

PRUDENT POLITICS: THE INTERNATIONAL CRIMINAL COURT, INTERNATIONAL RELATIONS, AND PROSECUTORIAL INDEPENDENCE

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INTRODUCTION

Like the other international and hybrid criminal tribunals that have come before it, the International Criminal Court (“ICC”) has faced substantial challenges in building a new prosecutorial and judicial institution in a sometimes inhospitable environment. Some of the obvious challenges that arise in establishing a new international criminal court are institutional, such as the need to build the organization, to hire qualified staff, to secure adequate funding, etc. The Court also faces operational challenges, such as the need to develop modalities for conducting investigations around the world, to provide security for witnesses, to develop detention practices, etc. Finally, other challenges involve taking on the obstacles that arise on the broader geopolitical landscape. In particular, the Court operates in a world where the commitment of states and international institutions to the underlying goal of international justice is sometimes subordinated to other political considerations.¹ Such geopolitical challenges can include the temptation on the part of states involved in conflict resolution efforts to try to resolve an ongoing conflict by granting amnesty to perpetrators of serious crimes, or the Court’s

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1. See, e.g., *UN Security Council: Address Inconsistency in ICC Referrals*, HUMAN RIGHTS WATCH (Oct. 16, 2012), available at <http://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals-0> (noting that despite the Security Council’s initial unanimous decision to refer the Libya situation to the ICC, “once political circumstances changed in Libya, the Security Council no longer actively supported the ICC investigation and failed to press Libya’s new government to cooperate with the court.”).

management of relationships with powerful third parties, such as the well-known complexities of its evolving relationship with the United States.²

But another essential element of building an international criminal court like the ICC is the challenge of enhancing its institutional status, legitimacy, and effectiveness in the international system. What I suggest in this essay is that in light of these concerns, another essential set of factors we should examine in thinking about building an institution like the ICC are those related to the political dimensions of the prosecutorial strategy adopted by the Court's Office of the Prosecutor, particularly in the nascent stages of the institution. (And although the ICC has been in existence for ten years, it seems fair to suggest that in terms of establishing its international status, legitimacy, and effectiveness, the institution is still in its early days.) I make the somewhat scandalous claim—scandalous at least among international legal scholars and international lawyers, both groups of persons committed to the impartial rule of law—that the prosecutor of an international court like the ICC³ needs to make careful and self-conscious political choices regarding charging strategies, particularly during the formative stages of the tribunal, in order to enhance the effectiveness and international standing of the institution.⁴

2. Harold Hongju Koh, Legal Advisor U.S. Department of State & Stephen J. Rapp, Ambassador-at-Large for War Crimes Issues, Special Briefing at Washington, DC: U.S. Engagement With the ICC and the Outcome of the Recently Concluded Review Conference (June 15, 2010), available at http://www.state.gov/j/gcj/us_releases/remarks/2010/143178.htm.

Summarizing U.S. engagement with the ICC, Mr. Koh recounts:

[A]fter 12 years, I think we have reset the default on the U.S. relationship with the court from hostility to positive engagement. In this case, principled engagement worked to protect our interest[s], to improve the outcome, and to bring us renewed international goodwill. As one delegate put it to me, the U.S. was once again seen, with respect to the ICC, as part of the solution and not the problem. The outcome in Kampala demonstrates again principled engagement can protect and advance our interests, it can help the states parties to find better solutions, and make for a better court, better protection of our interests, and a better relationship going forward between the U.S. and the ICC.

3. I use the phrase "institutions like the ICC" or variants of it throughout this essay. I note in this regard that the arguments advanced in this essay are based in no small part on my own experience dealing with the *ad hoc* tribunals that served as the ICC's predecessor institutions—the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. Before joining the faculty at Stanford Law School, I served for 11 years in the Office of the Legal Adviser in the U.S. State Department, and from 1996–2001, I served in the Office of the Legal Counselor at the U.S. Embassy in The Hague, first as Attaché and from 1998–2001 as Legal Counselor. In that capacity, I had the chance to observe carefully the work of the *ad hoc* tribunals and to work closely with many of their senior officials.

4. I am by no means the first to observe that international criminal tribunals must engage in the sometimes messy practice of politics in carrying out their mandates and, in particular, in seeking to secure cooperation from the states in which they are carrying out investigations. In his volume on the work of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, Victor Peskin criticizes what he characterizes the failure to recognize this reality

Of course, if one were to ask the Chief Prosecutors of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), the International Criminal Tribunal for Rwanda (“ICTR”),⁵ or the ICC,⁶ whether they take politics into account in making their charging decisions, they would almost certainly categorically deny doing so. They would assert that decisions about whom to indict are based purely on a dispassionate analysis of the law and its application to the prevailing facts.

I suggest that this is not really the case: I contend that the political environment affects international prosecutors’ professional decisions. Admittedly, it is difficult for me to provide irrefutable proof of that claim—unless a former prosecutor of the ICTY, ICTR, ICC, or other

as the “idealistic” outlook of “human rights champions” who see tribunals “as engaged in a virtuous battle to save international justice” He continues: “Left unacknowledged, perhaps out of a reasonable fear that such acknowledgment will undermine the tribunals’ moral authority, is the fact that the tribunals’ fight for cooperation is frequently driven by a legal and political calculus that involves bargaining with and concessions to recalcitrant states.” VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION 8 (2008).

5. According to Louise Arbour, former Chief Prosecutor of the ICTY and ICTR:

The political spirit of accommodation and compromise, which is so crucial for the peaceful resolution of all conflicts, is entirely inappropriate when it comes to compliance with the law. It is an affront to those who obey it and a betrayal of those who rely on its protection. This, in my view, should be the first reminder of what has been activated in Rome last year. It is the promise that something greater than force will govern, something that does not get traded away, something worthy of trust.

Press Release, The Hague Appeal for Peace, Introductory Statement by Justice Louise Arbour, Prosecutor ICTY and ICTR at the Launch of the ICC Coalition’s Global Ratification Campaign (May 13, 1999) [hereinafter Arbour Statement], *available at* <http://www.icty.org/sid/7767/en>.

Similarly, in her memoir of her tenure as Chief Prosecutor of the ICTY, Carla Del Ponte recalls her reaction to receiving a letter from then-Secretary-General Kofi Annan that chastised her for public comments she had made calling for greater political pressure on Serbia. She recounts:

Whenever I receive a letter of this kind, whether it be from Kofi Annan or ministers of state governments, I simply ask myself whether I have broken any law. The answer, inevitably, is no. Did I exceed my authority? No. Did I behave within the bounds of my competence? Yes, I did. So I deposited the letter in my file and effectively ignored it, because this was political interference, and I would resign rather than accept this kind of interference in our work.

CARLA DEL PONTE & CHUCK SUDETIC, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY’S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 106 (2009).

6. The former Prosecutor of the International Criminal Court Luis Moreno-Ocampo has stated:

[A]s the President of the Court Judge Song said, “*The Court is a judicial institution operating in a highly political environment.*” I shall not be involved in political considerations. I have to respect scrupulously my legal limits, my policy is not to stretch the interpretation of the norms adopted in Rome. It is the only way to build a judicial institution, to help the political actors to perceive the legal limits. To facilitate the work and planning of political actors, I inform them in advance of my next steps, and ensure that my Office be transparent and predictable. However, my duty is to apply the law without political considerations. Other actors have to adjust to the law.

Luis Moreno-Ocampo, Keynote Address at the Council on Foreign Relations, Washington, DC (Feb. 4, 2010).

internationalized criminal court improbably publishes a memoir in which he or she acknowledges that political considerations played an important role in the exercise of his or her prosecutorial functions.⁷ I will nevertheless seek to offer some examples of cases in which international criminal courts appeared to have acted, at least in part, on the basis of political considerations in carrying out their work. But beyond the claim that prosecutors *do* take politics into account, my stronger claim is that prosecutors *should* take politics into account. They should do so, though, in reflective, deliberative ways, not in the reactive and counterproductive ways we have at times witnessed in at least a few cases.

A THRESHOLD QUESTION: WHAT DO I MEAN BY “POLITICS”?

Before developing the argument further, it is important to address a threshold definitional question—in what sense do I mean that the prosecutor of an international criminal court should make *political* judgments in developing her prosecution strategy? In the context of an investigation of crimes committed during an armed conflict between different factions, I do not mean that chief prosecutors should make judgments about which party to the war should have its members charged with serious violations of international humanitarian law based on political

7. Notwithstanding the general insistence of international criminal prosecutors that their work is entirely apolitical, former ICTY Prosecutor Del Ponte makes at least some oblique references to the role that political considerations may have played in some of her prosecutorial decisions. She describes meeting with leaders in Croatia in 2000, following the death of Croatian strongman Franjo Tudjman, to demand improved Croatian cooperation with ICTY investigations of cases against Croatian defendants. “And to help [Prime Minister Račan] understand that the tribunal was not biased, I told him that we had reorganized our investigation teams to put more focus on crimes committed against mostly Croats in the towns of Vukovar and Dubrovnik.” DEL PONTE, *supra* note 5, at 250. In a similar vein, Del Ponte, whose efforts to secure cooperation from Serbia were highly contentious and tortuous, recounts her attempt to persuade U.S. officials to support her office’s investigations of crimes by Kosovar Albanians by suggesting that prosecutions of Kosovar Albanians might improve Serbian cooperation: “If the process of justice is to gain some acceptance in Serbia, and thus open the way to some degree of reconciliation, [Kosovo Liberation Army] crimes must be exposed.” *Id.* at 281. Del Ponte may have made decisions to increase focus on crimes against Croats or to pursue investigations against Kosovar Albanians in an exercise of prosecutorial impartiality because she thought those were the most significant crimes for the ICTY to pursue, and not because she thought the pursuit of such cases would offer instrumental advantages in trying to improve relations with Croatia and Serbia, respectively, but her account is certainly susceptible to the opposite interpretation. In her description of a period of improved cooperation between Belgrade and the Tribunal in late 2004 and early 2005, Del Ponte herself hints at the linkage between the ICTY’s relationship with Serbia and the Kosovar Albanian indictments. She explains that “Serbia did not have to wait long to reap benefits for . . . its government’s new attitude towards the tribunal.” *Id.* at 319. In addition to improved relations with the European Union, Del Ponte notes that “[a]gainst the backdrop [of enhanced Serbian cooperation] came the arrival in The Hague of the highest-ranking Albanian indicted by the tribunal . . . along with two other accused Kosovo Liberation Army commanders.” *Id.*

considerations. Prosecutors should not decide who should be indicted based on whether they sympathize with one side in a conflict as victims or detest the other side as villains. I am not suggesting that prosecutors should indict individuals based on whether they, or others, share or oppose the goals of the government or organization that would be affected by a potential indictment. In addition, I am not suggesting that prosecutors should make prosecutorial decisions based on whom other political actors in the international system—states (powerful or otherwise), NGOs, or others—would like to see indicted for the kinds of reasons noted above. And I am certainly not arguing that prosecutors should use their substantial power to reward friends or to punish opponents.

Indeed, to the extent we are evaluating the decision of an international criminal tribunal to bring its powers to bear on particular individuals, it is imperative that prosecutors *not* be political, and that they make their decisions purely based on the evidence and the law, as they insist that they do.⁸ A prosecutor's office certainly *could* be political with respect to the exercise of these prosecutorial functions, but doing so would be indefensible. Acting in such a manner would undermine the tribunal's commitment to the impartiality of the rule of law, which is essential to the tribunal's legitimacy and, in turn, its effectiveness.

I am instead exhorting courts like the ICC to take account of politics in a very different way. The sense in which I am using the term "political" could perhaps best be defined as "showing sensitivity to promoting the institutional well-being of the court in light of the prevailing geopolitical context."⁹ I believe that international criminal prosecutors do—and if they do not, they should—make *these* kinds of political judgments by developing prosecution strategies that include an evaluation of what will enhance the international status, legitimacy, and effectiveness of their tribunal in the international system.¹⁰

8. See Arbour Statement, *supra* note 5; DEL PONTE, *supra* note 5; Moreno-Ocampo, *supra* note 6; text accompanying notes 5 & 6.

9. Although the working definition here is my own, the concept certainly is not. Antonio Perez states in his article that the use of abstention principles by the International Court of Justice can serve in enabling the Court to best "participat[e] in the governance of the international community" Antonio F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstention by the International Court of Justice*, 18 MICH. J. INT'L L. 399, 443 (1997). Perez draws heavily on American constitutional scholar Alexander Bickel's work on the U.S. Supreme Court. *Id.* at 400. Over 40 years ago, Bickel argued that in deciding cases, the Supreme Court "might legitimately consider its own institutional self-preservation, and if necessary to maintain its credibility as a non-political institution, make pragmatic judgments regarding the best means for implementing constitutional principles." *Id.* It is these kinds of "pragmatic judgments" I encourage international criminal tribunals to make.

10. During the conference during which I delivered the remarks that serve as the basis for this essay, Professor Jordan Paust noted that, as lawyers, we ordinarily reject the introduction of political

If they are to be successful, international criminal courts in general, and the ICC in particular, must depend on the perceptions of states and other international actors as to whether they are effectively carrying out their mandates. Such courts depend on the support of those states and other international actors in carrying out their duties. This implies that they need to make judgments and take actions that enhance the court's authority in the international community.¹¹ As Victor Peskin notes in his impressive study of the work of the ICTY and ICTR, a prosecutor plays two roles. The prosecutor is not only "the trial lawyer who marshals evidence to convict war crimes suspects," but is also "the political strategist who maneuvers through the relatively uncharted shoals of the trials of cooperation to obtain state compliance for his or her courtroom mission to convict."¹² Or, as David Scheffer, a former United States Ambassador for War Crimes Issues, said in an interview, a tribunal prosecutor "has to be as much of a diplomat as a criminal prosecutor . . ."¹³

PAST POLITICS

In my view, it is not problematic that international criminal courts in general, and prosecutors in particular, do in some cases make political judgments—judgments informed by their effort to enhance the

considerations into criminal justice processes. He helpfully suggested that I describe the phenomenon I am describing in this essay as the need for prosecutors to factor "strategic," rather than "political," considerations into their charging policies. I was tempted to adopt that formulation and to use it in the title of this essay. On reflection, however, I concluded that I really am concerned with the *political* aspects of an international criminal court's prosecutorial strategies, to the extent that "politics" is defined as "activities aimed at improving someone's status or increasing power within an organization." Definition of *Politics*, OXFORD DICTIONARIES.COM, <http://oxforddictionaries.com/definition/english/politics> (last visited Apr. 10, 2013). Since my claim is that such a court can and should take into account how its prosecutorial strategies will affect its "status or . . . power" within the international system, it would seem coy to avoid using the term "politics."

11. Allison Danner couches the point in somewhat different terms, but makes a closely related argument:

[P]ressure exerted [by third party states to promote cooperation with an international court] will be critical to the success of the ICC. While states might have strategic reasons to assist the Prosecutor in pursuing his cases, cooperation with the Court will certainly be more attractive to states and other entities if it is widely viewed as an institution with a significant degree of legitimacy. . . . [T]hese entities will be more likely to support the Prosecutor if the Court is seen as legitimate, and that actions taken by the Prosecutor can enhance or weaken its legitimacy. In order to cope with the weaknesses of the ICC's enforcement regime, therefore, the Prosecutor must seek to enhance the Court's legitimacy.

Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion of the International Criminal Court*, 97 AM. J. INT'L L. 510, 535 (2003).

12. PESKIN, *supra* note 4, at 238.

13. *Id.* at 239 (quoting former U.S. Ambassador-at-Large for War Crimes Issues David J. Scheffer).

international status of their tribunals—in developing their prosecutorial strategies. The more difficult question is whether they do it well. In this section, I identify some instances in which I believe international criminal courts have made prosecutorial judgments with political considerations in mind. In these cases, I contend the political judgments made by court officials were not sound, not if we think of political judgments as ones that advance the institutional well being of the court in light of the prevailing geopolitical context.

Nearly twenty years ago, in the early days after the establishment of the ICTY, the Tribunal faced great pressure from various actors in the international community to be seen as doing *something* to address the ongoing atrocities in the former Yugoslavia.¹⁴ As a result, the Tribunal issued a large number of indictments, many of them based on atrocities at detention camps, which overwhelmingly involved low-ranking defendants.¹⁵ Moreover, when these accused persons began to arrive in The Hague, the trial teams in some cases discovered that the evidence

14. Richard Goldstone, the ICTY's Chief Prosecutor during its earliest years, acknowledges how efforts to respond to the prevailing geopolitical context, including a pressing need to secure funding for the Tribunal, influenced decisions on the issuance of indictments. He recounts:

The initial indictments were issued under tremendous pressure to obtain crucial funding from the United Nations. Indeed, soon after I arrived in the middle of August 1994, I was told that there was no budget for our Tribunal, and that I would have to appear before the budget committee of the United Nations at the beginning of November of that year—less than three months later. I was advised in a friendly fashion—and correctly as it turned out—that if we did not have an indictment out by that time, we would not get any money for the following year. The result was that we had to devote all of our meager resources to that endeavor (and there were then only twenty-three members of staff in the office, and very few of them were investigators). We had the important report from the Commission of Experts (the Bassiouni Committee) and we used it to find people against whom there might be sufficient evidence to justify indictments.

Just before the end of October 1994, we decided there was only one defendant against whom there was sufficient evidence available to justify an indictment. His name was Dragan Nikolic. We indicted him for a number of murders and the torture of innocent civilians. Now, Nikolic was not an appropriate first person for an indictment by the first international war crimes tribunal, but we had no option. In order for the work to continue, we had to get out an indictment quickly. That is the explanation for the Nikolic indictment.

Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT'L L. 277, 281 (2002).

15. Former ICTY Prosecutor Carla Del Ponte recounts that when she assumed her position as Chief Prosecutor of the ICTY,

[t]oo many [OTP] investigators were spending an inordinate amount of time and travel money exhuming bones, interviewing witnesses to individual criminal acts, and gathering evidence applicable only for cases against low-ranking individuals and not for indictments against the persons the Security Council had intended the tribunal to pursue: those persons most responsible for the crimes who had inhabited the higher political, military, and security echelons during the years Yugoslavia was at war.

DEL PONTE, *supra* note 5, at 122.

supporting the Tribunal's indictments was insufficient to convict the defendants at trial. It was not that the accused weren't guilty; it was just that the evidentiary record was not trial-ready. Substantial Office of the Prosecutor ("OTP") resources, consequently, were devoted to essentially re-investigating cases to get them ready for trial.¹⁶ In addition, most of the cases did not involve the most serious offenders, and their prosecution diverted the Tribunal from carrying out its most essential functions. Indeed, the ICTY was widely criticized for focusing only on "small fish."¹⁷

It seems quite clear, at least in my view, that the ICTY's OTP made a political judgment aimed at what it thought would enhance the institutional effectiveness of the tribunal in bringing its initial series of indictments. The judgment turned out to be a bad one, a choice that ultimately diverted the Tribunal from its mission and that made the ICTY vulnerable to criticism by those who in fact sought to undermine its quest for international justice.

Political considerations also appear to have influenced the ICTY's decision to initiate proceedings under Rule 61 of the ICTY's Rules of Procedure and Evidence during the Tribunal's early days. Rule 61 proceedings, which could be brought in cases involving indicted persons who had not been detained by their national authorities and transferred to the Tribunal, entailed the *ex parte* in-court presentation of evidence against the accused.¹⁸ The decision to conduct Rule 61 proceedings

16. ICTY officials, understandably, have not commented widely on this phenomenon. However, at least one former prosecutor has commented that the dynamics produced by "public and internal expectations . . . that the OTP would immediately issue indictments" led to a focus on cases where a U.N. Commission of Experts had carried out preliminary investigations. Minna Schrag, *Lessons Learned from ICTY Experience Symposium: The ICTY 10 Years On: The View from Inside—The Prosecution*, 2 J. INT'L CRIM. J. 427, 429 (2004). Schrag continues that "this focus was resource-intensive and seemed to interfere with the effort to plan a thorough prosecution strategy from the outset." *Id.* In 1998, then Chief Prosecutor Louise Arbour actually elected to withdraw indictments against fourteen persons who had previously been indicted by the ICTY in connection with detention camp atrocities in order to "balance the available resources within the Tribunal and in recognition of the need to prosecute cases fairly and expeditiously." International Criminal Tribunal for the Former Yugoslavia, Statement by the Prosecutor Following the Withdrawal of the Charges Against 14 Accused, CC/PIU/314-E (May 8, 1998), available at <http://www.icty.org/sid/7671>. To be fair, Arbour stressed at the time that her decision to withdraw these indictments was *not* based on a lack of evidence against the accused. *Id.*

17. See Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 777 (1998) (describing the big fish versus the small fish debate).

18. Rule 61 was included in the original version of the ICTY's Rules of Procedure and Evidence. See International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, IT/32 (Mar. 14, 1994). All the amended versions of the ICTY's Rules of Procedure and Evidence are available at *Rules of Procedure and Evidence*, ICTY, <http://www.icty.org/sid/136> (last visited Apr. 15,

appears to have been motivated in part by a desire to demonstrate to the international community that the Tribunal was moving forward to advance the cause of international justice at a time when virtually none of the persons indicted by the Tribunal had been transferred to The Hague. Once again, the Tribunal was making an effort to be seen as doing at least *something*.¹⁹

Rule 61 proceedings were also employed politically to expose the failure of states to arrest indicted war criminals and increase international pressure on those states to do so in the future. As an ICTY Trial Chamber itself indicated in a Rule 61 proceeding in the case of Radovan Karadzic and Ratko Mladic:

Recourse to the Rule 61 proceedings permits the International Criminal Tribunal which does not have a police force, *to react to failure of the accused to appear voluntarily and to the failure to execute the warrants issued against them. . . .* Rule 61 proceedings permit the charges in the indictment and the supporting material to be publicly and solemnly exposed. . . . *International criminal justice, which cannot accommodate the failures of individuals or States, must pursue its mission of revealing the truth about the acts perpetrated and suffering endured, as well as identifying and arresting those accused of responsibility.*²⁰

Similarly, the International Criminal Court has for its part been criticized for failing to think through certain actions that that seem to have been motivated by a desire to enhance the Court's international standing. Specifically, the ICC has been criticized for its decision to accept cases sent to it by Uganda, the Democratic Republic of the Congo, and the Central African Republic as "self-referrals."²¹ These cases were likely

2013). For a discussion of the operation of Rule 61, see Mark Thieroff & Edward A. Amley, Jr., *Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61*, 23 YALE J. INT'L L. 231 (1998).

19. International criminal tribunal expert William Schabas writes that "[t]he Rule 61 hearing procedure was used in the early years of the ICTY, at a time when judges were starved for trial work." William A. Schabas, *Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia*, 25 FORDHAM INT'L L.J. 23, 26 (2001).

20. Prosecutor v. Karadzic & Mladic, Cases No. IT-95-8-R61 & IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia July 11, 1996) (emphasis added).

21. William Schabas has described the danger that the "self-referral" mechanism can establish "a degree of complicity between the Office of the Prosecutor [of the ICC] and the referring state." William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. J. 731, 751 (2008). After reviewing the Uganda and Democratic Republic of the Congo self-referrals, Schabas concludes that the self-referral mechanism is a "trap" for the ICC's

seen by the OTP, especially in the Court's early days, as a way of addressing an important geopolitical challenge, namely, the fears of some commentators and states, of "overreaching" by the Court. How could anyone complain, senior ICC officials may have presumably thought, that the ICC had intruded improperly on the sovereignty of states if the states involved had invited the Court to take on the situation? But as some commentators have noted, this move opened the Court up to criticism that it was prosecuting only one side of the atrocities committed during the context of the armed conflicts referred to the Court, namely, those perpetrated by rebel groups and not those perpetrated by the government of the referring state itself.²²

PRUDENT POLITICS: WHAT DO THEY LOOK LIKE?

Let me return to the broader normative claim I am making: an international criminal court should take into account the institutional well-being of the institution in light of the prevailing geopolitical environment and should adopt a prosecution strategy that strengthens, rather than weakens, the court's international standing. I freely concede that by suggesting this, I am taking a step onto what could be a very slippery slope. Political calculation, after all, is in many ways antithetical to the principled and impartial rule of law. If courts are seen as engaging in politics, they run the risk of straying from the path indicated by the moral and legal compass that is the source of legitimacy and authority for such courts.

How, then, should international criminal courts stay on the "right side of the line" in taking political factors into account when developing

Office of the Prosecutor and has been exploited by the states making the referrals for political purposes. *Id.* at 753.

22. See Schabas, *supra* note 21, at 751. Schabas has elsewhere voiced concern that ICC favors the prosecution of non-state actors, i.e., non-state rebel groups. See William Schabas, *Preventing Genocide and Mass Killing: The Challenges for the United Nations*, MINORITY RIGHTS GROUP INT'L, at 2 (Dec. 7, 2006), available at <http://www.minorityrights.org/1070/reports/preventing-genocide-and-mass-killing-the-challenge-for-the-united-nations.html>. Elsewhere, Schabas has argued:

The Court was established to deal with impunity, and not to prosecute large-scale crimes in an abstract sense. To take Uganda as an example, the problem of impunity does not lie principally with the rebel Lord's Resistance Army, whose leaders can be prosecuted adequately under the national legal system once it can apprehend them. The problem with impunity in Uganda resides in the fact that pro-government forces are committing atrocities. This is not being addressed by either the country's national judicial system or by the International Criminal Court.

WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 191 (3d ed. 2007).

prosecution strategies? Allow me to offer some specific suggestions. In my view, these suggestions do not undermine the impartial exercise of core prosecutorial power. To the contrary, some of them are best seen as a cautionary warning about the need for international prosecutors to avoid making the kind of reactive political judgments that can get criminal tribunals into trouble. A recurrent theme among these ideas is the need for international criminal courts to insist, in developing and rolling out their prosecution strategies, on moving forward only with indictments of the highest quality.

First, it is critical for international criminal tribunals to bring indictments only for cases that can succeed in legal terms. As noted above, there have been cases in which it seems the tribunals have issued indictments because they were determined to rebut assertions that they were not acting quickly enough.²³ If we have learned anything, it is that international criminal justice is deliberate, even slow. Prosecutors must resist the temptation to allow their courts to be used as foreign policy instruments to respond to immediate geopolitical crises, as in the former Yugoslavia while the war was still underway there. Similarly, international courts should avoid bringing indictments of questionable validity in an effort to vindicate a contested position about whether particular acts qualify as a particular type of international crime. Some critics have charged that the ICC's indictment of Sudan's President Omar al-Bashir on genocide charges, an issue that has been the subject of considerable debate, was driven largely by the ICC's desire to make "a bold demonstration of the court's purpose."²⁴ Limiting the charges to war crimes and crimes against humanity counts, instead of making a legally contestable move aimed at bolstering the Court's standing, would have resulted in a more unimpeachable indictment and would have immunized the Court against allegations of politicization.²⁵

Second, prosecutors should bring charges not only for the most serious crimes, but also only against the most serious offenders, i.e., in the words of the Statute for the Special Court for Sierra Leone, only against "persons who bear the greatest responsibility for serious violations of international humanitarian law."²⁶ The Statute of the ICC focuses on the gravity of

23. See Goldstone, *supra* note 14.

24. David Kaye, *Who's Afraid of the International Criminal Court? Finding the Prosecutor Who Can Set It Straight*, FOR. AFF. 118, 124 (May/June 2011).

25. See *id.* at 125 (citing criticism by the nongovernmental organization the International Crisis Group that then-ICC Prosecutor's approach in bringing genocide charges "'risk[ed] politicizing his office'").

26. Statute of the Special Court of Sierra Leone art. 1, S.C. Res. 1315, U.N. Doc. S/RES/1315

crimes,²⁷ not necessarily the seniority of the offender, but the Prosecutor presumably has the power to take into account the rank of a perpetrator in deciding whether to bring charges. Moreover, the ICC's Rome Statute provides that one of the factors that should be considered in deciding whether a case that otherwise falls within the scope of its jurisdiction is admissible is whether the offense is of "sufficient gravity to justify further action by the Court."²⁸ As noted above, the ICTY was hampered for many years by the claim that it was a tribunal that tried only the "small fish."²⁹ The temptation to bring cases, particularly in the early stages of an investigation, against a suspect as to whom an international criminal court has gathered extensive information, or who happens to be in custody in a friendly country, is great. Such cases can seemingly represent a vindication of the international community's decision to create an international criminal justice mechanism. But fully investigating and trying these cases consumes substantial resources and can divert the court from devoting its attention to the difficult task of developing strong cases against senior leaders.

Third, although prosecutors should go after the accused that bear the greatest responsibility for crimes, this may not mean that they should rush to indict the very top-level actors in states from which they are seeking cooperation, at least not at the outset of a particular investigation. Starting with "second-tier" indictees instead may provide an opportunity for a court to demonstrate its *bona fides* in conducting impartial trials. In addition, the most senior leaders may be willing to cooperate with a tribunal that is investigating their subordinates, even though they would reject cooperation with an investigation into their own possible culpability. Such an interim period of cooperation can both foster changes in political coalitions within a target state and could create momentum for the removal of a head of state or government charged with serious international human rights violations.³⁰ At a minimum, such an interim period of cooperation by a target state can serve to undermine any potential objections advanced

(Jan. 16, 2002).

27. Article 1 of the Statute of the ICC provides that the Court "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern." Rome Statute of the International Criminal Court art. 1, July 17, 1998, 2187 U.N.T.S. 90, available at <http://www.unhcr.org/refworld/docid/3ae6b3a84.html> (emphasis added).

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

29. See Akhavan, *supra* note 17, at 777.

30. See in this regard Victor Peskin's suggestion that international criminal courts should, among other things, consider "[s]trategically timing indictments to mitigate domestic opposition to the arrest and transfer of indictees." PESKIN, *supra* note 4, at 241.

by the state later, when the court's focus turns to the very top level of government.

The ICTY was well served in both of these ways. It established its credibility as an independent judicial institution by conducting a number of world-class trials against senior officials *before* it indicted Slobodan Milosevic. The ICTY created a record that provided a persuasive rebuttal to challenge Milosevic's claim that the ICTY was an anti-Serb institution. Similarly, in the case of the ICC, its initial strategy in the Sudan situation of indicting Interior Minister Ahmad Harun and the Janjaweed militia leader Ali Kushayb was a sound one. This was an example of indicting serious criminals, but the Court acted without ensuring that it would trigger the crisis in relations that would be expected to arise—and that did in fact arise—when the Court moved against al-Bashir at the very top level of government.³¹ With hindsight, one might wonder whether the ICC would have been better off trying to build an international consensus for the surrender of Harun and Kushayb before proceeding with the al-Bashir indictment. In short, strategic timing can be critical.

Fourth, and implicit in everything I have suggested so far, is that international criminal prosecutors should resist the temptation to serve as a rapid response team to address ongoing international political crises. The consensus that developed for ICC action during the height of the Libya conflict was short-lived and has, perhaps predictably, given way to a more ambivalent international attitude towards international accountability for Saif Al-Islam Gaddafi and Abdullah Al-Senussi.³² An excellent example of a tribunal resisting the pressure to act immediately to address an ongoing international security crisis is the ICTY's approach towards Serbian war crimes in Kosovo in 1998 and 1999. During the Serbian campaign of violence in Kosovo, many states and NGO voices were calling vociferously for an indictment of Slobodan Milosevic, who "everybody knew" was guilty of atrocities in Kosovo. Yet then-ICTY Prosecutor Louise Arbour was cautious—in my view appropriately so—in satisfying herself that the events in Kosovo qualified as an "armed conflict" between two organized parties, and that the abuses that were taking place consequently fell within the jurisdiction of the ICTY. It was more important for the tribunal to get it right than to issue quick

31. Sudan expelled a number of international humanitarian organizations from its territory and "lambasted the West" following the ICC's issuance of an arrest warrant for President al-Bashir. Neil MacFarquhar & Marlise Simons, *Bashir Defies War Crime Arrest Order*, N.Y. TIMES, Mar. 6, 2009, at A10.

32. See HUMAN RIGHTS WATCH, *supra* note 1.

indictments to meet the demands of various actors within the international community for an additional “talking point” they could use in condemning Serbian actions in Kosovo.

Fifth, international criminal courts should be conscious of couching their indictments in a way that minimizes perceptions that it is the conduct of an entire *state* or *community*, as opposed to indicted individuals, that has given rise to criminal charges. Even in conflicts where serious atrocities have been committed, the citizens on each side are likely to believe that the cause for which they fought was just, even if they are prepared to acknowledge that criminal acts took place during the course of the fight. Indictments that focus on the criminality of the underlying conflict or its causes, as opposed to atrocities committed during it, are likely to create intense public backlash against cooperation with the court. The ICTY struggled severely with this challenge in connection with its indictments of Croatian military leaders who allegedly committed crimes during “Operation Storm,” a military campaign aimed at reclaiming territory that had been occupied by Serb separatists. Although the ICTY’s indictments were based on illegal acts committed in the course of Operation Storm and did not purport to challenge the lawfulness of the underlying military campaign, the indictments were widely seen in Croatia as a rebuke of its sovereign right to re-establish its territorial integrity.³³ Similarly, the use of indictments that charge entire leadership structures with membership in a joint criminal enterprise may create the impression that the Court is alleging that it is the entire state or community that is criminal, not simply a group of named individuals.³⁴

33. See Victor Peskin, *Beyond Victor’s Justice? The Challenge of Prosecuting Winners at the International Criminal Tribunal for Yugoslavia and Rwanda*, 4 J. HUM. RTS. 213, 218 (2005) (describing how Croatian nationalists “tried to turn the tribunal’s objective of determining individual guilt on its head by arguing that the tribunal’s investigations actually cast collective blame on Croats and criminalized the Homeland War”).

34. André Nollkaemper, among others, has argued that as a sociological matter, many mass atrocity situations are best characterized as instances of “system criminality,” not individual criminality, and that “[t]he state is the prime form of a collective entity that is involved in system criminality” André Nollkaemper, *Systemic Effects of International Responsibility for International Crimes*, 8 SANTA CLARA J. INT’L L. 313, 318 (2010). The claim itself is a powerful and persuasive one, but there are substantial practical costs for an international criminal court to characterize crimes as having been part of a system of state criminality. See Allen S. Weiner, *Working the System: A Comment on André Nollkaemper’s System Criminality in International Law*, 8 SANTA CLARA J. INT’L L. 353, 362 (2010) (arguing that “the highly judgmental notion of system criminality—if it is employed as a tool to devise legal responses in mass atrocity situations—may increase the extent to which members of a society whose agents have committed international crimes identify with the perpetrators,” and may accordingly stiffen public resistance to cooperation with an international criminal court that brings charges connected to that atrocity situation).

Sixth, in the case of the ICC in particular, prosecutors should avoid taking unduly aggressive positions on complementarity. Where there is a credible case that a state is prepared to hold one of its nationals criminally accountable for crimes related to war-time atrocities, the Court should resist the temptation to go forward with its own prosecution, even though the Court may have invested significant investigative resources in the case. William Schabas has observed that the Democratic Republic of the Congo at least appeared to be willing to prosecute Thomas Lubanga for genocide and crimes against humanity before the ICC determined that the complementarity principle did not bar the Court from taking jurisdiction over the child conscription charges upon which the Court's prosecution was based.³⁵ But where some credible form of justice can be done locally—even if it is not precisely the form of justice available at the ICC—there is a danger that the Court will be seen internationally as undermining the goals of complementarity.

Seventh, international criminal prosecutors should be wary of issuing indictments in cases where there is a plausible argument that the indictment might frustrate ongoing peace processes. To be clear, I am not suggesting that an international criminal court should effectively bestow immunity on a suspected war criminal merely because he is somehow involved—or claims to have a potential role—in peace negotiations. There may, however, be important questions of timing about *when* such an indictment should be issued. Even in this qualified form, my suggestion that an international criminal court should proceed with caution is not categorical, since claims that an indictment will frustrate ongoing peace processes are frequently made and often exaggerated.³⁶ There may be cases, though, in which there is a genuine tension between peace and justice, at least at a particular moment in time, and an international criminal court should seek to avoid working at cross-purposes with efforts to end wars.³⁷

The effort to separate individual criminal responsibility from state criminality will prove particularly challenging if and when the ICC brings prosecutions for the crime of aggression.

35. William A. Schabas, "Complementarity in Practice": Some Uncomplimentary Thoughts, Presentation for the 20th Anniversary Conference of the International Society for the Reform of Criminal Law, at 20 (June 23, 2007), available at <http://www.isrcl.org/Papers/2007/Schabas.pdf>.

36. For an example of the claim that the risk of international prosecutions can interfere with peace processes, see Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS 47, 55 (Winter 2003) ("the ICC could initiate prosecutions that aggravate bloody political conflicts and prolong political instability in the affected regions").

37. In Danner's words: "The destabilizing effects of misguided prosecutions suggest that the Prosecutor should carefully consider his prosecutorial decisions, in terms of their effects both on the

Eighth, and perhaps most controversially, international criminal courts need to be solicitous of their relations with powerful states in the international system. This can be a bitter pill for courts to swallow, since states may have political reasons for seeking to inculcate certain disfavored states or individuals, to immunize or protect allies, and to use international criminal justice processes as bargaining chips in conflict settings. But given that the ICC and other international criminal courts lack their own enforcement powers, they are dependent on powerful states to help secure cooperation with the Court's work and compliance with its orders. Although the ICC must maintain a principled stance, it must also realize that the Court was created to advance goals established by states in the international system.³⁸ It should ensure that its actions are aimed at promoting international peace and security in a way that is not flatly inconsistent with the objectives of those powerful states and institutions that, in Peskin's words, are able to serve as the "surrogate enforcers" of the Court's orders.³⁹

Finally, for the reasons noted above, the ICC should be wary of taking cases on the basis of self-referrals unless it is able to extract a public commitment from the referring state that it would also accept the ICC's jurisdiction if the Court concludes during the course of its investigation that crimes were committed by government, as well as non-governmental, forces.

DOING POLITICS, WITHOUT BEING SEEN AS DOING POLITICS

Although I have suggested that international criminal courts should take steps to enhance their own standing in the international system in formulating prosecution strategies, it is important for such courts to do this on their own—that is, unilaterally—to the greatest extent possible. International criminal courts should, in other words, seek to avoid projecting a "public image of negotiation" with target states.⁴⁰ For instance, it is one thing for a court to delay the timing of the indictment of a head of state in order to build international support for its investigative

region where the crime occurred and on the prospects for global justice." Danner, *supra* note 11, at 532.

38. Danner argues that states may hold international criminal courts "accountable" in practical terms by not supporting them unless the prosecutor is "sensitive to the political implications of his prosecutorial decision making, especially on the regions involved in the ICC's cases. This dynamic can enhance the effectiveness of the Court." *Id.* at 531.

39. PESKIN, *supra* note 4, at 256.

40. *Id.* at 242.

efforts in that country. It is another matter entirely for a prosecutor to agree on such a delay with the country involved. In Peskin's words, "the culture of deal-making that can arise may undercut a tribunal's larger goal of obtaining legitimacy from targeted states and winning domestic support for the norm of international justice."⁴¹ It can also "increase skepticism . . . abroad toward[s] [a] tribunal by imparting the lesson that the tribunal and the state are involved in an exercise that has more to do with politics than with law."⁴²

I fear international criminal prosecutors—despite their public pronouncements about their complete independence—have at times failed to heed this lesson. For example, I count myself among those who view then-ICTY Prosecutor Carla Del Ponte's decision to issue indictments against Kosovo Liberation Army leaders in Kosovo⁴³ as a step that appeared publicly as a "bargaining chip" to demonstrate to Serbian leaders that the ICTY was not biased against the Serbian side, and as a move to advance her efforts to secure greater cooperation from Serbia.⁴⁴

CONCLUSION

In a thoughtful study of one of the ICC's predecessor tribunals, Rachel Kerr concluded that "an international tribunal such as the ICTY cannot stand apart from politics."⁴⁵ Particularly during an international criminal court's formative years, when it is working to enhance its institutional status, legitimacy, and effectiveness in the international system, prosecutors should self-consciously recognize that this observation also applies to its prosecution strategy. For the most part, the best way the ICC can ensure that its prosecution strategy advances its international standing is to carry out its functions with a high degree of legal and judicial professionalism. It should resist the temptation to react to the way the political winds are blowing at any given moment; it should issue only meaningful and high-quality indictments that stand the test of time. In one sense, the best way the Court can enhance its status, legitimacy, and effectiveness in the international system is, ironically, by keeping its judicial nose to the grindstone and avoiding high-profile actions self-consciously calculated to bolster the Court's image.

41. Peskin, *supra* note 4, at 243.

42. *Id.*

43. *See* DEL PONTE, *supra* note 7 (discussing her experience of indicting Albanians).

44. *Id.*

45. RACHEL KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY 209 (2004).

At the same time, the Court and its prosecutorial leaders should consider the political impacts their decisions may have, and they should be open to balancing their desire for unfettered independence against the expected costs or consequences of actions they may take. Prosecutors' legitimate interests in issuing indictments against the most senior leaders in a situation over which the Court has jurisdiction does not mean they should ignore the potential practical political implications of their actions in deciding *when* the time is right to issue those indictments. Prosecutors need not alter their decisions about who should be indicted based on political factors, but it may be appropriate for them to alter their position about which particular charges to bring, or to think carefully about potential domestic political impacts in determining *how* to draft an indictment so as to minimize controversy or domestic backlash. Though the Court's prosecutors should be skeptical of claims that the Court's efforts to secure justice will interfere with attempts to make peace, they should at the same time not categorically reject the possibility that this may be true in some cases, and they should in such cases calibrate their prosecutorial strategies so as to minimize threats to international peace and security. Finally, prosecutors at the ICC should take care to ensure that the Court's vision of which situations demand an international criminal justice response is not wholly out of alignment with the views of key states in the international system. This is both a principled consideration—an expression of deference to the legitimate political role states play in shaping relations in the international system—and a practical one—a sensible strategy calculated to avoid alienating states upon whom the ICC must rely as allies in pressing its demands for cooperation.

There is no doubt that the prosecutors of the ICC, and international criminal courts like it, are rightly endowed with great prosecutorial independence in charting their prosecutorial strategies. At the same time, there is no reason why they should not exercise that independence with political prudence.