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Understanding the ICC Prosecutor through the Game of Chess

IDRIS FASSASSI*

'I should like to see a sunset . . . Do me that kindness . . . Order the sun to set . . .'

'If I ordered a general . . . to change himself into a sea-bird, and if the general did not carry out the order that he had received, which one of us would be in the wrong?' the king demanded. 'The general, or myself?'

'You,' said the prince firmly.

'Exactly. One must require from each one the duty which each one can perform,' the king went on. 'Accepted authority rests first of all on reason. . . . I have the right to require obedience because my orders are reasonable.'

'Then my sunset?' the little prince reminded him

'You shall have your sunset. I shall command it. But, according to my science of government, I shall wait until conditions are favorable.'

'When will that be?' inquired the little prince.

'Hum! Hum!'" replied the king; and before saying anything else he consulted a bulky almanac "'Hum! Hum! That will be about – about – that will be this evening about twenty minutes to eight. And you will see how well I am obeyed!'¹

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1. ANTOINE DE SAINT-EXUPÉRY, *THE LITTLE PRINCE* 43 (Katherine Woods trans., Scholastic Inc. 1975) (1943). Like most French grade schoolers, I have read *Le Petit Prince*, but here I draw more specifically on the analogy used by Professor Barry Friedman to describe the Supreme Court in an illuminating perspective. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

I. INTRODUCTION

The establishment of the International Criminal Court (ICC) gave rise to great expectations among the international community.² For the first time in history, a permanent international criminal tribunal was created for the purpose of carrying out justice for the most serious international crimes. This unprecedented development offered the possibility of global justice, with the jurisdiction of the Court extending to crimes committed by a national of a state party, on the territory of a state party or anywhere in the world if the United Nations Security Council refers a situation to the Court.³

Great expectations are usually met with great challenges, and although the Court was not asked to order the sun to set, it was clear that the goal of ending impunity⁴ would not easily be achieved. Among the greatest challenges facing the Court is the inescapable fact that it is dependent upon the support of individual states. Possessed of neither the purse nor the sword, the Court is forced to rely on state cooperation to carry out its mission.⁵ As its former President, Sang-Hyun Song, declared: “the Court is a judicial

2. “The long-held dream of a permanent international criminal court will now be realized. Impunity has been dealt a decisive blow.” Kofi Annan *quoted in* Press Release, United Nations, Activities of the Secretary General in Italy (Apr. 15, 2002) *available at* <http://www.un.org/News/Press/docs/2002/sgt2320.doc.htm>. *See also* Robert Badinter, *From Darkness to Light, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1931 (Antonio Cassese, Paola Gaeta & John Jones eds., Oxford Univ. Press 2002).

3. Antonio Cassese, *Is the ICC Still Having Teething Problems?*, 4 J. INT’L CRIM. JUST. 433, 434 (2006).

4. *See* Rome Statute of the ICC, *opened for signature* Jul. 17, 1998, 2187 U.N.T.S. 3 Preamble ¶ 5 (entered into force Jan. 7, 2002) [hereinafter Rome Statute] (“[The States Parties to this Statute] determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crime.”); The former Prosecutor of the ICC, Luis Moreno-Ocampo, declared that “[t]he goal of the Rome Statute is to end the impunity for the most serious crimes of international concern - genocide, crimes against humanity, and war crimes - and to contribute to the prevention of such crimes.” Luis Moreno-Ocampo, *The International Criminal Court: Seeking Global Justice*, 40 CASE W. RES. J. INT’L L. REV. 215, 216 (2007) [hereinafter *Seeking Global Justice*]. As discussed below, however, alternative views exist as to how the ICC can fulfill its purposes, particularly concerning the manner in which the Court should address the “peace versus justice” debate.

5. *See* René Blattmann, Kirsten Bowman, *Achievements and Problems of the International Criminal Court*, 6 J. INT’L CRIM. JUST. 711, 723 (2008). More precisely, the Court depends on the states’ purses—the budget of the Court is decided by the Assembly of States Parties (*see* Rome Statute, *supra* note 4, art. 115)—and swords—for example, although the Court has issued an arrest warrant against Sudanese President Omar Al Bashir, it is dependent on the states for his arrest since it has no police force.

institution operating in a political world.”⁶

The challenge is even greater for the Prosecutor. As the linchpin of the mechanism established by the Rome Statute, she is charged with the duty to conduct investigations and prosecutions for the most serious international crimes.⁷ She can launch an investigation if a situation is referred to her by a state party or by the Security Council, and she can also initiate an investigation on her own initiative (*proprio motu*) with the approval of the Pre-Trial Chamber.⁸ The Prosecutor thus disposes of large discretionary powers. However, although she is sometimes described as the world’s most powerful Prosecutor,⁹ she does not enjoy the resources available to her domestic counterparts. Given her limited resources, the Prosecutor must therefore select, among the thousands of potential international crimes, the ones that are the most appropriate for the Court’s intervention. This tension between the breadth of the Prosecutor’s mandate on the one hand, and her limited resources on the other hand, necessarily affects the conduct of the Prosecutor and is, by itself, a constraint on her prosecutorial discretion.

In a sense, one may be tempted to compare the Prosecutor to the king in Antoine de Saint-Exupéry’s *Le Petit Prince*. A king “seated upon a throne which [is] at the same time both simple and majestic,” a king who seems to rule “on the planets and the stars” and whose powers seem “universal” but who nonetheless knows that he must give “reasonable” orders in order to be obeyed.¹⁰ Given the various political and material constraints weighing on her office,

6. Judge Sang-Hyun Song, *quoted in* James Goldston, *More Candour About Criteria*, 8 J. INT’L CRIM. JUST. 383, 384 (2010).

7. See Rome Statute, *supra* note 4, art. 42. See also John Jones, *The Office of the Prosecutor*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 269 (Antonio Cassese, Paolo Gaeta & John Jones eds., 2002); Giuliano Turone, *Powers and Duties of the Prosecutor*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1137.

8. See Rome Statute, *supra* note 4, arts. 13, 15.

9. See Joshua Rozenberg, *Why the world’s most powerful prosecutor should resign: Part 4*, THE TELEGRAPH (Sept. 14, 2008), available at <http://www.telegraph.co.uk/news/newstopics/lawreports/joshuarozenberg/2700448/Why-the-worlds-most-powerful-prosecutor-should-resign-Part-4.html>.

10. SAINT-EXUPÉRY, *supra* note 1, at 41, 44 (“Clad in royal purple and ermine, [the king] was seated upon a throne which was at the same time both simple and majestic . . . ‘Sire—over what do you rule?’ ‘Over everything,’ said the king, with magnificent simplicity. ‘Over everything?’ The king made a gesture, which took in his planet, the other planets, and all the stars . . . For his rule was not only absolute: it was also universal. ‘And the stars obey you?’ ‘Certainly they do,’ the king said. “‘They obey instantly. I do not permit insubordination.’”).

the Prosecutor must take into consideration the feasibility of her orders in the exercise of her powers. It would indeed be difficult to assert that such practical considerations ought not to be taken into account at all, as they pertain to the legitimacy of the Prosecutor's action.

For an institution such as the Office of the Prosecutor (OTP), legitimacy is vital precisely because it is its only weapon.¹¹ The institution must thus be seen as legitimate by its audience in order to persuade it to either collaborate or to support its actions. Insofar as this audience is diverse—victims, states, NGOs, ICC judges, individuals, etc.—and as each of these constituencies has conflicting interests, the Prosecutor must necessarily act with subtlety.¹² She is thus engaged in a multilateral dialogue, which can also be described as a strategic negotiation due to the power dynamics involved.

If there is any activity that epitomizes the art of strategy and that has indeed influenced negotiation theories, it is undoubtedly the game of chess.¹³ In chess, as in any negotiation, logic, patience, and planning are essential virtues. Chess also teaches how to adapt to unexpected situations and how to resist pressure, whether emanating from the opponent's moves, the clock, or oneself. As Benjamin Franklin observed, the Game of Chess is not "an idle amusement [and] several very valuable qualities of the mind, useful in the course of human life, are to be acquired and strengthened by

11. *Seeking Global Justice*, *supra* note 4, at 225 ("We have no police and no army, but we have legitimacy. We will prevail."). A parallel can be drawn here with the dissenting opinion of Justice Felix Frankfurter in *Baker v. Carr*, 369 U.S. 186, 227 (1962), in which he famously declared that "[t]he Court's authority - possessed of neither the purse nor the sword - ultimately rests on sustained public confidence in its moral sanction." It should be borne in mind that legitimacy or public confidence is not conferred forever. Political scientist David Easton distinguished between what he called diffuse support—the "reservoir of favorable attitudes or good will" towards an institution, and specific support, defined as the support given to the specific outputs of this institution. Therefore, a high "reservoir of diffuse support will help members to accept or tolerate outputs to which they are opposed or the effects of which they see as damaging to their wants." See David Easton, *A Re-Assessment of the Concept of Political Support*, 5 BRIT. J. POL. SCI. 435, 444 (1975). However, this capital of legitimacy is not infinite and a succession of unpopular outputs may erode diffuse support. Legitimacy must therefore be apprehended through a dynamic perspective rather than a static one. Accordingly, the question is better framed as whether an institution such as the OTP can *maintain* or *increase* its legitimacy through its outputs rather than whether it *has* legitimacy.

12. See Robert Mnookin, *Rethinking the Tension Between Peace and Justice: The International Criminal Prosecutor as a Diplomat*, 18 HARV. NEGOT. L. REV. 145 (2013).

13. See ANATOLY KARPOV, JEAN-FRANÇOIS PHELIZON, *CHess AND THE ART OF NEGOTIATION* (Praeger 2006) for an illustration; see also BRUCE PANDOLFINI, *EVERY MOVE MUST HAVE A PURPOSE: STRATEGIES FROM CHess FOR BUSINESS AND LIFE* (Hyperion 2003).

it, so as to become habits ready on all occasions; for life is a kind of Chess, in which we have often points to gain, and competitors or adversaries to contend.”¹⁴ The “royal game”¹⁵ is thus an ideal lens through which to analyze the process of decision-making. This is particularly true for the Prosecutor of the ICC. After all, chess is “a play substitute for the art of war,”¹⁶ and the lessons that one can learn from one of the oldest games in the world¹⁷ are instructive for modern combats, even a combat against impunity.

While this paper will illustrate the many ways in which one can analyze the Prosecutor’s actions using the chess analogy, there are also important differences between the game of chess and the actions of the Prosecutor. The references to chess developed in this paper are thus not based on a strict analogy, but are rather tools, which allow us to examine the Prosecutor from a new perspective. The game of chess is therefore used as a vehicle to grasp the power dynamics that the Prosecutor must navigate. Through a succession of shifting frames based on the chess metaphor, I will consider the Prosecutor’s various actual or apparent roles and the inevitable tensions between each of these roles in part II. I shall then analyze more specifically some actions and inactions of the Prosecutor with a particular emphasis on the issue of feasibility in part III.

II. THE CHESS ANALOGY

Before discussing the various roles played by the Prosecutor, it is important to situate the chess analogy and to underline certain differences between chess and the strategic interactions in which the Prosecutor is involved. These differences plead in favor of a nuanced comparison with the game of chess but, because they highlight the unique specificities of the strategic game of the Prosecutor, they also reinforce the value of the chess analogy. In effect, they cast an interesting light on the Prosecutor herself and raise fundamental questions concerning her actions.

14. Benjamin Franklin, *Essay on The Morals of Chess* (1786), reproduced in GEORGE WALKER, *THE CHESS PLAYER* 8 (Dearborn 1840).

15. STEFAN ZWEIG, *THE ROYAL GAME* (Pushkin Press 2001) (1941).

16. REUBEN FINE, *THE PSYCHOLOGY OF THE CHESS PLAYER* 1 (Dover 1967) (quoting Ernest Jones).

17. A. MacDonell, *Art. XIII. The Origin and Early History of Chess*, 30 J. ROY. ASIAN SOC. GR. BRIT. IR. 117 (1898).

A. *The number of players*

One obvious difference between chess and the game of the Prosecutor is that, as mentioned in Article 1.1 of the Laws of Chess, “[t]he game of chess is played between two opponents who move their pieces alternately on . . . a ‘chessboard.’”¹⁸ Two players—no less, and surely no more. On the one hand, a game of chess with only one player seems to run counter to reason. In his famous novel, *The Royal Game*, Stefan Zweig described the story of a man who, under peculiar circumstances, had to play against himself and almost sank into madness.¹⁹ On the other hand, however tempting the multi-player variants might be, these variants cannot be called “chess.” Indeed, “[t]he fundamental attraction of chess lies, after all, in the fact that its strategy develops . . . in two different brains.”²⁰ As a result, chess players need to focus their attention on the moves and strategies of a single adversary.

Assuming that the Prosecutor is a player,²¹ whom is she playing against? The perpetrators of the most serious crimes? The states? Is the Prosecutor playing alone or does she have allies?²² What is the role of the ICC judges, and to what extent do their own games overlap with the Prosecutor’s?

Thus, it appears that the Prosecutor is playing a much more complex game than any chess player, since she needs to anticipate and respond to the moves of multiple actors. As a consequence, her “game” is much less predictable because it can be affected at any moment by the actions of multiple players, not just one. In other words, the international chessboard is much more unstable than any classic chessboard. A recent example is the decision of the

18. *E.I.O1A. Laws of Chess*, art. 1, FIDE.COM, available at <http://www.fide.com/component/handbook/?id=124&view=article> (last visited Apr. 13, 2013).

19. ZWIG, *supra* note 155, at 55 (“[I]t is an absurdity in logic to play against oneself . . . Such cerebral duality really implies a complete cleavage of the conscious, a lighting up or dimming of the brain function at pleasure as with a switch; in short to want to play against oneself at chess is about as paradoxical as to want to jump over one’s own shadow.”).

20. *Id.*

21. One can, however, analyze the Prosecutor from a different perspective. See *infra* parts II.A and II.B for the discussions on “the Prosecutor as an Arbiter” and “the Prosecutor as a Pawn.”

22. We could conceive of the cooperating states, individually or collectively through the UN Security Council, the supporting NGO’s, and the intermediaries, as being the potential allies of the Prosecutor. However, practice reveals that the same actors supporting the Prosecutor on one issue can turn into its adversaries on another, according to their political agenda.

Prosecutor to open an investigation in Mali in January 2013.²³ While the OTP had been conducting a preliminary examination since July 2012, the decision to open an investigation was announced only a few days after France decided to militarily intervene in Mali.²⁴ Although it is probable that the OTP was seriously considering opening an investigation before the French intervention started, the latter likely pushed the OTP to react and, in any case, modified the Prosecutor's agenda.

B. The Balance of Power

The second significant difference between the two situations lies in the balance of power. In the game of chess, the players begin as equals on the chessboard.²⁵ Of course, this does not mean that the players are of the same value, as skill and talent are not equally distributed among individuals. The point here is to note that the players have the same material resources—sixteen pieces—at the beginning of the game.²⁶ Such a balanced position is seldom found in the various investigations launched by the Prosecutor. On the contrary, the balance of powers will vary considerably from situation to situation. Clearly, investigating the crimes allegedly committed by Sudanese President, Omar Al Bashir, or newly elected Kenyan President, Uhuru Kenyatta, will give rise to greater challenges than those posed by the investigations of crimes committed by local warlords. As any chess player knows, the king is always the most difficult piece to capture.²⁷

C. The Obligation to Move

The third notable difference is that chess players have an obligation to move when it is their turn to play. They cannot skip a turn. This can lead to a situation of “zugzwang”²⁸ when the player is

23. See Press Release, ICC, ICC Prosecutor opens investigation into war crimes in Mali: “The legal requirements have been met. We will investigate.” (Jan. 16, 2013), available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr869.aspx.

24. *Id.*

25. With the only exception being that one player (the one who is playing with the white pieces) must play first, which is generally considered to be an advantage.

26. *Laws of Chess*, *supra* note 188, art. 2.2.

27. In fact, technically speaking, the king cannot be captured in chess. He can only be put in check. If the player is then unable to get the king out of check, checkmate results.

28. A zugzwang is a situation “in which whoever has the move would obtain a worse result than if it were the opponent's turn to play.” DAVID HOOPER & KENNETH WHYLD, *THE OXFORD COMPANION TO CHESS* 458 (2d ed. 1992).

forced to make a bad move simply because moving is, in itself, a disadvantage in the situation. In contrast, the Prosecutor does not have such an obligation to proceed. He can decide not to act, as Luis Moreno-Ocampo did in 2006, when he declined to investigate the war crimes allegedly committed by British soldiers in Iraq,²⁹ or more recently in 2012, when he refused to investigate the crimes allegedly committed in Palestine.³⁰ However, as discussed in the third part of this paper, deciding not to move may in fact amount to a move and these apparent inactions have important consequences.

D. The Rules of the Game

The fourth important difference lies in the fact that while chess is an old game with fixed and well-established rules,³¹ international criminal law and, more particularly, the Rome Statute, are recent developments,³² with evolving rules. Although the basic provisions have been determined by the states in the Statute, both the ICC chambers and the Prosecutor are still engaged in specifying, and sometimes modifying, the rules.³³ Furthermore, chess has a relatively simple objective: to win by checkmating the opponent.³⁴ The same cannot be said regarding the ICC and, consequently, the

29. ICC Office of the Prosecutor, *Response to Communication Received Concerning Iraq*, (Feb. 9, 2006), available at http://www.iccpi.int/iccdocs/asp_docs/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006_Fr.pdf.

30. ICC Office of the Prosecutor, *Situation in Palestine* (Apr. 3, 2012), available at <http://www.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf>.

31. See HOOPER & WHYLD, *supra* note 288, at 173. Chess originated in India in the 6th century, and its rules have hardly evolved since the end of the 18th century.

32. See M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 535–648 (2d rev. ed. 2013).

33. See Mahnoush H. & Arsanjani, W. Michael Reisman, *Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L L. 385 (2003). For a recent illustration, see the different positions adopted by the chambers on the issue of witness preparation. See *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Case No. ICC-01/09-01/11, Decision on Witness Preparation (Jan 2, 2013), available at <http://www.icc-cpi.int/iccdocs/doc/doc1533653.pdf> (Trial Chamber V authorizing the practice of witness preparation); *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial (Nov. 30, 2007), available at <http://www.icc-cpi.int/iccdocs/doc/doc371733.pdf> (Trial Chamber I prohibiting witness preparation on the ground that it was not specifically provided for in the Rome Statute.).

34. *Laws of Chess*, *supra* note 188, art. 1.2 (“The objective of each player is to place the opponent’s king ‘under attack’ in such a way that the opponent has no legal move. The player who achieves this goal is said to have ‘checkmated’ the opponent’s king and to have won the game The opponent whose king has been checkmated has lost the game.”).

Prosecutor.

Although the Prosecutor has repeatedly affirmed that the purpose of the Statute is to end the impunity of the perpetrators of the most serious international crimes and to prevent future crimes,³⁵ the concrete meaning of this goal is not self-evident. In particular, the salient question arises as to how the Prosecutor should resolve the tension between the pursuit of justice and the restoration of peace when, for instance, belligerents in a conflict attempt to obtain assurances that they will not be prosecuted as a *sine qua non* to laying down their arms.³⁶ Securing a peace agreement, even to the detriment of the imperatives of justice, might well be a more effective solution to stop and prevent the crimes than inflexibly prosecuting the perpetrators. Beyond the “peace versus justice” debate, competing views exist as to the goals of the ICC and as to how they should be fulfilled. As Professor deGuzman contended, “[t]he ICC inherited international criminal law’s mission schizophrenia” between global orientations and more local objectives.³⁷

E. The End of the Game

The final difference to be kept in mind concerns the end of the game. The previous paragraph discussed the clearly defined goals of chess and the much more ambivalent and complex purposes of the

35. ICC Office of the Prosecutor, *Policy Paper on the Interests of Justice 1* (2007), available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf> (“[The object and purpose of the Statute is] the prevention of serious crimes of concern to the international community through ending impunity.”); *Seeking Global Justice*, *supra* note 4, at 215 (“The goal of the Rome Statute is to end the impunity for the most serious crimes of international concern—genocide, crimes against humanity, and war crimes - and to contribute to the prevention of such crimes.”).

36. See WILLIAM SCHABAS, *THE INTERNATIONAL CRIMINAL COURT, A COMMENTARY ON THE ROME STATUTE* 42 (2010) (discussing the relationship between peace and justice in the Preamble of the Statute and the idea that the Preamble could be read to recognize promotion of peace as the rationale for the Court); Mnookin, *supra* note 122 (discussing the tension between peace and justice and its consequences on the work of the Prosecutor); ICC, Review Conference of the Rome Statute, *The Importance of Justice in Securing Peace*, 3, ICC Doc. RC/ST/PJ/INF.3 (May 30, 2010) (by Juan Mendez), available at http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-PJ-INF.3-ENG.pdf (arguing that the idea that the ICC has stopped peace processes is “pure invention”). See also Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT’L L. 481 (2003) (on the issue of whether the ICC might defer to national reconciliation programs that involve amnesties).

37. Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT’L L. 265, 280 (2011).

ICC. But here is a simple question: when does the game end? Chess is a time-limited game in which three outcomes are possible: White wins, Black wins, or the game ends in a draw. When the two players sit down at the chessboard, they both know that, a few dozen moves away, the game will be over. Chess is in this regard a closed game.³⁸ Turning to the Prosecutor, can we, and should we, imagine an end to her “game”? Can she lose? And how could she win?

It is beyond the scope of this paper to respond to all of these questions, which will undoubtedly continue to attract and divide scholars in the coming years, but a few elements ought nonetheless be mentioned.

Under a minimalist approach, one could argue that the simple fact that the Prosecutor is prosecuting the gravest crimes and that individuals are being tried in The Hague is already a win.³⁹ In other words, the mere fact that she sits down at the chessboard, implements her strategies, and captures “pieces” can be valued as a functional success.⁴⁰ From the audacious hopes of Gustave Moynier in 1872⁴¹ to the trial of Thomas Lubanga Dyilo, the first one before the ICC,⁴² a great deal has already been accomplished. The Court is

38. However, between the first move made on the chessboard and the last one, the number of possibilities is astronomical. The number of positions in a game of chess is in fact greater than the number of atoms in the universe. This is surely what led the French writer Pierre Mac Orlan to declare that “there are more adventures on a chessboard than on all the seas of the world,” *quoted in* THIERRY WENDLING, *ETHNOLOGIE DES JOUEURS D’ÉCHECS* 21 (2002).

39. Indeed, the fact that the Prosecutor still faces many challenges does not foreclose the possibility both to look back on successful accomplishments and to hope for future achievements. In this regard, the lessons of chess are instructive. As Benjamin Franklin noted, “[w]e learn by Chess the habit of not being discouraged by present bad appearances in the state of our affairs; the habit of hoping for a favourable change, and that of persevering in the search of resources.” WALKER, *supra* note 14, at 8. “In chess in the last resort optimism is decisive. I mean by this that it is psychologically valuable to develop to the greatest length the faculty of being able to rejoice over small advantages. . . . [O]ptimism . . . is the indispensable psychological basis for position play. It is this optimism, too, which gives us strength, in face of every evil, however great, to discover the faintest hint of a bright side of the picture.” ARON NIMZOWITSCH, *MY SYSTEM: 21ST CENTURY EDITION* 35 (Lou Hays ed., 1991).

40. It is however possible to analyze the activity of the Prosecutor from a different perspective. In light of the complementarity principle on which the ICC is based, the intervention of the Prosecutor signals that states have failed to fulfill their duties to investigate and prosecute the most serious international crimes. The functional success of the Prosecutor is thus also the indicator of the defeat of national institutions in the combat against impunity.

41. Gustave Moynier, *Note Sur la Création d’une Institution Judiciaire Internationale Propre à Prévenir et à Réprimer les Infractions à la Convention de Genève*, 3 *BULL INT’L DES SOCIETES DE SECOURS AUX MILITAIRES BLESSES* 11, 122 (1872).

42. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (Mar. 14, 2012), <http://www.icc->

now a reality and the Prosecutor is the crucial actor who orients its work.

Under a more idealist approach, one could envisage the end of the game as the day when the words “genocide,” “crimes against humanity,” “crimes of war,” and “crimes of aggression” would only be the tragic echoes of a bygone era. Assuming and hoping that such a day arrives, would it mean that the Prosecutor has fulfilled her mission and won the “game” or, on the contrary, that she must continue to play to preserve her victory?

Further reflection on these two perspectives ultimately leads to a more realist approach under which it appears that the Prosecutor, unlike any chess player, is in fact engaged in a never-ending game.⁴³ She might, case after case, defeat the faces of impunity and obtain the convictions of the perpetrators of the most serious crimes, but her real opponent, impunity itself, is a mobile adversary that she can only put in check, but never checkmate.

The questions raised by the differences between the game of chess and the “game” of the ICC Prosecutor highlight some of the most important challenges faced by the Prosecutor, as well as by the ICC as a whole. Based on these differences, and the analogies that are presented in the coming sections, the chess metaphor provides a unique framework within which to analyze the dynamic strategies that are invoked by the Prosecutor to carry out her mission.

II. THE ROLES OF THE PROSECUTOR

If one compares international criminal law to a game of chess, the first question that comes to mind is: “What is the role of the ICC Prosecutor”? In other words, where does she stand on the international chessboard? In the following subsections, I consider three different roles based on the chess analogy and argue that, although both the Arbiter and the Pawn metaphors are appealing, the Prosecutor is undoubtedly a Player.

http://www.cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/court%20records/chambers/trial%20chamber%20i/Pages/2842.aspx.

43. This presupposes that we should not apprehend each situation or investigation as a game in itself, but merely as a “move” in the broader game that the Prosecutor is playing against impunity. We could also conceive of them as games within a game, through a process of *mise en abyme*.

A. The Arbiter

One could firstly, and perhaps paradoxically, consider the Prosecutor as an arbiter. It is true that the restraint usually expected from a referee seems inappropriate for the active role generally envisioned for the Prosecutor, as the world's "most prominent advocate for crime victims."⁴⁴ However, the referee thesis should not be so easily discounted. While it may not be fully compatible with what the Prosecutor is actually *doing*, it illustrates in part what the Prosecutor is *pretending to do*.

Under the referee thesis, the Prosecutor is a neutral actor who "follows the evidence"⁴⁵ and applies the law⁴⁶ without being influenced by international politics, much in the same way that a chess arbiter would equally apply the rules of the game, irrespective of the strength or fame of the players.⁴⁷ In other words, the Prosecutor is impervious to political pressures and is simply, almost mechanically, implementing the provisions of the Rome Statute. Former Prosecutor Luis Moreno-Ocampo thus affirmed in a 2010 address:

I shall not be involved in political considerations. I have to respect scrupulously my legal limits, my policy is not to stretch the interpretation of the norms adopted in Rome [. . .] My duty is to apply the law without political considerations. Other actors have to adjust to the law.⁴⁸

Likewise, current Prosecutor Fatou Bensouda⁴⁹ declared in a 2012 address:

44. Rick Gladstone, *A Lifelong Passion Is Now Put to Practice in The Hague*, N.Y. TIMES, (Jan. 19, 2013), at A7.

45. Luis Moreno-Ocampo, *quoted in* Goldston, *supra* note 6, at 387.

46. Luis Moreno-Ocampo, Statement at the Commemoration of the 10th Anniversary of the Adoption of the Rome Statute of the ICC 4, 6 (July 17, 2008), *available at* http://icc-cpi.int/iccdocs/asp_docs/library/asp/17_July_2008_Prosecutors_remarks_final.pdf. ("I have to apply the law. Nothing more. Nothing less. That is what we did and what we will continue to do. . . . I will apply the law without political considerations and I should not adjust to political considerations.").

47. The Preface of the Laws of Chess underlines that, "[t]he Laws assume that arbiters have the necessary competence, sound judgment and *absolute objectivity*." *Laws of Chess*, *supra* note 18.

48. Luis Moreno-Ocampo, Prosecutor of the Int'l Criminal Court, Keynote Address at the Council on Foreign Relations (Feb. 4, 2010), *available at* <http://www.cfr.org/international-law/prepared-remarks-luis-moreno-ocampo-prosecutor-icc/p21375>.

49. Fatou Bensouda was elected Prosecutor of the ICC by the Assembly of States Parties on December 12, 2011 and sworn in on June 15, 2012.

[T]he Office of the Prosecutor cannot yield to political considerations or adapt its work according to the peace negotiations timetable. It must always conduct its work on the basis of the law and of the evidence it has collected, and act accordingly, in an independent manner.⁵⁰

The referee thesis is an idealistic vision that the Prosecutor has seemed to endorse and that some NGOs, apparently not convinced by her performance, would like her to truly play. There is an obvious interest in appearing as a referee for an institution that in fact operates at the juncture of law and international politics. The mantle of neutrality is a powerful legitimating argument and is reassuring for those who dread the unconstrained power of the Prosecutor.⁵¹ It is not surprising that other judicial institutions, also criticized for behaving as political actors, have resorted to this argument. John Roberts famously used the same metaphor when he described his role as that of an “umpire” during his confirmation hearings for the position of Chief Justice of the United States:

Judges are like umpires. Umpires don't make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role.

....

[A]nd I will remember that it's my job to call balls and strikes and not to pitch or bat.⁵²

The Rome Statute, to a large extent, supports the referee thesis,⁵³ as do the guidelines adopted and made public by the OTP

50. Fatou Bensouda, *Reflections from the International Criminal Court Prosecutor*, 45 CASE W. RES. J. INT'L L. 505, 510 (2012). Drawing upon this argument, Bensouda justified her 2013 decision to open an investigation in Mali on the ground that the legal requirements of the Rome Statute had been met; ICC Press Release, *supra* note 23. Bensouda did not mention the military intervention launched by France just a few days earlier, likely indicating the desire of the OTP to project an image that it is not swayed by political considerations.

51. “The Prosecutor will answer to no superior executive power, elected or unelected. Nor is there any legislature anywhere in sight, elected or unelected, in the Statute of Rome. The Prosecutor is answerable only to the Court, and then only partially, although the Prosecutor may be removed by the Assembly of States Parties. The Europeans may be comfortable with such a system, but Americans are not.” John R. Bolton, *The United States and the International Criminal Court*, U.S. DEP'T OF STATE (Nov. 14, 2002), available at <http://2001-2009.state.gov/t/us/rm/15158.htm>. See also Kevin J. Heller, *The Role of the International Prosecutor*, in OXFORD HANDBOOK OF INT'L ADJUDICATION (Cesare Romano, Karen Alter & Yuval Shany eds., 2013), available at <http://ssrn.com/abstract=2197024> (for an analysis of the tension between independence and accountability of the Prosecutor).

52. *Confirmation Hearing on the Nomination of John G. Roberts Jr. to be Chief Justice of the United States*, 109th Cong. 55-56 (2005).

53. See Rome Statute, *supra* note 4, art. 42, on the independence and impartiality of the Prosecutor, article 45, on the solemn undertaking of the Prosecutor to exercise her

through several policy papers.⁵⁴ In these documents, the Office set out its understanding of its own role, described its activities and articulated the criteria upon which its decisions are based. There is nothing surprising in the fact that these papers emphasize the referee thesis; in fact, it would have been remarkable if they had not, as their purpose was largely to illustrate the neutrality of the Prosecutor and to “objectify” the exercise of prosecutorial discretion. For instance, in the 2007 *Policy Paper on the Interests of Justice*, the Prosecutor discussed the exceptional circumstances in which the OTP may choose not to proceed with an investigation or a prosecution, due to a determination that the case would not serve the “interests of justice,” as stipulated by Article 53 of the Rome Statute.⁵⁵ The Prosecutor expressly distinguished in this policy paper the interests of justice from the interests of peace, stating that the latter “falls within the mandate of institutions other than the Office of the Prosecutor,” namely political institutions such as the United Nations Security Council.⁵⁶ In other words, the OTP will, for the purpose of Article 53 of the Rome Statute, only consider interests of justice and not interests of peace. This statement bears some resemblance to the political question doctrine in American constitutional law.⁵⁷ Under this perspective, the OTP delimits its

“respective functions impartially and conscientiously,” and article 54, which provides that the Prosecutor shall “investigate incriminating and exonerating circumstances equally.”

54. See *Policy Paper on the Interests of Justice*, *supra* note 355; see ICC Office of the Prosecutor, *Paper on some policy issues before the Office of the Prosecutor* (Sept. 2003), available at http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf; see ICC Office of the Prosecutor, *Policy Paper on Preliminary Examinations* (Oct. 4, 2010), available at http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf.

55. *Policy Paper on the Interest of Justice*, *supra* note 355, at 1. Article 53(1)(c) of the Rome Statute provides that the Prosecutor shall initiate an investigation unless he or she determines that there is no justification to proceed under the Statute, based on, inter alia, the consideration that “[t]aking 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.” Likewise, paragraph 2(c) of Article 53 stipulates that the Prosecutor may determine that there is not a sufficient basis for prosecution if “[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.” Rome Statute, *supra* note 4.

56. *Policy Paper on the Interest of Justice*, *supra* note 355, at 1.

57. The political question doctrine postulates that certain issues are inappropriate for judicial resolution and should be resolved by the political branches. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986) (1962) at 183–98 [hereinafter *THE LEAST DANGEROUS BRANCH*]; see also Louis Henkin, *Is There a Political Question Doctrine?*, 85 *YALE L.J.* 597 (1976).

competence to “the interests of justice” and denies itself the competence to act on political questions, the “interests of peace,” which belong to the political actors better suited for this purpose.⁵⁸ By narrowly interpreting Article 53 of the Rome Statute and strictly circumscribing its sphere of competence, the Prosecutor endeavors to reaffirm her imperviousness to political considerations.⁵⁹

Although the Rome Statute and the policy papers support the referee thesis, this approach does not withstand the test of practice. The truth is that “however powerful the aspirations for neutral principles, experience and common sense suggest that law can never be entirely divorced from its surrounding environment.”⁶⁰ Furthermore, the Prosecutor is not a judge, and the neutrality required of the latter is different in kind from the one expected from her. Assuredly, she must respect elementary principles of independence, impartiality, and fairness.⁶¹ She is nonetheless vested with a specific mission “to prosecute those who bear the greatest responsibility of the most serious crimes,”⁶² which entails choices that cannot be disconnected from the environment in which she operates. Both the discretion that the Prosecutor enjoys, and the constraints that weigh on her, make it almost impossible for her to ignore strategy and policy considerations.⁶³ In fact, the Prosecutor inevitably makes eminently political choices in her decisions whether to investigate or not, and whether to prosecute or not.⁶⁴

58. Fatou Bensouda, Prosecutor, Int'l Criminal Court, Keynote Address at the Seminar Institute for Security Studies: Reconciling the independent role of the ICC Prosecutor with conflict resolution 5 (Oct. 10, 2012), available at <http://www.issafrica.org/uploads/10Oct2012ICCKeyNoteAddress> (“I should stress here that the ‘interests of justice’ must not be confused with the interests of peace and security, which falls within the mandate of other institutions, notably the UN Security Council and the African Union. The Court and the Office of the Prosecutor itself are not involved in political considerations. We have to respect our legal limits. The prospect of peace negotiations is therefore not a factor that forms part of the Office’s determination on the interests of justice. The international community has put in place some clear divisions of responsibility. The UN Security Council is in charge of peace and security. The ICC is doing justice.”).

59. The process at work can also be interpreted as a “hands-tying commitment device,” whereby the Prosecutor reduces her freedom of action. See Mnookin, *supra* note 122, at 155.

60. Goldston, *supra* note 5, at 386–87.

61. See Rome Statute, *supra* note 4, art. 42.

62. *Seeking Global Justice*, *supra* note 4, at 221.

63. See Sarah M. H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT'L L. 941, 942 (2010).

64. William Schabas, *Victor's Justice: Selecting “Situations” at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 548–49 (2010) (“The Prosecutor regularly insists that his actions and decisions are based on judicial and not political factors. But if this is really the

According to Professor Schabas, the OTP should therefore cease “encouraging the myth that what they are doing is devoid of any political dimension.”⁶⁵ Once we abandon the idealist vision, it quickly becomes clear that refusing to take into account these policy considerations would dramatically hurt the institution. Moreover, when the referee is the most watched person on the chessboard or on the field,⁶⁶ there are legitimate reasons to doubt that she is just “following the evidence” or “calling balls and strikes.”

B. The Pawn

Under a radically opposite approach to the referee perspective, one could consider the Prosecutor as a pawn. According to this view, the Prosecutor is a political tool subject to the will of the real players: the states, acting individually or collectively through the United Nations Security Council. According to this view, the Prosecutor has no independent capacity of action or agenda. As a pawn, she can only be moved and used by other players.⁶⁷ This is the realist, or to some extent, the cynical thesis.

Three specific illustrations of the pawn thesis are particularly instructive. The first and arguably most powerful illustration of this approach is the issue of territorial state referrals or self-referrals.⁶⁸

case, then we need a better explanation for the current choice of situations. . . . In reality, what we have at the ICC is a political determination but with less transparency, not more.”)

65. *Id.* at 552.

66. The personality of the Prosecutor herself is also to be taken into account here, as it may amplify the already inherent tension between the high-profile nature of the OTP and the argument that the Prosecutor is simply a neutral arbiter. In this regard, one can doubt that Luis Moreno-Ocampo’s behavior during his term was consistent with the referee thesis. In particular, his appearance with Ugandan President Yoweri Museveni during a 2007 press conference affected the image of impartiality of the OTP. This tension with the referee thesis, however, does not necessarily indicate that high visibility is wrong for the Prosecutor. Once we adopt the player thesis, such exposure might in fact be valuable.

67. It is true that in chess, all the pieces, and not only the pawn, are necessarily moved by the player. Obviously no piece enjoys autonomous capacity of action. Here, I use the pawn analogy because the figure of the pawn epitomizes the idea of a person or an institution being used by others for their own purposes.

68. See Darryl Robinson, *The Controversy over Territorial States Referrals and Reflections on ICL Discourse*, 9 J. INT’ L CRIM. JUST. 355 (2011). Four states have referred a situation occurring on their own territory to the Prosecutor so far: Uganda, the Democratic Republic of Congo, Central African Republic and Mali. In accordance with Article 13 of the Statute, the United Nations Security Council referred the situations in Darfur, Sudan and in Libya to the Prosecutor, respectively in 2005 and 2011. In 2010 and 2011, the Prosecutor initiated investigations in Kenya and Côte d’Ivoire under his *proprio motu* powers (with the authorization of the pre-trial Chamber).

The argument is that the African heads of state who referred situations occurring on their own territory to the ICC—under article 14 of the Statute—manipulated the Court for political purposes, either to get rid of political opponents or to regain international legitimacy in the concerts of nations.⁶⁹

In addition to self-referrals by African states, the events of 2011 in Libya also lend support to the pawn thesis. Many scholars have viewed the Libyan case as an illustration of the manipulation of the Prosecutor and the Court by the United Nations Security Council's major powers. According to this thesis, the ICC was used by the intervening forces to frame their "intervention in the name of justice and to marginalize and pressure Gaddafi," and was later abandoned when it became an obstacle to new political interests in post-Gaddafi Libya.⁷⁰

Finally, under a neocolonialist version of the pawn thesis, the Prosecutor is described as a pawn of Western states who purposely focuses her investigations exclusively on African states.⁷¹ The argument is that the Prosecutor is using the African continent as a guinea pig to legitimate the work of the ICC, while at the same time serving the Western states' political interests.⁷² This thesis was recently reaffirmed in powerful terms by Ugandan President,

69. *See id.* at 367–70.

70. Mark Kersten, *Between Justice and Politics: The International Criminal Court's Intervention in Libya*, in *INTERNATIONAL CRIMINAL JUSTICE AND 'LOCAL OWNERSHIP': ASSESSING THE IMPACT OF JUSTICE INTERVENTIONS* (Carsten Stahn, Sara Kendall & Christian De Vos eds.) (forthcoming 2013).

71. The Prosecutor has initiated proceedings with regard to eight situations so far, all of them concerning African countries: Democratic Republic of Congo, Central African Republic, Uganda, Darfur (Sudan), Kenya, Libya, Côte d'Ivoire, and Mali.

72. "It seems that Africa has become a laboratory to test the new international law." Jean Ping, *quoted in Vow to Pursue Sudan over 'Crimes'*, BBC NEWS, available at <http://news.bbc.co.uk/2/hi/africa/7639046.stm> (last updated Sept. 27, 2008); Charles C. Jalloh, *Regionalizing International Criminal Law?*, 9 INT'L CRIM. L. REV. 463 (2009) ("Africans have become the sacrificial lambs in the ICC's struggle for global legitimation."); *see also* Mahmood Mamdani, *The New Humanitarian Order*, THE NATION (Sep. 29, 2008), available at <http://www.thenation.com/article/new-humanitarian-order#axzz2dz521Hqe> (discussing whether the ICC is an instrument of neocolonial domination). *See also* the 2009 Declaration of the African Union member states in which they decided to "not cooperate . . . for the arrest and surrender of President Omar El Bashir," and underscored that "the African Union and its Member States reserve the right to take any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent." ASSEMBLY OF THE AFRICAN UNION, 2009 DECISIONS AND DECLARATIONS OF THE AFRICAN UNION 8-9 (July 3, 2009), available at http://www.au.int/en/sites/default/files/ASSEMBLY_EN_1_3_JULY_2009_AUC_THIRTEENTH_ORDINARY_SESSION_DECISIONS_DECLARATIONS_%20MESSAGE_CONGRATULATIONS_MOTION_0.pdf (emphasis added).

Yoweri Museveni, at the swearing-in ceremony of Kenyan President elect, Uhuru Kenyatta:

I want to salute the Kenyan voters on one other issue - the rejection of the blackmail by the [ICC] and those who seek to abuse this institution for their own agenda. I was one of those that supported the ICC because I abhor impunity. However, the usual opinionated and arrogant actors using their careless analysis have now distorted the purpose of that institution. They are now using it to install leaders of their choice in Africa and eliminate the ones they do not like.⁷³

The pawn thesis is, however, more complex than it seems. For example, in the Democratic Republic of Congo and Uganda cases, the Prosecutor strongly encouraged the states to refer the situation to the ICC.⁷⁴ It is therefore unclear who is manipulating whom in this situation. It might well be argued that the Prosecutor instrumentalized the situation in order to be able to launch an investigation without using his *proprio motu* powers.⁷⁵ This solution had the advantage of empowering the Prosecutor to operate without further validating the neocolonialist claim, as it was the state itself that requested the intervention of the Court.⁷⁶

The neocolonialist claim itself can also be challenged under another version of the pawn approach. It is unclear to what extent African civil societies actually subscribe to the neocolonialist thesis. Therefore, it may be the case that the African heads of states invoking this thesis are merely exploiting the issue for their own

73. *East Africa: Statement By H.E. Yoweri Kaguta Museveni President of the Republic of Uganda Inauguration of H.E. Uhuru Kenyatta, Kenya's President-Elect Nairobi 9th April 2013*, THE NEW VISION (Apr. 9, 2013), http://allafrica.com/stories/201304091224.html?aa_source=slideout.

74. See ICC Office of the Prosecutor, *Report on the Activities Performed During the First Three Years (June 2003-June 2006)* (Sept. 12, 2006), at 7.

75. Rome Statute, *supra* note 4, art. 15.

76. Fatou Bensouda relied to some extent on this same argument in a 2012 address: It is no secret to all of you in this room that during recent African Union summits, international criminal justice has been put to the test. . . . Anti-ICC elements have been working very hard to discredit the Court and lobby for non support, with complete disregard for legal arguments.

....

I can give you examples of positive African engagement include [sic] - Uganda, DRC and CAR all referred their situations to the Court, requesting its intervention, thereby helping to start investigations without any controversy.

Fatou Bensouda, Prosecutor Elect, ICC, Introductory Remarks at the International Conference: 10 years review of the ICC. Justice For All? (Feb. 15, 2012) (emphasis added).

political purposes.⁷⁷

As these examples suggest, the pawn thesis is indeed multidimensional and raises more questions than it answers with regard to the role of the Prosecutor.

François-André Philidor, a French chess player and musician of the 18th century, famously declared that, “Pawns are the soul of chess.”⁷⁸ By that affirmation, he sought to emphasize the value of the pawn, which is all too often neglected.⁷⁹ In his words, “pawns uniquely determine the attack and the defense, and on their good or bad arrangement depends entirely the winning or losing of the game.”⁸⁰ Pawns have great potential indeed. In particular, when a pawn reaches the eighth rank on the chessboard it can be promoted to a queen.⁸¹ That the apparently weakest piece on the chessboard can over time turn into the most powerful one militates precisely against underestimating the importance of that piece.

In the context of the Prosecutor, it could well be argued that the politically driven self-referrals made by some states were necessary and even beneficial as a first phase, as it generated activity at a time when the Prosecutor was still in the early stages of acquiring sufficient legitimacy to operate through her *proprio motu* powers. In other words, the “pawn phase” was a necessary and temporary stage before the Prosecutor could be promoted as a real actor. In that regard, there may be some value in being used temporarily as a pawn, as long as the pawn knows where it is ultimately going. If your primary objective is to reach the eighth rank, the question of who is going to push you there might seem ancillary. This naturally raises the question of whether the Prosecutor can still be considered as a pawn if she is pursuing her own strategy.

The examples above illustrate that the pawn thesis is

77. “What offends me the most when I hear criticisms about this so-called Africa bias is how quick we are to focus on the words and propaganda of a few powerful, influential individuals, and to forget about the millions of anonymous people who suffer from their crimes.” Fatou Bensouda, *quoted in* Rick Gladstone, *supra* note 444, at A7.

78. FRANÇOIS-ANDRÉ PHILIDOR, *L'ANALYSE DES ECHECS*, at xix (London 1749) (“[Les pions] sont l’âme des Echès”); *see also* HOOPER, & WHYLD, *supra* note 288, at 304.

79. The classic value scale in the game of chess is as follows: Pawn=1; Knight =3; Bishop= 3; Rook=5; Queen=9.

80. FRANÇOIS-ANDRÉ PHILIDOR, *supra* note 78, at xix (translation by author).

81. *Laws of Chess*, *supra* note 18, art. 3.7e (“When a pawn reaches the rank furthest from its starting position it must be exchanged as part of the same move on the same square for a new queen, rook, bishop or knight of the same colour. . . . This exchange of a pawn for another piece is called ‘promotion’ and the effect of the new piece is immediate.”).

misleading precisely because it overlooks the fact that both the OTP and the states' leaders might have benefited from the referrals.⁸² In fact, while being portrayed by her detractors as a pawn, the Prosecutor was already playing.

C. The Player

Both the utopian vision of the referee and the cynical vision of the pawn can be encompassed and transcended in a third conception which does better justice to the Prosecutor's actual role and functioning. Under this third approach, the Prosecutor is a player. She is not outside the game, as the referee might be, because she is necessarily part of international politics⁸³ and is not doomed to be a passive pawn. Rather, she is an active player in the game.

Current Prosecutor, Fatou Bensouda, recently affirmed that "[w]hat has to be recognized is that even though we are a judicial institution, we operate in a political environment, whether we like that or we don't."⁸⁴ Although it acknowledges the political constraints that weigh on the OTP, this statement does not fully do justice to the player dimension because the Prosecutor still hides behind the mantle of judicial neutrality. The message conveyed is that the OTP is an apolitical body surrounded by political forces. The legal/political dichotomy is put forward in an attempt to convince the audience that the institution is neutral.

And yet this statement is, at the same time, an example of the "player dimension." At the risk of stating the obvious, if the Prosecutor is a player, she must actually "play." This means that the Prosecutor needs to appear as a "referee" for the largest part of its audiences, even though she is "playing." Acknowledging the political dimension would not advance the cause of the OTP, especially at this stage of its evolution. Likewise, although many Americans believe that ideology is a key factor in the Supreme Court decision-making process, no Justice has explicitly recognized that his or her

82. Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403, 404 (2005) ("For both Uganda and the ICC, the case presented an important opportunity. For Uganda, the referral was an attempt to engage an otherwise aloof international community by transforming the prosecution of LRA leaders into a litmus test for the much celebrated promise of global justice. . . . For the ICC, the voluntary referral of a compelling case by a state party represented both an early expression of confidence in the nascent institution's mandate and a welcome opportunity to demonstrate its viability.").

83. See Goldston, *supra* note 5, at 387; Nouwen & Werner, *supra* note 633, at 946.

84. Gladstone, *supra* note 44, at A7.

opinions were motivated by ideology.⁸⁵ The referee thesis therefore has a powerful appeal and it is unclear what gains would be obtained by taking off the mantle of neutrality completely.

In other words, the player dimension will necessarily lead the Prosecutor to advocate for certain things while doing the opposite, to move her pieces to one side of the chessboard while aiming at the other. As such, the Prosecutor as a player has the possibility to invoke the full variety of the other roles—in particular, the referee posture—depending on the circumstances and the audience she is addressing.

III. HOW THE PROSECUTOR CAN PLAY: THE PROSECUTOR IN ACTION

The Prosecutor has many strings to her bow. One important and widely debated way the Prosecutor can play is, paradoxically, by staying her hand and refusing to move. She can also threaten to move and force other actors to proceed. In this regard, the use of preliminary examinations is a powerful illustration of how the OTP can spur states to initiate their own investigations.⁸⁶ In any case, as the king in Saint Exupéry's novel knew, the Prosecutor should carefully factor in the feasibility of her orders before choosing her course of action.

A. Inaction

In chess, defense is sometimes the best form of attack, and inaction the most efficient form of action. In one of his recent books, former World Chess Champion, Garry Kasparov, praised the defensive talent of his predecessor, Tigran Petrosian, whom he described as an “inaction hero”:

[He] perfected the art of what we call ‘prophylaxis’ in chess. Prophylaxis is the art of preventative play, strengthening your position and eliminating threats before they are even threats. Petrosian defended so well that his opponent’s attack was over before it started, perhaps even before he’d thought of it himself. . . . I like to refer to him as a true chess ‘inaction hero.’ He developed a policy of ‘vigilant inaction’ that showed how to win without going directly on the offensive.⁸⁷

85. See William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 789 (2009).

86. *Reflections from the International Criminal Court Prosecutor*, *supra* note 50, at 509.

87. GARRY KASPAROV, *HOW LIFE IMITATES CHESS - INSIGHTS INTO LIFE AS A GAME OF STRATEGY* 27–28 (London: Arrow Books 2008).

The expression “policy of vigilant inaction” will naturally ring a bell for readers of Alexander Bickel. In *The Least Dangerous Branch*, the American constitutional scholar developed the theory of “the passive virtues,”⁸⁸ which permits the avoidance of unnecessary constitutional decision-making through the reference to certain jurisdictional doctrines. As Justice Louis Brandeis famously declared, “the most important thing we do is not doing.”⁸⁹

The Prosecutor has used “vigilant inaction” as well and has resorted to “passive virtues.” When, in 2009, Palestine lodged a declaration accepting the exercise of jurisdiction by the ICC for acts committed on the territory of Palestine since July 1, 2002, the Prosecutor initiated a preliminary examination.⁹⁰ He then waited three years before rejecting the case, arguing that the Court lacked jurisdiction because the statehood of Palestine, for the purpose of Article 12 of the Statute, was still under dispute, and that the resolution of such an issue was beyond the Prosecutor’s purview.⁹¹ The sensitivity of the case and the certainty that Israel would not cooperate—in other words, the practical impossibility to proceed—surely led the Prosecutor to resort to the virtue of prudence. Under

88. See THE LEAST DANGEROUS BRANCH, *supra* note 57; see also Alexander Bickel, *The Passive Virtues, Foreword to The Supreme Court 1960 Term*, 75 HARV. L. REV. 40 (1961).

89. ALEXANDER BICKEL, *THE UNPUBLISHED OPINIONS OF JUSTICE BRANDEIS* 17 (1957).

90. ICC Office of the Prosecutor, *Situation in Palestine*, *supra* note 30.

91. *Id.* (“In interpreting and applying article 12 of the Rome Statute, the Office has assessed that it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1). The Rome Statute provides no authority for the Office of the Prosecutor to adopt a method to define the term “State” under article 12(3) which would be at variance with that established for the purpose of article 12(1).”). The Prosecutor added that

[t]he Office has been informed that Palestine has been recognised as a State in bilateral relations by more than 130 governments and by certain international organisations, including United Nation bodies. However, the current status granted to Palestine by the United Nations General Assembly is that of “observer”, not as a “Non-member State”. The Office understands that on 23 September 2011, Palestine submitted an application for admission to the United Nations as a Member State in accordance with article 4(2) of the United Nations Charter, but the Security Council has not yet made a recommendation in this regard. While this process has no direct link with the declaration lodged by Palestine, it informs the current legal status of Palestine for the interpretation and application of article 12.

Thus, the UN General Assembly resolution adopted on November 29 2012 granting Palestine non-Member Observer State status appears, in light of the wording of the ICC Prosecutor decision itself, to “inform” and provide important elements of answer regarding the status of Palestine for the purpose of article 12 of the Rome Statute.

the “player conception,” this strategic move might well have been the least dangerous and indeed, a skilled one. By emphasizing that “it is for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State,” the Prosecutor protected the Office by externalizing this sensitive issue to the competent political actors.⁹² Moreover, the Prosecutor could achieve this result under the guise of restraint and neutrality by refusing to exercise powers that were not conferred upon him by the Rome Statute.

There are, however, obvious limits to the use of passive virtues by the Prosecutor. Sustained inaction might well be perceived as deliberate abdication. By refusing to proceed in sensitive cases, the Prosecutor protects her short-term interests; but if the OTP is to be a perennial institution, she will inevitably have to enter “complex games” and “play” against strong opponents.

Here, two major problems arise. First, it is unclear whether the decision not to proceed effectively protects the Prosecutor and insulates her from the strong political pressures that would have arisen had she proceeded further on the matter. Under a pragmatic perspective, the decision not to open an investigation—despite being based on the fact that the Court lacks jurisdiction—has the same effect as a decision affirming that there is no reasonable basis to believe that a crime has been committed, or that the crime does not meet the gravity threshold required by the Rome Statute. In both cases, the Prosecutor does not act. Lawyers will assuredly observe that these decisions are technically different and that this difference fundamentally matters, but the more global audience of the Prosecutor might simply understand the decision not to investigate as a clear rejection of Palestine’s claims. As a result, this may also reinforce the view that the Prosecutor is protecting the most powerful states.⁹³

Second, although the statement of the Prosecutor aims to promote the referee thesis, through the emphasis on his own limits and the necessity to defer to the decisions of the political actors, it is also, paradoxically, in tension with such an approach. When it is suspected that the rationale for the decision is a pretext for avoiding the launch of a sensitive investigation, and when it is argued that political considerations have influenced to a great

92. ICC Office of the Prosecutor, *Situation in Palestine*, *supra* note 30, ¶ 6.

93. See Richard Dicker, Op-Ed., *A Flawed Court in Need of Credibility*, INT’L HERALD TRIB. (May 22, 2012).

extent the decision, the use of apparently neutral arguments is at best superficial and at worst harmful.⁹⁴ In other words, when virtues are “‘passive’ in name and appearance only,”⁹⁵ and when it is widely believed that political considerations are in fact at work,⁹⁶ the referee thesis, although invoked by the Prosecutor, will fail to convince her audience. Thus, while utilizing the referee role for its own advantage may indeed further the cause of the Prosecutor at times, the Prosecutor as a player must be skillful enough to ensure that the referee costume is in fact credible.

B. The Threat of Action: the Use of Preliminary Examinations by the OTP

Aron Nimzowitsch was one of the best chess players of the early 20th century. In 1925, he wrote a strategy book that is, by all standards, a classic.⁹⁷ He is also famous for one sentence he uttered during a New York chess tournament in 1927.⁹⁸ When, at one point during a game, his opponent, Milan Vidmar, took out his cigarette case, Nimzowitsch, very sensitive to smoke, protested and called the referee.⁹⁹ The latter told Nimzowitsch that Vidmar was not actually smoking. Nimzowitsch then famously replied: “‘You are a chess master,’ . . . ‘and you must know that *the threat is stronger than the execution!*’”¹⁰⁰ The idea is that an attack does not have to come to fruition to be effective. The mere threat will force the opponent to react. In fact, the threat might be as effective as the attack itself while, at the same time, saving the cost of action.¹⁰¹

The Prosecutor’s use of preliminary examinations is a powerful illustration of this principle. The primary objective of a preliminary examination is to determine whether a situation brought to the attention of the Prosecutor meets the criteria provided by the Rome Statute to warrant an official investigation by

94. *Id.*

95. Gerald Gunther, *The Subtle Vices of the “Passive Virtues” - A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 (1964).

96. BASSIOUNI, *supra* note 32, at 713.

97. NIMZOWITSCH, *supra* note 39.

98. *See* REUBEN FINE, *THE WORLD’S GREAT CHESS GAMES* 128 (1976).

99. *Id.*

100. *Id.* (emphasis added).

101. PETER KURZDORFER, *THE TAO OF CHESS* 93 (2004). (“Often it is better to leave a threat hanging over your opponent’s head, like the sword of Damocles, than to carry it out. That way, your opponent has to constantly worry about the threat, which may well interfere with what she wants to do.”).

the OTP.¹⁰² When initiated by the Prosecutor, however, the preliminary examination can also be used as a way to threaten a state and encourage it to investigate the situation. Once the preliminary examination is launched, the state knows that this might well lead to an official investigation by the ICC; therefore, the state has a strong incentive to act on the matter before the ICC intervenes further.¹⁰³ The preliminary examination phase thus, enables the OTP to act as “a catalyst for national proceedings.”¹⁰⁴ As such, an effective use of preliminary examinations, in conjunction with the principle of complementarity,¹⁰⁵ may one day fulfill the wish of former Prosecutor Luis Moreno-Ocampo: a Court with no cases because states are fulfilling their duties to prosecute international crimes.¹⁰⁶

102. *Draft of Policy Paper on Preliminary Examinations*, *supra* note 54 (A “preliminary examination . . . may be initiated by . . . a referral from a state . . . or the [United Nations] Security Council,” by “a declaration pursuant to article 12(3) by a state which is not a party to the statute,” or by the Prosecutor himself, taking into account “any information on crimes under the jurisdiction of the Court.”).

103. The Prosecutor alluded to this threat effect in a 2003 statement: “Also, due to the dissuasive effect that the mere existence of the court generates, the possibility of presenting a case at the [ICC] could convince some states with serious conflicts to take the appropriate action.” Press Release, ICC, Election of the Prosecutor, Statement by Mr. Moreno Ocampo (Apr. 22, 2003), available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/press%20releases/press%20releases%202003/Pages/election%20of%20the%20prosecutor_%20statement%20by%20mr_%20moreno%20ocampo.aspx.

104. *Reflections from the International Criminal Court Prosecutor*, *supra* note 50, at 508.

105. The principle of complementarity is the cornerstone of the Rome Statute and of the functioning of the ICC. The essence of the principle is that the Court is not intended to replace national courts, but should operate only when national structures and courts are “unwilling or unable to conduct investigations and prosecutions.” *Paper on Some Policy Issues* (2003), *supra* note 54, at 4.

106. Luis Moreno-Ocampo, Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the ICC (June 16, 2003), available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/statement%20made%20by%20mr%20luis%20moreno%20ocampo%20at%20the%20ceremony%20for%20the%20solemn%20undertak.aspx (“As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.”); *Paper on Some Policy Issues* (2003), *supra* note 54, at 4; *Reflections from the International Criminal Court Prosecutor*, *supra* note 50, at 509 (“[The preliminary examination] is one of the most remarkable efficiency tools we have at our disposal as it encourages national prosecutions and prevents or puts an end to abuses. Thus, this process allows the Court to avoid opening investigations and prosecutions when national mechanisms are functioning in accordance with our founding Statute. This is what we are doing in Colombia, Georgia, and Guinea.”).

This approach of the Prosecutor is not without recalling the ideas advocated by a new school of chess, which appeared in the 1920s. In reaction to the rigid conceptions of Siegbert Tarrasch, the Hypermoderns—led by Aron Nimzowitsch—proposed new approaches and challenged classical conceptions.¹⁰⁷ Among these innovations was the idea that in order to control the center—the four squares at the center of the chessboard that are considered essential—it is not necessary to physically occupy the center. The Hypermoderns valued indirect control of the center through pressures exerted by the long-range action of distant pieces.¹⁰⁸ As Aron Nimzowitsch wrote, “the main point [is] to place the enemy center . . . under restraint.”¹⁰⁹

Maybe Luis Moreno-Ocampo is a Hypermodern. According to his conception, the ICC would not need to “occupy the center”—the prosecution of the most serious international crimes—in the future because it will be able to control it indirectly, through the threat of its intervention. The former Prosecutor further illustrated this idea by affirming that “the most important cases we are doing are the cases we are not doing.”¹¹⁰ The idea conveyed is that the majority of the cases will be solved by the states, in the “shadow” of the ICC, because the states will have internalized the threat of the Court’s intervention.¹¹¹

The most obvious argument challenging this approach is that it can be viable if, and only if, the threat of action is a real threat and not a hypothetical one. In other words, if certain states know that, for political reasons, the Court will not intervene, then the threat is merely symbolic and the “center” is not controlled. In this regard, the results of the ongoing preliminary investigations in non-African

107. See NIMZOWITSCH, *supra* note 39; RICHARD RETI, MODERN IDEAS IN CHESS 119–27 (1960); THE WORLD’S GREAT CHESS GAMES, *supra* note 98, at 122 (presenting the ideas of the Hypermoderns).

108. NIMZOWITSCH, *supra* note 39, at 118–19 (“[C]ontrol of the center depends not on a mere occupation, (placing of pawns), but rather on our general effectiveness there, and this is determined by quite other factors. . . . The true conception of the center is a far wider one. Certainly, pawns as being the most stable, are best suited to building a center, nevertheless centrally posted pieces can perfectly well take their place. *Pressure, also, exerted on the enemy center by the long range action of Rooks or Bishops directed on it can well be of corresponding importance.*”) (emphasis added).

109. *Id.* at 117.

110. Luis Moreno-Ocampo, *How Prosecution Can Lead to Prevention*, 29 LAW & INEQUALITY 477, 493 (2011).

111. Luis Moreno-Ocampo, Keynote Address at the Council on Foreign Relations (Feb. 4, 2010), at 10, available at <http://www.cfr.org/international-law/prepared-remarks-luis-moreno-ocampo-prosecutor-icc/p21375>.

countries will be instructive.

But one can go even further and question not only the threat of the intervention, but also the intervention itself. If certain states know that even when the Court intervenes, they can refuse to cooperate without serious damages, “the center” is still not controlled.

C. The Feasibility of Action: Lessons from Le Petit Prince

Although the objectives of the ICC are still debated among scholars,¹¹² the Prosecutor has made it clear that “[his] role is to prosecute those who bear the greatest responsibility for the most serious crimes.”¹¹³ The 2003 policy paper issued by the OTP thus provides that:

The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes.¹¹⁴

The game of chess and the fight against impunity that the Prosecutor is engaged in have, therefore, one final similarity; in both cases, one seeks to “capture” the most important piece of the opponent: the adverse king for the chess player, and those who bear the greatest responsibility for the most serious crimes for the Prosecutor.

This is not an easy task. The number of fugitives is indeed a major contemporary concern of the Prosecutor’s office.¹¹⁵ Out of the twenty-five individuals subject to an arrest warrant issued by the Court, thirteen have not yet been apprehended, the most famous being Sudanese President Omar Al Bashir.¹¹⁶ Assessing this situation, a chess grandmaster would probably question the Prosecutor’s strategy or her calculations. In effect, chess teaches the

112. *See supra* notes 36 and 37.

113. *Seeking Global Justice, supra* note 4, at 221.

114. *Paper on Some Policy Issues* (2003), *supra* note 54, at 7.

115. *See* Fatou Bensouda, *Looking Back, Looking Ahead—Reflections from the Office of the Deputy Prosecutor of the ICC, International Criminal Court*, 11 WASH. U. GLOBAL STUD. L. REV. 437, 441 (2012).

116. INTERNATIONAL CRIMINAL COURT, THE COURT TODAY, (updated Feb. 17, 2014), available at http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/the%20court%20today.aspx.

importance of developing a sound strategy and adequately implementing it. Because every move has a consequence, every move must have a purpose, and feasibility is necessarily part of the equation.¹¹⁷ The plan cannot simply be to rush towards the opponent's king. Those who have tried this strategy know that it rarely, if ever, works. In his recent book, Garry Kasparov describes one of his games against Alexei Fedorov in which Fedorov carelessly launched all his pieces against his king: "What Fedorov failed to do was to ask himself early on what conditions would need to be fulfilled for his attack to succeed. He decided he wanted to cross the river and walked right into the water instead of looking for a bridge."¹¹⁸

In contrast, Kasparov praises players like Paul Morphy, who "underst[and] that a winning attack should only be launched from a strong position."¹¹⁹ The general idea expressed here is encompassed in the words of former World Chess Champion, Wilhem Steinitz: "the capture of the adverse King is the ultimate but not the first object of the game."¹²⁰

How instructive is this maxim for the work of the Prosecutor? It first points to some questions that, as we have seen, have not been fully resolved concerning the goals of the ICC.¹²¹ Should the Prosecutor pursue cases against "kings" at the risk of challenging peace efforts or humanitarian aid in the field? Is the goal to checkmate the perpetrators of the most serious crimes totally divorced from these other objectives?

Furthermore, this maxim raises the question of the relevance of issuing arrest warrants against individuals who are unlikely to be arrested in the near future. Here lies the tension between two

117. See HOOPER & WHYLD, *supra* note 28, at 399 (stating that strategy is "the planning and conduct of the long term objectives in a game. . . . In its widest sense, strategy embraces all that happens on the board. Tactics should accord with strategic ends, and moves chosen to further a long-term plan should be examined to determine their tactical *feasibility*."). (emphasis added).

118. KASPAROV, *supra* note 87, at 25.

119. *Id.* at 40.

120. WILHELM STEINITZ, *THE MODERN CHESS INSTRUCTOR*, at xxxii (1889) (emphasis added); see also KASPAROV, *supra* note 87, at 18 ("The strategist starts with a goal in the distant future and works backwards to the present. A Grandmaster makes the best moves because they are based on what he wants the board to look like ten or twenty moves in the future. This doesn't require the calculation of countless twenty-move variations. He evaluates where his fortunes lie in the position and establishes objectives. Then he works out the step-by-step moves to accomplish those aims. These intermediate objectives are essential.").

121. See *supra* notes 36 and 37.

conflicting principles that should nonetheless guide the Prosecutor's conduct. On the one hand, the Prosecutor should struggle to combat impunity irrespective of the functions or status of the individuals she intends to prosecute.¹²² In this regard, she should be an idealist. On the other hand, the Prosecutor cannot be oblivious to practical considerations in light of her scarce material resources and concerns about her legitimacy. In this regard, she should be realistic. Idealism and realism, creativity and calculation, the Hypermoderns and the Dogmatists, Nimzowitsch and Tarrasch—the same tensions exist in chess.

Success does not require choosing one approach to the detriment of the other. To the contrary, on the chessboard as in the international arena, it is more often than not the product of a wise combination of the two. Furthermore, unlike any chess player, the Prosecutor benefits from one advantage that will help her mediate the tension between the breadth of her goals and the scarcity of her means: time.

It does not take much imagination to believe that the ICC will progressively overcome many of its present challenges; as in chess, it only takes optimism.¹²³ As Professor Bassiouni asserted, "we can take some solace in the reflection upon the early days of the US Supreme Court."¹²⁴ There was indeed a time when a state could impudently execute a man notwithstanding a Court order to the contrary¹²⁵ and when a President could openly challenge the Court's authority.¹²⁶ The Court built its prestige and its authority over time in spite of occasional crises. After all, the same Court whose orders were violated in the 18th and the 19th century decided the results of the presidential election a few years ago.¹²⁷ It goes without saying that the two institutions operate in different settings and that the international forum offers significantly greater resistance. Nonetheless, there is reason to believe that the strongest days of the ICC lie ahead.¹²⁸ The greatest adversary of the chess player—time—

122. See Rome Statute, *supra* note 4, art. 27.

123. See NIMZOWITSCH, *supra* note 39, on the importance of optimism in chess.

124. Cherif Bassiouni, *The ICC—Quo Vadis?*, 4 J. INT'L CRIM. JUST. 421, 427 (2006).

125. CHARLES WARREN, *THE SUPREME COURT IN AMERICAN HISTORY* 733, 733–34 (Little, Brown, and Company, rev. ed. 1926) (describing the Corn Tassel case).

126. See the alleged response of President Andrew Jackson to the Supreme Court decision in *Worcester v. Georgia*, 31 U.S. 515 (1832) ("John Marshall has made his decision, now let him enforce it."); WARREN, *supra* note 125, at 759.

127. See *Bush v. Gore*, 531 U.S. 98 (2000).

128. *The ICC—Quo Vadis?*, *supra* note 124, at 427.

is probably the greatest ally of the Prosecutor.

One concluding remark should be made about the arrest warrant issued against Omar Al Bashir in 2009 at the request of Luis Moreno-Ocampo. It is not a remark from a brilliant World Chess Champion, but rather a piece of wisdom possessed by the king in Saint-Exupéry's *Le Petit Prince*. By requesting an arrest warrant against a sitting President, the Prosecutor sent a powerful signal of his commitment to fight impunity. In actuality, however, the arrest warrant led to the radicalization of the conflict, the forced departure of NGOs in the field, and the strengthening of the sentiment that ICC prosecutions were skewed against African states. Moreover, after four years, President Al Bashir remains in power. Each day that he spends in office is a defeat for the Court. Each day that he manages to spend abroad is an affront to the Prosecutor.¹²⁹ It illustrates her weaknesses and demonstrates that she cannot checkmate her opponent. One could of course argue that issuing the arrest warrant was the "right" decision, that international criminal law is precisely about doing what may look impossible, that the Prosecutor should not abdicate in front of difficulty or that President Al Bashir is becoming more and more isolated. Maybe. But maybe the Prosecutor simply made his move too early. Maybe he should have followed the advice offered by the King in Saint Exupéry's novel, "[use your] *science of government and wait until conditions are favorable*."¹³⁰

129. Marlise Simons, *Sudan's President One Step Ahead of a Suit and a Warrant*, N. Y. TIMES (July 16, 2013), <http://www.nytimes.com/2013/07/17/world/africa/sudans-president-one-step-ahead-of-a-suit-and-a-warrant.html> (discussing the visit of President Al Bashir to Nigeria).

130. SAINT-EXUPÉRY, *supra* note 1, at 45 (emphasis added).