes) and obligation (normative instrumental pressure to abide by a ruling)).

[3] Rome Statute of the International Criminal Court art. 17, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Admissibility of a case is distinct from the concept of jurisdiction (nationality, subject matter, territorial and temporal), as discussed in Part II.

[4] *See, e.g.,* International Criminal Court, Elements of Crimes, ICC-PIDS-LT-03-002/11_Eng. (Sept. 3-10, 2002), https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-5BF9DE73D56/0/ElementsOfCrimesEng.pdf [hereinafter Elements of Crimes]; International Criminal Court, Regulations

function, the Court's subject matter is limited to the "most serious crimes of international concern,"[5] including crimes against humanity, genocide, war crimes, and crimes of aggression.[6]

The Court consists of an independent Prosecutor couched with discretionary powers as to what situations to investigate.[7] An investigation into situations is proper where there is a reasonable basis to believe[8] a crime within the Court's jurisdiction has occurred. Then, an investigation can be commenced through a referral made by a State Party,[9] a referral made by the United Nations Security Council ("UNSC"),[10] or at the Prosecutor's own initiative called *proprio motu*.[11] A non-State Party can also confirm jurisdiction through an Article 12(3) Declaration with the caveat that it too, will then be subject to the Court's jurisdiction, making its nationals prospectively subject to prosecution.[12]

The Statute delineates a multi-step process beginning with preliminary examinations commenced with either of the referral mechanisms mentioned above, or by the Prosecutor's *proprio motu* decision,[13] formal investigations that require

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of the Court, ICC-BD/01-01-04 (May 26, 2004), https://www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf [hereinafter Regulations of the Court].

[5] Rome Statute, *supra* note 3, pmbl.

[6] The Assembly of State Parties agreed upon the coming into force of the Rome Statute that crimes of aggression would be defined in 2010 at the Kampala Conference. Article 15 *bis* now includes definitions of acts of aggression, and crimes of aggression will come within the Court's jurisdiction after 2017. *See generally,* Harold Koh & Todd Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT'L L. 257 (2015).

[7] Rome Statute, *supra* note 3, arts. 15, 53.

[8] *Id*. art. 53(1). For a further discussion on the difference between a 'situation' and a 'case,' see generally, William A. Schabas, *Selecting Cases and Charging Crimes, in* THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Carsten Stahn ed., 2015).

[9] Rome Statute, *supra* note 3, art. 13(a).

[10] *Id*. art. 13(b).

[11] *Id*. art. 15(1).

[12] *Id*. art. 12(3). For an overview of the scope of Article 12(3) Declarations, see WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 69-72 (2012).

[13] *See Policy Paper on Preliminary Examinations*, Office of The

authorization by the Pre-Trial Chamber for *proprio motu* decisions,[14] and the issuance of an arrest warrant when there are reasonable grounds to believe a crime within the Court's jurisdiction has occurred.[15] With each subsequent step, the standard of proof increases. This multi-step process—irrespective of which method commences a preliminary examination—is governed by traditional notions of jurisdictional limitations that are akin to domestic courts.

The Court's jurisdictional scope is confined temporally, territorially, by subject matter, and by the person(s) the Court can prosecute.[16] While the ICC mimics aspects of domestic courts in its jurisdictional limitations, it is a wholly unique court from those hearing criminal domestic matters and even its predecessor ad hoc tribunals, such as the International Military Tribunal in Nuremberg and the Far East, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR"). It is also distinct from the hybrid tribunals, namely the Special Court for Sierra Leone ("SCSL") and Extraordinary Chambers in the Courts of Cambodia ("ECCC").[17] Each of the ad hoc and hybrid tribunals dealt with a single conflict and did not include the Statute's multiple referral mechanisms. Similarly, none of those tribunals provided the Prosecutor with discretionary powers as to which situations to investigate. As such, the possibility of politicization concerning prosecutorial selection within those tribunals remained low. Conversely, for the ICC, the Prosecutor or the UNSC has the ability to choose to investigate or refer, respectively, some

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Prosecutor, INT'L CRIM. CT., ¶ 25 (Nov. 2013), https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf [hereinafter *Policy Paper on Preliminary Examinations*].

[14] Rome Statute, *supra* note 3, art. 15(3).

[15] *Id*. art. 58.

[16] For a basic background on the ICC's jurisdiction, see Philippe Kirsch, *The Role of the International Criminal Court in Enforcing International Criminal Law*, 22 AM. U. INT'L L. REV. 539, 542-44 (2007).

[17] *Id*. at 542 ("At the end of 2000, the deadline for signature of the Rome Statute, 139 States had signed the Statute, which was about twenty more than those that had voted for the Statute in 1998. To my knowledge, this is a unique case in the history of a treaty negotiation. Normally what happens is that you vote for an instrument at the time of the conference because it is easier and then forget about it because that is also easier.").

situations over others. This selectivity is amenable to criticism based on subjective preferences or, in the case of the UNSC, national interest.

Distinct from domestic courts, the scale of atrocities, both in terms of numbers of casualties or level of destruction, is generally higher at the ICC. Also, the Court typically aims to prosecute high level political, military, or rebel leaders who may be immune, whether legally or *de facto*, from prosecution in domestic courts. Moreover, the subject matter within the ICC's jurisdiction is more political in nature. Few would oppose the contention that there are little geopolitical ramifications of prosecuting individual incidents of theft, rape, or even murder at the domestic level. However, when these crimes are committed on a large scale by criminal enterprises that are formed either from the State (as in Kenya, Sudan, or Libya) or from organized rebel groups opposing the State (as in the Democratic Republic of the Congo or Cote D'Ivoire) and implicate intra and/or international relations, a political element arises. In this regard, the Court's decisions delve into a State's affairs and power structures and, at times, bring to light histories of oppression and injustice.[18]

The purpose of this paper is to argue that while the four jurisdictional limitations mentioned above remain necessary to delineate the boundaries of cases that can proceed through preliminary examinations and investigations, it is possible to expand these limitations by considering the historical and political context of a particular conflict. By expanding

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[18] *See also* John R. Bolton, Under Sec'y for Arms Control and Int'l Sec., Remarks to the Federalist Society: The United States and the International Criminal Court (Nov. 14, 2002), https://2001-2009.state.gov/t/us/rm/15158.htm ("The Court's flaws are basically two-fold, substantive, and structural. As to the former, the ICC's authority is vague and excessively elastic, and the Court's discretion ranges far beyond normal or acceptable judicial responsibilities, giving it broad and unacceptable powers of interpretation that are essentially political and legislative in nature. This is most emphatically *not* a Court of limited jurisdiction. Crimes can be added subsequently that go beyond those included in the Rome Statute. Parties to the Statute are subject to these subsequently-added crimes only if they affirmatively accept them, but the Statute purports automatically to bind non-parties, such as the United States, to any such new crimes. It is neither reasonable nor fair that these crimes would apply to a greater extent to states that have not agreed to the terms of the Rome Statute than to those that have.").

jurisdictional limitations to aggregate information at the preliminary examination and investigation phases, the Court could achieve the gravity threshold in cases where it would not have done so previously. This article elaborates upon this expansive approach in more detail in Parts II and III.

The terminology of 'expanding' jurisdiction, instead of 'changing' jurisdiction, is used because, as will be outlined in detail below, in order for the herein argument to apply, the Court will require at least one of the bases of its jurisdiction to be met before jurisdiction can be expanded. In this regard, this article does not argue that the Court should change its jurisdiction as established in the Statute. It does not argue that the Court should amend the Statute in any way. It only argues that in the midst of a single conflict, where information exists from attacks taking place outside the Court's traditional jurisdiction, the Court should be able to consider that information. By considering information in the aggregate—whether from inside or outside the Court's traditional jurisdiction—situations and cases could come before the Court that would otherwise be excluded. This, in turn, will fill the impunity gap—a concept elaborated upon throughout this paper.

Can the Court use contextual factors outside its strict notions of jurisdiction to prosecute ISIS? According to the Prosecutor's April 8, 2015 Statement, the answer is no. The Prosecutor conceded that the Court does not have territorial jurisdiction because Iraq and Syria—where the majority of attacks have taken place—are not State Parties. The Prosecutor also emphasized that while there would be jurisdiction over State Party nationals who have traveled to Syria and Iraq to fight with ISIS, the terror group is "primarily led by nationals of Iraq and Syria."[19] Therefore, in addition to not having territorial jurisdiction, the Court also lacked nationality jurisdiction.

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[19] Press Release, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS, INT'L CRIM. CT. (Apr. 8, 2015), https://www.icc-cpi.int/Pages/item.aspx?name =otp-stat-08-04-2015-1 ("The information gathered indicates that several thousand foreign fighters have joined the ranks of ISIS in the past months alone, including significant numbers of State Party nationals from, *inter alia*, Tunisia, Jordan, France, the United Kingdom, Germany, Belgium, the Netherlands and Australia.") [*ISIS Statement*].

The argument this article wishes to assert is that aggregating information from attacks in both State and non-State Party territories to reach the requisite gravity threshold would allow the Prosecutor to pursue ISIS leadership, even though they are non-State Party nationals. ISIS attacks within the same conflict have occurred on both State Party (France[20] and Brussels[21]) and non-State Party (Syria, Iraq, and Turkey) territories. Evidence from all these attacks should be aggregated to meet the gravity threshold and bring ISIS leadership under the Court's jurisdiction. This article advocates that the Court need only to expand its notions of temporal and territorial jurisdiction to close the impunity gap consisting of matters that i) are neither prosecuted by State Parties nor the Court or, otherwise, ii) are not prosecuted by non-State Parties where the Court cannot exert its complementary jurisdiction. This approach has been practiced, although inconsistently, by the ad hoc tribunals and, in select situations, before the ICC. The ISIS example is delved into later in the paper.

A broader and more expansive approach to temporal and territorial jurisdiction that casts a wide net when relevant probative evidence is considered is necessary given the increasingly cross-border nature of contemporary conflicts. These conflicts, at times, may not fit within the strict jurisdictional boundaries envisioned by the Statute. State Party territories border non-State Party territories even though attacks within the same ongoing conflict permeate borders separating these territories. A broader jurisdictional approach that is not limited to traditional notions of territoriality and temporality will lead to more situations that fall within the Court's ambit, thereby narrowing the impunity gap. Throughout this paper, I will limit my argument in favour of jurisdictional expansion to the preliminary examination,

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[20] Anne Barnard & Hwaida Saad, *ISIS Claims Responsibility for Blasts that Killed Dozens in Beirut*, N.Y. TIMES (Nov. 12, 2015), http://www.nytimes.com/2015/11/13/world/middleeast/lebanon-explosions-southern-beirut-hezbollah.html.

[21] Alissa J. Rubin, Aurelien Breeden & Anita Raghavan, *Strikes Claimed by ISIS Shut Brussels and Shake European Security*, N.Y. TIMES (Mar. 22, 2016), http://www.nytimes.com/2016/03/23/world/europe/brussels-airport-explosions.html?_r=0.

investigation, and authorization stages, because these stages comprise the framework for analyzing when and how a situation comes within the Court's jurisdiction.

Analyzing the potential use of context in determining the Court's jurisdiction has become pertinent following a referral made by the Union of Comoros ("Comoros") pursuant to an attack in May 2010 aboard the *MV Mari Marmara*, a vessel registered to Comoros and delivering humanitarian aid to the Gaza Strip.[22] After the Prosecutor deemed the matter to be of insufficient gravity to warrant formal investigation by the Court,[23] Comoros brought an application to the Pre-Trial Chamber to request the Prosecutor to reconsider her decision.[24] While the Pre-Trial Chamber granted the request and asked the Prosecutor to reconsider her decision not to investigate on the ground that the decision to investigate occupies the lowest evidentiary threshold of a "reasonable basis to proceed,"[25] one of Comoros's arguments not considered in the Pre-Trial Chamber's decision was that the underlying political context of the Israeli-

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[22] The facts leading to the referral in the situation in Comoros are fairly straight-forward and not necessarily contested. The vessel was surrounded by Israeli Defence Forces' ("IDF") helicopters with IDF soldiers firing bullets upon the ship. IDF soldiers also landed on the ship. The incident resulted in 10 deaths and numerous others injured. *See* Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia, Case No. ICC-01/13-34, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, at 3 (July 16, 2015), https://www.icc-cpi.int/CourtRecords/CR 2015_13139.PDF.

[23] Situation on Registered Vessels of Comoros, Greece and Cambodia Article 53(1) Report, Office of the Prosecutor, ¶ 151 (Int'l Crim. Ct. Nov. 6, 2014), https://www.icc-cpi.int/iccdocs/otp/otp-com-article_53(1)-report-06nov 2014eng.pdf.

[24] Rome Statute, *supra* note 3, art. 53(3); *see* Situation on Registered Vessels of the Union of the Comoros, The Hellenic Republic of Greece and the Kingdom of Cambodia, Case No. ICC-01/13-3-Red, Application for Review Pursuant to Article 53(3)(a) of the Prosecutor's Decision of 6 November 2014 not to initiate an investigation in the Situation, ¶ 1 (Jan. 29, 2015), https:// www.icc-cpi.int/CourtRecords/CR2015_00576.PDF [Comoros Application].

[25] In the Situation in the Republic of Kenya, the Pre-Trial Chamber stated that the 'reasonable basis to believe' test stated in Article 53(1)(a) is the lowest evidentiary standard found in the Statute. *See* Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 27 (Mar. 31, 2010), https://www.icc-cpi.int/Court Records/CR2010_02399.PDF.

Palestinian conflict and the existing blockade on the Gaza Strip made any and all subsequent acts that could reasonably be crimes, *inter alia*, within the Court's jurisdiction. Comoros's lawyers argued in their brief:

> "[T]he wider occupation/conflict and the blockade are pre-conditions to the exercise of the Court's subject matter jurisdiction and the necessary contextual requirements for the conduct on board the vessels (over which the Court has territorial and temporal jurisdiction) to be charged as war crimes at the ICC. . . . Acts occurring outside of the territorial and temporal jurisdiction of the Court can certainly be taken into account when considering whether the Court can exercise jurisdiction over conduct which is within its territorial and temporal jurisdiction and in order better to understand and to characterise such conduct."[26]

Comoros's argument was that the Court should consider the wider context of the blockade and occupation over the Palestinian territories as part of its gravity analysis. In other words, Comoros was requesting the Court to consider information outside its strict notion of territorial jurisdiction, as Palestine was not a State Party at the time. Such consideration would militate in favour of concluding that a reasonable basis to believe that crimes within the Court's jurisdiction have occurred. As this article will argue, the Office of the Prosecutor ("OTP"), and the Pre-Trial Chamber when authorization is required, can and should aggregate evidence from inside and outside their strict notions of territorial and temporal jurisdiction when such evidence regards the same conflict. This aggregate approach should be taken when an alternatively truncated approach considering only evidence within the Court's territorial and temporal jurisdiction would not fulfill the requisite gravity threshold. A more detailed account of the *Situation in Comoros*[27] is provided later in the paper.

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[26] Comoros Application, *supra* note 24, at 8.

[27] The Prosecutor appealed the Pre-Trial Chambers decision requesting her to reconsider the decision to not investigate. The Appeals Chamber dismissed the appeal *in limine* on the grounds that decisions of admissibility are not appealable under Article 82(1). *See* Situation on Registered Vessels of

This paper proceeds in six subsequent parts. Part II outlines the jurisdictional regime as it currently stands within the Statute. While the article outlines all bases for jurisdiction, I specify that my argument for a full contextual analysis will be confined to territorial and temporal jurisdiction. That part ends with a salient discussion on the distinction between jurisdiction and admissibility and, perhaps more importantly, on the limitations of the herein contextual approach. I specifically outline that a matter will have to fall under, at least, one of the four traditional notions of the Court's jurisdiction for a contextual approach to apply. Any argument for expanding jurisdiction that does not exist in the first place is moot.

Part III presents my idea of *Context*. While the herein approach to expanding jurisdiction may be conceptualized as considering "political" context, taking into account the history of inter and intra-national relations, external hegemonic forces, colonialist history, and ethnic and religious divides, among others, I steer clear of the term "political" given the complex and nuanced philosophical underpinnings that render that term's numerous subjective connotations.[28] The section then proceeds through decisions by both the ad hoc and hybrid tribunals and the ICC in which contextual factors were considered as an evidentiary matter when determining whether to issue an arrest warrant or convict the accused.

While my advocacy for a contextual approach focuses on the ICC's initial assertion of jurisdiction by the OTP and the Pre-Trial Chamber, previous decisions—at albeit different stages of the litigation process—illustrate that the tribunals and Court are able to account for evidence outside the traditional boundaries of temporal and territorial jurisdiction. Part IV

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the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, ICC-01/13-51, Decision on the admissibility of the Prosecutor's appeal against the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation" (Nov. 6, 2015), https://www.icc-cpi.int/CourtRecords/CR2015_20965.PDF.

[28] This contention concerning the difficulty in defining the term "political" is also expressed in Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 266-67 (2012) ("Most recently, some authors have suggested that the prosecutor's role is inevitably political and should be acknowledged as such. The participants in this debate rarely define what they mean by 'political. . .'").

builds on the decisions cited in Part III by conceptualizing a contextual approach as an evidentiary enquiry in which the focus should be on the relevance and probity of collected information falling outside traditional territorial and temporal parameters.

Part V delves into the justifications for *Context* consideration. I divide that part into procedural and textual justifications. Procedurally, I argue that the ICC's multi-step prosecutorial process, which I term the Funnel Approach, provides a relatively open-ended evidentiary scope to the OTP and Pre-Trial Chamber to consider *Context*. Textually, I argue that the gravity analysis is intentionally ambiguous so as to provide a flexible and fluid approach to asserting jurisdiction.

Part VI proceeds through various implications of *Context* consideration. I argue that *Context* must be taken into account to effectively close the impunity gap between i) State Parties unwilling or unable to prosecute a situation; and ii) non-State Parties that do not fall within the Court's jurisdiction. I also address criticisms that may arise to a contextual approach to jurisdiction, such as impinging State sovereignty, turning the Court's members into a group of activists rather than objective and sober legal determinists, and the prospect of adding unwanted ambiguity into the jurisdictional analysis. Part VI goes through a practical example of prosecuting ISIS at the ICC. Part VII concludes this paper.

II. ICC Jurisdiction

a. Traditional Notions of Jurisdiction

The Rome Statute outlines the four bases of temporal, nationality, territorial, and subject matter jurisdiction in various provisions.[29] Temporally, the Court's jurisdiction applies

[29] *See* Rome Statute, *supra* note 3, arts. 11-13, 22. Nationality jurisdiction differs from personal jurisdiction in the domestic context. Whereas Article 12(2)(b) of the Rome Statute confers jurisdiction over "[t]he State of which the person accused of the crime is a national," personal jurisdiction in the domestic context is a person or organization's physical presence within a State's territory or, otherwise, its 'minimum contacts' with that State. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

only after the Statute enters into force, which is July 1, 2002.[30] For parties signing after that date, the Statute enters into force from the date the State Party signed it.[31] Furthermore, there is no criminal responsibility "unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court."[32] This applies particularly to crimes of aggression, which are not within the Court's jurisdiction until at least 2017.[33] Therefore, acts constituting the elements of a crime of aggression committed before 2017 cannot be investigated and prosecuted by the Court unless those same acts are initiated again or, otherwise, continue after 2017. The bar to retroactivity under the Statute (other than Article 12(3) Declarations) differs from the European Court of Human Rights ("ECHR") conception, which allows for prosecution of crimes retroactively when those crimes are both accessible and reasonably foreseeable by an offender.[34]

Under nationality jurisdiction, the Court is limited to prosecuting nationals of a State Party. For Article 12(3) Declarations or UNSC referrals where the Court's jurisdiction extends to non-State Party territories, the Court has jurisdiction over nationals from those territories. The ICC does not recognize immunity *ratione personae* for crimes committed by sitting or former heads of state.[35] While the Court can assert jurisdiction over nationals committing crimes on non-State Party territories,

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[30] Rome Statute, *supra* note 3, art. 11(1).

[31] *Id*. art. 11(2). Under Article 11(2), there is an exception for declarations made under Article 12(3) for non-State Parties. For Article 12(3) declarations, the Statute applies retroactively. Article 11(2) states, "[i]f a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, *unless that State has made a declaration under article 12, paragraph 3*." (emphasis added).

[32] *Id*. art. 22(1).

[33] *See* Koh & Buchwald, *supra* note 6, at 257.

[34] *See* Schabas, *supra* note 12, at 74 (citing SW v. United Kingdom, 355-B Eur. Ct. H.R. paras. 35-36 (1996); CR v. United Kingdom, 335-B Eur. Ct. H.R. paras. 33-34 (1995); Kononov v. Latvia, App. No. 36376/04 Eur. Ct. H.R. (2010).

[35] Dapo Akande, *International Law Immunities and the International Criminal Court*, 98 AM. J. INT'L L. 407 (2004) ("[I]mmunity *ratione materiae* does not exist with respect to domestic criminal proceedings for any of the international crimes set out in the Statute of the ICC.").

the Prosecutor retains discretion whether to pursue those nationals if, in her opinion, they play subordinate or minor roles within a criminal organization. This appears to be the Prosecutor's approach to State Party nationals committing crimes in Iraq and Syria as part of ISIS, as discussed above.

The ICC has territorial jurisdiction over crimes committed on the territory of a State Party regardless of the offender's nationality.[36] The Court also has jurisdiction over crimes committed on the territory of States accepting jurisdiction on an ad hoc basis as well as through UNSC referrals.[37] The exception to the general rule for territorial jurisdiction exists under Article 121(5), adopted in the 2010 Conference, whereby State Parties that have not accepted that amendment are not subject to its jurisdiction. Under territorial jurisdiction, the Statute also includes crimes committed on board vessels or aircrafts registered to a State Party, which is why Comoros was able to refer a case to the Court as the *MV Mavi Marmara* is considered an extension of its territorial boundaries.

For the crimes of genocide, crimes against humanity, war crimes, and crimes of aggression falling within the Court's jurisdiction, each crime is outlined in the Statute,[38] and supplemented by the accompanying Elements of Crimes.[39] By and large, the Court's subject matter jurisdiction is adopted from the Nuremberg and Tokyo tribunals after World War II where the crimes were referred to as crimes against peace, war crimes, and crimes against humanity.[40] Although the term 'genocide' had already been coined at the time of the Nuremberg and Tokyo trials, the indictments against Nazi perpetrators for the crimes against European Jews were argued under crimes against humanity.[41]

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[36] Rome Statute, *supra* note 3, art. 12(2)(a).

[37] *Id*. art. 13(b).

[38] *Id*. arts. 6-8.

[39] Elements of Crimes, *supra* note 4.

[40] *See* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter].

[41] Schabas, *supra* note 12, at 90-91.

As mentioned above, the argument for expanding jurisdictional scope will herein be limited to temporal and territorial jurisdiction. The Court's subject matter jurisdiction is defined and limited to the four crimes mentioned in the Statute. Also, its limitations on nationality jurisdiction leave little space for ambiguity, as it is a question of fact whether someone is or is not a national of a particular country. Conversely, relevant and probative information can be considered from both inside and outside the Court's temporal and territorial jurisdiction in the midst of the same conflict to determine which situations should be investigated.

Particularly with territorial jurisdiction, there exists an asymmetry between where conflicts occur and where the Court can exercise its jurisdiction. In other words, modern conflicts inevitably permeate across State borders. Conflicts often times take place in areas where a State Party to the Court borders a non-State Party(ies).[42] Consequentially, the Court is unable to consider the entirety of a situation due to its limitations to investigate only within the territory of a State Party. Take, for instance, conflicts occurring in the Middle East or parts of Africa. While Palestine is a State Party after its conferral as an observer State at the UN General Assembly,[43] Israel is not a State Party; while Jordan is a State Party, Iraq and Syria are not State Parties; while Kenya is a State Party, Somalia is not; while Chad is a State Party, Libya and Egypt are not. The porous nature of intra and inter-State conflicts obviates the Statute's ability to effectively and adequately investigate those situations that fall within its jurisdiction by trimming its investigative and prosecutorial scope only to those situations that fall strictly within its traditional notions of territorial and temporal jurisdiction.

While a situation may fall within the Court's jurisdiction pursuant to an attack occurring within the territory of a State

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[42] A related example concerns transnational conflicts where combatants of a State Party commit crimes on the territory of a non-State Party, e.g. British forces committing alleged war crimes in Iraq. *See* HÉCTOR OLASOLO, ESSAYS ON INTERNATIONAL CRIMINAL JUSTICE 33 (2012).

[43] *State Parties to the Rome Statute: Asia-Pacific States*, INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/asian%20states.aspx (last visited Feb. 7, 2017).

Party, the Court will be forced to neglect, at times, a plethora of relevant information that may be necessary for it to meet the gravity threshold necessary to continue with the prosecutorial process. Gravity determinations initially inhibited an investigation from commencing for alleged war crimes in Iraq by British forces.[44] Nonetheless, after reconsidering, the OTP has subsequently decided to investigate.[45]

b. Jurisdiction vs. Admissibility

As a final note to the jurisdictional framework as it currently stands in the Statute, both the concept and analysis of jurisdiction (under the four rubrics discussed above) are distinct from the admissibility of a case or situation. Whereas jurisdiction is a threshold determination, admissibility is considered after jurisdiction has been established and can negate the prospect of a situation reaching the Court even though it falls within the Court's jurisdiction. Under Article 17, the admissibility analysis considers whether a case under the Court's jurisdiction is or has been investigated or prosecuted in a national jurisdiction, whether prosecution would amount to *res judicata*, or, otherwise, whether the case is of sufficient 'gravity.'[46] Similarly, under Article 53, the Prosecutor can decide not to initiate an investigation taking into account Article 17 factors or by using lack of gravity to conclude that an investigation would not be in the interests of justice. In sum, admissibility can negate the finding of *prima facie* jurisdiction.

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[44] Letters to Senders re Iraq, Office of the Prosecutor, INT'L CRIM. CT., 2 n.4 (Feb. 9, 2006), https://www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-690BE61D0B5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2007.pdf ("[T]aking into account all the [gravity] considerations, the situation did not appear to meet the required threshold of the Statute.").

[45] Press Release, Int'l Crim. Ct., Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq (May 13, 2014), https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014.

[46] *See* Rome Statute, *supra* note 3, art. 17, 20(3). For an overview of the distinction between admissibility and jurisdiction, see Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity,* 7 UNYB 591, 594 (2003).

Throughout this paper, it will be advocated that the OTP and Pre-Trial Chamber may consider relevant and probative information outside territorial and temporal jurisdictional boundaries to bolster the admissibility criterion of gravity. As stated, the Statute contains separate enquiries for jurisdiction and admissibility. Jurisdiction considers where, when, why, and to and by whom attacks were committed. It is a preliminary enquiry separate and apart from the admissibility requirements outlined in Article 17 for a particular case and in Article 53 for the initiation of an investigation into a situation. Admissibility—specifically, whether a State Party is prosecuting a matter or whether it reaches the gravity threshold—is only considered once one of the four bases for jurisdiction outlined above is fulfilled.

As just stated, the herein argument only applies in situations where one of the four bases for jurisdiction has been fulfilled. If jurisdiction is not established, the Court cannot consider contextual factors. Only when either nationality, subject matter, territorial, or temporal jurisdiction exists can the Court expand that jurisdiction. This paper advocates for the permissibility of expanding territorial and/or temporal jurisdiction once one basis for jurisdiction is established.

Currently, statutory limitations exist for both temporal and territorial jurisdiction, as outlined at the beginning of this section. Temporally, the Statute only applies after July 2002. Territorially, the Statute is limited to State Parties, or, otherwise, its nationals in non-State Party territories. I argue here that the Court can expand territorial and/or temporal jurisdiction at the preliminary examination and investigation stages to consider contextual information temporally from before July 2002, or territorially from attacks on non-State Party territories committed by non-State Party nationals. This information from outside the Court's traditional jurisdiction can then be aggregated with information from attacks within the Court's traditional temporal and territorial jurisdiction. That information can then be used in the aggregate to reach the gravity threshold required for admissibility under Articles 17 and 53.

Two caveats exist to the herein approach to expanding jurisdiction to meet the gravity threshold. First, the information

considered from both inside and outside the Court's traditional temporal and territorial jurisdiction must relate to the same conflict. The cross-border nature of conflicts has led to attacks being perpetrated in various states and at various times. Some of these attacks may fall within the Court's traditional temporal or territorial jurisdiction, and others may not. Second, the contextual aggregate approach to information collection is only used when staying within the Court's traditional temporal and territorial jurisdiction would not itself meet the gravity threshold. For instance, in the flotilla attack, gravity may not have been met when looking at the attack on its own even though it fell within the Court's territorial jurisdiction. There is permission under the Statute, as Comoros argued, for the Court to consider information from within the Gaza Strip, which was not under the Court's territorial jurisdiction at the time of the attack. Aggregating information from attacks on the flotilla (inside the Court's territorial jurisdiction) with information from attacks on the Palestinian territories (outside the Court's territorial jurisdiction) would assist in meeting the gravity threshold. It is arguable whether the gravity threshold would be met by considering the flotilla attack in isolation—given the relatively low number of casualties resulting from the attack. For this example, the expansive aggregate approach to information collection would serve as a basis to potentially prosecute Israeli officials who would not otherwise come within the Court's jurisdiction, as Israel is not a State Party.

To further elaborate, it is mandatory that one of the four traditional bases of jurisdiction is present before a contextual approach is employed. In this vein, I do not argue that a matter of high gravity (i.e. resulting in many casualties or infrastructural destruction) can come before the Court when the traditional requirements of the four bases of jurisdiction as laid out in the Statute have not been met. A heinous attack killing hundreds or thousands of people completely within the territory of a non-State Party in the midst of a conflict with no direct or indirect effects on the territory of a State Party and with no involvement from State Parties' nationals would not fall within the Court's jurisdiction. As such, a contextual approach could not be taken. In the next part of this paper, I outline five

requirements for the application of a contextual approach to cross-border conflicts.

As stated in the introduction, the herein argument is limited to expanding, not changing, the Court's established bases for jurisdiction. Asserting jurisdiction regardless of the nationality and territory of the accused and attack, respectively, would amount to universal jurisdiction—a concept for which there is no basis in the Statute.[47] Nonetheless, from the examples outlined in Part III, the notion of an exclusively domestic conflict is becoming less common. The increasing norm is cross-border conflicts where attacks within the same conflict are perpetrated in various places and over a prolonged period of time. As such, it is necessary to apply a contextual approach to expand the ICC's jurisdiction to account for these trans-border conflicts and prosecute non-State Party nationals who are leading criminal organizations from non-State Party territories.

To conclude this discussion on the distinction between jurisdiction and admissibility in light of the requirements and caveats presented above, I lay out five criteria that must be fulfilled to proceed with an investigation under an expansive contextual approach aggregating information from inside and outside the Court's temporal and territorial jurisdiction. The five criteria are as follows:

1. Attacks by the same organization, whether directly by its leadership or (more likely) through its subordinates, would occur on the territories of both State and non-State Party territories;
2. The organization's leadership would reside in the territory of a non-State Party and be nationals of a non-State Party;
3. The attacks on State Party territories, taken in isolation, would not reach the gravity threshold;

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[47] Kirsch, *supra* note 16, at 542 ("The ICC does not have universal jurisdiction."); *see also* Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches And The Transnational Prosecution Of International Crimes,* 105 AM. J. INT'L L. 1, 1 (2011) ("Unlike the regime of international criminal tribunals created by the United Nations Security Council and the enforcement regime of the International Criminal Court (ICC), the regime of universal jurisdiction is completely decentralized.").

4. Aggregating the casualties and/or effects of the attacks by the organization on State and non-State Party territories would fulfill the gravity threshold; and
5. The State Party would be unable or unwilling to prosecute the perpetrators of attacks on its territory.

Each of the above five criteria must be fulfilled independently for the OTP and Pre-Trial Chamber to consider information outside its temporal and territorial jurisdiction during the preliminary examination and investigation stages. If even one of the above factual enquiries is not fulfilled, then the herein argument does not apply. Part III below specifically defines *Context* and its significance. That part then proceeds through previous decisions by both the ad hoc tribunals and the ICC where evidence—albeit at times in later stages of the prosecutorial process—was considered outside the Court's temporal or territorial jurisdiction.

III. A Contextual Jurisdictional Framework

a. Defining *Context*

As alluded to above, the ICC is distinct from its domestic and ad hoc / hybrid predecessors in that its prosecutorial discretion function and ability to consider large scale crimes perpetrated either by a State's government or forces opposing the government inherently politicize its proceedings. State actors, whether as perpetrators or recipients of armed attacks, have and will play heavily into cases before the ICC. As Burke-White notes, the DRC's self-referral to the Court functioned "as a politically expedient solution for the Congolese president to deal with potential electoral rivals. . ."[48] The interaction between the Court and domestic political systems comes in various forms, either through the State referral system or, otherwise, the requirement to cooperate with the Court's proceedings.[49]

The Court is not only subject to a referral from a State Party, but also from the UNSC, a committee of permanent and

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[48] Burke-White, *supra* note 1, at 559.

[49] *See generally* Rome Statute, *supra* note 3, at Part IX.

rotating States. Moreover, as a matter proceeds through its prosecutorial process, ICC judges are required to assess political concepts, such as diplomatic immunity, military command, the right to self-determination, and the responsibility to protect. While these topics may arise (although rarely) in domestic prosecutions, the ICC serves as an outside body whose jurisdiction only exists due to a State's consent by treaty or, otherwise, as a result of a UNSC referral foisting jurisdiction upon a State. In that light, the ICC essentially imposes its jurisdiction over a State's sovereignty and this may be done, at times, while conflicts in other States are not being investigated or prosecuted.[50] This permanent function, as opposed to the ad hoc nature of the predecessor tribunals, renders the ICC a unique Court that must remain loyal to its mandate to prosecute crimes within its jurisdiction while simultaneously relying on individual States to fulfill their duties and responsibilities triggered upon signing the Statute.

While the contention of this article is that the ICC should aggregate information both from inside and outside its traditional notions of territorial and temporal jurisdiction, I remain hesitant to characterize this expansive approach as considering "political" context. Politics as social order and societal classification finds its roots in Aristotelian thought, which essentialised political order from the family structure all the way up to a State's relation to its subjects. The term "politics" itself has deep historical roots with varied interpretations and iterations as diverse as Mill's harm theory, Machiavelli's separation of morality and the science of politics, and Locke's rights-based approach to politics leading to the Rawlsian conception of a liberal State. Given the historical complexity of the term "politics" *vis-à-vis* its narrative of State-to-State or State-to-citizen relations, I advocate for the ICC to expand its information gathering approach by stretching the boundaries of, specifically, territorial and temporal jurisdiction. I will simply

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[50] *See* deGuzman, *supra* note 28, at 276 ("The ICC currently suffers from low purposive legitimacy—it lacks both a defined community to which it is responsible and accepted values or goals associated with its work. The ICC's deficiencies in these regards distinguish it from national courts and explain why it is more important for the ICC to articulate acceptable justifications for its selection decisions than it is for national courts to do so.").

refer to this concept going forward as *Context*. This can be illustrated through the following formula:

Context (in relation to a particular conflict)
=
Relevant and probative information inside and outside the geographical boundaries of a State Party
+
Relevant and probative information prior to and after the ratification of the *Rome Statute*

The consideration of *Context*, whether by the OTP or Pre-Trial Chamber (for authorizations of *proprio motu* decisions), when deciding whether to assert jurisdiction is significant for three reasons. First, the prevalence of cross-border armed conflicts in conjunction with the reality that not all States have ratified the Statute means that there will exist conflicts where, according to the strict parameters of the Statute, a portion of attacks will fall within the Statute's territorial jurisdiction while other attacks will not—even though those attacks may be committed by the same entity in the midst of the same conflict. As Moir notes, the traditional dichotomy in the law of war between international (State versus State) and non-international (State versus rebel group) armed conflicts is breaking down. Modern warfare often consists of State versus rebel conflicts that transcend national borders.[51] This is exemplified by the U.S. war on terror against Al-Qaeda post-9/11, and the current ongoing conflict between Western and Middle Eastern States against ISIS.

The proliferation of non-State actors over the past fifty years has increased cross-border conflicts. Previous conflicts between State and non-State actors tended to stay within the boundaries of a single State. This is illustrated in the conflict between the Nicaraguan government and the Contras, or between the South Vietnamese Government and the National Liberation Front (Viet Cong). However, contemporary conflicts

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[51] Lindsay Moir, *'It's a Bird! It's a Plane! It's a Non-International Armed Conflict!': Cross-Border Hostilities Between States and Non-State Actors*, *in* CONTEMPORARY CHALLENGES TO THE LAW OF WAR 71-94 (2014).

do not respect State boundaries as in the past. Conflicts now expand across regions, such as the Lord's Resistance Army's conflict with Uganda, South Sudan, the Central African Republic, and the Democratic Republic of the Congo. Some conflicts even transcend continents, as exemplified by ISIS's attacks in various parts of the Middle East, West Africa, and Western Europe. The increasing normalcy of cross-border conflicts across nations that are State or non-State Parties makes the requirement of considering *Context* necessary.

The second significant reason for *Context* relates to the first - the emergence in many armed conflicts of non-State actors that do not adhere to the traditional laws of war.[52] Organized rebel groups, such as ISIS and Boko Haram, are not only conflating traditional territorial borders, but also launching attacks in multiple countries across a prolonged timespan without a firm declaration of war. In conjunction with Al-Shabab, another terrorist organization, Boko Haram, has launched offensives in parts of Kenya and Nigeria, both State Parties, while operating out of parts of Somalia, a non-State Party.[53] Any potential prosecution of either Boko Haram or Al-Shabab members can and should be considered in the territorial aggregate when the OTP engages in its analysis of whether to commence an investigation. Bifurcating Boko Haram and Al-

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[52] Non-state actors are bound by International Humanitarian Law as a matter of customary international law and by virtue of the citizenship of their members in States Parties to the relevant treaties. *See* Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INT'L REV. RED CROSS 189, 202 (2011) ("There is no substantive reason why the norms that apply to an armed conflict between a state and an organized armed group within its territory should not also apply to an armed conflict with such a group that is not restricted to its territory. It therefore seems . . . that to the extent that treaty provisions relating to non-international armed conflicts incorporate standards of customary international law, these standards should apply to all armed conflicts between a state and non-state actors. This means that, at the very least, Common Article 3 will apply to such conflicts.") (quoting David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?* 16 EUR. J INT'L LAW 171, 195 (2005)).

[53] Murithi Mutiga, *Are the Terrorists of Al-Shabaab about to Tear Kenya in Two?*, THE GUARDIAN (Apr. 4, 2015, 12:16 PM), http://www.theguardian.com/world/2015/apr/04/kenya-university-massacre-shabaab-divisions ("There have been media reports of collaboration in terms of training and exchanging ideas between Boko Haram and al-Shabaab, but it is essential to study the Shabaab's aims in greater detail to see what their goals are.")

Shabab's activities in East Africa according to strict territorial limits obviates a full evidentiary analysis where the complete intensity and scope of the attacks, and the depth of their organization and planning, will not be considered.

The third significant reason to implement *Context* when assessing jurisdiction is that innovative technologies have altered the manner of modern warfare. Such technologies are less constrained by geographical boundaries and, likewise, do not fall within the traditional characterization of an attack occurring at a specific time. Technological advancement has resulted in new tactics, such as cyber-attacks and drones. Both of these mechanisms lack territorial specificity (although drones can be controlled to a greater extent), and with cyber-attacks, it can be debated when an attack actually commences.[54] The current territorial and temporal constraints imposed by the Statute do not suffice in accounting for these new technologies. While it is beyond the scope of this paper, efforts such as the *Tallinn Manual on the International Law Applicable to Cyber Warfare* are attempting to address the various technological advancements in contemporary conflicts.[55]

The three factors outlined above signify the continually changing structure of international criminal law and the law of war. The Court has not achieved universal acceptance to date (especially in high conflict regions), and the actors and means involved in modern warfare are rapidly changing such that the international legal framework has not been able to follow suit. The following decisions, from both the ad hoc tribunals and the ICC, illustrate instances where judges have accounted for evidence presented by the prosecution extending beyond the statutory temporal and territorial limitations.

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[54] For an example of submissions at the ICC in relation to cyber-attacks, see Peter Micek, *Evidence of Communications Disruptions re: Investigation of Central African Republic for Crimes Against Humanity*, ACCESS (Feb. 13, 2014), https://www.accessnow.org/evidence-international-criminal-court-net-shutdown-in-central-african-repub/.

[55] TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt, ed., 2013).

IV. *Context* Consideration at the Ad Hoc Tribunals

As mentioned above, the ad hoc and hybrid tribunals are distinct from the ICC in that the former do not have referral mechanisms and are limited to a specific conflict. They are not permanent courts, and are arguably not committed to building a coherent and consistent policy when considering evidence and deciding what situations are ultimately to come within their jurisdiction. The decisions below concern evidentiary findings and, particularly, the admissibility of evidence outside statutory temporal and territorial limitations. The preliminary evidentiary issues in these decisions do not concern whether the case is properly before the tribunal. The accused has already been arrested and is before the tribunal. Rather, the legal questions pertain to the evidentiary scope to be considered when determining whether crimes within the tribunal's jurisdiction have occurred. Conversely, in the ICC decisions also discussed below, questions concerning the Court's jurisdiction over a particular situation or an accused—whether to commence an investigation or issue an arrest warrant—were at issue.

i. *Nahimana* (ICTR)

Ferdinand Nahimana was a Rwandan historian and founder of the radio station *Radio Télévision Libre des Mille Collines*. At the ICTR, it was alleged that in 1993, he carried out acts inciting genocide that continued until 1994 when the physical acts constituting the Rwandan genocide occurred. As the ICTR's temporal jurisdiction began from January 1, 1994,[56] the defence argued that Nahimana's comments before that date fell outside the ICTR's jurisdiction. They also argued that the incitement to genocide was not a crime that continued to run from the moment the comments were uttered until the time the acts of genocide were committed in 1994. The Prosecutor, on the other hand, argued that "[l]ogically, matters which go towards proof of events happening in 1994 may antedate 1994,"[57] and

[56] S.C. Res. 955, art. 7 (Nov. 8, 1994).

[57] Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Appeals Judgment, ¶ 304 (Nov. 28 2007), http://www.un.org/en/preventgenocide/rwanda/pdf/

unless the ICTR Statute expressly prohibited the reception of evidence before 1994, the evidence should be admissible.[58] The Prosecutor contended that the defence confused the concepts of jurisdiction and admissibility,[59] with the latter being the means the Tribunal can use to decide the former.[60] The Prosecutor also argued that Nahimana's comments pre-dating the Tribunal's temporal jurisdiction would be used to establish his *mens rea*.

The Appeals Chamber relied on the strict wording of Article 7 of the ICTR Statute and the comments made in a 1995 UN Secretary General Report[61] in concluding that the Tribunal's jurisdiction would be limited to crimes commenced and concluded in 1994. The Appeals Chambers, however, did accede to the Prosecutor's argument that evidence pre-1994 was admissible if it was relevant, of probative value, and there was no compelling reason to exclude it. The Appeals Chamber held that the pre-1994 evidence, to be admitted, should i) be aimed at clarifying a given context, ii) establish by inference the elements of criminal conduct occurring in 1994 or iii) demonstrate a deliberate pattern of conduct.[62] The Appeals Chamber concluded that the Trial Chamber did not exceed its jurisdiction or breach trial fairness by relying on pre-1994 evidence.[63]

The Appeals Chamber decision also discussed whether direct and public incitement to genocide occurring pre-1994 was

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NAHIMANA%20ET%20AL%20-%20APPEALS%20JUDGEMENT.pdf [hereinafter Nahimana Appeals Judgment].

[58] *Id*.

[59] Admissibility here refers to evidentiary admissibility and is distinct from that in Article 17 of the Rome Statute, which concerns admissibility of a situation before the Court when a domestic jurisdiction is unwilling or unable to prosecute and the Court finds the matter meets the gravity and interests of justice thresholds.

[60] Nahimana Appeals Judgment, *supra* note 57, ¶ 304.

[61] The Report stated, "The temporal jurisdiction of the Tribunal is limited to one year, beginning on 1 January 1994 and ending on 31 December 1994. Although the crash of the aircraft carrying the Presidents of Rwanda and Burundi on 6 April 1994 is considered to be the event that triggered the civil war and the acts of genocide that followed, the Council decided that the temporal jurisdiction of the Tribunal would commence on 1 January 1994, in order to capture the planning stage of the crimes." *See* U.N. Secretary-General, Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 995 (1994), ¶14, U.N. Doc. S/1995/134 (Feb. 13, 1995).

[62] Nahimana Appeals Judgment, *supra* note 57, ¶ 315.

[63] *Id*. ¶ 316, at 98.

a continuing crime with a persistent or ongoing course of conduct that, therefore, came within the ICTR's jurisdiction. It concluded that incitement to commit genocide is an inchoate crime that "is completed as soon as the discourse in question is uttered or published, even though the effects of incitement may extend in time."[64] The Chamber, however, again noted that while *Nahimana* could not be convicted solely for comments pre-1994, the Trial Chamber could have considered those comments as contextual elements. The Chamber, for example, held that the pre-1994 comments inciting genocide could be used to explain how the radio station listeners perceived the 1994 broadcasts. The Appeals Chamber found the pre-1994 radio broadcasts admissible based on their relevance and probative value.[65]

Nahimana did not use evidence outside its temporal jurisdiction to establish the *actus reus* of genocide or incitement to commit genocide. Rather, the tribunal admitted the evidence within the broader contextual analysis of the Rwandan genocide given its probative value and relevance to acts that actually occurred within 1994. The Appeals Chambers recognized the saliency of contextualizing serious crimes that may straddle both sides of temporal jurisdictional boundaries. Before physical acts of genocide are undertaken, an environment of revulsion and animosity must exist that takes time to develop.

Nahimana's broadcasts, both outside and inside the ICTR's temporal jurisdiction, were relevant to establishing this animus, thereby leading to genocide, and subsequently to Nahimana's conviction according to his role. Similarly, my argument for *Context* consideration to bolster the gravity requirement at the ICC requires that the elements of the crime in question, as a threshold, take place within the territorial and temporal jurisdictional limits. Similarly to *Nahimana*, where conduct by the same person in the course of the same conflict straddled temporal boundaries, armed conflicts considered at the ICC can straddle the Court's temporal and/or territorial jurisdictional limits.

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[64] *Id.* ¶ 723, at 230.
[65] *Id.* ¶ 725.

ii. *Akayesu* (ICTR)

Jean-Paul Akayesu was a politician for the Republican Democratic Movement in Rwanda and was the mayor of the Taba Commune from April 1993 to June 1994. He was alleged to have acquiesced to and personally supervised the killing of Tutsis while a mayor. At the ICTR, he was charged with genocide, crimes against humanity, and violation of Common Article 3 to the Geneva Convention concerning conflicts of a non-international nature.[66]

At trial, the Tribunal opined that the indictment against Akayesu could not properly be understood without insight into the historical, political, and ethnic context of Rwanda. In that light, the Tribunal was required to consider extra-temporal evidence in order to determine the existence of genocidal policy. The Tribunal proceeded through Rwanda's colonial history from the 19th century onwards. Prior to the Belgian occupation, the distinction between Hutu and Tutsi was merely of lineage and "one could move from one status to another, as one became rich

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[66] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Common Article 3 to the Geneva Conventions of 12 August 1949 provides: ". . . the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;(b) taking of hostages;(c) outrages upon personal dignity, in particular humiliating and degrading treatment;(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

Akayesu was also charged under Article 4(2)(e) of the additional protocol as incorporated by Article 4(e) ("[o]utrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault") of the Statute of the Tribunal. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(e), June 8, 1977, 1125 U.N.T.S. 609.

or poor, or even through marriage."[67] The Tribunal explained that the permanent distinction between the two groups was introduced under the Belgian occupation in the 1930s, which mandated all Rwandans to carry identity cards specifying their designated group.[68] The ethnic divide deepened as the Belgian government disproportionately favoured the Tutsi population while the Catholic Church further sought to illuminate the differences in each group.[69]

The Tribunal then went on to discuss the power struggles, which perpetuated in Rwanda from the 1950s onwards as political parties divided on ethnic, rather than ideological, lines. The Tribunal explained the continued fighting between Tutsi rebels, organized both within Rwanda and externally through Tutsi exiles in Uganda, and the ruling government of President Habyarimana, who was pro-Hutu. The historical context was described up until the plane crash killing President Habyarimana and President Ntaryamirai of Burundi as they were returning from discussing peace accords in Dar-es-Salaam with the disputing Rwandan factions.[70]

While it was the April 1994 plane crash that constituted the immediate pre-cursor to the Rwandan Armed Forces ("RAF") and the presidential guard killing various Tutsi members of the coalition government, and subsequently ordinary Tutsi citizens, the events following the crash did not occur in a vacuum and were necessary evidence to establish Akayesu's genocidal intent. Absent this informative background, Akayesu was no more than a negligent politician who neither had the will nor the power to stop killings within his jurisdiction. In that case, the high threshold for establishing genocidal intent would not have been met. However, the context of the ethnic divisions that evolved over the preceding century better placed Akayesu's actions and inactions within the realm of genocidal crimes falling within the ICTR's jurisdiction.

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[67] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 81, at 47 (Sept. 2, 1998), http://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf [hereinafter Akayesu Trial Judgment].

[68] *Id.* ¶ 83, at 48. This practice was abolished after the 1994 Genocide.

[69] *Id.* ¶¶ 83-87, at 48-49.

[70] *Id.* ¶ 106, at 57.

iii. *Taylor* (SCSL)

Charles Taylor was the president of Liberia from 1997 to 2003. Pursuant to an agreement between the Government of Liberia and the United Nations, the Special Court for Sierra Leone ("SCSL") was formed in order to prosecute Taylor for his crimes committed as a rebel leader and, after his ascendency, as a president.[71] The crux of the charges related to Taylor's alleged support of the Revolutionary United Front ("RUF"), a rebel group whose goal was to overthrow the All People's Congress ("APC") Government of Sierra Leone. Taylor supplied arms and facilities to the RUF in exchange for blood diamonds. RUF's role in Sierra Leone's civil war resulted in thousands of civilian deaths.

At trial, the defence brought a motion limiting evidence to the temporal and territorial scope as defined by the SCSL Statute.[72] Taylor's lawyers objected to the evidence of crimes allegedly committed in Liberia and evidence that pre-dated the "indictment period." The Prosecution, conversely, argued that the Chamber was permitted to admit any relevant evidence as stated in Rule 89(C) of the Tribunal's Rules of Evidence.[73] The prosecution also argued that Taylor's crimes were continuous in that his intention was formed prior to the Tribunal's temporal mandate and continued after its mandate began, such that both the *actus reus* and *mens rea* could be established within the Tribunal's jurisdiction with the anterior temporal evidence

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[71] Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶¶ 12-14 (May 18, 2012), http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf [hereinafter Taylor Trial Judgment]. The specific indictment charged Taylor with crimes against humanity (murder, rape, sexual slavery, other inhumane acts and enslavement). Taylor was also charged under Article 3 common to the Geneva Convention and Additional Protocol II for acts of terrorism, violence to life, health and physical or mental well-being of persons. He was also charged with conscripting children under 15 years of age.

[72] Prosecutor v. Taylor, Case No. SCSL-03-01-T, Defence Motion to Exclude Evidence Falling Outside the Scope of the Indictment and/or the Jurisdiction of the Special Court for Sierra Leone, ¶¶ 3-4 (Sept. 24, 2010), http://www.rscsl.org/Documents/Decisions/Taylor/1101/SCSL-03-01-T-1086.PDF.

[73] *See* Taylor Trial Judgment, *supra* note 71, ¶¶ 92-97, at 45-47 (submissions of parties relating to limiting evidence to the Statute's temporal and geographical jurisdiction).

serving as relevant context to Sierra Leone's civil war and Taylor's role in it.

The Tribunal cited the *Nahimana* appeals decision, discussed above, for the principle that both the act and intention related to the crime alleged must be committed within the temporal jurisdiction of the Tribunal.[74] The Tribunal also considered the role of temporal jurisdiction in relation to a joint criminal enterprise. In this regard, it cited the *Prlic* judgment from the ICTY for the proposition that "only criminal conduct, in the form of a joint criminal enterprise or any other form of responsibility alleged in the indictment, taking place during the alleged material period [of the indictment] may form the basis for the conviction of the accused." The Trial Chamber, nonetheless, adopted the principle from *Nahimana* that it could rely on evidence outside the Tribunal's temporal scope i) to clarify a given context, ii) to establish by inference the element, in particular the *mens rea*, of criminal conduct occurring during the material period; or iii) to demonstrate a deliberate pattern of conduct.[75]

For evidence outside a Tribunal's temporal scope, the Trial Chamber stated that such evidence could only be used to establish the existence of a continuing crime that, while commencing anterior to the temporal period mandated under the Tribunal's jurisdiction, continued into the Tribunal's temporal mandate, such that "a conviction may be based only on that part of such conduct which occurs during the material period."[76] The prosecution must, nonetheless establish beyond a reasonable doubt that the required elements of a crime continued into the indictment period.

As for evidence consistent with a pattern of conduct where some of that evidence falls outside the Tribunal's temporal scope, Rule 93 of the Tribunal's Rules of Evidence stated that such evidence may be admissible in the interests of justice. The Trial Chamber adopted the ICTR's principal in *Bagorosa*[77] that evidence of prior criminal offences is not

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[74] *Id.* ¶ 103, at 49.

[75] *Id.* ¶ 101 (citing Nahimana Appeals Judgment, *supra* note 58, ¶ 315).

[76] *Id.* ¶ 104.

[77] Prosecutor v. Bagosora, Case No. ICTR-98-41-T, Decision on

admissible simply for establishing the accused's propensity to commit an offence. Even if the prior crime was identical to the one of which an accused is charged, evidence outside of the Tribunal's jurisdiction to establish proclivity to commit a crime will not be admitted. Similar to the evidentiary principle in domestic jurisdictions,[78] the Tribunal agreed to accept similar-conduct evidence outside its temporal mandate only when "it is probative of some peculiar feature of the case" or where it is "highly distinct and unique such that it amounts to a signature of an identifiable person."[79] The Trial Chamber analogized that the three exceptions to admitting evidence outside a tribunal's temporal jurisdiction apply equally to admitting evidence outside its geographical scope.

iv. *Haradinaj* (ICTY)

During the conflict in the former Yugoslavia, Ramush Haradinaj was the commander of the Kosovo Liberation Army ("KLA"). At the ICTY, he was charged with war crimes and crimes against humanity against Serbs, Romanians, and Albanians between March and September 1998, during the Kosovo war.[80] After a partial retrial ordered by the Appeals Chamber subsequent to Haradinaj's case being dismissed, he was acquitted of all charges due to a lack of evidence.

In May 2011, Haradinaj brought a motion before the ICTY Appeals Chamber with regard to the partial retrial arguing that the indictment included charges that fell outside the retrial's scope. Specifically, he argued that any evidence not relevant to the Jablanica / Jabllanice area should be excluded. Conversely, the prosecution argued that the evidence relating to

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Admissibility of Proposed Testimony of Witness DBY, ¶ 12 (Sept. 18, 2003*) aff'd* ICTR-98-41-AR93, (Dec. 19, 2003) [hereinafter Bagosora Decision on Witness DBY].

[78] *See* R. v. Smith, [1992] 2 S.C.R. 915; R. v. Handy, [2002] 2 S.C.R. 908 (Canadian cases concerning similar-fact evidence).

[79] Taylor Trial Judgment, *supra* note 71, ¶ 108 (citing Bagorosa Appeals Judgment).

[80] Prosecutor v. Haradinaj, Case No. IT-04-84bis-AR73.1, Decision on Haradinaj's Appeal on Scope of Partial Retrial (Int'l Crim. Trib. for the Former Yugoslavia May 31, 2011), http://www.icty.org/x/cases/haradinaj/acdec/en/110531.pdf.

Haradinaj's involvement outside the Jablanica / Jabllanice area was relevant to demonstrate a continued pattern of conduct and that the events in those areas did not occur in isolation, but rather "[t]ook place in a context of violence against perceived KLA opponents."[81]

The Appeals Chamber ruled that evidence submitted regarding events outside the Jablanica / Jabllanice area was still relevant even though it pertained to charges previously dropped. The Appeals Chamber accepted the prosecution's argument that the evidence was relevant to the common purpose required to be shown amongst a Joint Criminal Enterprise ("JCE").[82]

V. *Context* at the ICC

The decisions cited below from the ICC, in counter-distinction to the ad hoc and hybrid tribunal decisions discussed above, pertain to the admissibility of an entire situation, as in the case of the Gaza flotilla incident, or a particular case, as in the arrest warrant decisions for Al-Bashir and Gaddafi. While at their root these decisions are evidentiary ones, they all relate to threshold issues of the scope of temporality and territoriality in determining whether the ICC should assert its jurisdiction.

i. *The Situation in Libya*

The situation in Libya, as to the oppositional suppression by the Gaddafi government from February 2011 onwards, was referred to the ICC by the UNSC pursuant to Resolution 1970.[83] After conducting an investigation, the OTP requested arrest warrants for Muammar Gaddafi, his son, Saif Al Islam Gaddafi, and the country's head of intelligence, Abdullah Al-Senussi. Specifically, the referral delineated acts committed by these three individuals from February 15 to February 28, 2011. Despite Libya not being a State Party to the Court, the UNSC

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[81] *Id.* ¶ 38.

[82] *Id.*

[83] S.C. Res. 1970, ¶¶ 4-8 (Feb. 26, 2011) (referring the situation in Libya to the ICC; mandating that Libyan authorities cooperate fully with the Court's investigation; urging non-State Parties to cooperate fully).

referral brought Libya within the Court's jurisdiction for the purpose of acts alleged in the referral.[84]

The application for the arrest warrant contended that the three individuals committed the crimes against humanity of murder[85] and persecution against an identifiable group.[86] To establish crimes against humanity, there must be an "attack directed against any civilian population"[87] via an organizational policy. Given the limited temporal jurisdiction provided in the referral, the Pre-Trial Chamber, in its decision to issue the arrest warrant, relied on a speech by Muammar Gaddafi given on January 15, 2011 (which is outside the referral's temporal scope) in order to find a reasonable basis to proceed. In the January 2011 and other speeches, Muammar and Saif Al Islam Gaddafi condemned the ongoing Tunisian uprisings and "stated their intention to suppress any kind of demonstrations against the regime."[88]

The Pre-Trial Chamber utilized that speech—as first referred to in the Prosecutor's application for an arrest warrant—to establish reasonable grounds to believe that an

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[84] Situation in the Libyan Arab Jamahiriya, ICC-01/11-12, Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah AL-SENUSSI, ¶ 10 (June 27, 2011), https://www.icc-cpi.int/CourtRecords/ CR2011_08350.PDF [hereinafter Situation in the Libyan Arab Jamahiriya]. The specific alleged grounds for arrest were stated as:Count 1: *Murder constituting a crime against humanity (Article 7(l)(a) and Article 25(3)(a) of the Rome Statute)*

From February 15, 2011, onwards, GADDAFI, as indirect perpetrators, and SAIF AL ISLAM and AL-SENUSSI, as indirect co-perpetrators, committed crimes against humanity in the form of murder across Libya in, inter alia, Tripoli, Benghazi, and Misrata, through the Libyan State apparatus and Security Forces in violation of Articles 7(1)(a) and 25(3)(a) of the Rome Statute;

Count 2: *Persecution (Article 7(l)(h) and Article 25(3)(a) of the Rome Statute)*

From February 15, 2011, onwards, GADDAFI, as indirect perpetrator, and SAIF AL ISLAM and AL-SENUSSI, as indirect co-perpetrators, committed crimes against humanity in the form of persecution across Libya in, inter alia, Tripoli, Benghazi.

[85] Rome Statute, *supra* note 3, art. 7(1)(a).

[86] *Id.*

[87] *Id.*

[88] Situation in the Libyan Arab Jamahiriya, *supra* note 84, ¶ 26.

organizational policy to suppress potential dissenters to the Gaddafi government was present within the referral's temporal scope. It is arguable that an organizational policy could be established if the temporal scope of the referral was limited to evidence from February 15 to February 28, 2011, as there were only two speeches by the accused which referred to the uprisings and the possibility of suppression within Libya during that time.

The Pre-Trial Chamber concluded, after taking into account evidence before and during the referral period, that there was a reasonable basis to believe that crimes against humanity, which are within the Court's jurisdiction, had taken place. The Court concluded that there existed sufficient evidence to believe that an organizational plan and policy, as required by the Statute, was present in the Gaddafi regime after the uprisings began in Tunisia and Egypt. The Chamber specifically found "reasonable grounds to believe that the highest level of the State apparatus, through the legal system, the media monopoly, and the Security Forces, designed a system which enables the monitoring, control and repression of any actual or perceived opposition to Muammar Gaddafi's regime."[89]

While the context of this decision may be within the context of a particular case in order to establish the organizational policy requirement of crimes against humanity, this analysis is equally applicable as precedent to the OTP, and the Pre-Trial Chamber in authorization decisions, adopting a policy of expansive information collection from both inside and outside the Court's temporal and territorial jurisdiction to meet the requisite gravity threshold in order to commence an investigation.

ii. *Situation in Sudan*

The situation in Sudan was another UNSC referral under Chapter VII of its Charter. The OTP sought an arrest warrant for Omar Al-Bashir, the Sudanese president, for committing "genocide, crimes against humanity and war crimes against members of the Fur, Masalit and Zaghawa groups in Darfur

[89] *Id.* ¶ 24.

from 2003 to 14 July 2008."[90] Those groups were accused of being allied with organized armed groups opposing the Sudanese Government in Darfur. Al-Bashir was accused of ordering the suppression of Darfurian civilians through the Janjaweed militia, Sudanese Police Forces, National Intelligence and Security Service ("NISS"), and the Humanitarian Aid Commission ("HAC").[91]

In its arrest warrant application for Al-Bashir, the prosecution made an inferential argument to establish genocidal intent.[92] In support of this argument, the prosecution relied on documentary evidence from the early and mid-1990s. The documents proffered were:

> 1) a Secret Bulletin issued by the Sudanese intelligence services in 1992 advocating for the execution of Fur from key government positions, intelligence services, the military and police;
>
> 2) a decree issued by President Al-Bashir in 1992 dividing Darfur into three states with the "aim and effect of diluting the political strength of the Fur;"
>
> 3) a reform law enacted in March 1995 reducing the Masalit power over land; and
>
> 4) a 1986 Armed Forces Memorandum establishing the chain of command in which President Al-Bashir was in charge of the armed forces.[93]

The Pre-Trial Chamber concluded that none of those documents were relevant to establish genocidal intent on the Sudanese government's part.The Armed Forces Memorandum establishing a chain of command between Sudan's civil government and the military forces was not necessarily

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[90] Situation in Darfur, Sudan, Case No. ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶ 4 (Mar. 4, 2009), https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF [hereinafter Situation in Darfur, Sudan].

[91] Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, Case Information Sheet, 1 (March 26, 2015), https://www.icc-cpi.int/darfur/albashir/Documents/AlBashirEng.pdf.

[92] Situation in Darfur, Sudan, *supra* note 90, ¶ 147.

[93] *Id*. ¶ 166.

unlawful.[94] The Pre-Trial Chamber stated, "evidence of close coordination provides *indicia* of the existence of a well organised governmental structure through which decisions taken in the upper levels of the [Government] can be effectively implemented."[95]

The majority of the Court, while not admitting evidence outside the referral's temporal scope, concluded there was a reasonable basis to believe that crimes against humanity and war crimes had been committed. However, the majority did not find sufficient evidence of genocide. In her dissent, Judge Anita Ušacka concluded that Al-Bashir possessed sufficient genocidal intent for the arrest warrant to include the charge of genocide. Unfortunately, while Judge Ušacka relied on contextual factors to determine genocidal intent, the extent of her dissent was limited to matters falling within the referral's temporal scope.

The *Al-Bashir* decision illustrates an instance where the Court did not admit extra-temporal evidence in its determination. Nonetheless, what must be kept in mind is that the standard of proof at the arrest warrant stage is higher than at the preliminary examination and investigation stages.[96] The herein argument for *Context* advocates that extra-temporal and extra-territorial information should be aggregated with information from within the Court's temporal and territorial jurisdiction at the initial stages of the prosecutorial process in order to fulfill the gravity threshold where bifurcating the consideration of that information would not meet the threshold. Therefore, this decision does not necessarily undermine the Court's ability to consider *Context* nor serves as a contrary precedent.

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[94] *Id*. ¶¶ 167-69.

[95] Situation in Darfur, Sudan, *supra* note 90, ¶ 169.

[96] *See* Rome Statute, *supra* note 3, art. 58(1)(a) (expounding the standard for issuing an arrest as "reasonable grounds to believe"); *see also* Manuel Ventura, *The 'Reasonable Basis to Proceed' Threshold in the Kenya and Côte d'Ivoire Proprio Motu Investigation Decisions: The International Criminal Court's Lowest Evidentiary Standard?*, *in* EDUARDO VALENCIA-OSPINA, ED, THE LAW & PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 48-80 (2013) (comparing the "reasonable basis to believe" standard with the "reasonable grounds to believe" standard).

iii. *The Situation in Comoros*

In May 2013, the Union of Comoros, a small island nation off the coast of East Africa, made a referral to the ICC for crimes within the Court's jurisdiction allegedly committed by the Israeli Defence Forces ("IDF") when their helicopters surrounded and shot at aid workers aboard a humanitarian flotilla attempting to deliver aid to the Gaza Strip.[97] The majority of the alleged crimes took place on the *MV Maria Marmara*, a vessel registered with Comoros, and thus falling within the Court's territorial jurisdiction. The attack resulted in nine deaths.[98] In its referral, Comoros discussed the attack's wider political context:

> The attack on the flotilla must be seen in the wider context of the Israel-Palestine conflict. It is a follow up to and a consequence of Operation Cast Lead (December 2008 – January 2009), which is still the subject of investigation by the Human Rights Council and was condemned by the Goldstone inquiry report. Furthermore, the blockade of Gaza has been condemned by the United Nations and the international community at large as a collective punishment that deprives the people of Gaza of the most basic of commodities and services. Indeed, the UNFFM[99] described the situation in Gaza as totally intolerable and unacceptable. The situation in Gaza is grave and the attack on the flotilla, which was aimed at perpetuating the situation, must therefore meet the test of gravity.[100]

Operation Cast Lead was a military campaign by the Israeli Government aimed at ceasing rocket fire into Israel by Hamas militants. The campaign, which lasted from December 27, 2008 to January 18, 2009, bombarded key sites in the Gaza Strip, including police stations and military outposts in Gaza,

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[97] Referral, Int'l Crim. Ct., Union of Comoros, May 14, 2013 (the Union of Comoros referred the matter of the May 31, 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip to the Prosecutor for the International Criminal Court, pursuant to Articles 12, 13, and 14 of the Rome Statute).

[98] *Id.* ¶ 12.

[99] Acronym for 'United Nations Fact Finding Mission.'

[100] Referral, Int'l Crim. Ct., Union of Comoros, *supra* note 97.

Khan Yunis and Rafah. Israel also declared a blockade of the Gaza Strip on January 3, 2009.[101] The conflict resulted in 1,417 Palestinian deaths. Moreover, as stated by the United Nations Office of the Coordination of Humanitarian Affairs, there was "massive destruction of livelihoods and a significant deterioration of infrastructure and basic services."[102]

According to the World Food Programme, anywhere from 35% to 60% of Gaza's agricultural industry was destroyed. The UN Emergency Relief Coordinator stated after the conflict that only 120 truckloads daily were getting into Gaza, whereas 500 truckloads, at minimum, were required.[103] There were also allegations of the Hamas government diverting humanitarian aid.[104] The UN Office for the Coordination of Humanitarian Affairs' Gaza Humanitarian Situation Report stated that 80% of the Gazan population could not support themselves and were therefore dependent on humanitarian aid.[105] With this background, the Gaza aid flotilla—consisting of four cargo vessels and four passenger vessels occupying approximately 700 people from 36 countries—set out to deliver humanitarian aid to the Gaza Strip in May 2010. The flotilla and its passengers were unarmed, with the vessels containing only humanitarian aid.

After the Prosecutor's decision to not investigate the alleged crimes aboard the flotilla for want of gravity and not being in the 'interest of justice,' representatives on behalf of Comoros brought an application pursuant to Article 53(3) asking the Pre-Trial Chamber to make a request to the Prosecutor to reconsider her decision. For our purposes, the pertinent part of Comoros's application is the political context, or as framed in this paper the extra-territorial information relevant to the

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101 Human Rights Comm., Report of the United Nations Fact Finding Mission on the Gaza Conflict, ¶¶ 185, 831, U.N. Doc. A/HRC/12/48 (2009).

102 G.A. Res. ES-10/2, Illegal Israeli Actions in Occupied East Jerusalem and the Rest of the Occupied Palestinian Territory (Jan. 2, 2009), [hereinafter Illegal Israeli Actions].

103 *Israel Must Allow Full Access for Aid and Supplies to Rehabilitate Gaza – UN Relief Chief*, U.N. BLOG TODAY (Jan. 27, 2009, 5:10 PM), http://un-blog-985-320-6006.blogspot.com/2009/01/israel-must-allow-full-access-for-aid.html.

104 *Id.*

105 Illegal Israeli Actions, *supra* note 102.

Israel-Palestinian conflict, as a result of the pre-existing blockade of the Gaza Strip.

Comoros argued that "the Prosecutor certainly *can* take account of all acts that occurred during the blockade and occupation in order to determine whether the acts on the vessels over which she has jurisdiction could constitute war crimes of sufficient gravity under the ICC's Statute in order to decide whether they should be investigated."[106] For Comoros, acts outside the Court's territorial jurisdiction could be taken into account in the Prosecutor's determination to investigate the situation.[107] As a result, Comoros contended, had the Prosecutor considered the wider context of the blockade and occupation following Operation Cast Lead—both aboard the *MV Mari Marmara* and within the Gaza Strip (while also extending the timeline to before the flotilla attack)—she would have determined that the attack met the gravity threshold.[108]

According to Comoros, if the blockade was unlawful by disproportionately targeting civilians or amounting to collective punishment (as concluded by the International Committee of the Red Cross and various UN bodies), then all the acts that followed in enforcing the blockade would themselves be unlawful.[109] It also argued that there was a reasonable basis to believe, unless and until disproved by an evidence-based investigation, that the particular IDF operation to intercept the flotilla formed part of a plan and policy to uphold the unlawful blockade. In this regard, Comoros utilized the language of Article 8(1) of the Statute, which only requires that crimes be committed as *part of* a policy, plan, or large-scale pattern. It argued that the Statute contained no express provision that each act constituting the plan, policy, or large-scale pattern must come within the Court's temporal or territorial jurisdiction.[110]

The argument by Comoros for the consideration of political context is, as far as can be discerned, the first such

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[106] Comoros Application, *supra* note 24, ¶ 14. Recall that at the time of the flotilla attack, the State of Palestine was not a State Party to the Rome Statute.

[107] *Id.* ¶ 15.

[108] *Id.*

[109] *Id.* ¶ 16.

[110] *Id.* ¶ 68.

argument brought before the ICC. While the decisions from the ad hoc tribunals and ICC cited above may *in vacuo* have admitted evidence outside the Court's traditional temporal or territorial jurisdiction, those decisions have not translated into any precedent. Comoros was, in effect, arguing that the Court should aggregate evidence from the flotilla attack with evidence from attacks during Operation Cast Lead and the subsequent blockade when deciding whether the gravity threshold is fulfilled.

The argument of this article mirrors that of Comoros – to use an aggregate expansive approach to information collection at the preliminary examination and investigation stages to assist in fulfilling the gravity requirement. This approach can, and should be, considered in every ICC situation and case. However, in employing this expansive approach to jurisdiction, the two caveats discussed above must be taken into account. First, information from attacks both inside and outside the Court's traditional jurisdiction must be from the same conflict. Second, an expansive approach should only be used when an otherwise bifurcated approach to determining jurisdiction would not meet the gravity threshold.

VI. *Context* and Evidentiary Admissibility

As in domestic legal systems, the ICC distinguishes between evidentiary admissibility and the weight to be given to admissible evidence.[111] Whereas admissibility of evidence is a threshold inquiry, it may be given little or no weight after its admission. The admissibility and, ultimately, the weight to be accorded to evidence is decided by the Pre-Trial Chamber judge or the panel at trial. As there is no jury system at the ICC, judges are the ultimate finders of fact. As the SCSL Trial Chamber stated in *Brima et al.*, "[i]ssues before the Special Court are conducted before professional judges, who by virtue of their education and experience are able to ponder independently

[111] The reference to evidentiary admissibility here is distinct from the concept of jurisdictional admissibility in Articles 17 and 19 of the Statute, which concerns whether a matter is of sufficient gravity and in the 'interests of justice' to warrant coming before the Court.

without prejudice to each and every case which will be brought before them."[112] The same principle would apply to the ICC, in which complete discretion is given to judges as to what evidence is admissible and, subsequently, the weight it receives.

The Statute has various provisions concerning evidentiary admissibility. Upon a motion by either party, the Trial Chamber can make a ruling "on the admissibility or relevance of evidence."[113] In deciding on admissibility, the Court balances the evidence's probative value against "any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness."[114] Conversely, the Court's Rules outline that evidence deemed "irrelevant or inadmissible shall not be considered."[115]

As with the IMT, the ad hoc tribunals use an inquisitorial model for admissibility, with a loose evidentiary threshold. The IMT Charter articulated this principle by stating, "[t]he Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to be of probative value."[116] The ICTY, ICTR, and ECCC also emphasised relevance and probity when making decisions on the admissibility of evidence.[117] The SCSL took a more expansive approach to evidentiary admissibility by

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[112] Prosecutor v. Brima et al., Case No. SCSL-2004-16-PT, Decision on the Prosecution Motion for Concurrent Hearing of Evidence Common to Cases SCSL-2004-15-PT and SCSL-2004-16-PT, ¶ 38 (May 11, 2004).

[113] Rome Statute, *supra* note 3, art. 64(9).

[114] *Id*. art. 69(4).

[115] ICC-ASP/1/3, and Coor.1 (2002), Rule 64(3).

[116] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, ¶ 19, Aug. 8, 1945, 2 U.N.T.S. 279.

[117] *See, e.g.*, ICTY Rules of Procedure and Evidence, Rule 89(C)-(D) (July 8, 2015) (as amended) [hereinafter ICTY Rules] (Rule 89(D) states that "[a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."); ECCC Internal Rules, Rules 81(1), 87(2), Rev. 9 (July 16, 2016) (as revised) [hereinafter ECCC Rules]; STL Rules of Procedure and Evidence, Rule 149(c) (2009), STL-BD-2009-01-Rev.6-Coor.1 (Apr. 3, 2014) (as corrected) [hereinafter STL RPE] ("[a] Chamber may admit any relevant evidence which it deems to have probative value."); *see also id.* Rule 149(d) ("[a] Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.").

allowing its chamber to admit any relevant evidence without conducting a balancing test.[118]

At the ICC, the threshold of admitting evidence is lower at the investigation and confirmation of charges stages than at trial. At the confirmation stage, evidentiary challenges have, by and large, failed and only been successful in lessening its weight.[119] In *Lubanga*, the Trial Chamber held that "[t]here should be no automatic reasons for either admitting or excluding a piece of evidence, but instead the court should consider the position overall."[120] In the same decision, the Trial Chamber stated, "the Chamber must be careful not to impose artificial limits on its ability to consider any piece of evidence freely, subject to the requirements of fairness."[121] Moreover, the Trial Chamber must first "ensure that the evidence is *prima facie* relevant to the trial, in that it relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims."[122] The Trial Chamber must then assess whether the evidence has probative value.[123]

In *Prosecutor v. Katanga and Ngudjolo*, the Pre-Trial Chamber held:

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[118] SCSL Rules of Procedure and Evidence, Rule 89(C) (May 28, 2010) (as amended) [hereinafter SCSL RPE].

[119] Prosecutor v. Katanga, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 70 (Sept. 30, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_05172.PDF [hereinafter Katanga] (Pre-trial Chamber evidentiary rulings do not extend to the Trial Chamber); *see id.* ¶ 189. The Pre-Trial Chamber also stated, "should charges against the suspects be confirmed, any ruling on the admissibility of a particular item of evidence for the purposes of the confirmation hearing and the present decision will not preclude a subsequent determination of the admissibility of that same evidence later in the proceedings because the 'admission of evidence' [at the pre-trial stage] is without prejudice to the Trial Chamber's exercise of its functions and powers to make a final determination as to the admissibility and probative value of any evidence." *Id.* ¶ 71; *see also id.* ¶ 193.

[120] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1399, Decision on the Admissibility of Four Documents, ¶ 29 (June 13, 2008), https://www.icc-cpi.int/CourtRecords/CR2008_03425.PDF.

[121] *Id.*

[122] *Id.* ¶ 27.

[123] *Id.* ¶ 28.

> [U]nder Article 69(4) of the Statute the Chamber may exercise its discretion when determining the relevance and/or admissibility of any item of evidence. According to Article 69(4) of the Statute, probative value is one of the factors to be taken into consideration when assessing the admissibility of a piece of evidence. Therefore, in the Chamber's view it must look at the intrinsic coherence of any item of evidence and declare inadmissible those items of evidence of which probative value is deemed *prima facie* absent after such an analysis. Any other assessment of the probative value of any given item of evidence will be made in light of the whole body of evidence introduced at the confirmation hearing.[124]

The above background to the ICC's approach to evidentiary admissibility, which falls in line with the rules and jurisprudence of the ad hoc tribunals, establishes that the Court will cast a wide net in determining what evidence to consider. In this vein, the criteria for admitting evidence lies in its relevance and probative value (judged against its prejudicial effect), rather than a strict construction of the Statute's temporal and territorial parameters. I correlate the Court's approach to evidentiary admissibility with what the OTP and Pre-Trial Chamber's approach should be when collecting information at the preliminary examination and investigation stages. The OTP and Pre-Trial Chamber, when determining whether to consider information, is best advised to employ an expansive approach prioritizing relevance and probity, rather than from where and when the information originates. In the midst of the same conflict where the gravity threshold would not otherwise be met, the OTP and Pre-Trial Chamber can consider information equally from times and places both inside and outside the Court's traditional temporal and territorial jurisdiction. Only then will the Court be able to adequately consider the entire nature of a conflict, especially one that transcends State borders and occurs over a prolonged period of time.

As in *Nahimana*, the admitted information, if outside the Court's temporal or territorial jurisdiction, would be prohibited from use to establish the required *actus reus* and *mens rea* of the

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[124] Katanga, *supra* note 119, ¶ 77.

crimes in question. However, if such information is relevant and of probative value, it can be considered *in conjunction* with information within the Court's strict jurisdiction to conclude that an act meets the gravity threshold to commence a formal investigation. In other words, simply because information presented to the OTP or the Pre-Trial Chamber does not meet the Statute's strict temporal or territorial parameters, it does not mean that it is not relevant or probative. This is especially true when during the same conflict there is information from attacks occurring within the Court's temporal and territorial jurisdiction. At the preliminary examination, investigation and, if needed, authorization stages, relevant and probative information can, and should, be considered both inside and outside the Statute's strict jurisdictional parameters. Nonetheless, as established by the ad hoc tribunals and the Court in the case law above, the required elements of the crime in question must take place within the Court's jurisdictional limitations. This requirement is in line with my assertion that for *Context* to apply, one of the four bases of jurisdiction as laid out in the Statute must first be established.

In sum, the Court's admissibility of evidence has prioritized relevance and probity. Similarly, during the preliminary examination and investigation stages, the OTP and Pre-Trial Chamber should employ the same criteria of relevance and probity when considering information. The OTP and Pre-Trial Chamber can, and should, consider information from attacks both inside and outside the Court's temporal or territorial jurisdiction when those attacks occur in the midst of the same conflict and, if otherwise considered in isolation, would not meet the gravity threshold. This approach is justified according to both the Statute's procedural framework and intentional textual ambiguity of the gravity threshold, as Section V will now outline.

VII. Justifying the Use of *Context* in the *Rome Statute*

I divide the justifications for *Context* consideration into procedural and textual justifications. While the procedural justification outlined below is more of an overview of the existing

prosecutorial process, the textual justification delves into specific statutory provisions. I focus on these two strands of justification to illustrate that my argument for *Context* does not require any amendments to the Statute or its accompanying documents. On the contrary, the OTP, and subsequently the Court, can expand temporal and territorial jurisdiction without reading any additional text into the Statute or interpreting the Statute in a manner contrary to its purposes outlined in its Preamble.

a. Procedural Justification – 'The Funnel Approach'

The Statute distinguishes between "preliminary examinations," "situations," and "cases," wherein the former two terms are broader and in relation to a referral before an arrest warrant is issued for a particular accused. A case must always be within a situation, which is always preceded by a preliminary examination. As the Court stated in the *Kenya* authorization decision in relation to post election violence in 2007-08, prosecution proceeds in stages that begin with a situation and proceed to a case where one or more suspects have been identified.[125] As Phillippe Kirsch has stated, "the general approach of referring 'situations,' rather than 'cases,' seems a prudent one. This helps reduce the arguably unseemly prospect of State Parties referring complaints against specific individuals, which might create a perception of using the Court to 'settle scores.'"[126]

The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 if a *situation* in which one or more

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[125] Situation in the Republic of Kenya, Case No. ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (March 31, 2010), https://www.icc-cpi.int/CourtRecords/CR2010_02399.PDF ("[T]he Chamber wishes to underline that the Statute is drafted in a manner which tends to solve questions related to admissibility at different stages of the proceedings up until trial. These stages begin with a 'situation' and end with a concrete 'case', where one or more suspects have been identified for the purpose of prosecution.").

[126] PHILIPPE KIRSCH & DARRYL ROBINSON, THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, A COMMENTARY 623 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

of such crimes appear to have been committed is referred to the Prosecutor by (a) a State Party; or (b) the UN Security Council.[127] The purpose of a referral is to request the Prosecutor to investigate a situation to determine whether one or more persons could be charged with a crime within the Court's jurisdiction.[128] While the OTP can proceed with an investigation of a situation if it has been referred by the UNSC or by a State Party, for an investigation initiated *proprio motu*, the Prosecutor, upon concluding a reasonable basis to proceed with an investigation of a situation, must request authorization from the Pre-Trial Chamber.[129]

Regulation 29 of the Office of the Prosecutor gives the prosecutor discretion in deciding whether there exists a reasonable basis to proceed with an investigation, taking into account jurisdiction, admissibility (including gravity), and the interests of justice.[130] In November 2013, the OTP published a Policy Paper on Preliminary Examinations, in which it recognized guiding principles of independence, impartiality, and objectivity in its preliminary examinations in determining whether to initiate an investigation.[131] Citing Article 42 of the

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[127] Rome Statute, *supra* note 3, art. 13.

[128] *Id*. art. 14.

[129] *Id*. art. 15(3).

[130] Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, Regulation 29 (Apr. 23, 2009), https://www.icc-cpi.int/iccdocs/PIDS/female counsel/RegulationsOTPEng.pdf. The full text of Regulation 29 states:

> 1. In acting under article 15, paragraph 3, or article 53, paragraph 1, the Office shall produce an internal report analysing the seriousness of the information and considering the factors set out in article 53, paragraph 1 (a) to (c), namely issues of jurisdiction, admissibility (including gravity), as well as the interests of justice, pursuant to rules 48 and 104. The report shall be accompanied by a recommendation on whether there is a reasonable basis to initiate an investigation.
> 2. In order to assess the gravity of the crimes allegedly committed in the situation the Office shall consider various factors including their scale, nature, manner of commission, and impact.
> 3. Based on the report, the Prosecutor shall determine whether there is a reasonable basis to proceed with an investigation.
> 4. The evaluation shall continue for as long as the situation remains under investigation. 5. In acting under article 53, paragraph 2, the Office shall apply *mutatis mutandis* sub-regulations 1 to 4.

[131] *See Policy Paper on Preliminary Examination*, *supra* note 13, § III.

Statute, the OTP held that independence means that "decisions shall not be influenced or altered by the presumed or known wishes of any party, or in connection with efforts to secure cooperation."[132] Impartiality means selecting situations in a non-partisan manner and applying the same methodology and standards to each examination. Lastly, objectivity refers to the OTP considering incriminating and exonerating circumstances equally.[133]

Prosecutorial impartiality and independence have also been defined by the ECHR. In order to establish independence, the ECHR has stated that there must be regard to, *inter alia*, the manner of appointment, the existence of guarantees against outside pressure, and whether the Tribunal presents an appearance of independence.[134] For impartiality, the Tribunal must be subjectively free of personal prejudice or bias, and must be objectively impartial in that it must offer sufficient guarantees so as to exclude any legitimate doubt of partiality.[135] In this regard, both the Policy Paper and the ECHR jurisprudence demonstrate a concern with the presence of outside pressure and personal bias when selecting which matters to prosecute. The ECHR adds factors relating to outside appearance that would suggest it retains a higher threshold for prosecutorial independence and impartiality that is not considered by the OTP in its Policy Paper.

The Policy Paper outlines a four-phase process for the OTP to determine what situations warrant investigation. Phase 1 involves an initial assessment to determine whether the situation in question falls within the traditional notions of jurisdiction, as discussed above.[136] Evidence falling outside the traditional notions of jurisdiction can "be revisited in light of new information or circumstances, such as a change in the jurisdictional situation."[137] Phase 2 examines the Court's

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[132] *Id.* ¶ 26; *see also* Rome Statute, *supra* note 3, arts. 42(1), (5), (7).

[133] *See Policy Paper on Preliminary Examination*, *supra* note 13, ¶ 41.

[134] Morris v. United Kingdom, 2002-I Eur. Ct. H.R. 387 ¶ 58 (2002).

[135] *Id.*; *see also* Findlay v. United Kingdom, App. No. 22107/93 Eur. Comm'n H.R. ¶ 76 (Feb. 25, 2997), http://hudoc.echr.coe.int/eng?i=001-58016.

[136] *Policy Paper on Preliminary Examinations, supra* note 13.

[137] *Id.* ¶ 79.

jurisdiction under both territorial jurisdiction[138] and subject matter jurisdiction.[139] Phase 2 is more specific than Phase 1 in that it only considers communications to the OTP that were not rejected in Phase 1. Phase 3 conducts both complementarity and gravity analyses, and results in an Article 17 Report.[140] Phase 4 examines whether the investigation is in the interests of justice, as required by Article 53(1). As of 2015, the Office of the Prosecutor has opened 22 preliminary examinations, twelve of which proceeded to a formal investigation and four to a decision not to proceed with an investigation.[141] The OTP has decided not to proceed with investigations in situations in Iraq (gravity threshold required under Article 53 not met),[142] Venezuela,[143] Korea (no subject matter jurisdiction),[144] and Palestine (not a recognized state at time of preliminary examination).[145]

The multistep ICC prosecution commences with a preliminary examination, wherein the OTP considers communications by State Parties or the UNSC. It then narrows to a "situation" framed by definitive territorial and temporal limits, and then narrows further to the issuance of an arrest warrant for the accused within those territorial and temporal parameters. I term this process the Funnel Approach to jurisdiction. The Funnel Approach—dwindling the scope of prosecution from a preliminary examination based on a referral, or initiated *proprio motu*, to jurisdiction over a particular situation and then to a particular accused—is unique to international criminal law.

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138 Rome Statute, *supra* note 3, arts. 1, 12.

139 *Id*. art. 5.

140 *Policy Paper on Preliminary Examinations, supra* note 13, ¶ 82.

141 SCHABAS, *supra* note 12, at 74.

142 Letters to Senders re Iraq, Office of the Prosecutor, INT'L CRIM. CT. (Feb. 9, 2006), https://www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-690BE61D0B5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2007.pdf.

143 Letters to Senders re Venezuela, Office of the Prosecutor, INT'L CRIM. CT. (Feb. 9, 2006).

144 Situation in the Republic of Korea, Office of the Prosecutor, Article 5 Report, INT'L CRIM. CT. (June 2014).

145 Situation in Palestine, Office of the Prosecutor, INT'L CRIM. CT. (April 2012).

In domestic criminal systems, there does not exist any analogous referral processes, and certainly there is no investigation of political conflicts between State and non-State actors in order to determine whether a crime within a court's jurisdiction has taken place. The ICC's Funnel Approach is also distinct from other international courts and tribunals. The *ad hoc* tribunals did not have a referral system and the temporal and territorial jurisdiction of every case remained the same irrespective of the accused. The International Court of Justice does not have a referral system, but rather requires explicit consent by both parties as well as a determination that the subject matter falls within the ICJ's jurisdiction.[146]

The ICC's OTP, governed by independence, impartiality, and objectivity, begins with a broad canvas that can, and normatively should, consider information from inside and outside the Court's temporal or territorial jurisdiction. This broad mandate at the earlier parts of the prosecutorial process is necessary given the increasingly cross-border nature of conflicts. If the Court continues to implement a strict and bifurcated approach to its jurisdiction, it would ignore necessary information and fail to appreciate a cross-border conflict in its entirety. Furthermore, the Court would not utilize the open-ended ability to collect information at the earlier stages of the process (in this analogy, the top wide part of the funnel). The Funnel Approach is consistent with the Court's rules and jurisprudence emphasizing relevance and probity, as opposed to strict temporal and territorial parameters. As such, the Court's ability to consider *Context* is placed within the Statute's procedural framework at the early stages of preliminary examinations and investigations, and should be used accordingly to close the impunity gap. By doing so, the Court will be better placed to eventually prosecute perpetrators who are non-State Party nationals and who reside in non-State Party territories when those perpetrators carry out attacks that fall within the Court's traditional temporal and territorial jurisdiction.

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[146] Statutes of the International Court of Justice art. 26, June 26, 1945, 33 U.N.T.S 933.

b. Textual Justification – 'Gravity'

While the Funnel Approach and the primacy of considering evidence according to its relevance and probity sets out the general discretionary framework for the OTP and the Court in deciding whether to prosecute a case, there exists specific open-ended text within the Statute itself that allows for the Prosecutor to consider *Context* when asserting jurisdiction. The most relevant example to the herein discussion is the gravity threshold. The term 'gravity' is contained in Articles 53 (as a criterion to commence a formal investigation), 17 (relating to the admissibility of a situation that is not being prosecuted at the national level), 59 (arrest by a custodial state), 77 (penalties), 78 (sentencing), 84 (revision of sentence), and 90 (competing requests for extradition). For our purposes, Articles 17 and 53 are most important, and they state:

> Article 17: Issues of Admissibility
>
> 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
> (d) The case is not of sufficient gravity to justify further action by the Court.
>
> Article 53: Initiation of an investigation
>
> 1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
> (b) The case is or would be admissible under article 17; and
> (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
>
> If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

> 2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
> (b) The case is inadmissible under article 17; or
> (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.[147]

Margaret deGuzman's work has concluded, among other things, that the concept of gravity is inherently ambiguous and this ambiguity has enabled it to serve a constructive role in the ICC regime. In her assessment, gravity's ambiguity has enabled the Court to bridge the divide between States that wanted the ICC to have a broad mandate and States concerned about the Court's potential for infringing on State sovereignty. According to deGuzman, States could therefore agree that the Court's mandate is to prosecute the most serious crimes of international concern without agreeing what that would include.[148] I argue that this inherent ambiguity assists the OTP in collecting information both inside and outside the Court's territorial and temporal jurisdiction in order to reach the gravity threshold. Neither the Court's Statute nor any of its supporting documents place limitations on what basis, and in accordance with what information, the OTP is to determine whether a matter reaches the gravity threshold to commence an investigation.

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[147] Rome Statute, *supra* note 3, arts. 17, 53.

[148] Margaret M. deGuzman, *Gravity Rhetoric: The Good, the Bad, and the 'Political'*, 107 AM. SOC'Y OF INT'L L. 421, 421-22 (2013); *see also* Margaret M. deGuzman, *The International Criminal Court's Gravity Jurisprudence at Ten,* 12 WASH. U. GLOBAL STUD. L. REV. 421, 475 (2013); Margaret M. deGuzman, *How Serious are International Crimes? The Gravity Problem in International Criminal Law*, 51 COLUM. J. TRANSNAT'L L. 18 (2012); *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, *supra* note 28; Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L L. J. 1400 (2009).

The OTP's Policy Paper on Preliminary Examinations sets out that the gravity assessment includes both qualitative and quantitative factors even though the OTP, as discussed above, has prioritized the number of victims when determining whether or not to open an investigation. According to the Policy Paper, factors in the gravity determination include the *scale* of crimes, *nature* of crimes, and *manner* of crimes' commission and their *impact*.[149] Scale means more than just numbers. Scale can include an analysis of the temporal or geographical spread. The gravity of crimes with greater quantitative intensity over a short period of time is higher than crimes with less quantitative intensity over a long period of time.[150]

As for the nature of the crimes, the OTP has prioritized killing, rape, and child conscription.[151] The manner of crimes refers to the means employed to execute the crime, the degree of participation, the intent of the perpetrator, and the extent to which the crimes were systematic or resulted from a plan or organised policy or, otherwise, resulted from the abuse of power or official capacity. The OTP has placed particular emphasis on cruelty, crimes against defenceless victims, crimes involving discrimination, and abuse of *de jure* or *de facto* power violating the responsibility to protect principle.[152] The scale of crimes refers to the particular suffering placed upon victims, their increased vulnerability, subsequent terror instilled, or the social, economic, and environmental damage inflicted on affected communities.[153] As the Statute is silent as to how the OTP should determine gravity,[154] the Policy Paper remains the most concrete explanation of the gravity threshold.

The OTP does not place any fixed weight on any of the above criteria in assessing gravity, but determines gravity based on the facts and circumstances of each situation.[155] In assessing

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149 *Policy Paper on Preliminary Examinations*, *supra* note 13, ¶ 61.

150 *Id.* ¶ 62.

151 *Id.* ¶ 63.

152 *Id.* ¶ 64.

153 *Policy Paper on Preliminary Examinations*, *supra* note 13, ¶ 65.

154 *See* KEVIN JON HELLER, SITUATIONAL GRAVITY UNDER THE ROME STATUTE IN FUTURE DIRECTIONS IN INTERNATIONAL CRIMINAL JUSTICE 33 (2009).

155 Fabricio Guariglia, *The Office of the Prosecutor and the Selection of Situations and Cases, in* THE LAW AND PRACTICE OF THE INTERNATIONAL

the above criteria of scale, nature, manner, and impact, it becomes clear that the factors in assessing gravity are open-ended in nature and not necessarily required to be constricted by the strict territorial and temporal limits listed in the Statute. As such, the OTP would be at liberty to consider *Context* within a given situation when conducting a preliminary examination. Also, given the advocacy nature of the Prosecutor's role, the OTP can permissibly err on the side of expansive evidence gathering to conclude the gravity threshold is met in initiating an investigation.[156]

A practical example of when *Context* consideration can result in the OTP reaching the gravity threshold when it may not reach that threshold otherwise is when a referral is made by a State Party or the UNSC in a scenario where there were potential crimes committed both before and after the referral. While the UNSC referral for the Situation in Sudan expanded its temporal scope back to July 1, 2002,[157] the referral for the Situation in Libya, as stated above, limited the temporal scope only back to February 15, 2011.[158] Therefore, this limited the OTP to investigating crimes within that time span.

A scenario can arise where UNSC members, fearing prosecution of their own nationals, will come to a compromise to limit the permissible timespan under which the OTP can investigate. In this regard, there may be casualties on both sides of the temporal scope of the referral, whereby the scale, nature, manner, and impact may not suffice if limited to the referral's temporal mandate. Relevant and probative information may straddle both sides of the Court's jurisdiction where some information falls within its jurisdiction and other information does not. For instance, there may have been intense spurts of

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CRIMINAL COURT 360 (2015).

156 *See* Alexander Greenawalt, *Justice Without Politics?: Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583 (2007) (arguing that the Prosecutor's role is inherently political).

157 S.C. Res. 1593, ¶1 (Mar. 31, 2005) ("*Acting* under Chapter VII of the Charter of the United Nations, 1. *Decides* to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court. . .").

158 Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar GADDAFI, Saif Al-Islam GADDAFI and Abdullah ALSENUSSI, *supra* note 83.

bombing with numerous casualties before the commencement of the referral's temporal scope but substantially less casualties within the temporal scope. As in the (initial) Iraq and Palestine referrals, this may lead the OTP to conclude that the required gravity threshold has not been satisfied, thereby not commencing an investigation. On the other hand, in accordance with the Funnel Approach and accounting for the standards of relevance and probity, the OTP may take an expansive approach to temporal jurisdiction in its gravity analysis. Therefore, combining the number of casualties both before and within the referral's temporal scope may fulfill the gravity threshold resulting in an investigation. All of this is keeping in mind the two caveats presented above that the information must be for the same conflict and would not reach the gravity threshold otherwise. Lastly, one of the four bases for jurisdiction must be fulfilled before gravity's ambiguity can assist in applying a contextual approach.

VIII. Implications of *Context* Consideration

a. Filling the Impunity Gap

Two of the policy objectives stated by the OTP in its Policy Paper on Preliminary Examinations are: i) ending impunity through positive complementarity; and ii) prevention. The former reiterates the Court's exceptional character that asserts jurisdiction when national courts are unwilling or unable to investigate and/or prosecute a matter.[159] Complementarity serves to close the impunity gap where those matters not pursued on a national level are referred to the ICC. Similarly, the prevention objective requires the OTP to "systematically and proactively collect open source information on alleged crimes that [ ] appear to fall within the jurisdiction of the Court."[160] Both of these objectives, whether to step in as a complementary Court to national jurisdictions or work with national jurisdictions to prevent crimes before they occur, in fact, support

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[159] *Policy Paper on Preliminary Examinations*, *supra* note 13, ¶¶ 100-03.
[160] *Id.* ¶ 104.

an expansive approach to information collection by the OTP, whether it ultimately asserts jurisdiction or not.

I have alluded throughout this paper to the need for the ICC to assert jurisdiction expansively as doing so would fill the impunity gap. I use this term to mean two distinct but, nonetheless, related concepts. The first recognizes that the ICC is a complimentary Court of last resort and its jurisdiction only takes hold once a national court is unwilling or unable to prosecute a matter. If a State Party does not proceed to investigate an attack or incident and, subsequently, the ICC finds that that matter falls outside its jurisdiction or is otherwise inadmissible based on insufficient gravity or interests of justice grounds, a jurisdictional vacuum would be created outside the prosecutorial will of State Parties and the ICC.

The second manifestation of the impunity gap concerns non-State Parties that, out of prosecutorial discretion or political sensitivities, decide not to investigate a matter. This has been the case with various soldiers or defence contractors that the U.S. has not prosecuted as a result of alleged crimes committed while in Iraq.[161] Whereas in the first concept the impunity gap is created by the ICC's unwillingness to launch an investigation based on jurisdictional or admissibility grounds, this second type of impunity gap arises due to the ICC's legal constriction in venturing into the jurisdiction of a non-State Party absent an Article 12(3) Declaration or UNSC referral.

While the second type of impunity gap cannot be remedied even with expansive notions of jurisdiction, under *Context*, the OTP, and subsequently the Pre-Trial Chamber, can remedy the first type of impunity gap by considering *Context* when the gravity threshold under strict textual notions of jurisdiction would not be met. In this regard, *Context* is a tool for jurisdictional expansiveness that assists the Court in its admissibility analyses by bolstering the information available to meet the gravity threshold.

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[161] *See, e.g.*, Lara Jakes & Rebecca Santana, *Iraq Prime Minister: Immunity Issue Scuttled U.S. Troop Deal*, WASH. TIMES (Oct. 22, 2011), http://www.washingtontimes.com/news/2011/oct/22/iraq-pm-immunity-issue-scuttled-us-troop-deal/.

An expansive approach is not only in line with the ICC's procedural framework under the Funnel Approach and its textual permissibility, but also accords with the Statute's underlying principles of prosecuting the most serious crimes of international concern.[162] Akhavan argues that prosecuting a select number of mid to high level officials in international criminal tribunals, in fact, serves as a general deterrent to future atrocities. He states, "it is not necessary . . . to punish a large number of perpetrators in order to achieve deterrence . . . [t]he punishment of particular individuals—whether star villains such as Karadzić or Mladić or ordinary perpetrators such as Tadić and Erdemović—becomes an instrument through which respect for the rule of law is instilled into the popular consciousness."[163]According to Akhavan, prosecutions can contribute to replacing a culture of impunity with a culture of compliance.[164]

While it may be speculative to conclude that increased international prosecutions will result in fewer future atrocities—and the reality has not provided any such suggestion—expanding the ICC's jurisdiction by applying *Context* will narrow the current space occupied by many perpetrators who have carried out attacks on State Party territories. These perpetrators have essentially escaped prosecution whether or not they are State Party nationals. Their impunity stems from the inability or unwillingness of their own State to prosecute them and the ICC's reluctance to commence an investigation.[165]

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[162] Rome Statute, *supra* note 3, art. 1.

[163] Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia?*, 20 HUM. RTS. Q. 737, 747, 749 (1999).

[164] David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L. J. 487, 486 (1999). Wippman questions this assertion by Akhavan in that a transformation from a culture of impunity to compliance would require far more than the occasional punishment of a particular offender since i) the signaling effects are not clear; and ii) the internationalization of norms is not sufficient to prevent atrocities.

[165] A contentious but relevant example of the first type of impunity gap mentioned herein is the proposed prosecution of former British Prime Minister Tony Blair who engaged his armed forces in the 2003 invasion of Iraq. *See* Twiggy Garcia, *Tony Blair Should Be Prosecuted for War Crimes—Not Just Judged by History*, INDEPENDENT (May 7, 2014), http://www.the guardian.com/commentisfree/2014/may/07/tony-blair-war-crimes-prosecuted-eel-like-boris-

IX. Example: Prosecuting ISIS at the ICC

Potential prosecution against the Islamic State in Iraq and Syria ("ISIS") presents a tangible example as to how *Context* consideration can alter the Court's assertion of jurisdiction. The argument presented below to prosecute ISIS would be analogous to Comoros's argument that the flotilla attack should be considered in conjunction with attacks in the Gaza Strip, which were outside the Court's territorial jurisdiction. As a starting point, we consider the ISIS attacks in Paris on November 13, 2015[166] and in Brussels on March 22, 2016.[167] France has been an ICC State Party since July 18, 1998[168] and Belgium since September 10, 1998.[169] The Prosecutor has taken the position that she cannot investigate ISIS attacks in Iraq and Syria, as its leadership consists of Iraqi and Syrian nationals who are not subject to the Court's nationality jurisdiction.[170] This is in spite of the fact that nationals from State Parties have traveled to Iraq and Syria, and have carried out attacks that can reasonably be considered within the Court's jurisdiction. Therefore, the Prosecutor has taken the position that she cannot investigate ISIS, as it falls beyond the Court's nationality and territorial jurisdiction.

As outlined in Part II, to prosecute ISIS leadership, non-State Party nationals who perpetrate attacks on both State and non-State Party territories, the following criteria would have to be fulfilled to proceed with an investigation under *Context*:

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166 *Paris Attacks: What Happened on the Night*, BBC NEWS (Dec. 9, 2015), http://www.bbc.com/news/world-europe-34818994.

167 Lizzie Deardon, *Isis Supporters Claim Group Responsible for Brussels Attacks: 'We Have Come to You with Slaughter'*, INDEPENDENT (Mar. 22, 2016), http://www.independent.co.uk/news/world/europe/isis-supporters-claim-responsibility-for-brussels-attacks-bombings-belgium-airport-maalbeek-metro-we-a6945886.html.

168 *State Parties to the Rome Statute: Western Europe and other States,* INT'L CRIM. CT., https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (last visited Jan. 30, 2017).

169 *Id*.

170 *ISIS Statement*, *supra* note 19.

1. ISIS attacks—whether directly by its leadership or (more likely) through its subordinates—occur on State and non-State Party territories;
2. ISIS leadership resides in non-State Party territories and members are nationals of a non-State Party(ies);
3. Attacks on State Party territories, taken in isolation, would not reach the gravity threshold;
4. Aggregating the casualties and/or effects of ISIS attacks on State and non-State Party territories would fulfill the gravity threshold;
5. The State Party on the territory of which at least one ISIS attack took place is unable or unwilling to prosecute the perpetrators.

Taking as granted that the perpetrators of the Paris and Brussels attacks are ISIS agents under the command and control of ISIS leadership in Iraq and/or Syria, attacks by ISIS, whether in France or Belgium or, otherwise, in Iraq or Syria,[171] fall within the context of the same conflict. Nonetheless, only a portion of the attacks took place within the Court's territorial jurisdiction.

Accounting for *Context* as framed herein, the OTP, whether on its own accord or through the UN or a State Party, can begin to collect information in relation to any of the attacks listed above, whether or not committed on the territory of a State Party. Comoros similarly argued that information relating to attacks on both the flotilla and within the Gaza Strip as a result of Operation Cast Lead can be collected. To prosecute ISIS, temporal jurisdiction will not be an issue as both France and Belgium signed the Statute well before the attacks on their respective territories took place. However, territorial jurisdiction may factor into whether the OTP ultimately decides to commence an investigation and pursue prosecution against ISIS leadership. Under traditional territorial jurisdiction, the

[171] Atrocities in Iraq and Syria perpetrated by ISIS have been oft-documented. *See, e.g.*, Amnesty Int'l, Annual Report, POL Index 10/2552/2016 (2016); *The Persistence of History*, ECONOMIST (Aug. 22, 2015), http://www.economist.com/news/international/21661812-islamic-states-revival-slavery-extreme-though-it-finds-disquieting-echoes-across; Human Rights Watch: Iraq Report, https://www.hrw.org/middle-east/n-africa/iraq.

OTP, as it has already deemed in its April 8, 2015 Statement, cannot pursue ISIS leadership in Iraq and Syria. Under the four-phase process outlined in the OTP's Policy Paper, evidence of ISIS's operations in Iraq and Syria would be discarded at either Phase 1 or Phase 2, which are before the OTP can even consider whether the attack meets the gravity requirement under the Statute.

Limiting its preliminary examination to isolated attacks in France and Belgium while ignoring the background of ISIS's operations and ongoing atrocities in Iraq and Syria, which have included civilian executions, kidnappings, authorized rapes, and the destruction of cultural property, would make it difficult for the OTP to decide that ISIS's attacks meet the requisite gravity requirements to launch an investigation. This is especially true given the relatively limited number of casualties as a result of the Paris and Brussels attacks in comparison to other attacks where the Court has determined sufficient quantitative gravity for an investigation.[172]

Bifurcating information relating to ISIS's attacks between State Party and non-State Party territories would obscure the sheer quantity of lives ISIS attacks have claimed. The number of casualties has played a salient role in the Prosecutor's past decisions whether to initiate an investigation. In his address to the Assembly of State Parties in November 2005, the Court's first Prosecutor, Luis Moreno-Ocampo, stated, "[i]n Uganda, we examined information concerning all groups that had committed crimes in the region. . . . Between July 2002 and June 2004, the Lord's Resistance Army (LRA) was allegedly responsible for at least 2200 killings and 3200 abductions in over 850 attacks. It was clear that we must start with the LRA."[173] Conversely, in his decision to initially not proceed with an

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[172] The Paris attack resulted in 130 casualties and the Brussels attack resulted in 32 casualties. *See Policy Paper on Preliminary Examinations*, *supra* note 13; *see also Brussels Attacks Death Toll Lowered to 32*, HUFFINGTON POST (Mar. 29, 2016), http://www.huffingtonpost.com/entry/brussels-attacks-death-toll-lowered_us_56facaa4e4b0a372181b27ed.

[173] Statement to the Fourth Session of the Assembly of State Parties by Luis Moreno-Ocampo, Office of the Prosecutor, INT'L CRIM. CT. Nov. 28, 2005, http://www.iccnow.org/documents/ProsecutorMorenoOcampo_Opening_28Nov05.pdf.

investigation into potential war crimes committed by British officials in Iraq, Moreno-Ocampo stated, "[t]he information available at this time supports a reasonable basis for an estimated 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment, totaling in all less than 20 persons."[174]

Despite criticism of the overly quantitative approach to investigative selection, the OTP's continuing policy appears to be one that prioritizes situations with a larger number of victims. As such, if quantity determines whether the OTP will investigate a situation, a myopic bifurcated approach to jurisdiction under the strict wording of the Statute ignores the trans-territorial nature of modern conflicts where national boundaries are being blurred and organizational policies may exist across such boundaries. This reality is exemplified in ISIS's attacks in various States and non-State Party territories. Considering *Context* when deciding whether to commence an investigation into a situation is not only permissible but also provides a better assessment of the true nature of a trans-border conflict and whether it is a situation in which crimes under the Court's jurisdiction have taken place. Also, this expansive approach would fall within the Court's previous jurisprudence, which prioritized relevance and probity of information when determining whether to commence an investigation.

To conclude the ISIS example, traditional jurisdictional parameters, as they currently stand, leave open an impunity gap where potential perpetrators or criminal organizations that may come within the Court's jurisdiction are sheltered from prosecution because the majority of their acts are committed

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174 Letters to Senders re Iraq, Office of the Prosecutor, INT'L CRIM. CT. (Feb. 9, 2006), https://www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-690BE61D0B5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2007.pdf. Kevin Jon Heller has argued, conversely, for 'situational gravity' where the OTP, rather than exclusively relying on numbers of casualties as in the LRA and the Iraq examples above, should take a qualitative approach focusing on the systematicity of crimes, their social alarm, and the level of State involvement. He argues that "[i]nvestigating situations that involve systematic and socially alarming crime but fewer victims would significantly increase the likelihood that potential prosecutors would be apprehended and prosecuted, thus increasing the deterrent value of those investigations." *See* HELLER, *supra* note 154.

outside the Court's strict territorial boundaries. If, for instance, France and/or Belgium are unable or unwilling to investigate the attacks as contemplated in Article 17 of the Statute, not only will a decision by the Prosecutor to not investigate inhibit the Court from prosecuting crimes in those States, but it will also immunize criminal acts that have taken place by ISIS leadership and functionaries within Iraq and Syria. The same argument was applied by Comoros when arguing that not commencing an investigation will immunize the flotilla attack *and* attacks in the Gaza Strip. For ISIS, if the same organization is responsible for criminal acts within France, Belgium, Iraq, and Syria, a full contextual analysis aggregating information from attacks in all those countries to meet the requisite gravity threshold will have the potential for exacting punishment on ISIS's leadership for crimes within State and non-State Parties alike.

X. Criticisms of Expansive Jurisdiction

The crux of my argument herein lies in the assumption that the ICC should be a strong and robust Court with expansive jurisdiction so as to close the impunity gap. Iontcheva, conversely, has argued that a weaker Court that relies more on national governments with more diverse perspectives and greater acceptability by local populations is a better way to achieve the goals of international criminal justice.[175] She has proposed four models of how to implement international criminal law in the absence of a strong ICC: i) having the UN create more ad hoc tribunals, such as the ICTY or ICTR; ii) increasing the number of national prosecutions either under international law or domestic human rights and war crimes statutes; iii) asserting universal jurisdiction in domestic courts; or iv) establishing mixed courts comprised of international and national judges.[176] Furthermore, her critiques of a strong, centralized ICC include its lack of informed and diverse perspectives, its inability to foster the internalization of

[175] Jenia Iontcheva Turner, *Nationalizing International Criminal Law: The International Criminal Court as a Roving Mixed Court*, 52 STAN. J. INT'L L. 52 (2004).

[176] *Id.* at 16-18.

international norms leading to a backlash by local communities, and its inability to promote post-conflict reconciliation as a result of being far from the place where the crimes occurred.[177]

Needless to say, I disagree with any current proposal to weaken the ICC's jurisdiction in exchange for stronger domestic courts or mixed courts, especially in light of the Court's nascent nature and increased membership since its inception. An increasingly globalised world marked by greater instances of cross-border conflicts between both rebel and State forces—whether on the ground, in the air, through the water, or in cyberspace—is precisely the reason why a strong and centralized ICC with eventual universal membership will be more effective at prosecuting current crimes and deterring future ones than a weak and decentralized Court. I now tackle some likely criticisms that may arise to the ICC's proposed implementation of *Context*.

a. Obviating State Sovereignty

The first potential criticism of the above expansive approach is that investigating potential crimes within non-State Parties that have not consented to the Court's jurisdiction infringes on territorial sovereignty. Critics of an expansive approach to ICC jurisdiction will note that the ICC is a treaty-based Court that requires a State to sign onto the Statute for its jurisdiction to apply. Benzing characterized the primary rationale for the ICC's complementary jurisdictional framework to be state sovereignty.[178] While this criticism is valid and in line with traditional conceptions of jurisdiction outlined in the Court's documents, there are other aspects of the Statute where state sovereignty is compromised without a State's consent. Two specific instances of this are UNSC referrals and Article 12(3) Declarations. Both of these mechanisms used to assert jurisdiction can relate to non-State Parties, and in the case of

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[177] *See id.* at 20-21.

[178] *See* Benzing, *supra* note 46, at 595 ("The most apparent underlying interest that the complementarity regime of the Court is designed to protect and serve is the *sovereignty* [,] both of State parties and third states."); *see also* Rep. of the Preparatory Comm. on the Establishment of an Int'l Crim. Ct., GAOR 50th Sess., Supp. No. 22 (Doc. A/51/22), ¶ 155.

Article 12(3) Declarations can swell the Court's temporal jurisdiction back to July 1, 2002.[179] Furthermore, state sovereignty is relegated in the general complimentary approach to the ICC, in that the Court will step into the place of a national jurisdiction if the latter is unwilling or unable to prosecute an act in which there is a reasonable basis to believe it falls within the Court's jurisdiction. State sovereignty, even within the traditional notions of jurisdiction, is not an absolute bar for the ICC to extend its long arm into the domestic sphere.

There is, indeed, a political connotation to the Court extending into territories that have not consented to the Court's jurisdiction. Powerful nations, such as the U.S. and China, that have not signed on to the Statute will likely never have the Court reach into its jurisdiction to prosecute individuals that they are neither willing nor able to prosecute themselves. However, the more likely scenario (if a contextual approach as argued here is adopted) is that the Court may seek to extend its territorial reach into those non-State Parties that do not exert as much political influence, such as Iraq and Syria in the ISIS example above. This may lead to selective prosecution, an already well-established criticism of a Court that has disproportionately targeted prosecutions in African nations.[180]

The rebuttal to the selective prosecution criticism if *Context* is accepted is that the prospect of selective prosecution exists whether or not *Context* is adopted. The contention that the ICC has adopted an Afro-centric approach to its prosecutorial ambit has existed within its current jurisdictional confines without a contextual approach. With an independent Prosecutor armed with discretionary powers in addition to multiple avenues of referral, one of which can be subject to veto by the UNSC, the prospect of selective prosecution will always exist. However, as argued here, the Court's mandate is to close the impunity gap and ensure those situations involving crimes at a mass scale falling within its jurisdiction are brought before it. Only then

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[179] Rome Statute, *supra* note 3, arts. 12(3), 13(b).

[180] *See*, *e.g.*, Geoffrey York, *Kenya and South Africa Shelve Protests Against International Criminal Court*, GLOBE AND MAIL (Nov. 26, 2015), http://www.theglobeandmail.com/news/world/kenya-and-south-africa-shelve-protests-against-international-criminal-court/article27503348/.

can the Court unabashedly expand its jurisdiction through *Context* despite the perennial prospect of prosecutorial bias.

As for the prospect of powerful nations, such as the U.S. or China, having their nationals subject to the Court's jurisdiction under *Context* when they perpetrate attacks on State Party territories, this contention is easy to rebut legally but difficult at a political level. Legally, the ICC should assert its jurisdiction objectively irrespective of a particular nation's political clout. While the U.S. may be able to hinder the Court's effectiveness if its nationals are investigated, this does not change the legal permissibility under the Statute to apply *Context* to cross-border conflicts. Admittedly, as a political matter, it may be more prudent to attempt prosecuting ISIS leadership, as opposed to Dick Cheney or Donald Rumsfeld, as the U.S. could exert its political will on the ICC or, more likely, its allies who are State Parties if either of those individuals are considered for prosecution. Nonetheless, the political ramifications of applying *Context* are beyond the confines of this paper. I merely assert that there are *legal* justifications and court precedents allowing for an expansive approach to temporal and territorial jurisdiction.

b. Legalism vs. Activism

Judge Hersch Lauterpact of the International Court of Justice wrote in 1961 that there are two possible judicial approaches in either international or domestic law. The first approach conceives a judge's task to be primarily, if not solely, confined to deciding the case at issue. The other approach conceives it properly within a judge's purview, in addition to deciding the present case, "to utilise those aspects of it which have a wider interest or connotation, in order to make general pronouncements of law and principle that may enrich and develop the law."[181] Commenting on this distinction, the ICJ's Judge Gerald Fitzmaurice exclaimed that while domestic courts have national legislatures to fill the gaps in the law, there exists no equivalent in international law. He wrote, "[t]he

[181] G. Fitzmaurice, *Hersch Lauterpacht, The Scholar as Judge*, 37 B.Y.I.L. 1, 14 (1961).

international community is therefore peculiarly dependent on its international tribunals for the development and clarification of the law, and for lending to it an authority more substantial and less precarious than can be drawn from the often divergent or uncertain practices of States."[182]

Judges Lauterpact and Fitzmaurice's comments could rightfully be construed as arguing for the construction of a coherent set of judicial decisions premised on precedent in order to establish a coherent policy framework under which international courts make decisions. However, more broadly, the Judges' comments also regard the scope of an international judge's decision-making powers and their ability to consider wider context when rendering judgments. This is especially true in Justice Lauterpact's reference to the "wider interest and connotation" that a judge can consider even though his or her decision will pertain to the facts of a particular case. Those writing after World War II, when the advent of international courts took root, were aware of the nascence of international law and the necessity to develop robust judgments capable of precedential value.

A growing concern in international law is judicial scope.[183] For the purpose of this paper, while it may be within the confines of the OTP's responsibilities to consider *Context* under its rubric of impartiality, independence, and objectivity when considering whether to commence an investigation, a justifiable criticism arises whether, and to what extent, judges of the Court can step outside the jurisdictional boundaries of the Statute in rendering a situation admissible before the Court,

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[182] Friedmann, *supra* note 1, at 143-44. "Of interest, after Friedmann expounds on the efficacy of IMT, he notes that the unlikeliness of establishing a permanent international criminal court "in an inevitably highly charged atmosphere of retribution of the victors against the vanquished. . . . nor is such a development at all likely in the foreseeable future. A draft Convention establishing an International Criminal Court has no prospect of adoption." *See id.* at 145-46.

[183] While there is scarce literature on judicial scope in international criminal law, more has been written in the field of investor-state arbitration in relation to the difference between arbitrators and judges. *See, e.g.*, W. Michael Reisman, *Case Specific Mandates versus Systemic Implications: How Should Investment Tribunals Decide?: The Freshfields Arbitration Lecture*, 29 ARB. INT'L 131 (2013).

and/or subsequently utilizing contextual evidence to issue an arrest warrant or convict an accused. While I concur with the decisions from the *ad hoc* tribunals, the court emphasized that the requisite elements of crimes must come within the Statute's strict territorial and temporal limitations to find an accused guilty. However, the threshold enquiry of whether to commence or authorize an investigation can account for *Context* according to the herein doctrinal arguments.

The collective goal of the ICC and all States—whether or not as members of the Court—should be to completely fill the impunity gap such that all cases in which a domestic jurisdiction is unwilling or unable to prosecute a matter where a reasonable basis to believe crimes within the Court's jurisdiction have taken place should be considered for ICC investigation. Relevant contextual considerations can assist the OTP and Pre-Trial Chamber to determine whether to proceed with such investigations. Asking Pre-Trial Chamber judges to consider *Context* does not prejudice an individual's rights because i) at the authorization stage there is no accused; and ii) at the arrest warrant stage, even if there is a dispute as to whether the alleged crimes meet the gravity threshold, there would still be evidence that crimes within the Court's strict jurisdiction have occurred. Judges would not be politicized by considering *Context* as it is not they who are choosing what situations to investigate. Rather, if a matter is not referred by a State Party or UNSC, it would be at the discretion of an independent Prosecutor who is not precluded from prioritizing some situations over others. Also, *Context* considerations would apply universally to all potential situations irrespective of what region of the world the conflict occurs.

c. Ambiguity vs. Certainty

Another potential criticism to the herein argument of expanding the ICC's traditional notions of jurisdiction to consider *Context* is that by doing so the legal framework under which the OTP and Pre-Trial Chamber function will incorporate an inordinate amount of uncertainty whereby there will no longer be consistent criteria in jurisdiction and admissibility analyses. This argument has some teeth, especially since part of

a court's processes and decisions are designed to establish precedent to guide future decisions. Nonetheless, I am proposing that the OTP and Pre-Trial Chamber, in *all* situations (irrespective of their referral mechanism) should consider *Context*. By employing *Context* consistently for all potential situations, the OTP and Pre-Trial Chamber would be recognizing the changing face of modern armed conflict that is constrained by neither place nor time. The crimes within the Court's jurisdiction universally require some form of organizational and policy-based conduct on the part of a government or rebel apparatus, and at times such conduct cannot be fully assessed without applying *Context*.

Proponents of legal certainty will inevitably tout that the drafters' intent when formulating the Statute was to not assert jurisdiction over those States not party to the Court, except for UNSC referrals and Article 12(3) Declarations. This position advocates both for state sovereignty and the necessity for legal certainty when drawing the Court's jurisdictional boundaries. While there is little doubt the drafters intended to limit jurisdiction to the explicit parameters set out in the Statute, they included open-ended terminology, such as 'gravity,' permitting the Court to expand its jurisdiction to adequately fill the impunity gap. Both the Funnel Approach and gravity's inherent ambiguity allow for the OTP and Pre-Trial Chamber to apply *Context* despite its lack of jurisdictional certainty.

XI. Conclusion

On March 14, 2016, the United States Congress voted unanimously that the atrocities committed by ISIS committed in Iraq and Syria constitute genocide.[184] Congress had adopted a similar vote in 2004 with regard to acts in Darfur.[185] After the March 14 vote, Cameron Hudson, director of the Holocaust Museum's Centre for the Prevention of Genocide, stated, "one

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[184] *See* Michelle Boorstein, *The U.S. House Just Voted Unanimously that the Islamic State Commits 'genocide.' Now What?*, WASH. POST (Mar. 15, 2016), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/03/15/the-u-s-house-just-voted-unanimously-that-the-islamic-state-commits-genocide-now-what.

[185] *Id.*

thing that has troubled me is that I know of no organized government effort to investigate crimes committed."[186] Mr. Hudson's comment is not ill-placed.

The current legal framework concerning criminal acts being committed by ISIS in Iraq and Syria are immunized from prosecution. Any UNSC referral to the ICC would likely be vetoed by Russia or even China; neither Iraq nor Syria have signed onto the Statute for a State Party referral to be legitimate. It is such an instance where the implementation of *Context* by the ICC's OTP and the Pre-Trial Chamber can play a role in prosecuting ISIS crimes. The terrorist organization has claimed responsibility for attacks in State Parties, including France[187] and Belgium,[188] as well as in Turkey, a non-State Party.[189] *Aggregating the relevant and probative evidence from all these attacks, plus those in Iraq and Syria, would inevitably meet the gravity threshold. *Context* considerations would also interpret the attacks—either inside or outside the Court's territorial jurisdiction—as being perpetrated by one criminal enterprise with its leadership in Iraq and Syria and agents in parts of Europe where attacks have taken place. Given France and Belgium's ratification of the Statute, the possibility therefore exists to prosecute ISIS leadership for attacks both inside and outside State Party territories. A similar approach could be taken toward other organizations whose attacks permeate state boundaries and occur over a prolonged period of time. Although this innovative argument was presented by Comoros, it was not settled by the Pre-Trial Chamber and thus remains an open enquiry.

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[186] *Id.*

[187] *See* Vivienne Walt, *ISIS Claims Responsibility for Paris Attacks as Arrests are Made*, TIME (Nov. 14, 2015), http://time.com/4112884/paris-attacks-isis-isil-france-francois-hollande/.

[188] *See* Alissa J. Ruben et al., *Strikes Claimed by ISIS Shut Brussels and Shake European Security*, N.Y. TIMES (Mar. 22, 2016), http://www.nytimes.com/2016/03/23/world/europe/brussels-airport-explosions.html.

[189] *See* Lizzie Deardon, *Ankara Terror Attack 'Ordered by ISIS to Cause Political Instability and Delay Elections', Turkish Prosecutors Say*, THE INDEPENDENT (Nov. 28, 2015), http://www.independent.co.uk/news/world/europe/ankara-terror-attack-ordered-by-isis-to-cause-political-instability-and-delay-elections-turkish-a6711766.html.

I have argued here that the changing structure of modern conflicts paired with the existence of a permanent Court with expansive procedural mechanisms and open-ended admissibility factors are ripe considerations to close the impunity gap. This will serve to fulfill the Court's mandate of prosecuting the most serious crimes of international concern. While a unanimous vote in Congress has little, if any, legal effect in its ability to render punishment upon perpetrators of genocide or crimes against humanity or war crimes, the ICC harbors the ability to enforce its law upon international criminal actors.

In taking an expansive jurisdictional approach, I do not contend that the Court, whether its judges or the OTP, should overstep its judiciary bounds to become legislators or appease powerful nations by pursuing some prosecutions over others. I also do not contend that the Court has to change its current conception of jurisdiction as laid out in the Statute. I merely suggest that the jurisdictional framework necessary to close the impunity gap already exists within the Statute, both procedurally and textually. Until and when—if ever—the Statute receives universal acceptance, an expansive approach to jurisdiction will be required to adequately appreciate the nature of cross-border and inter-temporal conflicts. *Context* will be most useful when there is an attack on a State Party's territory by an organization operating out of a non-State Party that is on the cusp of being of sufficient gravity for the OTP to commence an investigation.

The potential for further criticism in that the Court lacks utility because of its inability to prosecute the world's largest conflicts, or is selective in its prosecutions is real. Adopting an expansive approach to jurisdiction, rather than a constricted one, would aid the Court in fulfilling its complementary mandate, and provide legal recourse where none has existed in decades—or even centuries—past. The hope is that by applying *Context* the Court will perennially resolve to fulfill its ambitious mandate thoroughly in light of the evolving nature of conflicts.