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Choosing to Prosecute: Expressive Selection at the International Criminal Court

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CHOOSING TO PROSECUTE: EXPRESSIVE SELECTION AT THE INTERNATIONAL CRIMINAL COURT

*Margaret M. deGuzman**

INTRODUCTION.....	265
I. SELECTIVITY AS A THREAT TO THE ICC’S LEGITIMACY.....	271
A. <i>The Critics</i>	271
B. <i>Mechanics of ICC Selection Decisions</i>	274
C. <i>ICC Legitimacy Requires Increased Clarity of Community, Goals, and Priorities</i>	276
1. What Is the ICC’s Constitutive Community?	278
2. Gravity as a Stand-In for Goals and Priorities.....	281
II. GOOD PROCESS IS NOT ENOUGH	289
A. <i>Independence</i>	291
B. <i>Impartiality</i>	293
C. <i>Objectivity</i>	296
D. <i>Transparency</i>	298
III. THEORIZING SELECTION DECISIONS.....	299
A. <i>Failure of Dominant Theories to Justify Selection Decisions</i>	301
1. Retribution.....	301
2. Deterrence	306
3. Restorative Justice	309
B. <i>An Expressive Theory</i>	312
CONCLUSION	319

INTRODUCTION

The International Criminal Court (ICC), an institution in its infancy, has had occasion to make only a relatively small number of decisions about which defendants and which crimes to prosecute. But virtually every choice it has made has been attacked: the first defendant, Thomas Lubanga, was not senior enough and the crimes with which he was charged—war crimes involving the use of child soldiers—were not serious enough; the Court

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should have investigated British soldiers for war crimes committed in Iraq; the ICC should not be prosecuting only rebel perpetrators in Uganda and the Democratic Republic of Congo; the Court's focus on situations in Africa is inappropriate; the Court has focused insufficient attention on gender crimes; and so on.¹ Much of the debate about such selection decisions centers on whether the ICC, and particularly its prosecutor, are improperly motivated by political considerations. Critics charge that selection decisions are inappropriately political,² while the Court's current prosecutor,³ Luis Moreno-Ocampo, counters that his decisions are apolitical—that he is simply implementing the law enunciated in the ICC's statute.⁴ Most recently, some authors have suggested that the prosecutor's role is inevitably political and should be

1. Such criticisms are articulated in political fora, news media, and academic literature. See *infra* Part II.A.

2. See, e.g., Julie Flint & Alex de Waal, *Case Closed: A Prosecutor Without Borders*, WORLD AFF., Spring 2009, available at <http://www.worldaffairsjournal.org/articles/2009-Spring/full-DeWaalFlint.html> (expressing worry among Africans that the ICC “may be turning criminal prosecution into a selective political instrument”); 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, 48–80 (2005) (assessing the potential risk of NGOs taking advantage of the ICC's independent prosecutor to launch politically motivated investigations and prosecutions into U.S. military activity); Matthew Happold, *The International Criminal Court and the Lord's Resistance Army*, 8 MELB. J. INT'L L. 159, 170–73 (2007) (explaining criticism that the ICC was used as political weapon of the Ugandan government); Charles Jalloh, *Regionalizing International Criminal Law?*, 9 INT'L CRIM. L. REV. 445, 462–65 (2009) (discussing criticism by African leaders that the ICC is political); William A. Schabas, *Victor's Justice: Selecting “Situations” at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 549 (2010) (arguing ICC case selection decisions are inherently political); David Palister, *Human Rights: Growing Clamour to Remove the Hague Prosecutor Who Wants Sudanese President Arrested*, THE GUARDIAN (London), Aug. 18, 2008, <http://www.guardian.co.uk/world/2008/aug/18/humanrights.sudan> (criticizing many of the prosecutor's decisions as one-sided and political).

3. Moreno-Ocampo's term as ICC prosecutor ends in June 2012 and he cannot be re-elected. Joshua Rozenberg, *Prosecutor Luis Moreno-Ocampo Is the Best Asset of Those Opposed to the International Criminal Court*, THE GUARDIAN (London), Apr. 21, 2011, <http://www.guardian.co.uk/law/2011/apr/21/moreno-ocampo-international-criminal-court>.

4. For example, in a keynote address at the Council on Foreign Relations, Moreno-Ocampo stated that his “duty is to apply the law without political considerations. Other actors have to adjust to the law.” Luis Moreno-Ocampo, *Prosecutor for the Int'l Criminal Court, Keynote Address at the Council on Foreign Relations in Washington, D.C.*, 6 (Feb. 4, 2010). Prosecutors of other tribunals have made similar statements. For example, International Criminal Tribunal for the Former Yugoslavia prosecutor Louise Arbour espoused the view that politics have no place in selection decisions in response to criticisms that the indictment of Slobodan Milošević would impair efforts to resolve the Kosovo crisis. *Arbour, Milosevic and “Yesterday's Men,”* INST. FOR WAR & PEACE REPORTING, June 5, 1999, <http://iwpr.net/report-news/arbour-milosevic-and-quotyesterdays-menquot>. Cf. James A. Goldston, *More Candour About Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court*, 8 J. INT'L CRIM. JUST. 383, 387 (2010) (observing that supporters of the ICC respond to criticism with “a pristine notion of ‘law in a vacuum’ that, at its extreme, stretches credibility”).

acknowledged as such.⁵ The participants in this debate rarely define what they mean by “political,” nor will this Article attempt such definition. Instead, this Article seeks to reframe the debate about the ICC’s selection decisions by shifting from the current focus on the boundaries between “legal” and “political” criteria to a constructive dialogue about the most appropriate goals and priorities for the Court. The ICC’s core selectivity problem is that the Court lacks sufficiently clear goals and priorities to justify its decisions. States created the ICC to adjudicate “the most serious crimes of concern to the international community as a whole,”⁶ but they gave it a budget that enables only a handful of prosecutions per year.⁷ Persons charged with implementing the Court’s broad mandate—its prosecutor and judges—must thus select a few cases from among thousands.⁸ Yet the international community has provided the Court virtually no guidance about what goals it should seek to achieve through the cases it selects, beyond the vague mandate to strive to end impunity for “the most serious crimes.”⁹

This lack of clearly defined goals and priorities poses a serious challenge to the ICC’s legitimacy. If the ICC is to prosper, it must build its

5. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 604 (7th ed. 2008) (“Political considerations, power, and patronage will continue to determine who is to be tried for international crimes and who [is] not.”); Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT’L CRIM. L. REV. 93, 116 (2002) (noting that political considerations resulted in creation of only two ad hoc tribunals when many other situations justified creation of such tribunals); Matthew R. Brubacher, *Prosecutorial Discretion Within the International Criminal Court*, 2 J. INT’L CRIM. JUST. 71, 74 (2004) (discussing interrelationship of law and politics at the ICC); Goldston, *supra* note 4; A.K.A. Greenawalt, *Justice Without Politics?: Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT’L L. & POL. 583, 586–88 (2007) (asserting that the prosecutor has inherently political functions and the current structure of the ICC makes it impossible to have an apolitical prosecutor); Sarah M. H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT’L L. 941, 946 (2010) (arguing that the ICC is political in that it draws distinctions between friends and enemies of the international community); 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, 50 (2007) (“The subset selected for prosecution has historically been, and will inevitably remain, contingent on discretionary political decisions made by international rather than local officials.”).

6. Rome Statute of the International Criminal Court pmbl., *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

7. The Court’s current prosecutor, Luis Moreno-Ocampo, projects that the Court will adjudicate a minimum of three cases between 2009 and 2012. INT’L CRIMINAL COURT, OFFICE OF THE PROSECUTOR, PROSECUTORIAL STRATEGY 2009–2012, at 7 (2010) [hereinafter PROSECUTORIAL STRATEGY 2009–2012], available at <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf>.

8. Current levels of armed conflict and repression mean that war crimes and crimes against humanity are being committed in numerous situations around the world. HUMAN SEC. REPORT PROJECT, THE CHANGING FACE OF GLOBAL VIOLENCE 24–25, fig. 1.2 (2005), available at <http://www.hsrgroup.org/docs/Publications/HSR2005/2005HumanSecurityReport-Part1-ChangingFaceOfViolence.pdf>.

9. Rome Statute, *supra* note 6, pmbl. (“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished . . .”).

legitimacy among relevant audiences—states, nongovernmental organizations (NGOs), affected communities, and the global community. Legitimacy is a complex, multidimensional concept.¹⁰ I use the term herein to refer to the perception among relevant audiences that the ICC's actions are worthy of respect.¹¹ Such legitimacy depends to a significant degree on whether such audiences perceive the Court—primarily the prosecutor but also the judges¹²—as selecting appropriate crimes and defendants for prosecution. If important constituencies view the Court as making the wrong choices, they are likely to withdraw their support from the Court and possibly even seek its destruction. State actors are a particularly important legitimacy audience for the ICC—without their support the Court would have no funding, no defendants to prosecute, and no evidence with which to conduct prosecutions. The support of NGOs is also crucial to the Court's work, which relies heavily on the input of NGO networks for its investigations.¹³ Indeed, the globalization of communications increasingly means that an institution's legitimacy depends on the opinions of ordinary citizens around the world. All of these audiences will assess the Court's legitimacy in significant degree according to their evaluations of its selection decisions.

Evaluations of selection decisions are much more important to the ICC's legitimacy than to that of most national criminal law systems. In national systems, selectivity—discretionary decisions not to prosecute even though prosecution appears warranted¹⁴—operates largely at the margins.

10. Hilary Charlesworth, *Conclusion: The Legitimacies of International Law*, in *FAULT LINES OF INTERNATIONAL LEGITIMACY* 389, 396 (Hilary Charlesworth & Jean-Marc Coicaud eds., 2010).

11. This sociological approach to legitimacy is usually attributed to Max Weber. MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 325 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1947) (arguing belief in legitimacy is normally one element that influences obedience). In prior work I have explored other aspects of the ICC's legitimacy, including those associated with legal factors and moral principles. See Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 *FORDHAM INT'L L.J.* 1400, 1436–37 (2009) (citing Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 *HARV. L. REV.* 1787, 1789–97 (2005)). My use of “legitimacy” here is closely tied to the concept of “authority,” which refers to the justified use of power. See Bruce Cronin & Ian Hurd, *Introduction*, *THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY* 3, 6 (Bruce Cronin & Ian Hurd eds., 2008).

12. As elaborated below, *infra* Part I.B, the prosecutor has significant discretion in making selection decisions but the Court's judges also play an important role in some cases. For that reason, this Article, unlike some others addressing the topic, refers to selection decisions as decisions of the Court rather than merely of the prosecutor.

13. See, e.g., Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 *VA. J. INT'L L.* 107, 146 (2009) (describing the OTP's reliance on public statements from NGOs to support the assertion that withdrawal of the Uganda arrest warrants would be inappropriate). NGOs have also been essential in encouraging states to ratify the Rome Statute of the ICC and to adopt implementing domestic legislation. Jalloh, *supra* note 2, at 450–51.

14. ROBERT CRYER, *PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME* 192 (2005) (quoting KENNETH KULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 163 (1969)).

Prosecutors are expected to prosecute the vast majority of serious cases; and, on the rare occasions when a prosecutor's decision whether or not to prosecute a case is controversial, such debates are generally limited to the particular case. Given the massive numbers of cases national courts prosecute, only very exceptionally will a selection decision spark challenges to the legitimacy of the entire criminal justice system. Moreover, nationally, constituencies can usually agree on the result—prosecution and punishment—even if they disagree about the justifying goals, such as retribution or deterrence. In contrast, since the ICC is limited to prosecuting a handful of cases out of thousands of potential cases, each selection attracts substantial attention. Each decision expresses a statement about how the Court views its role in the world, with which relevant audiences may agree or disagree. As such, the ICC's inability to justify its selection decisions by reference to a coherent theory of its goals and priorities undermines its efforts to build legitimacy.

In the absence of a clear understanding of the ICC's goals and priorities, the Court's current prosecutor has relied largely on two strategies to justify his selection decisions: (1) he has appealed to the gravity of the crimes selected; and (2) he has sought to portray his decisions as reached impartially, objectively, independently, and transparently.¹⁵ This Article will demonstrate that these strategies cannot succeed in their goal of enhancing the ICC's legitimacy. The concept of gravity—that certain crimes are so serious as to merit international adjudication—was instrumental in motivating states to establish the ICC. Nonetheless, there is little agreement even among the Court's supporters about what makes crimes grave enough for international attention, and even less about which crimes are the most deserving of ICC resources.¹⁶ Nor can principles such as impartiality and objectivity effectively constrain the prosecutor's discretion in the absence of coherent underlying goals and priorities. Rather, to enhance the ICC's legitimacy, it will be necessary to develop such goals and priorities in a manner that reflects the values of the ICC's constitutive communities.

In addition to exposing this weakness in the ICC's foundation, this Article aspires to point the way toward a coherent theoretical basis for ICC selection decisions that has the potential to enhance the Court's legitimacy. I argue that the traditional justifications for criminal law—deterrence and retribution—although they help to justify the ICC's work, do not provide an adequate basis for selection decisions. The ICC's meager resources mean

15. See generally OFFICE OF THE PROSECUTOR [OTP], ICC, DRAFT POLICY PAPER ON PRELIMINARY EXAMINATIONS 6–8, 13 (2010), <http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP-Draftpolicypaperonpreliminaryexaminations04101.pdf> [hereinafter DRAFT POLICY PAPER ON PRELIMINARY EXAMINATIONS] (discussing criteria behind the OTP's preliminary examination decisions); ICC-OTP, CRITERIA FOR SELECTION OF SITUATIONS AND CASES 1–7 (2006) (unpublished policy paper) (on file with author) [hereinafter DRAFT POLICY PAPER ON CRITERIA FOR SELECTION] (enumerating specific criteria for selection decisions).

16. See discussion *infra* Part I.C.

that it can have only a limited impact in each of these areas. Moreover, neither of these theories provides an adequate basis for an ordinal ranking of potential cases. The relative culpability of all potential defendants worldwide is impracticable, if not impossible, to measure. Nor is there any basis to determine which crimes are more likely than others to be deterred by international prosecution. In fact, even assuming international criminal law has a deterrent effect—a highly contested proposition—there is good reason to doubt whether selection decisions can influence that effect. More recent theories of restorative justice, which urge a greater focus on rebuilding relationships, also provide a partial justification for the work of the ICC, but do not provide an adequate basis for the Court's selection decisions. The Court simply lacks the resources to make any significant progress toward such locally oriented goals.¹⁷

Instead, as several scholars have suggested, the ICC's focus should be on expressing global norms.¹⁸ I move the discussion of the Court's expressive role forward by arguing that the Court's decisions about which situations and cases to select for prosecution should aim primarily to maximize the Court's expressive impact. Expressivism therefore is not just the best justification for the ICC's work; it also provides the most appropriate theoretical basis for the Court's resource allocation decisions. While the ICC can make only a very small impact in terms of such goals as retribution and deterrence, the Court can effectively promote global norms with a limited number of illustrative prosecutions.

The expressive prescription raises questions about what global norms the ICC should seek to express and in what order of priority—questions to which there are no clear answers, just as there is no international consensus about the goals of the Court more broadly. Nonetheless, I argue that by focusing explicitly on an expressive agenda, ICC selection decision makers can stimulate a dialogic process through which norms are expressed, feedback is received, and, ideally, consensus builds over time.

The argument proceeds in three parts. First, I explain why selectivity presents a serious threat to the ICC's legitimacy and, in particular, why it is more problematic for an international system than for national systems. I further elucidate the role that the concept of gravity played in enabling the international community to establish a highly selective criminal law regime without a defined mandate. The next Part critiques the primary approaches

17. While the specifics of restorative justice are still being debated, it is generally understood that it refers to a system where victims and offenders work together to remedy the damage done by the offense. The process is seen as an alternative to, or as an additional, separate process from, criminal prosecution. See *infra* Part III.A.3.

18. See, e.g., MARK A. DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 173–76 (2007); Amann, *supra* note 5, at 95; Mirjan Damaska, *What Is the Point of International Criminal Justice?*, 83 CHI.-KENT, L. REV. 329, 345 (2008); David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 569, 576 (Samantha Besson & John Tasioulas eds., 2010); Sloane, *supra* note 5, at 44.

that the prosecutor and commentators have taken to address the problem that selectivity poses to the ICC's legitimacy, including attempts to rely on objectivity, independence, impartiality, and transparency. The final Part proposes an expressive theory for selection decisions at the ICC.

I. SELECTIVITY AS A THREAT TO THE ICC'S LEGITIMACY

A. *The Critics*

No aspect of the ICC's work has been more controversial to date than its decisions about which situations and cases to prosecute.¹⁹ Every selection decision the Court makes is scrutinized, and many have given rise to strong criticisms. Such expressions of disapproval have come from each of the ICC's primary evaluative audiences—states, NGOs, communities most affected by the ICC's work, academics, and the global community generally. State actors have opposed vociferously some of the ICC's decisions about whether to open investigations. In particular, leaders of African states, who had formed one of the most supportive constituencies of the ICC, have begun to object to the ICC's exclusive focus on prosecuting African defendants.²⁰ African leaders have expressed particular dismay at the ICC's decision to issue an arrest warrant for Sudan's president, Omar al-Bashir.²¹ In 2009, in the wake of the Bashir indictment, the African Union adopted a resolution formally condemning the action and urging states not to cooperate

19. The terms "situation" and "case" are terms of art at the ICC. A "situation" refers to a geographic and sometimes temporal space where crimes within the Court's jurisdiction are alleged to have been committed. A "case" refers to one or more defendants and one or more crimes within the Court's jurisdiction that those defendants are alleged to have committed. See DRAFT POLICY PAPER ON CRITERIA FOR SELECTION, *supra* note 15, at 1; see also Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 50 (Mar. 31, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf> (defining "case" for the purposes of admissibility at the investigation stage as comprising the persons and crimes "likely to be the focus of the investigation").

20. See Flint & de Waal, *supra* note 2, at 36 (noting that "Africans were once the most passionate supporters of the ICC" but that Africans are increasingly skeptical because the OTP has not initiated cases outside Africa, and view warrants against Bashir and others as using prosecution as a "selective political instrument"); Jalloh, *supra* note 2, at 462–65 (discussing strong support for the ICC among African states as well as recent criticisms).

21. Flint & de Waal, *supra* note 2, at 36; see also Pallister, *supra* note 2 (noting the African Union quickly denounced the OTP's decision to seek arrest warrant of Bashir); ALEXIS ARIEFF, RHODA MARGESSON & MARJORIE ANN BROWNE, CONG. RESEARCH SERV., RL 34665, INTERNATIONAL CRIMINAL COURT CASES IN AFRICA: STATUS AND POLICY ISSUES 15 (2009), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA503976&Location=U2&doc=GetTRDoc.pdf> (noting governments of South Africa, Nigeria, Kenya, Rwanda, Tanzania, Benin, Egypt, Iran, Syria, Libya, Algeria, and Morocco "expressed concern" about the arrest warrant).

with the ICC.²² The following year, Kenyan political leaders reacted to the ICC decision to open an investigation into post-election violence in Kenya by passing a motion in parliament calling for withdrawal from the Court.²³

African audiences more broadly, including the communities most directly affected by the Court's work, have also been increasingly critical. In a 2009 article, Professor Charles Jalloh cited a "growing perception" that "Africans have become the sacrificial lambs in the ICC's struggle for global legitimation."²⁴ The Bashir arrest warrant has been controversial in Sudan, with some Sudanese worrying that it will do more harm than good in their country.²⁵ African and non-African audiences alike have questioned the legitimacy of the ICC prosecutor's decision to pursue rebel defendants but not those associated with the governments in power.²⁶ The prosecutor has also been challenged for his decision not to pursue nationals of powerful states, in particular, his refusal to investigate war crimes allegedly committed by British soldiers in Iraq.²⁷

22. Assembly of the African Union [AU], *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, ¶¶ 2–13, Assembly/AU/Dec.245(XIII) Rev.1 (July 3, 2009); see also Jalloh, *supra* note 2, at 482–85 (discussing African objections to the ICC's work specifically in the context of ICC jurisdiction over heads of state); *African Union Moves Aggressively to Shield Bashir from Prosecution*, SUDAN TRIBUNE, July 29, 2010, <http://www.sudantribune.com/African-Union-moves-aggressively,35786/>.

23. See Peter Opiyo, *Parliament Wants Kenya to Withdraw from ICC*, THE STANDARD (Kenya), Dec. 23, 2010, <http://www.standardmedia.co.ke/InsidePage.php?id=2000025340&cid=4&>.

24. Jalloh, *supra* note 2, at 463.

25. See Flint & de Waal, *supra* note 2, at 35 ("Many Sudanese fear that an arrest warrant could make things significantly worse, perhaps bringing about the very sorts of atrocities that the ICC is meant to deter."); see also ALEXIS ARIEFF ET AL., *supra* note 21, at 13 ("Other Sudanese reactions [to the decision to seek an arrest warrant of Bashir] have focused on the potential impact of an arrest warrant on ongoing peace processes, peacekeeping operations, and humanitarian relief . . ."); Alex de Waal & Gregory H. Stanton, *Should President Omar al-Bashir of Sudan Be Charged and Arrested by the International Criminal Court? An Exchange of Views*, 4 GENOCIDE STUD. & PREVENTION 329, 329 (2009) (asserting an arrest warrant is risky and could impede attempts at peace and democracy in Sudan with limited potential to further justice and human rights).

26. SCHABAS, *supra* note 2, at 191; see also Kevin Jon Heller, *Situational Gravity Under the Rome Statute*, in FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE (manuscript at 14–16) (Carsten Stahn & Larissa van den Herik eds., 2009), available at <http://ssrn.com/abstract=1270369>; Flint & de Waal, *supra* note 2, at 36 (expressing worry among Africans that the ICC "may be turning criminal prosecution into a selective political instrument"); Happold, *supra* note 2, at 170–72 (explaining criticism the ICC received for focusing investigations and prosecutions on rebels rather than state actors despite evidence that both parties committed atrocities).

27. See, e.g., William Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 742–43 (2008) (questioning the ICC prosecutor's decision not to investigate crimes of British soldiers in Iraq); Press Release, ICC Watch, *Why Won't the ICC Move Against Tony Blair on War Crimes?* (Feb. 4, 2010), <http://www.iccwatch.org/pdf/Press%20Release%2004Feb10.pdf> (discussing failure of the ICC to investigate alleged war crimes of British leaders and soldiers).

Members of the NGO community, even those committed to supporting the Court, have been critical of the prosecutor's selection decisions in important respects. In particular, some argue that the prosecutor was wrong to charge the Court's first defendant, Thomas Lubanga, only with recruiting child soldiers when there was evidence that he was also responsible for crimes of sexual violence and other serious war crimes.²⁸ NGOs have also objected to the Court's failure to pursue leaders and situations outside of Africa.²⁹

Not everyone has been dissatisfied with the ICC's choices. Many state actors, members of affected communities, commentators, and NGO activists have praised the ICC's decisions about what situations to investigate and what cases to prosecute.³⁰ Moreover, not all of these challenges to the appropriateness of the ICC's selection decisions will negatively impact upon the Court's legitimacy. When leaders with little personal legitimacy, such as Robert Mugabe of Zimbabwe and Muammar Gaddafi, attack the Court, their views are widely discounted.³¹ Nonetheless, in these early years of the

28. WOMEN'S INITIATIVES FOR GENDER JUSTICE, *Beni Declaration*, in MAKING A STATEMENT 17, 17 (June 2008), available at <http://www.iccwomen.org/publications/articles/docs/MakingAStatement-WebFinal.pdf> (reporting that various women's rights and human rights NGOs complain that the ICC improperly focused on the crime of conscripting child soldiers though the Union des Patriotes Congolais (UPC) had committed many other more serious crimes); see also Flint & de Waal, *supra* note 2, at 30 (noting shock felt by Congolese human rights groups and women's groups at learning of limited charges brought against Lubanga and belief that the OTP's choice of charges threatened to offend victims and undermine trust in the ICC and OTP); Justin Coleman, Comment, *Showing Its Teeth: The International Criminal Court Takes on Child Conscripting in the Congo, but Is Its Bark Worse than Its Bite?*, 26 PENN. ST. INT'L L. REV. 765, 780 (2007) (noting criticism by and concerns of Congolese people and foreign organizations regarding the OTP's failure to pursue prosecution of widespread incidents of rape, murder, and torture).

29. See, e.g., ICC Watch, *supra* note 27, at 1 (accusing the ICC of failing to prosecute Tony Blair despite alleged involvement in war crimes).

30. See, e.g., Maxwell Masava, *Nyong'o, Karua Praise ICC Hearing*, THE STAR (Kenya), Sept. 5, 2011, <http://www.the-star.co.ke/national/national/39062-nyongongo-karua-praise-icc-hearing> (reporting praise from some Kenyan political leaders for ICC action in the Kenya situation); *African Groups Praise ICC on Sudan but Ask for Fairness*, SUDAN TRIBUNE, July 17, 2008, <http://www.sudantribune.com/African-rights-groups-praise-ICC,27901> (reporting that African human rights organizations supported the ICC prosecutor's request for an arrest warrant of Sudan President Omar al-Bashir); Molly Hennessy-Fiske, *Libya: Rights Groups Praise Arrest-Warrant Request for Kadafi, Call for Action in Syria*, BABYLON & BEYOND (May 16, 2011, 9:42 AM), <http://latimesblogs.latimes.com/babylonbeyond/2011/05/libya-rights-groups-praise-icc-action-against-kadafi-call-for-more.html> (observing that human rights groups such as Amnesty International praised ICC action in Libya while calling for more consistent application elsewhere).

31. Compare *Mugabe Wantsr* [sic] *Bush, Blair Charged by International Criminal Court*, THE ZIMDIASPORA, Dec. 1, 2010, http://www.zimdiaspora.com/index.php?option=com_content&view=article&id=4562:mugabe-calls-for-bush-and-blair-to-be-brought-before-international-criminal-court&catid=38:travel-tips&Itemid=18 (describing Mugabe's claims that the ICC is hypocritical for not prosecuting Bush and Blair) with Opinion, *Mugabe Should Face Trial for Crimes Against Humanity*, N.Y. TIMES, Jan. 23, 2009, <http://www.nytimes.com/2009/01/23/opinion/23iht-edmugabe.1.19632133.html> (reporting recommendation of Physicians for Human Rights that Mugabe be investigated for crimes against humanity).

Court's existence, the mounting criticisms have given reason for concern. In light of the Court's high degree of selectivity, widespread criticisms of its selections or critiques from highly respected sources can result in broader challenges to the Court's legitimacy. To withstand such challenges, the ICC must be able to articulate its selection decisions in terms of goals and priorities that relevant audiences accept.

B. Mechanics of ICC Selection Decisions

Although many commentators treat the problem of selectivity at the ICC as entirely one of prosecutorial discretion, in fact, the ICC's judges also play a significant role in determining what situations and cases the Court investigates and prosecutes.³² An ICC investigation is triggered in one of three ways: the Security Council refers a situation under Chapter VII of the U.N. Charter; a state party to the Rome Statute of the ICC (Rome Statute) refers a situation; or the prosecutor initiates an investigation *proprio motu* on the basis of information from any source.³³ If the prosecutor acts *proprio motu*, he or she can only initiate an investigation after obtaining the permission of a three-judge Pre-Trial Chamber.³⁴ Furthermore, regardless of the triggering mechanism, the prosecutor must determine that there is a reasonable basis to proceed before starting an investigation—a determination over which the judges have powers of review.³⁵ The reasonable basis determination requires the prosecutor, and sometimes the judges, to decide whether: (1) national courts are already investigating or prosecuting in good faith; (2) the situation involves cases that are of sufficient gravity for ICC adjudication; and (3) investigation and prosecution “serve the interests of justice.”³⁶ The prosecutor makes initial determinations of these questions.³⁷ However, if the prosecutor declines to investigate a situation based on his or her evaluation of the interests of justice, the Pre-Trial Chamber judges have the

32. One reason the selectivity problem has been largely framed in terms of prosecutorial discretion is that the judges have yet to exercise most of their powers to shape the situations and cases brought before the Court. Moreover, the law related to selection decisions remains contested in several respects. For example, although Article 15 of the Rome Statute states that the prosecutor “may” initiate investigations based on evidence received from any source, some argue the prosecutor is *required* to initiate an investigation if a reasonable basis exists. Rome Statute, *supra* note 6, art. 15; Morten Bergsmo & Pieter Kruger, *Article 53: Initiation of an Investigation*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 701, 704 (Otto Triffterer ed., 1999). The current prosecutor has interpreted the statute to require him to seek approval for investigations whenever a reasonable basis exists. *See infra* notes 35–40 and accompanying text. Another dispute surrounds the circumstances under which judicial review of prosecutorial decisions not to proceed is permitted. *See infra* note 41.

33. Rome Statute, *supra* note 6, arts. 13–15.

34. *Id.* arts. 15, 39(2)(b)(iii).

35. *Id.* arts. 15, 53.

36. *Id.* art. 53.

37. *See id.*

power to invalidate the decision, requiring the prosecutor to investigate.³⁸ If the prosecutor decides not to proceed on one of the other grounds and the referring entity asks for review of the decision, the Pre-Trial Chamber judges may ask the prosecutor to reconsider the decision.³⁹ Moreover, if a state with jurisdiction notifies the prosecutor that it is investigating or prosecuting, the prosecutor must defer to the state unless the Pre-Trial Chamber judges authorize the investigation.⁴⁰

Once a situation is under investigation, decisions about which cases—crimes and defendants—to prosecute rest almost entirely with the prosecutor. However, if the prosecutor decides not to pursue any cases in a situation and bases that decision entirely on the interests of justice, the Pre-Trial Chamber judges may once again invalidate the decision and require him to proceed.⁴¹ The Pre-Trial Chamber judges can also request reconsideration if the decision is based on other grounds.⁴² Moreover, the judges can decide at any time that a case is not admissible because a state is prosecuting in good faith or the case is not of sufficient gravity.⁴³ Finally, while the prosecutor decides what charges to bring against an accused, the judges have the power to recharacterize the facts to convict a defendant of crimes not charged as long as they stay within the factual parameters of the charging document.⁴⁴

In sum, while the ICC prosecutor enjoys substantial discretion in deciding which cases and situations to investigate and prosecute, the Court's judges also have the power under the statute to contribute significantly to selection decisions. For that reason, this Article, unlike others addressing matters of ICC selection, refers to decisions *of the Court* rather than limiting the discussion to prosecutorial decisions. Although in the first instance selections are a matter of the prosecutor's discretion, the judges will have the last word in some cases, such as when they disagree with the prosecutor about the interests of justice.⁴⁵

38. *Id.* art. 53(3).

39. *Id.*

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

41. *Id.* art. 53(3)(b). The statute is unclear whether judicial review is permitted only when the prosecutor decides not to pursue *any* case in the situation (thereby effectively closing the investigation) or, alternatively, whenever the prosecutor decides not to pursue a particular individual. Situation in Darfur, Sudan, Case No. ICC-02/05-185, Decision on Application under Rule 103, ¶ 21 (Feb. 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc627395.pdf>.

42. Rome Statute, *supra* note 6, art. 53(3)(a).

43. *Id.* art. 19(1).

44. Regulations of the Court as amended on 14 June and 14 November 2007, ICC-BD/01-02-07, Reg. 55 (entered into force Dec. 18, 2007), *available at* <http://www.icc-cpi.int/NR/rdonlyres/DF5E9E76-F99C-410A-85F4-01C4A2CE300C/0/ICCBDO10207ENG.pdf>; Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04/-01/06 OA 15 OA 16, Judgment on the Appeals of Mr. Lubanga Dyilo and the Prosecutor, ¶¶ 88–100 (Dec. 8, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc790147.pdf>.

45. In practice, however, it may be difficult for the judges to force the prosecutor to allocate resources to an investigation.

C. ICC Legitimacy Requires Increased Clarity of Community, Goals, and Priorities

For an organization to be legitimate in the sociological sense employed herein, it must be “identified with purposes and goals that are consistent with the broader norms and values of its society.”⁴⁶ Only once an organization has such “purposive” legitimacy can mechanisms such as good process contribute to its legitimation.⁴⁷ Moreover, an institution with purposive legitimacy can only maintain its legitimacy over time “by satisfactorily achieving the community’s purposes.”⁴⁸ An institution’s failure to act pursuant to the values of its constitutive community will therefore undermine its legitimacy.⁴⁹

The ICC currently suffers from low purposive legitimacy—it lacks both a defined community to which it is responsible, and accepted values or goals associated with its work. The ICC’s deficiencies in these regards distinguish it from national courts and explain why it is more important for the ICC to articulate acceptable justifications for its selection decisions than it is for national courts to do so.

Selectivity is a feature of virtually all criminal courts. This is true even in civil law systems that subscribe to the principle of mandatory prosecution, whereby prosecutors are theoretically required to prosecute every crime for which there is sufficient evidence.⁵⁰ In practice, prosecutors and judges in such systems turn away some potential cases, often because the cases are perceived as insufficiently serious.⁵¹ Moreover, national criminal law, like international criminal law, is imperfectly theorized. Deterrent and retributive rationales compete with one another and, more recently, expressivism and restorative justice have joined the fray. Like the ICC prosecutor, national prosecutors operate without a consistent theoretical foundation in deciding which cases to prosecute—disparate goals push in different directions.⁵²

46. Cronin & Hurd, *supra* note 11, at 6.

47. *Id.*

48. Wayne Sandholtz, *Creating Authority by the Council: The International Criminal Tribunals*, in *THE UN SECURITY COUNCIL AND THE POLITICS OF INTERNATIONAL AUTHORITY*, *supra* note 11, at 131, 140.

49. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 *ETHICS & INT’L AFFAIRS* 405, 419–24 (2006) (stating that moral legitimacy requires adherence to goals for which an institution was established); Mirjan R. Damaška, *The International Criminal Court Between Aspiration and Achievement*, 14 *UCLA J. INT’L L. & FOREIGN AFF.* 19, 20 (2009) (“For these courts, as for all fledgling institutions, the viability of professed goals is a close cousin of legitimacy.”).

50. Daniel D. Ntanda Nsereko, *Prosecutorial Discretion Before National Courts and International Tribunals*, 3 *J. INT’L CRIM. JUST.* 124, 127 (2005).

51. CRYER, *supra* note 14, at 192.

52. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 *WIS. L. REV.* 837, 840 (arguing that prosecutors have not sought workable norms for their discretionary decisions).

Yet at least in consolidated democracies, national courts are widely considered legitimate for at least three reasons. First, and most importantly, unlike the ICC, national courts are embedded in defined communities.⁵³ Such courts are created by and responsive to their communities, which share a high level of agreement about the goals and priorities of the criminal justice system notwithstanding underlying theoretical debates. The more homogenous the society, the more this is true. Social agreement is never perfect. In the heterogeneous United States, criminal law is characterized by fierce disputes about such issues as whether resources should focus on drugs or white collar crime and whether an act such as carrying a handgun should be a crime at all.⁵⁴ Despite such disputes at the margins, however, national communities generally have a high level of agreement about what crimes should be prosecuted and what the priorities should be among them.⁵⁵ Moreover, when courts fail systematically to reflect the community's values, a properly functioning democratic process corrects the problem.⁵⁶

In addition to this clarity of constituency, national courts usually enjoy much greater parity between available resources and the conduct the community wants to punish than does the ICC. In other words, the selectivity of such courts is much less significant—they are expected to prosecute the vast majority of serious violations of the relevant community's moral and sometimes regulatory norms. As such, it is often sufficient for the community to agree on the result—prosecution and punishment—even if its members disagree on the underlying values at stake.⁵⁷ Members of the community may disagree about whether criminals should be punished for retributive

53. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 96 (2005).

54. See Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 458–60 (1999) (noting the dichotomy of views on gun control laws in the United States though empirical evidence is inconclusive about gun laws either causing or preventing crime).

55. Cf. NORMAN ABRAMS ET AL., *FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT* 76 (5th ed. 2010) (“[M]uch of the conduct that is made criminal under state law can also be prosecuted federally.”); SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 735 (8th ed. 2007) (noting that at least thirty-three states passed antiracketeering statutes that closely mirrored the federal Racketeer Influenced and Corrupt Organizations Act after it was passed).

56. See Eric Rasmusen, *Judicial Legitimacy as a Repeated Game*, 10 J.L. ECON. & ORG. 63, 64–65 (1994) (noting many states in the United States elect judges, that state statutes and constitutional amendments can be passed to overrule irresponsible judgments, and the U.S. Congress has power to create rules of procedure for federal courts and to restrict jurisdiction of federal courts); see also James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 343 (1998) (“Not even the most powerful courts in the world have the power of the ‘purse’ or ‘sword’; with limited institutional resources, courts are therefore uncommonly dependent upon the goodwill of their constituents for both support and compliance.”).

57. See generally Cass Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1734–37 (1995) (arguing practitioners do not attempt to agree on underlying principles but rather specific outcomes).

reasons (they deserve it) or in service of utilitarian goals (such as deterrence) but most agree that punishment is the right result in the vast array of cases.

Finally, the long history and tradition of national criminal justice means that national courts often enjoy substantial reserves of institutional legitimacy.⁵⁸ Societies accept that criminal courts are important and worthy of respect as a general matter, even if they sometimes make mistakes. Only very marginal political players object to the very institution of criminal justice. This historical respect, along with the sheer volume of cases national courts prosecute, means that no single decision a national court makes will have a significant impact upon the legitimacy of the entire criminal justice system. Even a highly controversial outcome, like that in the O.J. Simpson case, has limited repercussions for the system as a whole.⁵⁹

The ICC, in contrast, enjoys consensus neither about the community it is intended to serve nor about the goals for which it was established.

1. What Is the ICC's Constitutive Community?

Not just the ICC, but international criminal law more broadly, has long suffered from a lack of agreement about its appropriate community of interest. With the possible exception of the Nuremberg and Tokyo tribunals, international criminal law institutions have all been torn between seeking primarily to serve the ephemeral "global community" and acting as surrogates for ill-functioning or nonfunctioning local justice systems.⁶⁰ The architects of the Nuremberg and Tokyo tribunals seem to have imagined international criminal law largely as a global endeavor.⁶¹ The primary purpose of those tribunals

58. See, e.g., Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1828–29 (2005) (discussing the "reservoir of trust" that the U.S. Supreme Court has that allows it to retain legitimacy despite controversial or heavily criticized rulings).

59. Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989, 990–91 (1996) (arguing that any efforts at immediate reform after the O.J. Simpson trial will cause more harm than good and any reforms should be made incrementally and slowly); see also W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075, 1077 (1996) (disagreeing with the verdict in the Simpson case but asserting that "the system functioned more or less as it was designed" and any knee-jerk reform of the criminal justice system is inappropriate).

60. Sloane, *supra* note 5, at 41 ("[International criminal law] purports to serve multiple communities, including both literal ones—for example, ethnic or national communities—and the figurative 'international community,' which, needless to say, is not monolithic.").

61. See, e.g., Robert H. Jackson, Chief Counsel for the United States at the Nuremberg Military Tribunals, Opening Statement for the United States of America at the Palace of Justice, Nuremberg, Germany (Nov. 21, 1945), *reprinted in* THE NUREMBERG CASE 30, 34 (1947) ("Civilization can afford no compromise with the social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces now precariously survive."); Brig. Gen. Telford Taylor, Chief Counsel for War Crimes, Opening Statement of the Prosecution (Dec. 9, 1946), *reprinted in* 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 28 (1949) ("It is our deep obligation to all peoples of the world to show why and how these things happened.").

was to vindicate the moral conscience of the world, and little thought was given to involving or compensating victims, nor was healing Germany and Japan the principal goal. With its rebirth in the 1990s, however, the constitutive communities of international criminal law became increasingly unclear. The ad hoc international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) have a global orientation in that they enjoy primacy over national courts, are staffed by non-nationals, and permit little victim involvement in the process.⁶² At the same time, the goals articulated for those tribunals include fostering peace and reconciliation in the societies where the crimes were committed.⁶³ This local orientation has affected the tribunals' practices, including selection decisions. For example, the ICTY has prosecuted defendants from the various ethnic groups involved in the conflict in an apparent effort at interethnic reconciliation.⁶⁴ The ICTR has not engaged in this kind of ethnic balancing, but has selected cases from various parts of the country in the name of regional equity.⁶⁵ Most recently, a number of "hybrid" tribunals have been created that include both national and international participants and, in some cases, adjudicate both national

62. See Statute of the International Criminal Tribunal for Former Yugoslavia art. 9(2), May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute], available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf ("The International Tribunal shall have primacy over national courts."); *id.* arts. 16–17 (stating staff of the OTP and Registry will be appointed by the Secretary-General on recommendations from the prosecutor and registrar); see also Statute of the International Criminal Tribunal for Rwanda art. 8(2), Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute] ("The International Tribunal for Rwanda shall have the primacy over national courts of all States."); *id.* arts. 15–16 (stating staff of OTP and Registry will be appointed by the Secretary-General on recommendations from the prosecutor and registrar); Gerard J. Mekjian & Mathew C. Varughese, *Hearing the Victim's Voice: Analysis of Victims' Advocate Participation in the Trial Proceeding of the International Criminal Court*, 17 PACE INT'L L. REV. 1, 11 (2005) (noting victims' participation in the ICTY and ICTR were extremely limited); cf. Robert D. Sloane, *Sentencing for the 'Crime of Crimes': The Evolving 'Common Law' of Sentencing of the International Criminal Tribunal for Rwanda*, 5 J. INT'L CRIM. JUST. 713, 733 (2007) ("The ICTR, for better or worse, represents principally the interests and values of the amorphous international community rather than those of Rwanda, the victims of the genocide or any other local community.").

63. See Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*, 49 DEPAUL L. REV. 925, 929–32 (2000) (citing statements from delegates of the Permanent Members of the Security Council as articulating six goals of the ICTY: providing justice for victims, establishing accountability of perpetrators, deterring commission of more atrocities in Balkans, aiding in restoring peace, developing a truthful historic record to prevent future atrocities, and deterring atrocities globally).

64. It is far from clear that such efforts have been successful. See, e.g., James Meernik, *Victor's Justice or the Law? Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia*, 47 J. CONFLICT RESOL. 140, 147 (2003) (noting claims by Serbs that they were singled out for prosecution as villains and claims by some Muslim defendants that they were only prosecuted to provide ethnic diversity to ICTY's prosecutions).

65. Hassan B. Jallow, *Prosecutorial Discretion and International Criminal Justice*, 3 J. INT'L CRIM. JUST. 146, 153 (2005).

and international laws.⁶⁶ These tribunals are even more torn between local and global objectives.

The ICC inherited international criminal law's mission schizophrenia. On the one hand, the Rome Statute's preamble suggests a global orientation, proclaiming that "all peoples are united by common bonds, their cultures pieced together in a shared heritage" and stating that the Court is being created "for the sake of present and future generations."⁶⁷ The Court's structure—potentially global reach yet limited resources—also suggests that it is intended to achieve global rather than local aims. At the same time, the Rome Statute includes provisions clearly aimed at addressing local needs, such as those providing for victim protection and participation and the award of reparations.⁶⁸

This structural ambiguity as to community orientation is reflected in divergent expectations of the Court's role in the world. On the one hand, many view international criminal law as primarily a vehicle for global justice. For example, practitioners of international criminal law, including prosecutors, judges, and many NGO advocates, tend to consider such law, particularly as implemented by the ICC, to be an instrument of global deterrence and retribution.⁶⁹ They view themselves as human rights champions, fighting for a world where the most egregious violations are prevented and punished.⁷⁰ The global vision also finds considerable support in the academic literature.⁷¹ Steven Roach goes so far as to argue that the ICC has a moral

66. These include, for example, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.

67. Rome Statute, *supra* note 6, pmb1.

68. *Id.* arts. 68 (victim participation), 75 (reparations).

69. At the July 2010 ICC Review Conference in Kampala, the author interviewed five current and former chief prosecutors of international tribunals who expressed the view that deterrence and retributivism were primary goals.

70. See Elena Baylis, *Tribunal-Hopping with the Post-Conflict Justice Junkies*, 10 OR. REV. INT'L L. 361, 364 (2008) (noting that international criminal law work provides an opportunity to make a difference in some of the worst atrocities of our time and to contribute to a new area of international law); see also Louise Arbour, *The Status of the International Criminal Tribunals for the Former Yugoslavia and Rwanda: Goals and Results*, 3 HOFSTRA L. & POL'Y SYMP. 37, 37 (1999) (stating that, as prosecutor at the ICTY and ICTR, her ambition was to create an international criminal law forum to "eradicate the most outrageous violations of human rights").

71. See, e.g., GILLIAN BROCK, *GLOBAL JUSTICE: A COSMOPOLITAN ACCOUNT* 166–68 (2009) (arguing that the ICC shows promise as an institution for cosmopolitan justice); WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* 68 (2006) (claiming that international criminal tribunals aim to restore peace and security and encourage reconciliation, among other goals, while national justice is targeted at social stability in a more "mundane sense"); M. Cherif Bassiouni, *International Criminal Justice in Historical Perspective: The Tension Between States' Interests and the Pursuit of International Justice*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 131, 131 (Antonio Cassese ed., 2009) ("[The] increased commonality of norms, procedures and processes in the world's legal systems . . . [reflect] the shared values these represent."); Stephanos Bibas & William Whitney Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 652–53 (2010) ("International tribunals are ideally situated to restore and reconcile because their cases

duty to investigate all serious crimes within its jurisdiction in the service of global communitarianism.⁷² On the other hand, not surprisingly, the societies most affected by the crimes international courts adjudicate tend to view the ICC as a vehicle for achieving local goals such as retribution and restoration and, in ongoing conflicts, individual deterrence.⁷³ A number of scholars argue strongly for a local orientation to the ICC's work.⁷⁴

These two visions of the role of the ICC can potentially lead to quite different outcomes in terms of selection decisions. For example, global deterrence might be best served by prosecuting a small number of leaders in a given situation, whereas a local retributive agenda probably requires a much greater number of prosecutions. Local restoration might suggest prosecuting both sides of a conflict, while global ideals of retributive proportionality may require that only the side that committed the more egregious crimes be prosecuted. This uncertainty of constitutive community makes it all the more important for the ICC to articulate coherent rationales for its choices.

2. Gravity as a Stand-In for Goals and Priorities

The ICC also lacks a clear sense of its goals and priorities. In fact, the Court's current prosecutor, Luis Moreno-Ocampo, has recognized this problem and early in his tenure suggested that the states parties work together to clarify the institution's goals.⁷⁵ The states parties have not yet heeded this

are high profile and their stage is global, rising above national politics and local ethnic tensions."); Antonio Cassese, *The Rationale for International Criminal Justice*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra*, at 123, 127 (claiming that "international courts . . . may be more impartial than national courts"; they have judges more competent in humanitarian and international criminal law; they may be better able to handle matters across states; they possess greater visibility; they protect universal values; and they ensure greater uniformity in adjudication); David S. Koller, *The Faith of the International Criminal Lawyer*, 40 NYU J. INT'L L. & POL. 1019, 1021–23 (2008) (noting "faith" in broad ideals of international criminal law has substituted for actual philosophical or theoretical justifications); Steven Roach, *Value Pluralism, Liberalism, and the Cosmopolitan Intent of the International Criminal Court*, 4 J. HUM. RTS. 475, 485–86 (2005) (arguing for a global communitarian approach to the ICC); Sloane, *supra* note 5, at 44 (arguing for a global expressivist approach to international criminal law punishment).

72. Roach, *supra* note 71, at 483, 487.

73. See, e.g., Janine Natalya Clark, *The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Hercegovina*, 7 J. INT'L CRIM. JUST. 463, 471 (2009) (presenting empirical findings that victims in the former Yugoslavia call for retribution). A general preference for retributive justifications has been demonstrated in empirical studies conducted in Western countries. See Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 823 n.25 (2007) (citing studies).

74. See, e.g., MARK FINDLAY & RALPH HENHAM, *TRANSFORMING INTERNATIONAL CRIMINAL JUSTICE: RETRIBUTIVE AND RESTORATIVE JUSTICE IN THE TRIAL PROCESS* 271–75 (2005); Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 61–62 (2010).

75. See Luis Moreno-Ocampo, Prosecutor, ICC, Statement at Informal Meeting of Legal Advisors of Ministries of Foreign Affairs 9 (Oct. 24, 2005), http://www2.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO_20051024_

call, however, and selectivity remains a substantial obstacle to the Court's legitimacy.

The explanation for the creation of an international court without clear goals lies to a significant degree in the nature of the crimes at issue. The ICC was created through the emotional-intuitive force of calls to prosecute the *most serious* international crimes.⁷⁶ The central motivation for the establishment of the Court was what in international criminal law has come to be called "gravity"—that certain crimes are so heinous that international action is warranted and perhaps even required.⁷⁷ After the Holocaust, and later after the atrocities committed in the former Yugoslavia and Rwanda, many in the international community felt that some response was necessary.⁷⁸ In the absence of more forceful measures to stop the crimes, criminal prosecutions of the perpetrators seemed a fitting measure.⁷⁹ With the establishment of the ad hoc tribunals, the view that atrocious crimes should be prosecuted internationally in the absence of national prosecution gained traction. The creation of the ICC was therefore largely spurred by the widely held view that very grave crimes should be prosecuted.⁸⁰ The centrality of gravity as a motivating force for the ICC is reflected in the Rome Statute's provisions limiting the Court's jurisdiction to war crimes, crimes against humanity, genocide, and aggression, and in the gravity threshold for admissibility discussed above.⁸¹

English.pdf (suggesting that states parties should reflect on "the desired scope and role of the Court").

76. See *About the Court*, ICC, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> (last visited Sept. 24, 2011) (stating that the Court was established "to help end impunity for the perpetrators of the most serious crimes of concern to the international community").

77. See deGuzman, *supra* note 11, at 1400.

78. See *Overview*, ROME STATUTE OF THE INT'L CRIMINAL COURT, <http://untreaty.un.org/cod/icc/general/overview.htm> (last visited Sept. 24, 2011).

79. Some authors suggest that the tribunals were created to mask the unwillingness of powerful states to take more active steps to stop atrocities. See, e.g., Sloane, *supra* note 5, at 46–47 (citing Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 744–45 (1998)) ("There is more than a little truth to the critique that international prosecutions in the wake of mass atrocities operate as a 'fig leaf' to cloak and ameliorate the collective guilt of states and world leaders for their failure to intervene earlier or more decisively.").

80. Although the negotiations that led to the Rome Statute were initiated by Trinidad and Tobago, which hoped that the Court would assist its efforts to combat drug trafficking, the focus quickly turned to the crimes generally considered the most serious—war crimes, crimes against humanity, genocide, and aggression. See *Overview*, ROME STATUTE OF THE INT'L CRIMINAL COURT, <http://untreaty.un.org/cod/icc/general/overview.htm> (last visited Sept. 24, 2011).

81. Rome Statute, *supra* note 6, art. 1 (stating that the ICC "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern"); *id.* art. 5(1) (listing genocide, crimes against humanity, war crimes, and aggression as crimes within the ICC's jurisdiction); *id.* art. 17(1)(d) (establishing a gravity threshold for admissibility).

The goal of prosecuting the most serious crimes might, at first glance, seem to provide the Court with purposive legitimacy. In fact, one scholar has taken the position that the ICC, along with the other international criminal courts, enjoys substantial purposive legitimacy because its purpose—"the prosecution of persons accused of major war crimes and crimes against humanity"—is widely accepted.⁸² There are several flaws in this position. First, while there is widespread agreement around the world that "major" war crimes and crimes against humanity should be punished under some circumstances, there is significant disagreement, even among the creators of the Court, about when prosecution is appropriate. For example, some participants in the negotiation of the Rome Statute felt that truth commissions such as South Africa's Truth and Reconciliation Commission can sometimes adequately substitute for criminal prosecutions.⁸³ This perspective led to the inclusion in the statute of the provision allowing the prosecutor to decline to investigate or prosecute "in the interests of justice."⁸⁴

Moreover, there was no agreement among those who negotiated the statute about which crimes are "major" enough for international jurisdiction, nor has consensus developed since then. For example, there were contentious debates about whether crimes against humanity should be defined to include inhumane acts committed as part of a widespread *or* systematic attack or should instead be limited to cases where the attack was both widespread *and* systematic.⁸⁵ The compromise ultimately reached was to use the disjunctive but to define the attack to require a state or organizational policy to commit inhumane acts.⁸⁶ A similar debate took place in the context of war crimes. A significant number of states wanted to limit the Court's jurisdiction to war crimes committed as part of a plan or policy or on a large scale, while others felt strongly that the Court should have the ability to try isolated individual war crimes.⁸⁷ Ultimately, the drafters included an optional "threshold" for war crimes, that provides (rather incoherently) that the Court has jurisdiction over war crimes "in particular" when they are "committed as part of a plan or policy or on a large scale."⁸⁸ The gravity

82. Sandholtz, *supra* note 48, at 133.

83. See Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 483 & n.8 (2003) (discussing divergent views expressed during Rome Statute negotiations on amnesties and national truth and reconciliation efforts).

84. Rome Statute, *supra* note 6, art. 53(2)(c); see Chris Gallavin, *Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice?*, 14 KING'S C.L.J. 179, 185–86 (2003).

85. Herman von Hebel & Darryl Robinson, *Crimes Within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 79, 94–95 (Roy S. Lee ed., 1999).

86. Rome Statute, *supra* note 6, art. 7.

87. See Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 AM. J. INT'L L. 2, 8 n.21 (1999).

88. Rome Statute, *supra* note 6, art. 8.

threshold for admissibility was also aimed at eliding differences of opinion about when jurisdiction is appropriate. The term “gravity” was vague enough to allow those on each side of the debate to believe the Court would adhere to that side’s vision of the ICC’s role.

The ICC was thus founded on what one scholar has called an “incompletely theorized agreement[.]”⁸⁹ The various parties to the negotiation agreed on the result—creating a Court—but did not agree on a foundational principle to guide the Court’s actions.⁹⁰ The legacy of this unstable foundation is that the Court’s prosecutor and judges are struggling to determine which cases are sufficiently grave for admissibility. The Court’s very first case revealed divergent views among the judges about the institution’s mission. In deciding the admissibility of the *Lubanga* case, the judges of the Pre-Trial Chamber held that the gravity threshold requires widespread or systematic crimes and high-level defendants with the greatest responsibility for those crimes.⁹¹ In other words, they sided with the states that had wanted to restrict the Court’s reach in the negotiations of the Rome Statute. The Appeals Chamber judges disagreed, however, stating that the lower court’s interpretation contravened the language of the statute and undermined the goal of deterrence.⁹² Although the majority opinion offered no interpretation of the gravity requirement, one judge wrote separately to give his view that the threshold should be set very low, excluding only very insignificant crimes.⁹³ A similar issue arose in the context of whether to authorize investigation in the situation involving post-election violence in Kenya. In that situation, the judges disagreed about whether the crimes were sufficiently serious to merit ICC action.⁹⁴

The Court’s prosecutor has also failed to articulate a coherent understanding of the gravity threshold for admissibility. The prosecutor declined

89. See Sunstein, *supra* note 57, at 1735.

90. See *id.* at 1735–36.

91. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, 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, ¶¶ 46, 50 (Feb. 24, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc236260.PDF>.

92. Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-169, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I, ¶¶ 69–79 (July 13, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc183559.pdf>.

93. *Id.* ¶¶ 39–40 (Separate and Partly Dissenting Opinion of Pikis, J.) (stating that the threshold should exclude only cases “unworthy of consideration by the Court”).

94. Compare Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶¶ 198–200 (Mar. 31, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf> (holding that the high-ranking nature of alleged perpetrators and the number of burned houses, deaths, and displaced people resulting from violence as well as elements of brutality, such as burning victims alive, satisfied the gravity threshold), *with id.* ¶¶ 150–53 (Dissenting Opinion of Kaul, J.) (asserting that because violence lacked requisite organization and that there was no evidence that violence was sponsored by the state, the situation did not meet the requirements of crimes against humanity).

to open an investigation into alleged British war crimes in Iraq on the grounds that the gravity threshold was not met in light of the low number of victims—“4 to 12 victims of wilful killing and a limited number of victims of inhumane treatment.”⁹⁵ The prosecutor noted that the number of victims alleged in Iraq was “of a different order” from the other situations before the Court, each of which involves thousands of deaths.⁹⁶ Nonetheless, the prosecutor has since announced that he is conducting a preliminary examination of war crimes allegedly committed by North Korean forces that also involve a relatively low number of victims—approximately fifty people killed.⁹⁷ In sum, the question of what situations and cases are “major” enough for ICC adjudication remains contested, even among the Court’s prosecutor and judges.

The final reason to reject the claim that the ICC enjoys substantial purposive legitimacy based on its mission to prosecute “major” crimes is that there is no agreement, either among the states parties, or even among those running the tribunal, about what makes some crimes more “major” than others such that they should be given priority in allocating the Court’s scarce resources. It is widely accepted that international criminal courts should adjudicate the most serious cases available to them.⁹⁸ The Nuremberg Charter limited that tribunal’s mandate to the “major war criminals” of the Axis countries.⁹⁹ Although the statutes of the subsequent international criminal tribunals for the former Yugoslavia and Rwanda did not include such a limitation, the ICTY’s first prosecutor, Richard Goldstone, learned the hard way that such a policy was expected of him. Under heavy pressure to get the

95. Letter from Luis Moreno-Ocampo, Chief Prosecutor of the ICC, to The Hague (Feb. 9, 2006), http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

96. *Id.*

97. Press Release, ICC OTP, ICC Prosecutor: Alleged War Crimes in the Territory of the Republic of Korea Under Preliminary Examination, ICC-CPI-20101206-PR608 (June 12, 2010), [http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2010\)/pr608?lan=en-GB](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/pr608?lan=en-GB).

98. Rod Rastan, *Comment on Victor’s Justice & the Viability of Ex Ante Standards*, 43 J. MARSHALL L. REV. 569, 590 (2010); see also Sloane, *supra* note 5, at 50. *But see* Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365, 470–71 (1999) (arguing that trials should reflect the reality that a “wide variety of people” are complicit in atrocities).

99. Charter of the International Military Tribunal art. 1, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 279. Decisions about which defendants fit this description were explicitly political. *See, e.g.*, MICHAEL SALTER, NAZI WAR CRIMES, US INTELLIGENCE AND SELECTIVE PROSECUTIONS AT NUREMBERG, CONTROVERSIES REGARDING THE ROLE OF THE OFFICE OF STRATEGIC SERVICES 244–45 (2007) (discussing placement of U.S. intelligence agents in the highest levels of the Nuremberg prosecution team to ensure high-ranking Nazis who collaborated with the United States at the end of the war were not prosecuted); BRADLEY F. SMITH, REACHING JUDGMENT AT NUREMBERG 64 (1977) (stating that the Americans selected defendants “not because of their personal actions, cruelty, or notoriety, but because they fitted into the American plan for prosecuting organizations”).

tribunal up and running,¹⁰⁰ Goldstone adopted a strategy of using lower-level perpetrators to build cases against those with greater responsibility.¹⁰¹ The ICTY judges immediately condemned this approach, telling Goldstone he should focus exclusively on the most serious cases.¹⁰² They even issued a public statement saying they did not feel his strategy would “effectively meet the expectations of the Security Council and of the world community at large.”¹⁰³ Eventually, when the Security Council began pressing the two tribunals to complete their work¹⁰⁴ the tribunals’ rules were changed to enable the judges to refer cases that do not involve leaders with responsibility for very serious crimes to national authorities.¹⁰⁵

The ICC prosecutor, mindful of the expectation that he select the most serious situations and cases for investigation and prosecution, has made gravity central to his selection policies.¹⁰⁶ In fact, Moreno-Ocampo sometimes conflates the gravity threshold for admissibility discussed above with his discretionary invocations of gravity to justify selecting particular situations and cases from among all of those that appear admissible.¹⁰⁷ In other words, he implies that he has selected particular situations and cases be-

100. Richard Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT’L L. 277, 281 (2002) (recalling that Goldstone was told that if he did not indict someone within a few months of his arrival, the tribunal would have no money the following year).

101. Antonio Cassese, *The ICTY: A Living and Vital Reality*, 2 J. INT’L CRIM. JUST. 585, 586 (2004).

102. *See id.* at 586–87.

103. Press Release, ICTY, The Judges of the Tribunal for the Former Yugoslavia Express Their Concern Regarding the Substance of Their Programme of Judicial Work for 1995, U.N. Press Release CC/PIO/003-E (Feb. 1, 1995), available at <http://www.icty.org/sid/7251>.

104. *See, e.g.*, S.C. Res. 1503, ¶ 6–7, U.N. Doc. S/RES/1503 (Aug. 28, 2003) (requesting the tribunals to complete all trial activities and implement completion strategies).

105. *See* ICTY R. P. & EVID. 11bis, U.N. Doc. IT/32/Rev. 41 (Feb. 28, 2008); ICTR R. P. & EVID. 11bis (Oct. 1, 2009), available at <http://www.unict.org/Portals/0/English/Legal/ROP/100209.pdf>. Some subsequent international tribunals have included such a limitation on their jurisdictions as well. The Special Court for Sierra Leone was established “to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law.” Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, appended to letter dated Mar. 6, 2002 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2002/246 (Jan. 16 2002). The Extraordinary Chambers in the Courts of Cambodia were established to “bring to trial senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979.” Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2001), amended by NS/RKM/1004/006 (Oct 27, 2004), art. 1, available at http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

106. DRAFT POLICY PAPER ON CRITERIA FOR SELECTION, *supra* note 15, at 4–6; DRAFT POLICY PAPER ON PRELIMINARY EXAMINATIONS, *supra* note 15, ¶¶ 7, 9, 67–72.

107. deGuzman, *supra* note 11, at 1429.

cause they are *the most* serious as if that were a requirement of the Rome Statute.¹⁰⁸ In fact, the statute only requires that the cases be *serious enough* for jurisdiction and his use of relative gravity to justify selection is purely an exercise of his discretion. This conflation is perhaps intentional. Moreno-Ocampo may be seeking to root his selections in the requirements of the statute rather than his own judgment to enhance perceptions that those decisions are legitimate.

Moreno-Ocampo thus uses the concept of gravity to explain the correctness of his selection decisions and even to suggest their inevitability. In fact, in October 2010, Moreno-Ocampo issued a draft policy paper with regard to the initiation of investigations where he implicitly takes the position that he does not “select” situations at all, but rather is constrained to pursue all situations that meet the criteria for jurisdiction and admissibility before the Court. Whereas a 2006 draft policy had been titled “Criteria for Selection of Situations and Cases,”¹⁰⁹ the new proposed policy is called “Policy Paper on Preliminary Examinations.”¹¹⁰ While the earlier draft announced a policy of addressing “serious situations,” the 2010 version states that the prosecutor is “obliged” to conduct a preliminary examination until he is able to determine whether a reasonable basis to investigate exists.¹¹¹ The unstated assumption seems to be that the prosecutor must pursue all situations that meet the reasonable basis test and may not, therefore, reject a situation based on the relatively low gravity of the preliminary information received.

On the other hand, the prosecutor’s current policy regarding case selection (also still in draft form) acknowledges that the prosecutor selects among cases that meet the admissibility threshold and announces the prosecutor’s priorities largely in terms of gravity. The case selection policy indicates that the prosecutor’s office will focus its resources on “particularly serious cases.”¹¹² It further states that it will give priority to prosecuting “persons most responsible for the most serious crimes,” while seeking to maximize the ICC’s preventive impact.¹¹³ The policy states that this emphasis on those most responsible will generally entail selecting cases against high-ranking leaders,¹¹⁴ and lays out four factors to be considered in assessing gravity:

108. *Id.*

109. DRAFT POLICY PAPER ON CRITERIA FOR SELECTION, *supra* note 15.

110. DRAFT POLICY PAPER ON PRELIMINARY EXAMINATIONS, *supra* note 15. “Preliminary examination” is the term the OTP has adopted for the stage where it considers whether to open an investigation. *See id.* ¶¶ 4–5, 12–14.

111. *Compare* DRAFT POLICY PAPER ON CRITERIA FOR SELECTION, *supra* note 15, at 9 with DRAFT POLICY PAPER ON PRELIMINARY EXAMINATIONS, *supra* note 15, ¶ 83.

112. DRAFT POLICY PAPER ON CRITERIA FOR SELECTION, *supra* note 15, at 9.

113. *Id.* at 12.

114. *Id.* at 13 (“[I]nvestigation may go wider than high-ranking officers if, for example, investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case.”).

(1) the scale of the crimes; (2) the nature of the crimes; (3) the manner of commission of the crimes; and (4) the impact of the crimes.¹¹⁵

Some scholars support the prosecutor's emphasis on gravity as the primary basis for his selection decisions. For example, Professors Stephanos Bibas and William Burke-White write that international courts should "focus on the most intentional and flagrant crimes that caused the gravest harm to the most victims and sowed the most widespread grief and bitterness."¹¹⁶ By picking "a handful of strong cases involving the worst crimes," international courts can "maximize public satisfaction and historic resolution."¹¹⁷ What these authors overlook is that there is no agreement on which cases cause "the gravest harm" or involve "the worst crimes."¹¹⁸ As the prosecutor's policy acknowledges, harm can be measured along various dimensions: extent of harm to individual victims, number of victims affected, broader impact on the community, and so forth. One person may feel that it is "worse" to inflict great suffering on a single victim, while another is more outraged by a crime that harms many people to a lesser extent. Similarly, some may view an attempted crime that harms no one but threatened substantial harm as more grave than a completed crime that harms a great number but only slightly. Seriousness of harm, in other words, is incommensurable and therefore provides an inadequate justification for selection decisions.

In sum, the concept of gravity served a constructive role in the establishment of the Court, providing a stand-in for agreement on more precise goals. The inclusion of gravity as a threshold for admissibility, along with the multiple references to seriousness in the descriptions of the Court's jurisdiction, enabled state and nonstate actors to believe that the Court would act in accordance with their visions of its appropriate role. Those who wanted the Court's work to be limited to situations like the Holocaust, ethnic cleansing in the former Yugoslavia, and genocide in Rwanda could believe that "sufficient gravity" referred to those kinds of situations.¹¹⁹ Those who saw the Court as being able to intervene more frequently when states are not adequately protecting people could interpret gravity as a much lower thresh-

115. *Id.* at 5. See also ICC, REGULATIONS OF THE OFFICE OF THE PROSECUTOR, reg. 29 (Apr. 23, 2009) [hereinafter OTP REGULATIONS], available at http://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/CCBD050109_ENG.pdf (listing the same factors for assessing gravity in the regulations of the OTP).

116. Bibas & Burke-White, *supra* note 71, at 681.

117. *Id.* at 681–82.

118. *Id.* at 681. See deGuzman, *supra* note 11, at 1424–27 (noting that legislative history of the Rome Statute reveals little about the precise content or definition of "gravity"); see also Mohamed M. El Zeidy, *The Gravity Threshold Under the Statute of the International Criminal Court*, 19 CRIM. L.F. 35, 40–42 (2008).

119. Cf. Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 26 (1999) (noting some countries, including the United States, wanted the ICC's automatic jurisdiction to be limited to genocide).

old.¹²⁰ However, gravity's imprecision has become problematic as the Court's prosecutor and judges seek to implement the Court's mandate to prosecute "the most serious crimes of concern to the international community."¹²¹ Gravity simply does not have enough agreed content to provide convincing justifications for selection decisions. To establish its purposive legitimacy, the Court needs greater agreement around actual goals and priorities. Otherwise, its selection decisions will continue to be attacked as "political" or simply incoherent.

II. GOOD PROCESS IS NOT ENOUGH

Considerable scholarly and advocacy attention has focused on the problem of selectivity at the ICC, and several scholars have identified selectivity as a threat to the ICC's legitimacy.¹²² However, this Article is the

120. The use of a gravity threshold to mask differences among negotiating parties was also evident in the post-Rome discussions surrounding the definition of aggression. For example, during the Sixth Session of the Special Working Group on the Crime of Aggression, there was a dispute on whether the list of actions in U.N. General Assembly Resolution 3314 (XXIX) should serve as an illustrative or exhaustive list of "acts of aggression" for the purposes of the definition. Concern was expressed that not all of the acts listed in the resolution were sufficiently serious for the purposes of the ICC. Rep. of the Special Working Group on the Crime of Aggression, 6th Session, Nov. 30–Dec. 14, 2007, ¶¶ 18–23. Rather than resolve this dispute outright, it was observed that "the inclusion of the threshold clause [was] all the more important." *Id.* ¶ 23.

121. *Id.* ¶ 23 (quoting Rome Statute, *supra* note 6, pmbl.).

122. See, e.g., CRYER, *supra* note 14, at 192; AVRIL McDONALD & ROELOF HAVEMAN, PROSECUTORIAL DISCRETION—SOME THOUGHTS ON 'OBJECTIFYING' THE EXERCISE OF PROSECUTORIAL DISCRETION BY THE PROSECUTOR OF THE ICC 2–3 (2003), available at http://www.issafrika.org/anicy/uploads/McDonald-Haveman_issues_relevant.pdf (explaining the importance of "objectifying" prosecutorial discretion); James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. REV. 1, 27 (2009) (discussing legitimacy problems faced by the ICC); Brubacher, *supra* note 5, at 72, 74 (stating that the success of the ICC hinges in part on how the prosecutor exercises his discretion); Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162, 168, 171, 177 (2005) (discussing legitimacy of prosecutorial discretion in light of political efforts during peace negotiations); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 535–37 (2003) (arguing lack of objective standards for selection undermines the prosecutor's legitimacy); Jingbo Dong, *Prosecutorial Discretion at the International Criminal Court: A Comparative Study*, 2 J. POL. & L. 109, 113 (2009) (studying the ICC prosecutor and determining prosecutorial discretion needs to be adjusted to "reach coherence"); Mark A. Drumbl, *Collective Violence and Individual Punishment*, 99 NW. U. L. REV. 539, 593 (2005) (arguing that selectivity undermines the ability of international tribunals to achieve their various goals); Goldston, *supra* note 4, at 402–05 (considering the possibility that the OTP will develop and publish flexible guidelines that make selection more transparent); Greenawalt, *supra* note 5, at 586–88 (observing problems selectivity creates for the ICC's legitimacy); Ntanda Nsereko, *supra* note 50, at 124 (asserting that prosecutors must properly exercise discretion and mechanisms for prosecutorial accountability must be established); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1821 n.321 (2005) (noting the inability of international courts to indict leaders of major world powers creates legitimacy problems); Schabas,

first to argue that ICC selection decisions will tend to undermine the Court's legitimacy unless they are rooted in goals and priorities that are acceptable to relevant audiences. Instead of focusing on the substantive justifications for selection decisions, most commentators, as well as current ICC prosecutor Moreno-Ocampo, maintain that selection decisions that follow good process will enhance the ICC's legitimacy. Good process in this context is usually thought to include adhering to such principles as independence, impartiality, objectivity, and transparency in making selections.¹²³ For example, in a widely cited article, Allison Marston Danner argued that prosecutorial decisions will be both actually legitimate and perceived as such if they are taken in a principled, reasoned, and impartial manner.¹²⁴ Similarly, David Luban has written that the legitimacy of international courts stems from "the manifested fairness of their procedures and punishments."¹²⁵ Moreno-Ocampo has adopted this approach, articulating a policy of adherence to the principles of independence, impartiality, objectivity, and transparency.¹²⁶

supra note 27, at 740, 749 (asserting the prosecutor's selection decisions are not aligned with the purported criteria of "gravity" and "interests of justice"); Carsten Stahn, *Judicial Review of Prosecutorial Discretion: On Experiments and Imperfections*, in INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW 239, 240, 242–43 (G. Sluiter & S. Vasiliev eds., 2009). Commentators have also discussed the problem of selectivity for the legitimacy of other international criminal courts. *See, e.g.*, Elena Baylis, *Outsourcing Investigations*, 14 U.C.L.A. J. INT'L L. & FOREIGN AFF. 121, 135 (2009) (discussing perceived legitimacy of the ICC in Congo); 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, 1069, 1072–73 (2007) (claiming that the selective nature of the Lebanon tribunal undermines its legitimacy).

123. *See, e.g.*, HUMAN RIGHTS WATCH, THE SELECTION OF SITUATIONS AND CASES FOR TRIAL BEFORE THE INTERNATIONAL CRIMINAL COURT 4–5 (2006), available at <http://www.hrw.org/en/news/2006/10/26/selection-situations-and-cases-trial-international-criminal-court>; McDONALD & HAVEMAN, *supra* note 122, at 3, 9 (noting the need for objective criteria on investigation, admissibility, and prosecution of cases); Danner, *supra* note 122, at 511 (emphasizing the importance of transparency); Brian Leopard, *How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles*, 43 J. MARSHALL L. REV. 553, 558–63, 564, 566–67 (2010) (arguing the ICC prosecutor should use fundamental ethical principles to guide selection decisions).

124. Danner, *supra* note 122, at 536–37.

125. Luban, *supra* note 18, at 579; *see also* Leopard, *supra* note 123, at 566–67 (arguing that the prosecutor should adhere to "fundamental ethical principles" including independence and impartiality).

126. DRAFT POLICY PAPER ON PRELIMINARY EXAMINATIONS, *supra* note 15, ¶¶ 15, 33; *see also* OTP REGULATIONS, *supra* note 115, regs. 13, 24, 28(1)–(2); OTP, REPORT ON THE ACTIVITIES PERFORMED DURING THE FIRST THREE YEARS (JUNE 2003–JUNE 2006) 24 (2006) [hereinafter REPORT ON FIRST THREE YEARS], available at http://www.icc-cpi.int/NR/rdonlyres/70CB178C-15C7-4BDB-B09E-9E93CEF0E165/143610/3yearreport20060914_English.pdf (noting that the OTP developed standard operating procedures that address several subjects, including "impartial investigation"); Press Release, ICC OTP, Statement by the Prosecutor Related to Crimes Committed in Barlonya Camp in Uganda, Int'l Crim. Ct. Press Release pids.002.2004-EN (Feb. 23, 2004), available at http://212.159.242.181/iccdocs/asp_docs/library/organs/otp/PIDS.OTP.002.2004-EN2.pdf (affirming that the investigation "will be carried out in an independent and impartial way"); Luis Moreno-Ocampo, Prosecutor, ICC, Statement by the Chief Prosecutor on the Uganda Arrest Warrants 2 (Oct. 14, 2005), available at

Although good process is undoubtedly important to the ICC's legitimacy, adherence to principles of good decision making cannot enhance such legitimacy in the absence of agreed goals and priorities for ICC action. Principled decision making is by definition impossible without principles. Moreover, transparency may actually exacerbate perceptions of illegitimacy by exposing the incoherence underlying selection decisions.

A. Independence

The idea that international prosecutors should act independently is enshrined in the constitutive documents of most international criminal law institutions.¹²⁷ The Rome Statute provides that the prosecutor "shall act independently as a separate organ of the Court," and "shall not seek or act on instructions from any external source."¹²⁸ Moreno-Ocampo's interpretation of the principle goes even further, stating that his office's decisions "shall not be altered by the presumed or known wishes of any party or by the cooperation seeking process."¹²⁹ In particular, the prosecutor makes frequent statements claiming that his selection decisions are not influenced by the wishes of political actors.¹³⁰

http://www.icc-cpi.int/NR/rdonlyres/AF169689-AFC9-41B9-8A3E-222F07DA42AD/143834/LMO_20051014_English1.pdf (reporting that the OTP had informed Ugandan authorities that the investigation would be impartial); Luis Moreno-Ocampo, Prosecutor, ICC, Statement at the Informal Meeting of Legal Advisors of Ministries of Foreign Affairs 6 (Oct. 24, 2005) [hereinafter Prosecutor Statement of Oct. 24], available at http://www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO_20051024_English.pdf ("Case selection is carried out through careful analysis based on the principles of objectivity and impartiality . . .").

127. See, e.g., ICTY Statute, *supra* note 62, art. 16(2) ("The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source."); ICTR Statute, *supra* note 62, art. 15(2) ("The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any Government or from any other source."). The Nuremberg Charter, on the other hand, contained no such limitation, and decisions about who to prosecute were made with explicit input from political actors. Cf. SALTER, *supra* note 99, at 125 (noting that the United States government had intelligence agents in the highest levels of the staff of the U.S. prosecutor to ensure that high-level Nazi officials who had collaborated with the United States at the end of the war were not prosecuted).

128. Rome Statute, *supra* note 6, art. 42; see also OTP Regulations, *supra* note 115, reg. 13 (stating that prosecutors will "maintain their full independence" and will not "seek or act on instructions from any external source").

129. DRAFT POLICY PAPER ON PRELIMINARY EXAMINATIONS, *supra* note 15, ¶ 34.

130. Moreno-Ocampo's keynote address provides an example of his rhetoric regarding political independence of decision making. See Moreno-Ocampo, *supra* note 4, at 6. Despite such statements, WikiLeaks disclosed a U.S. diplomatic cable asserting that Moreno-Ocampo privately told diplomats that he did not want to investigate British war crimes in Iraq. Afua Hirsch, *WikiLeaks Cables Lay Bare U.S. Hostility to International Criminal Court*, THE GUARDIAN (London), Dec. 17, 2010, <http://www.guardian.co.uk/law/2010/dec/17/wikileaks-us-international-criminal-court>.

A number of commentators assert that such independence from political influence is crucial to the Court's legitimacy.¹³¹ However, others argue that it is inappropriate and perhaps even impossible for the ICC to adhere to such a strict standard of independence from the political actors who created and sustain the institution.¹³² The idea that the prosecutor can act completely independently is particularly problematic for the ICC in light of the failure of its creators to endow the Court with clear goals and priorities. In fact, previous international tribunals, although their missions were limited to particular situations, have not adhered to such narrow interpretations of the independence requirement. For example, the ICTY has held that the prosecutor's independence does not preclude the prosecutor from heeding the "urging" of the Security Council to investigate particular allegations of criminal conduct.¹³³ According to the *Milošević* trial chamber, such encouragement is "no different from a government in a domestic jurisdiction setting a prosecutorial policy."¹³⁴ Although some national systems reject the notion of political involvement in setting prosecutorial priorities,¹³⁵ the practice is arguably more appropriate at the international level where greater disagreement exists about which cases most merit adjudication.¹³⁶ Moreover, since the views of state actors are critical to the work and even survival of the Court, the institution ignores their preferences at its peril.

Certainly, political actors should not be allowed to use the Court to further self-interested objectives such as increasing their power at the expense of rivals. Some authors have questioned the legitimacy of the "self-referrals" that three governments have made on that basis.¹³⁷ However, when political actors are simply seeking to encourage the Court to advance particular goals or priorities, there is no reason the Court should ignore their views. Indeed,

131. See, e.g., Jerry Fowler, *The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations*, 6 HUM. RTS. BRIEF 1, 20 (1998) (claiming that danger of political decision making is averted by the Rome Statute's requirements of an independent prosecutor under judicial supervision and strict jurisdictional provisions).

132. See, e.g., Greenawalt, *supra* note 5, at 587–88 and accompanying text.

133. Prosecutor v. Milošević, Case No. IT-02-54, Decision on Preliminary Motions, ¶ 15 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 8, 2001), http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm. However, commentators have suggested that the Security Council's decision to urge the prosecutor to collect evidence relating to the Kosovo conflict called into question the impartiality and independence of the tribunal. See CRYER, *supra* note 14, 213–14 ("[T]he fact that three powerful NATO States, which by that time were heavily involved in the Kosovo conflict, are permanent members of the Security Council, raises the question of whether the Council ought to have attempted to set prosecutorial policy.").

134. *Milošević*, Case No. IT-02-54 (ICTY), ¶ 15.

135. See Ntanda Nsereko, *supra* note 50, at 129.

136. See *supra* Part I for a discussion of the controversy and debate surrounding selections decisions at the ICC.

137. See, e.g., Schabas, *supra* note 27, at 751–52 (discussing Uganda's use of ICC self-referral to put political pressure on the Lord's Resistance Army).

as a number of commentators have suggested, greater involvement by political bodies in ICC selection decisions may be important for the institution's legitimacy and long-term survival.¹³⁸

B. Impartiality

The principle of impartiality is similarly unhelpful in promoting the legitimacy of ICC selection decisions in the absence of guiding goals and principles. The current prosecutor has interpreted the requirement of impartiality to mean two things: that he cannot discriminate on prohibited grounds; and that he must "apply consistent methods and criteria irrespective of the State or parties or the person(s) or group(s) concerned."¹³⁹ As such, the prosecutor contends that consideration of geopolitical factors, geographic balance, and parity between rival parties is not appropriate in selecting situations.¹⁴⁰

The idea that the prosecutor should not engage in discrimination on grounds such as group membership when selecting cases and situations seems uncontroversial at first blush. The principle that all people are equal before the law is a well-established norm of human rights law.¹⁴¹ In national systems, many commentators consider it inappropriate for prosecutors to decide not to prosecute particular classes of offenders.¹⁴² In international criminal law, however, the notion of nondiscrimination is complicated by

138. See, e.g., Greenawalt, *supra* note 13, at 154–56 (observing potential benefits, including increased legitimacy, of greater Security Council involvement in ICC prosecutorial decisions); Schabas, *supra* note 2, at 550–51. In preparation for the ICC Review Conference in 2010, the African Union circulated a "Concept Note" suggesting that the Assembly of States Parties adopt guidelines that the prosecutor is obligated to consider in making selection decisions. See Goldston, *supra* note 4, at 404–05 (citing AFRICAN UNION, CONCEPT NOTE FOR THE PREPARATORY MEETING OF MINISTERS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT § 21 (2009)). As one author has noted, when the Security Council refers a situation to the Court based on the Council's assessment that prosecution is a necessary measure to secure or restore peace and security, it is arguably inappropriate for the prosecutor or judges to have discretion to reject the situation. See Jens David Ohlin, *Peace, Security, & Prosecutorial Discretion*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 185, 194–95 (Carten Stahn & Goran Sluiter eds., 2009).

139. DRAFT POLICY PAPER ON PRELIMINARY EXAMINATIONS, *supra* note 15, ¶ 38.

140. *Id.* ¶¶ 38–40. The prosecutor has noted that "impartiality does not mean 'equivalence of blame' within a situation," *id.* ¶ 40, and he has promised to elaborate on the matter in a forthcoming paper on case selection.

141. See, e.g., International Covenant on Civil and Political Rights arts. 14(1), 26, *opened for signature* Dec. 19, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), arts. 1, 7 (Dec. 10, 1948).

142. CRYER, *supra* note 14, at 196 (citing JOSEPH RAZ, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210, 218 (1977)); see also *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (noting that, due to the equal protection component of the Fifth Amendment's Due Process Clause, "the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification' ") (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

the high degree of selectivity required. At those courts, selecting defendants in part based on their membership in rival groups—and thereby deselecting others based on the same criterion—may be necessary to achieve the goal of fostering peace and security.¹⁴³ When the Security Council creates an ad hoc tribunal or refers a situation to the ICC, such action hinges on the determination that international investigation and prosecution will foster peace and security.¹⁴⁴ Some commentators, including prominent human rights advocates, maintain that prosecuting only one side of a conflict undermines the prospects for lasting peace, particularly when the conflict involved rival groups defined in terms of such characteristics as race, religion, and ethnicity.¹⁴⁵ In an apparent effort to advance peace and reconciliation, international prosecutors have sometimes selected defendants in part based on their group affiliation.¹⁴⁶ The ICTY, for example, has prosecuted mostly Serb defendants but has also selected some Muslims and Croats for prosecution. Nonetheless, when defendants have claimed that their prosecution violated the principle of equality, they have been uniformly rebuffed by the courts.¹⁴⁷ For example, the ICTY rejected the claim of defendant Vojislav Seselj that he was selected for prosecution because he was Serb, writing that “persons from all relevant different ethnic backgrounds have been and are being prosecuted.”¹⁴⁸ The implication of this statement seems to be that the tribunal might consider the matter differently if only Serbs were being prosecuted. Nonetheless, defendants at the ICTR have had no greater success with claims of selective prosecution, even though the ICTR has prosecuted only

143. Rome Statute, *supra* note 6, pmb1.; *see also infra* note 240 and accompanying text.

144. *See* U.N. Charter art. 24, para. 1.

145. For example, according to Human Rights Watch, the ICTR’s failure to prosecute Tutsi perpetrators has led some Rwandans to view that tribunal as an instrument of “victor’s justice,” undermining the tribunal’s ability to contribute to national reconciliation and the maintenance of peace. HUMAN RIGHTS WATCH, MAKING KAMPALA COUNT: ADVANCING THE GLOBAL FIGHT AGAINST IMPUNITY AT THE ICC REVIEW CONFERENCE 65–66 (2010), *available at* <http://www.hrw.org/sites/default/files/reports/ij0510webwcover.pdf>.

146. One commentator has also suggested that the ICC prosecutor took ethnicity into account in deciding which defendants to prosecute in the Congo. Goldston, *supra* note 4, at 401 (citing A. Hochschild, *The Trial of Thomas Lubanga*, THE ATLANTIC, Dec. 2009, at 4).

147. In deciding claims based on the principle of equality, courts have generally found that defendants failed to establish the required discriminatory motive as long as there was a basis for their selection other than their racial or ethnic identity. Thus, in the *Celebici* case, the ICTY Appeals Chamber rejected defendant Landžo’s claim that he had been improperly selected for prosecution because he was Muslim in order to give an appearance of evenhandedness to the prosecutor’s selection policy. The Chamber held that the selection was motivated by the seriousness of the defendant’s crimes rather than his identity. *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment, ¶ 612–14 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

148. *Prosecutor v. Seselj*, Case No. IT-03-67-PT, Decision on Motion by Vojislav Seselj Challenging Jurisdiction and Form of Indictment, ¶ 21 (Int’l Crim. Trib. for the Former Yugoslavia May 26, 2004).

Hutu defendants.¹⁴⁹ In fact, an ICTR trial chamber stated explicitly that prosecution of only one ethnic group does not necessarily violate the principle of equality, and thus rejected a claim of selective prosecution in part on the grounds that it was within the prosecutor's discretion to focus exclusively on persons who participated in the genocide against Tutsis.¹⁵⁰

In sum, international criminal law jurisprudence to date suggests that international prosecutors do not violate their obligation of nondiscrimination when they select defendants in part based on their affiliation with a particular group. The principle of nondiscrimination thus does little to address the problem of ICC selectivity.

The prosecutor's second claim—that his decisions are constrained by the impartiality-based requirement of applying consistent “methods and criteria”—also fails adequately to address selectivity. The prosecutor is not alone in endorsing this approach; several commentators, including Danner, have argued that the adoption of selection criteria will enhance the ICC's legitimacy.¹⁵¹ Applying consistent methods and criteria to selection decisions is unlikely to advance the Court's legitimacy, however, because those criteria are not currently tied to accepted goals and priorities. For example, the prosecutor's four gravity factors—scale, nature, manner of commission, and impact of crimes—cannot be consistently applied as he suggests. Instead, in light of the volume of comparisons being made, some factors must be privileged over others, leading to disparate results. If the prosecutor emphasizes the scale of the crimes, he can justify prosecuting widespread illegal detention rather than more limited instances of rape or torture. He can

149. See, e.g., Prosecutor v. Bizimungu, Case No. ICTR-2000-56-T, Decision on Defense Motions for Stay of Proceedings and for Adjournment of the Trial, ¶ 26 (Sep. 24, 2004) (holding that the defense's examples in support of its selective prosecution claim were “insufficient to substantiate any charge so grave against the Prosecutor”); Prosecutor v. Ndindiliyimana, Case No. ICTR-2000-56-I, Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council, ¶ 26 (Mar. 26, 2004) (“[T]he Chamber finds that the Defence has not adduced any evidence of the Prosecution's alleged impermissible discriminatory motives—besides the general allegation that the Prosecution has acted politically—to satisfy the high burden required to show abuse of prosecutorial discretion.”); Prosecutor v. Ntakirutimana, Cases No. ICTR-96-10 & ICTR-96-17-T, Judgment and Sentence, ¶ 871 (Feb. 21, 2003) (rejecting selective prosecution claim on grounds that defendant failed to adduce any evidence that prosecutor acted with discriminatory motive); Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Judgment, ¶ 96 (June 1, 2001) (“Assuming that the Prosecutor pursues a discriminatory prosecutorial policy, Akayesu has failed to show any causal relationship between such a policy and the alleged partiality of the Tribunal.”).

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

151. Danner, *supra* note 122, at 534–50; see also Goldston, *supra* note 4, at 402–05 (noting a need for the OTP to develop its own set of guidelines for case and situation selection); Rastan, *supra* note 98, at 593 (arguing *ex ante* standards are important for the transparency they provide); Philippa Webb, *The ICC Prosecutor's Discretion Not to Proceed In the “Interests of Justice,”* 50 CRIM. L.Q. 305, 324 (2005) (arguing for *ex ante* standards in evaluating the “interests of justice”).

reach the opposite result by highlighting the nature of the crimes, since rape and torture are generally considered more serious than illegal detention. Similarly, he can stress the manner of commission of crimes to select a small number of particularly brutal killings over large-scale persecution although the impact of the crimes might be much more severe for the latter.

In fact, due to the malleability of the factor-based approach to assessing gravity as well as the “interests of justice,” a claim that the prosecutor adheres to *ex ante* standards for selection decisions may actually undermine the Court’s efforts to build legitimacy. When selection decisions are patently inconsistent, presenting them as the result of the application of *ex ante* standards may appear disingenuous. Thus, by purporting to follow unchanging criteria rather than admitting the policy choices he faces, the prosecutor may actually detract from the Court’s legitimacy, strengthening accusations of improper political influence and even “victor’s justice.”¹⁵²

C. Objectivity

Another principle that the current prosecutor and a number of commentators invoke to bolster the legitimacy of selection decisions is that of objectivity.¹⁵³ Like independence and impartiality, however, objectivity cannot solve the problem of selectivity. First, in the absence of agreed goals and priorities there is simply no way of applying such vague concepts as gravity or the interests of justice objectively.¹⁵⁴ For example, Human Rights Watch, a leading NGO in international criminal law advocacy, takes the position that the “interests of justice” provision does not allow the prosecutor to decline to initiate an investigation on the grounds that the national government is addressing crimes through alternatives to prosecution such as truth commissions or traditional reconciliation methods.¹⁵⁵ Others assert that deferring to such processes is precisely the reason for the inclusion of the interests of justice provision.¹⁵⁶ Similarly, with regard to gravity, Human Rights Watch suggests that the prosecutor should use “objective criteria” to decide wheth-

152. See Schabas, *supra* note 2, at 551–52.

153. See Prosecutor Statement of Oct. 24, *supra* note 126, at 6 (“Case selection is carried out through careful analysis based on the principles of objectivity and impartiality . . .”); McDONALD & HAVEMAN, *supra* note 122, at 3, 9.

154. Ray Murphy, *Gravity Issues and the International Criminal Court*, 17 CRIM. L.F. 281, 292 (2006) (noting the criteria of “gravity” and “interests of victims” have been “characterized by vagueness” and that the prosecutor has broad discretion especially in choosing whether to prosecute a case).

155. HUMAN RIGHTS WATCH, THE MEANING OF “THE INTERESTS OF JUSTICE” IN ARTICLE 53 OF THE ROME STATUTE 2 (2005), available at <http://hrw.org/campaigns/icc/docs/ij070505.pdf>.

156. See Robinson, *supra* note 83, 498–502 (discussing the complementarity principle under Article 17 of the Rome Statute); see also Richard J. Goldstone & Nicole Fritz, *In the Interests of Justice’ and Independent Referral: The ICC Prosecutor’s Unprecedented Powers*, 13 LEIDEN J. INT’L L. 655, 656 (2000) (noting controversy surrounding the “in the interests of justice” provision).

er a case merits prosecution and, if the threshold for prosecution is met, should bring the case “even if the scale of the underlying crimes is not of the same magnitude as those of other defendants before the ICC.”¹⁵⁷ As explained above, however, there is no “objective” way to determine the gravity of potential cases. The prosecutor might have a better claim to objectivity if, as Christopher Hall of Amnesty International suggests, he disregards the gravity threshold and simply prosecutes all cases involving international crimes.¹⁵⁸ However, such a prosecutorial policy is impracticable in light of the Court’s very limited resources.

Moreover, the adoption of *ex ante* criteria may be inappropriate because, as Alexander Greenawalt has argued, decisions about which cases and situations to pursue may simply be unsusceptible to rule-based decision making.¹⁵⁹ Each situation presents such a complex mix of relevant circumstances that application of rigid criteria may be impossible and is probably undesirable.¹⁶⁰

Finally, by claiming that such fraught concepts as gravity can be applied “objectively,” persons making selection decisions may actually become more wedded to their personal understandings of the Court’s role and less able to contribute to a productive dialogue on the subject. As one author has noted, to reach optimal decisions, the prosecutor should engage in “open-minded consultation.”¹⁶¹ Empirical studies suggest that such open mindedness is impaired when a decision maker is asked to behave objectively.¹⁶² Additionally, the claim that selection decisions have been reached “objectively” may aggravate charges of illegitimacy by persons who disagree with the goals being pursued and thus reject claims that the decisions are objectively correct.¹⁶³

157. HUMAN RIGHTS WATCH, *supra* note 123, at 5.

158. Christopher K. Hall, *Danger of Selective Justice: All Cases Involving Crimes Under International Law Should Be Investigated and the Suspects, When There Is Sufficient Admissible Evidence, Prosecuted*, in CRITERIA FOR PRIORITIZING AND SELECTING CORE INTERNATIONAL CRIMES CASES 123, 125 (Morten Bergsmo ed., 2009), available at [http://www.prio.no/upload/FICHL/090326%20FICHL%20Publication%20Series%20No.%204%20\(2009\)%20\(criteria\).pdf](http://www.prio.no/upload/FICHL/090326%20FICHL%20Publication%20Series%20No.%204%20(2009)%20(criteria).pdf).

159. Greenawalt, *supra* note 5, at 654–55.

160. As Greenawalt points out, advocates of the public criterion approach generally fail to provide concrete bases on which decisions should be made. *Id.* at 655.

161. Leopard, *supra* note 123, at 564.

162. Cf. Geoffrey L. Cohen et al., *Bridging the Partisan Divide: Self-Affirmation Reduces Ideological Closed-Mindedness and Inflexibility in Negotiation*, 93 J. PERS. & SOC. PSYCHOL. 415, 428 (2007) (discussing implications of study showing people instructed to act objectively or rationally were less effective at debiasing than “the combination of identity salience and affirmation”).

163. I am indebted to David Hoffman for suggesting this potential problem with claims of objective decision making.

D. Transparency

Finally, a mantra of those seeking to increase the ICC's legitimacy is that decisions should be made transparently. For that reason, Danner and others have stressed the need for the ICC prosecutor to adopt public guidelines for selection decisions.¹⁶⁴ Professor Brian Lepard has written that transparency "naturally helps to build and sustain political trust of the Court and enhance its legitimacy."¹⁶⁵ Such openness can alleviate suspicions that the prosecutor is politically motivated.¹⁶⁶ Professor Philippa Webb has argued that the adoption of public criteria for prosecutorial selection decisions "would improve the ICC Prosecutor's relations with the outside world" and a failure to follow public criteria will damage the prosecutor's credibility.¹⁶⁷ Moreno-Ocampo has heeded such admonitions and, unlike the prosecutors of other international courts, has circulated policy papers explaining the criteria his office uses for selection decisions.¹⁶⁸

Transparency in selection decisions is indeed important, but not for the reasons these commentators suggest. The argument that transparency inherently enhances legitimacy is flawed. In fact, the contrary may be true. Transparency enhances legitimacy when it exposes good process, but may undermine legitimacy when it reveals incoherence. Since the ICC lacks agreed goals and priorities, articulating "criteria" or "guidelines" for selections may simply highlight the inconsistent manner in which such decisions are made. For example, the ICC has articulated gravity as a key element in decision making.¹⁶⁹ Yet, as explained above,¹⁷⁰ there seems to be little basis in gravity to explain the prosecutor's decision to decline investigation of alleged British war crimes in Iraq, but pursue those allegedly committed by

164. Danner, *supra* note 122, at 546–47; *see also* Rastan, *supra* note 98, at 593 (noting that the value of *ex ante* standards lies partly in the promotion of external transparency); Susana SáCouto & Katherine A. Cleary, *The Gravity Threshold of the International Criminal Court*, 23 AM. U. INT'L L. REV. 807, 813–14 (2008) (noting public trust in the ICC would increase if the prosecutor clearly communicated the role of gravity in both admissibility and selection of cases).

165. Lepard, *supra* note 123, at 564.

166. *Id.* at 565.

167. Webb, *supra* note 151, at 324.

168. DRAFT POLICY PAPER ON CRITERIA FOR SELECTION, *supra* note 15; DRAFT POLICY PAPER ON PRELIMINARY EXAMINATIONS, *supra* note 15, at 5. The prosecutors of other international tribunals have been criticized for failing to issue public criteria. *See, e.g.*, Côté, *supra* note 122, at 171–72 ("It is difficult to understand why the Prosecutors of the ICTR and ICTY, both institutions being confronted with credibility problems in their specific regions, failed to adopt public regulations stating the criteria used in the general exercise of prosecutorial discretion.") (footnotes omitted).

169. *See, e.g.*, deGuzman, *supra* note 11, at 1400 ("The concept of gravity or seriousness resides at the epicenter of the legal regime of the International Criminal Court . . ."). In addition, the Rome Statute only provides jurisdiction over "the most serious crimes," and mandates judges reject admissibility of a case that is not of sufficient gravity. Rome Statute, *supra* note 6, arts. 5, 17.

170. *See supra* notes 95–97 and accompanying text.

North Korean forces that also affected a relatively small number of victims. Such decisions thus appear pejoratively “political”—the prosecutor seems to be currying favor with powerful states. The claim that the decisions were reached through the application of *ex ante* criteria sounds insincere or even disingenuous. Transparency without goals may therefore harm the ICC’s legitimacy.¹⁷¹

On the other hand, transparency can serve a legitimating function if it exposes to public discourse the decision makers’ understanding of the appropriate goals and priorities for the institution. Unless the states parties amend the statute or otherwise impose on the Court’s decision makers goals and priorities to guide their selections, it will remain up to the prosecutor and, to a lesser extent, the judges to seek to develop greater consensus around the ICC’s purposes. As described more fully below,¹⁷² the Court’s decision makers can foster such consensus by announcing their visions of the Court’s role, testing it against the reactions of relevant audiences, and using such reactions to inform future selection decisions. If selection decision makers adopt the expressive agenda advocated below, transparency will be a critical component of norm promulgation and will facilitate the dialogic process of identifying the appropriate norms for ICC expression.

In sum, efforts to enhance the Court’s legitimacy through good process cannot succeed in the absence of goals and priorities that relevant audiences accept as appropriate for the Court. It is critical therefore that supporters of the ICC turn their attention to the task of identifying such goals and priorities. The next Part examines each of the primary goals advanced for the ICC and makes the case for the ICC to focus its efforts on the expression of global norms.

III. THEORIZING SELECTION DECISIONS

Thus far, this Article has sought both to explain why the ICC’s necessary selectivity poses a serious threat to its legitimacy and to demonstrate that current attempts to address the problem are insufficient because they fail to link selection decisions to the goals and priorities that justify ICC action. This Part aims to launch a discussion about how the selection of situations and cases for ICC adjudication can be made to promote appropriate goals and priorities for the institution. It argues that an expressive approach to selection decisions may enable the Court over time to ground selections in goals and priorities that are accepted by relevant audiences, including states, NGOs, local communities, and the global community.

171. Greenawalt, *supra* note 5, at 658 (noting that since the ICC lacks such democratic accountability, any guidelines adopted “must face the irreducible tension between the policy priorities of the international institution on the one hand, and those of the societies most directly affected by international crimes on the other”); Schabas, *supra* note 2, at 548–49 (asserting that the prosecutor’s insistence that he is using objective standards when evidence indicates otherwise is problematic).

172. See discussion *infra* Part III.B.

A growing body of scholarship seeks to elucidate the philosophical underpinnings of international criminal law adjudication.¹⁷³ Many of these efforts focus on the purposes of punishment,¹⁷⁴ but, as David Luban has noted, international criminal law's objectives extend beyond punishment.¹⁷⁵ While international criminal law punishment requires justification as much as any other official infliction of pain, the rationales for international criminal law often relate as much to the processes of investigation, indictment, trial, and judgment as to the result of punishment.¹⁷⁶ Thus, while substantial agreement exists that the dominant rationales for punishment in national law—deterrence and retribution—also apply to international criminal law, commentators are increasingly focusing on restorative justice and expressivism as goals of international criminal law processes.¹⁷⁷

Despite the growing interest in the philosophical underpinnings of international criminal law, neither commentators nor decision makers at the ICC have sought to identify priorities among the institution's goals with which to justify selection decisions. Like most criminal justice, ICC adjudication can be justified through multiple rationales acting synergistically, and sometimes coming into conflict. In national criminal justice systems, where resources are better matched to communal expectations of punishment, it is usually unnecessary to justify particular prosecutions by reference to specific goals. As explained above, communities can generally agree on the result of punishment even if they disagree on the underlying justifications.¹⁷⁸ For

173. See, e.g., Bibas & Burke-White, *supra* note 71; Damaska, *supra* note 18, at 331; Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT'L L. 79, 83 (2009); Deirdre Golash, *The Justification of Punishment in the International Context*, in INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY 201, 202 (Larry May & Zachary Hoskins eds., 2010); Ralph Henham, *The Philosophical Foundations of International Sentencing*, 1 J. INT'L CRIM. JUST. 64 (2004); Koller, *supra* note 71; Martti Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. 1, 4 (2002); Luban, *supra* note 18, at 575; Larry May, *Defending International Criminal Trials*, in PHILOSOPHY OF LAW: CLASSIC AND CONTEMPORARY READINGS 423, 423 (Larry May & Jeff Brown eds., 2010); Sloane, *supra* note 5; Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561 (2002); Jenia Iontcheva Turner, *Legal Ethics in International Criminal Defense*, 10 CHI. J. INT'L L. 685, 686 (2010).

174. See, e.g., Golash, *supra* note 173, at 211 ("The prevention of crimes is one of the most important goals of punishment . . ."); Sloane, *supra* note 5, at 42–45 (arguing that the primary goal of punishment in international criminal law is to express condemnation against criminals); Tallgren, *supra* note 173, at 569 ("The consequentialist or relativist theory of punishment bases its justification for punishing on the possibility of prevention by means of general or special prevention. Punishment looks to the future and contributes to greater utility by preventing further criminality.").

175. Luban, *supra* note 18, at 575 (endorsing an expressivist view of international criminal law rather than more traditional retributivist theories); Amann, *supra* note 5, at 117 ("[T]he larger goal of pursuing international criminal justice may be found, however, in a newer concept, expressivism.").

176. See Amann, *supra* note 5, at 121–22.

177. See *infra* Part III.A.3 and Part III.B.

178. See *supra* note 57 and accompanying text.

the ICC, on the other hand, where resource limitations require decision makers to select a few cases from among the thousands for which prosecution may be warranted, it is critical for decision makers to root their selections in identified priorities among justifying aims.

What follows represents an initial effort to identify the appropriate priorities to justify ICC selection decisions. I begin by examining the dominant theories of the ICC's goals—retribution, deterrence, and restorative justice—to determine whether they provide an adequate basis to justify selecting particular situations and cases for prosecution. I conclude that they do not, at least most of the time. Instead, I argue that the ICC's primary objective in making selection decisions should be to express global norms. This emphasis on norm promulgation is justified for two reasons. First, in light of its resource constraints, the ICC is simply unable to make significant contributions to the other goals in most situations, whereas its stature as a global organization renders it particularly effective at global norm promulgation. Second, as a descriptive matter, an expressive orientation makes sense of the ICC's complementarity regime in a way that the other theories do not. To be clear, I am not arguing that retribution, deterrence, and restorative justice are irrelevant as rationales for ICC action. On the contrary, each of these theories helps to justify ICC prosecutions, and their importance will vary according to the circumstances of particular cases. Rather, my argument is that global expression should usually be the ICC's priority when it selects situations and cases for adjudication over other potential situations and cases.

A. Failure of Dominant Theories to Justify Selection Decisions

1. Retribution

Although retributive theories take a variety of forms,¹⁷⁹ all retributivists share the belief that desert justifies the infliction of punishment and mandates its quantity.¹⁸⁰ The concept of desert is complex and contested.¹⁸¹ Typically, desert is considered to be a function of two factors: (1) the seriousness of the harm caused or risked by a crime; and (2) the defendant's culpability as to that harm.¹⁸²

179. See generally JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 38–48 (4th ed. 2007) (discussing different strands of retributive theory that have developed over time).

180. *Id.*; see also Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 *CAMBRIDGE L.J.* 145, 145 (2008).

181. See Robinson, *supra* note 180, at 145; see also Robert Blecker, *But Did They Listen? The New Jersey Death Penalty Commission's Exercise in Abolitionism: A Reply*, 5 *RUTGERS J.L. & PUB. POL'Y* 9, 27 (2007) (“Retributivists split into different camps, disagreeing among themselves about the calculus of desert.”).

182. Andrew Von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living Standard Analysis*, 11 *OXFORD J. LEGAL STUD.* 1, 2–3 (1991) (“Seriousness of crime has two dimensions:

Retribution, along with deterrence, are the most frequently invoked justifications for international criminal law punishment.¹⁸³ The ICC's primary rallying cry—"an end to impunity"¹⁸⁴—rings of retribution. Most scholars who have considered the question, however, reject retribution as a justification for ICC adjudication, or at least they express skepticism about the Court's ability to serve retributive ends.¹⁸⁵ Such criticisms largely center around the ICC's selectivity and the difficulty of inflicting proportionate punishment for atrocity crimes. For example, Professor Mark Drumbl argues that the ICC's high selectivity undermines its capacity to achieve retributive justice, and cites Hannah Arendt for the proposition that the harm of international crimes is so great that terms of imprisonment can never be retributively proportionate.¹⁸⁶ Although Drumbl is correct that the ICC's resource constraints limit the amount of

harm and culpability."). Culpability focuses primarily on the defendant's mental state as to the harm caused—both intent and motive—and may also include factual circumstances bearing on blameworthiness. *See id.* at 2–3. Cf. Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 58 n.103 (2002) (arguing that desert should look to mens rea rather than harm).

183. Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Sentencing*, 87 VA. L. REV. 415, 444 (2001); *see also* Prosecutor v. Sherushago, Case No. ICTR 98-39-S, ¶ 20 (Feb. 5, 1999) (noting that retribution and deterrence remain the primary objectives); Henham, *supra* note 173, at 72; Sloane, *supra* note 5, at 47–52.

184. *See About the Court*, ICC, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> (last visited Sept. 24, 2011).

185. *See, e.g.*, DRUMBL, *supra* note 18, at 151 (arguing that retribution is insufficient justification for international criminal law because a variety of political factors motivate punishment); Amann, *supra* note 5, at 116; Koller, *supra* note 71, at 1025–26 (asserting that retributive justifications have had little influence in international criminal law because they have been discredited in domestic criminal justice systems); Koskeniemi, *supra* note 173, at 9 (arguing that criminal trials are more complex than inflicting punishment or retribution, but rather are part of broader "transitional justice"); Tallgren, *supra* note 173, at 583 (asserting the ICC's adoption of complementarity limits the role of the ICC in achieving retributive justice). *But see* May, *supra* note 173, at 426 (espousing retribution as partial justification for international criminal law); Adil Ahmad Haque, *Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law*, 9 BUFF. CRIM L. REV. 273, 278 (2005) (proffering a relational theory of retributive justice in international criminal law); Dan Markel, *The Justice of Amnesty? Towards a Theory of Retributivism in Recovering States*, 49 U. TORONTO L.J. 389, 421 (1999) (arguing that particularized amnesty proceedings in international criminal law are justified by retributivist principles).

186. DRUMBL, *supra* note 18, at 151–54, 156–57 (citing Letter to Karl Jaspers (Aug. 17, 1946), in HANNAH ARENDT & KARL JASPERS, CORRESPONDENCE 1926–1969, at 54 (Lotte Kohler & Hans Saner eds., Robert Kimber & Rita Kimber trans., 1992)). Arendt wrote that: "The Nazi crimes, it seems to me, explode the limits of the law; and that is precisely what constitutes their monstrosity. For these crimes, no punishment is severe enough. It may well be essential to hang Göring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems." *Id.* (Letter 43). This criticism does not apply to all international crimes, however. In particular, war crimes that do not amount to crimes against humanity or genocide are often susceptible to proportionate punishment. Robert Sloane adds that international criminal law can never be as successful as national criminal justice in exacting retribution given its physical and moral distance from the crimes and affected communities. Sloane, *supra* note 5, at 50–51.

retribution it can exact, and very serious crimes stretch the notion of proportionality, retribution may nonetheless provide a partial justification for the Court's work.¹⁸⁷ Even national systems do not punish all wrongdoers, but retribution can justify the punishment they do inflict. In the same way, retribution provides some justification for ICC adjudication even if the ICC cannot inflict retribution on all those who deserve it and the punishments it awards do not always appear satisfactory in terms of proportionality.

Whatever its force as a justification for punishment, retribution does not provide an adequate basis for most ICC selection decisions. First, retributive theory generally fails to justify selecting certain defendants and not others.¹⁸⁸ In the strictest Kantian formulation, retributivism requires that *all* persons deserving punishment be punished.¹⁸⁹ Such a categorical directive of course provides no basis for resource allocation decisions. In spite of this theoretical limitation, Professor Michael Cahill has suggested that an "absolutist retributivist" faced with resource constraints might endorse prosecuting the greatest possible number of offenders regardless of the seriousness of their crimes.¹⁹⁰ Allocating resources in this way, however, would likely undermine the legitimacy of even well respected national courts, and would certainly do so at the ICC. It would be senseless for the ICC to select the easiest and cheapest cases to prosecute so that it could pursue a few more defendants out of the vast numbers of those deserving punishment in situations all over the world. A prosecutorial strategy that focused on easy-to-convict low-ranking soldiers and allowed leaders to go free would thus undermine the ICC's legitimacy with most relevant audiences and would certainly do so at the international level.¹⁹¹

Moreover, even assuming retributivists could agree to a model of highly selective justice, a selection strategy focused on maximizing retribution through ICC prosecutions would be very difficult to implement. Such an approach would require decision makers to rank potential defendants in terms of their relative desert. Desert, however, is notoriously difficult to measure.¹⁹² Scholars who have sought to theorize desert have

187. See May, *supra* note 173, at 426.

188. See Cahill, *supra* note 73, at 870 (criticizing retributive theories for failing to provide a model of "real" world justice).

189. *Id.* at 826; see also Russell L. Christopher, *The Prosecutor's Dilemma: Bargains and Punishments*, 72 *FORDHAM L. REV.* 93, 103-04 (2003) (claiming that the conflicting imperatives of retributivism in the face of immunity and plea deals constitute a fatal flaw in the theory); Michael S. Moore, *The Moral Worth of Retribution*, in *CASES AND MATERIALS ON CRIMINAL LAW*, *supra* note 179, at 38, 38-39 (writing that retributivism looks backward, basing justification for punishment upon the moral desert of the offender's actions).

190. Cahill, *supra* note 73, at 849.

191. The criticism of Richard Goldstone's early efforts to prosecute low-level defendants is evidence of this effect. See *supra* notes 100-105 and accompanying text.

192. See, e.g., Cahill, *supra* note 73, at 852. Rather than attempt to theorize desert, Cahill relies on actual sentencing schemes based on the questionable assumption that legislatures followed retributive principles in assigning punishment amounts. *Id.*

taken one of two approaches: deontological or empirical. Deontological retributivists seek to measure desert—both harm and culpability—by appeal to moral principles. For example, the renowned philosopher Joel Feinberg argued that harms should be ranked according to the extent to which they invade “welfare interests,” “security interests,” or “accumulative interests,”¹⁹³ and professors Andrew von Hirsch and Nils Jareborg have suggested that harm should be gauged according to its effects on individual living standards.¹⁹⁴ Deontologists similarly assess culpability according to moral values.¹⁹⁵ Deontological assessments of desert are said to be “derived from fundamental values, principles of right and good,” and therefore “will produce justice without regard to the political, social, or other peculiarities of the situation at hand.”¹⁹⁶ Empirical approaches, on the other hand, measure desert according to “the community’s intuitions of justice.”¹⁹⁷ Scholars such as Paul Robinson have conducted social science studies from which they extrapolate a variety of factors that they claim influence people’s assessments of blameworthiness. They assert that such assessments or intuitions are consistent across social, cultural, and economic divides.¹⁹⁸ In fact, some assert that these “intuitions of justice” have a basis in biology.¹⁹⁹

Neither of these methods of measuring desert provides an appropriate basis for the ICC to make selection decisions. Deontological retributivism’s claim to universal truths is highly contested, as are all such claims. Deontological retributivism is therefore particularly ill suited to the diverse context of international criminal justice.²⁰⁰ Empirical measures of desert are no less problematic. The claim that “intuitions of justice” derive from a moral organ shared by all humans has been convincingly at-

193. Von Hirsch & Jareborg, *supra* note 182, at 7–10.

194. *Id.* at 6–7.

195. See Robinson, *supra* note 180, at 148 (“The deontological conception of desert focuses not on the harm of the offense, but on the blameworthiness of the offender, and is drawn primarily from the arguments and analyses of moral philosophy.”). In particular, culpability is assessed according to judgments about the moral wrongfulness of particular mental states such as negligence, recklessness, and intent.

196. *Id.*

197. *Id.* at 149.

198. *Id.* at 165.

199. See, e.g., John Darley, *Realism on Change in Moral Intuitions*, 77 U. CHI. L. REV. 1643, 1643 (2010) (discussing perspective that people’s judgments regarding punishment and justice are due in part to evolution of cognitive biases); J.L. Mackie, *Morality and the Retributive Emotions*, CRIM. JUST. ETHICS, Winter/Spring 1982, at 3, 8 (suggesting biological explanation for human desire for retributive justice); Lawrence M. Solan, *Cognitive Foundations of the Impulse to Blame*, 68 BROOK. L. REV. 1003, 1004 (2003) (arguing humans’ quick assignment of blame is a result of the triggering of cognitive elements by certain impulses).

200. Sloane, *supra* note 5, at 77 (“[R]etributivism—with its characteristic discourse of ‘just deserts,’ blameworthiness, and the restoration of some moral balance—remains strongly redolent of religious notions of justice, ill-suited to a diverse international community of states and peoples.”).

tacked.²⁰¹ In fact, empirical evidence suggests the opposite— notions of justice are highly contested and depend on a range of social, political, and economic factors.²⁰² Moreover, even proponents of empirical desert acknowledge that agreement about desert is “less pronounced” beyond “the core of wrongdoing.”²⁰³ They have not extended the theory to ordinal rankings of the kinds of large-scale and systematic atrocity crimes generally at issue in international criminal law.

There may be exceptional cases in which essentially the entire world agrees that an individual is more deserving of punishment than others who have also committed serious international crimes—Hitler and Pol Pot come to mind. Moreover, if the ICC were conceived as a proxy for nonfunctioning national systems, an argument might be made that it should prioritize cases according to the shared intuitions of the local population about who most deserves punishment. However, as currently configured, the ICC does not have the resources or expertise to replace nonfunctioning national courts around the world. Moreover, the contexts in which international crimes are committed almost inevitably involve populations that are divided in their perceptions of desert.²⁰⁴ Thus, in the vast array of cases the ICC will have no globally accepted basis for choosing defendants based simply on desert.

As such, when the ICC prosecutor attempts to justify selection decisions in retributive terms he elicits skeptical responses and engenders challenges to the Court’s legitimacy. For example, the decision to prosecute Sudanese President Bashir has been articulated as founded significantly on Bashir’s high level of desert.²⁰⁵ In Africa, such pronouncements have been redolent of Western hegemony and neocolonialism.²⁰⁶

201. See Donald Braman et al., *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 1531, 1533, 1567 (2010); cf. Nathan Hanna, *Say What? A Critique of Expressive Retributivism*, 27 L. & PHIL. 123, 123 (2008) (“Retributive arguments often rely on controversial intuitions of questionable reliability and justificatory power.”) (footnote omitted).

202. Braman et al., *supra* note 201, at 1533 (asserting human intuitions about wrongdoing are based on malleable social constructs).

203. See, e.g., Paul Robinson, *Empirical Desert* 33 (Univ. of Pa. Law Sch., Public Law Research Paper No. 08-29, 2009), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=1148907##.

204. See JULIE MERTUS ET AL., THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 56–57 (undated), available at <http://www.cla.purdue.edu/history/facstaff/Ingrao/si/Report-10g.pdf> (observing differing national views of “commensurability of guilt” provide grounds for controversy in the ICTY, specifically noting that Croats were surprised at the number of Croatian defendants indicted because the Croatian perspective saw the war as a “matter of Serb aggression against innocent parties”).

205. See, e.g., Interview by U.N. News Centre with Luis Moreno-Ocampo, Prosecutor for the Int’l Criminal Court (June 5, 2009), <http://www.un.org/apps/news/newsmakers.asp?NewsID=13> (explaining importance of Bashir’s prosecution because he was leader of a “massive campaign orchestrated against the citizens”).

206. See Jalloh, *supra* note 2, at 462–63 (quoting African politicians and scholars who consider the ICC akin to “colonialism” and “imperialism”). Similarly, when the ICTR prosecutor’s decision to engage in one-sided prosecutions is articulated as an assessment of relative

2. Deterrence

Deterrence theory emanates from utilitarian moral philosophy,²⁰⁷ which holds that actions should be evaluated according to their tendencies to maximize happiness, either average or aggregate.²⁰⁸ Specific deterrence, along with the related concept of incapacitation, seeks to avoid repeated criminal conduct by a particular offender.²⁰⁹ General deterrence looks to avert criminality in the public at large.²¹⁰ The dominant model of deterrence theorizes that punishment can effectuate deterrence in economic terms. Criminal law is thus conceived as precipitating a cost-benefit analysis in the minds of rationally calculating prospective criminals.²¹¹ Deterrence theorists believe that by shaping criminal law rules they can affect individuals' decisions about whether to commit crimes. Such decisions are said to be based on an assessment of the likelihood of apprehension and the cost of conviction—usually in terms of length of imprisonment.²¹² The theory asserts that optimal deterrence can be achieved by manipulating these factors.

Many criminal law theorists, including many retributivists, accept that the existence of a criminal law system has some deterrent effect.²¹³ The principal debates about deterrence center around: (1) whether it is a legitimate justification for punishment given that it treats offenders as

desert, it engenders controversy in light of the very serious crimes committed by the other side. See 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, 50–51 (2011) (criticizing the ICTR's decision not to prosecute war crimes committed by Tutsis).

207. GEORGE P. FLETCHER, 1 THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL 248–49 (2007) (“All four of these goals—general deterrence, special deterrence, rehabilitation, and isolation—are grouped under the general heading of ‘social protection’ as the purpose of punishment The genesis of social protection as a rationale for punishment lies in the utilitarian theory developed by Beccaria and Bentham: The suffering of the prisoner is justified as necessary to achieve the greater good of improving the welfare or happiness of society.”).

208. *Id.* at 193–94 (“Utilitarians are divided about whether they wish to pursue aggregate happiness or average happiness.”).

209. *Id.* at 247.

210. *Id.*

211. See Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1221 (1985) (framing the deterrence question as “what criminal penalties are optimal to deter” criminal activity of rational actor).

212. See *id.* at 1205–14 (analyzing “optimal criminal penalties” to maximize deterrence).

213. See, e.g., Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 951 (2003) (“There seems little doubt that having a criminal justice system that punishes violators, as every organized society does, has the general effect of influencing the conduct of potential offenders. This we concede: Having a punishment system does deter.”).

instrumental to social goods;²¹⁴ and (2) whether it works—that is, whether legal rules can in fact be manipulated to effectuate deterrence.²¹⁵ Scholars who answer the second question in the negative argue, for instance, that potential offenders are not aware of the law, are not rational calculators, or do not perceive the cost of crimes as outweighing the benefits.²¹⁶ Such arguments are hard to refute because of the difficulty of proving the counterfactual—that criminal conduct would have occurred but for the existence of particular legal rules.²¹⁷

Deterrence is frequently invoked to justify the work of international courts and tribunals. For example, the U.N. Security Council seems to have implicitly endorsed a deterrence rationale when it established the ad hoc tribunals under Chapter VII, a provision authorizing measures to maintain and restore international peace and security. Moreover, international prosecutors justify their policies in part based on deterrence,²¹⁸ and international criminal law judges rely on deterrence in sentencing defendants.²¹⁹

Nonetheless, as with retribution, most commentators are skeptical of the ICC's ability to deter potential criminals.²²⁰ Critics of the deterrence

214. See, e.g., IMMANUEL KANT, *Groundwork of the Metaphysics of Morals*, in PRACTICAL PHILOSOPHY 37, 79 (Mary J. Gregor ed. & trans., 1st ed. 1999) (“[T]he human being and in general every rational being *exists* as an end in itself, *not merely as a means* to be used by this or that will at its discretion . . .”).

215. See Robinson & Darley, *supra* note 213, at 951.

216. *Id.* at 953, 954–56.

217. *Cf. id.* at 977–78 (discussing complexities of determining, weighing, and analyzing various deterrence factors).

218. See, e.g., Press Release, ICC OTP, Prosecutor Opens Investigation in the Central African Republic, ICC-OTP-20070522-220 (May 22, 2007), <http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2007/prosecutor%20opens%20investigation%20in%20the%20central%20african%20republic?lan=en-GB> (quoting the ICC prosecutor as saying: “In the interests of deterring future violence and promoting enduring peace in the region, we have a duty to show that massive crimes cannot be committed with impunity. We will do our part, working through our judicial mandate”).

219. See, e.g., Prosecutor v. Popovic, Case No. IT-05-88-T, Judgment, ¶ 2128–29 (June 10, 2010), <http://www.icty.org/x/cases/popovic/tjug/en/100610judgement.pdf> (affirming the ICTY's commitment to deterrence); Prosecutor v. Brima, Case No. SCSL-04-16-T, Sentencing Judgment, ¶ 16 (July 19, 2007) (noting that deterrence is important in establishing the world's lack of tolerance for serious crimes against international humanitarian law and human rights); Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 28 (Sept. 4, 1998), <http://www.unict.org/Portals/0/Case%5CEnglish%5CKambanda%5Cdecisions%5Ckambanda.pdf> (justifying a sentence of life imprisonment in part upon the notion that would-be perpetrators of mass atrocity must be dissuaded through demonstrating that the global community is not prepared to tolerate serious violations of international criminal law).

220. See, e.g., DRUMBL, *supra* note 18, at 169; Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99 AM. J. INT'L L. 747 (2005) (“The evidence on the death penalty as a deterrent is mixed and its success remains a point of contention in the social sciences.”); Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 17 (2005) (citing David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 473 (1999)); Wippman, *supra*, at 474.

rationale argue principally that international criminals are not rational calculators²²¹ and that the likelihood and severity of punishment by international courts are too low to generate deterrence.²²² Some scholars have even suggested that international criminal law may promote rather than deter criminal conduct in some circumstances.²²³ Other commentators are more sanguine, however.²²⁴ Juan Mendez, the ICC's Special Advisor on Crime Prevention, points to one situation where the threat of ICC action appears to have stopped hate speech that threatened to spark genocide.²²⁵

The debate about whether the ICC is capable of deterring potential criminals may be impossible to resolve in light of the problem of counterfactual proof. In any event, for present purposes it is sufficient to assume that deterrence, like retribution, provides a partial justification for the ICC's work. Nonetheless, deterrence theory also fails to supply an adequate basis for making selection decisions at the Court. First, in the same way that retributivism has difficulty ranking defendants according to desert, deterrence theory says nothing about which crimes constitute greater and lesser setbacks to social welfare.²²⁶ Without a way to rank the disvalue of different kinds of conduct, the ICC cannot decide how to allocate scarce deterrence

221. See e.g., Sloane, *supra* note 5, at 72–73.

222. DRUMBL, *supra* note 18 at 169–70; Alexander, *supra* note 122, at 12 (“More likely than not, the ICC will often confront Darfur-like situations in which the power with physical control over suspects is unwilling to turn over suspects and cannot be compelled to do so absent outside military intervention.”); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 832 (2006) (discussing existence of informal sanctions typically more severe than those of an international tribunal); Wippman, *supra* note 220, at 477–78 (arguing that the conflict in Bosnia mobilized all aspects of society in ways unlikely to be halted for fear of prosecution).

223. See e.g., Ku & Nzelibe, *supra* note 222, at 827–31 (discussing “political opportunism effects” by which politicians embrace the rhetoric of international criminal tribunals to avoid substantive reforms).

224. See, e.g., Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities*, 95 AM. J. INT'L L. 7, 10 (2001); Jonathan I. Charney, Editorial Comment, *Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452, 462 (1999) (consistently prosecuting leaders may eventually deter those who provoke the circumstances that encourage international crimes); May, *supra* note 173, at 427 (“Deterrence, like retribution, can give us a partial defense of international criminal law in that in many cases the threat of punishment will have an effect on behavior, at least lessening the likelihood of harmful behavior if not completely eliminating such behavior.”); Theodor Meron, *Centennial Essay: Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 557 (2006); Theodor Meron, *From Nuremberg to the Hague*, 149 MIL. L. REV. 107, 110–11 (1995) (arguing that international criminal law would have a greater deterrent effect if prosecutions were more consistent and national legal systems prosecuted similar offenses in a similar way).

225. ICC, *The Importance of Justice in Securing Peace*, ICC Doc. RC/ST/PJ/INF.3, ¶ 18 (May 30, 2010) (by Juan Mendez).

226. Cahill, *supra* note 73, at 852; see also Robinson & Darley, *supra* note 213, at 964–65 (discussing examples where deterrence-based recidivist statutes may impose heavy punishment without consideration of a specific crime's relative harm to society).

resources.²²⁷ If the ICC had the resources and expertise to serve as a proxy for local justice, it might be possible to allocate prosecutorial resources to maximize deterrence of the crimes that a particular society finds most deleterious to its well being. However, any attempt to determine which crimes most detract from the happiness of all humans worldwide would be futile.

Moreover, if ICC prosecutions in fact deter some potential criminals, there is no evidence to suggest which ones, nor is such evidence likely to emerge since people rarely admit to having contemplated crimes they decided not to commit. ICC judges took different positions on how selection decisions affect deterrence in decisions concerning admissibility in the *Lubanga* and *Ntaganda* cases. The Pre-Trial Chamber judges expressed the view that the ICC can best maximize its deterrent effect by restricting admissibility to senior leaders responsible for serious crimes.²²⁸ According to these judges, deterring leaders is most important and is best accomplished by prosecuting leaders. The Appeals Chamber judges rejected this approach, noting that non-leaders are sometimes responsible for very serious crimes and that excluding this category of perpetrators would detract from the Court's deterrent potential.²²⁹ Although these decisions concerned admissibility rather than choices among admissible cases, deterrence theory suggests that failing to prosecute categories of perpetrators even if their crimes are technically admissible would undermine deterrence.

In sum, even accepting the much-contested premise that ICC action is capable of effectuating deterrence, a deterrence-based framework for selecting situations and cases for prosecution would be at least highly impracticable, if not impossible, to develop.

3. Restorative Justice

While ICC adjudication is most frequently justified in retributive or deterrent terms, a competing narrative has developed, focusing on the needs of affected local populations, that is often described as restorative justice.²³⁰ Restorative justice is a relative newcomer to criminal law theory, and the concept itself remains highly contested.²³¹ The debates surrounding the term

227. Dan M. Kahan, *The Theory of Value Dilemma: A Critique of the Economic Analysis of Criminal Law*, 1 OHIO ST. J. CRIM. L. 643, 644–45 (2004) (“Unless we know whether and how much we disvalue a particular species of conduct, we can’t determine whether the cost of deterring any particular amount of it is worth paying.”).

228. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-8-Corr, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006, ¶¶ 48–50, 54 (Feb. 24, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc236260.pdf>.

229. Prosecutor v. Ntaganda Dyilo, Case No. ICC-01/04-169, Judgment on the Prosecutor’s Appeal, ¶¶ 73–75 (July 13, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc183559.pdf>.

230. See Linda M. Keller, *Achieving Peace With Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT’L L. 209, 275 (2008).

231. See John Braithwaite, *Narrative and “Compulsory Compassion,”* 31 LAW & SOC. INQUIRY 425, 425–26 (2006) (noting that restorative justice’s “values framework is not settled and clear”).

include: (1) whether it refers principally to process, values, or outcomes; (2) what practices qualify as restorative; and (3) how restorative justice should interact with the traditional criminal justice system.²³² Typically, restorative justice is envisioned as an alternative or adjunct to prosecutions and connotes a process whereby victims and offenders work collaboratively to heal the harm caused by the offense.²³³ “The purpose is to restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just.”²³⁴ Whether such restorative processes should replace or complement prosecution is a matter of debate.²³⁵ The key principles at the heart of restorative justice are that crime should be understood not merely as an act against the state, but as an offense against a particular victim or victims and relevant communities. Societal responses to crime should therefore focus on repairing the damage caused rather than on penalizing the offender.²³⁶

As a criminal court, the ICC is not primarily an institution of restorative justice. Nonetheless, a variety of goals are ascribed to the Court that aim at implementing restorative justice principles. At the individual level, the ICC purports to contribute to the restoration of the victims of the crimes it adjudicates by allowing victims to participate in the prosecutorial process²³⁷ and

232. Kathleen Daly, *The Limits of Restorative Justice: A Global Perspective*, in *HANDBOOK OF RESTORATIVE JUSTICE* 134, 135 (Dennis Sullivan & Larry Tiff eds., 2006). For sources discussing restorative justice, see NANCY AMOURY COMBS, *GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH* 285 n.776 (2007).

233. See United Nations Basic Principles on Use of Restorative Justice Programmes in Criminal Matters, E.S.C. Res. 2002/12, Annex ¶ 2, U.N. Doc. E/2002/30 (July 24, 2002) (defining restorative justice processes as “any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles”); Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 228–29. In the past few decades, such alternative processes as victim-perpetrator conferences and mediation have gained traction in various parts of the world, including Canada, New Zealand, and Australia. See *id.* at 229. Moreover, for many years before their adoption in Western countries, restorative justice practices were common in non-Western communities, including those in Rwanda and Uganda. Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 164 (2007) (describing modern efforts as “variations on” Rwandan and Ugandan restorative processes). Generally, restorative justice practices are limited to crimes that are less serious than those under the ICC’s jurisdictions. Cf. *id.* at 175 (“[I]n very serious cases (murder, rape, and serious assault) restorative justice is ancillary or supplemental, not substitutory, to formal adjudication.”).

234. Luna, *supra* note 233, at 228.

235. COMBS, *supra* note 232, at 140.

236. Luna, *supra* note 233, at 228–29.

237. See Rome Statute, *supra* note 6, art. 68; Brianne N. McGonigle, *Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court*, 21 FLA. J. INT’L L. 93, 96 (2009) (“This participatory regime is an attempt to make a court that punishes individual perpetrators as well as a court that focuses on administering restorative and reparative justice.”) (footnote omitted).

by providing for reparations.²³⁸ Thus one author has written that the Rome Statute reflects the recognition that victims have “an interest in restorative justice.”²³⁹ Beyond individual victims, the work of the ICC is said to contribute to reconciliation of communities in conflict and thus to long-term peace and security.²⁴⁰ In this sense, restorative justice is about prevention of future crimes. The view that the ICC can foster reconciliation rests on a belief that reconciliation requires accountability, truth telling, or both, and that the ICC can supply the former with convictions and the latter by building the historical record.²⁴¹

Whether or not it is appropriate for the ICC to pursue any of these restorative justice goals is controversial. While a few authors advocate transforming ICC processes to better achieve restorative justice goals,²⁴² many conclude that such objectives should not be a primary focus of the Court.²⁴³ For example, some commentators argue that allowing victims to participate in the determination of guilt further stacks the deck against already disadvantaged defendants by essentially permitting multiple

238. Rome Statute, *supra* note 6, art. 75.

239. Christopher Muttukumaru, *Reparation to Victims*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, *supra* note 85, at 262, 264.

240. See G.A. Res. 65/12, U.N. Doc. A/RES/65/12 (Nov. 23, 2010) (“Recognizing the role of the International Criminal Court in a multilateral system that aims to end impunity, establish the rule of law, promote and encourage respect for human rights and achieve sustainable peace.”). The belief that international criminal law can promote peace and security is reflected in the Security Council’s creation of the ad hoc tribunals under its Chapter VII mandate to take actions to restore and promote international peace and security. See, e.g., Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 38–39 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> (finding establishment of tribunal was an appropriate measure to restore and promote international peace and security); S.C. Res. 827, at 1, U.N. Doc. S/RES/827 (May 25, 1993) (expressing the conviction that creation of a tribunal “would contribute to the restoration and maintenance of peace”).

241. See Aukerman, *supra* note 182, at 81 (discussing role of accountability in reconciliation practices); Mark A. Drumbl, *Toward a Criminology of International Crime*, 19 OHIO ST. J. ON DISP. RESOL. 263, 278 (2003) (quoting WILLIAM J. LONG & PETER BRECKE, WAR AND RECONCILIATION (2003)) (“[Systematic research on societies in conflict suggests that] social order is restored by a ‘forgiveness process characterized by truth telling, redefinition of the identity of the former belligerents, partial justice, and a call for a new relationship.’”).

242. For example, Nancy Combs has argued that international criminal justice should strive to “impose[] retributive sanctions pursuant to restorative processes.” COMBS, *supra* note 232, at 141. She proposes a process whereby defendants would be encouraged to plead guilty in exchange for reduced sentencing, but would be required first to complete restorative obligations such as providing a full and complete accounting of their crimes. *Id.* See also FINDLAY & HENHAM, *supra* note 74, at 275 (urging a transformation of international justice process to better accommodate restorative justice principles without sacrificing retribution).

243. See Aukerman, *supra* note 182, at 79–80 (concluding that “the reparative paradigm of restorative justice offers little justification for prosecution”); Ramji-Nogales, *supra* note 74, at 10 (“For example, the defendants’ rights to confrontation and to a speedy trial may conflict with the victims’ interest in telling their stories as witnesses; in some cultural contexts, the latter might be more important than the former.”).

prosecutors.²⁴⁴ Moreover, critics charge that the very limited amount of reparations the Court can provide to a small number of victims hardly offers a convincing justification for its work.²⁴⁵ Finally, the Court's current prosecutor has rejected historical record building as an ICC goal on the grounds that the Court is not "well suited" to the task.²⁴⁶

Nonetheless, like retribution and deterrence, restorative justice should not be entirely rejected as a justification for the ICC's work. ICC prosecutions may well help to restore some victims, offenders, and communities under some circumstances. That said, the Court should not strive to maximize its restorative impact through its situation and case selection decisions. As currently configured, the ICC does not have the resources or proximity to local populations to make significant direct contributions to restoring victims or communities that have suffered mass violence. As such, the ICC should not, for example, select one situation over another based on the greater need for reconciliation in a particular population. Nor should it select cases based on the desires of particular victims to participate in criminal prosecutions or receive reparations. Instead, as elaborated below, the ICC should focus on its expressive impact at the global level in the hopes that its various justifying aims will be indirectly achieved as the norms it promotes are strengthened and entrenched throughout the world.

B. *An Expressive Theory*

This Section advances the argument that in making selection decisions the ICC should aim primarily to express global norms. This is not to say that the ICC should ignore the other goals discussed above. In deciding whether to investigate and prosecute situations and cases, the prosecutor and judges should consider whether ICC action will contribute to retribution, deterrence, restorative justice, or some combination of the three. But when the Court is faced with having to choose particular situations and cases over others that also deserve its attention, such decisions should aim to maximize the Court's expression.

Expressive theories posit that law, like other forms of expression, manifests states of mind, including beliefs, attitudes, and intentions.²⁴⁷ Law,

244. See McGonigle, *supra* note 237, at 124–25; see also Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgment on the Appeals of the Prosecutor, ¶¶ 5–14 (July 11, 2008) (Pikis, J., dissenting in part) (asserting victims' participation is inappropriate because it violates the statute and the principle that adversarial proceedings are between only the prosecution and defense).

245. Cf. WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 913 (2010) (showing evidence that Victim's Trust Fund operating costs exceeded contributions to the Fund); Aukerman, *supra* note 182, at 79–80.

246. DRAFT POLICY PAPER ON CRITERIA FOR SELECTION, *supra* note 15, at 10.

247. Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1504–05 (2000).

therefore, has “social meaning.”²⁴⁸ Such meaning derives not from the intent of the person making or enforcing the law, but rather from the ways in which relevant communities understand and interpret the law in light of existing social norms.²⁴⁹ An expressivist’s normative agenda therefore includes both crafting law to express valued social messages and employing law as a mechanism for altering social norms.²⁵⁰

A number of theorists, including Dan Kahan, advocate expressivism as a justification for criminal punishment.²⁵¹ Such theorists view crime as an expressive act and consider punishment justified when it counters the wrongful expression inherent in the criminal act.²⁵² Kahan further asserts that punishment is necessary to condemn wrongdoing when the relevant community would interpret other forms of expression as inadequate.²⁵³ For example, in many cultures a monetary sanction in response to a serious crime like murder or rape would be viewed as insufficient condemnation.²⁵⁴ Norm expression through criminal law can function as a form of prevention—discouraging crime by entrenching values—and as a means for communities to affirm their common identities.²⁵⁵

A growing number of scholars have turned to expressive theories to justify international criminal law processes and punishment.²⁵⁶ Courts have

248. Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597 (1996).

249. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022–24 (1996). Anderson and Pildes go so far as to say that the social meanings of an act “do not actually have to be recognized by the community, they have to be *recognizable* by it, if people were to exercise enough interpretive self-scrutiny.” Anderson & Pildes, *supra* note 247, at 1525.

250. Sunstein, *supra* note 249, at 2022–24 (discussing the relationship between law, changing social norms, and expressive aspects of lawmaking).

251. See Kahan, *supra* note 248, at 593 (describing the various benefits provided by expressivist theory); see also JOEL FEINBERG, *The Expressive Function of Punishment, in DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 98 (1970); Bernard E. Harcourt, *After the “Social Meaning Turn”: Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 LAW & SOC’Y REV. 179 (2000) (discussing implications of a new emphasis on social meaning for social-scientific research).

252. See, e.g., Dan M. Kahan, *The Anatomy of Disgust in Criminal Law*, 96 MICH. L. REV. 1622, 1641 (1998) (claiming that “an expressively effective punishment must make clear that we are in fact disgusted with what the offender has done”).

253. Kahan, *supra* note 248, at 600; see also Dan M. Kahan, *What’s Really Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2075–76 (2006).

254. See Kahan, *supra* note 248, at 600.

255. See Sunstein, *supra* note 249, at 2027 (“A society might identify the norms to which it is committed and insist on those norms via law, even if the consequences of the insistence are obscure or unknown.”).

256. See, e.g., GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 13 (2001); DRUMBL, *supra* note 18, at 173; Amann, *supra* note 5, at 120; Damaska, *supra* note 18, at 353 (emphasizing the stigma of conviction); Luban, *supra* note 18, at 575; Sloane, *supra* note 5, at 85 (“Over time, punishment by international criminal tribunals can shape as well as express social norms.”). *But see* Turner, *supra* note 220, at 17

also sometimes endorsed this rationale.²⁵⁷ Moreover, although Moreno-Ocampo has not explicitly articulated an expressive approach to selections, some of his statements and decisions appear to reflect an expressive orientation. For example, in his 2009–2012 Prosecutorial Strategy document, Moreno-Ocampo states that his office will select a limited number of incidents within a given situation for prosecution “to provide a sample that is reflective of the gravest incidents and the main types of victimization.”²⁵⁸ The prosecutor’s strategy of selecting a representative sample of charges may suggest a purpose to express condemnation of all the varieties of wrongdoing perpetrated in a situation.²⁵⁹ Moreno-Ocampo’s decision to bring a case involving the killing of a relatively small number of peacekeepers in Sudan may also suggest an expressive purpose to condemn attacks on peacekeepers.²⁶⁰ Similarly, the controversial decision to charge Congolese defendant Thomas Lubanga only with crimes related to child soldiers may have been animated by expressive goals. There were apparently practical reasons to charge Lubanga even though the investigation was incomplete—national authorities were threatening to release him from custody.²⁶¹ Nonetheless, the decision to proceed in the absence of evidence of arguably more serious crimes such as murder and rape seems to reflect a desire to promote the relatively new and ill-established norm against the recruitment and use of child soldiers.²⁶²

A focus on norm expression is particularly appropriate for the ICC for several reasons. First, as a descriptive matter, expressivism makes sense of the ICC’s structure, including its high degree of selectivity and its ability to

(arguing that international criminal law does not promote norms, but rather stirs up local backlash).

257. See, e.g., *Prosecutor v. Sesay, Kallon, & Gbao*, Case No. SCSLJ4-15-T, Sentencing Judgment, ¶ 15 (Apr. 8, 2009) (endorsing the view that punishment in international criminal law should reflect the revulsion of the international community and denounce the defendant’s conduct).

258. PROSECUTORIAL STRATEGY 2009–2012, *supra* note 7, at 6.

259. The strategy of representative charging could also be aimed at providing some satisfaction to victims whose direct persecutors will not be punished or contributing to the historical record, although the prosecutor has denied attempting to create “comprehensive historical records.” *Id.*

260. OTP, ICC, Eighth Rep. of the Prosecutor of the ICC to the UN Security Council Pursuant to UNSC 1593 (2005), ¶ 56 (Dec. 3, 2008), <http://www.icc-cpi.int/NR/rdonlyres/BBA77B57-C81C-4152-988C-D8D953471453/279075/8thUNSCreportsenttoUNENG1.pdf> (“Such attacks constitute violent crimes of exceptionally serious gravity and consequences for the victims and for the international community.”).

261. See REPORT ON FIRST THREE YEARS, *supra* note 126, at 8.

262. Fatou Bensuda, Deputy Prosecutor of the ICC, Statement at the OTP Monthly Media Briefing 3 (Aug. 28, 2006), http://www.icc-cpi.int/NR/rdonlyres/53FB2CF6-B86C-4026-A8DC-FA2FC2450BCA/277236/FB_20060828_en5.pdf (“It is the view of the Office of the Prosecutor that the abuse of child soldiers has gone largely unrecognized and unpunished for too long. . . . Regardless of the outcome of these proceedings, the hearing represents an unprecedented opportunity to shine a spotlight on this abuse of children worldwide.”).

decline to proceed “in the interests of justice.”²⁶³ The ICC’s selectivity is significantly less problematic if one adopts a primarily expressive theory of the institution’s work rather than one focused on deterrence or retribution. Both deterrence and retribution are undermined by the ICC’s inability to prosecute the vast majority of international crimes. The ICC can inflict retribution on but a handful of perpetrators, and can provide only a minor disincentive to prospective criminals. On the other hand, the ICC may effectively promote important moral norms with a small number of illustrative prosecutions.

Certainly, as Mark Drumbl has pointed out, international criminal law’s selectivity limits its expressive potential.²⁶⁴ But unlike in national systems where failure to prosecute is often interpreted as acquiescence in wrongdoing,²⁶⁵ the ICC is not expected to respond to all serious violations of international criminal law—it simply does not have the resources to do so. Moreover, despite a strong trend toward criminal punishment, there is no consensus in the international community that punishment is the only appropriate response to international crimes.²⁶⁶ Failure to prosecute particular situations or cases at the ICC is therefore much less likely to be viewed as expressing approval than it would be at the national level.

The expressive focus also helps to explain the ICC’s ability to decline prosecution in the “interests of justice.” If deterrence or retribution were the primary purposes of the ICC, it would seem inappropriate to permit

263. Rome Statute, *supra* note 6, art. 53.

264. See DRUMBL, *supra* note 18, at 176; Aukerman, *supra* note 182, at 88–89 (stating that demonstrating international criminal law’s ability to express values is undermined by selectivity and the strictures of the trial process).

265. Kahan, *supra* note 253, at 2075–76; see also Charles Cheney Hyde, Editorial Comment, *Concerning Damages Arising from Neglect to Prosecute*, 22 AM. J. INT’L L. 140, 141 (1928) (“It is said in substance that when the State neglects to prosecute it is to be deemed to approve of or condone the wrongful acts of those who did violence to the claimant, and to assume a responsibility therefor.”).

266. See, e.g., Alexander, *supra* note 122, at 29–30 (noting that the ICC’s commitment to combating impunity may complicate situations where a government provides amnesty to criminals in order to promote peace); PHUONG PHAM ET AL., *WHEN THE WAR ENDS: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE, AND SOCIAL RECONSTRUCTION IN NORTHERN UGANDA* 35–42 (Human Rights Ctr. U.C. Berkeley ed., 2007) (noting survey evidence in Uganda that showed that despite seventy percent of respondents believing the Ugandan military committed war crimes in the north, when asked whether they preferred “peace with amnesty” or “peace with trials,” eighty percent favored peace with amnesty and seventy-six percent claimed that pursuing trials at the present would endanger peace). The same survey found that ninety percent favored the establishment of a truth commission in Uganda. *Id.* at 4. See also Alison Des Forges & Timothy Longman, *Legal Responses to Genocide in Rwanda*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* 49 (Eric Stover & Harvey M. Weinstein eds., 2004) (criticizing international efforts to end impunity in Rwanda and claiming that the government of Rwanda has declined to establish a truth commission for fear of a broader picture of responsibility being established among the Rwandan people). Kahan argues there is such a consensus at the national level in the United States. See *supra* notes 251–252 and accompanying text.

non-prosecution in the “interests of justice.” Retribution assumes that prosecution is always a necessary response to wrongdoing and deterrence would be undermined whenever an offender walks free. On the other hand, expression is only necessary when the message is not already being conveyed. The “interests of justice” provision recognizes that sometimes nonprosecutorial mechanisms can adequately express condemnation of serious crimes at the international level.²⁶⁷ When a national government engages in a truth commission process, lustration, or traditional justice mechanism, ICC prosecution may no longer be necessary to serve justice. The question of which nonprosecutorial mechanisms adequately express condemnation is a controversial one that requires further exploration.²⁶⁸

In addition to these structural reasons to accept the primacy of expressive goals for the ICC, as a normative matter, global expression is the most appropriate role for the institution. Most of the crimes at issue in international criminal law are especially worthy of condemnation relative to national crimes in light of their gravity.²⁶⁹ Moreover, some of those crimes—particularly those committed during armed conflict and by governments against their own people—are especially in need of expressions of condemnation since they have historically been tolerated by the international community.²⁷⁰ Finally, the ICC’s global platform and scope make it an especially effective mechanism for expressing shared social norms.²⁷¹

Moreover, a transparently expressive approach to selection decisions has the potential to generate increased consensus around the work of the ICC. As explained above, in order for the Court to gain legitimacy it must develop the perception among relevant audiences that it selects appropriate situations and cases for investigation and prosecution. The current incoherence around the Court’s goals hinders its ability to generate such agreement.

267. See, e.g., Robinson, *supra* note 83, at 483 n.8 (noting that there was debate over whether prosecution should be sought in all instances, even when prosecution would threaten young and transitioning democracies, in light of the efficacy of South Africa’s Truth and Reconciliation Commission proceedings in achieving repentance and forgiveness).

268. See, e.g., Greenawalt, *supra* note 13, at 108–10 (examining Uganda’s efforts to introduce alternative justice mechanisms and alternatives to ICC jurisdiction).

269. See *id.* at 128 (explaining that the “broader aspiration” of international criminal law makes it focus on situations where gross atrocities have occurred, such as Uganda); cf. Amann, *supra* note 5, at 128 (discussing the hierarchy of severe crimes appearing before international criminal tribunals).

270. See Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT’L L. 551, 554 (2006) (noting that in the pre–World War I era, states rarely prosecuted their own nationals for war crimes despite a growing number of treaties codifying war crimes and calling for national enforcement).

271. Amann, *supra* note 5, at 95 (noting expressivism has “special force in international criminal law”); Damaska, *supra* note 18, at 345–47 (explaining expressivist goals of international criminal courts); Sloane, *supra* note 5, at 93 (“ICC sentencing judgments, like the statute itself, hold a similar potential to influence the practice and policy of states by acting as an engine of jurisprudential and normative development where it matters the most, within nation-states.”).

Furthermore, for the reasons already explained, it will be very difficult for the Court to develop consensus around its choices if it attempts to root them in retribution, deterrence, or restorative justice. Relevant audiences are unlikely to agree about who most deserves punishment, where deterrence will be most effective, or what populations most require restoration. On the other hand, if the ICC focuses on promoting the norms of its constitutive communities, it has the greatest chance of developing support for its work.

Developing consensus around the Court's work requires not just agreeing that expression is the appropriate focus for the ICC, but also determining which norms are most appropriate for ICC expression and what the appropriate priorities should be among such norms. These tasks are complex. Just as the international community has failed to provide the ICC with clear priorities among potential goals, no agreement exists about what norms are the most appropriate for ICC expression. For example, judges and commentators disagree about whether a hierarchy exists among international crimes. Some argue that genocide is the worst crime, followed by crimes against humanity and then war crimes.²⁷² According to that view, the norm against genocide should be given priority in selecting cases for international norm expression. Others have taken the position, however, that no such hierarchy exists and would therefore object to a hierarchy-based selection strategy.²⁷³ Some argue that the ICC should give priority to situations involving crimes with high numbers of victims, while others suggest the Court should focus on systematic crimes committed by government actors.²⁷⁴

In the short term, international agreement on such questions is unlikely. However, a transparently expressive approach to selection decisions may be

272. See, e.g., *Prosecutor v. Tadic*, Case No. IT-94-1-A & IT-94-1-Abis, Judgment in Sentencing Appeal, ¶ 16 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000) (Separate Opinion of Cassese, J.) (“[W]henver an offence committed by an accused is deemed to be a ‘crime against humanity’, it must be regarded as inherently of greater gravity, all else being equal (*ceteris paribus*), than if it is instead characterised as a ‘war crime.’”); *Prosecutor v. Erdemovic*, Case No. IT-96-22, ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997) (Joint Separate Opinion of McDonald & Vorah, JJ.) (noting a “crime against humanity is a more serious crime” than a war crime); Danner, *supra* note 183, at 420 (arguing “that the chapeaux of the crimes under international law should be read to form a hierarchy of crimes, connoting increasing levels of harm caused by a defendants actions”).

273. See, e.g., *Tadic*, Case No. IT-94-1-A & IT-94-1-Abis (ICTY), ¶ 69 (“After full consideration, the Appeals Chamber takes the view that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime.”); *Erdemovic*, Case No. IT-96-22 (ICTY), ¶ 19 (Separate and Dissenting Opinion of Li, J.) (asserting that “the gravity of a criminal act, and consequently the seriousness of its punishment, are determined by the intrinsic nature of the act itself and not by its classification under one category or another”).

274. Compare Luis Moreno-Ocampo, Keynote Address, *Integrating the Work of the ICC into Local Justice Initiatives*, 21 AM. U. INT'L L. REV. 497, 498 (2006) (emphasizing the number of victims as criterion in assessing gravity), with Kevin Jon Heller, *Situational Gravity Under the Rome Statute*, in FUTURE PERSPECTIVES IN INTERNATIONAL CRIMINAL JUSTICE, *supra* note 26, at 227, 229 (“[T]he OTP should privilege systematicity, social alarm, and the State criminality instead, because crimes that exhibit those features are inherently more serious than crimes that simply involve numerous victims.”).

able to generate agreement over time. Under such an approach, the Court's decision makers would announce the norms to which they have accorded priority in explaining the grounds for their selection decisions rather than claiming that their selections are based on "objective" and "impartial" evaluations of gravity or the interests of justice. In some cases, they might also have to explain the impact of practical factors on their decisions. For example, with regard to the *Lubanga* case, the prosecutor might have said not only that he proceeded in the case due to the risk of Lubanga's imminent release, but also that his intent was to express the norm against recruiting child soldiers. Relevant audiences—states, NGOs, local communities, and the broader international community—would then react, providing the decision makers with feedback on their normative choices. Decision makers would incorporate such feedback into their future decisions. Through this dialogic process, incremental progress would ideally be made toward greater consensus on norms and priorities.

Such decisions would not be easy and would raise many questions to which there are no ready answers. For example, to what extent should decision makers value the perspectives of state actors versus NGOs or local communities when their views conflict? Also, to what extent should the Court, in particular the prosecutor, seek to act as a reformer, advancing new or controversial norms as opposed to simply reflecting norms already widely accepted in the international community? Such questions require further exploration, but the answer to the latter question depends in part on the personal legitimacy of the decision makers. A charismatic prosecutor will have more room to advance a progressive agenda than one whose judgment is less widely respected.²⁷⁵ Moreover, as some have suggested, it may be time to reconsider the extent of the ICC prosecutor's role in selection decisions.²⁷⁶ Perhaps such decisions should involve the input of political actors who are more representative of the ICC's various constitutive communities.

Regardless of the identities of decision makers, ICC constituencies, in particular state actors, will need to play a more active role in reacting to selection decisions for the iterative process suggested herein to work. To date, state actors have demonstrated a reluctance to comment on the ICC's selection decisions, perhaps out of fear of being perceived as interfering with the Court's independence. However, this attitude actually hinders the Court's ability to develop a greater sense of the goals and priorities that states and other constituencies value. For an expressive approach to selection decisions to build consensus around the Court's goals, it will be critical not only for selection decision makers to express clearly the values underlying their choices but also for ICC stakeholders to provide the Court feedback on those choices.

275. WEBER, *supra* note 11, at 301, 328 (arguing that sociological legitimacy can derive from a leader's charisma).

276. See, e.g., Schabas, *supra* note 2, at 541–42 (arguing for a greater role for political factors in ICC). *But see* Rastan, *supra* note 98, at 584–87 (rebutting Schabas's arguments).

There is no guarantee that the dialogic process described above will succeed in generating consensus over time. The various relevant audiences may simply disagree about the norms the ICC should promote. In that case, the ICC is unlikely to develop and maintain high levels of legitimacy. On the other hand, if the effort to build consensus on norms meriting global expression succeeds, the ICC's legitimacy will be substantially enhanced because its actions will reflect the values of its constituencies.²⁷⁷

CONCLUSION

The ICC's need to select a small number of cases for prosecution from an enormous pool of potential cases represents one of the greatest challenges to its legitimacy. If it fails to select well, it will be condemned as illegitimate and perhaps even abandoned by dissatisfied states. Currently, no theoretical framework exists to explain how the ICC should select situations and cases for investigation and prosecution. The Court was created without clear goals and priorities under the banner of the ambiguous concept of gravity, and continues to reference gravity to justify its selection decisions. Although gravity served a constructive role in the ICC's creation, it cannot sustain the weight of justifying selection decisions. Instead, those wishing to ensure an important place for the ICC in the global legal order must urgently engage the task of clarifying the institution's goals and priorities.

This Article has sought to contribute to that endeavor by arguing for an expressive theory of selection decisions. Such an approach has the potential to enhance the ICC's legitimacy for several reasons. First, by clarifying the Court's goals it will enable evaluative audiences to debate the merits of the value choices animating ICC selection decisions rather than speculating about the improper motivations of decision makers.²⁷⁸ Such transparency about values (as opposed to the transparency of unmoored criteria discussed above) and the open debate it engenders should assist the Court in ensuring that the goals and priorities it pursues reflect the values of its constitutive communities. Second, by clarifying that it does not choose cases according to the relative desert of perpetrators or the deterrent benefits expected, the ICC can avoid criticisms stemming from the inherent incommensurability of such goals. Finally, at a minimum the explicit adoption of a global expressivist agenda would have the salutary effect of lowering expectations about what the ICC can accomplish.²⁷⁹ Currently, the lack of clarity about the ICC's goals enables various audiences to ascribe to the Court the purposes and priorities they value most. Victims in particular are led to believe that

277. See *supra* notes 69–74 and accompanying text.

278. Rastan, *supra* note 98, at 592–93 (arguing that prosecutors should focus on values in addition to judgments about fairness).

279. Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 86–87 (2006) (calling for lower expectations in regard to transitional justice mechanisms' potential in the wake of mass atrocity).

the Court will help them heal the wounds they have suffered and rebuild their communities. When, as is inevitable, the Court cannot deliver on such hopes, victim communities are embittered and view the Court as illegitimate. Adoption of an explicit global expressivist agenda would make sense of an institution created to “end impunity” with the resources to prosecute but a few exemplary cases.