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## Fairness, Legitimacy, and Selection Decisions in International Criminal Law

Jonathan Hafetz

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# Fairness, Legitimacy, and Selection Decisions in International Criminal Law

Jonathan Hafetz\*

## ABSTRACT

*The selection of situations and cases remains one of the most vexing challenges facing the International Criminal Court (ICC) and other international criminal tribunals. Since Nuremberg, international criminal law (ICL) has experienced significant progress in developing procedural safeguards designed to protect the fair trial rights of the accused. But it continues to lag in the fairness of its selection decisions as measured against the norm of equal application of law, whether in the disproportionate focus on certain regions (as with the ICC's focus on Africa), the application of criminal responsibility only to one side of a conflict, or the continued insulation of major powers from international criminal responsibility.*

*Selection decisions are less within the control of international courts than the provision of fair trial safeguards to individual defendants. This Article argues that international criminal courts, and the ICC in particular, could nevertheless benefit from even marginal adjustments in this area. Specifically, the Article argues that international criminal courts should focus more on distributive considerations in choosing from among the numerous international crimes that can feasibly be pursued with the limited resources available. It argues that these courts should use selection decisions to express the norm that international criminal responsibility applies to all individuals as a means of enhancing their fairness and legitimacy.*

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\* Professor of Law, Seton Hall University School of Law. This Article benefitted greatly from presentations at the ASIL International Criminal Law Interest Group workshop at SMU Dedman School of Law, the International Law Colloquium at Temple University, Beasley School of Law, and the Seton Hall Law School annual faculty workshop. In particular, I would like to thank Kristen Boon, Margaret deGuzman, Megan Fairlie, Alexander K. A. Greenawalt, Aziz Huq, Asad Kiyani, Margaret Lewis, Alexandra Popova, Jaya Ramji, Alice Ristroph, Peter Spiro, and Jenia Iontcheva Turner for their comments and suggestions. I would also like to thank the editors at the *Vanderbilt Journal of Transnational Law* for their assistance. All errors are my own.

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## I. INTRODUCTION

The selection of situations and individuals for prosecution remains one of the most difficult challenges facing international criminal justice. In other areas, international criminal law (ICL) has developed substantially since its rebirth more than two decades ago with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Renewed efforts to prosecute mass atrocities have produced a growing body of international criminal procedure that, notwithstanding its shortcomings, is increasingly attentive to human rights norms designed to protect the accused.<sup>1</sup> Yet, selection decisions remain a persistent concern, despite a growing awareness of the risks to the fairness and legitimacy of ICL<sup>2</sup> and, particularly, to the International Criminal Court (ICC).<sup>3</sup>

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1. See YVONNE MCDERMOTT, *FAIRNESS IN INTERNATIONAL CRIMINAL TRIALS* 1 (Paola Gaeta et al. eds., 2016).

2. See, e.g., Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 593 (2005); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1821 n.321 (2005) (referencing the inability to indict senior leaders of major powers like President Vladimir Putin as a form of selectivity detrimental to the legitimacy of international courts).

3. See, e.g., Elena Baylis, *Outsourcing Investigations*, 14 UCLA J. INT'L L. & FOREIGN AFF. 121, 135 (2009); William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 740, 749 (2008) [hereinafter *Prosecutorial Discretion*]. For a discussion of the impact of selection decisions on other tribunals, see, for example, Marieke Wierda et al., *Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1065, 1072–73 (2007).

A key achievement of the Rome Statute, which established the ICC,<sup>4</sup> was the creation of an independent prosecutor with the authority to initiate investigations. Supporters viewed an independent prosecutor as critical to establishing an effective and independent international court by facilitating prosecutions based on considerations of law and justice rather than self-interest or the power and priorities of individual states.<sup>5</sup> Under the Rome Statute, the ICC Prosecutor can initiate cases without a referral from a State Party or the UN Security Council.<sup>6</sup> Yet, prosecutorial independence has proven a double-edged sword, raising expectations that the ICC has been unable to fulfill. The territorial and nationality restrictions on the ICC's jurisdiction under the Rome Statute make it difficult to prosecute individuals from non-state parties, particularly individuals from the three permanent members of the UN Security Council—China, Russia, and the United States—that have refused to join the court. The ICC not only lacks jurisdiction over crimes committed within the territory or by nationals of non-member states, but any of these three countries can block the alternative path to ICC jurisdiction of Security Council referral under Chapter VII through exercise of its respective veto power.<sup>7</sup>

In practice, the ICC's docket has deepened the perception that the selection of situations and cases for investigation and prosecution remains heavily influenced by structural, strategic, and political considerations beyond strict formal assessments of criminal responsibility. Critics cite the ICC's docket as evidence of various forms of bias in the choice of situations, from protecting major powers and their allies from criminal responsibility to focusing disproportionately on particular regions (especially countries in Africa).<sup>8</sup> They also point to the ICC's past failures to investigate and prosecute all sides within a given conflict.<sup>9</sup>

The ICC's seeming powerlessness to address these concerns, especially given the continued UN Security Council influence over selection decisions that is built in to the ICC's design, has limited the ICC's effectiveness and colored perceptions of its fairness and

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4. Rome Statute on the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

5. Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 540 (2003).

6. Rome Statute, *supra* note 4, arts. 13(c), 15.

7. Matiangai V.S. Sirleaf, *Regionalism, Regime Complexes, and the Crisis in International Criminal Justice*, 54 COLUM. J. TRANSNAT'L L. 699, 711–12 (2016).

8. *See id.* at 712–13 (2016) (surveying critiques of the ICC's selection of cases).

9. *Id.* at 715.

legitimacy.<sup>10</sup> In Africa, the ICC faces growing resistance to its authority and strains in its relationship with the African Union.<sup>11</sup> Notably, South Africa, Burundi, and Gambia recently announced their intention to withdraw from the ICC.<sup>12</sup> South Africa subsequently revoked its decision to withdraw from the Court, citing a ruling by a South African court declaring the withdrawal unconstitutional and invalid, and Gambia similarly reversed its decision to withdraw.<sup>13</sup> Yet, such signs of resistance, particularly by powerful states like South Africa, has raised fears of a coordinated exodus by African leaders that could undermine the ICC's credibility and survival.<sup>14</sup>

Commentators have thus properly focused on selectivity as one of the most important challenges confronting the ICC and as a recurring concern for international criminal tribunals more generally. This Article seeks to unpack the concept of fairness to explain how, broadly understood, it encompasses not only familiar criminal law concerns surrounding due process protections and properly circumscribed doctrines of criminal responsibility, but also choices about which situations and cases to investigate and prosecute. The Article's main focus is on how selection decisions affect the perceived fairness and, in turn, legitimacy of ICL's implementation by international and hybrid tribunals. Ultimately, the Article argues, even the most robust procedural safeguards and carefully calibrated doctrines of individual criminal responsibility cannot entrench a court's legitimacy if broader selectivity considerations remain unaddressed. The Article maintains that addressing ICL's selectivity challenge is an important component of fulfilling the twin aims of accountability and fairness central to ICL since Nuremberg.

10. See Rosa Aloisi, *A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court*, in *THE REALITIES OF INTERNATIONAL CRIMINAL JUSTICE* 147, 149 (Dawn L. Rothe et al. eds., 2013).

11. Sirleaf, *supra* note 7, at 703–04, 717.

12. Sewell Chan & Marlise Simons, *South Africa to Withdraw from International Criminal Court*, N.Y. TIMES (Oct. 21, 2016), <https://www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminal-court.html> [<https://perma.cc/D6RR-8QM2>] (archived Sept. 19, 2017).

13. Norimitsu Onishi, *South Africa Reverses Withdrawal from International Criminal Court*, N.Y. TIMES (Mar. 8, 2017), <https://www.nytimes.com/2017/03/08/world/africa/south-africa-icc-withdrawal.html> [<https://perma.cc/JU4H-LWBF>] (archived Sept. 19, 2017).

14. Simon Allison, *African Revolt Threatens International Criminal Court's Legitimacy*, THE GUARDIAN (Oct. 27, 2016), <https://www.theguardian.com/law/2016/oct/27/african-revolt-international-criminal-court-gambia> [<https://perma.cc/4PYW-VTQU>] (archived Sept. 20, 2017); David Bosco, *Is the International Criminal Court Crumbling Before Our Eyes*, FOREIGN AFF. (Oct. 26, 2016), <http://foreignpolicy.com/2016/10/26/is-the-international-criminal-court-crumbling-before-our-eyes-burundi-south-africa-gambia/> [<https://perma.cc/D3WK-Z4YD>] (archived Sept. 20, 2017).

Part I describes the concerns underlying criticisms of selection decisions by international tribunals. Part II discusses how these decisions can impact the fairness of international tribunals and, in turn, their legitimacy. Part III examines studies of fairness and legitimacy in domestic contexts, particularly those based on theories of procedural and distributive justice, and then describes their implications for ICL. Part IV explores several possibilities for greater incorporation of distributive considerations in selection decisions by the ICC and other international tribunals. It concludes that these courts should make more deliberate use of selection decisions to express the principle that international criminal responsibility applies to all individuals and that no person is above the law.

## II. CRITICISMS OF SELECTION DECISIONS IN INTERNATIONAL CRIMINAL LAW

International criminal tribunals historically have faced criticism for their selection decisions. The problem is particularly acute at the ICC, which raised expectations of a more depoliticized application of ICL through the creation of an independent prosecutor, but which confronts both design limitations and practical obstacles that make those expectations difficult to achieve. As a result, the ICC has increased skepticism about the capacity of international criminal justice mechanisms to fulfill the aspiration of equal application of the law.

In the past, selectivity concerns have had several, overlapping dimensions. They have traditionally included: victor's justice (the claim that the winning side of a conflict is not prosecuted); the insulation of officials of powerful nations and their allies from prosecution; the shielding of high-level officials while only less culpable, lower-level officials are held criminally responsible; and a disproportionate focus on particular countries and regions.

Claims of victor's justice date to the post-World War II trials at Nuremberg and Tokyo.<sup>15</sup> At Nuremberg, the International Military Tribunal (IMT) expressly limited prosecutions to the defeated European Axis powers.<sup>16</sup> Potential Allied war crimes, such as the bombing of Dresden, were thus excluded from the tribunal's jurisdiction.<sup>17</sup> An overarching normative commitment to due process at Nuremberg, where three of the original twenty-four defendants

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15. See LYL S. SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* 32–33 (1992).

16. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 1, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 270.

17. Gerry J. Simpson, *Didactic and Dissident Histories in War Crimes Trials*, 60 ALB. L. REV. 801, 804–06 (1997).

were acquitted, helped soften criticisms that the results were predetermined. The International Military Tribunal for the Far East (IMTFE), based in Tokyo, considered only war crimes committed by the Japanese. The IMTFE was criticized for its exclusive focus on the vanquished as well as for its procedural deficiencies and retroactive imposition of criminal responsibility.<sup>18</sup> These critiques were captured in Justice Radhabinod Pal's scathing dissent, which characterized the tribunal as essentially a political affair "cloaked by a juridical appearance" and an exercise in "formalized vengeance."<sup>19</sup>

Subsequent international tribunals have shown greater sensitivity to the importance of prosecuting international crimes regardless of the nationality of the perpetrator. The statutes for the ICTY and ICTR are neutral on their face as to the identity of the perpetrator, referring instead to crimes committed in a particular territory during a specified time period.<sup>20</sup> Moreover, the judges for these two *ad hoc* tribunals had no direct connection to the region that suffered the atrocities, in contrast to Nuremberg, where the tribunal was composed of judges from the winning side.<sup>21</sup> The ICTY brought war crimes cases against ethnic Serbs, Muslims, and Croats, including Croatian generals.<sup>22</sup> In one important case, for example, the ICTY prosecuted Bosnian Muslim and Croat officials for their respective roles in crimes committed at a prison camp in Bosnia where Bosnian Serbs were grossly mistreated.<sup>23</sup> Although the ICTY arguably focused disproportionately on crimes committed by Serb forces,<sup>24</sup> it brought "a semblance of balance to its indictments and prosecutions,"<sup>25</sup> and its greater focus on Serb crimes approximated

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18. See RICHARD H. MINEAR, *VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL* 74-124 (1971).

19. *United States v. Araki*, Dissenting Opinion of Justice Radhabinod Pal, in 105 *THE TOKYO MAJOR WAR CRIMES TRIAL: THE RECORDS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST* 37 (R. John Pritchard ed., 1981).

20. Statute of the International Criminal Tribunal for the former Yugoslavia art. 1, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda art. 1, Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute].

21. See VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (A DOCUMENTARY HISTORY AND ANALYSIS)* 3-4, 143-144 (1995).

22. Victor Peskin, *Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 4 J. HUM. RTS. 213, 227-28 (2005).

23. See generally *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (prosecuting officials for mistreatment of Bosnian Serbs at the Celebici prison camp).

24. See Vijay M. Padmanabhan, *Norm Internationalization Through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay*, 31 U. PA. J. INT'L L. 427, 444 (2009).

25. Peskin, *supra* note 22, at 228.

criminal responsibility on the ground, as Serb forces committed the vast majority of crimes.<sup>26</sup>

Proceedings at the ICTY raised a distinct set of concerns about the insulation of major powers from prosecution. Following NATO's bombing of Kosovo as part of Operation Allied Force, a group of law professors filed a war crimes complaint with the ICTY against American and Western European political and military leaders and pressed the Prosecutor to bring war crimes charges, including for the killing of civilians.<sup>27</sup> The ICTY Prosecutor appointed an independent committee to consider the allegations against NATO and subsequently informed the Security Council that she would not investigate further based on the committee's conclusions.<sup>28</sup> The report distinguished, for example, the use of cluster bombs by Serbian nationalist Milan Martić, whom the ICTY prosecuted for deliberately targeting the civilian population of Zagreb, from NATO's use of cluster bombs, which the report described as consistent with proportionality principles under International Humanitarian Law (IHL).<sup>29</sup> Critics nonetheless maintained that the investigation was biased towards NATO, selectively applied IHL's proportionality rules, and undermined the ICTY's claim to impartiality.<sup>30</sup> They also claimed that the UN Security Council, led by the United States, excluded the crime of aggression from the ICTY statute, thus avoiding politically charged questions not only about the right of various states of the former Yugoslavia to declare their independence, but also about the legality of NATO strikes in Kosovo.<sup>31</sup> Defenders of the Prosecutor's decision emphasized that electing not to pursue NATO officials was consistent with a pre-existing prosecutorial policy of focusing on high-level officials responsible for the atrocities committed in the former Yugoslavia. Beyond the formidable practical and political hurdles, a

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26. See Stuart Ford, *Fairness and Politics at the ICTY: Evidence from the Indictments*, 39 N.C. J. INT'L L. & COM. REG. 45, 93–94 (2013) (noting that ethnic Serbs make up the largest number of indictees at the ICTY, but also that ethnic Serbs committed the vast majority of crimes).

27. Andreas Laursen, *NATO, the War over Kosovo, and the ICTY Investigation*, 17 AM. U. INT'L L. REV. 765, 770–72 (2003).

28. Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, ICTY: Final Rep. to the Prosecutor, ¶ 3 (June 8, 2000), reprinted in 39 ILM. 1257 (2000) [hereinafter Final Report to Prosecutor]; Laursen, *supra* note 27, at 770–71.

29. Final Rep. to Prosecutor, *supra* note 28, ¶ 27.

30. See, e.g., Paolo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 12 EUR. J. INT'L L. 503, 503–506 (2001); 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, 99 (2001); Virgil Wiebe, *Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law*, 22 MICH. J. INT'L L. 85, 136–37 (2000).

31. Chris Mahony, *The Justice Pivot: U.S. International Criminal Law Influence from Outside the Rome Statute*, 46 GEO. J. INT'L L. 1071, 1079 (2015).

continued investigation into Operation Allied Force did not appear likely to advance that stated prosecutorial goal.<sup>32</sup>

Selectivity issues were more pronounced at the ICTR, which focused exclusively on crimes committed by one side of the conflict (Hutu), despite evidence of grave violations committed by the other side (Tutsi).<sup>33</sup> Efforts by the ICTR's former chief prosecutor, Carla Del Ponte, to investigate Tutsi massacres of Hutus, which the Tutsi-controlled government of Rwanda strenuously opposed, helped prompt the United States and other members of the UN Security Council to seek her removal.<sup>34</sup> Such one-sided approaches to prosecuting mass atrocities triggered accusations of "victor's justice."<sup>35</sup> Cases such as that of Jean-Bosco Barayagwiza, a key figure in the violence that swept through Rwanda in 1994, also underscored how political pressures can influence prosecutorial decisions. In that case, the government of Rwanda suspended cooperation with the ICTR after the trial chamber ordered the release of the accused Hutu génocidaire based on pretrial defects, prompting the appellate chamber to reverse the dismissal as too drastic a remedy.<sup>36</sup> The tribunal's exclusive focus on Hutu crimes as well as such instances of heavy-handed political interference spurred attacks on the ICTR's legitimacy.<sup>37</sup> The ICTR, however, rejected legal challenges by individual defendants asserting that their prosecution violated the principle of equality and upheld the Prosecutor's exercise of discretion in the selection of defendants absent evidence of invidious discrimination against a particular defendant.<sup>38</sup> The ICTY reached a similar outcome in adjudicating selectivity challenges brought before it by individual defendants.<sup>39</sup>

The choice of defendants also has presented challenges for hybrid tribunals, which combine international and domestic elements.<sup>40</sup> One hybrid tribunal, the Special Court for Sierra Leone (SCSL), did

32. Danner, *supra* note 5, 510, 540.

33. Carla De Ycaza, *Victor's Justice in War Crimes Tribunals: A Study of the International Criminal Tribunal in Rwanda*, 23 N.Y. INT'L L. REV. 53, 54–55 (2010).

34. Peskin, *supra* note 22, at 224–226; Mahony, *supra* note 31, at 1117.

35. See William A. Schabas, *Victor's Justice: Selecting Situations at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 551–52 (2010); Simpson, *supra* note 17, at 805–06.

36. *Barayagwiza v. Prosecutor*, Case No. ICTR 97-19-AR72, Request for Review or Reconsideration, ¶ 7 (Mar. 31, 2000); see Danner, *supra* note 5, at 510, 530–31.

37. Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 593 (2008).

38. *Prosecutor v. Karemera*, Case No. ICTR-98-44-T, Decision on Joseph Nzirorera's Motion for Selective Prosecution Documents, ¶¶ 17, 19 (Sept. 30, 2009).

39. *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment, ¶¶ 612–14 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

40. See generally Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 DENV. J. INT'L L. & POL'Y 169 (2016) (discussing selectivity challenges at several hybrid tribunals).

prosecute individuals from all sides of the conflict.<sup>41</sup> But it has been criticized for prosecuting only cases of political expediency to the Sierra Leonean government.<sup>42</sup> Another hybrid tribunal—the recently established Kosovo Relocated Specialist Judicial Institution (KRSJI)—expressly contemplates prosecuting atrocities committed by members of the victorious party, the Kosovo Liberation Army (KLA), at the end of the war in Kosovo from 1998 to 2000, thus seeking to address the perceived failure of the prior tribunal for Kosovo, the Regulation 64 Panels, to address those crimes.<sup>43</sup> The degree to which KRSJI will be able to prosecute members of the KLA, whom the local population widely regards as heroes for fighting a just war, remains to be seen.

The sharpest criticisms surrounding selection decisions have been directed at the ICC. The Rome Statute's creation of an independent prosecutor with the authority to initiate investigations engendered visions of an international court more capable of addressing international crimes free of outside influence. A group of like-minded states, supported by various nongovernment organizations that played an important role in setting the agenda during negotiations, insisted that an independent prosecutor was necessary to counterbalance the Security Council and to enhance the overall fairness and legitimacy of an international criminal court.<sup>44</sup> A number of states opposed the creation of an independent prosecutor and sought to restrict the ICC's jurisdiction to referrals by the Security Council or self-referrals by member states.<sup>45</sup> The United States, for example, cautioned that an independent prosecutor would diminish the prerogatives of the Security Council and would pursue politically motivated prosecutions, including into US military

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41. Leslie Haskell & Lars Waldorf, *The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences*, 34 HASTINGS INT'L & COMP. L. REV. 49, 51 (2011).

42. Mahony, *supra* note 31, at 1119. The SCSL has also been criticized from the other direction, with members of the public objecting to the decision to indict members of the Civil Defense Forces, who were viewed as war heroes because they fought to preserve the constitutional order. Van Schaack, *supra* note 40, at 260.

43. Mark Kersten, *The New Kosovo Tribunal—Turning Victors' Justice on its Head?*, JUSTICE IN CONFLICT BLOG (Jan. 18, 2016), <https://justiceinconflict.org/2016/01/18/the-new-kosovo-tribunal-turning-victors-justice-on-its-head> [https://perma.cc/9TP9-5KYT] (archived Sept. 21, 2017); see Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 34–35 (2010) (discussing shortcomings in Regulation 64 panels).

44. Alexander K. A. Greenawalt, *Justice without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 590–92 (2007).

45. Mahony, *supra* note 31, at 1083–84.

actions.<sup>46</sup> But despite the Rome Statute's creation of an independent prosecutor, these fears have yet to materialize. The ICC has instead largely sought to accommodate the concerns of major powers, including the United States, which has pursued a policy of selective engagement with the ICC.<sup>47</sup> Situations and cases before the ICC have thus far largely tracked realist models of international relations, with stronger states generally supporting prosecutions against defendants from weaker states because of the lower international relations costs.<sup>48</sup>

Critics frequently point to the ICC's disproportionate focus on countries in Africa.<sup>49</sup> The ICC also has faced criticism for its selection of cases within a given situation by targeting one side of a conflict, such as in Uganda, where the ICC prosecuted crimes committed by the Lord's Resistance Army but not those committed by government forces, and in the Democratic Republic of Congo (DRC), where the ICC pursued only crimes committed by rebel and militia leaders in the Ituri region of the DRC, despite evidence that government forces had committed the same crimes.<sup>50</sup>

The ICC's treatment of powerful states (and their allies) has been a recurring source of controversy. The ICC has still not opened a full investigation into (let alone indicted) any official from a permanent member of the UN Security Council, including for alleged war crimes committed by UK forces in Iraq and US forces in Afghanistan.<sup>51</sup> In addition, powerful states have sought to influence the ICC's complementarity framework. Under that framework, a case is not admissible before the ICC if it is being investigated or prosecuted by a state with jurisdiction over the crime unless that state is unwilling or unable to carry out the investigation or

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46. Richard John Galvin, *The ICC Prosecutor, Collateral Damage, and NGOs: Evaluating the Risk of a Politicized Prosecution*, 13 U. MIAMI INT'L & COMP. L. REV. 1, 3–4 (2005).

47. DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* (2014); Mahony, *supra* note 31, at 1094–96.

48. Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 2 (2011).

49. Charles Chenor Jalloh, *Africa and the International Criminal Court: Collision Course or Cooperation?*, 34 N.C. CENT. L. REV. 203, 209–11 (2012); Langer, *supra* note, 48, at 47 (summarizing criticisms); Ramji-Nogales, *supra* note 43, at 44–45 (same).

50. WOLFGANG KALECK, *DOUBLE STANDARDS: INTERNATIONAL CRIMINAL LAW AND THE WEST* 91–94 (2015); MARK KERSTEN, *JUSTICE IN CONFLICT: THE EFFECTS OF THE INTERNATIONAL CRIMINAL COURT'S INTERVENTIONS ON ENDING WARS AND BUILDING PEACE* 164–65, 173–77 (2016). Additionally, in the Côte D'Ivoire, the ICC has prosecuted only the deposed Laurent Gbagbo and his supporters while excluding from prosecution supporters of the victorious Alassane Ouattara. See Asad Kiyani, *Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity*, 14 J. INT'L CRIM. JUST. 939, 950–51 (2016).

51. *Prosecutorial Discretion*, *supra* note 3, at 742–43.

prosecution.<sup>52</sup> In connection with the ICC's extended preliminary examination in Colombia, for example, the United States has helped design a transitional justice process intended to prevent a formal ICC investigation or prosecution by addressing crimes within the ICC's jurisdiction while also protecting politically powerful actors and reducing or mitigating sentences for middle and lower-level members of government or aligned forces.<sup>53</sup>

Such criticisms must be tempered by a recognition of the various constraints the ICC faces and the degree to which the preservation of major power influence remains part of the ICC's design. Limits on the ICC's jurisdiction over the international crimes set forth in the Rome Statute significantly circumscribe its reach.<sup>54</sup> Outside of referrals by the Security Council, the Rome Statute confines the ICC's jurisdiction to instances where those crimes are committed by a national or on the territory of a State Party (or the State's vessel or aircraft).<sup>55</sup> or where a non-State Party accepts the ICC's jurisdiction on an *ad hoc* basis.<sup>56</sup> Moreover, three of the five permanent members of the Security Council have not ratified the Rome Statute and can veto any Security Council referral to the ICC, thus helping insulate their respective officials (and those of their allies) from prosecution.<sup>57</sup> Additionally, the Security Council can, by adopting a resolution under Chapter VII of the UN Charter, request that the ICC defer any investigation or prosecution for renewable periods of twelve months.<sup>58</sup> The Security Council can also shape the parameters of any referrals it makes. Its referrals to the ICC for Libya and the Darfur, for example, limited the ICC's jurisdiction to the relevant state under investigation, while providing immunity from ICC prosecution for officials and nationals from non-party states for liability arising from operations authorized by the Security Council or the African Union.<sup>59</sup> The Security Council did not fund either referral, placing the full cost on the ICC, and has done little to support the ICC's investigations in either country.<sup>60</sup> Moreover, the Security Council, as well as various member states,

52. Rome Statute, *supra* note 4, art. 17(1)(a)–(b).

53. Mahony, *supra* note 31, at 1093, 1104–06.

54. Kiyani, *supra* note 50, at 948.

55. Rome Statute, *supra* note 4, art. 12(1)–(2). The Rome Statute additionally permits a non-State Party to accept the Court's jurisdiction over a particular crime on an *ad hoc* basis. *Id.* art. 12(3).

56. *Id.* art. 12(3).

57. Sirleaf, *supra* note 7, at 711–12.

58. Rome Statute, *supra* note 4, art. 16.

59. Rosa Aloisi, *A Tale of Two Institutions*, in *THE REALITIES OF INTERNATIONAL CRIMINAL JUSTICE* 147, 149, 153 (Dawn L. Rothe et al. eds., 2013) (discussing S.C. Res. 1593, para. 6, U.N. Doc. S/RES/1593 (Mar. 31, 2005), and S.C. Res. 1970, para. 6 (Feb. 26, 2011)).

60. Alex Whiting, *International Justice Year-in-Review: Looking Backwards, Looking Forwards*, *JUST SECURITY* (Jan. 19, 2016), <https://www.justsecurity.org/28869/international-criminal-justice-2015-part-1> [<https://perma.cc/PCL6-BMD5>] (archived Oct. 11, 2017).

failed to act in the face of flagrant noncompliance by Sudanese President Omar Hassan Al-Bashir, who has traveled the globe in defiance of international arrest warrants issued by the ICC.<sup>61</sup> In 2014, the ICC Prosecutor suspended the investigation into the situation in the Darfur following a lack of support by the Security Council, including the Security Council's failure to implement sanctions or take action against States Parties that hosted visits by al-Bashir.<sup>62</sup> In 2017, the ICC Pre-Trial Chamber II ruled that South Africa had a duty to arrest al-Bashir when al-Bashir was in South Africa attending an African Union summit in 2015 and surrender him to the Court, but refused to refer South Africa to the Assembly of States Parties or to the UN Security Council for non-compliance with its legal obligations.<sup>63</sup> In exercising their discretion against a referral to external organs, the ICC judges explained that such referral would not be an effective means of obtaining South Africa's cooperation.<sup>64</sup> While the ICC's ruling might be viewed as a pragmatic solution to ensure South Africa's continued support for the Court, it nevertheless sends a message to States Parties that non-compliance has no consequences.<sup>65</sup>

The ICC, moreover, has finite resources, limiting the number of investigations and prosecutions it can realistically pursue.<sup>66</sup> Lacking any law enforcement power of its own, the ICC relies on states, especially those with powerful militaries, for such essential tasks as

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61. Carmel Agius, *2015 Brandeis Institute of International Judges Report: International Courts, Local Actors*, 47 U. PAC. L. REV. 371, 398 (2016).

62. David Smith, *ICC Chief Prosecutor Shelves Darfur War Crimes Probe*, THE GUARDIAN (Dec. 14, 2014), <http://www.theguardian.com/world/2014/dec/14/icc-darfur-war-crimes-fatou-bensouda-sudan> [<https://perma.cc/YP9Y-UUQC>] (archived Oct. 11, 2017). In July 2017, the ICC Pre-Trial Chamber II ruled that South Africa had failed to comply with its obligations under the Rome Statute by not arresting al-Bashir while he was in South Africa for a summit of the African Union in 2015. *Situation in Darfur, Sudan; Prosecutor v. Al-Bashir*, No. ICC-02/05-01/09, Pre-Trial Chamber II, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, para. 123 (July 6, 2017). The judges, however, nevertheless refused in the exercise of their discretion to refer the matter to the Assembly of States Parties or the UN Security Council. *Id.* para. 140.

63. *Prosecutor v. Al-Bashir*, ICC-02/05-01/09, ICC Pre-Trial Chamber II, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ¶¶ 123, 140 (July 6, 2017).

64. *Id.* ¶¶ 137–39.

65. Angela Mudukuti, *Non-Compliance But No Referral—The ICC Muddies the Waters*, JUSTICE IN CONFLICT BLOG (July 20, 2017), <https://justiceinconflict.org/2017/07/20/non-compliance-but-no-referral-the-icc-muddies-the-waters/> [<https://perma.cc/XP7Y-WLQ7>] (archived Oct. 26, 2017).

66. Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 269–70 (2012) [hereinafter *Choosing to Prosecute*].

arresting suspects and enforcing its judgments.<sup>67</sup> The ICC likewise depends heavily on states for gathering evidence and securing the production of witnesses.<sup>68</sup> These practical considerations limit the ICC's ability to fulfill its goal of combatting impunity for grave crimes, particularly those committed by senior government officials.<sup>69</sup>

Further, the suggestion that international criminal justice is merely a tool for the strongest nations to maintain their hegemony in international relations must be qualified by closer examination of the ICC's docket. Most of the situations in Africa under investigation by the ICC involve self-referrals by the respective African nations themselves.<sup>70</sup> The ICC, for example, was invited by the government to review the situation in northern Uganda, and its involvement received broad support both in Europe and Africa.<sup>71</sup> In addition, prosecution of only one side of the conflict appeared to be the price of Uganda's self-referral.<sup>72</sup> Only two situations (the Darfur and Libya) have been referred to the ICC by the Security Council and only two (Kenya and the Côte d'Ivoire) were initiated by the ICC Prosecutor. The ICC Prosecutor, moreover, commenced the Kenya investigation only after Kenya failed to take action against those responsible for the post-election violence there.<sup>73</sup> African leaders, moreover, have leveraged self-referrals to insulate themselves and their supporters from prosecution. Their success in pursuing this strategy suggests how a simplistic framing that pits a Eurocentric court against states in the developing world—and equates ICL with colonialism—obscures

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67. Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 11 (2005).

68. David Tolbert, *International Criminal Law: Past and Future*, 30 U. PA. J. INT'L L. 1281, 1283 (2009).

69. ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 192 (2005).

70. See *Situations under Investigation*, INT'L CRIMINAL COURT, <https://www.icc-cpi.int/pages/situations.aspx> (last visited Oct. 15, 2017) [<https://perma.cc/C2NT-89J3>] (archived October 15, 2017) (describing self-referrals by Uganda, the Central African Republic, Mali, and the Democratic Republic of Congo).

71. Phuong Pham, Patrick Vinck & Eric Stover, *Abducted: The Lord's Resistance Army and Forced Conscription in Northern Uganda*, 30 HUM. RTS. Q. 404, 404 (2008).

72. *Prosecutorial Discretion*, *supra* note 3, at 753.

73. Kenneth Roth, *Africa Attacks the International Criminal Court*, HUM. RTS. WATCH (Jan. 14, 2014), <https://www.hrw.org/news/2014/01/14/africa-attacks-international-criminal-court> [<https://perma.cc/QMK8-AZCA>] (archived Oct. 11, 2017). More specifically, the ICC Prosecutor sought authorization to investigate *proprio motu* crimes committed during the post-election violence in Kenya only after Kenya had refused to approve the locally sponsored accountability mechanism proposed by the Commission of Inquiry into Post-Election Violence, which had advocated establishing a hybrid tribunal, consisting of national and international judges and staff, to prosecute alleged crimes. Report of the Commission of Inquiry into Post-Election Violence, INT'L CENTER FOR TRANSITIONAL JUSTICE (Oct. 15, 2008), <https://www.ictj.org/sites/default/files/ICTJ-Kenya-Dialogue-Inquiry-2008-English.pdf> [<https://perma.cc/PSY2-5AFC>] (archived Oct. 26, 2017).

a more nuanced post-colonial reality in which local power structures interact with international organizations to target weaker domestic communities.<sup>74</sup>

These considerations aside, however, it is difficult to deny that the ICC's docket contributes to a perception of universal justice as "universal in name only."<sup>75</sup> Further, the geographic distribution of situations and cases on the ICC's docket has helped enable political and military elites in Africa (and elsewhere) to seize upon historical grievances and paint the ICC as a pro-western institution biased against Africa and other developing nations in order to avoid accountability for their own crimes.<sup>76</sup>

Implementation of the ICC's specialized jurisdiction over the crime of aggression could exacerbate these negative perceptions. The Rome Statute initially placed the crime of aggression within the ICC's jurisdiction but did not define aggression or supply jurisdictional triggers over it until the 2010 Review Conference in Kampala, Uganda.<sup>77</sup> The resulting amendments to the Rome Statute define acts of aggression as the use of armed force by one state against the sovereignty, territorial integrity, or political independence of another state whose character, gravity, and scale constitute a manifest violation of the UN Charter, and delineate various acts that would so qualify.<sup>78</sup> The amendments limit criminal responsibility to individuals who exercise effective control over a state's political or military action, and who plan, prepare, initiate, or execute acts of aggression.<sup>79</sup> The ICC's jurisdiction over the crime of aggression is set to take effect after January 1, 2017, once thirty States Parties have ratified the amendments and the Assembly of States Parties votes by a two-thirds majority to activate the ICC's jurisdiction.<sup>80</sup> Once this jurisdiction is activated, the ICC will become the first international tribunal since Nuremberg and Tokyo empowered to prosecute the crime of aggression. The ICC, however, may exercise jurisdiction only

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74. Kiyani, *supra* note 50, at 940–41.

75. William A. Schabas, *Regions, Regionalism, and International Criminal Law*, 4 N. Z. Y. B. INT'L L. 3, 14 (2007).

76. Yvonne M. Dutton, *Bridging the Legitimacy Divide: The International Criminal Court's Domestic Perception Challenge* 30–33 (Aug. 10, 2017), 56 COLUM. J. TRANSNAT'L L. (forthcoming), [https://ssrn.com/abstract\\_id=3016621](https://ssrn.com/abstract_id=3016621) [<https://perma.cc/5LUF-3BQQ>] (archived Oct. 26, 2017); Mark Kersten, *The Africa-ICC Relationship—More and Less than Meets the Eye (Part I)*, JUSTICE IN CONFLICT (July 17, 2015), <https://justiceinconflict.org/2015/07/17/the-africa-icc-relationship-more-and-less-than-meets-the-eye-part-1/> [<https://perma.cc/6FT2-6NUU>] (archived Oct. 11, 2017).

77. Rachel E. VanLandingham, *Criminally Disproportionate Warfare: Aggression as a Contextual War Crime*, 48 CASE W. RES. J. INT'L L. 215, 243 (2016).

78. Rome Statute, *supra* note 4, art. 8 *bis*.

79. *Id.* art. 8 *bis* (1).

80. *Id.* arts. 15 *bis* (2), (3); 15 *ter* (2), (3).

over crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.<sup>81</sup>

Supporters hail this development as an important, albeit partial, step towards fulfilling the legacy of Nuremberg, which regarded aggression as the supreme international crime.<sup>82</sup> The amendments, however, face significant obstacles in achieving this goal and raise concerns about how jurisdiction over crimes of aggression will ultimately be exercised.

The amendments' potential impact on the Security Council's authority to determine acts of aggression by virtue of its exclusive responsibility for maintaining international peace and security under the UN Charter proved controversial at Kampala.<sup>83</sup> The amendments outline different roles for the Security Council, depending on the trigger mechanism.<sup>84</sup> In cases referred by States Parties or in investigations *proprio motu*, the ICC Prosecutor must first ascertain whether the Security Council has made a determination of an act of aggression.<sup>85</sup> Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation; where the Security Council has not done so within six months after the date of notification of the situation before the ICC by the Prosecutor to the UN Secretary-General, a Pre-Trial Chamber of the ICC may authorize the investigation to commence.<sup>86</sup> In either case, the determination of the Security Council is not binding on the ICC's assessment of whether an act of aggression has occurred.<sup>87</sup> Although these provisions help carve out a role for the ICC in determining acts of aggression,<sup>88</sup> the ICC cannot exercise jurisdiction over crimes of aggression committed in the territory, or by nationals, of non-States Parties, absent Security Council referral.<sup>89</sup> This limitation is the result of pressure exerted by the United States and other major powers at Kampala.<sup>90</sup> The United States, for example, had cautioned that ICC jurisdiction over the crime of aggression could discourage states from intervening to prevent humanitarian

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81. *Id.* art. 15 *ter* (2).

82. Julie Veroff, Note, *Reconciling the Crime of Aggression and Complementarity: Unaddressed Tensions and a Way Forward*, 125 YALE L. J. 730, 743 (2016); see also Donald M. Ferencz, *Bringing the Crime of Aggression within the Active Jurisdiction of the ICC*, 42 CASE W. RES. J. INT'L L. 531, 542 (2009) (describing the value of activating ICC jurisdiction over the crime of aggression).

83. Kai Ambos, *The Crime of Aggression after Kampala*, 53 GER. Y. B. INT'L L. 463, 475–77 (2010).

84. Johan D. van der Vyver, *Prosecuting the Crime of Aggression in the International Criminal Court*, 1 U. MIAMI NAT'L SEC. & ARMED CONFLICT L. REV. 1, 2 (2011).

85. Rome Statute, *supra* note 4, art. 15 *bis* (6).

86. *Id.* arts. 15 *bis* (6), (7).

87. *Id.* arts. 15 *bis* (9).

88. Ambos, *supra* note 83, at 475–77.

89. Rome Statute, *supra* note 4, art. 15 *bis*.

90. Mahony, *supra* note 31, at 1110.

catastrophes because such intervention would bring a risk of international criminal prosecution.<sup>91</sup> The Security Council also has the power to defer any investigation or prosecution for renewable twelve-month periods.<sup>92</sup> Additionally, States Parties may opt out of the ICC's jurisdiction over the crime of aggression by lodging a declaration with the ICC Registrar, prior to any act of aggression otherwise subject to ICC jurisdiction.<sup>93</sup> While it remains uncertain whether, and how, the ICC would pursue crimes of aggression once its jurisdiction is activated, the controls on its exercise of this jurisdiction could deepen existing perceptions of major power influence over the ICC.

Concerns about selectivity also lurk in the background of discussions to create new tribunals. They surround, for example, proposals for a future hybrid tribunal for Syria and Iraq that would focus only on crimes committed by the Assad regime or, alternatively, by ISIS, despite the evidence of widespread international law violations committed by all sides of the conflict.<sup>94</sup> Such a focus would reinforce perceptions of a one-sided approach to international criminal justice and weaken the chances for lasting peace and security in the region.<sup>95</sup>

Paradoxically, ICL's selectivity problem has deepened even as it has benefited from other advances that enhance the fairness of international criminal trials, such as the establishment of more robust due process protections for individual defendants. Continued asymmetries in the selection of situations and cases—even if largely the product of a tribunal's design and the practical obstacles it faces—will hinder the ICC and other international tribunals from achieving broader goals of fairness rooted in the equal application of criminal responsibility under international law.

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91. The United States unsuccessfully proposed language that would have expressly excluded from crimes of aggression the use of force to prevent genocide, crimes against humanity, and war crimes. See Harold Hongju Koh & Todd F. Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AM. J. INT'L L. 258, 273 (2015). But see Jennifer Trahan, *Defining the 'Grey Area' Where Humanitarian Intervention May Not be Fully Legal, But is Not the Crime of Aggression*, 2 J. USE OF FORCE & INT'L L. 42 (2015).

92. Rome Statute, *supra* note 4, art. 16.

93. *Id.* art. 15 *bis*(4). Some commentators, however, maintain that this opt-out provision conflicts with a provision in the Rome Statute that prevents States from ratifying the statute subject to reservations. van der Vyver, *supra* note 84, at 47.

94. Jennifer Trahan, *Accountability for Crimes in Syria: Lessons Learned from the Field of International Justice*, SYRIA JUSTICE AND ACCOUNTABILITY CENTRE 1–2 (June 2015), <http://syriaaccountability.org/wp-content/uploads/Syria-Lessons-from-tribunals.pdf> [<https://perma.cc/A5DD-CY4U>] (archived Oct. 11, 2017).

95. Mark Kersten, *The ICC and ISIS: Be Careful What You Wish For*, JUSTICE IN CONFLICT (June 11, 2015), <https://justiceinconflict.org/2015/06/11/the-icc-and-isis-be-careful-what-you-wish-for/> [<https://perma.cc/4W7P-E294>] (archived Oct. 11, 2017).

### III. SELECTIVITY, FAIRNESS, AND LEGITIMACY

A trial's fairness is essential to its legitimacy in both international and domestic settings.<sup>96</sup> International criminal courts derive moral authority from the fairness of their proceedings, and the severity of the alleged crimes deepens the importance of fairness to a trial's integrity.<sup>97</sup> Protections for the accused are thus particularly significant in an area of law as "politicised, culturally freighted and passionately punitive as war crimes."<sup>98</sup> Trials, moreover, must be fair not merely in some, but in all aspects.<sup>99</sup> A trial's fairness is commonly assessed in terms of its procedures—more specifically, whether those procedures safeguard the rights of the accused and whether they are applied equally to all defendants.<sup>100</sup> Choices about which defendants and crimes are prosecuted, however, also can color determinations about a trial's fairness and, by extension, its legitimacy.

Closer consideration of the concept of legitimacy helps highlight the importance of selection decisions. Various scholars have sought to define legitimacy, both generally and within the context of international criminal tribunals. Legitimacy may be broadly defined as acting with justified authority,<sup>101</sup> although some political theorists have stressed that legitimacy further requires the continuing consent of those subject to the exercise of political power and not merely the justness *ex ante* of the state and its institutions.<sup>102</sup> Legitimacy may be divided along the following axes: legal, moral, and sociological.<sup>103</sup> Legal legitimacy describes adherence to legal norms and procedures; moral legitimacy focuses on the justness of outcomes; and sociological legitimacy measures the perception of relevant audiences.<sup>104</sup> Thus, while the first two categories (legal and moral legitimacy) are based

96. David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW (Samantha Besson & John Tasioulas eds., 2010); Aaron Fichtelberg, *Democratic Legitimacy and the International Criminal Court: A Liberal Defense*, 41 J. INT'L CRIM. JUST. 765, 775 (2006); Sophie Rigney, Case Note, 'The Words Don't Fit You': *Recharacterization of the Charges, Trial Fairness, and Katanga*, 15 MELB. J. INT'L L. 515, 523 (2014).

97. Rigney, *supra* note 96, at 522; see also Gerry J. Simpson, *War Crimes: A Critical Introduction*, in THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 15 (Timothy L. H. McCormack & Gerry J. Simpson eds., 1997).

98. Simpson, *supra* note 97.

99. Prosecutor v. Katanga, Case No. ICC-01/04-01/07-3436-Anxl, Minority Opinion of Judge Wyngaert, ¶ 311 (Mar. 7, 2014).

100. IAN HURD, AFTER ANARCHY: LEGITIMACY AND POWER IN THE UNITED NATIONS SECURITY COUNCIL 174 (2007).

101. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 601 (1999).

102. A. JOHN SIMMONS, JUSTIFICATION AND LEGITIMACY: ESSAYS ON RIGHTS AND OBLIGATIONS 126–30 (2001).

103. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1789 (2005).

104. *Id.* at 1794–99.

on intrinsic qualities or norms, the third category (sociological legitimacy) is based on perceptions of others.<sup>105</sup> In other words, if normative legitimacy centers mainly on “the qualities of the ruler,” sociological legitimacy turns on “the attitudes of the ruled.”<sup>106</sup>

While distinct conceptually, these categories are dynamic and can intersect in different ways. Thomas Franck, for example, described legitimacy as “a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”<sup>107</sup> Rights, Franck argued, are thus “defined, acquired, and protected through the legitimate and legitimating processes of the community.”<sup>108</sup> As Franck’s description suggests, a norm or norm-generating institution that possesses legal and moral legitimacy is more likely to be perceived as such, as evidenced by heightened compliance among relevant actors and acceptance by relevant audiences. Allen Buchanan and Robert Keohane have similarly noted that legitimacy for global governance institutions implies the moral right of institutional agents to make rules and secure compliance with them and, correspondingly, provides a moral reason for people subject to those rules to follow them.<sup>109</sup>

The compliance pull that results from perceptions about an institution’s adherence to principles of right process can increase that institution’s fidelity to those principles through a type of feedback loop.<sup>110</sup> Abram Chayes accordingly described legitimacy as the product of a dynamic, negotiated process that rests ultimately on “the ability of a judicial pronouncement to sustain itself in the dialogue” with other political forces and “to generate assent over the long haul.”<sup>111</sup> Because legitimate institutions typically enjoy diffuse support, the public will back those institutions’ continued operation even when it disagrees with their decisions in specific cases.<sup>112</sup>

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105. Danner, *supra* note 5, at 536.

106. Bodansky, *supra* note 101, at 327.

107. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 24 (1990).

108. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 27 (1998).

109. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 *ETHICS AND INT’L AFF.* 405, 411 (2006).

110. Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 *FORDHAM INT’L L. J.* 1400, 1437 (2009) [hereinafter *Gravity*].

111. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281, 1316 (1976).

112. James L. Gibson & Gregory A. Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 *AM. J. POL. SCI.* 459, 460 (1995).

Legal and moral legitimacy do not, however, necessarily yield sociological legitimacy. The decision of a tribunal, for example, may be justified normatively because it emanates from “a fair and accepted procedure, is applied equally and without invidious discrimination, and does not offend minimum standards of fairness and equity.”<sup>113</sup> The decision may also reach a morally just outcome. But relevant audiences may still regard it as illegitimate, which in turn can affect the decision’s acceptance within a given society.

In international criminal justice, the audience is often broad and diverse, encompassing not only the individuals and societies directly affected by the particular atrocities, but also other states, their citizens, and non-government organizations and other civil society actors.<sup>114</sup> Even if an international criminal tribunal has established procedures that are widely regarded as fair, the tribunal’s choice of defendants for investigation and prosecution may still be perceived as illegitimate by at least some segments of this audience. In the case of the ICC, the selection of situations for investigation and prosecution is most likely to impact the ICC’s standing within the broader international community. By contrast, the selection of cases within a given situation—and, particularly, the prosecution of only one side of a conflict where atrocities were committed by all sides—has the greatest potential impact within directly affected communities. As Asad Kiyani has explained, such intra-selectivity decisions can create “a problematic symbiosis between the ICC and domestic arrangements of power that produce or depend upon systematic repression or violence” and can reinforce neocolonial patterns that marginalize certain domestic groups while privileging others.<sup>115</sup> The Ugandan government, for example, used an ICC prosecution to help weaken and delegitimize the rebel Lord’s Resistance Army (LRA) in northern Uganda, while ensuring that the ICC Prosecutor did not investigate any members of the Ugandan government or military forces, including by withholding any possible cooperation. The resulting asymmetry, in which all ICC arrest warrants were issued for senior LRA commanders, undermined the ICC’s legitimacy as well as the post-conflict process in Uganda by helping frame the conflict simplistically as a battle between good and evil.<sup>116</sup> This type of intra-situational selectivity, moreover, tends to shield government forces, thereby reinforcing the “classic impunity paradigm” of a state sheltering its own forces<sup>117</sup> and conveying negative messages about a

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113. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 127 (1995).

114. Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 *STAN. J. INT’L L.* 39, 41 (2007).

115. Kiyani, *supra* note 50, at 949.

116. KERSTEN, *supra* note 50, at 174–78.

117. *Prosecutorial Discretion*, *supra* note 3, at 747–48.

non-government group's moral worth and claim to protection of the law.<sup>118</sup>

The Rome Statute requires that the ICC Prosecutor treat like cases alike and apply a consistent set of criteria to each case.<sup>119</sup> But an *ex ante* commitment to treat like cases alike as a basic component of fairness may be insufficient to achieve both normative and sociological legitimacy even when coupled with the use of standards and procedures designed to achieve that goal. The Rome Statute's threshold gravity requirement, which mandates that cases be of sufficient severity, provides a potential means of grounding selection decision in neutral and generally applicable criteria.<sup>120</sup> Assuming those decisions are made in a nonarbitrary manner through a fair process—and the chosen situations and cases objectively satisfy the minimum gravity threshold—the decisions can claim normative legitimacy.<sup>121</sup> But the minimum gravity threshold does not determine which of the numerous international crimes the ICC should pursue with the limited resources available.<sup>122</sup> The ICC Prosecutor's decision to pursue certain cases from among many potential ones thus exposes her to potential criticism.<sup>123</sup> If the Prosecutor were consistently to select the least serious cases without good reason, it would undermine the ICC's normative legitimacy.<sup>124</sup> But even if the Prosecutor does not engage in such a skewed pattern of decision making, and even if she provides cogent explanations that address normative concerns about which situations and cases were selected and why, it will not necessarily ensure the ICC's perceived legitimacy, particularly if those decisions collectively resulted in a predominant focus on particular regions or sides of a conflict. Thus, even as the ICC becomes more rigorous in its approach to procedural fairness, it will continue to confront concerns—real and perceived—about the overall fairness of its selection decisions. Studies of procedural and distributive justice in national criminal justice systems provide further insight into this dynamic and the challenges confronting the ICC and international criminal tribunals more generally.

#### IV. INSIGHTS FROM NATIONAL CRIMINAL JUSTICE

Selection decisions are generally regarded as more important to the fairness and legitimacy of international tribunals than they are to

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118. Kiyani, *supra* note 50, at 952.  
119. Danner, *supra* note 5, at 537.  
120. Rome Statute, *supra* note 4, art. 17(1)(2).  
121. *Gravity*, *supra* note 110, at 1440–41.  
122. *Id.*  
123. *Id.*  
124. *Id.*

national criminal justice systems.<sup>125</sup> In national systems, prosecutors not only are expected to pursue the most serious cases, but also possess the resources and means to do so in most instances.<sup>126</sup> Further, given the volume of cases prosecuted by national criminal justice systems, the decision not to prosecute in particular instances is less likely to trigger broader questions about a system's overall fairness and legitimacy.<sup>127</sup> In many countries, moreover, prosecutors are accountable to the citizenry through the democratic process. Their selection choices thus can claim legitimacy because they reflect, at least to some degree, the views of the elected government and populace.<sup>128</sup>

International courts, by contrast, handle far fewer cases and prosecutors typically must make hard choices about which, among a large number of international crimes, they have the resources and support to tackle. Selection decisions thus assume a greater symbolic importance. International courts, like other international institutions, also lack the grounding in domestic politics and the connection to ordinary citizens that national courts possess.<sup>129</sup>

Yet, the contrast between the effect of selection decisions on domestic and international courts may be less stark than generally assumed. Selection decisions matter in national systems, not only in high-profile cases, but also in the aggregate. Patterns of prosecutorial or judicial decision making, especially decisions that disproportionately affect particular racial or ethnic groups, can erode a criminal justice system's perceived fairness and legitimacy among those groups, regardless how equitable that system's procedures are in individual cases.<sup>130</sup> Also, the capacity of national justice systems to prosecute serious crimes varies significantly. Even though courts in advanced western democracies typically prosecute the most serious crimes committed within their respective jurisdictions, they too have faced challenges in ensuring equal application of the law, whether in confronting white-collar crime<sup>131</sup> or avoiding racial disparities in charging and sentencing.<sup>132</sup> States that have weak law enforcement

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125. See, e.g., *Choosing to Prosecute*, *supra* note 66, at 268; Alexander K. A. Greenawalt, *Justice without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 656–57 (2007).

126. *Choosing to Prosecute*, *supra* note 66, at 269.

127. *Id.*

128. Greenawalt, *supra* note 125, at 656–57.

129. ALISON DUXBURY, *THE PARTICIPATION OF STATES IN INTERNATIONAL ORGANISATIONS: THE ROLE OF HUMAN RIGHTS AND DEMOCRACY* 30 (2011).

130. Ben Bradford et al., *Obeying the Rules of the Road: Procedural Justice, Social Identity, and Normative Compliance*, 31(2) J. CONTEMP. CRIM. JUST. 3 (2015).

131. KALECK, *supra* note 50, at 114–15.

132. Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73(2) SOCIAL RESEARCH 445 (2006); Stephen B. Bright, *Discrimination, Death and Denial: The*

capacity or that lack a strong rule-of-law tradition confront particular challenges. Such states not only fail to prosecute much serious crime, including in areas like narcotics and public corruption, but also often conduct prosecutions in a manner that protects powerful interests and individuals.<sup>133</sup> In these circumstances, selection decisions can undermine the legitimacy of a criminal justice system and public institutions more generally.<sup>134</sup>

It should not be surprising, therefore, that studies of domestic law enforcement and criminal courts can help inform assessments of international criminal courts, both in their procedural and distributive dimensions.<sup>135</sup> In particular, studies of national criminal justice systems suggest how distributive considerations—including the cases chosen for investigation and prosecution—can impact the perceived fairness and legitimacy of international criminal tribunals. They also caution against focusing exclusively on the fair treatment of individual defendants and excluding consideration of broader patterns of case selection in the administration of criminal justice.

The work of Tom Tyler and others underscores the impact of procedural justice on local policing and courts. Tyler has demonstrated how perceptions of legitimacy form around judgments about the manner in which police and courts treat individuals. By shaping perceptions of law enforcement and judges, those experiences help determine compliance with the law.<sup>136</sup> For Tyler, fair treatment, rather than fair outcomes, is the most critical factor in creating a perception of legitimacy and fostering compliance with public authority.<sup>137</sup> Procedural justice scholarship thus builds on the Weberian insight that power is transformed into authority, triggering a duty to obey, when it is viewed as legitimate.<sup>138</sup> It has significant implications for the administration of criminal justice at the local

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*Tolerance of Racial Discrimination in the Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 439, 462–65 (1995).

133. Ivelaw L. Griffith, *Drugs and Democracy in the Caribbean*, 53 UNIV. MIAMI L. REV. 869, 874 (1999); Angel Ricardo Orquendo, *Corruption and Legitimation Crises in Latin America*, 14 CONN. J. INT'L L. 475, 490 (1999).

134. Thomas M. DiBiagio, *Judicial Corruption, the Right to a Fair Trial, and the Application of Plain Error Review*, 25 AM. J. CRIM. L. 595, 622 (1998) (discussing Mexico); Steven E. Hendrix, *New Approaches to Addressing Corruption in the Context of U.S. Foreign Assistance, with Examples from Latin America and the Caribbean*, 12 SW. J. L. & TRADE AM. 1, 5 (2005).

135. See, e.g., Bernadette Atuahene, *The Importance of Conversation in Transitional Justice: A Study of Land Restitution in South Africa*, 39 L. & SOC. INQUIRY 902 (2014) (applying procedural justice to transitional justice in South Africa); Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VAND. J. TRANSN'TL L. 405, 418, 456 (2012) (applying theories of sociological legitimacy to international criminal tribunals).

136. TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 5–6 (2006).

137. TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* xiii–iv, 50 (2002).

138. Aziz Huq et al., *Acts that Legitimate Widening the Array of Predicate Police Practices* 7 (Chicago Public Law and Legal Theory Working Paper No. 603, 2016).

level, where enforcement impacts large segments of the population and contributes to judgments about the perceived legitimacy of law enforcement agents, prosecutors, and courts.<sup>139</sup> These institutions cannot continually violate norms of fair process and remain effective,<sup>140</sup> particularly in settings where legal compliance depends more on a sense of moral duty than on a fear of getting caught and punished for lawbreaking.<sup>141</sup>

Social identification plays an important role in theories of procedural justice. Fair treatment helps generate positive identification with legal structures and institutions by demonstrating that power-holders are acting in fair, justified, and measured ways.<sup>142</sup> It also communicates to members of different social groups messages concerning their respective inclusion, status, and value within a society.<sup>143</sup> The social identification resulting from fair treatment can motivate adherence to rules and laws governing behavior<sup>144</sup> and strengthen alignment with state actors and institutions.<sup>145</sup> Conversely, unfair treatment can weaken social identification and contribute to a sense of marginalization.<sup>146</sup> Such treatment can not only convey an abuse of power, but also alienate individuals from the group that the power holders represent.<sup>147</sup> This dynamic frequently plays out along racial and ethnic lines, reinforcing perceptions of outsider status among particular sub-groups.<sup>148</sup>

Distributive factors also impact the fairness and legitimacy of national criminal justice systems. Whereas procedural justice concentrates on the treatment of individuals at the micro level, distributive justice centers on broader patterns within a society.

The distribution of criminal law has a dual nature. First, it embodies an exercise of coercive power by legal institutions and actors—a form of corrective justice designed to punish wrongdoing.<sup>149</sup>

139. *Id.* at 90–93.

140. Morris Zelditch, Jr., *Theories of Legitimacy*, in *THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES IN IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS* 33–53 (John T. Jost & Brenda Major eds., 2001).

141. Bradford et al., *supra* note 130.

142. Ben Bradford et al., *Officers as Mirrors: Policing, Procedural Justice and the (Re)Production of Social Identity*, 54 *BRIT. J. CRIMINOLOGY* 528 (2014) [hereinafter *Officers as Mirrors*].

143. Bradford et al., *supra* note 130, at 5–6.

144. *Officers as Mirrors*, *supra* note 142, at 528.

145. Ben Bradford et al., *Identity, Legitimacy, and 'Making Sense' of Police Violence* 4–6, 11 (Oxford Legal Studies Research, Paper No. 41, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2793818](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2793818) [<https://perma.cc/22Y8-EDXS>] (archived Oct. 15, 2017).

146. *Officers as Mirrors*, *supra* note 142, at 528.

147. *Id.*

148. *Id.* at 533; TYLER & HUO, *supra* note 137, at 139–43.

149. Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *YALE L. J.* 949, 982 n.73 (1988).

This power includes choices regarding arrest, charging, prosecution, and sentencing. While these choices are directed primarily at individuals, they can produce racial disparities or other imbalances across groups when considered in the aggregate.<sup>150</sup> Second, criminal law constitutes a public good or resource that is distributed among communities and individuals in society.<sup>151</sup> It provides security and safety to members of society as well as satisfying public demands to hold accountable those individuals who breach shared and accepted norms.<sup>152</sup> The uneven distribution of criminal law resources across communities and groups in society not only reflects power asymmetries, but also can contribute to different perceptions of the fairness and legitimacy of the state's exercise of criminal law authority. The media further shapes those perceptions within a society.<sup>153</sup>

Some scholars have elevated the importance of fair treatment over distributive considerations. William Stuntz, for example, maintained that attitudes about law enforcement turn principally on how law enforcement treats individuals, not on how it selects suspects or treats different groups collectively.<sup>154</sup> Some domestic courts have reinforced the focus on procedural fairness for individual defendants by erecting barriers to claims targeting bias in charging and sentencing decisions.<sup>155</sup> But the distribution of criminal law authority—whether as a form of coercion or as a public resource—can affect its legitimacy even where its exercise is procedurally fair on a micro level. Institutionalized practices, including how courts and police treat different groups, as well as background knowledge about these practices, help shape public perceptions about criminal justice

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150. See, e.g., Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75 (2015) (discussing racial disparities in federal sentencing in the United States).

151. Aya Gruber, *A Distributive Theory of Criminal Law*, 52 WM. & MARY L. REV. 1, 11 (2010); Loïc Wacquant, *A Janus-Faced Institution of Ethnoracial Closure: A Sociological Specification of the Ghetto*, in *THE GHETTO: CONTEMPORARY GLOBAL ISSUES AND CONTROVERSIES 1-2* (Ray Hutchison & Bruce D. Haynes eds., 2011).

152. Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1182-83 (1994).

153. Huq, *supra* note 138, at 4.

154. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L. J. 2137, 2173-74 (2002).

155. See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996) (holding that claims of selective prosecution must prove both discriminatory purpose and effect and erecting barriers to obtaining the discovery of evidence often necessary to sustain a claim of discrimination); Marc Price Wolf, Note, *Proving Race Discrimination in Criminal Cases Using Statistical Evidence*, 4 HASTINGS RACE & POVERTY L. J. 395, 414-21 (2007) (discussing the challenges of demonstrating claims of racial bias in criminal prosecutions).

actors and institutions.<sup>156</sup> Excessive focus on the fair treatment of individuals risks ignoring this larger context.

Criminal justice scholars have drawn on the concept of social alienation to look beyond the procedural justice framework. Monica Bell, for example, has addressed the lack of social inclusion across different groups based on a theory of legal estrangement.<sup>157</sup> Legal estrangement theory places the community, rather than the personal interactions of individuals, at the center of how justice is experienced.<sup>158</sup> It also considers historical patterns and the role of collective memory in constructing social identity.<sup>159</sup> Collective experience, including the experience of how authority and resources are distributed across diverse communities, helps inform how communities perceive criminal justice actors and institutions.<sup>160</sup>

Theories of procedural and distributive justice map onto the international level in several ways. Legitimacy in the international sphere continues to depend partly on generally accepted principles of right process.<sup>161</sup> But it can also depend on the substantive distribution of benefits and goods across borders and not simply within a given society.<sup>162</sup> Such benefits may include the equitable distribution of resources on the prosecution of international crimes and the equal application of international criminal law authority. Moreover, the difficulty of securing compliance through coercive measures in international affairs places greater emphasis on the compliance pull generated by the acceptance of ICL rules and decisions as fair and legitimate.<sup>163</sup> This acceptance is also critical to the internalization of legal norms at the local and national level.<sup>164</sup>

Procedural safeguards, to be sure, remain a *sine qua non* of international criminal justice. But distributive concerns also matter. International tribunals prosecute a relatively small number of cases, and the gap between the number of international crimes and the limited resources available to pursue them remains wide. Further, international criminal prosecutions often seek to reach a global

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156. CHARLES R. EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 116–19 (2014).

157. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L. J. 2054 (2017); see also ROBERT J. SAMPSON, GREAT AMERICAN CITY: CHICAGO AND THE NEIGHBORHOOD EFFECT 365–67 (2012) (discussing a similar concept under the label of “legal cynicism.”).

158. Bell, *supra* note 157, at 2087–88.

159. *Id.* at 2106–07.

160. *Id.* at 2108–09.

161. See FRANCK, *supra* note 107, at 24.

162. Charles R. Beitz, *International Liberalism and Distributive Justice: A Survey of Recent Thought*, 51(2) WORLD POL. 269, 270–71 (1999); see also Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT’L L. J. 163, 181 (2011) (describing the application of distributive justice in the spheres of international trade and the environment).

163. FRANCK, *supra* note 108, at 6–7.

164. Dutton, *supra* note 76.

audience as well as individuals, communities, and stakeholders in affected countries. The comparatively low number of international prosecutions instills them with greater symbolic weight than most domestic prosecutions where, outside a narrow band of high-profile cases, the audience is at most national, if not mainly local. The selection of situations and cases for international prosecution thus conveys a significant message about a tribunal's priorities to multiple audiences at the local, national, and international level.

Further, international criminal prosecutions rely on legal norms that transcend borders and justify overriding national sovereignty. The procedural mechanisms by which criminal responsibility is imposed on individual defendants can promote acceptance of those norms and facilitate identification with international criminal justice institutions through an associative process. But even prosecutions that are procedurally fair in individual cases can still diminish identification with ICL's universal norms and increase marginalization when, in the aggregate, those prosecutions are skewed towards certain regions or against weaker countries or, within a given situation, are directed exclusively at one side of the conflict.

Prosecutions, moreover, are commonly viewed through the prism of collective memory. International prosecutions that appear to favor the victorious and insulate the powerful can reinforce a preexisting sense of dislocation and distrust rooted in past experience. Such perceptions can not only affect the willingness of governments to cooperate with international tribunals on pressing practical needs such as the collection of evidence and access to and the protection of witnesses, but also can impede acceptance of the legal norms that international prosecutions seek to advance and embed within societies.

Applying lessons of social psychology to survey data about how affected populations perceive international criminal courts, Stuart Ford has shown the important, if complicated, impact selection decisions can have on perceptions of legitimacy.<sup>165</sup> He observes that groups within an affected country or region are likely to view a tribunal as legitimate in direct relation to the degree to which that tribunal's charging decisions support a group's dominant internal narrative of the conflict.<sup>166</sup> This might suggest that any attempt by a criminal tribunal to assign responsibility will necessarily cause a net loss in perceived legitimacy among the affected population as a whole.<sup>167</sup> Yet, Ford also recognizes that this negative impact can be mitigated where courts help realign dominant internal narratives with what actually happened on the ground as part of a larger

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165. Ford, *supra* note 135, at 405, 409–10, 418, 456.

166. *Id.* at 409–10.

167. *Id.* at 410.

transitional justice process focused on redressing past violence and abuses.<sup>168</sup> Prosecutorial charging decisions that seek to apportion blame among all responsible parties can contribute to this realignment, while bolstering a tribunal's perceived legitimacy and strengthening its normative legitimacy by attributing criminal responsibility to all sides, where warranted.

The importance of addressing distributive considerations is magnified for courts established to enforce norms of international justice. The legitimacy of human rights courts, for example, is influenced by perceptions of the most vulnerable groups since those groups represent key constituencies that such courts are meant to serve.<sup>169</sup> Decisions by human rights courts that elevate pragmatism over principle in response to external pressures can undermine their credibility and influence. International criminal tribunals similarly are premised on universal norms of justice and generate expectations that those norms will be applied in a neutral and equitable manner, independent of power disparities among parties and states. More emphasis on addressing distorting influences on selection decisions both across and within situations—especially where it requires resisting geopolitical pressures—can help counter perceptions that international prosecutions are necessarily directed against particular regions or necessarily serve dominant power interests at the expense of weaker states or communities.

ICL has, thus far, experienced greater success in the domain of procedural rather than distributive justice. The ICC provides the most notable example of this divide, with its elaborate procedural safeguards afforded the accused, on the one hand, and its disproportionate focus on countries in Africa at the expense of international crimes committed elsewhere, on the other. Several factors help explain this focus, including: the number of ICC investigations and prosecutions resulting from self-referrals by African states; the magnitude of the atrocities committed in several African countries; the ICC's design, which includes significant jurisdictional limitations and avenues for the exercise of Security Council influence; multiple practical obstacles from apprehending suspects to collecting evidence; and a wish to avoid controversial prosecutions that could inflame opposition and weaken the ICC at a relatively early stage in its development. But the selectivity challenges the ICC faces are in several respects a more extreme version of those faced by all international and hybrid criminal

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168. *Id.* at 411.

169. Molly K. Land, *Justice as Legitimacy in the European Court of Human Rights*, in LEGITIMACY AND INTERNATIONAL COURTS 12–14, 17, 22 (Harlan Grant Cohen et al. eds., Cambridge University Press, forthcoming) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2608578](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2608578) [<https://perma.cc/3LDD-9ZZL>] (archived Oct. 6, 2017).

tribunals. The next Part examines competing approaches to these challenges and describes other possible ways of approaching selection decisions in ICL.

## V. RETHINKING APPROACHES TO SELECTION DECISIONS IN ICL

A number of proposals have sought to address selectivity issues in international criminal justice. While these proposals focus mainly on the ICC, they contain principles applicable more broadly to future *ad hoc* and hybrid tribunals. Some approaches advocate the adoption of formal legal standards that can be applied equally across a diverse set of situations and cases. Others emphasize the need to reconcile the aspiration of equal application of the law with the practical challenges international courts face and with ICL's other goals, such as promoting peace and stability in societies devastated by war and civil strife. This Part describes several of these proposals. It then suggests an alternative way of addressing selectivity challenges based on insights gained from studies of procedural and distributive justice in national criminal justice systems.

### A. Approaches to Increasing the Legitimacy of Selection Decisions

Some commentators, joined by NGOs, maintain that no individual should escape accountability for grave crimes.<sup>170</sup> This position is grounded in the human rights norm of equality before the law.<sup>171</sup> It opposes impunity for international crimes and thus rejects the provision of amnesty to individuals who commit them. Although anchored in retributivist rationales, this approach also contains an instrumentalist dimension that predicates the establishment of future peace and stability on securing accountability for past atrocities. Aggressively pursuing the equal application of individual criminal responsibility could help international criminal tribunals resist pressures to avoid controversial prosecutions. At the same time, this categorical anti-impunity approach faces obstacles given the jurisdictional and practical constraints under which international criminal tribunals, and the ICC in particular, must operate. It thus faces significant barriers as a path to enhancing legitimacy and could potentially raise expectations beyond current levels of feasibility.

Another approach focuses less on outcomes and more on the process used to reach decisions. It relies on the notion, rooted in procedural justice theory, that legitimacy will flow from the fairness

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170. Greenawalt, *supra* note 125, at 592 (summarizing positions of several human rights groups).

171. See Madeline Morris, *Few Reservations about Reservations*, 1 CHI. J. INT'L L. 341, 344 (2000).

of the procedures used to select situations and cases for prosecution. Allison Marston Danner, for example, has argued that prosecutorial decisions will be viewed as more legitimate if they result from a principled and transparent decision making process.<sup>172</sup> Adopting publicly promulgated guidelines and methods for selecting situations and cases, she suggests, can help increase fairness and shield prosecutors from accusations of politicized prosecutions.<sup>173</sup> The ICC Prosecutor has drawn on this approach, seeking to channel prosecutorial discretion by articulating overarching standards of independence, impartiality, and objectivity for the selection of both situations and cases.<sup>174</sup> Such standards can contribute to a perception, if not a reality, of bounded discretion and heightened transparency.

Process-based approaches that rely on the articulation and application of generalized standards nonetheless have limitations. These standards do not resolve the difficult challenges in determining which situations or cases the ICC should pursue from among the various ones that satisfy the gravity threshold. The Rome Statute's gravity requirement is intended to help the ICC fulfill its goal of prosecuting "the most serious crimes of concern to the international community as a whole."<sup>175</sup> But the Rome Statute's lack of specificity about the meaning of gravity reflects a wider debate among the various participants who negotiated the Rome Statute over which situations and cases the Court should prioritize and when prosecution is appropriate.<sup>176</sup> Disagreement over interpretation of the gravity requirement arose in the ICC's first prosecution. In *Lubanga*, the Pre-Trial Chamber stated that the bar should be set at widespread or systematic crimes and senior-level defendants who bear the greatest responsibility for those crimes,<sup>177</sup> but the Appeals Chamber rejected setting such a high bar.<sup>178</sup> In a separate opinion, one judge explained that the gravity requirement should exclude only insignificant

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172. Danner, *supra* note 5, at 536–37.

173. *Id.* at 537.

174. Office of the Prosecutor [OTP], ICC, Policy Paper on Preliminary Examinations, para. 25 (Nov. 2013), [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf) [<https://perma.cc/KW65-LEHZ>] (archived Oct. 6, 2017); OTP, Policy Paper on Case Selection and Prioritisation, para 16 (Sept. 15, 2016), [https://www.icc-cpi.int/itemsDocuments/20160915\\_OTP-Policy\\_Case-Selection\\_Eng.pdf](https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf) [<https://perma.cc/X53X-UALW>] (archived Oct. 6, 2017).

175. Rome Statute, *supra* note 4, Preamble.

176. *Choosing to Prosecute*, *supra* note 66, at 283–84.

177. Prosecutor v. Lubanga, ICC-01/04-01/06, Pre-Trial Chamber I, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Mr. Thomas Lubanga Dyilo, Annex I, paras. 46, 50 (Feb. 24, 2006).

178. Situation in the Democratic Republic of the Congo, ICC-01/04-169, Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on Prosecutor's Application for Warrants of Arrest, Article 58," paras. 73–79 (July 13, 2006).

crimes.<sup>179</sup> The Appeals Chamber, however, did not clarify how the ICC should choose from among situations and cases that cross the minimum gravity threshold.

The plasticity of the factors articulated by the ICC Prosecutor to assess gravity—the scale, nature, manner of commission, and impact of crimes—can lead the Prosecutor to privilege some factors over others given the limited resources at her disposal.<sup>180</sup> The term “interests of justice,” which the ICC Prosecutor must consider in deciding whether to decline to undertake an investigation or bring charges for crimes that meet the gravity threshold,<sup>181</sup> is also ambiguous. It does not determine, for example, whether and to what extent the existence of other, noncriminal transitional justice mechanisms, such as truth and reconciliation commissions, might justify a decision not to investigate or prosecute grave international crimes.<sup>182</sup> Process-oriented approaches thus face significant hurdles not only because of the indeterminacy of the underlying criteria, but also because of the dilemmas commonly encountered in the transitional justice setting, where other priorities, such as maintaining peace and stability can, in some circumstances, weigh against prosecution.<sup>183</sup> The need to determine when a state is engaging in a good faith effort to investigate or prosecute international crimes under the Rome Statute’s complementarity framework injects an additional layer of uncertainty into the selection process.<sup>184</sup> At the same time, focusing on the uniform application of *ex ante* standards can create an unrealistic expectation that ICL violations will be treated equally if those standards are dutifully followed.

The ICC Prosecutor has rejected the need to address perceptions of unfairness in selection decisions. The Prosecutor is certainly correct that she should not, for example, seek to create “the appearance of parity within a situation between rival parties by selecting cases that would not otherwise meet the criteria” established by her office.<sup>185</sup> But refusing to allow perceptions of the need for parity to influence decisions where cases do not otherwise meet applicable selection criteria is not the same as allowing perceptions of parity to play some role when choosing from among

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179. *Id.* Separate and Partly Dissenting Opinion of Judge Georghios M. Pikis, paras. 39–41.

180. *Choosing to Prosecute*, *supra* note 66, at 295–96.

181. Rome Statute, *supra* note 4, art. 53(1)(c), (2)(c).

182. Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT’L L. 481, 498–502 (2003).

183. Greenawalt, *supra* note 125, at 653–54.

184. Rome Statute, *supra* note 4, art. 17.

185. OTP, Policy Paper on Case Selection and Prioritisation, *supra* note 174, at para. 20.

cases that do meet those criteria. A more candid assessment of the importance of perceptions of parity could help the ICC address the legitimacy deficit surrounding selection decisions, particularly given the significant resource constraints that effectively require the prosecution to forego pursuing cases that satisfy the Rome Statute's threshold jurisdictional and admissibility requirements.

Other commentators place less stock in the neutral application of legal standards and seek other means of enhancing the fairness and legitimacy of selection decisions. Some have argued, for example, that international criminal tribunals should abandon the aspiration of treating all international crimes the same, at least until those tribunals gain more enforcement power. Stephanos Bibas and William Burke-White argue, for example, that tribunals should instead focus on the most egregious offenses, as measured by such factors as the number of victims and quantum of harm and suffering inflicted.<sup>186</sup>

Yet, even assuming one could objectively identify a "worst" set of crimes from among a broader spectrum of ICL violations,<sup>187</sup> this focus could still produce asymmetric results in the selection of situations and cases. Concentrating on the "worst" crimes, for example, would not necessarily address the myriad of complaints regarding selection decisions, from more recent criticisms of the ICC's focus on Africa to longstanding concerns about victor's justice and the insulation of officials from the most powerful nations from international criminal responsibility. A continued focus on mass atrocities would instead likely maintain the ICC's current distributive trajectory on selection decisions since such atrocities are typically committed by weak or failed states, many of which are in Africa.<sup>188</sup> It also would limit the ICC's important role in developing and expressing nascent norms in areas where international criminal responsibility is less firmly established.

Others question not only the possibility, but also the desirability of an apolitical international criminal tribunal. As Alexander Greenawalt has argued, choices about whether, when, and whom to prosecute in societies undergoing transition after mass violence and social upheaval can have significant ramifications.<sup>189</sup> Even if prosecutors could advance the goals of independence and impartiality by applying objective legal criteria evenly across the board, such

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186. See Stephanos Bibas & William Whitney Burke-White, *Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L. J. 637, 681 (2010).

187. But see *Choosing to Prosecute*, *supra* note 66, at 288.

188. See Kevin Jon Heller, *Situational Gravity under the Rome Statute*, in FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 227 (Carsten Stahn & Larissa van den Herik eds., 2010).

189. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 93–94 (2005); Greenawalt, *supra* note 125, at 633.

policies would not necessarily further ICL's broader ends, including the promotion of peace and stability. The ICC Prosecutor, Greenawalt argues, should therefore generally defer to decisions by legitimate political actors at the national level as they seek to navigate the thicket of competing policy demands and trade-offs facing societies in transition.<sup>190</sup> ICC intervention, he explains, should instead focus on cases of ongoing and unambiguous ICL violations by high-level officials. Greenawalt offers a more nuanced view of the Rome Statute's complementarity regime, with the ICC Prosecutor generally adopting a less interventionist stance in societies undergoing transition. His approach could lead to selection decisions more attuned to local context and more closely aligned with the ICC's broader aims beyond imposing individual criminal responsibility on those who violate ICL. But it is unlikely to alter negative perceptions resulting from the distribution of situations and cases before the Court.

Other approaches emphasize the symbolic importance of prosecutions in addressing selectivity challenges in ICL. While they vary in certain respects, these approaches recognize the expressive value of prosecuting international crimes. Diane Orentlicher, for example, has described the utility of exemplary prosecutions. Even if most individuals suspected of international crimes cannot be prosecuted, she argues, targeted prosecutions of select individuals can help strengthen the duty to prosecute under ICL and reinforce the norm of accountability.<sup>191</sup>

A generalized notion of exemplary prosecutions alone, however, will not resolve underlying divisions over how a tribunal's scarce resources should be allocated or how a prosecutor should choose from among various situations and cases that meet the minimum level of severity. Margaret deGuzman has argued, therefore, that the ICC Prosecutor should instead focus her finite resources on articulating and expressing legal norms through illustrative prosecutions.<sup>192</sup> Such prosecutions would target particular offenses, such as attacks on peacekeepers, the use of child soldiers, or the destruction of cultural sites, to harness criminal law's potential to develop and entrench norms and values.<sup>193</sup> The ICC Prosecutor's recent decision to focus case selection more on historically under-prosecuted crimes, such as destruction of the environment, illegal exploitation of natural resources, and illegal dispossession of land, acknowledges the utility

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190. Greenawalt, *supra* note 125, at 660, 671–72.

191. Daniel F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L. J. 2537, 2598–99 (1991); see also RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 46–51 (2000) (describing the use of limited prosecutions and limited punishments in the transitional justice context).

192. *Choosing to Prosecute*, *supra* note 66, at 312.

193. *Id.* at 314.

of illustrative prosecutions.<sup>194</sup> This expressive approach thus prioritizes representative cases to strengthen both the impact and legitimacy of prosecutorial choices.

Reorienting the focus around the expression of norms through the prosecution of representative cases is particularly suited to international tribunals, such as the ICC, where the number of potential prosecutions greatly exceeds capacity and where dependence on state cooperation remains a persistent challenge. It also offers an opportunity to build support among diverse constituencies if those norms are identified through a collaborative and inclusive process that incorporates local actors. Yet, this focus does not directly address the issues underlying the longstanding perception of selection bias or its causes. Prioritizing the expression of certain international criminal law norms may still result in the disproportionate prosecution of cases from a particular region, a focus on one party to a conflict even where crimes are committed by all sides, and the insulation of officials from powerful states and their allies from prosecution when they commit international crimes.

### B. *Incorporating Distributive Considerations into Selection Decisions*

As described above, the legitimacy of the ICC and other international tribunals depends on their fairness, both objective and perceived, and fairness has both procedural and substantive dimensions. One of the most difficult challenges for international tribunals is overcoming the perceived unfairness of selection decisions. International tribunals could better address this challenge by focusing more on distributive considerations in the selection of situations and cases, a path the ICC has thus far resisted.<sup>195</sup> In particular, the ICC and other international criminal tribunals should seek to express the principle that no person is above the law—both across and within situations—through their decisions to investigate and, where the evidence supports it, to prosecute. Even modest steps in this direction could contribute to an alternative narrative about selection patterns and help counteract the perception that international criminal justice merely tracks the preferences of the strong and their supporters.<sup>196</sup>

There are several possible paths for incorporating distributive considerations in the selection of situations and cases. At the ICC, the Office of the Prosecutor could make communicating the principle that

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194. OTP, Policy Paper on Case Selection and Prioritisation, *supra* note 174, at para. 41.

195. OTP, Policy Paper on Preliminary Examinations, *supra* note 174, at paras. 28–29.

196. Mirjan Damaska, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 361 (2008) (describing criticism and concern).

no one is above the law an express goal in order to expand the ICC's geographic focus and anchor a commitment to pursuing international crimes committed by major powers, to the extent they fall within its jurisdiction. The Prosecutor could also prioritize her investigation of state actors to overcome past patterns of sheltering state forces and better ensure the prosecution of all sides of a conflict where warranted by the evidence. This prioritization would be consistent with the Rome Statute's gravity requirement since state involvement represents "the archetype of international crime and paradigm of impunity."<sup>197</sup> It also would be consistent with the ICC's goal of securing "lasting respect for the enforcement of international justice,"<sup>198</sup> since achievement of those ends depends on the ICC's maintaining support among its various constituencies.

The ICC Prosecutor could additionally consider distributive goals within the "interests of justice" analysis under the Rome Statute. Specifically, the Rome Statute provides that the Prosecutor may decline to initiate an investigation or pursue a prosecution where she concludes it would not serve "the interests of justice."<sup>199</sup> This provision is designed to give the Prosecutor discretion not to proceed in exceptional cases that warrant departure from the Rome Statute's overarching anti-impunity norm.<sup>200</sup> The goal of communicating the principle of equal application of law, long regarded as a cornerstone of the rule of law,<sup>201</sup> could thus provide a reason for the ICC Prosecutor not to exercise this discretion and instead proceed with an investigation or prosecution that satisfies the statutory requirements of gravity and complementarity and falls within the ICC's jurisdiction. Also, the Pre-Trial Chamber could consider the importance of expressing this principle in its review of a decision by the ICC Prosecutor not to open a formal investigation or to pursue a prosecution based on the interests of justice.<sup>202</sup> Statutes for future international and hybrid tribunals could be drafted in a way that not only exposes all sides of the relevant conflict to potential prosecution for the commission of international crimes, but also makes expressing the even-handed application of individual criminal responsibility an explicit aim.

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197. Kiyani, *supra* note 50, at 956.

198. Rome Statute, *supra* note 4, Preamble; *Gravity*, *supra* note 110, at 1464.

199. Rome Statute, *supra* note 4, art. 53(1)(c) (investigation); *id.* art. 53(2)(c) (prosecution).

200. Robinson, *supra* note 182, at 481, 483.

201. BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 63–64 (2004); Mark Ellis, *Toward a Common Ground Definition of the Rule of Law Incorporating Substantive Principles of Justice*, 72 UNIV. PITT. L. REV. 191, 193 (2010) (citing A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1885)).

202. Rome Statute, *supra* note 4, art. 53(3)(a).

Additionally, ICC prosecutors and investigators could seek to identify opportunities to lessen their reliance on state cooperation for conducting investigations. The increased ability of individuals to document international crimes and upload them to the Internet by means of smart phones with cameras and connectivity, for example, could help decrease the dependence of ICC investigators on state authorities for gathering evidence of international crimes.<sup>203</sup> While the ICC will still need to rely heavily on states to arrest suspects and bring them to The Hague, and while the Court will have to ensure the authenticity and security of video evidence, such technological advances could provide the ICC with greater independence from state authorities in gathering evidence and selecting cases.

Limited resources, structural constraints, and practical challenges on the ground will continue to hinder the equal application of international criminal responsibility. Moreover, equal application of law itself resists reduction to a quota or other easily quantifiable form. Yet the ICC and other international criminal tribunals could soften attacks on the fairness of their selection decisions and reinforce their legitimacy by drawing on the power of expressive prosecutions to communicate the norm that no person is above the law, much as the ICC has sought to express other norms through the prosecution of certain crimes, such as the use of child soldiers and the destruction of cultural property.

Placing more emphasis on the equal application of law could, to be sure, potentially prompt a tribunal, such as the ICC, to take action that has the unintended effect of weakening its credibility. The ICC is understandably hesitant to alienate countries on which it depends for support in crucial areas such as collecting evidence, arresting suspects, and securing witness cooperation.<sup>204</sup> Prosecutions that have major power support, such as those based on Security Council referrals, tend to stand on firmer ground.<sup>205</sup> Further, unsuccessful efforts to pursue high-level officials from non-cooperative states could backfire, causing the ICC to look weak and ineffective. The ICC's inability to secure the arrest of indicted Sudanese president Omar al-Bashir and its failed prosecution of senior Kenyan officials, including current president Uhuru Kenyatta, highlight this risk, although

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203. Alex Whiting, *The ICC's New Libya Case: Extraterritorial Evidence for an Extraterritorial Court*, JUST SECURITY Blog (August 23, 2017), [www.justsecurity.org/44383/iccs-libya-case-extraterritorial-evidence-extraterritorial-court/](http://www.justsecurity.org/44383/iccs-libya-case-extraterritorial-evidence-extraterritorial-court/) (discussing the ICC's heavy reliance on video evidence in issuing an arrest warrant for Mahmoud Mustafa Busayf Al-Werfalli, a militia leader in Libya, for war crimes and noting the use of video evidence for investigations of crimes committed in Syria).

204. BOSCO, *supra* note 47, at 20.

205. Alexander K. A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT'L L. 107, 154–56 (2009).

negative perceptions stemming from the ICC's disproportionate focus on Africa help explain the intensity of the backlash against the ICC in both situations.

While valid, these concerns could be mitigated if prosecutions designed to express the principle of equal application of law remained focused primarily on morally unambiguous crimes. In seeking to widen its geographic focus and, in particular, to confront international crimes committed by more powerful countries, the ICC Prosecutor could concentrate on instances where the legal norms are articulated in absolute terms, such as the intentional killing of civilians or the torture and other mistreatment of prisoners.<sup>206</sup> The alleged torture and abuse of detainees by UK forces in Iraq and by US forces in Afghanistan fall within this category. Non-prosecution of such conduct not only erodes these norms, but also sends the broader message that more powerful countries are above the law, thus tainting the ICC's goal of ending impunity for grave crimes. An international prosecutor, by contrast, might proceed more cautiously where the norm is less clearly defined or more challenging to apply in practice because it is articulated as a general standard whose application requires a balance of factors, such as the use of force that unintentionally causes disproportionate civilian harm and death (as opposed to the intentional killing of civilians, which is necessarily a war crime).<sup>207</sup>

The ICC Prosecutor initially declined to open an investigation into UK forces' alleged mistreatment of prisoners in Iraq based on an assessment of relative gravity, which focused on the comparatively low number of victims there when measured against the number of victims in mass atrocities committed elsewhere.<sup>208</sup> The Prosecutor has since reopened a preliminary examination into possible crimes committed by UK forces in Iraq and has been conducting a preliminary examination in Afghanistan, including into possible crimes committed by US forces.<sup>209</sup> A report on ICC investigative activities issued just prior to the release of the executive summary of the U.S. Senate Intelligence Committee's report on CIA torture in

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206. See generally Blum, *supra* note 162, at 186 (characterizing these norms as absolute).

207. See Luban, *supra* note 96, at 23; see also Blum, *supra* note 162, at 186–87. One commentator maintains that the ICC Prosecutor should articulate a policy stating that she will not normally investigate allegations of collateral damage. Galvin, *supra* note 46, at 90–91.

208. Letter from Luis Moreno-Ocampo, Chief Prosecutor of the ICC (Feb. 9, 2006), [https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](https://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf) [<https://perma.cc/U3XA-8UV8>] (archived Oct. 6, 2017).

209. Jonathon Beale, *ICC to investigate claims of abuse by UK forces in Iraq*, BBC NEWS (May 13, 2014), <http://www.bbc.com/news/uk-27397695> [<https://perma.cc/NGZ7-VHCP>] (archived Oct. 6, 2017).

December 2014 indicated that American officials were potential targets.<sup>210</sup> The ICC Prosecutor recently announced that there was a reasonable basis to conclude that US soldiers and CIA agents had committed war crimes in Afghanistan, including torture, suggesting the likelihood that she would open a full investigation.<sup>211</sup> Neither the United Kingdom nor the United States has demonstrated a genuine willingness to prosecute the alleged international crimes.<sup>212</sup>

Despite the relatively low number of victims compared to mass atrocities, prosecuting torture and forced disappearance committed by powerful states may be justified under a relative gravity assessment given the threat to bedrock international norms and the alarm such misconduct causes in the international community. This is particularly true where, as in the case of the US secret detention and torture program, the offending conduct emanated from the highest levels of the government.<sup>213</sup> Both situations present an opportunity for the ICC to show that it will pursue allegations of state-sponsored torture even when committed by the most powerful countries. Further action by the ICC Prosecutor could strengthen the ICC's overall reputation and legitimacy even if such action triggered strong opposition and ultimately proved unsuccessful.<sup>214</sup>

The ICC's authorization for the Prosecutor to open a *proprio motu* investigation into possible war crimes committed in the Republic of Georgia represents another potentially significant development. The ICC Prosecutor is investigating the ethnic cleansing of Georgians from the breakaway region of South Ossetia as

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210. OFFICE OF THE PROSECUTOR, INT'L CRIMINAL COURT, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 22, para. 94 (2014), <https://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf> [<https://perma.cc/S39N-DL3U>] (archived Oct. 15, 2017).

211. OTP, Report on Preliminary Examination Activities 47 (Nov. 16, 2016), [https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE\\_ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf) [<https://perma.cc/S4ZG-QUBQ>] (archived Oct. 11, 2017); Somini Sengupta & Marlise Simons, *U.S. Forces May Have Committed War Crimes in Afghanistan, Prosecutor Says*, N.Y. TIMES (Nov. 14, 2016), <https://www.nytimes.com/2016/11/15/world/asia/united-states-torture-afghanistan-international-criminal-court.html> [<https://perma.cc/Q5BX-F5AD>] (archived Oct. 6, 2017).

212. Aoife Duffy, *Searching for Accountability: British-Controlled Detention in Southeast Iraq, 2003–2008*, 10 INT'L J. TRANSNAT'L JUSTICE 410, 429–30 (2016) (describing the unwillingness of the United Kingdom to prosecute abuses of detainees by UK forces in Iraq and to penetrate the culture of impunity surrounding security force actions there); Sudha Setty, *Obama's National Security Exceptionalism*, 91 CHI-KENT L. REV. 91, 97 (2015) (noting the failure of the United States to prosecute serious allegations of US torture).

213. Heller, *supra* note 188, at 244.

214. Mark Kersten, *Whatever Happens, the ICC's Investigation into US Torture in Afghanistan is a Win for the Court*, JUSTICE IN CONFLICT (Nov. 17, 2016), <https://justiceinconflict.org/2016/11/17/whatever-happens-the-iccs-investigation-into-us-torture-in-afghanistan-is-a-win-for-the-court/> [<https://perma.cc/H9LF-2DZ8>] (archived Oct. 6, 2017).

well as direct attacks on peacekeepers.<sup>215</sup> The investigation into crimes committed during the conflict in and around South Ossetia, which involved Georgia, Russia, and pro-Russian separatists, marks the ICC's first investigation into a situation outside the African continent.<sup>216</sup> It also represents the first instance in which ICC prosecutors are conducting an official investigation into the alleged crimes of a leading world power.<sup>217</sup>

Negative perceptions about the ICC's fairness and legitimacy will persist if the ICC fails to address the distributive dimensions of its selection decisions. The ICC necessarily remains constrained by limits on its jurisdiction under the Rome Statute. The ICC Prosecutor also cannot realistically ignore the larger geopolitical context in which the Court operates. But the Prosecutor can help counteract these perceptions by seeking to express the norm that no individual is above the law through her choice of investigations and prosecutions. Pursuing this goal not only would reinforce the principle of equal application of law, but also could prove a more pragmatic approach than it might first seem by building broader support for the ICC and strengthening the ICC's reputation for fairness.

## VI. CONCLUSION

The selection of situations and cases will likely remain one of the most vexing challenges facing the ICC and other international tribunals. Past experience has shown not only how difficult this challenge is to overcome, but also how important it is to a tribunal's fairness and legitimacy. One important lesson from studies of national criminal justice systems is that fairness has both procedural and distributive dimensions. International criminal tribunals have made significant strides in incorporating elements of procedural justice through the development of safeguards that protect the fair trial rights of those accused of committing international crimes. But they continue to lag on the distributive side and have failed to entrench the principle that international criminal responsibility applies equally to all individuals. This Article suggests that international courts and the ICC in particular could benefit from

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215. *ICC authorizes Russia-Georgia war crimes investigation*, BBC NEWS (Jan. 17, 2016), <http://www.bbc.com/news/world-europe-35422437> [<https://perma.cc/AD6T-87FP>] (archived Oct. 6, 2017).

216. Mark Kersten, *Why is the International Criminal Court stepping out of Africa and into Georgia?*, WASH. POST (Feb. 6, 2016), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/05/why-is-the-international-criminal-court-stepping-out-of-africa-and-into-georgia/?utm\\_term=.2dc3e669220e](https://www.washingtonpost.com/news/monkey-cage/wp/2016/02/05/why-is-the-international-criminal-court-stepping-out-of-africa-and-into-georgia/?utm_term=.2dc3e669220e) [<https://perma.cc/98QJ-5U8J>] (archived Oct. 6, 2017).

217. *Id.*

greater attention to distributive considerations in selecting from among the numerous international crimes that could potentially be pursued with the limited resources available. A more concerted effort to use selection decisions to express the norm that international criminal responsibility applies to all individuals offers one means of achieving this result.

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