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Prosecutorial Discretion v. Judicial Activism at the International Criminal Court

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Abstract

The Prosecutor of the International Criminal Court has exercised broad prosecutorial discretion in the selection of situations and cases to be heard by the Court. It is difficult to explain the exercise of this discretion by reference to the criteria purportedly used by the Prosecutor of ‘gravity’ and

'interests of justice' under Articles 17 and 53 of the ICC Statute, respectively. Unlike the ad hoc international criminal tribunals, it appears more the norm that the Prosecutor of the International Criminal Court acts in accordance with the wishes of the State parties, and with respect to the availability of an individual to be prosecuted. For its part, the Court has encountered difficulties in reviewing the Prosecutor's exercise of discretion as it has been unable to effectively access the criteria of 'gravity' and 'interests of justice'. In relation to the charges faced by an accused, the Court has been more active, and has even been willing to add the criterion of 'inactive' to Article 17 ICC Statute. The Court's impatience with the slow pace of prosecutions in Darfur has created tension with the Prosecutor.

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