

JUSTICE WITHOUT POLITICS?  
PROSECUTORIAL DISCRETION AND THE  
INTERNATIONAL CRIMINAL COURT

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I. INTRODUCTION

Few international institutions have elicited greater expectations or deeper suspicions than the International Criminal Court (ICC or “Court”). Mandated by a multilateral treaty, the so-called Rome Statute, to prosecute and punish persons accused of serious international crimes,<sup>1</sup> the ICC represents the latest chapter in the evolution of an international legal order once concerned primarily with the mutual relations of states but now increasingly focused on the rights and obligations of individuals. In the eight years since the Rome Statute’s adoption, one hundred and four nations representing each inhabited continent have become “States Parties” to the treaty. An additional thirty-five countries have signed the treaty without ratifying it. In a separate category stands the United States, which, under the Clinton administration, voted against the Rome Statute’s adoption in July 1998, then signed the treaty;<sup>2</sup> and then, under the Bush administration, announced that it would not become a party.<sup>3</sup> The U.S. government has since taken vigorous actions to oppose the ICC and to preempt any scenario that might focus the Court’s investigative and prosecutorial powers on U.S. soldiers or officials.<sup>4</sup> At the same

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1. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

2. See Steven Lee Myers, *U.S. Signs Treaty for World Court to Try Atrocities*, N.Y. TIMES, Jan. 1, 2001, at A1.

3. Press Release, U.S. Department of State, International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002), <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>; see WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 21 (2d. ed. 2004).

4. In 2002, the U.S. Congress passed the American Servicemembers’ Protection Act which, subject to various presidential waivers, prohibits the United States from providing military assistance to any party to the Rome Statute. See American Servicemembers’ Protection Act of 2002 (ASPA), Pub. L. No. 107-206, 116 Stat. 899. The United States has also entered into over ninety bilateral “Article 98” agreements with various states prohibiting the

time, the United States, along with fellow nonratifiers Russia and China, remains a participant in the ICC by virtue of its permanent, veto-wielding seat on the U.N. Security Council, whose mandate to protect international peace and security is specifically recognized by a Rome Statute provision allowing the Council to refer situations to the Court that would otherwise be outside the Court's jurisdiction.<sup>5</sup> In that capacity, the United States recently decided (by abstaining from the vote rather than exercising its veto) to *allow* ICC investigations of war crimes in the Darfur area of Sudan, a nonparty to the Rome Statute.<sup>6</sup>

The ICC has proven controversial to say the least. And no aspect of the Court's institutional architecture has provoked more controversy—or proven more central to the United States' opposition—than has the provision for a standing independent prosecutor authorized to initiate investigations and indictments subject primarily to judicial, rather than political, constraints. The conception of the prosecutor provoked bitter debate during the negotiation of the Rome Statute, with the United States demanding that the prosecutorial function be dependent always upon the U.N. Security Council's decision to trigger investigation of any "situation" of alleged crimes.

The defeat of that proposal in favor of a more independent prosecutor may have ended one debate, but it has failed to resolve the more profound question of how the ICC Prosecutor should and will employ the authority afforded by the Rome Statute. While not entirely unrestrained, the ICC Prosecutor remains the most crucial arbiter of where, and against whom, the ICC directs its efforts. Just as important, the Prosecutor will largely decide when to restrain the powers of the

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surrender of U.S. citizens to the ICC. See Frederic L. Kirgis, *U.S. Drops Plan to Exempt G.I.'s from U.N. Court*, ASIL INSIGHTS, (July 2004), <http://www.asil.org/insights/insigh139.htm>; Rome Statute, *supra* note 1, art. 98. After threatening to withdraw its support for U.N. peacekeeping missions across the globe, the United States has twice, in 2002 and 2003, passed Security Council resolutions prohibiting any ICC investigations of U.N. peacekeepers for a one-year period. S.C. Res. 1422 ¶ 1, U.N. Doc. S/RES/1422 (July 12, 2002); S.C. Res. 1487, ¶ 1, U.N. Doc. S/RES/1487 (June 12, 2003). The United States failed to secure a similar resolution in 2004.

5. Rome Statute, *supra* note 1, art. 13(b).

6. S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005); S.C. Meeting Record, U.N. Doc. S/PV.5158 (Mar. 31, 2005).

Court. These decisions will fundamentally define the Court's role and purpose.

To date, the debate over the ICC Prosecutor has tracked familiar lines that largely replicate those which divided the treaty's drafters. To the Court's supporters it remains clear that, as a legal institution administering a legal process, the Court must be guided by legal criteria and remain impervious to outside political pressures. To the extent that prosecutorial discretion is even perceived as a problem, the problem is one of legality: When existing legal rules do not determine whom to investigate and indict, either the Prosecutor must develop *ex ante* guidelines that have the quality of law, or the Court's judges must direct or guide the Prosecutor through their interpretation of the Rome Statute.<sup>7</sup> Although this account has some appeal, its plausibility depends on the adequacy of its underlying assumptions. The negative refrain against "politicizing" the ICC presupposes a positive model of prosecutorial discretion that furthers the Court's institutional goals without recourse to political considerations. A problem arises, however, if this account of the ICC's work is insufficient, if indeed the "legitimacy" of the ICC depends on determinations that are sensitive to contingent political criteria in ways not susceptible to bright-line or politically neutral rules. In that event, the emphasis on formal or procedural legitimacy may come at the cost of public perceptions of legitimacy, focused not on the procedural neutrality of the Court's inner workings but instead on the outcome of the Court's work for societies that have experienced war crimes.

The competing account, advanced primarily by the U.S. government and American political conservatives, also adheres by and large to the ideal of an apolitical court and continues

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7. Avril McDonald & Roelof Haveman, *Prosecutorial Discretion – Some Thoughts on 'Objectifying' the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC*, Apr. 15, 2003, ICC-OTP, at 2, <http://www.icc-cpi.int/otp/consultations.php>; Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L. L. 510 (2003); Héctor Olásolo, *The prosecutor of the ICC before the initiation of investigations: A quasi-judicial or a political body?* 3 INT'L CRIM. L. REV. 87 (2003); Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L L. REV. 293 (2005); Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions, and the International Criminal Court*, 14 EUR. J. INT'L L. 481 (2003).

to focus on the alleged illegitimacy of unrestrained and unaccountable prosecutors.<sup>8</sup> Drawing in part on the United States' experience under its now lapsed Independent Counsel Act, these critics argue that the ICC lacks sufficient political safeguards to protect against the abuse of prosecutorial authority.<sup>9</sup> Those who advance this position also sometimes point to the inherently political nature of the ICC's work as an additional shortcoming.<sup>10</sup> In this view, prosecutorial discretion is not a problem to be solved but a reason to reject and oppose the Court wholesale.

Thus focused on problems of legality and accountability, the existing debate over prosecutorial authority has offered a limited, and ultimately unsatisfying, perspective on the problems of international criminal justice. This Article seeks to remedy that deficit in two ways. First, I provide a fuller, more considered account than currently exists in the literature of why prosecutorial discretion is such a troubling challenge for the ICC. Consistent with the view that the Prosecutor's function is broadly "political," I argue that the very structure of the ICC—with its framework of prosecutorial independence and mandatory deference to "complementary" national pro-

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8. See, e.g., Marc Grossman, Under Sec'y for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, DC (May 6, 2002), <http://www.state.gov/p/us/rm/9949.htm>; Lee A. Casey et al., The United States and the International Criminal Court: Concerns and Possible Courses of Action (Feb. 8, 2002), <http://www.fed-soc.org/Publications/White%20Papers/nationalsecurity.htm>.

9. See Allison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55 STAN. L. REV. 1633, 1644-51 (2003) (describing this view and arguing that the ICC Prosecutor must be distinguished from the Independent Counsel). The Independent Counsel Act provided for the judicial appointment and supervision (with only limited involvement of the U.S. Attorney General) of independent counsel to investigate alleged federal crimes committed by senior government officials. In his famous dissent to the U.S. Supreme Court's decision upholding the Act in *Morrison v. Olson*, Justice Antonin Scalia expressed the fear that the framework would allow prosecutors to pursue politically motivated agendas with "no one accountable to the public to whom the blame could be assigned." *Morrison v. Olson*, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting).

10. See, e.g., John R. Bolton, Under Sec'y of State for Arms Control and International Security, The United States and the International Criminal Court, Remarks to the Federalist Society (Nov. 14, 2002), <http://www.state.gov/t/us/rm/15158.htm>.

ceedings—will impose difficult policy dilemmas on even the most well-meaning and politically detached Prosecutor. Thus complicating purely legalistic accounts of the Court's mission, the current structure of the ICC violates the very standards of legitimacy that the Court's founders and supporters invoke to justify its existence. More than any argument offered at the Rome Conference, this fundamental instability calls into question the viability of an international criminal enforcement regime rooted in the Rome Statute's high level of prosecutorial independence.

Second, although there are no ready means to eliminate this instability, I argue that a deeper understanding of the prosecutorial function and its relationship to the ICC's broader mission suggests that internal prosecutorial policy can—and most likely will—moderate the problem. Here, I agree in part with those ICC supporters who seek legitimacy through rules, although the mere existence of objective guidelines or judicial interpretation is no panacea. Rather, a successful prosecutorial policy must come to terms with the tension between the demand for prosecutorial independence and the legitimacy challenge posed by the substantive dilemmas of prosecutorial discretion. In this Article, I propose a pragmatic model of prosecutorial discretion that seeks, to the extent possible, to satisfy both conditions and to reconcile the concerns of the Court's supporters and detractors.

My discussion divides into five parts. Part One provides a brief introduction to the ICC. It offers an overview of the Rome Conference debate on prosecutorial authority, the most relevant terms of the treaty, and subsequent developments.

Part Two situates the problem of prosecutorial discretion within the context of the ICC's institutional structure and mission. Defining contextual factors include the Court's aspiration to catalyze social and political change in war-torn societies, the limited political contexts in which the Court's historical predecessors have employed international criminal law to pursue these goals, and the extreme resource limitations that emphasize the symbolic, tokenistic methods of international criminal tribunals.

Part Three considers five discretionary dilemmas that complicate the work of the ICC Prosecutor. I begin with the well-worn but nonetheless still-pressing debate on whether war

crimes prosecutions should ever defer to nonprosecutorial alternatives such as amnesty processes, and then I consider how, far from representing a special or unique case, the considerations underlying the amnesty debate pervade prosecutorial decisionmaking even in cases where the criminal justice system is applied. What emerges is less a clear choice between amnesty and prosecution than a continuum of solutions faced by societies which have experienced the pervasive commission of terrible crimes. This Part also considers related questions involving the timing of indictments, the gravity of crimes investigated, and the challenges posed by investigations of multilateral offenders.

Part Four looks at existing proposals to justify or correct the Rome Statute's system of prosecutorial authority through *ex ante* prosecutorial guidelines or judicial construction of the Rome Statute. I consider the benefits and drawbacks of each approach and argue that neither adequately resolves the ICC's legitimacy crisis.

In Part Five, I develop an alternate framework for prosecutorial authority, which I term the "political deference model." According to this model, the Prosecutor can honor the Rome Statute's normative goals by taking vigorous action during times of ongoing conflict to investigate high-level perpetrators of morally unambiguous crimes whose prosecution should presumptively draw broad political consensus. By launching investigations and indictments before a political settlement has been reached, the Prosecutor may play a key symbolic role by drawing attention to international crimes and, one hopes, by encouraging international political actors to assign greater weight to the concerns of international justice even if actual arrests and trials remain infeasible.

However, the Prosecutor's own charging policies should be prepared to give way to the judgments of legitimate political actors in times of political transition when actual arrests are more likely and competing justice proposals pose a more troubling challenge to the ICC's authority. In that scenario, I argue that the Prosecutor should encourage legitimate political actors to reach policy decisions that will command deference by the ICC. Such deference could take one or both of the following forms: (1) explicit deference to political actors, principally the U.N. Security Council acting under Chapter VII of the U.N. Charter, and (2) implied or constructive defer-

ence undertaken through a minimalist focus on only the most severe offenders of the most offensive and morally unambiguous crimes. To some extent these two options mirror the divide between the Court's detractors and supporters, but the options are not mutually exclusive, and each, I believe, has the potential to bridge that divide. Although explicit deference may best engage the ICC in a productive international regime of transitional justice, the Court's Prosecutor has publicly endorsed an approach that more closely follows the path of constructive deference. If so, this Article provides a framework for understanding that strategy and supplies it with a rationale—one based on unresolved policy dilemmas rather than mere resource constraints—that is superior to that which the ICC Prosecutor has publicly invoked.

## II. BACKGROUND: THE HISTORY AND STRUCTURE OF THE ICC

### A. *The Debate at the Rome Conference*

The project of the ICC dates from the conclusion of World War II, when the Allied Powers created International Military Tribunals (IMTs) to try individual senior German and Japanese officials for crimes committed under international law.<sup>11</sup> Calls for the establishment of a permanent standing tribunal would have to wait until the end of the Cold War, however, when the U.N. Security Council's creation of ad hoc criminal tribunals to try perpetrators of atrocities in the former Yugoslavia and Rwanda renewed the global commitment to international criminal justice. Efforts organized by the U.N. General Assembly ultimately led to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (the Rome Conference), held in Rome from June 15 to July 17, 1998, at which delegates

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11. On the history of the IMTs, see generally GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIALS* (2000); ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1987); PETER MAGUIRE, *LAW AND WAR: AN AMERICAN STORY* (2001); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992); RICHARD H. MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971); *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* (George Ginsburgs & V.N. Kudriavtsev eds., 1990); ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* (1983).



from over 160 states negotiated and approved the final text of the Rome Statute.<sup>12</sup>

The question of prosecutorial authority proved a major point of dispute throughout the process. A 1994 draft statute developed by the U.N.'s International Law Commission foresaw that investigations would generally commence upon referral by either the U.N. Security Council or a State Party that held a suspect in custody or whose territory was the locus of the alleged crime.<sup>13</sup> At the Rome Conference, however, proposals for a more independent Prosecutor and an expanded system of state referrals<sup>14</sup> received critical support from an organized group of sixty-three "like-minded" states that played the key role in deciding the terms of the final statute.<sup>15</sup>

Although the like-minded agenda doubtless reflected some resentment over the disproportionate political power enjoyed by the five veto-wielding permanent members of the U.N. Security Council,<sup>16</sup> the public rationale for enhanced

12. SCHABAS, *supra* note 3, at 15-19.

13. *Draft Statute for an International Criminal Court*, arts. 21, 23 (1994), [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_4\\_1994.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1994.pdf). The draft allowed one exception to this rule: In cases of genocide, any party to the Genocide Convention could lodge a complaint which might form the basis of a genocide investigation. *Id.* art. 25(1).

14. *See* Diplomatic Conference of Plenipotentiaries on the Establishment of International Criminal Court, June 15 - July 17, 1998, *Draft Statute of the Preparatory Committee on the Establishment of an International Criminal Court*, art. 11, 12, U.N. Doc. A/Conf.183/2/Add.1 (1998) [hereinafter "Final PrepCom Draft Statute"].

15. SCHABAS, *supra* note 3, at 15-16, 16 n.54. Of the Security Council's permanent members, only the United Kingdom joined the like-minded group. *Id.* at 16 n.54. France, however, would later ratify the Statute as well. *See id.* at 159 n.43. Schabas identifies the full list of like-minded states at 16 n.54.

16. *See* U.N. Charter art. 23 para. 1 (designating Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America as permanent Security Council members; Russia has since been recognized as the legal successor to the Soviet Union's membership). *See* Ruth Wedgwood, Comment, *Fiddling in Rome: America and the International Criminal Court*, 77 FOREIGN AFF. 20 (1998) (arguing that developing countries' "new jealousy of the Security Council's exclusive authority over international security matters" and "the recent failed attempt of middle-rank powers to expand the Council . . . [m]ade it impossible for the United States to preserve an American veto over prosecution decisions by using the requirement of Council approval.")

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prosecutorial authority was that prosecutorial independence was an essential requirement of a legitimate criminal court. As the Ad Hoc Committee's report had noted, those states favoring a stronger Prosecutor argued that mandatory Security Council referral "would reduce the credibility and moral authority of the court, excessively limit its role, [and] introduce an inappropriate political influence over the functioning of the institution."<sup>17</sup> This position received strong support from representatives of nongovernmental organizations who enjoyed unprecedented access to the proceedings and played an instrumental role in setting the agenda of the like-minded states.<sup>18</sup> For example, the Lawyers Committee for Human Rights urged the "imperative" that the Court's exercise of jurisdiction be "bound by *legal considerations only* if the Court is to play a meaningful role in the prevention and punishment of genocide, crimes against humanity and other serious violations of international humanitarian law."<sup>19</sup> Amnesty International similarly argued that because the Court is "a *judicial body* . . . its Prosecutor must have the independence to decide whether to investigate or prosecute."<sup>20</sup>

The United States favored a very different Court whose powers would be almost entirely dependent upon Security Council referrals,<sup>21</sup> but it did not dispute the basic ideal of an

17. U.N. GAOR, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, ¶ 121, U.N. Doc. A/50/22 (Sept. 6, 1995).

18. See William R. Pace & Mark Thieroff, *Participation of Non-Governmental Organizations*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 392-93 (Roy S. Lee, ed. 1999) (noting that "[m]any governments, the Secretary-General, other United Nations officials and media experts have commented on the decisive role of NGOs at the Rome Conference"); SCHABAS, *supra* note 3, at 15, 15 n.53. R

19. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *THE ACCOUNTABILITY OF AN EX OFFICIO PROSECUTOR* 6 (1998).

20. AMNESTY INTERNATIONAL, *THE INTERNATIONAL CRIMINAL COURT: MAKING THE RIGHT CHOICES – PART 1* 108-109 (Jan. 1997), [http://web.amnesty.org/library/pdf/IOR400011997ENGLISH/\\$File/IOR4000197.pdf](http://web.amnesty.org/library/pdf/IOR400011997ENGLISH/$File/IOR4000197.pdf). Both the Lawyers Committee for Human Rights (since renamed Human Rights First) and Amnesty International have been singled out as belonging to a group of particularly influential NGOs who became engaged early on in the deliberations over the ICC. See Pace & Thieroff, *supra* note 18, at 391. R

21. Although the United States was prepared to agree to referrals by States Parties as well, it insisted upon a "require[ment] that if a State Party referred a situation to the Court and that situation already was the object of Security Council deliberations, then the Security Council's approval would

apolitical body. It cautioned instead that a self-initiating Prosecutor would “encourage overwhelming the court with complaints and risk diversion of its resources, as well as embroil the court in controversy, political decision-making, and confusion.”<sup>22</sup> In this respect, the debate at the Rome Conference reflected at least a rhetorical consensus that war crimes prosecutions should be dictated by legal criteria rather than clouded by “political decision-making.”<sup>23</sup>

### B. *The Rome Statute*

The outcome of the Rome Conference is reflected in the Rome Statute, which provides for the establishment of an International Criminal Court sitting in The Hague, Netherlands and charged with “exercis[ing] its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute.”<sup>24</sup> Through membership in an “Assembly of States Parties,” the treaty members appoint by majority vote the Court’s senior officials, including its Prosecutor, who heads the Office of the Prosecutor (OTP) for a maximum nonrenewable term of nine years, and its eighteen judges, who serve nine-year terms and are divided among an Appeals Chamber, Trial Chambers, and Pre-Trial Chamber.<sup>25</sup> The

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be required before the matter could be taken up by the ICC.” David Scheffer, Ambassador at Large for War Crimes Issues, Address at American University, Washington, D.C. (Sept. 14, 2000), [http://www.state.gov/www/policy\\_remarks/2000/000914\\_scheffer\\_au.html](http://www.state.gov/www/policy_remarks/2000/000914_scheffer_au.html). This exception would have effectively vitiated the significance of including an independent state referral process.

22. See Statement of David J. Scheffer, Ambassador at Large for War Crimes Issues And Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court Before the Committee on Foreign Relations of the U.S. Senate (July 23, 1998). One diplomat who participated in the Rome Conference recalls that “[t]hose who argued against granting *proprio motu* powers to the Prosecutor feared an overzealous or politically motivated prosecutor targeting, unfairly or in bad faith, highly sensitive political situations.” Silvia A. Fernández de Gurmendi, *The Role of the International Prosecutor in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS*, *supra* note 18, at 181.

23. *Id.* at 178 (“Both supporters and opponents of an independent Prosecutor feared the risks of politicization of the Court which, both sides agreed, would undermine the impartiality and independence of the Court.”).

24. Rome Statute, *supra* note 1, arts. 1, 3.

25. *Id.* arts. 34-52.

Prosecutor may be removed from office by a majority vote of the Assembly of States Parties only for "serious misconduct," "serious breach of duties," or "[inability] to exercise the functions required by the Statute."<sup>26</sup> The criteria for the removal of judges are the same, but removal requires a two-thirds majority vote.<sup>27</sup>

The ICC has jurisdiction over three categories of crimes: genocide, crimes against humanity, and war crimes.<sup>28</sup> The elements of genocide, reproduced verbatim from the Genocide Convention, comprise any of five enumerated acts when committed "with intent to destroy, in part or in whole, a national, ethnical, racial, or religious group, as such."<sup>29</sup> Crimes against humanity are defined as a broader set of enumerated acts committed as "part of a widespread attack directed against any civilian population, with knowledge of the attack."<sup>30</sup> The Statute defines "war crimes" as "[g]rave breaches of the Geneva Conventions of 12 August 1949" and "[o]ther serious violations of the laws and customs applicable in international armed conflicts, within the established framework of international law," both of which are further defined in the Statute.<sup>31</sup> The Statute also provides for prosecution of the crime of aggression, if and when the States Parties agree by majority vote to amend the Statute to define the crime. This issue deeply divided the delegates to the Rome Conference and agreement on a definition for aggression remains elusive.<sup>32</sup>

Cases come before the ICC in one of three ways. The U.N. Security Council, acting under Chapter VII of the U.N.

26. *Id.* art. 46.

27. *Id.*

28. *Id.* art. 5.

29. *Id.* art 6; Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, [hereinafter Genocide Convention]. I have previously written on some of the ambiguities of this definition. See Alexander K.A. Greenawalt, Note, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Standard*, 99 COLUM. L. REV. 2259 (1999).

30. *Id.* Art 7. The definition of crimes against humanity has undergone substantial evolution since it was first codified for purposes of the Nuremberg and Tokyo tribunals. On the evolution of the crime's definition see generally Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787 (1999).

31. Rome Statute, *supra* note 1, art. 8.

32. SCHABAS, *supra* note 3, at 26-27.

Charter, may refer to the Prosecutor a “situation” in which “one or more of such crimes [within the jurisdiction of the Court] appears to have been committed.”<sup>33</sup> Alternately, a State Party may refer such a “situation” to the Prosecutor.<sup>34</sup> Finally, the Prosecutor may commence an investigation independently, or “*proprio motu*,” after concluding there is a “reasonable basis to proceed” and provided the Pre-Trial Chamber, acting upon the Prosecutor’s submission, authorizes the investigation.<sup>35</sup> In both State Party referrals and Prosecutor-initiated investigations, the Court’s jurisdiction is limited to crimes committed on the territory of or by a national of a state that is either a party to the treaty or that has specifically consented to the Court’s jurisdiction over the specific crime in question.<sup>36</sup> No such limitation applies with respect to Security Council referrals.<sup>37</sup>

Even when the Court has jurisdiction over a crime, it may not entertain a case unless the case is “admissible.” It is here that the Rome Statute sets forth its so-called “complementarity” regime, requiring deference to genuine state investigations and prosecutions. A case “being investigated or prosecuted by a State which has jurisdiction over it” is inadmissible “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>38</sup> The result is similar when a state has investigated a case over which it has jurisdiction, “and has decided not to prosecute the person concerned.”<sup>39</sup> In that event, the case is inadmissible “unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.”<sup>40</sup> And in cases of double jeopardy where a “person has already been tried for conduct which is the subject of a complaint,” the case is inadmissible unless the proceedings in the other court “[w]ere for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court” or “[o]therwise were not

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33. Rome Statute, *supra* note 1, art. 13(b).

34. *Id.* arts. 13(a), 14.

35. *Id.* arts. 13(c), 15.

36. *Id.* art 12.

37. *Id.* (specifying territorial and nationality preconditions to jurisdiction only with respect to prosecutions arising under articles 13(a) & (c)).

38. *Id.* art. 17(1)(a).

39. *Id.* art. 17(1)(b).

40. *Id.*

conducted independently or impartially in accordance with the norms of due process recognized by international law . . . and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”<sup>41</sup>

The Statute also creates an independent ground of inadmissibility in cases where “[t]he case is not of sufficient gravity to justify further action by the Court.”<sup>42</sup>

The Prosecutor is required to undertake investigations unless “there is no reasonable basis to proceed.”<sup>43</sup> To make this determination, the Prosecutor must consider whether “[t]he information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed,” and whether “[t]he case is or would be admissible.”<sup>44</sup> In addition, the Prosecutor must consider whether “[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.”<sup>45</sup> If the Prosecutor decides solely on the latter ground not to investigate a case, that decision must be reported to the Pre-Trial Chamber.<sup>46</sup>

The same set of considerations apply after investigation, when the Prosecutor must assess whether there is a basis for prosecution. The enumerated bases for declining prosecution include lack of jurisdiction, the inadmissibility of the case, or the opinion that “[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.”<sup>47</sup> In all cases where the Prosecutor declines to prosecute after investigation, the decision must be reported

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41. *Id.* arts. 17(1)(c), 20 (3).

42. *Id.* art. 17(1)(d).

43. *Id.* art. 53(1).

44. *Id.* art. 53(1)(a)-(b).

45. *Id.* art. 53(1)(c). This phrasing is an odd fit with the remainder of article 53. Read literally, it suggests the logical contradiction that “there is no reasonable basis to proceed” if “there are substantial reasons to believe that an investigation would not serve the interests of justice.”

46. *Id.* art. 53.

47. *Id.* art. 53(2).

and explained to the Pre-Trial Chamber and, if applicable, to the referring State Party or U.N. Security Council.

Where the U.N. Security Council or State Party has referred a case to the Prosecutor, the referring body may ask the Pre-Trial Chamber to review the Prosecutor's decision not to investigate or prosecute a case and the Pre-Trial Chamber may, at its discretion, ask the Prosecutor to reconsider the decision.<sup>48</sup> If the decision not to proceed rests solely on the "interests of justice," the Pre-Trial Chamber may also review the Prosecutor's decision on its own motion. The Statute provides that "[i]n such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber."<sup>49</sup>

The Prosecutor's affirmative decision to proceed with investigation or prosecution is also subject to judicial review. With respect to self-initiated prosecution and state referrals, the Prosecutor must give notice to all States Parties as well as to all states that would normally exercise jurisdiction over the matter. A state that has jurisdiction over persons potentially subject to the investigation may then give notice that it is investigating or prosecuting such persons, after which the Prosecutor cannot proceed without authorization from the Pre-Trial Chamber.<sup>50</sup>

In all cases, the Prosecutor must apply to the Pre-Trial Chamber for a warrant of arrest against a particular suspect (which States Parties are required to enforce) or a summons to appear.<sup>51</sup> Once a suspect is arrested or voluntarily appears before the Court, the Pre-Trial Chamber will hold a hearing to confirm the charges. Each accused party, state with jurisdiction over a case, and nonparty state whose consent may be required to establish jurisdiction may challenge the admissibility of a particular case. This challenge will come before the Pre-Trial Chamber or Trial Chamber depending upon whether the charges have already been confirmed, and the Court's decision is subject to interlocutory appeal. In the event that the Court declares a case inadmissible, the Prosecutor may later seek review of that decision based on new facts.<sup>52</sup> More gener-

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48. *Id.* art. 53(3)(a).

49. *Id.* art. 53(3)(b).

50. *Id.* art. 18(2).

51. *Id.* arts. 58-60.

52. *Id.* art. 19(10).

ally, the Prosecutor is authorized at any time “to reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.”<sup>53</sup>

The Rome Statute also provides a number of additional provisions which I do not consider here, including those regulating the arrest, extradition, trial, and sentencing of suspects.<sup>54</sup>

### C. *Subsequent Developments*

The Rome Statute entered into force on July 1, 2002, after receiving ratifications from the requisite sixty States Parties.<sup>55</sup> The Assembly of States Parties has since elected judges to the Court and appointed as the Court’s first Prosecutor Luis Moreno-Ocampo, a highly respected lawyer from Argentina who previously prosecuted top leaders of a military junta responsible for disappearances in his home country.<sup>56</sup> The OTP has subsequently commenced investigations into three situations of alleged crimes within the Court’s jurisdiction. Two of these, in Uganda and the Democratic Republic of Congo, have come at the referral of the State Party within whose borders the allegations are focused.<sup>57</sup> The Uganda investigation has since yielded five arrest warrants but no arrests, while the Democratic Republic of Congo investigation has led to charges against one suspect currently within the Court’s custody.<sup>58</sup>

53. *Id.* art 53(4).

54. *See, e.g., id.* arts. 55-128.

55. *See* Leila Nadya Sadat, *The International Criminal Court Treaty Enters Into Force*, ASIL INSIGHTS (April 2002), available at <http://www.asil.org/insights/>.

56. *See* Press Release, International Criminal Court, Election of the Prosecutor (April 23, 2003), <http://www.icc-cpi.int/press/pressreleases/52.html>.

57. *See* Press Release, International Criminal Court, President of Uganda Refers Situation Concerning the Lord’s Resistance Army (“LRA”) to the ICC (Jan. 29, 2004), <http://www.icc-cpi.int/press/pressreleases/16.html>; Press Release, International Criminal Court, Communications Received by the Office of the Prosecutor of the ICC (July 16, 2003), <http://www.icc-cpi.int/press/pressreleases/67.html>. A third referral, from the Central African Republic, has yet to yield a decision whether or not to pursue investigation. *See* Press Release, International Criminal Court, Prosecutor Receives Referral Concerning Central African Republic (Jan. 7, 2005), [http://www.icc-cpi.int/pressrelease\\_details&id=87&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html).

58. For the Uganda arrest warrants, see International Criminal Court, Request for Arrest and Surrender of Joseph Kony Issued on July 8, 2005 as Amended on Sept. 27, 2005, ICC-02/04-01/05 (Sept. 27, 2005), available at <http://www.icc-cpi.int/cases/UGD/c0105.html>; International Criminal



The third investigation commenced after the U.N. Security Council acted under Chapter VII to refer allegations of war crimes committed in the Sudan, which remains a nonparty to the treaty.<sup>59</sup> No charges so far have resulted from that investigation. Nor has Moreno-Ocampo commenced an investigation on his own authority.

### III. THE CONTEXT OF DISCRETION

Questions of prosecutorial discretion, of course, are not unique to the International Criminal Court. The structure of prosecutorial authority set forth in the Rome Statute closely resembles that typical of traditional common law systems, in which prosecutors, subject to varying degrees of judicial supervision, enjoy the primary authority to select and pursue criminal cases.

Consider the example of the United States, in which the vast majority of criminal cases never reach trial. Prosecutors dispose of such cases either by deciding not to prosecute the guilty party or by negotiating a plea bargain that rewards a cooperative defendant with a lower sentence or punishment for a lesser offense than would otherwise have been charged. The literature and case law on prosecutorial discretion has focused on such motivating concerns as the need to promote essential government policies and priorities in the face of resource constraints, the need to ensure that justice is achieved in individual cases, and the need to respect fairness and equality by

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Court, Request for Arrest and Surrender of Dominic Ongwen, ICC-02/04 (July 8, 2005), *available at* <http://www.icc-cpi.int/cases/UGD/c0105.html>; International Criminal Court, Request for Arrest and Surrender of Okot Odhiambo, ICC-02/04 (July 8, 2005), *available at* <http://www.icc-cpi.int/cases/UGD/c0105.html>; International Criminal Court, Request for Arrest and Surrender of Raska Lukwiya, ICC-02/04 (July 8, 2005), *available at* <http://www.icc-cpi.int/cases/UGD/c0105.html>; International Criminal Court, Request for Arrest and Surrender of Vincent Otti, ICC-02/04 (July 8, 2005), *available at* <http://www.icc-cpi.int/cases/UGD/c0105.html> [hereinafter Uganda Arrest Warrants]. For the Democratic Republic of Congo arrest and warrant, see Press Release, International Criminal Court, First Arrest for the International Criminal Court (Mar. 17, 2006), *available at* [http://www.icc-cpi.int/pressrelease\\_details&id=132.html](http://www.icc-cpi.int/pressrelease_details&id=132.html); International Criminal Court, Situation in the Democratic Republic of Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo, Warrant of Arrest, ICC-01/04-01/06 (Feb. 10, 2006), *available at* <http://www.icc-cpi.int/cases/RDC.html>.

59. S.C. Res. 1593, ¶¶ 1, 4, 6, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

treating like cases alike.<sup>60</sup> To guide prosecutorial decision-making, executive officials such as state or federal attorneys general or chief prosecutors of particular local jurisdictions promulgate prosecutorial guidelines designed to direct and regularize prosecutorial authority according to specific policies.<sup>61</sup> The situation is more complex in civil law countries, which have traditionally rejected the notion of prosecutorial discretion in favor of a judge-controlled system characterized by a “duty” to prosecute and by judicial administration of investigations, charging decisions, and trials. A longstanding debate among scholars has questioned whether the actual practice of civil law states reflects more commonalities with common law systems than formally are recognized, and legislative reforms in civil law states have further blurred the distinction.<sup>62</sup>

If the debate over the ICC Prosecutor were concerned merely with those questions typically confronted in the domestic context, there might be little reason to afford the ICC special attention. However, the policy dilemmas facing the ICC Prosecutor are heavily determined by institutional goals and limitations that fundamentally distinguish international prosecution from its domestic counterpart. I consider below some

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60. For recent discussion of these issues, see, e.g., Bruce A. Green and Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837 (2004); Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 650-56 (2002) (summarizing primary models of prosecutorial guidelines); Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2136-41 (1998) (discussing justifications for prosecutorial discretion including resource constraints); Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1325-34 (1997) (critiquing common rationales for prosecutorial discretion).

61. See, e.g., Krug, *supra* note 60, at 650-52.

62. See, e.g., Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?* 18 B.C. INT'L & COMP L. REV. 317 (1995); Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 610-25 (1990); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325 (1993); John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: “Myth” and Reality*, 87 YALE L. J. 1549 (1978); Abraham S. Goldstein & Martin Marcus, *The Myth of Judicial Supervision in Three “Inquisitorial” Systems: France, Italy, and Germany*, 87 YALE L. J. 240 (1977).

key contextual considerations that frame the ICC Prosecutor's work.

#### A. Goals

The Rome Statute itself does not explore prosecutorial goals in any substantial detail. Lumping the Court's rationale together under the single heading of crime prevention, the Statute's preamble notes its signatories' "mindful[ness] that during this century millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity," and their "recogni[tion] that such grave crimes threaten the peace, security, and well-being of the world." It then expresses the States Parties' "determin[ation] to put an end to impunity for the perpetrators of these crimes and thus to prevent such crimes."<sup>63</sup> The goal of crime prevention is of course a laudable one and, phrased at that level of generality, offers a rationale for the ICC that few could dispute. But precisely how is the ICC expected to prevent crime? And does crime prevention alone provide a satisfactory account of the ICC's aspirations?

##### 1. Political Aspirations

Standard utilitarian rationales for punishment such as incapacitation, deterrence, denunciation, and rehabilitation all aim, in one way or another, to prevent crime.<sup>64</sup> Although supporters of international criminal tribunals may be said to embrace versions of these goals, their focus is a form of prevention simultaneously broader and more specific than that contemplated by the standard theories: namely, the aspiration that international criminal tribunals can effect positive political change in the societies most affected by the commission of war crimes. This "political" aspiration operates in different ways. In some permutations prosecution and punishment aims directly to impact political or military governance through incapacitation and a kind of specific deterrence.<sup>65</sup> In-

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63. Rome Statute, *supra* note 1, pmbl. (emphasis added).

64. See, e.g., Michael S. Moore, *A Taxonomy of Purposes of Punishment*, in FOUNDATIONS OF CRIMINAL LAW 60-61 (Leo Katz, Michael S. Moore & Stephen J. Morse, eds., 1999).

65. See, e.g., Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001). In this context, I

carceration may remove evil political actors from power, and those who remain at large may go into hiding from where they have less influence, or they may otherwise temper their behavior. Perhaps the most central goal, however, is that trials will serve as tools of social engineering by catalyzing society-wide transformations that eliminate the underlying social and political causes that have facilitated the commission of international crimes. Advocates hope that by exposing the truth about atrocities, subjecting a select group of perpetrators to highly public criminal trials whose procedures reflect fair and impartial process, and providing some measure of justice to victims while emphasizing individual over collective responsibility, tribunals will help break cycles of violence, delegitimize criminal regimes, and promote transitions to peaceful liberal societies rooted in the rule of law.<sup>66</sup>

These lofty ideals pervade the history of international criminal tribunals, beginning with the Nuremberg trials following World War II, in which a tribunal consisting of judges and prosecutors appointed by the Allied Powers tried and con-

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use the term specific deterrence to refer to the potential for national deterrence in the specific societies in which investigations are focused—whether the object of the deterrence is a past or prospective war criminal. That rationale may be distinguished from a kind of general international deterrence which hopes that war crimes prosecutions in some states will affect the behavior of individuals in other states. See *infra* Part II.A.2.

66. See, e.g., Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2031-32 (1998) (distilling the “goals most frequently articulated by the diplomats who established these tribunals and the relevant epistemic community of international lawyers,” including these goals: to “channel victims’ thirst for revenge toward peaceful dispute resolution,” “tell the truth about what occurred, thereby preserving an accurate historical account of barbarism that would help prevent its recurrence,” and “perhaps most importantly, restore the lost civility of torn societies to achieve national reconciliation.”); Akhavan, *supra* note 65 (evaluating the impact of international criminal justice on postconflict peace building); Richard J. Goldstone & Gary Jonathan Bass, *Lessons from the International Criminal Tribunals*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 51, 53 (Sarah B. Sewall & Carl Kaysen eds., 2000) (“The denial of atrocity is closely linked to the committing of atrocity . . . . After a war, distorted memories can lay the groundwork for a fresh outbreak of violence.”); RUTI G. TEITEL, TRANSITIONAL JUSTICE 28 (2000) (“Why punish? The leading argument for punishment in periods of political flux is consequentialist and forward-looking: It is contended that, in societies with evil legacies moving out of repressive rule, successor trials play a significant foundational role in laying the basis of a new liberal order.”).

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victed twenty-four high-ranking German officials. A critical champion of the effort to pursue fair trials rather than summary execution,<sup>67</sup> U.S. War Department Secretary Henry Stimson saw Nuremberg as a crucial building block of a future peace in Europe based on a stable, rehabilitated Germany. “We should always have in mind,” he argued, “the necessity of punishing effectively enough to bring home to the German people the wrongdoing done in their name, and thus prevent similar conduct in the future, without depriving them of the hope of a future respected Germany community.”<sup>68</sup> The Allies’ endorsement of this approach represented a critical victory for those who, like Stimson, believed that “[a] transition to peace without vengeance would provide a stable foundation for the postwar world.”<sup>69</sup>

In his famous opening speech at the commencement of the Nuremberg trials, U.S. Supreme Court Justice and Nuremberg Chief Prosecutor Robert Jackson highlighted the symbolic ambitions of the proceedings. Observing that the individual fate of the “twenty-odd broken men” sitting in the prisoners’ dock was “of little consequence to the world,” Jackson emphasized that the purpose of the proceedings was not simply to prove the individual criminal guilt of the defendants, but instead to reveal the accused as “living symbols” of “fierce nationalisms and of militarism, of intrigue and war-making which have embroiled Europe generation after generation, crushing its manhood, destroying its homes, and impoverishing its life.”<sup>70</sup> Echoing Stimson’s concern for the rehabilitation of German society, Jackson further emphasized that there

67. At one point both Churchill and Stalin favored summary execution for Nazi leaders, as did U.S. Treasury Secretary Henry Morgenthau, who further advocated the deindustrialization of the German state into one “primarily agricultural and pastoral in nature,” *quoted in* MAGUIRE, *supra* note 11, at 88 (2001).

68. BASS, *supra* note 11, at 157.

69. MAGUIRE, *supra* note 11, at 90-91. Stimson argued that summary justice would “create Nazi martyrs and an opportunity for revisionists and isolationists to claim once more that charges against the German enemy were fabrications. . . . Stimson believed that trials would force the German people to face an irrefutable record of Nazi atrocities and as a result they would undergo a national catharsis.” *Id.* (quoting WILLIAM BOSCH, *JUDGMENT ON NUREMBERG* 9 (1970)).

70. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 99 (1945).

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was “no purpose to incriminate the whole German people” and that “[t]he German, no less than the non-German world, has accounts to settle with these defendants.”<sup>71</sup>

A related focus on the political ambitions of prosecution has defined the goals of Nuremberg’s successors. At the opening hearing of the first trial of the International Criminal Tribunal for the former Yugoslavia (ICTY), for example, the prosecution observed:

The duty of any criminal court is onerous, but the duty imposed on this Tribunal is a heavy burden indeed. This Tribunal has been created not only to administer justice in respect of the accused that stands before you, but there is an expectation that in so doing you will contribute to a lasting peace in the country that was once Yugoslavia.<sup>72</sup>

Later, when a trial chamber of the International Criminal Tribunal for Rwanda (ICTR) issued the first-ever genocide conviction by an international tribunal, U.N. Secretary General Kofi Annan expressed the confidence that “I speak for the entire international community when I express the hope that this judgement will contribute to the long-term process of national reconciliation in Rwanda. For there can be no healing without peace; there can be no peace without justice; and there can be no justice without respect for human rights and rule of law.”<sup>73</sup>

It is, of course, the case that regular domestic criminal justice systems play a vital political role: Through some combination of the standard rationales for punishment, criminal justice helps sustain the social order upon which any political system is based. But even to state this point only serves to highlight the peculiar ambitions of international war crimes prosecution. Whether the difference is characterized as one of degree rather than of kind,<sup>74</sup> the political goals of domestic

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71. *Id.* at 102-03.

72. Transcript of Prosecutor v. Dusko Tadic, Case No. IT-94-I-T, Tr. May 7, 1996, at 11:13-18, <http://www.un.org/icty/transel/960507IT.htm>.

73. Message from Secretary General Kofi Annan, <http://www.icty.org> (follow “about” hyperlink).

74. See, e.g., Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 763 (2004).

justice may be described, broadly speaking, as preservational: sustaining and improving an existing social order.

The political goals of international criminal tribunals are, by contrast, transformational. These courts aspire to change the political and social conditions—via a direct link between individual trials and broader political goals—that gave rise to the commission of crimes in the first instance. The operation of justice in this context is almost by definition irregular. An international criminal tribunal represents the intervention of an institution outside of the affected society, typically to address pervasive atrocities belonging to extraordinary historical events that have fundamentally disrupted the social order, and typically with the hope of catalyzing societal transformation. To the extent that the now-terminated trial of the late Serbian dictator Slobodan Milošević assists the transformation of Serbian society, for example, it will do so largely by helping Serbian society come to grips with the truth of Milošević himself and the criminal acts committed under his authority. There is little analogy between the society-wide ambition of such trials and the incremental ways in which the prosecution of a common murderer may, for example, help make the streets safer and deter other murderers.

## 2. *The Limits of General Deterrence*

Although the goal of political transformation remains a dominant rationale for international criminal tribunals, it accompanies, as I have said, more traditional reasons to punish. In particular, a commonly expressed hope is that the ICC, much like domestic criminal courts, will offer a general deterrent against criminal activity.<sup>75</sup> By this logic, the ICC's prosecution of war crimes committed in a state like the Democratic Republic of Congo or Sudan will not only help rehabilitate those societies, but will also deter prospective perpetrators in entirely different contexts.

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75. See, e.g., Alvarez, *supra* note 66, at 2031, (noting the aspiration to “threaten those in positions of power to deter further violence.”); LEYLA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW* 73-75 (2002); David Wippman, *Atrocities, Deterrence and the Limits of International Justice*, 23 *FORDHAM INT'L L.J.* 473, 473 (1999) (noting that “Supporters of the Rome Statute . . . routinely urge ratification on deterrence grounds.”).

Despite the frequency with which this rationale is invoked, even some advocates of the ICC have acknowledged the difficulty of this goal.<sup>76</sup> The ICC, of course, is only a court. Like all its predecessor tribunals, it lacks a built-in enforcement mechanism and is thus highly dependent upon the cooperation and assistance of political powers. Moreover, because the Court's jurisdictional requirements limit the tribunal's reach to systematic crimes that are generally sponsored by states or other quasi-state actors (such as rebel forces), and because a case is only admissible if a state with jurisdiction over the crime proves unable or unwilling to prosecute, the level of political commitment necessary to bring perpetrators to justice will often be extraordinary.

These basic facts, of course, pose an impediment to the ICC's work in any context, but the problem is particularly acute from the perspective of a deterrence theory that relies on rational calculation by prospective criminals.<sup>77</sup> It is not enough, for these purposes, that the international community marshals the political will to facilitate prosecutions in one context or another. Instead, the international community must sufficiently increase the general likelihood of punishment that some individuals, especially leaders, will decline to commit crimes prohibited by the Rome Statute in the first instance. As one commentator notes, "if it is true that high probability of punishment generally deters more effectively than a severe sanction rarely applied, the international criminal justice system has not reached the stage at which its deterrent value may be fairly assumed, largely due to problems of inter-State cooperation and State sovereignty."<sup>78</sup> In his opening speech to the Nuremberg Tribunal, Justice Jackson similarly recognized that "[w]ars are started only on the theory and in the confidence that they can be won" and "[p]ersonal punishment, to be suffered only in the event the war is lost, will probably not be a

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76. See SADAT, *supra* note 75, at 73-75; Wippman, *supra* note 75, at 474; Akhavan, *supra* note 65, at 31.

77. I recognize that one can posit a system of deterrence which relies on irrational fears that may deter those who have no real risk of facing arrest and punishment. Whether the ICC can effect that sort of deterrence is an empirical question, but it is safe to say that that prospect is also highly speculative.

78. SADAT, *supra* note 75, at 74.



sufficient deterrent to prevent a war where the warmakers feel the chances of defeat to be negligible.”<sup>79</sup>

The recent example of Iraq provides an apt illustration. Although allegations of atrocities by Saddam Hussein stretch back decades, it required a U.S.-led invasion and occupation—justified largely on account of the risk of weapons of mass destruction rather than human rights concerns—to apprehend him and make him available for trial. In such rare cases, where there is political will to impose regime change, it is speculative to assume a marginal deterrent effect of threatened prosecution beyond the threats already posed by the regime change itself. Indeed, if the alternative is summary execution, as administered to fallen leaders like Italy’s Mussolini and Romania’s Ceausescu, or domestic courts imposing the death penalty, as Saddam Hussein and many leaders of Rwanda’s genocide have faced, the prospect of a fair international trial followed by the ICC’s maximum term of life imprisonment appears comparatively attractive.

Given existing political realities, therefore, powerful considerations dictate that international criminal tribunals should focus primarily on assisting the particular societies in which investigations and prosecutions are pursued, with deterrence operating, at most, as a complementary goal to the principle objective of societal transformation.

### B. *Limited Precedents*

A second defining characteristic of international criminal justice is the very limited prior use of international tribunals to achieve the goals just described. Historically, the international community has employed such tribunals on an ad hoc basis to prosecute crimes in situations in which pervasive and unspeakable atrocities have taken place on a widespread scale. Typically, moreover, these efforts have taken place as the society at the center of the atrocities undergoes a political transition toward new political forces that are hostile to the wrongdoers and committed to policies that complement the transformational ambitions of the international tribunal.

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79. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 70, at 153-54 (1945).

The paradigmatic precedent is the IMT that tried senior Nazi officials. Routinely cited as a historic success story for international criminal law, the Nuremberg trials are credited with publicizing the horrors of Nazi atrocities and, through criminalization and fair prosecution of those acts, assisting Germany's transition to a liberal democratic state in which government sponsorship of such acts would be unthinkable. Those trials, however, did not take place in a vacuum; they formed part of a decades-long effort to rebuild Germany as a liberal democratic state (excluding, of course, the Soviet-occupied portion which became the German Democratic Republic). That endeavor included extensive efforts at denazification, public education, and further trials conducted by the individual occupying powers through the Allied Control Council and later by German authorities. The politics of the Nuremberg tribunal have attracted criticism to be sure—most frequently the charge of “victor’s justice” applied by the victorious to the defeated<sup>80</sup>—and the historical literature has indicated that the effort commanded less respect among the German population than it did among the populations of Germany’s victims.<sup>81</sup> But such shortcomings must be viewed against the broader question of whether even a better-executed Nuremberg process could be conceived outside the po-

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80. The Nuremberg Charter limited the IMT jurisdiction to crimes committed by those “acting in the interests of the European Axis countries.” Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremberg Charter]; see, e.g., TAYLOR, *supra* note 11, at 641 (noting the victor’s justice argument). Another common criticism has highlighted the *ex post facto* nature of some of the proceedings, which permitted prosecution of the crime of aggression and crimes against humanity that had never been codified as individual crimes under international law. The inclusion of the crime of aggression found some support in the Kellogg-Briand Pact of 1928, which provided a multilateral prohibition on the “recourse to war for the solution of international controversies.” The pact was accepted by Germany and all the other Great Powers except the Soviet Union. That treaty, however, did not specifically make aggressive war-making a war crime subject to individual punishment and prosecution. See, e.g., *id.* at 20. The Nuremberg Charter also authorized the prosecution of “violations of the laws or customs of war” which did have a background in international treaties and customs. Nuremberg Charter, art. 6(b); TAYLOR, *supra* note 11, at 3-20.

81. See, e.g., TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945* at 58 (2005).

litical context of the post-war nation-building project of which it formed a part.

The reemergence of ad hoc international criminal tribunals has mirrored the Nuremberg precedent to the extent that it has generally reflected a policy decision to prosecute in the context of a political transition. The U.N. Security Council exercised its Chapter VII powers to create the ICTR after the Tutsi-led Rwandan Patriotic Front had overthrown the genocidal Hutu-led government. A “mixed” tribunal consisting of both international and national judges was created in Sierra Leone in 2002 at the conclusion of a violent conflict and pursuant to a U.N. Security Council mandate and an agreement between Sierra Leone’s government and the United Nations.<sup>82</sup> The ICTY may have been created inauspiciously in the midst of war, but it too evolved into an institution of transitional justice recognizably within the Nuremberg model following the North American Treaty Organization (NATO) military intervention in Bosnia, a U.S.-brokered peace agreement, and the commitment of NATO troops on the ground. A U.S.-supported democratic revolution in Serbia in 2000 further advanced this trend, leading to the arrest and extradition, under significant international pressure, of top Serbian suspects including Milošević.<sup>83</sup>

The jurisdiction of the ICC, however, is not limited to such transitional scenarios. As Mahnoush Arsanjani and W. Michael Reisman have noted, the Court is “the archetypal *ex ante* tribunal” authorized to operate “*before* an international security problem has been resolved or even manifested itself, or . . . *in the midst* of the conflict in which the alleged crimes occurred.”<sup>84</sup> A central question for the ICC Prosecutor is whether and to what extent sensitivity to such contextual considerations should affect the exercise of prosecutorial discretion.

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82. See generally, HUMAN RIGHTS WATCH, BRINGING JUSTICE: THE SPECIAL COURT FOR SIERRA LEONE (2004), <http://hrw.org/reports/2004/sierraleone0904/sierraleone0904.pdf>.

83. See BASS, *supra* note 11, at 271-75; 311-24.

84. Mahnoush Arsanjani & W. Michael Reisman, *The Law-In-Action of the International Criminal Court*, 99 AM. J. INT’L L. 385, 385 (2005).

### C. *Limited Capacity*

A third factor that will fundamentally define prosecutorial choice in the context of the ICC is limited prosecutorial capacity. Of course, no criminal justice system can apprehend and prosecute every criminal it wishes to try, but there is little comparison between the constraints that limit a properly functioning domestic criminal justice system and those that define the work of the ICC. In many domestic systems, the balance between prosecutorial resources and the general crime rate is such that the system can at least aspire toward something approximating universal prosecution, at least in the context of the most serious, violent crimes.

When serious perpetrators successfully evade accountability, the reasons generally lie in investigatory failure, lack of evidence, or underreporting by victims. Considerations of docket control have led to plea bargaining and nonprosecution in systems that allow it or have led to other functionally analogous methods in legal systems that do not. Authorities may also pursue reduced charges or decline prosecution of some perpetrators in order to procure testimony against more serious offenders. But it is virtually unheard of that a peacetime society, in the absence of official corruption, refuses wholesale to prosecute serious criminals such as murderers or rapists purely for reasons of docket control.

The everyday tradeoffs faced by domestic justice systems have no real analogy in the context of international criminal tribunals, in which a handful of prosecutors appearing before a handful of judges seek justice for mass atrocities committed by countless perpetrators. The numbers speak for themselves. At Nuremberg, the IMT prosecuted twenty-four suspects for Nazi war crimes.<sup>85</sup> The ethnic cleansing which followed the breakup of Yugoslavia yielded hundreds of thousands of victims of systematic atrocities committed by many thousands of perpetrators. After thirteen years of operation and almost a billion dollars in expense, the ICTY has tried ninety-four perpetrators with an additional sixty-seven indictees either at large or in custody.<sup>86</sup> The Rwandan justice system has held in cus-

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85. See Tusa, *supra* note 11, at 15; Kudriavtsev, *supra* note 11, at 93.

86. See *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991* at 4, U.N. Doc. A/61/271 (Aug.

tody over 100,000 suspects at one time or another, yet in eleven years of operation, the ICTR has tried just twenty-two genocidaires, with an additional fifty-six in custody or at large.<sup>87</sup> Even the government of Rwanda, which has committed itself to a far more ambitious program of domestic prosecutions (often at the expense of basic procedural protections that the international tribunals have been at pains to uphold), cannot hope to try all of those culpable for the Rwandan genocide.<sup>88</sup> Moreover, these efforts are coming to a close. In 2003, the U.N. Security Council resolved that the ICTR and the ICTY should complete all investigations by 2004, all trials by 2008, and all appeals by 2010; and requested the transfer of all but the highest level remaining suspects to national jurisdictions.<sup>89</sup>

A functioning peacetime society that experienced such low prosecution rates would be unable to sustain the basic order necessary to preserve its form of government. That such limited prosecution rates are not merely accepted but expected in the context of international criminal trials serves to highlight the uniquely symbolic and political goals of these trials.<sup>90</sup>

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21, 2006), <http://www.un.org/icty/rappannu-e/2006/AR06.pdf>; ICTY Website, <http://www.un.org/icty/glance/index.htm>.

87. See Achievements of the ICTR, <http://69.94.11.53/ENGLISH/factsheets/achievements.htm> (last visited Nov. 7, 2006).

88. See *infra* notes 128-32 and accompanying text.

89. S.C.Res. 1503 U.N. Doc. S/RES/1503 (Aug. 28, 2003).

90. Former ICTY Prosecutor Louise Arbour has noted in a related context that “[t]he main distinction between domestic enforcement of criminal law, and the international context, rests upon the broad discretionary power granted to the international Prosecutor in selecting the targets for prosecution. Domestically, the general assumption is that enforcement is universal, i.e. that all crimes beyond the *de minimis* range will be prosecuted, subject to the determination by the Prosecutor that a charge is appropriate based on a preliminary examination of the facts of the case. . . . In the international context, particularly in a system based on complementarity with State jurisdiction, the discretion to prosecute is considerably larger, and the criteria upon which such Prosecutorial discretion is to be exercised are ill-defined, and complex.” Justice Louise Arbour, NATO: Statement by Justice Louise Arbour on Establishment of an International Criminal Court (Dec. 10, 1997), in M2 PRESSWIRE, at 3 (LEXIS). Ruti Teitel has linked the general practice of transitional States pursuing limited prosecutions to symbolic goals. “Why,” she asks “despite the aftermath of the successor trials [which have resulted in limited criminal sanctions], is it nonetheless the common perception that at the Nuremberg Tribunal, in Greece’s Military Court, and

The powers of the ICC Prosecutor are also limited in yet another, related way: The ICC Prosecutor has no control over related political events, which may affect the prospects for successful prosecution and, more broadly, for the realization of prosecution’s social and political goals. Although this may be an obvious point, it serves to distinguish the position of the ICC Prosecutor from broader debates regarding the benefits and scope of war crimes prosecution, which may also take into account policies that political powers can or should implement in order to facilitate successful prosecutorial efforts.

IV. DILEMMAS OF DISCRETION

As I have emphasized previously, the structure of prosecutorial authority under the Rome Statute reflects a commitment to the idea that international criminal prosecutions must be dictated by pure legal standards free from “political” considerations.<sup>91</sup> That perspective gives rise to a commonly echoed narrative which portrays the ICC as the pinnacle of an evolutionary history of international criminal tribunals in which each stage “is a further step down the road from partiality to impartiality.”<sup>92</sup> The ideal of the apolitical court that motivated the drafters is shared by many commentators<sup>93</sup> as well as the cadre of former prosecutors who served the ad hoc

in Buenos Aires Federal Court, justice has been done? Despite the absence of full or lasting punishment, the transitional criminal sanction appears to constitute a symbol of the rule of law.” TEITEL, *supra* note 66, at 49.

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91. See *supra* Part II.A.

92. Goldstone & Bass, *supra* note 66, at 51-52 (tracing the history from the “victor’s justice” of Nuremberg and Tokyo, to the superior but mandate-limited ad hoc tribunals to the ICC).

93. See, e.g., Danner, *supra* note 7, at 515 (“[M]aking the Court subject to direct political control would have constituted a betrayal of fundamental principles. The Prosecutor’s ability to make individualized considerations based on law and justice, rather than the self-interest or sheer power of any particular state, transforms the Court from a political body festooned with the trappings of law to a legal institution with strong political undertones.”); Olásolo, *supra* note 7.

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tribunals,<sup>94</sup> and is even reflected in the rhetoric of the Rome Statute’s critics.<sup>95</sup>

This ideal, however, does not present an accurate picture of the ICC as it actually exists, and it is hard to see how it ever could. The difficulty here derives in part from imprecision in the use of the word “political” itself. One may argue that some political considerations are by definition illegitimate and should play no role in the decisionmaking of legal actors involved in war crimes prosecutions. For example, the fact that a government involved in genocide may have friendly relations or economic ties with a government that sits on the U.N. Security Council is not a valid reason to forego investigation or prosecution. But does the same proscription against “politicization” apply to extra-legal considerations of historical or political context that are concerned not with illicit motives but with promoting the tribunal’s own institutional goals? To the extent that such considerations form a part of the prosecutorial calculus, the evolution of the ICC assumes a different cast. Seen in that light, the ICC reflects a more complex reallocation of authority which confers upon the ICC Prosecutor additional political functions alongside increased legal authority.

This Part explores five interrelated problems of prosecutorial discretion that complicate the ICC’s work. I am not concerned here with the risk of a renegade or “politicized” Prosecutor, which the United States invoked at the Rome Conference. Rather, my focus is on dilemmas which will complicate the work of even a well-meaning Prosecutor who seeks in good faith to perform the functions delegated to it by the Rome Statute.

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94. Arbour, *supra* note 90, at 3 (“The greatest threat, in my view, to the legitimacy of the permanent Court, would be the credible suggestion of political manipulation of the Office of the Prosecutor, or of the Court itself, for political expediency.”); RICHARD J. GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIME INVESTIGATOR 131-32 (2000) (“[T]he complete and effective independence of the prosecutor is crucial. . . . By their nature war crimes investigations are politically controversial, so that the independence of a war crimes prosecutor is even more important than that of prosecutors operating within national jurisdictions.”); Goldstone & Bass, *supra* note 66.

95. See *supra* note 22 and accompanying text.

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A. *The Problem of Amnesty*

I begin with the question of amnesty, which presents a familiar problem of transitional justice that has vexed the ICC recently with respect to the Court's Uganda indictments. Many states facing atrocities committed by a past regime have chosen not to prosecute the wrongdoers, but have either ignored past crimes or employed alternate mechanisms to expose and acknowledge those crimes without subjecting individual perpetrators to prosecution.<sup>96</sup> The paradigmatic and most celebrated example of this approach is South Africa's Truth and Reconciliation Commission (TRC), which addressed political crimes committed by both the government and its opponents during decades of apartheid. Operating during the country's transition to a constitutional democracy rooted in equal rights, the TRC offered amnesty to individual perpetrators of politically motivated crimes who offered a full confession—many of them testifying in televised public proceedings at which victims and family members were free to confront their tormentors.<sup>97</sup> Other states have adopted similar mechanisms, with varying methods of truth-seeking and degrees of individual accountability. In Chile, for example, a truth commission arose after the legislature passed a blanket amnesty precluding prosecution of crimes committed by the Pinochet regime, whereas in El Salvador, a blanket amnesty followed the release of a truth commission report that named specific high-level government perpetrators of notorious crimes.<sup>98</sup>

The rationales invoked to defend amnesty tend to assume one of two standard forms. One argument allows that prose-

96. For just a few examples from the literature dealing with this question see, e.g., ALEX BORAINÉ, *A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION* (2001); PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* (2002); TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis Thompson eds., 2000); TEITEL, *supra* note 66, at 69-117; MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1999).

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97. See I THE TRUTH AND RECONCILIATION COMMISSION, *THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT* (1998) [hereinafter TRC FINAL REPORT], <http://www.doj.gov.za/trc/report/finalreport/TRC%20VOLUME%201.pdf> (last visited Jan. 20, 2007).

98. See HAYNER, *supra* note 96, at 35-40. Hayner provides summaries of twenty-one different truth commissions which have operated from 1974 to the present, some of which were coupled with amnesty laws. See *id.* at 32-71.

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cutions may be preferable under ideal circumstances, but maintains that nonprosecutorial alternatives may be justified as a compromise necessary to facilitate political transition to a more just society that rebukes the evils of the past. As Rajeev Bhargava has observed:

[N]ormally such transitional moments emerge out of a settlement in which former oppressors refuse to share power unless guaranteed that they will escape the criminal justice system characteristic of a minimally decent society . . . . The danger [of insisting upon criminal justice] is obvious: victims may forever remain victims and their society may never cease to be barbaric.<sup>99</sup>

TRC Chair Archbishop Desmond Tutu invoked this rationale in the Commission’s final report, arguing that “[h]ad the miracle of the negotiated settlement not occurred, we would have been overwhelmed by the bloodbath that virtually everyone predicted as the inevitable ending for South Africa.”<sup>100</sup> Although rooted in compromise, the justification is ultimately a moral one: Justice is sacrificed, but only for the sake of greater future justice or other equivalent moral goods.<sup>101</sup>

This line of reasoning is, of course, highly contingent. The mechanism that best maximizes goals of justice or moral goods in one context does not necessarily apply in another. To the extent, for example, that the international community chooses to engage in Kosovo- and Iraq-style military interventions aimed at regime change and proves willing to commit itself financially and militarily to the future stability of such societies through peacekeeping operations and the like, the political compromise argument is less compelling. Thus, W. Michael Reisman has urged a diverse approach to transitional justice, arguing that where the international community is unwilling to make the military commitment to defeat wrongdoers, “it is preferable to emphasize techniques that reestablish public order as quickly as possible and fulfill feasible sanction-

99. Rajeev Bhargava, *Restoring Decency to Barbaric Societies*, in TRUTH v. JUSTICE, *supra* note 96, at 48. See also Amy Gutmann & Dennis Thompson, *The Moral Foundations of Truth Commissions*, in TRUTH v. JUSTICE 22, *supra* note 96.

100. TRC FINAL REPORT, *supra* note 97, at 5.

101. See Gutmann & Thompson, *supra* note 99, at 23.

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ing goals of public order.”<sup>102</sup> At the extreme, considerations of this sort could also be invoked to justify ever more diluted forms of accountability, such as less-thorough or less-public truth commissions, blanket rather than individualized amnesties, or simply inaction.<sup>103</sup>

A second line of argument maintains that truth commissions paired with amnesty can supply an intrinsically superior form of transitional justice to prosecution, irrespective of political compromises. Martha Minow has argued that truth commissions “are not a second best alternative to prosecutions . . . . When the societal goals include restoring dignity to victims, offering a basis for individual healing, and also promoting reconciliation across a divided nation, a truth commission may be as or more powerful than prosecutions.”<sup>104</sup> In the South African context, Tutu has similarly advocated a form of “restorative justice” rooted in forgiveness and has argued that “the route of trials would have stretched an already hard-pressed judicial system beyond reasonable limits. It would also have been counterproductive to devote years to hearing about events that, by their nature, arouse very strong feelings. It would have rocked the boat massively and for too long.”<sup>105</sup> To accept this line of logic, one need not agree that the justice provided by a nonprosecutorial alternative is qualitatively equivalent or superior to conventional forms of criminal justice. As with the political compromise rationale, one may allow that nonprosecutorial solutions require some sacrifice of justice but nevertheless defend them in contexts where they may be expected to achieve an aggregate amount of justice greater than that which would otherwise be realized.<sup>106</sup>

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102. W. Michael Reisman, *Institutions and Practices for Restoring and Maintaining Public Order*, 6 DUKE J. COMP. & INTL. L. 175, 186 (1995). On the difficulties of regime change, see also Michael W. Reisman, *The Manley O. Hudson Lecture: Why Regime Change is (Almost Always) a Bad Idea*, 98 AM. J. INT'L L. 516 (2004).

103. BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 69-98 (1994) (1992) (arguing that a policy of amnesia may better foster liberal transition than any form of corrective justice).

104. MINOW, *supra* note 96, at 88-89.

105. TRC FINAL REPORT, *supra* note 97, at ¶ 23.

106. Kent Greenawalt, *Amnesty's Justice*, in TRUTH V. JUSTICE, *supra* note 96, at 194-98.

This broader debate might not matter for the ICC Prosecutor's specific job if the Rome Statute provided clear guidance as to how the Court should respond to amnesties that purport to cover crimes within the Court's jurisdiction. However, it does not. As a legal matter, some scholars have argued that international law both requires prosecutions of perpetrators of international crimes and forbids amnesties, but these arguments are highly disputed.<sup>107</sup> Most important for present purposes, the question about amnesty was one which the delegates to the Rome Conference both explicitly considered and failed to resolve.<sup>108</sup> William A. Schabas recounts that there was great debate on this issue and that "[d]espite 'widespread sympathy' for South Africa's experience, some delegates expressed concern that other amnesty measures like the one accorded by Chilean President Augusto Pinochet to himself, were 'disgraceful.'"<sup>109</sup> Rome Conference Chair and current ICC President Philippe Kirsch has reportedly described the final result as a decision to settle for "creative ambiguity."<sup>110</sup> Thus, we are left with a Statute whose preamble affirms a general determination to "to put an end to impunity for the perpetrators of [serious international] crimes" but whose specific provisions contemplate that the Prosecutor may invoke the "interests of justice" to decline prosecution of serious offenses that are otherwise admissible.

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107. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991). A full consideration of this argument is beyond the scope of this Article. The argument is strongest with respect to treaties such as the Genocide Convention, Geneva Conventions, and Torture Convention that impose specific duties to prosecute enumerated crimes, although even in those cases there are arguments that exceptions may exist and that morally justified amnesties are one such exception. For a summary of the debate, see Newman, *supra* note 7, at 308-09. R

108. Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT'L L. 93, 96 (1999).

109. *Id.*

110. Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 521-22 (1999) (quoting conversation with Mr. Kirsch); *see also* Robinson, *supra* note 7, at 483 ("The drafters of the Rome Statute wisely chose not to delve into these difficult questions [of national amnesties]. . . . [T]hey turned to the faithful and familiar friend of diplomats, ambiguity, leaving a few small avenues open to the Court and allowing the Court to develop an appropriate approach when faced with concrete situations."). R

Given the moral arguments invoked to support amnesties, the deliberate silence of the Rome Statute, and the lack of any clear prohibition under international law, a number of observers have maintained that the ICC and national amnesty laws may be compatible, at least in some circumstances.<sup>111</sup> Indeed, no less an advocate of the ICC than former U.N. Secretary General Kofi Annan has argued:

No one should imagine that [the ICC] would apply to a case like South Africa's, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgment for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.<sup>112</sup>

When the Republic of Colombia ratified the Rome Statute, moreover, it submitted without objection from any other State Party a declaration interpreting the Rome Statute not to preclude amnesties, reprieves, or judicial pardons.<sup>113</sup> In light of the history surrounding amnesty, one might expect the Court to defer to the next South Africa. However, attitudes are, as Schabas notes, "impossible to predict, and judges or prosecutors might well decide that it is precisely in cases like the South

111. See, e.g., Helmut Gropengießer & Jörg Meiß ner, *Amnesties and the Rome Statute of the International Criminal Court*, 5 INT'L. CRIM. L. REV. 2 (2005); Newman, *supra* note 7, at 317-18; Olásolo, *supra* note 7, at 137-41; Robinson, *supra* note 7; SADAT, *supra* note 75, at 112-13 ("It is hotly contested . . . when and under what conditions amnesties are permissible either as a matter of international law, or under the Statute."); Scharf, *supra* note 110; TRUTH V. JUSTICE, *supra* note 96; Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 216-17 (2000).

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112. Press Release, Secretary General, Secretary General Urges 'Like Minded' States to Ratify Statute of International Criminal Court. U.N. Doc. SG/SM/6686 (Sep. 1, 1998), <http://www.un.org/News/Press/docs/1998/19980901.sgsm6686.html> [hereinafter Annan Press Release]. Notably, Annan relies on the goals of the Court to defend this approach, arguing that "[t]he purpose of that [complementarity] clause in the Statute is to ensure that mass murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order." *Id.*

113. Rome Statute, *supra* note 1; Declaration of Colombia, (Aug. 5, 2002); Newman, *supra* note 7, at 325.

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African one where a line must be drawn establishing that amnesty for such crimes is unacceptable.”<sup>114</sup>

Recent developments transpiring in Uganda as this Article went to press have now brought this question squarely before the Court. Although it was Uganda’s own referral that originally spurred the ICC Prosecutor to indict Joseph Kony and four other leaders of the rebel Lord’s Resistance Army,<sup>115</sup> Ugandan President Yoweri Museveni has now declared a cease-fire and proposed a tentative peace deal which offers amnesty to the accused in the form of a traditional tribal forgiveness ritual.<sup>116</sup> The crimes alleged—involving the systematic murder, abduction, sexual enslavement, and mutilation of Ugandan civilians—are certainly hideous, but Uganda argues that it has no viable alternative, as neither the domestic authority nor the ICC is capable of arresting the accused. Some reports suggest, moreover, that the amnesty proposal enjoys strong domestic support in Uganda.<sup>117</sup>

Amnesty, however, is not Uganda’s alone to give, and reports indicate that the ICC’s outstanding warrants are proving to be a stumbling block.<sup>118</sup> In a recent public statement Moreno-Ocampo emphasized that the Uganda warrants should be executed, but he has yet to announce a broader policy indicating whether, and under what conditions, that mandate might give way to other considerations.<sup>119</sup>

In sum, then, the amnesty debate poses a critical dilemma for the ICC Prosecutor. The language and context of the Rome Statute suggest that the Prosecutor may sometimes

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114. SCHABAS, *supra* note 3, at 69.

115. See ICC Press Release, *supra* note 57; Uganda Arrest Warrants, *supra* note 58.

116. See Jeffrey Gettleman, *Uganda: Peace Hinges on Amnesty for Brutality*, N.Y. TIMES, Sept. 15, 2006, at A1.

117. For example, the U.N. Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator has concluded following a recent trip to Uganda that “[t]he predominant feeling among all the stakeholders in the peace process is that the ICC warrant of arrest should be dropped against the LRA leaders so that a peaceful conclusion to the talks can be reached.” Grace Matsiko et al., *Kony Charges a Stumbling Block, Says UN Chief*, MONITOR (Uganda), Sept. 13, 2006, available at 2006 WLNR 15910098.

118. *Id.*

119. *ICC says Uganda crimes may go on without arrests*, REUTERS (Sept. 26, 2006), <http://today.reuters.com/News/CrisesArticle.aspx?storyId=L26206254>.

forego prosecution in deference to amnesty arrangements, but the considerations inherent in that determination invite the kind of broad-based policy assessments that the ICC was ostensibly designed to eliminate.

### B. *Selective Prosecution*

It may be tempting to view the questions raised by nonprosecutorial mechanisms as a kind of side issue to the primary work of international criminal prosecution. In this view, people may argue about whether amnesties should ever be pursued, but that debate has little to say about the mechanics of prosecution itself in situations where formal amnesties are not at play. The reality, however, is far more complex than this simple assumption. The decision in transitional situations is not simply whether to prosecute, but whom to prosecute, and how broadly.

And it is here that we come across a remarkable fact: In contrast to the division provoked by the amnesty debate, there appears to be broad agreement that transitional states facing mass atrocities may adopt a policy of targeted, highly selective prosecutions which leave the vast majority of criminals unprosecuted. Orentlicher, for example, who has advanced the best known and most systematic argument for a duty to prosecute under international law, also argues that a state may, and even should, fulfill its international duties through a program of partial, “exemplary” prosecution.<sup>120</sup> Other prominent supporters of a duty to prosecute have endorsed similar arguments.<sup>121</sup>

Exemplary prosecution—or what Ruti Teitel has termed the “limited sanction” to include consideration of both limited prosecutions and limited punishment—also appears to re-

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120. Orentlicher, *supra* note 107, at 2598-99.

121. See, e.g., M. Cherif Bassiouni et. al., *Proposed Guiding Principles for Combating Impunity*, in *POST-CONFLICT JUSTICE* 255, 261 (M. Cherif Bassiouni ed., 2002) (“Prosecution of all the perpetrators of widespread international criminal acts is sometimes impractical if not impossible. Selective prosecution and use of ‘exemplary prosecution’ is accepted in principle in virtually all legal systems and is therefore consistent with general principles of law.”); Robinson, *supra* note 7, at 493 (summarizing this position and advancing the proposition that “In Transitional Situations following Mass Violence, a Targeted Programme Prosecuting Only Those Most Responsible May Be Appropriate”).

present the near universal practice of those transitional states that do opt for criminal punishment to address crimes committed by the past regime.<sup>122</sup> From post-war Germany to Greece, Argentina, and the former Communist states of Central and Eastern Europe, prosecutorial efforts have been marked as much for their restraint as for their ambition.<sup>123</sup> The underlying rationale is similar to that used to defend amnesties: More extensive efforts at backward-looking criminal justice may prove politically impossible or socially disruptive, or may be excessively onerous given limited resources and weak institutions.<sup>124</sup> The limited sanction may also, as Teitel argues, reflect some acknowledgment of a “diminished sense of blameworthiness and related criminal responsibility associated with periods of nondemocratic rule.”<sup>125</sup> By prosecuting the few, rather than the many, the transitional state may seek to acknowledge past wrongs, assign blame, mark a break from the past, and provide some sense of collective justice without jeopardizing the forward-looking goals of a liberalizing political transition.

### 1. *International Law*

Although the basic rationale for exemplary prosecution may arise out of compelling policy considerations, the legal argument for such prosecution is an odd one when considered against the background of the legal sources typically cited in support of a duty to prosecute. Take, for example, article 4 of the Genocide Convention, which states that “[p]ersons committing genocide . . . shall be punished,” or language in the

122. TEITEL, *supra* note 66, at 46-51.

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123. *Id.*

124. Orentlicher, *supra* note 107, at 2598 (“The contrasting experiences of Argentina and Greece suggest that the demands of justice and political stability are best reconciled through a program of prosecutions that has defined limits.”).

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125. TEITEL, *supra* note 66, at 50. Reisman makes a similar point about blameworthiness, and has argued that “[i]n many of the most hideous international crimes, many of the individuals who are directly responsible operate within a cultural universe that inverts our morality and elevates their actions to the highest form of group, tribe, or national defense . . . . [T]he perpetrators may not have had the moral choice that is central to our notion of criminal responsibility.” W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 75, 77 (Autumn 1996).

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Geneva Conventions requiring states to prosecute or extradite those who have committed grave breaches of the conventions.<sup>126</sup> If one reads that language as precluding an amnesty exception for transitional societies even when morally justified, how does one simultaneously construct an argument that a state can ignore the vast majority of perpetrators as long as it prosecutes some? Both readings would seem incompatible with the text, the difference being that the latter approach promises more effective prosecution than the former. Orentlicher appears to acknowledge this point, and argues that “treaties should be interpreted in a manner that avoids imposing impossible obligations or duties whose discharge would prove harmful.”<sup>127</sup> But that argument simply begs the question of what is “possible” or not “harmful” under the circumstances and why exemplary prosecutions but not amnesty laws are appropriate subjects of such debate. Here, Orentlicher invokes a “functional” argument that the underlying goal of deterrence—allegedly promoted by exemplary prosecution but not amnesty—supports her proposed interpretation.<sup>128</sup> Even putting aside the broader question of whether trials deter, or whether deterrence is the best rationale for prosecution, that claim provides a rationale for insisting on exemplary prosecution to the exclusion of comprehensive amnesties only if one first rejects the central moral claim of amnesty advocates: namely, that the kind of political transition which might make prosecution (and hence deterrence) possible in the first place may not be possible without an amnesty deal that precludes prosecution.

Moreover, even accepting the argument for exemplary prosecution, one is still faced with a wide range of possibilities for how to reconcile the demands of criminal justice for past

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126. Genocide Convention, *supra* note 29, art. 4; Geneva Convention relative to the Protection of Civilian Persons in Time of War, arts. 146, 147, *adopted* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *see also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, arts. 49, 50, *adopted* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, arts. 50, 51, *adopted* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention relative to the Treatment of Prisoners of War, arts. 129, 130, *adopted* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

127. Orentlicher, *supra* note 107, at 2600, n.284.

128. *Id.* at 2600.

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crimes with the realities of resource constraints and the political stability necessary to achieve a just future society. If one is to take seriously Orentlicher's claim that some prosecution is mandatory, but that too much prosecution may "have diminishing returns and may reverse progress toward consolidating a democratic transition,"<sup>129</sup> then the legal clarity of the alleged duty to prosecute quickly transforms into a subjective, context-specific judgment that hinges on empirical predictions rather than meaningful legal standards.

Not surprisingly, historical precedents reflect a range of approaches on the part of transitional states. At one extreme, to take an example explored by Orentlicher, is the case of Argentina, where a transitional government established a truth commission and commenced prosecutions in connection with an estimated 14,000 to 30,000 disappearances and other crimes committed during the "dirty war" waged by Argentina's military junta against political opponents in the 1970s and early 1980s. The effort resulted in the historic and highly publicized conviction of five high-level military commanders. However, military uprisings frustrated attempts to extend the trials to active-duty mid-ranking officers and ultimately led to a series of amnesty laws and pardons which precluded the prosecution of all perpetrators, excepting the five military commanders and two other individuals already convicted.<sup>130</sup> In 2005, Argentina's Supreme Court declared Argentina's amnesty laws unconstitutional, and the government has since brought charges against some two hundred former military officers.<sup>131</sup> How extensive these renewed efforts will ultimately

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129. Orentlicher, *supra* note 107, at 2598-99.

130. Alejandro M. Garro, *Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success*, 31 COLUM. J. TRANSNAT'L L. 1 (1993-1994). Although Orentlicher views Argentina's efforts as inadequate, she argues the transitional government should have limited the scope of prosecutions from the beginning rather than pursue a more ambitious and protracted plan which then triggered social unrest. Orentlicher, *supra* note 107 at 2597. This fact-based argument hinges on Orentlicher's own disputed interpretation of contingent historical events and does not exclude, as a legal matter, that Argentina's efforts could reflect sufficient exemplary punishment.

131. *Argentina: The Slow Battle for Justice*, ECONOMIST, Sep. 14, 2006, at 47; Human Rights Watch, *Argentina: Amnesty Laws Struck Down* (June 14, 2005), <http://hrw.org/english/docs/2005/06/14/argent11119.htm>.

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prove to be remains to be seen,<sup>132</sup> and the question of what justice policies are possible and beneficial for Argentina today is, of course, analytically distinct from the dilemmas that faced the country in a more fragile period of transition two decades ago. Writing in 1991, for example, law professor and former government advisor Carlos S. Nino argued that “[t]he results [of the investigation and prosecution of past human rights abuses] were nearly all that could be morally required under the circumstances.”<sup>133</sup>

Rwanda represents another example, presenting different challenges faced on a larger scale by a transitional government less politically constrained than Argentina’s in its commitment to seek criminal justice. Following the genocide of an estimated 800,000 members of Rwanda’s Tutsi minority in 1994, and the subsequent military defeat of the genocidal regime, a Tutsi-dominated multiethnic government undertook steps to prosecute the guilty.<sup>134</sup> Although it is hard to doubt Rwanda’s incentives, it too has had to confront the difficulty of attempting anything close to universal prosecution of offenders. Faced with its own inability to try the great majority of suspects in the regular justice system (as of 2002 Rwanda had processed slightly over 7,000 genocide cases in eight years whereas over 100,000 suspects remained in pre-trial detention) and faced with compelling reasons to promote reconciliation (Rwandan Tutsis remain a vulnerable minority in a Hutu-majority country), Rwanda’s legislature passed a special plea-bargaining scheme.<sup>135</sup> Whereas designated “Category I” leaders and or-

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132. For example, current Argentine President Néstor Kirchner is quoted to have complained that “[t]hey say that there were more than 490 concentration camps and we barely have 200 people arrested. There must have been concentration camps where the prisoners looked after themselves!” *Id.*

133. Carlos S. Nino, *The Duty to Punish Past Human Rights Abuses Put Into Context: The Case of Argentina*, 100 *YALE L.J.* 2619, 2637 (1990).

134. For an account of the Rwanda genocide see, e.g., PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* (1999).

135. See Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990 (Rwanda), *available at* <http://www.preventgenocide.org/law/domestic/rwanda.htm> [hereinafter “Rwanda Genocide Law”]; Organic Law 40/200 of 26/01 setting up “Gacaca Jurisdictions” and organizing prosecutions for offenses constituting the crime of genocide or crimes against humanity committed between October

ganizers of the genocide face full trials and remain subject to the death penalty,<sup>136</sup> all other offenders, including both “regular” genocidal murderers and confessed Category I offenders not previously designated as such, are removed from the regular justice system and subject to informal village trials presided over by village elders who are nonprofessional judges and who are required to offer massively reduced sentences in exchange for guilty pleas. For example, murderers who confess prior to trial face a prison term of only three and a half years plus an equal term of community service.<sup>137</sup> Because the primary pool of suspects consists of tens of thousands of persons who have already spent significant time in pre-trial detention (many since 1994),<sup>138</sup> the effect of the plea bargain regime has been that large numbers of confessed genocidal murderers and other violent offenders are reintegrated into their communities at the conclusion of their trial, with only their community service obligation left to undertake.<sup>139</sup>

As these examples suggest, the impracticability of full prosecution may be less troubling itself than the question of what exactly a regime of “exemplary prosecution” should require and whether such a generalized requirement can even prove meaningful in the context of particular circumstances.<sup>140</sup> The

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1, 1990 and December 31, 1994 (as modified by Organic Law 33/2001) (Rwanda), <http://www.inkiko-gacaca.gov.rw/En/EnLaw.htm> [hereinafter “Gacaca Law”]. See generally Maya Goldstein Bolocan, *Rwandan Gacaca: An Experiment in Transitional Justice*, 2004 J. DISP. RESOL. 355 (2004).

136. Rwanda Genocide Law, *supra* note 135.

137. Gacaca Law, *supra* note 135, art. 69(c).

138. The U.S. State Department’s 2004 Human Rights report noted that “[a]pproximately 80,000 individuals accused of genocide continued to be imprisoned while awaiting trial” and that “some suspects had been in jail since 1994.” U.S. DEP’T STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – 2004: RWANDA (2005), <http://www.state.gov/g/drl/rls/hrrpt/2004/41621.htm>. The previous year’s report cites a figure of 88,000 detainees, ninety percent of whom were awaiting trial on genocide charges, and also reports that 24,000 had been released from detention to await their gacaca trial. U.S. DEP’T STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – 2003: RWANDA (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27744.htm>.

139. American University Washington College of Law, Center for Human Rights and Humanitarian Law, *International Legal Updates*, 13 HUMAN RIGHTS BRIEF 31 (2005).

140. Nino argues, for example that any duty to prosecute must be extended to include a “duty of governments to safeguard human rights from

distinction between prosecution and nonprosecution can be a slippery one, both at the level of systemic policy (who must be prosecuted and how many prosecutions are enough?) and at the level of the individual perpetrator (what counts as a criminal trial and criminal conviction?). Governments facing political transitions have employed and combined a variety of strategies, including blanket amnesties, conditional amnesties, truth commissions, exemplary prosecutions of high-level perpetrators, plea-bargaining, and simple refusals to investigate or prosecute categories of suspects. Even South Africa's approach—often discussed as a paradigmatic example of a nonprosecutorial model—was more complex than that. As a formal matter, South Africa's time-limited, case-by-case amnesty process would appear consistent with a form of exemplary prosecution. And indeed, during the time of the TRC's operation, South African authorities also pursued select prosecutions of a few high-profile suspects who had not sought the TRC's amnesty.<sup>141</sup> But despite the failure of the great majority of perpetrators to seek the TRC's protection, the authorities have generally declined to pursue further prosecutions of apartheid-era crimes, notwithstanding the continued eligibility of many suspects for criminal trials.<sup>142</sup> Viewed from another perspective, then, there may be less difference than sometimes assumed between South Africa's conditional amnesties and a policy of blanket amnesty.

## 2. *The ICC and Selective Prosecution*

The question directly faced by the ICC Prosecutor, of course, is not identical to the one confronting a government seeking to develop its own prosecution strategy. Because the

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future violation by the government or other parties" and this broader duty must recognize that "what may appear to the international community to be passivity on the part of a government may actually be the active safeguarding against *future* violations at the cost of foregoing prosecution of past crimes." Nino, *supra* note 133, at 2639. Nino does not reduce this broader duty to a judicially enforceable test but instead contemplates more generally that "the international community would assume responsibility for upholding the general duty I am proposing." *Id.*

141. See TRC FINAL REPORT, *supra* note 97, at 11.

142. Paul Van Zyl, *Unfinished Business: The Truth and Reconciliation Commission's Contribution to Justice in Post-Apartheid Africa*, in POST-CONFLICT JUSTICE, *supra* note 121 at 754.

ICC can only prosecute so many offenders, the ICC Prosecutor might appear to have a more focused task. It need focus only on the select group of suspects who merit the attention of the ICC, leaving the broader questions of political compromise to other actors. And in this respect, something of a consensus has emerged that the ICC Prosecutor should negotiate the inherent limitations of prosecutorial capacity by focusing investigations and prosecutions on those culpable individuals who occupied the highest levels of political or military authority.<sup>143</sup>

The emphasis on the prosecution of high-level perpetrators reflects the general practice of international tribunals to date, all of which, with limited exception, have focused on senior-level perpetrators.<sup>144</sup> The charters of the post-World War II IMTs explicitly focused on the “major war criminals of the European Axis” and “in the Far East,”<sup>145</sup> respectively, whereas the U.N. Security Council has issued resolutions endorsing this prosecutorial strategy for the ICTY and ICTR as well.<sup>146</sup> In a

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143. M. CHERIF BASSIOUNI, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, in *POST-CONFLICT JUSTICE* 3, 27 (2002) (“As a matter of policy, international prosecutions should be limited to leaders, policy-makers and senior executors. This policy does not and should not preclude prosecutions of other persons at the national level which can be necessary to achieve particular goals.”); *see also* Danner, *supra* note 7 at 543 (“That the international justice forum should be reserved for high-level perpetrators has gained wide acceptance.”).

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144. The ICTY provides both the exception and the rule. It focused on some relatively low level suspects during its early, difficult period when ongoing war and lack of political cooperation complicated its work. In 1998, however, the prosecutors actually dropped indictments against fourteen suspects accused of war crimes in Bosnian Serb-run concentration camps solely on the ground of giving priority to high-level suspects. *See* Press Release CC/PIU/314-E, Int’l Criminal Tribunal for the former Yugoslavia, Statement of the Prosecutor Following the Withdrawal of the Charges Against 14 Accused (May 8, 1998) [hereinafter ICTY Press Release], <http://www.un.org/icty/latest-e/index.htm> (follow “Press Release Archive” hyperlink; then follow “1998” hyperlink; then follow “CC/PIU/315-E” hyperlink) (emphasis added). Bass, *supra* note 11, at 223.

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145. Nuremberg Charter, art. 1; Charter of the Int’l Military Tribunal for the Far East, art. 1, Jan. 19, 1946, T.I.A.S. No. 1589 4 *Bevans* 20 (1968).

146. S.C. Res. 1503, U.N. Doc. S/RES/1503 (Aug. 28, 2003) (“Recalling and reaffirming in the strongest terms the statement of 23 July 2002 made by the President of the Security Council (S/PRST/2002/21), which endorsed the ICTY’s strategy for completing investigations . . . by concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction and transferring cases

policy paper issued in September 2003, the ICC OTP formally adopted the same approach as a guideline for its own work, concluding 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 organisation allegedly responsible for those crimes.”<sup>147</sup>

There is an obvious intuitive appeal to this policy. Granted, one might ask whether high-level offenders should be given priority in all circumstances.<sup>148</sup> And the standard for assigning culpability based on command responsibility is broad enough to encompass situations where the guilt of higher-level commanders may reflect less moral culpability than that of subordinates more directly linked to the primary offense.<sup>149</sup> But powerful considerations dictate that if one is to pursue a path of prosecution, and if one must make selections, it makes sense to give priority to high-level offenders, at least where those offenders exhibit a high degree of culpability.

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involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions.”).

147. Paper on Some Policy Issues Before the Office of the Prosecutor 7 (Sept. 2003), [http://www.icc-cpi.int/library/organs/otp/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf) [hereinafter “OTP Policy Paper”].

148. *See, e.g.*, Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 *YALE J. INTL. L.* 365, 399-401 (1999) (emphasizing, in the Rwandan context, the importance of prosecuting lower level offenders); Madeline Morris, *Complementarity and its Discontents: States, Victims, and the International Criminal Court*, in *INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT* 187 (Dinah Shelton ed., 2000) (arguing that the prosecution of some low-level suspects by the ICC will “acknowledge[ ] the interests of victims and their legitimacy” and may provide a “symbolic retributive value” even to those victims “whose own individual perpetrators are not prosecuted”).

149. *See* Rome Statute, *supra* note 1, art. 28. For military commanders, the Rome Statute adopts a negligence-based approach to command responsibility, holding such persons criminally responsible for crimes committed by forces under their “effective command and control” or “effective authority and control” where a commander “either knew or . . . should have known” that the forces were committing or about to commit crimes and “[t]hat military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to competent authorities for investigation and prosecution.” *Id.* For other superiors, a somewhat stricter standard applies which requires “conscious[ ] disregard” of criminal behavior. *Id.*

The planners and leaders of atrocities are broadly considered the most culpable, their arrest and prosecution is likely to have the greatest symbolic value and provide the greatest sense of justice for the largest number of victims, their incarceration is most likely to aid political transition, they provide a relatively narrow target for deterrence, and the deterrence resulting from their punishment, if effective, will have a broader impact than that of individual low-level perpetrators.

But simply to state that the prosecution of higher-level offenders should take priority over lower-level offenders does not insulate the ICC Prosecutor from the dilemmas of transitional justice. Unlike the ad hoc tribunals which have exercised unfettered primacy over proceedings in domestic courts,<sup>150</sup> the ICC is designed to address only those crimes that a state has proven “unwilling or unable” to investigate and prosecute. This structural feature is often described as a conservative check on prosecutorial authority,<sup>151</sup> but it also has a more radical side. Because the ICC’s mandate is limited to the *unprosecuted* (or more precisely, those who have not received an actual or “genuine” investigation or prosecution), the execution of an uninvited ICC indictment generally sends a signal that a state is not doing what it should.<sup>152</sup> This fact has significant implications for the ICC’s work. First, it emphasizes that a state’s entire prosecutorial strategy is a matter of international concern: As long as there remain unprosecuted persons

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150. For a critical view on this policy in the context of Rwanda, see Alvarez, *supra* note 148; Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT’L L. 349 (1997).

151. See, e.g., de Gurmendi, *supra* note 22, at 181 (observing that, at the Rome Conference, “some of the . . . fears [of an overzealous or politically motivated Prosecutor] were dismissed by the supporters of *proprio motu* powers who argued that the stringent criteria provided for in the complementarity regime would considerably narrow the scope of situations that could be targeted by the Prosecutor.”); GOLDSTONE, *supra* note 94, at 129 (“A further protection from unfounded prosecutions is to be found in what has been referred to as the system of complementarity.”).

152. I am focused here in particular on cases in which ICC indictment results from a case that is admissible on account of a state’s unwillingness to prosecute rather than its inability based, for example, on the occupation of its territory by enemy forces. As already mentioned, the ICC’s investigations in the Democratic Republic of Congo and Uganda are the results of referrals issued by those very States. On the potential political and legal difficulties related to State referrals of crimes in their own territory, see Arsanjani & Reisman, *supra* note 84.

for whom there is evidence to support a conviction under the Rome Statute, the prospect of ICC action remains. Second, it ensures that in one fundamental way, the Prosecutor's authority is unrestrained. Although the ICC may not have the resources to prosecute all perpetrators of crimes within its jurisdiction, the Prosecutor can always indict some unprosecuted suspects and in that way signal that the state in question has not done enough to address international crimes.

This implication of complementarity may be of little practical significance when the Court faces a pre-transitional criminal regime that acts to secure its own impunity. Here, one can imagine the ICC OTP proceeding much in the same manner as its predecessors at the ad hoc tribunals. But that is also the situation in which the ICC's power is most likely to remain symbolic. Absent extraordinary international pressure or a military intervention, the very unwillingness of the regime to prosecute criminals will also preclude the ICC from securing custody over defendants who remain under the regime's protection. The thornier questions arise in the transitional setting in which a successor regime desiring to become a good citizen in the international community undertakes efforts that fall short of universal prosecution. That is the situation in which ICC indictments are most likely to lead to actual arrests. And in that situation, the Prosecutor cannot simply apply a policy of targeting high-level offenders without having some deeper sense of this policy's underlying goals.

If it were clear what states should do in these situations, a straightforward prosecutorial policy would offer itself: The Prosecutor would indict unprosecuted suspects as long as there remained unprosecuted suspects whom the state was obligated to bring to justice. There would be no need to set an arbitrary cut-off: The only relevant question would be whether the state had done enough.<sup>153</sup> The problem is that the Rome Statute does not provide this guidance. Instead article 53, read together with the complementarity regime, appears to set

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153. I accept, of course, that the very existence of the ICC may increase the number of optimal prosecutions by increasing bureaucratic capacity and eliminating some of the domestic political pressures that could hinder domestic proceedings. But this consideration—itsself context-specific—does not affect the basic problem of how far a state should be expected to pursue justice.



forth the following inconclusive set of obligations and rights: (1) States have an overarching duty to pursue justice, which in some instances may trump the imperatives of prosecution, (2) the ICC may second guess whether a state's actions are consistent with this overarching duty, and (3) a state may preclude the ICC's prosecution of a particular individual by genuinely investigating and/or prosecuting that individual.

The OTP's existing policy statement fails to confront the problem raised by this framework. It seems to suggest that the focus on highest-level perpetrators arises as a kind of *per se* rule. It concludes in this regard that "[t]he 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 organisation allegedly responsible for those crimes.*"<sup>154</sup> But the arguments marshaled in defense of this view do not provide persuasive reasons to treat this policy as a general limitation rather than simply a question of assigning priority.

The policy statement relies principally on a logic that appears to equate the seniority of the perpetrator with the gravity of the crime and thus justifies its policy of targeting high-level perpetrators based on language in the Rome Statute which emphasizes that the ICC is concerned with serious crimes and that cases are not admissible if "not of sufficient gravity to justify further action by the Court."<sup>155</sup> Taken at face value, this argument could be read to suggest that the ICC Prosecutor is simply concerned with prosecuting those whom it is authorized to target by the Rome Statute itself. But can one really limit the Court's jurisdiction or admissibility requirements to crimes committed by the handful of top leaders whom the ICC has the institutional capacity to prosecute? Not even the OTP appears to take this statutory argument too seriously: It notes that "[i]n some cases the focus of an investigation by the Office of the Prosecutor may go wider than high-ranking officers, if investigation of certain type of crimes [or] those officers lower down the chain of command is necessary for the whole

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154. OTP Policy Paper, *supra* note 147, at 7.

155. *See id.* at 6-7 (citing Rome Statute at pmbll., art. 5, and art. 17(1)(d)).

case.”<sup>156</sup> To the extent that such concepts have any meaning at all, the seriousness or gravity of an individual’s crime can hardly be determined by reference to whether, as an administrative or evidentiary matter, prosecution of that individual’s case is necessary to the prosecution of other persons who have committed crimes that independently meet the statutory threshold.

Elsewhere, the Policy Paper endorses, in principle, the goal of universal prosecution. It notes that “[t]he strategy of focusing on those who bear the greatest responsibility for crimes within the jurisdiction of the Court will leave an impunity gap unless national authorities, the international community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used.”<sup>157</sup> For those offenders who are not captured under the policy of targeting the highest-level offenders, the Policy Paper observes that “alternative means for resolving the situation may be necessary, whether by encouraging and facilitating national prosecutions, by strengthening or rebuilding national justice systems, by providing international assistance to those systems, or by some other means.”<sup>158</sup> It further argues that the ICC’s own focus on high-level perpetrators may provide precisely such encouragement:

If the ICC has successfully prosecuted the leaders of a state or organization, the situation in the country concerned might then be such as to inspire confidence in the national jurisdiction. The reinvigorated national authorities might now be able to deal with the other cases. In other instances, the international community might be ready to combine national and international efforts to ensure that perpetrators of serious international crimes are brought to justice.<sup>159</sup>

But, again, this specific example only speaks to cases in which the ICC is at liberty to prosecute the highest level of offenders, which may not pertain if the state itself undertakes exemplary prosecution. If the ICC were truly concerned with eliminating the “impunity gap,” would the prosecution of ad-

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156. *Id.* at 7.

157. *Id.*

158. *Id.*

159. *Id.*

ditional lower-level persons not captured by the state policy not further encourage national and international efforts by drawing attention to the “impunity gap” that the state’s own policy had created?

One cannot help but suspect that what truly underlies this policy is some acknowledgment that states recovering from mass atrocities may legitimately seek to balance the interests of prosecution against other considerations of resource allocation and future reconciliation that may counsel against full prosecution. But if that is the case, then we are left with the same problem I previously posed: How does the ICC Prosecutor make principled distinctions between which methods of balancing are acceptable and which are not? Can it possibly be that a state’s optimal transitional prosecution strategy happens to coincide with the number of high-ranking perpetrators whom the ICC would otherwise be able to prosecute consistent with its own institutional limits? Again, once the goals of prosecution are balanced against the broader context-specific goals of political transition and reconciliation, the line between prosecution and amnesty begins to blur. In place of stark distinctions stands a continuum of options, none of which emerges, a priori, as the obvious best choice.

What the problem of exemplary prosecution highlights, therefore, is that the ICC Prosecutor cannot make even individual charging decisions without also assessing, as a broader matter, whether a state’s transitional justice efforts as a whole are adequate. And that broader question involves precisely the kind of complex political calculations that the structure of the ICC was ostensibly designed to avoid.

### C. *Positive Law and Moral Debate*

The nature of the crimes covered by the Rome Statute and predecessor tribunals is central to the mission of the International Criminal Court. From Nuremberg forward, international criminal tribunals have arisen in the wake of atrocities involving either genocide or mass murders that have qualified as crimes against humanity. The preamble to the Rome Statute itself recalls this paradigmatic context when it notes that “millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,” “[r]ecogniz[es] that such grave crimes threaten

the peace, security and well-being of the world” and therefore expresses a “[d]etermin[ation] to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”<sup>160</sup>

There is a tendency to understand the substantive crimes set forth in the Rome Statute with these past precedents in mind. One commentator, for example, has argued that “the jurisdiction of the ICC is limited to . . . crimes [that] are cautiously defined so as to focus on atrocities of particular scale and severity.”<sup>161</sup> But such statements do not appear justified by the text of the Rome Statute, whose reach extends to a broader range of conduct than the kinds atrocities which gave rise to international prosecutions in the past. This realization raises questions about whether, and to what extent, the ICC Prosecutor should limit investigations and indictments to situations that fit the standard contexts associated with international criminal prosecution.

NATO’s military intervention to stop ethnic cleansing in Kosovo in 1999 presents a much-debated problem of prosecutorial discretion that may preview the difficulties that will confront the ICC Prosecutor. During NATO’s Operation Allied Force, airplanes launched a missile attack on the Belgrade headquarters of the Federal Republic of Yugoslavia’s state-owned media company Serbian Radio and Television (RTS), killing sixteen civilians inside and damaging the building.<sup>162</sup> NATO justified its action on two distinct grounds: that the facilities were being used as a relay station to support military communications and that Milošević’s regime was using the state-owned television as a means of disseminating propaganda favorable to its murderous campaign in Kosovo.<sup>163</sup> It also ar-

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160. Rome Statute, *supra* note 1, at pmb1.

161. Robinson, *supra* note 7, at 485. Prior to the adoption of the Rome Statute, Louise Arbour made a similar point concerning the general practice of international tribunals, noting that “[g]enerally speaking recourse to an international criminal forum will only occur when horrendous crimes have been committed with the collusion or impotence of national authorities.” Arbour, *supra* note 90, at 1.

162. *See generally* Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, paras. 71-79, (June 13, 2000), [www.un.org/icty/pressreal/nato061300.htm](http://www.un.org/icty/pressreal/nato061300.htm) [hereinafter “ICTY NATO Report”].

163. *Id.* paras. 73-74.

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gued that it had taken measures to reduce civilian casualties, including giving advance warning of the target to the Yugoslav government.<sup>164</sup> Critics, however, argued that this action violated applicable rules of war prohibiting the intentional targeting of nonmilitary objects and requiring military actions to be pursued without disproportionate loss of civilian life.<sup>165</sup>

Then ICTY Prosecutor Louise Arbour created a special committee to look into these and other allegations of NATO war crimes, and the following year the committee issued a report in which it recommended against initiating a formal investigation.<sup>166</sup> Arbour's successor and current ICTY Prosecutor Carla Del Ponte declined investigation and cited the report, which she also released publicly, as the basis for her decision.<sup>167</sup>

Taken at face value, the committee's recommendations turned solely on the question of whether the missile attack was "legally acceptable."<sup>168</sup> In concluding that it was, the committee accepted NATO's word that the primary goal was to disable Serbia's military communication system, with the disruption of propaganda operating only as an "incidental" and "complementary" goal. The committee also indicated, however, that

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164. *Id.* para. 77.

165. See, e.g., Amnesty International, *NATO/Federal Republic of Yugoslavia "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force*, AI Index: EUR 70/18/00, June 2000 [hereinafter Amnesty International Report]; Danner, *supra* note 7, at 538-40; Andreas Laursen, *Nato, the War over Kosovo, and the ICTY Investigation*, 17 AM. U. INT'L L. REV. 765, 778 (2003); Michael Mandel, *Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to be Learned From It*, 25 FORDHAM INT'L L.J. 95 (2001).

166. See ICTY NATO Report, *supra* note 162, para. 91.

167. ICTY Press Release *supra* note 144.

168. ICTY NATO Report, *supra* note 162, para. 5 ("In the course of its review, the committee has applied the same criteria to NATO activities that the Office of the Prosecutor (OTP) has applied to the activities of other actors in the territory of the former Yugoslavia. The committee paid particular heed to the following questions: (a) Are the prohibitions alleged sufficiently well-established as violations of international humanitarian law to form the basis of a prosecution, and does the application of the law to the particular facts reasonably suggest that a violation of these prohibitions may have occurred? and (b) upon the reasoned evaluation of the information by the committee, is the information credible and does it tend to show that crimes within the jurisdiction of the Tribunal may have been committed by individuals during the NATO bombing campaign?").

the attack would have been a war crime worthy of investigation and prosecution had the anti-propagandistic motive been the primary one.<sup>169</sup> Apparently, there was evidence to support that alternate finding: An Amnesty International report indicates that in the period immediately following the attack, several NATO officials, including British Prime Minister Tony Blair, defended the strike solely as an attempt to dismantle Milošević's propaganda apparatus.<sup>170</sup>

However one assesses the merits of the allegations against NATO, clearly this episode presents a context very different from the one that has traditionally framed the operation of international tribunals. We are faced not with rules proscribing the deepest moral offenses of human history, but instead with traditional rules of war—often vaguely phrased—that cover the details of military tactics in situations that are more susceptible to legal and moral debate concerning the propriety of particular objectives and means, and with the changing nature of warfare. What are the proper standards governing the distinction between acceptable and unacceptable targets, and collateral damages to civilians? Is the disruption of hateful propaganda used to support a war effort necessarily an illegitimate military aim? These questions are open for reasonable debate in a way, for example, that the propriety of geno-

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169. *Id.* para. 47. Citing the example of Rwanda, in which the radio was used to incite and direct the commission of genocide against Tutsis, the report urges that “[i]f the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target.” *Id.* Danner has argued that the ICTY Prosecutor’s decision not to initiate an investigation was “entirely consistent with the OTP’s preexisting prosecution strategy” of “[t]argeting high level officials or individuals who had perpetrated particular heinous offenses.” Danner, *supra* note 7, at 540. But the policy statement evidencing that strategy employs the disjunctive when it endorses a policy of “maintaining an investigative focus on persons holding higher levels of responsibility, *or* on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences.” ICTY Press Release *supra* note 144; Danner, *supra* note 7, at 540 n. 254 (quoting the same). As thus phrased, ICTY’s preexisting policy would have supported rather than discouraged prosecution of high-level NATO officials. In justifying her decision not to initiate investigation, Del Ponte relied exclusively the committee report, which did not focus on gravity considerations, as the basis for her decision. See ICTY NATO Report, *supra* note 162, para. 5.

170. Amnesty International Report, *supra* note 165, at 49.

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cide is not.<sup>171</sup> In contrast to the kinds of acts which have provoked the intervention of criminal tribunals in the past, one could argue that NATO's actions, committed as part of a humanitarian intervention and with the presumed intent of bringing a faster close to its campaign, involved far less moral culpability than the standard violent crime that finds no place in the lexicon of international criminal law but is prosecuted every day in domestic jurisdictions.

Moreover, although the specific incident at issue arose in the context of the ICTY, the Rome Statute also prohibit attacks on civilians and civilian objects as well as incidental harm to civilians and civilian objects that is "clearly excessive in relation to the concrete and direct overall military advantage anticipated."<sup>172</sup> The Statute also embraces a broader list of rules and customs of war which include, to name a few, prohibitions against the unnecessary destruction of enemy property, the improper use of enemy or U.N. flags, and the commission of "outrages upon personal dignity, in particular humiliating and degrading treatment."<sup>173</sup>

If one seeks to understand the vehemence of the U.S. opposition to an institution created to address "unimaginable atrocities that deeply shock the conscience of humanity," one must start by considering the prospect that investigations and prosecutions might arise out of more disputed exercises of military judgment. As Jack Goldsmith has argued, "[t]he real concern is that the indeterminateness of international criminal law makes it easy to imagine the ICC and the United States having genuine, principled disagreements about whether a

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171. It is worth emphasizing that even the ICTY committee investigating NATO's action did not perceive a per se prohibition on targeting media infrastructure. It allowed that one could legally bomb a media station that was being used criminally to incite persons to commit genocide (as did Rwanda's primary radio station), but drew the line in the present context where the government-directed propaganda did not itself meet the requirements for incitement but instead involves "merely disseminating propaganda to generate support for the war effort." See ICTY NATO Report, *supra* note 162, para. 47.

172. Rome Statute, *supra* note 1, arts. 8(2)(b)(i)-(ii), (iv). The "clearly excessive" language of the Rome Statute standard may set a higher bar for proportionality-based charges, but much will depend, of course, on exactly how this standard is interpreted and applied.

173. *Id.* arts. 8(2)(b)(vii), (xiii), (xxi).

particular act is an international crime.”<sup>174</sup> Perhaps hesitant to present the issue so forthrightly, U.S. public statements opposing the Court have repeatedly focused on a hypothetical scenario in which U.S. peacekeeping troops serving in a country that has ratified the Rome Statute become subject to the investigations and indictments of a rogue Prosecutor, notwithstanding the United States’ own refusal to join the treaty.<sup>175</sup> Or the case is presented that the United States may hit a civilian target in error and have its judgment second-guessed by the Prosecutor and Court.<sup>176</sup> These concerns might seem far-fetched: The majority of war crimes listed in the Rome Statute can only become subject to prosecution “when committed as part of a plan or policy or as part of a large-scale commission of such crimes”<sup>177</sup> and the complementarity regime ensures that the United States will in any case always have the first opportunity to investigate and prosecute any actual offenses.

But the allegations at issue in the Kosovo scenario are not the kind committed by rank and file peacekeeping troops acting of their own accord. NATO bombing targets were authorized on the basis of consensus decisions following careful review by the highest-level military and government officials of each of the individual NATO states.<sup>178</sup> In his memoir of the campaign, General Wesley Clark, then Supreme Allied Commander for Europe, describes how the targets he selected were taken to the White House for examination and approval and how, specifically, it was “difficult to get political approval for striking the television stations, because strikes on television facilities seemed undemocratic and perhaps illegal.”<sup>179</sup> If the ICC Prosecutor were to second-guess such a high-level tactical decision, it would not be hard to establish that the actions formed part of a “plan or policy” and criminal liability in that instance would go straight to the top. Nor would it require a “rogue” or politically motivated Prosecutor to pursue that path: A Prosecutor embracing a particular view of the law and of prosecutorial duties might perceive a legal obligation to

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174. Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 95 (2003).

175. Scheffer, *supra* note 21.

176. *Id.*

177. Rome Statute, *supra* note 1, art. 8(1).

178. WESLEY K. CLARK, *WAGING MODERN WAR* 114-15 (2001).

179. *Id.* at 249.



pursue prosecutions. Thus, this example presents a concrete scenario in which the heads of state of every NATO country might be charged with war crimes in the event that a Prosecutor disagreed with them about the legitimacy of the objective underlying a particular tactical decision. Indeed, one group of law professors who urged the ICTY to prosecute NATO officials accused “all the prime ministers, presidents, foreign and defense ministers of the NATO countries, and various officials of NATO itself, that is to say Clinton, Albright, Cohen, Blair, Chretien etc., down through Javier Solana, Wesley Clark, and Jamie Shea.”<sup>180</sup>

Of course, the mere fact that the laws of war apply equally to leaders of powerful states and to rogue dictators cannot be reason itself to oppose the ICC. The very idea of establishing international laws to regulate the conduct of warfare necessitates their universality—a fact not lost on Justice Jackson when, during his opening speech at Nuremberg, he emphasized that “while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.”<sup>181</sup> But the question here is a qualitative one: Should the same mechanisms used to bring to justice genocidal murderers also apply to the prosecution of acts for which there is greater legal and moral ambiguity?

The ICC Prosecutor might approach this question in different ways. For example, one could treat the decision as a question of gravity and argue that the crime, if any, perpetrated in NATO’s humanitarian intervention is simply not serious enough to command the attention of the ICC. Interestingly, this was not the approach adopted by the ICTY committee that looked into NATO’s actions. Although the report noted that “[t]he ICTY has jurisdiction over *serious* violations of international humanitarian law as specified in articles 2-5 of the Statute,”<sup>182</sup> it did not analyze seriousness as a consideration independent of the underlying crimes themselves. The Rome Statute, by contrast, specifies “sufficient gravity” as a separate admissibility requirement, thus suggesting a clearer dis-

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180. Mandel, *supra* note 165, at 95.

181. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 154 (1954).

182. ICTY NATO Report, *supra* note 162, para. 31 (emphasis added).

inction between substantive crimes and the seriousness of the offense.<sup>183</sup> But the concept of gravity is not defined, and it remains to be seen how the ICC Prosecutor, and ultimately the ICC judges, will construe this mandate.

Another approach is to apply deferential standards that recognize the difficulty of the underlying legal determinations and the institutional limitations of a court asked to second-guess military judgments. Assessing which targets are legitimate and what level of collateral civilian casualties are proportional to a legitimate military goal requires a complex balancing that a court may be ill-suited to conduct. Thus, a Prosecutor might abstain from pursuing such cases unless the unambiguous facts provide no conceivable legal justification for the actions at issue. This approach would have the further benefit of promoting the ideal of legality—ridding unclear laws of their retroactive character—and, by increasing predictability, would diminish the disincentive that states fearful of prosecution might have to engage in military interventions motivated by worthy goals. Arguably, this was the approach adopted by the ICTY Prosecutor's committee when it elected to give credence to NATO's factual explanation of its actions. But this approach may not work as well when purely legal questions are at issue. For example, had NATO taken the view that the anti-propagandistic rationale was sufficient to justify its actions, no amount of deference to military judgment would serve to stave off prosecution if the Prosecutor determined, as the committee suggested, that that rationale was inadequate.

Another way to look at this problem—or perhaps an additional reason to justify taking a strict view of grave crimes or deferring to arguably reasonable decisions—is to consider prosecutorial strategy in light of the broader political goals of the ICC. For example, the social benefits sought from the exposure and condemnation of past crimes are less likely to be realized if the truths revealed simply invite moral debate rather than moral clarity. In that instance, there is greater risk that the extraordinary intervention of an international tribunal will backfire by calling into question its own moral and political legitimacy. In this way, the question of gravity becomes similar to that of amnesty or exemplary prosecution: In decid-

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183. Rome Statute, *supra* note 1, art. 17(1)(d).

ing whether or not the Court's powers should be activated, the ICC Prosecutor must bring to bear extra-legal considerations that go to the very heart of the ICC's political goals.

In a recent communication justifying his decision not to initiate an investigation into detainee abuse by British troops in Iraq, Moreno-Ocampo has taken a first step toward establishing a practice in this area. Although the Prosecutor questioned whether there was sufficient evidence to establish that the alleged war crimes flowed from a "plan or policy" as required by the Rome Statute, he also argued that even if there were a reasonable basis to believe that crime within the Court's jurisdiction had occurred, the number of potential victims (between four and twelve willfully killed and fewer than twenty subjected to inhumane treatment), was insufficient to trigger the Rome Statute's gravity requirement, particularly when compared with the scale of atrocities at issue in the Court's investigations in Uganda, the Democratic Republic of Congo, and Sudan.<sup>184</sup> Although this numbers-focused reasoning leaves open many questions and is sure to draw criticism, it suggests a current reluctance to expand the Court's energies beyond the contexts of mass atrocity that have given rise to international tribunals in the past, even if that role is a narrower one than what the text of the Rome Statute could reasonably be read to authorize.

#### D. *Timing*

Thus far, I have considered the issue of prosecutorial discretion as one of whether to investigate and prosecute. A distinct subset of discretionary issues arise with respect to the timing of indictments. In contrast to the Nuremberg paradigm, the "ex ante" nature of the ICC allows the Court to undertake indictments at a time when conflicts are ongoing, thus raising more acutely the question of what effect the prosecutorial process may have on efforts to end violent conflicts and achieve peace.<sup>185</sup> This prospect also raises questions about the operation of the Court's complementarity regime. Is it meaningful

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184. Communication from Luis Moreno-Ocampo, Chief Prosecutor, International Criminal Court (Feb. 9, 2006), [http://www.icc-cpi.int/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf).

185. See, e.g., Arsanjani & Reisman, *supra* note 84 at 385 (observing that "[i]n these circumstances, other authoritative political entities are still en-

to limit the Court's reach to cases in which a state is "unable or unwilling genuinely" to investigate or prosecute if the Prosecutor is to seek indictments at times of conflict when states are highly unlikely to be both willing and able to pursue prosecutions? Perhaps more significantly, to the extent that the ICC Prosecutor might, in theory, defer to a state's decision to pursue a nonprosecutorial approach to past crimes, is that possibility meaningful if the Prosecutor is to seek indictments before a state reaches the historical moment when it becomes able to implement a transitional justice policy?

The debate on timing tends to focus on two interrelated concerns. First, is it possible that pre-transitional indictments will hinder justice and prolong conflict and suffering by precluding otherwise optimal political arrangements that might involve peaceful transition to a more just society in exchange for nonprosecutorial alternatives?<sup>186</sup> Second, is it possible that such indictments could have positive effects? Might they deter political actors from expediency when insistence on prosecution would ultimately prove preferable? (This, of course, is the flip-side of the question just posed.) Or might they deter existing or prospective war criminals engaged in the conflict from future crimes—in other words, could early indictment provide a sort of conflict-specific deterrence that is distinct from the goal of general international deterrence?<sup>187</sup>

History offers little empirical evidence to answer these questions, and existing cases caution against easy generalizations. The experience of the ICTY has given rise to two instances in particular which provoked debate about the timing of charging decisions: the indictments of self-styled Bosnian Serb President Radovan Karadžić and General Ratko Mladić in 1995 a few months prior to the Dayton peace negotiations, and the indictment of Yugoslav President Slobodan Milošević in 1999 during NATO's Operation Allied Force.

Although some U.S. and European diplomats worried that the indictments would hinder peace negotiations in Bos-

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gaged in reestablishing order and the *ex ante* tribunal's various options for decision may influence these political and often military actions").

186. See, e.g., *id.*; Danner *supra* note 7 at 544-45; Bass, *supra* note 11, at 229-30.

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187. See, e.g., Danner *supra* note 7, at 544-45; Goldstone, *supra* note 94, at 103, 126.

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nia,<sup>188</sup> then-ICTY Chief Prosecutor Justice Richard Goldstone has argued that the action was essential to peace because Karadžić and Mladić's subsequent exclusion from the negotiation of the historic Dayton peace accord facilitated the participation of Bosnia's Muslim-led government in those talks.<sup>189</sup> Closer examination of these events, however, fails to yield clear answers. Taking Goldstone's account on its own terms—that indictment yielded exclusion from diplomatic negotiations—any political success resulting from the Karadžić and Mladić indictments is highly contingent and anecdotal. After all, the head negotiator for the Bosnian Serbs at Dayton was none other than Serbia's Slobodan Milošević, who would later find himself on trial at the ICTY for acts of genocide and crimes against humanity, many committed prior to Dayton. Croatian President Franjo Tudman negotiated on behalf of both Croatia and the Bosnian Croat leadership, and provided the international community with an essential, if not wholly welcome, ally in opposing Milošević.<sup>190</sup> But he too has been accused of war crimes and effectively received a posthumous indictment when the ICTY charged a Croatian general with having participated in a joint criminal enterprise with Tudman.<sup>191</sup> If Goldstone were right about the effect of his indictment, then the lesson would be an odd one: Peace in Bosnia resulted not from a general policy of early indictment but from the peculiar fact that the negotiations took place after the indictment of Karadžić and Mladić, but before Milošević or Tudman faced similar charges. Moreover, the underlying assumption rests upon a dubious moral distinction: that the in-

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188. BASS, *supra* note 11, at 230.

189. Justice Richard Goldstone, *The United Nations' War Crimes Tribunals: An Assessment*, 12 CONN. J. INT'L L. 227, 233 (1997) (claiming that "without the indictment of Dr. Karadžić and General Mladić, there would have been no Dayton Agreement"); GOLDSTONE, *supra* note 94, at 126. For a detailed account of the Dayton peace process viewed from the perspective of the United States' chief negotiator, see RICHARD HOLBROOKE, *TO END A WAR* (1998).

190. BASS, *supra* note 11, at 229 (noting obstacles to gathering evidence against Tudman in 1995 including the fact that "Bosnia was somewhat circumspect in its accusations against Croatia, realizing that Croatian support was needed to balance against the Serb forces").

191. *The Prosecutor v. Ante Gotovina*, Amended Indictment, Case No. IT-01-45, Amended Indictment (Feb. 19, 2004), <http://www.un.org/icty/indictment/english/got-ai040224e.htm>.

ternational community should refuse negotiation with indicted war criminals while continuing to deal with known (and arguably worse) criminals who have not faced the formality of indictment.

The more plausible historical reading is that the timing of the Karadžić and Mladić indictments had little, if any, effect upon the resolution of the Bosnian conflict as the marginalization of the Bosnian Serbs resulted not from legal formalities, but from political calculation. As Bass has noted, the “real point” in the U.S. strategy “was not the indictments, but the fact that the White House increasingly saw Karadžić and Mladić as useless interlocutors, unlike Milošević.”<sup>192</sup> Nor is there any evidence, before or after these indictments, that the most critical actors in the international community saw amnesty for Karadžić or Mladić as an effective or realistic strategy for achieving peace.

The indictment of Milošević, four years later, in the middle of NATO’s military intervention in Serbia—the first ever international indictment of a sitting head of state—provoked similar concerns that the action might inhibit peace negotiations.<sup>193</sup> But Milošević later agreed to a cease-fire that included U.N. governance of Kosovo, backed by NATO troops and contained no promise of amnesty for him. Milošević apparently realized that an ICTY indictment had little meaning for his hold on power unless he was first removed by international intervention or domestic effort, and it is unlikely that any deterrent threat arising from those prospects would be much amplified by the formal existence of an ICTY indictment. As it turned out, it took both a domestic revolution and extraordinary international pressure to deliver Milošević to The Hague.<sup>194</sup>

192. BASS, *supra* note 11, at 232.

193. *Id.* at 274 (noting that “America and Britain publicly cheered the indictments while American officials privately fretted that they would derail cease-fire negotiations. Viktor Chernomyrdin, Russia’s envoy on Kosovo, complained that a new obstacle had been put up. How could the great powers negotiate with indicted war criminals.”).

194. See BASS, *supra* note 11, at 271-75; Goldsmith, *supra* note 174, at 93 (“[I]t was U.S. military, diplomatic, and financial might. U.S. military and diplomatic power ousted Milošević’s and other unattractive regimes in the Balkans, making a trial of Balkan leaders a possibility. And it was the United States’ threat to withhold a half-billion dollars in U.S. and International

As with the Karadžić and Mladić indictments, there is no evidence that the Milošević indictment scuttled any realistic effort to trade amnesty for peace, and it is unclear whether it would have deterred international political actors from following that route had it looked otherwise attractive. It is possible to imagine that international indictment may frustrate amnesty deals. Although international tribunals cannot force political actors to enforce their edicts, the existence of indictments may nevertheless impact public opinion and political thinking in ways that make otherwise appealing amnesty deals, whether formal or de facto, less palatable. One could argue, however, that this is a good thing. Even those willing to promote amnesty in specific contexts must recognize that doing so involves a tradeoff. Indictments issued during ongoing conflicts may serve to highlight the nature of this tradeoff, encouraging political actors and the publics to which they are accountable to consider more deeply whether moral considerations truly justify forsaking prosecution in particular instances.

Of course, the very prospect of existing indictments giving way to subsequent amnesty deals raises a concrete question of prosecutorial policy: If circumstances might otherwise justify deferring prosecution, should the Prosecutor distinguish between indictments already issued and those that are merely pending or potential? The most interesting aspect of the ICTY precedents may be less what they show about the empirical political effect of indictment than what they reveal about prosecutorial attitudes. Goldstone not only lobbied states to comply with ICTY indictments, he also lobbied the brokers of the Dayton Agreement not to trade in amnesties (and received assurances they would not) or otherwise reach settlements that would interfere with the ICTY's mission.<sup>195</sup> Arbour has admitted to using the Milošević indictment to attempt to dissuade the international community from reaching an amnesty deal: "I was in a hurry," she explained in an interview with *The New*

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Monetary Fund (IMF) aid to the successor regime in Yugoslavia that led to Milošević's actual transfer to the ICTY.").

195. Bass, *supra* note 11, at 243-45. As Bass notes, deputy prosecutor Graham Blewitt has even stated that the ICTY OTP specifically timed the release of some additional indictments to coincide with the start of the Dayton talks as part of an effort "to make sure that we were going to be a part of the Dayton solution." *Id.* at 244. Goldstone, however, remembers the coincidental timing as pure "happenstance." *Id.*

*York Times*, "I thought we might miss out as peace was being discussed. I thought he might be able to negotiate a deal for his departure."<sup>196</sup> The official press release accompanying that indictment struck a similar note: Arbour offered that she was "mindful of the impact that this indictment may have on the peace process in the Federal Republic of Yugoslavia," but expressed confidence that "the product of our work will make a major contribution to a lasting peace, not only in Kosovo, but in the whole region in which we have jurisdiction" and that "no credible, lasting peace can be built upon impunity and injustice."<sup>197</sup> Arbour then communicated additional political advice to the international community, stating that with respect to Milošević and other suspects indicted with him that "the evidence upon which this indictment was confirmed raises serious questions about their suitability to be the guarantors of any deal, let alone a peace agreement."<sup>198</sup>

In adopting this stance, the ICTY's prosecutors could and did claim to be acting according to a specific political mandate: The U.N. Security Council had deemed the operation of the ICTY necessary to "international peace and security" and had created the tribunal to that end.<sup>199</sup> But the same body that had created the ICTY was also capable of changing its mandate or taking a different course of action. Any agreement on a Yugoslavia amnesty deal would also presumably have required the support of a Security Council resolution, and that resolution would similarly have defended this course of action based on Chapter VII considerations of international peace and security. The ICTY's experience thus suggests a fine line between following a mandate and taking action to preserve and extend that mandate to the exclusion of other

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196. Marlise Simons, *Proud but Concerned: Tribunal Prosecutor Leaves*, N.Y. TIMES, Sept. 15, 1999, at A3. See also Danner, *supra* note 7, at 544.

197. See Press Release, Statement by Justice Louise Arbour, Prosecutor ICTY, JL/PIU/404-E (May 27, 1999), available at <http://www.un.org/icty/pressreal/p404-e.htm> [hereinafter Arbour].

198. *Id.*

199. See S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993) (establishing the ICTY). Arbour's press release announcing the Milošević indictment spoke of the Security Council as confident in "creating this Tribunal and in calling upon it several times in the last year to address this [war crimes] issue." Arbour, *supra* note 197.



potential mandates that might replace or modify the original one.

The ICC Prosecutor has thus far taken no formal position on these matters, although all of the ICC's three ongoing investigations are taking place in the midst of ongoing conflicts. Ultimately, it remains an unresolved empirical question whether the timing of indictments will have much consequence for the ICC's mission, but historical experience in this area reveals a degree to which international prosecutors have themselves assumed a self-consciously political role in the administration of international criminal justice.

#### E. *Multilateral Prosecutions and Disproportionate Crimes*

The questions already discussed pose unique difficulties for the mission of international criminal tribunals in situations where the Prosecutor must consider alleged crimes perpetrated by opposing parties to a conflict. The "victor's justice" of the Nuremberg process ensured that only Axis crimes would be investigated and prosecuted. The story told by the Nuremberg process was thus a relatively straightforward one of Nazi aggression and criminality which required no consideration or evaluation of Allied acts during the war. This selectivity—inevitable in light of the political context giving rise to the tribunal—provided for a straightforward pedagogical mission aimed at condemning Nazi aggression and atrocities.

The wars fought in Croatia and Bosnia between 1991 and 1995 once again provide an instructive example of the challenges faced in attempting to establish a more equitable tribunal, both because ICTY prosecutions have included crimes committed by all three sides to those conflicts, and also because of the disproportionate distribution of major criminal acts among the parties to the conflict with the great majority of serious crimes having been committed by Serb forces.<sup>200</sup> In deciding upon the few suspects whom it could select for prosecution, the ICTY Prosecutors faced not merely the vertical question of whether to focus on top leaders or to pursue some

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200. Separate assessments by a U.N. Commission of Experts and the CIA estimated that roughly ninety percent of crimes in Bosnia were committed by Serb forces. Florence Hartmann, *Bosnia*, in *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 50, 56, (Roy Gutman & David Rieff eds., 1999), available at <http://www.crimesofwar.org/thebook/bosnia.html>.

other method of selection, but also the horizontal question of whether and how to take account of the distribution of crimes among the parties to the conflict.

Underlying this question is the broader issue of the ICC's symbolic goals. If prosecution of the select few is inherently tokenistic, then what is this symbolic process supposed to symbolize? Ironically, although international criminal tribunals are often said to promote the principle of individual guilt, the mere prosecution of those individually guilty of particular acts is unlikely to advance the political goals of international criminal tribunals unless the trials can also speak to broader grievances rooted in collective responsibility.<sup>201</sup> Should the ICTY have indicted equal numbers of high-level Serbs, Croats, and Muslims, regardless of the resulting imbalance in the gravity of the underlying offenses? It seems unlikely that Croats and Muslims would perceive much legitimacy in a justice process which did not in some real sense reflect the asymmetry of ethnic cleansing and the unique role played by Serbian nationalistic aggression in starting and perpetuating the Balkan wars.

Alternately, one might imagine a policy which emphasized the gravity of crimes without regard to broader political sensitivities. Had the ICTY pursued that approach, it is conceivable that it would have expended its limited resources prosecuting Serb-perpetrated offenses such as the genocide at Srebrenica and other atrocities, without ever reaching Croat and Muslim crimes that, while often hideously grim, were not as large-scale or, at least in the apparent case of the Bosnian Government, did not involve the same degree of high-level sponsorship and planning.<sup>202</sup> (Although it is broadly rooted in fact, I state this scenario as a hypothetical; I am not claiming that reliance on gravity considerations alone would have precluded non-Serb prosecutions at the ICTY.) But that outcome would also have been deeply unfortunate, however fair-

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201. For a related meditation on the role of collective responsibility in international criminal law, see George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499 (2002).

202. For a general account of the Bosnian conflict which covers these events, see ALAN LITTLE & LAURA SILBER, *THE DEATH OF YUGOSLAVIA* 226-83 (1995). On the Srebrenica massacre specifically, see DAVID ROHDE, *ENDGAME: THE BETRAYAL AND FALL OF SREBRENICA, EUROPE'S WORST MASSACRE SINCE WORLD WAR II* (1997); JAN WILLEM HONIG & NORBERT BOTH, *SREBRENICA: RECORD OF A WAR CRIME* (1996).

minded the principles that produced it. Not only would it have seriously deprived the tribunal of credibility among Serbs, it also would have encouraged Croats and Muslims to sweep their own crimes under the rug, thus preventing those societies from coming to terms with evils committed in their names and possibility strengthening chauvinistic forces within those communities.

Looking at the actual indictment practices of the ICTY Prosecutor's office, one cannot help but perceive some rough attempt to strike a balance between these extremes via a prosecutorial selection process designed to achieve the greatest amount of public legitimacy. As might be expected, the lion's share of indictments arising out of the Bosnian conflict have targeted Serb offenders, followed by a much smaller number of Croats and only a handful of Muslims.<sup>203</sup> Agree or disagree with the ICTY's specific indictment choices, it is difficult to imagine the ICTY Prosecutor devising an acceptable indictment policy without making some related judgments about the broader political context of the former Yugoslav conflict. Thus, far from simply operating as a legal actor who focuses on neutral legal facts, the Prosecutor becomes, by virtue of the indictment selection process, the teller of a broader, and likely contested, political narrative.

The demand for tribunals to tell collective truths rather than merely individual ones will complicate the work of any international criminal prosecution, whether the ICC Prosecutor has initiated investigations independently or whether the Security Council has created a specific ad hoc tribunal designed to address one historical context only. One can imagine historical situations (perhaps the Israel-Palestinian conflict), where the perception of collective rights and broad historical injustices may be so deep and complex that atomistic prosecutions of particular individuals for individual crimes will have little value outside the context of a broader political resolution that can make sense of the transitional justice process. Although these factors may not make the job of international prosecutors any easier when an international tribunal has been called to prosecute crimes that local actors have generally proved unwilling to address, they do provide additional reasons why prosecutorial policies reached according to politi-

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203. See <http://www.un.org/icty>.

cal settlements—including decisions to confer amnesty, to undertake limited exemplary prosecutions while employing a truth commission to address most crimes, and to narrow the context and scope of investigations—may sometimes command greater respect than policies imposed independently by an international prosecutor.

## V. DISCRETION AND LEGITIMACY

The issues I have just discussed all pose difficult substantive policy questions for those seeking to impose accountability on perpetrators of international crimes. In the context of the ICC, however, they also raise a distinct set of institutional problems. From one perspective, the issue may be viewed as the familiar administrative problem of delegation. The Rome Statute entrusts the ICC Prosecutor with the prosecution of international crimes, but provides insufficient guidance on selecting cases for prosecution. This leaves open the risk of arbitrary prosecutions and raises the general question of whether a Prosecutor's policymaking functions bear sufficient legal accountability.

At a deeper level, however, the problem of prosecutorial discretion raises a more fundamental separation of powers question. One need not develop a comprehensive theory of legitimacy to perceive the problem. If the decision to prosecute depends on deeply political questions that require complex policy judgments about what form of transitional justice is best suited to a particular situation, then the very rationale for delegating this decision to an independent Prosecutor is undermined.<sup>204</sup> Can a single official's discretion possibly provide

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204. This point is one often overlooked even by those who do focus on the substantive policy dilemmas facing the ICC Prosecutor. One author, for example, argues that because prosecutorial discretion "is the cornerstone of prosecutorial independence" and is "needed to insulate the prosecutor from political interests and promote impartiality and independence," the ICC Prosecutor is therefore appropriately entrusted (subject only to pragmatic constraints) with deciding such thorny questions as whether a particular amnesty law deserves deference. See Matthew R. Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 J. INT'L CRIM. JUST. 71, 76 (2004). The problem, of course, is that the value of "impartiality and independence" from "political interests" takes on a different cast when the Prosecutor is entrusted with policy decisions that, by their nature, resemble those typically entrusted to political actors.

an effective means of deciding these questions? One might be inclined to agree in a formal sense with Jack Goldsmith that the ICC is indeed a “self-defeating” institution:<sup>205</sup> The Court centers on a prosecutorial mechanism that is incapable of meeting the very standard of legitimacy that its advocates have invoked to justify its existence.

For that reason, the existence of prosecutorial authority poses a far greater challenge to the mission of the ICC than does, for example, the narrower debate over whether the Rome Statute contains sufficient protections against bias or prosecutorial abuse. It should also come as little surprise, therefore, that the dilemmas of transitional justice have fueled the arguments of those who believe not merely that the ICC should be improved, but that it should not exist at all. For example, whereas outgoing President Clinton grudgingly signed the Rome Statute on behalf of the United States, after having warned that its provisions created a risk of politicized prosecution, upon taking office President Bush promptly withdrew U.S. support,<sup>206</sup> emphasizing both the previous administration’s concerns and the deeper institutional critique that there is no unitary solution to problems of transitional justice. In this vein, the Bush administration has adopted the view that, “[w]hen a society makes the transition from oppression to democracy, their new government must face their collective past. The state should be allowed to choose the method. The government should decide whether to prosecute or seek national reconciliation. This decision should not be made by the ICC.”<sup>207</sup>

States, of course, are free to argue that the ICC should not exist, and to take diplomatic actions to oppose its operation and funding. But that strategy is little help to the ICC itself, which does exist, must interpret its mandate, and must make do as best it can. Are there strategies internal to the ICC itself which may help alleviate the tensions of prosecutorial policy and enhance the Court’s efficacy and institutional legitimacy? In the remainder of this Article I consider and evaluate three such proposals. The first envisions the Prosecutor limiting his own discretion by promulgating formal guidelines that will di-

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205. See Goldsmith, *supra* note 174, at 89-101.

206. See *supra* notes 2-3 and accompanying text.

207. Grossman, *supra* note 8.

rect his actions. The second seeks a similar result, but does so through legal interpretation of the Rome Statute itself. In this Part, I conclude that neither strategy is sufficient on its own terms to address the underlying problem and that both risk aggravating it. In Part V, I propose a more promising strategy of political deference by which the Prosecutor acknowledges the political, extra-legal nature of the policy questions affecting transitional justice initiatives and seeks external political partners who are better suited to assist and evaluate states' efforts at transitional justice. I consider various permutations of this model and assess the strengths and weaknesses of each.

#### A. *Ex Ante Guidelines*

Several commentators have advocated a guidelines-based approach to constraining prosecutorial discretion. For example, as participants in a process of expert consultations organized by the ICC Prosecutor, Avril McDonald and Roelof Haveman urged the Prosecutor to "objectify" the use of prosecutorial discretion, arguing that "it is of vital importance that guidelines are developed—and made public—giving direction to the decision either [to initiate] or not to initiate an investigation. 'Vital', as the danger looms large that the court is accused of starting investigations on entirely arbitrary grounds, and even based on political considerations."<sup>208</sup> Allison Danner has attempted a more systematic defense of this approach. Arguing that prosecutorial guidelines rooted in "good process" may "enhance" the legitimacy of the ICC Prosecutor, she proposes a regulated system of prosecutorial policy based on publicly promulgated guidelines developed by the Prosecutor and approved eventually by a vote of the Assembly of States Parties. This approach, argues Danner, will enhance legitimacy by rooting the Prosecutor's decisionmaking in neutral *ex ante* criteria that "provid[e] for a transparent standard that the Prosecutor will consistently apply."<sup>209</sup> It will also avoid, in her view, the prospect of prosecutorial choice becoming subject primarily to an informal sort of "pragmatic ac-

208. McDonald & Haveman, *supra* note 7, at 9; *see also* Olásolo, *supra* note 7, at 143-44 (arguing that "core policy choices" left unanswered by the Rome Statute should be addressed by amending the treaty or, "[a]s the second best solution," by amending the Court's Rules of Procedure and Evidence.).

209. *See* Danner, *supra* note 7, at 552.

countability” to various actors “including states that are not party to the treaty, and other actors such as NGOs.”<sup>210</sup>

There is an obvious appeal to this framework, but the mere existence of public guidelines fails to address the core of the dilemma. There are two general sets of problems here. One concerns the nature of the policy issues confronting the ICC Prosecutor; the second concerns the lack of an appropriate political framework to justify prosecutorial control over these issues.

Because the guidelines argument focuses primarily on the concern of actual or perceived arbitrariness, it relies on a kind of a self-fulfilling prophecy: By defining legitimacy as impartiality it ensures that fixed prosecutorial guidelines will confer an almost per se legitimacy as long as they provide decisional rules which are honored in practice. Drawing upon the work of Abram and Antonia Chayes, Danner maintains that an international law norm may be regarded as “legitimate” if it “(1) emanates from fair and accepted procedure, (2) is applied equally and without invidious discrimination, and (3) does not offend minimum standards of fairness and equity.”<sup>211</sup> She emphasizes, therefore, that established guidelines can provide a means by which the ICC Prosecutor may “ensure that he reaches his decisions in a fair and nondiscriminatory way” and “demonstrate that he adheres to good process in decision making.”<sup>212</sup> Danner does contemplate a somewhat broader concept of legitimacy that encompasses not only “actual” legitimacy but also the “external perceptions of the Prosecutor’s legitimacy.”<sup>213</sup> But she limits this inquiry to the question of

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210. 209*Id.* at 525.

211. *Id.* at 536 (citing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 127 (1995)).

212. *Id.*

213. *Id.* The centrality of perception figures in some standard definitions of legitimacy. In a discussion of legitimacy and international institutions Julian Ku has drawn from Robert Dahl’s formulation that “a government is said to be ‘legitimate’ if the people to whom its orders are directed believe that the structure, procedures, acts, decisions, policies, officials, or leaders of government possess the quality of ‘rightness,’ propriety, or moral goodness—the right, in short, to make binding rules.” Julian Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71, 126 (2000) (quoting ROBERT A. DAHL, *MODERN POLITICAL ANALYSIS* 41 (2d ed. 1970)); see also Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93

whether the Prosecutor is perceived to follow a fair and neutral process that satisfies her own, rather narrow, procedural definition of “actual” legitimacy.<sup>214</sup> Even from that perspective, moreover, one may doubt whether prosecutorial discretion, or the ICC more broadly, can provide a “fair and accepted procedure” for resolving the thorniest political questions of transitional justice.<sup>215</sup>

The problem of prosecutorial discretion emerges not merely from the absence of fixed guidance in the Rome Statute, but from the very nature of the questions at issue. Guidelines developed to demonstrate the objectivity of prosecutorial choices are of little assistance if the problems are not of the sort themselves that can be effectively subjected to rule-based decisionmaking. It is instructive to note the gap here between, on the one hand, the range of issues and considerations which the literature identifies as properly subject to prosecutorial guidelines and, on the other hand, the apparent inability to supply concrete proposals for how these concerns could or should be converted into *ex ante* decisional rules. McDonald and Haveman argue that the kinds of issues and guidelines faced by domestic prosecutors “are almost entirely useless on the supranational level of the ICC,”<sup>216</sup> and they propose their own, nonexclusive set of thirteen open-ended criteria that the Prosecutor should consult. These include such considerations as “the level of public outrage,” “popular support for a particular investigation,” “security issues (whether conflict is ongoing . . .),” “threats to the security of a fragile transitional state

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AM. J. INT’L L. 596 (1999) (distinguishing between normative and popular theories of legitimacy).

214. *Danner*, *supra* note 7 at 536. It is also worth noting here that Chayes and Chayes do not endorse a strictly procedural view of legitimacy but acknowledge that “the question of the legitimacy of a rule or a system cannot be kept wholly distinct from the fairness of its substantive content.” ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 134 (1995).

215. Thomas Franck has similarly emphasized the importance of substantive fairness to international law. He writes that “[t]he fairness of international law, as of any other legal system, will be judged, first by the degree to which the rules satisfy the participants’ expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as right process.” THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 7 (1995).

216. McDonald & Haveman, *supra* note 7, at 9.



by prosecuting key individuals,” and “political issues, including the existence of a peace treaty amnesties (distinguish between democratic and non-democratic societies/popular will and conditional and unconditional).”<sup>217</sup> The authors fail, however, to suggest any model for how these criteria can be “objectified” into decisional rules that would specifically guide the commencement of investigations and dictate when a state’s efforts should receive deference and when they should not. Instead, they advise that the matter is “not necessarily [one] of making a straight-forward choice or of choosing between two or several extremes.”<sup>218</sup> Danner also sees a wide group of decisions—including recognition of amnesties and truth commissions in lieu of criminal trials—as open for resolution by guidelines, and she too generally declines to offer much specific advice on what these guidelines should look like beyond the fact that they should exist.<sup>219</sup>

This silence suggests the difficulty of establishing clear rules to govern the context-specific question of what transitional justice efforts undertaken by a particular society are sufficiently sound to command deference. Indeed, one may ask whether *ex ante* rules are even desirable. Danner sees it as essential to the Court’s integrity that the Prosecutor act impartially and treat “like cases alike.”<sup>220</sup> But how well does that approach serve transitional societies themselves? Nations grappling with the dilemmas of transitional justice have created individualized legislative solutions after the fact to deal with singular historical events involving mass atrocities. South Africa created the TRC specifically to deal with its history of apartheid. Rwanda promulgated a special genocide statute to address the genocide of Tutsis in 1994. These regimes created special *ex post* rules to confront specific categories of crimes

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217. *Id.*

218. *Id.*

219. *See* Danner, *supra* note 7, at 542-46. In particular, Danner notes with respect to article 53’s exception for the “interests of justice” that “a prime goal of the prosecutorial guidelines should be to give content to this nebulous phrase.” *Id.* at 543. However, beyond endorsing the general policy of prioritizing high-level offenders of serious crimes, she does not suggest answers to the critical question of how the Prosecutor should apply this language to alternative justice proposals, ongoing conflicts, or other situations in which prosecution might have adverse political effects. *Id.* at 542-46.

220. *Id.* at 537.

committed in the context of defined historical events. Their operation did not hinge upon what actions other countries may have adopted in response to similar events. If a nation in the future wishes to implement an amnesty-granting TRC, should it be denied that opportunity simply because the ICC decided to conduct prosecutions in some other country that faced similar crimes? And will the demonstrable neutrality of the process really create perceived legitimacy if the outcome is opposed by the societies most affected?<sup>221</sup>

One might argue that treating like cases alike is a complex thing, and that once every situation is viewed in light of its full context it is possible to reach the right result in each as long as all appropriate criteria are considered. But here we face a tension. The kind of guidelines that provide for meaningful *ex ante* decisional rules likely to demonstrate the ICC Prosecutor's impartiality may not be the kind likely to embrace the full complexity and contingency of each situation. The Prosecutor may therefore be stuck between the Scylla of ossified *ex ante* decisional rules that promote certainty at the risk of substantive inadequacy and the Charybdis of open-ended criteria that leave great flexibility for individual circumstances but risk that the Prosecutor's discretion may be no more guided than if those criteria did not exist in the first place.

The second problem with the guidelines approach is its indebtedness to a domestic administrative law model, which is rooted in a democratic legitimacy that the ICC inherently lacks.<sup>222</sup> McDonald and Haveman as well as Danner draw support for their guidelines-based approach from the fact that prosecutorial guidelines are a common feature of domestic justice systems.<sup>223</sup> But domestic prosecutors are internal to the societies in which crimes have been committed and they are

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221. For a related argument in the domestic context, *see* Green and Zacharias, *supra* note 60, at 890 ("Decontextualized decision-making, at least in part, is inconsistent with the notion of public accountability. If a prosecutor ignores public expectations in an effort to avoid being swayed by prejudice and irrational excesses, how can the prosecutor serve the public's will? Public accountability presupposes some form of responsiveness to society's present-day desires.").

222. *See, e.g.*, Bodansky, *supra* note 213, at 599 (observing "democracy has become *the* touchstone of legitimacy in the modern world").

223. McDonald & Haveman, *supra* note 7, at 9; Danner, *supra* note 7, at 541-42.

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accountable to the democratic process of those societies, thus allowing an easier fit with standard notions of legitimacy. This basic link exists regardless of the precise mechanism used to delegate or constrain prosecutorial decisionmaking. In the United States, for example, prosecutors are either directly elected or are appointed by democratically accountable officials of the executive branch. Their policies may therefore be said to reflect those of executive officials entrusted with policymaking or of the populace itself.<sup>224</sup> The bureaucratic judge-driven model of civil law societies, by contrast, realizes democratic values through a greater degree of legislative supremacy. And as previously emphasized, it is always possible that societies may seek specialized solutions to address singular historic atrocities.

The ICC, by contrast, suffers from the same “democratic deficit” that is typical of many international institutions.<sup>225</sup> The selection of the Prosecutor on a one-state-one-vote basis<sup>226</sup> takes place on an international plane that is divorced from the democratic process and societal experience of the

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224. Indeed, the executive nature of the prosecutorial role is one of the standard rationales invoked by U.S. courts and commentators to justify the exercise of broad prosecutorial discretion. See Krug, *supra* note 60 at 645-46; Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001).

225. There is a wide literature dealing with problems of democratic legitimacy in international institutions. For a summary with citations, see, e.g., Bodansky, *supra* note 2, at 597-98. For some other recent debates on this topic, see, e.g., Jed Rubenfeld, *Two World Orders*, PROSPECT, Dec. 18, 2003; Ann-Marie Slaughter, *Opinion: A Dangerous Myth*, PROSPECT, Jan. 22, 2004 (responding to Rubenfeld); Joseph S. Nye, Jr., *Globalization's Democratic Deficit: How to Make International Institutions More Accountable*, 80 FOREIGN AFF. 2 (2001). On the democratic deficit of the ICC, see Madeleine Morris, *Democracy and Punishment: The Democratic Dilemma of the International Criminal Court*, 5 BUFF. CRIM. L. R. 591, 593 (2002).

226. Among other anomalies, the one-state-one-vote approach would mean that, should the United States join the Court, it would have only one out of ninety-nine prosecutorial votes, notwithstanding that the U.S. population is greater than the population of seventy of the current State Parties combined. See CIA World Factbook, <http://www.cia.gov/cia/publications/factbook/index.html> (follow “Guide to Rank Order Pages” hyperlink; then follow “Population” hyperlink) (reporting international population data). Of course, even amending the process to adjust for population does not really speak to the more fundamental tension between the Court’s legalistic aspirations and the complexity of the dilemmas faced by transitional societies.

individual state actually implementing a transitional justice policy. Thus, any framework for prosecutorial guidelines at the ICC level must face the irreducible tension between the policy priorities of the international institution on the one hand, and those of the societies most directly affected by international crimes on the other. As Danner notes, some form of democratic deficit may be an inevitable feature of international institutions,<sup>227</sup> but that fact does not mean that the issue should be ignored or that it does not inform which questions may effectively and legitimately be addressed by international institutions and which may not.<sup>228</sup>

The problem is particularly vexing in the present case as the classic rationale for administrative delegation—that complex problems should be entrusted to those with special expertise to resolve them—does not apply. Indeed, it is hard to imagine how a criminal prosecutor appointed *ex ante* by the Assembly of State Parties can stake some special claim to resolve the types of policy dilemmas I have explored in this Article. Nor does the Rome Statute appear to reflect the drafters' considered judgment to the contrary. Instead, the Court's legalistic design reflects the false assumption that such problems have little or no legitimate impact on the prosecutorial function in the first instance.

In raising these concerns, I do not mean to suggest that prosecutorial guidelines cannot, under any circumstances, enhance the ICC's ability to address the kind of discretionary choices that the Prosecutor will face. But the focus should not be on the existence of guidelines *per se*; the more pressing issue is whether the content of prosecutorial policy can come to terms with the legitimacy challenge posed by the substantive dilemmas of prosecutorial discretion. And we must also be realistic about how far appropriate guidelines can narrow the Prosecutor's range of choices.

### B. *Interpreting the Rome Statute*

Another line of thinking contemplates that interpretation of the Rome Statute may resolve the most pressing questions

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227. Danner, *supra* note 7, at 535.

228. *See, e.g.*, Nye, *supra* note 225, at 6 (arguing that "the more an institution deals with broad values, the more its democratic legitimacy becomes relevant").

of prosecutorial discretion.<sup>229</sup> Thus, for example, the Court's judges might announce a legal test to decide when the Prosecutor should decline proceeding with an otherwise admissible case, if it would be in the "interests of justice."<sup>230</sup> Or the Court might develop more specific standards to dictate whether certain types of proceedings—for instance a TRC-style amnesty commission or a Rwandan-style plea bargaining regime—count as a "genuine" domestic "trial" for admissibility purposes.<sup>231</sup>

The judicial review provisions of the Rome Statute make the prospect of such judicial intervention a real one. Although this approach would not eliminate all questions of prosecutorial choice—resource limitations will inevitably limit the number of suspects whom the Court can investigate and prosecute—it could take some of the most political questions out of the Prosecutor's hands. Still, it is hard to see how this result solves the problem. To the extent that neither the Statute, nor background principles of international law, clarify how far transitional states must pursue criminal justice, judge-imposed standards are unlikely to prove a more effective or legitimate means of resolving the underlying policy questions than is prosecutorial discretion. The basic problem is the same: Either the Court will find itself relying on contested and formalistic rules that fail to capture the complexity of individual cases, or the Court will rely on open-ended balancing tests that effectively reserve for its judges the very kind of policy decisions the Rome Statute was supposed to avoid. Indeed, the judicial model is probably a worse solution because it threat-

229. See, e.g., Robinson, *supra* note 7. Robinson argues that the "interests of justice" should be interpreted to exclude blanket amnesties, allow exemplary prosecutions as a matter of course, and permit reliance on non-prosecutorial alternatives in extreme circumstances. *Id.* See also Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 245-47 (2002) (arguing that "accountable" amnesties should receive recognition).

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230. Rome Statute, *supra* note 1, art. 53(1)(c); Robinson, *supra* note 7, at 483.

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231. Rome Statute, *supra* note 1, art. 17; Robinson, *supra* note 7; see also Informal Expert Paper: The Principle of Complementarity in Practice (2003), <http://www.icc-cpi.int/library/organs/otp/complementarity.pdf> (suggesting that "alternative forms of justice" may be treated within the rubric of complementarity in addition to article 53).

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ens to convert policy questions into immutable norms that are less subject to evolution or reconsideration. At the very least, it will shift policymaking away from prosecutors to judges who, possessing even less claim to executive authority than prosecutors, arguably are less institutionally competent to address such questions.<sup>232</sup>

## VI. THE POLITICAL DEFERENCE MODEL

I turn now to a third model for constraining political discretion, which I call the political deference model. This model contemplates a reconceived ICC, which begins from the realization that the Rome Statute has neither solved the problem of transitional justice nor resolved the role of international courts in promoting that justice. It maintains, moreover, that the only way for the ICC Prosecutor to act according to ex ante decisional rules that enhance internal procedural legitimacy, while still acknowledging the unresolved, political nature of the choices underlying those decisions, is to cooperate with political actors who are presumptively best suited to address in context the adequacy of a state's justice efforts.

Such a policy, of course, must come at a cost to the ideal of an independent Prosecutor vigorously pursuing investigations in the face of political weakness, but it need not transform the Court into a de facto ad hoc tribunal which overrides the decisions of the Rome Conference and provides the United States, through the exercise of discretion, what it could not achieve in diplomatic negotiations. A possible reconciliation between the demands of prosecutorial independence and context-sensitivity offers itself in the following claims: (1) that the case for prosecutorial independence is greatest—and the fear of political inaction most credible—during times of ongoing crimes or when criminal regimes remain in power, and (2) that both the need for and prospect of political guidance is greatest when states undergo political transitions and seek to develop their own policies for dealing with the past. I consider both these scenarios in greater detail below.

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232. See Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT'L L. 377 (2006) (discussing problems posed by judicial policy-making at the ICC).

A. *Pre-Transitional Regimes*

As previously detailed, some of the most difficult questions of prosecutorial discretion arise when transitional states seek to provide some form of accountability for past crimes that falls short of universal prosecution.<sup>233</sup> But the question of whether to defer to alternate or nonprosecutorial transitional justice policies simply does not arise in the case where regimes implicated in criminality retain power. Such states are unlikely to seek any form of justice for past crimes, and if they do, those efforts are unlikely to command the minimal credibility necessary to raise a legitimate claim to deference. In that case, the choice is effectively between ICC justice and no justice.

At the same time, it is also easy to see why ICC advocates fear that crimes will be ignored—and impunity endorsed—if the operation of international justice is solely committed to political powers. Although not as dramatic as military intervention, the creation of a tribunal to try crimes committed by a sitting regime can be a highly charged act requiring substantial political commitment. The states sitting on the Security Council may not wish to upset a political ally, or they may fear that a public commitment to war crimes prosecution will merely call attention to their own failure to take more substantial steps to end the violence. Consider for example, the pains the U.S. government took in 1994 not to refer to the Rwandan genocide as such, out of fear that public endorsement of the term would call attention to its obligation under the Genocide Convention to “prevent” that crime.<sup>234</sup>

The authority of the ICC Prosecutor to initiate investigations and prosecutions in these scenarios is arguably the most significant innovation of the ICC. Although indictment alone cannot remove the political obstacles to arrest and punishment, it may serve an expressive role, providing a public reminder to the world of the obligations imposed by international criminal law. By giving the Prosecutor the independent authority to launch investigations and seek indictments, the

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233. See *supra* Parts III.A & III.B.

234. See SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 358-64 (2003). Of course, the opposite may also apply. The Security Council may cynically authorize prosecution in order to mask its own failure to take stronger action necessary to end a conflict.

Rome Statute ensures that this expressive function can apply largely unrestrained by considerations of *realpolitik*.

The debate in this context focuses on the prospect that pre-transitional indictments will not merely be symbolic but may in fact impede transitions by foreclosing nonprosecutorial alternatives that, on balance, might be the preferable means to maximize the goals of both justice and peace. I have already discussed reasons why that fear may be overly speculative,<sup>235</sup> but that fear, even if eventually justified, depends largely upon how indictments are conceived. This risk is greatest if ICC indictments are understood to foreclose transitional options that may materialize in the future. But that need not be the case if the Prosecutor's policies leave open the possibility that specific indictments might give way to other options if future developments justify that choice. In that instance, indictment can continue to serve its symbolic role of highlighting a state's failure to pursue accountability without prejudging the eventual form that that accountability will assume.

It may, of course, be the case that the symbolic effect of ICC indictments will raise international attention to war crimes and cause states to assign greater value to the prosecution of war crimes and to reflect that policy in their international relations. Indeed, that very hope is central to the ICC's mission: In a world in which the Court is powerless to enforce its own edicts, there is little more the institution can hope to achieve.<sup>236</sup> But fundamentally, the fact of an indictment does not—and should not—change the basic policy considerations that dictate how and whether the international community will push for prosecutions in states that refuse compliance with the ICC.

The practice of pre-transitional indictment during ongoing conflicts also finds political precedent in the Security Council's past actions establishing the ICTY and referring crimes in Darfur to the ICC. The situation of the ICC Prosecutor is actually rather similar to that of the Security Council in this context. It may well be that contingent considerations cause a later reassessment of how and to what degree justice

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235. See *supra* Part III.D.

236. The question of whether, and to what extent, international law and institutions constrain the actions of political actors remains, of course, a central point of debate in international legal and political theory.



should be pursued, but that point applies equally whether or not it is the ICC Prosecutor or Security Council that authorizes a criminal investigation. In short, neither actor can tell the future. On balance then, the practice of pre-transitional investigation and indictment seems preferable to abdication of prosecutorial independence based on sheer speculation that indictment might affect transitional possibilities which themselves may never materialize, may proceed on the basis of historical events having nothing to do with the existence of an indictment, or may in fact be aided by symbolic effects of an indictment.

At the same time, the ICC does have a clear institutional interest in pursuing indictments that are compelling beyond their symbolic importance. However provisional or incomplete an ICC indictment may be in theory, the integrity of the institution will be best served if there is a correspondence between those whom the ICC indicts and those who most likely *should* be prosecuted as a matter of good policy and political consensus. Given, in particular, the ICC's lack of meaningful democratic accountability (or even an adequate theory of what such accountability would look like), the Prosecutor will be on the surest footing when focusing on cases that involve unambiguous evils that are universally recognizable as such. To the extent that this approach itself invites ambiguity, the Prosecutor can look to past precedents of ad hoc tribunals for guidance as to the kind of pervasive atrocities that have attracted international justice measures. The focus of the ICC should be on the clearest cases, not on breaking new legal ground.

This rationale for requiring a high moral threshold relies on a perpetrator-neutral logic: It matters not whether the guilty are citizens of a neglected African nation, or the leadership of a powerful Western democracy. At the same time, however, there is a more calculating logic to limiting the contextual reach of the ICC, based in the broad recognition that the ICC will rise or fall on the political support of the international community. An institutional focus on the most serious, systematic atrocities would provide a perpetrator-neutral method of defining the ICC's mission in ways calculated to achieve political consensus where possible while minimizing the perceived threat of prosecutorial overreaching among the most politically and economically stable states who are most critical to the ICC's future. While this solution may not please

those who desire the broadest application of the rules of war by an international criminal tribunal, a more focused ICC is preferable to an expansive but ineffectual one.

### B. *Transitional Regimes*

The risk that prosecutorial restraint will give free reign to political apathy and ulterior motives does not disappear once transitional regimes take root, but several countervailing considerations urge a policy of political deference in this context. Unlike pre-transitional states, transitional states are presumptively more likely to pursue transitional justice policies that represent a good faith balance between the backward-looking justice of criminal accountability and the forward-looking goals of social reconciliation and constructing a more just society. The Rome Statute, meanwhile, sets forth no mechanism for assessing the merits of such policies vis-à-vis the Prosecutor's own assessment of how much, if any, exemplary prosecution is necessary. In addition, to the extent that transitional states are genuinely interested in achieving justice, and to the extent that they are more likely to seek participation in and assistance from the international community, the prospect of cooperative engagement with the international community also becomes more likely.

I consider here two frameworks for how the Prosecutor may defer to political actors in these circumstances.

#### 1. *Explicit Deference*

One option is for the ICC Prosecutor to explicitly defer to the decisionmaking authority of political actors. There are several forms this deference might take. The Prosecutor might, for example, rely on regional organizations like NATO or the African Union. Or he might seek indicators that particular transitional governments have sufficient credibility and legitimacy to be entrusted with pursuing their own transitional policies. The most promising policy from this perspective, however, is to seek the engagement of the U.N. Security Council, whose mandate under Chapter VII of the U.N. Charter to protect international peace and security has extended in recent years to the creation of international criminal tribunals, as well as to other questions of nation-building and peacekeeping. According to this approach the Prosecutor would affirma-

tively invite the Council to issue resolutions addressing the adequacy of a state's transitional justice policies and providing guidance as to what role, if any, ICC investigation should play in ensuring the accountability of those efforts. This approach would, in turn, give states an incentive to engage the Security Council, whose oversight could also help states develop policies adequate to command some measure of international political approval. Although the result in some circumstances might be to drop existing indictments of unprosecuted persons whom the ICC had investigated during the pre-transitional period, the converse scenario is also, and perhaps even more, likely. A determination that a state's prosecution of only a few top leaders was inadequate under the circumstances would justify further ICC investigation and prosecution beyond the state's own cut-off.

In a formal sense, the prospect of such cooperation between the Prosecutor and Security Council already exists within the provisions of the Rome Statute. Article 13 authorizes the Security Council to refer cases to the Prosecutor whereas article 16 permits the Security Council to defer investigations for a year at a time. And here, one may anticipate a concern: If a requirement of affirmative Security Council referral were too unreliable to command the agreement of the like-minded delegates to the Rome Conference, and the existing safeguard of article 16 was too weak to satisfy the United States, how can the prospect of Chapter VII action hope to resolve the tension underlying the fundamental dispute over prosecutorial authority?

Without attempting to minimize the risks of reliance on Chapter VII, I believe the greatest issue may be attitudinal. As written, article 16 has the character of a temporary emergency measure that views Security Council involvement as a kind of extraordinary intervention in the Court's work. Security Council members sympathetic to the Court have already refused (after twice granting) the attempt of the United States to secure annual prospective deferrals of any and all investigations of U.N. peacekeepers deployed overseas.<sup>237</sup> The demand for that kind of blanket speculative deferral is very different from one targeted at the specifics of an actual situation that could generate the Court's involvement, but one can imagine

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237. See Kirgis, *supra* note 4.

these states exhibiting similar reluctance to employ article 16 in circumstances where such action would be viewed as undermining the Court. Transitional states, meanwhile, can place little reliance in a temporary measure that requires annual renewal with the assent of all Permanent Members of the Council.

The picture changes, however, if Security Council involvement is viewed not as interference in the Court's work, but as a welcome measure necessary to define and legitimize the Court's incomplete mandate. By deferring to Security Council guidance as a matter of internal policy, and by doing so at times when states themselves are undertaking efforts to address past crimes, the Prosecutor may be able to help moderate the political friction that otherwise complicates Security Council referrals. And one must recall here that the Security Council has often proven more willing to exercise its authority in transitional contexts than in times of ongoing conflict: Whereas the Council was unable to agree on measures authorizing either the Kosovo intervention or the recent Iraq war, in both cases it proved itself able to authorize the post-war nation-building efforts.

Of course, there is no guarantee that the Prosecutor will in fact welcome such participation. Former ICTY Prosecutor Louise Arbour has argued, for example, that "[t]he greatest threat, in my view, to the legitimacy of the permanent Court, would be the credible suggestion of political manipulation of the Office of the Prosecutor, or of the Court itself, for political expediency."<sup>238</sup> If international prosecutors are to reject reliance on political decision makers as "political manipulation," the kind of constructive relationship I have contemplated will be difficult to achieve.

A different concern focuses not on the reliability of Security Council action, but on its desirability. If the ICC Prosecutor is not an ideal arbiter of the adequacy of transitional justice measures, is the Security Council any better?<sup>239</sup> The creators

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238. Arbour, *supra* note 90, at 3.

239. See Sean D. Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security after the Cold War*, 32 COLUM. J. TRANSNAT'L L. 201, 246-69 (1994); Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516 (1991); see also Bodansky, *supra* note 213.

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of the U.N. designed the Security Council to reflect the realities of international power (as they existed as the end of World War II no less), not democratic principles or liberal values. Why should the particular states comprising the Council at any given time—and in particular the five veto-wielding permanent members—get to decide how countries go about the business of transitional justice?

There are two responses here. One argument admits that the Security Council is a flawed vehicle but argues that it is, nevertheless, the best we have. If one accepts—as both the Rome Statute and past Security Council precedents affirm—that serious violations of international criminal law are matters of international concern which cannot be entrusted solely to individual states, then one must ask how best to give effect to this international concern. The Security Council, whatever its underlying flaws, at least has the advantage of being a political body entrusted with imposing post hoc policy solutions that carry legal legitimacy under the U.N. Charter. It may in this respect claim to be a superior arbiter of transitional justice policy than a judicial institution or international prosecutor charged with applying the law. The second response is that it matters a great deal how the Security Council goes about the business of addressing international crimes. In particular, the Council may prove most effective if it avoids conceiving itself as an administrator of top-down “one-size-fits-all” policy solutions, but instead focuses on ensuring the accountability of the processes by which affected societies address their own past crimes. By seeking to enhance the democratic legitimacy of national policies, the Council can help ensure that national policies exhibit greater legitimacy than those imposed by fiat. And in cases where states refuse democratic solutions, the Council’s endorsement of ICC action will rest on stronger footing given the lack of a democratically legitimate alternative.

The focus on such process-based concerns pervades the literature on transitional justice. Guttmann and Thompson, for example, observe that amnesties will have greater claim to moral justification if they are the products of deliberative democratic processes that rely on rationales accessible to (if not necessarily accepted by) all stakeholders.<sup>240</sup> Other commenta-

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240. See Guttmann & Thompson *supra* note 99.

tors have highlighted similar concerns.<sup>241</sup> It is also no coincidence that the most celebrated amnesty deal, that implemented by South Africa, is also the one reflecting the greatest democratic legitimacy, with the mechanics of the TRC having emerged from a public, national process characterized by repeated legislative hearings, study of lessons learned in past transitional justice experiments, and engagement of a broad array of stakeholders.<sup>242</sup> Recall again Kofi Annan's argument that the ICC should defer to a South African-style solution that reflects the assent of the "whole nation."<sup>243</sup> There is no reason why a similar ideal (if never capable of full realization) should not animate all discussion of transitional justice policies, whether involving amnesties, truth commissions, exemplary prosecutions, or Rwandan-style plea bargaining.

One can imagine, for example, that coordination between individual states, the Security Council, and the ICC might take the form of what Michael C. Dorf and Charles F. Sabel have described as democratic experimentalism, encouraging a "directly deliberative" democracy through local experimentation, stakeholder engagement, and information sharing.<sup>244</sup> The U.N. Security Council could seek to guarantee the integrity and accountability of this process both through its own authority and by relying on the oversight of actors such as the U.N. Secretary General or relevant regional institutions. Ultimately, this type of arrangement could pave the way for a richer role on the ICC's part. The Court would no longer define itself by reference to a policy of limited, atomistic prosecution conducted without regard to political context but could instead link its operations to a broader effort of promoting societal transformation.

Of course, this kind of process-based approach will require judgments based on the circumstances of individual cases. Although my distinction between pre-transitional and transitional contexts may suggest a binary distinction, the reality can be murkier. For example, states in Latin America have faced slow transitions in which moderate democratic govern-

241. See McDonald & Haveman, *supra* note 7; Slye, *supra* note 229, at 245.

242. See BORAINE, *supra* note 96, at 47-75.

243. Annan Press Release, *supra* note 112.

244. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 290 (1998).

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ments are elected but entrenched military officials have prevented accountability measures that otherwise might have been possible.<sup>245</sup> In divided societies that have experienced persecution of ethnic minorities, or in international conflicts where citizens of one state cross borders to commit crimes in another, the majoritarian democracy of any particular state may be insufficient.<sup>246</sup> But these complexities merely confirm the desirability of engaging an external political actor such as the Security Council to help reach accountable judgments about acceptable compromises and about the breadth and type of stakeholder engagement required.

## 2. *Constructive Deference*

Another approach is for the Prosecutor to refrain from actual cooperation with political actors but to adopt policies designed to afford maximum flexibility to those actors. The Prosecutor could do this by adopting the same policy in the transitional context as I have proposed for the pre-transitional context. By acting only in the case of the most serious atrocities, and by selecting only egregious offenders occupying the highest levels of authority, the Prosecutor may hope to target those few suspects who are least likely to be spared prosecution under any sound transitional justice regime. This rationale provides a framework for understanding the ICC Prosecutor's current policy: The best justification for leaving unindicted the vast majority of perpetrators is not resource constraints or independent considerations of gravity, but rather the realization that the so-called "impunity gap" reflects deep policy dilemmas that are beyond the competence of the Prosecutor to resolve. A policy of highly selective prosecution reflects a constructive deference to political bodies to address these issues.

The primary appeal of this approach is prosecutorial autonomy: It allows the Prosecutor to delegate policy questions to political bodies without making the ICC's actual decision-making dependent upon political authorization. But as the 2006 standstill in Uganda reflects, this form of prosecutorial

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245. I have discussed above the example of Argentina. *See supra* notes 130-133 and accompanying text.

246. Indeed, a similar complexity applies any time victims may be concentrated in a discrete class with perceived interests that differ from those of the majority.

minimalism is insufficient to avoid political friction when blanket amnesty or something like it is on the table.<sup>247</sup> Implicitly, therefore, the constructive deference approach rests upon a prediction that this strategy will correspond to good transitional justice policy in any given situation. In other words, the expectation (not unreasonable) is that the prosecution of a handful of the worst offenders will prove desirable for most transitional societies irrespective of other contingent considerations that may lead different societies to adopt different policies with respect to the majority of wrongdoers. If that expectation proves unwarranted—if, for example, it turns out that blanket amnesties are desirable in many cases—then the strategy of constructive deference will fail to remedy the legitimacy problem of the ICC.

In most situations, however, it is more likely that such minimalism will be insufficient: The ICC's efforts, however constructive, are no substitute for a deeper reckoning undertaken by transitional societies. And here there may be some risk that the international community will ignore this point, and look to the ICC's efforts for a comprehensive justice policy, rather than as one piece of a larger puzzle. For example, Croatia's accession to the European Union was recently delayed by the country's failure to surrender an indicted general to the ICTY.<sup>248</sup> But this pressure to comply with individual indictments issued from The Hague does not seem to be matched by any broader concern about Croatia's general failure to pursue any form of accountability or public reckoning for the vast majority of its war criminals.

For these reasons, constructive deference may work best as a complementary strategy to explicit deference rather than as an alternate and independent approach: The Prosecutor could follow the minimalist path as a default, while simultaneously seeking advice and legitimation from the Security Council as to whether this approach should be expanded or contracted.<sup>249</sup> The hope is that such guidance would typically be

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247. See *supra* notes 116-119 and accompanying text.

248. Renwick Mclean & Marlise Simons, *Croatian Suspect In War Crimes Is Arrested In Canary Isles*, N.Y. TIMES, Dec. 9, 2005, at A3.

249. Although it remains to be seen what relationship may develop between the ICC and the Security Council, some have already anticipated that the Prosecutor is in fact likely to heed the Council's advice when it chooses to provide it. See Brubacher, *supra* note 204, at 83 ("For reasons of public

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forthcoming, and that constructive deference would therefore be the exception rather than the rule.

## VII. CONCLUSION

The aim of this Article has been broadly two-fold: first, to provide an account of the International Criminal Court, which complicates the standard belief that prosecutorial decision-making must flow from legal principles unmarred by political considerations or interference; and second, to consider and suggest ways in which the ICC Prosecutor may, within the statutory structure and spirit of the existing Court, moderate the resulting legitimacy crisis by externalizing some of the most difficult and unresolved questions of prosecutorial choice to political actors who may claim greater comparative legitimacy. I do not suggest or expect that a deferential policy along the lines I have outlined can ever convert the ICC into a perfect institution that neither requires controversial prosecutorial judgments nor provokes detractors from both inside and outside the societies whose lives the ICC will most affect. I do believe, however, that this approach has the potential, if implemented, to create a partial bridge between the institution's supporters and opponents, which may set the stage for a more stable and productive Court.

For those who insist upon an independent Prosecutor as a bulwark against political weakness and *realpolitik*, my approach preserves the Prosecutor's critical ability to employ investigations and indictments that call to account both international criminals and the international community in times when crimes are ongoing and unaddressed. The hope—indeed arguably the greatest hope to which the ICC may aspire—is that this function will affect states' behavior in ways that take the demands of international justice more seriously. At the same time, however, my approach recognizes that prosecutorial policies are ultimately dependent, in part, upon legitimate political questions that favor both a restrained approach to international indictment policy and a consideration of the dilemmas faced by societies attempting to undertake transitions to a more just order. By seeking guidance from ap-

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policy and in order not to obfuscate the role of the Security Council, the Prosecutor will likely follow political determinations made by the Security Council.”).

propriate political actors in these circumstances, the ICC Prosecutor may actually protect the Court's institutional integrity by outsourcing those policy questions which pose the greatest challenge to the ambition of prosecutorial impartiality. One hopes that political actors, and in particular the U.N. Security Council, will act wisely and with a proper respect for human rights and justice. But even if that is not the case, there remains a logic to placing the policy dilemmas of transitional justice in the political arena where they belong, where they can be considered as such, and where they can be subject to public debate and scrutiny. This result, in my view, is preferable to an approach which effectively seeks to stifle public debate by hiding policy dilemmas behind a shroud of legality and impartial rules.

Of course, even this model will not satisfy those who believe that the mere potential for an irresponsible Prosecutor supplies a sufficient basis to oppose the ICC.<sup>250</sup> Prosecutorial policies adopted without amendment of the Rome Statute cannot legally constrain the full reach of the Prosecutor's authority. But over time, such policies may gain acceptance among the parties to the Statute and come to define the criteria according to which future Prosecutors are selected by the Assembly of States Parties. In any event, I am inclined to agree with those critics who view the threat of prosecutorial overreaching as more of a danger to the integrity and success of the ICC than to the interests of the world's greatest powers.<sup>251</sup> For a nation like the United States that has expressed concerns about the direction the Court might take, a policy of political deference may provide a principled and situation-specific basis for its criticism, allowing it to support the Court when working well, but to withdraw cooperation and support in instances in

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250. See, e.g., Casey et al., *supra* note 8, at 20 ("It remains to be seen whether the Prosecutor and the judges of the ICC will push the limits of their discretion to interpret their power and authority as broadly as possible and second-guess the exercise of the primary jurisdiction by States. Rather, the point is that the Rome Statute allows them to do so, and due to the lack of built-in oversight and accountability of the Prosecutor and the judges, it will be very hard, if not impossible, to stop them if they are so inclined."). Nor, of course, can my approach satisfy those who believe that international institutions are inherently suspect and can be entrusted with matters such as criminal enforcement.

251. See Goldstone, *supra* note 94.

which the institution has trespassed the principles that have facilitated such cooperation.

Such support will be especially critical in times when there is broad acceptance of the need for international criminal prosecution but disagreement over the mechanism. That was the case, for example, when the United States recently agreed to let the U.N. Security Council refer the Darfur situation to the ICC. It would be both ironic and unfortunate if, as happened in that case, a decision to pursue international prosecution must be preceded, and possibly even scuttled, by preliminary debates about the Court's legitimacy that have nothing to do with the instance at hand.<sup>252</sup> A policy of political deference may help that general institutional debate to recede into the background, and may focus the world's efforts on the deeper project of international justice, and the political commitments which that project requires.

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252. See Warren Hoge, *U.N. Votes to Send Any Sudan War Crimes Suspects to the Hague*, N.Y. TIMES, Apr. 1, 2005, at A6.

