The prosecutor of the ICC before the initiation of investigations: 
A quasi-judicial or a political body?

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After more than a hundred years\(^1\) since *Gustave Moynier* first proposed it in 1872,\(^2\) an international treaty (the Rome Statute) creating a permanent International Criminal Court was adopted by 120 States on July 18, 1998.\(^3\) The Rome Statute (R.S.), one of the most complex international treaties ever drafted,\(^4\) consists of

(a) a classic international instrument that creates an international organization, establishes its main organs, defines its functions and provides for the cooperation of the States Parties with it;

(b) a penal code defining both the basic principles of criminal law that direct the ICC criminal justice system and the crimes within the jurisdiction of the Court; and

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(c) a criminal procedure code that regulates the procedures through which the jurisdiction of the Court is to be exercised.\textsuperscript{5}

In the Preamble and in Part I of the R.S., one finds the objectives and purposes that have led about two-thirds of the Members of the International Community\textsuperscript{6} to create an International Criminal Court. In the Preamble,\textsuperscript{7} a strong commitment to the prevention and deterrence of the commission of “the most serious crimes of concern to the international community as a whole” by “[putting] an end to impunity for [their] perpetrators” is made. In order to implement such a commitment, the drafters of the R.S. created a permanent International Criminal Court (ICC) that would complement the criminal investigations and prosecutions of those crimes carried out by national Courts so as to ensure “their effective prosecution” and to avoid that their perpetrators go “unpunished”. In addition, they expressly provided for the ICC to fully respect the Purposes and Principles of the United Nations and to cooperate, through zealously keeping its independence, with the United Nations, and, especially, with the Security Council as the international political organ entrusted with the maintenance and restoration of international peace and security. Finally, the drafters of the R.S. declared their strong belief that by creating a permanent international criminal court that puts an end to impunity, the “delicate mosaic” of all peoples of the world, and their peace, security and well-being will be preserved, and “lasting respect for and the enforcement of international justice” will be achieved.

Despite the complexity of the negotiations, when it came to draft the operative provisions of the R.S., its drafters were for the most part consistent with the strong commitment they assumed in the Preamble. However, there were a handful of provisions where the drafters of the R.S., through the back-door, unmade some of the core policy choices already made in the R.S. Preamble. As a result, some of the core policy choices, that due to their great relevance were supposed to be adopted by the legislators of the R.S., have been left in the hands of the ICC Prosecutor and the judicial bodies of the Court. By hav-


\textsuperscript{6} The R.S. has been adopted by 120 States. At the time this paper was drafted, 139 States from all five continents, including three permanent members of the Security Council (France, the Russian Federation, and the United Kingdom) had signed the R.S; the R.S. has entered into force on 1 July 2002.

\textsuperscript{7} For a detailed analysis of the R.S. Preamble, see \textit{Bergsmo, M/Triffterer, O.}, in: \textit{Triffterer, n. 5, Preamble.}