

Guest Lecture Series of the Office of the Prosecutor

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“Prosecutorial discretion and legitimacy”[†]

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ENHANCING THE LEGITIMACY AND ACCOUNTABILITY OF PROSECUTORIAL DISCRETION AT THE INTERNATIONAL CRIMINAL COURT

By Allison Marston Danner*

The rapid ratification of the Rome Statute of the International Criminal Court (ICC) and the orderly election of its judges and prosecutor belie the radical nature of the new institution.¹ The Court has jurisdiction over genocide, aggression, crimes against humanity, and war crimes—crimes of the utmost seriousness often committed by governments themselves, or with their tacit approval. The ICC has the formal authority to adjudge the actions of high state officials as criminal and to send them to jail, no matter how lofty the accused's position or undisputed the legality of those acts under domestic law.² While the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) also possess this authority, those institutions operate directly under the control of the United Nations Security Council and within narrow territorial limits. The ICC, by contrast, is largely independent of the Council and vests the power to investigate and prosecute the politically sensitive crimes within its broad territorial sweep in a single individual, its independent prosecutor.³

The ICC Prosecutor sits at a critical juncture in the structure of the Court, where the pressures of law and politics converge. The cases adjudicated by the ICC are infused with political implications and require sensitive decision making by those members of the Court—including the Prosecutor—who are vested with the discretion to exercise its powers. Because of the high stakes of its subject matter and the threat that its decisions can pose to powerful international interests, the ICC will inevitably be subject to charges that it is a purely political institution, remote from both the rule of law and the places where the crimes it adjudicates occur.

* Assistant Professor of Law, Vanderbilt University Law School. I would like to thank the many people who agreed to be interviewed in connection with this project and, especially, Justice Louise Arbour, Graham Blewitt, Richard Dicker, Justice Richard Goldstone, Judge David Anthony Hunt, Judge Claude Jorda, Judge Richard George May, and Judge Wolfgang Schoenberg. For assistance in arranging interviews at the ICTY and at the United Nations, I would like to thank Hafida Lahiouel, Daryl Mundis, Cara Robertson, and staff members of the Coalition for an International Criminal Court. For critiques of earlier drafts, many thanks to Mark Brandon, Lisa Bressman, Rebecca Brown, John Goldberg, Laurence Helfer, Nancy King, Jeannine Marston, Jenny Martinez, Richard Nagareda, Diane Orentlicher, Robert Rasmussen, and Suzanna Sherry. For helpful discussions about this project, I would like to thank M. Cherif Bassiouni, Leila Nadya Sadat, Beth Van Schaack, and members of the International Association of Prosecutors. For superior research assistance, I am grateful to Stephen Jordan and Emily Urban of the Vanderbilt Law School Library and my research assistants Ashley Jones and James McHenry.

¹ The ICC's first judges were elected in February 2003. The results of the election are available online at <<http://www.un.org/law/icc/asp>> (visited July 24, 2003). The Court's Prosecutor, Luis Moreno Ocampo, was elected in April 2003. Election of the Prosecutor of the International Criminal Court, *available at* <<http://www.un.org/law/icc/asp>> (visited July 24, 2003).

² Rome Statute of the International Criminal Court, July 17, 1998, Art. 27, UN Doc. A/CONF.183/9* (1998), *reprinted in* 37 ILM 999 (1998), *corrected through May 8, 2000*, by UN Doc. CN.177.2000.TREATIES-5 [hereinafter Rome Statute], *available at* <<http://www.icc-cpi.int>>. The International Criminal Court shall be referred to hereinafter as either "the ICC" or "the Court."

³ Although this article refers to the Prosecutor in the singular, he clearly will not act alone but, instead, will be supported by a team of prosecutors. *Id.*, Art. 42(2) (providing that "the Prosecutor shall be assisted by one or more Deputy Prosecutors"). The Prosecutor and deputy prosecutors will be in charge of the "Office of the Prosecutor." At the ICTY and ICTR, the prosecution is usually referred to by its acronym, "OTP," further underscoring the collective nature of prosecutorial decision making. References in this article to the "Prosecutor," therefore, should be understood to refer to the chief prosecutor, his deputy prosecutors, and the other prosecutors that make up the ICC's Office of the Prosecutor. The ICTY and ICTR Prosecutor will be referred to analogously.

The Court will face serious challenges that will question its independence from political institutions, its legitimacy as an authentic interpreter of international norms, and its accountability to the states that created it and whose nationals face prosecution within its courtrooms.

This article examines two fundamental questions relating to the Prosecutor and, with it, the ICC as a whole. The first concerns the extent to which the Prosecutor can be expected to function as an accountable political actor. The second addresses the extent to which he will be able to claim legitimacy. The concepts of accountability and legitimacy are abstract and contestable, and this article does not purport to provide a full-blown account of either. Instead, by adapting extant accounts of these concepts to the context of the ICC Prosecutor, I hope to refine and advance our understanding of them. This article draws, not just on international law theory, but also on the concrete particulars of the ICC's institutional structure and the actual experiences of the closest analogue to the ICC Prosecutor, the Prosecutor of the ad hoc international tribunals.⁴ I seek to show how even a popularly unelected official such as the ICC Prosecutor can, depending in part on how the office actually functions, lay a valid claim to be both accountable and legitimate.

In part I, I describe the debate over the proper role of the Prosecutor in the negotiating history of the Rome Statute. Part II sets out the major theoretical and practical justifications for prosecutorial discretion and delineates the areas in which the ICC Prosecutor enjoys significant discretion. I turn to the question of prosecutorial accountability in part III. A major goal of this part is to refute the argument that the Prosecutor poses a danger to world order because of inadequate checks on his discretion. While U.S. officials have taken the most extreme position on this question by flatly declaring that the Prosecutor is unaccountable,⁵ any state whose national stands accused before the Court will surely be concerned about prosecutorial accountability.

Through an analysis of the structure of the Court, I describe how the Prosecutor's autonomy is constrained by several mechanisms of accountability. These include formal accountability procedures, in particular those exercised by the ICC judiciary and by state representatives in the Assembly of States Parties (ASP). In addition, I argue that the Prosecutor is pragmatically accountable to states and, to a lesser extent, nongovernmental organizations (NGOs). By pragmatic accountability, I mean that the Prosecutor must rely on these entities to accomplish his tasks of investigating and prosecuting those responsible for international crimes. Through their decisions whether or not to cooperate with the Prosecutor, these entities can force the Prosecutor to account for his decisions in a way that will significantly enhance or hamper his effectiveness.

In part IV, I turn to the question of the Prosecutor's and the Court's legitimacy. Specifically, I consider how the Prosecutor can enhance the legitimacy of the Court and advance the idea that the office can contribute to the ICC's legitimacy through transparency and a demonstrated commitment to impartial decision making—in short, through good process. In part V, I propose that, for the Prosecutor, good process should include the public articulation of prosecutorial guidelines that will shape and constrain his discretionary decisions.

In addition to enhancing the quality of his decision making, these guidelines will protect the Prosecutor's independence from the pressures generated by the ICC's regime of pragmatic accountability. Guidelines will help shield the Prosecutor—and inferentially the Court

⁴ The Prosecutor of the ICC has more discretion than the Prosecutor of the ad hoc tribunals because of the wider scope of the ICC's jurisdiction. 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, 657 (2000) (describing degree of ICC Prosecutor's independence as a "fundamental departure" from that of the Prosecutor of the ad hoc tribunals).

⁵ See, e.g., John R. Bolton, under secretary of state for arms control and international security, The United States and the International Criminal Court, Remarks to the Federalist Society (Nov. 14, 2002), at <<http://www.state.gov>>; Marc Grossman, under secretary of state for political affairs, Remarks to the Center for Strategic and International Studies (May 6, 2002), at <<http://www.state.gov>>.

itself—against charges of politically driven prosecutions. As Louise Arbour, former Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, notes, “[C]harges that decisions are politically-driven are easy to make and hard to rebut.”⁶ Furthermore, these guidelines will enhance the accountability of the Prosecutor. By providing a transparent standard by which outside entities can judge his decision making, guidelines serve as a focal point for critical evaluation of the Prosecutor’s actions. Guidelines also help provide a mechanism for second-order accountability—that is, holding those who seek to influence the Prosecutor accountable as well. If states or NGOs ask the Prosecutor to act in a way that violates his own guidelines, this request should be considered presumptively impermissible.

I. PROSECUTORIAL INDEPENDENCE IN THE ROME STATUTE

In both international and municipal criminal law systems, prosecutors play a critical role in the administration of justice. Antonio Cassese, the first president of the International Criminal Tribunal for the Former Yugoslavia, told the UN General Assembly that the Prosecutor provided “the key to the Tribunal’s action.”⁷ The exact duties and powers of the police, prosecutors, judges, and victims vary widely in municipal criminal systems. Nevertheless, as the Committee of Ministers of the Council of Europe has underscored, “it is public prosecutors, not judges, who are primarily responsible for the overall effectiveness of the criminal justice system.”⁸

In addition to this critical systemic role, prosecutors also enjoy significant influence over individual cases. In the Netherlands, the United States, and Egypt, for example, prosecutors have broad discretion to direct criminal investigations and to determine charging decisions.⁹ In Pakistan, England,¹⁰ Denmark, and Canada, by contrast, prosecutors do not generally oversee investigations but have broad discretion over charging decisions and argue the state’s case at trial.¹¹ In France, a judge, not the prosecutor, investigates the most serious crimes, but the prosecutor sets the limits of the investigation by directing the *juge d’instruction* which facts to investigate.¹² French prosecutors also have significant discretion in charging cases and overall play a central role in the criminal process.¹³

⁶ Telephone interview with Justice Louise Arbour (July 29, 2002).

⁷ Antonio Cassese, Address to the General Assembly of the United Nations (Nov. 14, 1994), 1994 ICTY Y.B. 134, 137, UN Sales No. E.95.III.P.2; see also The Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, *id.* at 81, 116.

⁸ COUNCIL OF EUROPE, THE ROLE OF PUBLIC PROSECUTION IN THE CRIMINAL JUSTICE SYSTEM, RECOMMENDATION (2000) 19 ADOPTED BY THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE ON 6 OCTOBER 2000 AND EXPLANATORY MEMORANDUM at 21 (2001) [hereinafter COE, ROLE OF PUBLIC PROSECUTION]. For similar statements from individual municipal systems, see, for example, Hans-Jörg Albrecht, *Criminal Prosecution: Developments, Trends and Open Questions in the Federal Republic of Germany*, 8 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 245, 245 (2000); Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC’Y 18, 18 (1940); Stephan Parmentier, Cyrille Fijnaut, & Dirk Van Daele, *From Sisyphus to Octopus: Towards a Modern Public Prosecutor’s Office in Belgium*, 8 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 154, 156 (2000).

⁹ Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors’ Ethics*, 55 VAND. L. REV. 381, 456 (2001) (describing prosecutorial functions in the United States); Nico Keijzer, *The Netherlands*, in THE PROSECUTOR OF A PERMANENT INTERNATIONAL COURT 413, 418–19 (Louise Arbour et al. eds., 2000); Adel Omar Sherif, *Egypt*, *in id.* at 291, 293.

¹⁰ There is no unified prosecutorial system in the United Kingdom. References to English practice include the practice in England and Wales but not Scotland or Northern Ireland. See Andrew Ashworth, *Developments in the Public Prosecutor’s Office in England and Wales*, 8 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 257, 257 (2000).

¹¹ David J. Feldman, *England and Wales*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 91, 92, 115, 122 (Craig M. Bradley ed., 1999); Vagn Greve, *Denmark*, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 51, 54–55 (Christine Van Den Wyngaert et al. eds., 1993); Patrick Healy, *Canada*, in THE PROSECUTOR OF A PERMANENT INTERNATIONAL COURT, *supra* note 9, at 245, 247–48; S. M. Zafar, *Pakistan*, *in id.* at 435, 437.

¹² Valérie Dervieux, *The French System*, in EUROPEAN CRIMINAL PROCEDURES 218, 241 (Mireille Delmas-Marty & J. R. Spencer eds., 2002). Prosecutors do direct the investigations into less serious crimes. *Id.* at 236–37.

¹³ Jacqueline Hodgson, *The Police, the Prosecutor and the Juge d’Instruction*, 41 BRIT. J. CRIMINOLOGY 342, 346 (2001).

In Germany, prosecutors are responsible for investigating criminal cases, and, in theory, are required to charge all felonies for which there is an adequate evidentiary basis, although in practice they have considerable discretion over the disposition of cases.¹⁴ The Italian Constitution also imposes on prosecutors the obligation to prosecute all crimes,¹⁵ although Italian prosecutors engage in a variety of techniques to weed out weak cases.¹⁶ In Chile, the prosecutor is in charge of investigations and has some charging discretion.¹⁷

The key function of the prosecutor in directing the course of criminal justice systems did not escape the drafters of the Rome Statute. The vision of the Prosecutor's role changed markedly throughout the negotiations leading up to its adoption and, in fact, remained uncertain until the end of the Rome Conference.¹⁸ The history of this evolution reveals the growing ambition of those interests that wished to see the ICC play a role independent of state control.

The Debate at Rome over the Prosecutor's Powers

The first draft of the treaty that would eventually become the Rome Statute was produced by the International Law Commission (ILC) in 1994.¹⁹ That draft limited the ICC's jurisdiction to cases that formed the subject of a complaint by a state party or were referred to the Court by the Security Council.²⁰ It did not allow a prosecutor to initiate a case absent either of these conditions, principally out of fear that an independent prosecutor would lead to politically motivated or frivolous proceedings.²¹ The ILC's commentary on the draft Statute noted the Commission's belief that affording the Prosecutor the power to initiate investigations on his own—what has come to be known as his *proprio motu* powers—was not advisable “at the present stage of development of the international legal system.”²²

Once negotiations turned to the Preparatory Committee, delegates suggested that the Prosecutor should have the ability to initiate investigations based on information received from nonstate sources, such as individuals and NGOs.²³ The question whether or not to authorize the Prosecutor to initiate investigations absent a prior complaint by a state or the Security Council became one of the most contentious issues in the negotiations over the ICC.²⁴

Both supporters and opponents of a prosecutor with *proprio motu* powers grounded their arguments on fears of politicizing the Court. Opponents argued that the Prosecutor could become either a “lone ranger running wild” around the world targeting highly sensitive political situations or a weak figure who would be subject to manipulation by states, NGOs, and other groups who would seek to use the power of the ICC as a bargaining chip in political

¹⁴ Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?* 18 B.C. INT'L & COMP. L. REV. 317, 322, 337–39 (1995); Rodolphe Juy-Birmann, *The German System*, in EUROPEAN CRIMINAL PROCEDURES, *supra* note 12, at 292, 314.

¹⁵ COST. Art. 112.

¹⁶ Antoinette Perrodet, *The Public Prosecutor*, in EUROPEAN CRIMINAL PROCEDURES, *supra* note 12, at 415, 447.

¹⁷ Claudio Uribe Diaz, *Chile*, in THE PROSECUTOR OF A PERMANENT INTERNATIONAL COURT, *supra* note 9, at 251, 252–53.

¹⁸ Morten Bergsmo & Jelena Pejić, *Article 15: Prosecutor*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 359, 363 n.19 (Otto Triffterer ed., 1999) [hereinafter COMMENTARY ON THE ROME STATUTE].

¹⁹ Draft Statute for the International Criminal Court, in Report of the International Law Commission on the Work of its Forty-sixth Session, UN GAOR, 49th Sess., Supp. No. 10, at 43, UN Doc. A/49/10 (1994), *reprinted in* [1994] 2 Y.B. INT'L L. COMM'n 46, UN Doc. A/CN.4/Ser.A/1994/Add.1 (Part 2) [hereinafter ILC Draft]; *see also* Roy S. Lee, *Introduction to THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 1, 3 n.5 (Roy S. Lee ed., 1999) [hereinafter THE MAKING OF THE ROME STATUTE] (describing ILC draft).

²⁰ ILC Draft, *supra* note 19, Arts. 23, 25.

²¹ *See* Silvia A. Fernández de Gurmendi, *The Role of the Prosecutor*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 55, 55 (Mauro Politi & Giuseppe Nesi eds., 2001).

²² ILC Draft, *supra* note 19, Commentary to Art. 27, at 46.

²³ Silvia A. Fernández de Gurmendi, *The Role of the International Prosecutor*, in THE MAKING OF THE ROME STATUTE, *supra* note 19, at 175, 177.

²⁴ Bergsmo & Pejić, *supra* note 18, at 360.

negotiations.²⁵ Proponents of the *proprio motu* powers, on the other hand, argued that limiting the Prosecutor's investigatory ability to situations identified by overtly political institutions like states and the Security Council would decrease the independence and credibility of the Court as a whole.²⁶ Both sides agreed that the outcome of this debate would "fundamentally affect the Court's structure and functioning."²⁷

NGOs in particular fought for inclusion of an independent prosecutor in the Rome Statute.²⁸ They echoed the concern that limiting the triggering of the ICC's jurisdiction to states and the Security Council would result in the politicization of the Court.²⁹ In addition, NGOs argued that states' historical reluctance to use the existing state complaint procedures in human rights mechanisms suggested that they would be similarly unwilling to incur the political costs of referring cases to the ICC.³⁰

The United States took a particularly strong stance against the idea of a prosecutor with *proprio motu* powers. David Scheffer, the United States ambassador-at-large for war crimes issues, later stated that "the independent prosecutor . . . was of deep, deep concern to us. We spent much of the second week of the [Rome] conference arguing against this proposal."³¹ The U.S. delegation laid out its position on the Prosecutor in a paper circulated during the conference.³² The document stated that allowing the Prosecutor to initiate investigations based on information from nonstate entities would inundate the Prosecutor with frivolous complaints. It argued that the ICC regime needed a "screen," which could only be provided by states and the Security Council, to distinguish between cases that deserved to be heard by the Court and those that did not.³³ In addition, the United States demanded the power to divest the Prosecutor of the ability to investigate a case if it were being considered by the Security Council under the Council's Chapter VII authority. Since any member of the Council can put measures on the Security Council's agenda, under this proposal the United States could have removed any case from the ICC's purview.³⁴

The U.S. position was rejected. The delegates at Rome found making the Court formally subordinate to political institutions, and especially to the Security Council, incompatible with the purpose of the ICC. In the final version of the Statute, the Security Council has only limited ability to restrict the Prosecutor's discretion.³⁵

Despite the delegates' rejection of the Security Council as the ultimate regulator of the ICC's jurisdiction, many states recognized the danger posed by arming the Prosecutor with unfettered discretion. In March 1998, a few months before the convening of the Rome Conference, Germany and Argentina introduced a proposal that granted the Prosecutor *proprio*

²⁵ Fernández de Gurmendi, *supra* note 23, at 181.

²⁶ *Id.* at 178.

²⁷ Bergsmo & Pejić, *supra* note 18, at 360.

²⁸ Fernández de Gurmendi, *supra* note 23, at 177.

²⁹ LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE INTERNATIONAL CRIMINAL COURT: TRIGGER MECHANISM AND THE NEED FOR AN INDEPENDENT PROSECUTOR 9–11 (ICC Briefing No. 4, July 1997).

³⁰ HUMAN RIGHTS WATCH, JUSTICE IN THE BALANCE: RECOMMENDATIONS FOR AN INDEPENDENT AND EFFECTIVE INTERNATIONAL CRIMINAL COURT 2 (1998); see Lawrence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for an ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 85, 94 (Sarah B. Sewall & Carl Kaysen eds., 2000) [hereinafter THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT].

³¹ *Is a U.N. International Criminal Court in the U.S. National Interest? Hearing Before the Subcomm. on International Operations of the Senate Comm. on Foreign Relations*, 105th Cong. 16 (1998) (prepared statement of David Scheffer).

³² *Statement of the United States Delegation Expressing Concerns Regarding the Proposal for a Proprio Motu Prosecutor* (June 22, 1998), reprinted in *id.* at 147–49 [hereinafter *Statement of United States Delegation*].

³³ *Statement of United States Delegation*, *supra* note 32, at 148.

³⁴ Lionel Yee, *The International Criminal Court and the Security Council: Articles 13(b) and 16*, in THE MAKING OF THE ROME STATUTE, *supra* note 19, at 143, 150.

³⁵ The Security Council may defer the investigation or prosecution by the Prosecutor of any case for a period of twelve months by adopting a resolution to that effect pursuant to its Chapter VII powers. Rome Statute, *supra* note 2, Art. 16. The Council can renew the request for deferral upon the expiration of the twelve-month period. *Id.*

motu powers but also provided a check on his discretion at an early stage of the investigation.³⁶ According to this proposal, the Prosecutor's independent decision to initiate an investigation would be subject to judicial review by a pretrial chamber before the Prosecutor could actually proceed with the investigation. This proposal was eventually incorporated into the Rome Statute, which allows for the Prosecutor to commence investigations on his own initiative.

The inclusion of the independent prosecutor—independent in the sense of having the authority to initiate investigations without a formal state complaint or Security Council referral—has been hailed by many states and commentators as a great achievement.³⁷ It constitutes a dramatic step away from the ILC's original assessment that an independent prosecutor was not feasible “at the present state of development of the international system,” toward a vision of international law enforcement that enhances the power of individuals and demonstrates less solicitude for state sovereignty.³⁸

The independence of the International Criminal Court, and particularly of its Prosecutor, from direct political control is rightly celebrated as a salutary development. Human rights instruments, as well as decent criminal justice systems, guarantee that “in the determination of any criminal charge against him . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”³⁹ For an institution that promises a more muscular enforcement of the human rights of individuals, making the Court subject to direct political control would have constituted a betrayal of fundamental principles. The Prosecutor's ability to make individualized considerations based on law and justice, rather than the self-interest or sheer power of any particular state, transforms the Court from a political body festooned with the trappings of law to a legal institution with strong political undertones.

The independent prosecutor also brings the ICC closer to the best practices of domestic criminal justice systems. While the exact relationship between the prosecutor, the executive, and the judiciary varies from state to state, there appears to be a general practice in states with independent judiciaries that the prosecutor should be independent of both the executive and the judiciary, or, where subordinate to the executive, that guidance provided to prosecutors should be subject to legal constraints.⁴⁰ The Canadian Supreme Court, for example, has declared that “the independence of the Attorney-General, in deciding fairly who should be prosecuted, is . . . a hallmark of a free society.”⁴¹ Even in states where they are clearly part of the executive, prosecutors typically enjoy a significant measure of autonomy.⁴²

³⁶ Bergsmo & Pejić, *supra* note 18, at 362.

³⁷ Antonio Cassese et al., *The Rome Statute: A Tentative Assessment*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1901, 1907 (Antonio Cassese et al. eds., 2002) [hereinafter ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT]; Roy S. Lee, *Creating an International Criminal Court—Of Procedures and Compromises*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS 141, 150 (Herman A. M. von Hebel et al. eds., 1999) [hereinafter REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT].

³⁸ See Gustavo Gallón, *The International Criminal Court and the Challenge of Deterrence*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 93, 103 (Dinah L. Shelton ed., 2000). Further underscoring the importance of prosecutorial independence, the Rome Statute declares that the Prosecutor “shall act independently as a separate organ of the Court” and forbids the Prosecutor from “seek[ing] or act[ing] on instructions from any external source.” Rome Statute, *supra* note 2, Art. 42(1).

³⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 14, 999 UNTS 171.

⁴⁰ COE, ROLE OF PUBLIC PROSECUTION, *supra* note 8, at 9. In France, for example, if the minister of justice wishes to give instructions relating to a particular case, these must be in writing and included in the dossier. In addition, a prosecutor may depart from his written instructions in his oral representations to the court. Dervieux, *supra* note 12, at 218, 224. Nevertheless, in many respects, French prosecutors lack independence. The proper degree of prosecutorial independence is a subject of continuing debate in France; legal experts advocate greater prosecutorial independence, whereas politicians are apprehensive about relinquishing their control over prosecutorial decision making. Perrodet, *supra* note 16, at 415, 425. In Italy, prosecutors have been made functionally independent of the executive, “creating a prosecution service which in effect runs itself.” *Id.* at 429.

⁴¹ Krieger v. Law Soc'y (Alta.), [2002] 217 D.L.R. (4th) 513, 527 (citations omitted).

⁴² Perrodet, *supra* note 16, at 415, 432.

Yet this independence comes at a price. Independence necessarily entails institutional autonomy and discretion, a result potentially threatening to states. Some states, such as the United States, refuse to trust an entity whose jurisdiction they cannot directly control. Even for states willing to place faith in an international institution of broad jurisdiction, an independent prosecutor raises the specter of a renegade crusader who will use the Court's jurisdiction as a political weapon brandished against unpopular states. The ability to accuse political and military leaders of serious crimes—and perhaps to try and convict them—is not the kind of power one wants to deliver without any restraints. For this reason, the Rome Statute does not grant the Prosecutor the authority simply to select which cases the Court will adjudicate. An accurate understanding of the Prosecutor's discretion, as well as its limits, requires a review of the procedure by which a case makes its way through the Court.

Prerequisites to Trial at the ICC

Before a case goes to trial at the Court, it must first survive an elaborate series of tests designed largely with two purposes in mind. The first objective is to establish that there is sufficient evidence that the accused has committed a crime within the jurisdiction of the Court to warrant a trial; the second, to ascertain whether the case both merits the international forum and cannot or will not be tried by the courts of any state with jurisdiction over the crime. These questions form the basis of the jurisdictional, triggering, and admissibility provisions of the Rome Statute and serve to restrict the Prosecutor's authority.

Jurisdiction of the Court. The ICC's jurisdiction is limited to cases alleging the commission of crimes against humanity, war crimes, or genocide, as defined in the Rome Statute,⁴³ occurring after July 1, 2002, the date of entry into force of the Statute.⁴⁴ Unless the Security Council has referred the relevant situation to the Prosecutor, the ICC will not have jurisdiction over the case unless either the state where the crime occurred or the state whose national is accused of committing the crime has ratified the Rome Statute.⁴⁵

Triggering authority. Three kinds of entities have the ability to trigger investigations and prosecutions in the ICC. The first is states parties to the treaty. Second, the UN Security Council may refer a situation to the Prosecutor under its Chapter VII powers. Finally, the Prosecutor may himself trigger the ICC's jurisdiction by commencing an investigation on the basis of information he has received; the source of the information is irrelevant.⁴⁶ It is widely assumed that NGOs and victims' groups will provide this kind of information to the Prosecutor.

If the Prosecutor receives information from an NGO alleging that crimes within the ICC's jurisdiction have been committed, he will evaluate the information and make two determinations: first, whether there is a "reasonable basis" to proceed with the investigation; and second, whether the case appears to fall within the jurisdiction of the Court.⁴⁷ If the Prosecutor answers both of these questions in the affirmative, he must then apply in writing to a three-judge panel, called the pretrial chamber, for authorization to commence an investigation.⁴⁸

⁴³ The crime of aggression will come within the jurisdiction of the Court once the Assembly of States Parties amends the Statute to include a definition of this crime. Rome Statute, *supra* note 2, Art. 5(2). According to the terms of the Statute, the earliest such an amendment can occur is in 2009, seven years after the entry into force of the treaty. *Id.*, Art. 121(1).

⁴⁴ *Id.*, Art. 11(1). If a state ratifies the Rome Statute after July 1, 2002, the ICC will have jurisdiction only over crimes committed after the entry into force of the treaty for that state. *Id.*, Art. 11(2).

⁴⁵ *Id.*, Art. 12(2). A state may also accept the jurisdiction of the Court on an ad hoc basis with regard to that particular situation. *Id.*, Art. 12(3).

⁴⁶ *Id.*, Art. 15(1).

⁴⁷ *Id.*, Art. 15(4).

⁴⁸ *Id.*, Art. 15(3); ICC Rules of Procedure and Evidence, Rule 50(2), available at <<http://www.icc-cpi.int>> (visited July 30, 2003).

If the pretrial chamber agrees that there is a reasonable basis to proceed with an investigation and that the case appears to be within the Court's jurisdiction, it must authorize the commencement of an investigation.⁴⁹ If the pretrial chamber refuses the Prosecutor's request, then the Prosecutor may submit a subsequent request "based on new facts or evidence."⁵⁰ Alternatively, if the Prosecutor finds that the information he has received does not provide a reasonable basis to proceed with an investigation, he must inform those who provided the information of his conclusion.⁵¹

Admissibility. The admissibility provisions in the Rome Statute have several consequences for the ICC Prosecutor. They ensure that his prosecutions are complementary⁵² to national prosecutions, they restrict his *proprio motu* powers,⁵³ and they create a complex and potentially politically charged series of procedural hurdles that he must negotiate.

If the Prosecutor decides there is a reasonable basis to proceed with an investigation, he must so notify all states parties to the Rome Statute and all states that would normally exercise jurisdiction over the crimes.⁵⁴ If one of these states informs the Prosecutor that it is investigating or has investigated the perpetrators within its jurisdiction in relation to the information provided in the notification and requests the Prosecutor not to proceed, the Prosecutor "shall defer to the State's investigation."⁵⁵ The Prosecutor may, however, challenge the state's assertion that the case is inadmissible in the ICC because of an ongoing domestic investigation or prosecution. He may petition the pretrial chamber to find a case admissible in the face of a domestic investigation or prosecution if the state is unwilling or unable to investigate or prosecute the case.⁵⁶

The admissibility proceedings may significantly delay the Prosecutor's authority to commence or pursue an investigation.⁵⁷ Furthermore, the "unwillingness" and "inability" determinations are fraught with political peril, both for the Prosecutor and for the Court. As Justice Arbour points out, the admissibility regime essentially requires the Prosecutor to put a domestic system of criminal justice on trial.⁵⁸ The Prosecutor will have to prove either that a state's criminal justice system is incompetent or that it is being manipulated by the state's government. These questions have far-ranging political overtones, and will pose a significant challenge for the ICC's Prosecutor.

Investigation and confirmation of the charges. Assuming that the Prosecutor has been given permission to investigate by the pretrial chamber, and assuming that admissibility is not an issue, he may begin investigating the relevant events. If the Prosecutor wishes to issue an arrest warrant, he must first secure the approval of the pretrial chamber.⁵⁹ Once a suspect has been arrested, the pretrial chamber will hold a hearing to confirm the charges on which the Prosecutor intends to try the accused.⁶⁰ At the hearing, the Prosecutor must furnish the pretrial chamber with enough evidence for it to conclude that "there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged."⁶¹

⁴⁹ Rome Statute, *supra* note 2, Art. 15(4).

⁵⁰ *Id.*, Art. 15(5).

⁵¹ *Id.*, Art. 15(6).

⁵² *See id.*, pmbl.

⁵³ *See* John T. Holmes, *The Principle of Complementarity*, in *THE MAKING OF THE ROME STATUTE*, *supra* note 19, at 41, 71.

⁵⁴ Rome Statute, *supra* note 2, Art. 18(1).

⁵⁵ *Id.*, Art. 18(2).

⁵⁶ *Id.*, Art. 17(1).

⁵⁷ Giuliano Turone, *Powers and Duties of the Prosecutor*, in *2 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 37, at 1137, 1142.

⁵⁸ Louise Arbour, *The Challenges of Litigation in the 21st Century: From the ad hoc Tribunals to the International Criminal Court*, Address to the American Bar Association, Toronto (Aug. 3, 1998), 1998 ICTY Y.B. 445, 446, UN Sales No. E.00.III.P.1.

⁵⁹ Rome Statute, *supra* note 2, Art. 58.

⁶⁰ *Id.*, Art. 61.

⁶¹ *Id.*, Art. 61(7)(a).

The pretrial chamber must confirm any charges that meet this standard, and may decline the charges for which it concludes there is insufficient evidence.

II. PROSECUTORIAL DISCRETION

As the negotiating history and pretrial procedure of the Rome Statute demonstrate, the decision to invest the Prosecutor with a significant degree of autonomy to select his cases is coupled with an array of formal limits on his independence. The intensive oversight exerted by the pretrial chamber and the complex admissibility procedures provide a series of checks on the Prosecutor's autonomy.

The U.S. description of the Prosecutor as an institution with no oversight is therefore overblown. There is, however, a fundamental tension in the Rome Statute highlighted by the U.S. objections. The decision to vest the Prosecutor with *proprio motu* powers places greater importance on the sensible discharge of his mandate and on the other checks and balances in the ICC regime than would a system with more direct state control. In the ICC, the Prosecutor functions as a counterweight to state power,⁶² a role not often played by prosecutors in domestic systems. At the same time, the ICC depends heavily on state support to discharge its mandate effectively. Reconciling this inherent conflict constitutes one of the primary challenges for the Court's Prosecutor.

The debate over the role of the Prosecutor's *proprio motu* powers was essentially a fight over the proper scope of the Prosecutor's discretion—in particular, whether it should extend to the decision to initiate an investigation. Prosecutorial discretion, meaning the power to choose between two or more permissible courses of action,⁶³ plays an important role in many national criminal justice systems.⁶⁴ Discretion entails both risks and benefits.⁶⁵ By promoting case-sensitive decision making, it can protect liberty, but it can also lead to unjustified discrimination. Discretion sits uneasily between the twin demands of the individualization of prosecutorial decisions and protection from arbitrary state action.

Prosecutorial discretion can also provide important efficiency benefits. Since crime in virtually every country exceeds the ability of the criminal justice system to adjudicate it, prosecutors must be able to exercise their discretion to pursue or decline particular cases in order to maintain a functioning criminal justice system.⁶⁶ Even in countries like Germany that in theory mandate prosecutors to prosecute every crime committed, exceptions to this rule allow prosecutors to exercise their discretion in particular kinds of cases.⁶⁷

Discretion also forces prosecutors to make decisions that cumulatively affect the criminal justice system as a whole.⁶⁸ It requires them to make judgments about the purpose and priorities of their particular system.⁶⁹ Of all the by-products of discretion, this policymaking role has perhaps the greatest systemic consequences for criminal justice. Thus, the prosecutorial function assumes special importance in criminal systems—like that created by the Rome

⁶² CHRISTOPHER J. M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 76–77 (2001); see also Louise Arbour, *Litigation Before the ICC: Not If and When, But How?* 40 COLUM. J. TRANSNAT'L L. 1, 3 (2001).

⁶³ This definition is taken from HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 144 (William N. Eskridge Jr. & Philip P. Frickey eds., 1994).

⁶⁴ See *supra* text at notes 10–18.

⁶⁵ In Kenneth Culp Davis's famous formulation, "Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness." KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 3 (1969).

⁶⁶ Kai Ambos, *Comparative Summary of the National Reports*, in THE PROSECUTOR OF A PERMANENT INTERNATIONAL COURT, *supra* note 9, at 495, 525.

⁶⁷ Juy-Birmann, *supra* note 14, at 292, 314.

⁶⁸ Giuseppe Di Federico, *Prosecutorial Independence and the Democratic Requirement of Accountability in Italy*, 38 BRIT. J. CRIMINOLOGY 371, 378 (1998).

⁶⁹ Gerard E. Lynch, *Special Prosecutors: What's the Point?* WASH. POST, May 28, 1995, at C7.

Statute—characterized by a large measure of prosecutorial discretion.⁷⁰ The following discussion examines the stages of a case in which the ICC Prosecutor has the greatest discretion.

Investigations

The power to choose to pursue an investigation and the concomitant power of declination lie at the heart of the independence of the Prosecutor, as embodied in the Rome Statute.⁷¹ The ICC's Prosecutor will likely face an avalanche of complaints from NGOs, victims, and other individuals alleging that crimes within the Court's jurisdiction have occurred. In addition, states and the Security Council have the authority to trigger the Prosecutor's investigations, although they will likely be a source of far fewer cases.⁷²

The ICC Rules of Procedure and Evidence, as well as certain articles in the Statute, establish that the Prosecutor may exercise discretion to decline to investigate cases, even where he believes that a crime within the jurisdiction of the Court has occurred.⁷³ The Prosecutor's decision to investigate particular situations will have important ramifications, even if no charges are ever brought. Simply opening an investigation provokes the assumption that the Prosecutor believes that the targets have committed criminal acts. A contrary decision implies—however erroneously—that the Prosecutor believes no crimes have been committed. The ICTY Prosecutor's decision not to investigate NATO, for example, which is further discussed in part IV of this article, was widely reported in the media and affected attitudes toward that Tribunal.

Other aspects of the Rome Statute also force the Prosecutor to exercise discretion in selecting and prioritizing investigations. Resource constraints, a potent brake on overprosecution in domestic systems, will limit the ICC Prosecutor's ability to pursue all meritorious cases. With respect to investigations, for example, the Rome Statute requires the Prosecutor to "establish the truth" of the events in question and mandates that he "investigate incriminating and exonerating circumstances equally."⁷⁴ This directive, based on the civil law conception of the Prosecutor as a truth seeker,⁷⁵ does not affect the exercise of the Prosecutor's discretion. It does, however, suggest that his duty to investigate will be quite broad, and presumably more resource intensive than a search focused solely on incriminating evidence. This provision highlights the necessity of prosecutorial discretion—if solely as a defensive tactic to prevent overwhelming the investigatory functions of the Office of the Prosecutor.

The Prosecutor could conceivably be faced with ongoing investigations throughout the world, with all of the problems of logistics, language, and diplomacy that this situation would entail. The experience of the ad hoc tribunals has made clear that, owing to their length and complexity, international prosecutions cannot be undertaken for all crimes associated with a particular conflict.⁷⁶ Justice Arbour has observed, on the basis of her experience, that the

⁷⁰ Arbour, for example, has stated that "[t]he main distinction between domestic enforcement of criminal law, and the international context, rests upon the broad discretionary power granted to the international Prosecutor in selecting the targets for prosecution." Morten Bergsmo, *The Jurisdictional Regime of the International Criminal Court (Part II, Articles 11–19)*, 6 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 29, 39 (1998).

⁷¹ Morten Bergsmo & Pieter Kruger, *Article 53: Initiation of an Investigation*, in COMMENTARY ON THE ROME STATUTE, *supra* note 18, at 701, 702.

⁷² Some observers speculate that states will lobby the Prosecutor to initiate investigations *proprio motu*, even if the state could have referred the case to the Prosecutor itself. "The result will be the same, but they will save the diplomatic discomforts that accompany public denunciation." WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 100 (2001).

⁷³ *Id.*

⁷⁴ Rome Statute, *supra* note 2, Art. 54(1).

⁷⁵ SCHABAS, *supra* note 72, at 103; Bergsmo & Kruger, *supra* note 71, at 716–17.

⁷⁶ In 1999 a group of experts commissioned by the Security Council to provide suggestions for improving the ICTY and ICTR issued a detailed report on the ad hoc tribunals. Describing the function of the investigatory staff of the Office of the Prosecutor, the expert group noted:

real challenge faced by the ICC Prosecutor will be “to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones.”⁷⁷ The ICC’s first budget, for example, allocates only €3,961,200 to the Office of the Prosecutor, out of a total budget of €30,893,500.⁷⁸ The budget also states that, during the first financial period, “it is to be expected that the Office of the Prosecutor will receive many communications” asserting that crimes within the Court’s jurisdiction may have been committed.⁷⁹ The Prosecutor must prioritize these investigations and determine how to allocate his limited resources—a difficult problem on which the Rome Statute is completely silent.⁸⁰

Indeed, the U.S. objections to the independent prosecutor rest largely on the increased scope of prosecutorial discretion contemplated by the *proprio motu* regime. The U.S. delegation to the Rome Conference argued that, because of this discretion, “the Prosecutor will be required to make decisions of policy in addition to those of law.”⁸¹ Furthermore, the United States noted, the pretrial chamber’s review of the Prosecutor’s decision to initiate an investigation will not solve this problem because that chamber assesses only the lawfulness, not the wisdom, of the Prosecutor’s decision to investigate.⁸²

Screening Cases and Selecting Charges

In addition to selecting which situations to investigate and deciding how to prioritize investigations, the Prosecutor will have the critical task of deciding which individuals to charge with crimes as a result of his investigations. These screening decisions will shape the content of the cases heard by the ICC and will determine the overall direction of the institution. The Rome Statute specifically contemplates that the Prosecutor will have discretion over which individuals to charge in connection with any particular violation.⁸³ “The Office of the Prosecutor,” the Statute declares, “shall act independently as a separate organ of the Court.”⁸⁴ No external entity can direct the Prosecutor to charge cases against particular individuals.⁸⁵

These screening determinations will be particularly difficult for the Prosecutor. The kinds of crimes that fall within the ICC’s jurisdiction are typically committed by multiple perpetrators, not all of whom could be tried by the Court because of constraints on its resources. The Prosecutor of the ad hoc tribunals for Yugoslavia and Rwanda has testified to the Security

Allegations are brought to the attention of the Office of the Prosecutor and the investigations staff from numerous sources, including victims, witnesses, the media, NGOs, Governments and others. The number of complaints is so great and involves so many widespread geographic areas and individuals that it is physically impossible for the investigations staff to deal with all of them.

Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54/634, para. 125 (1999).

⁷⁷ Louise M. Arbour, Statement to the Preparatory Commission on the Establishment of an International Criminal Court (Dec. 8, 1997), 1997 ICTY Y.B. 229, 232, UN Sales No. E.99.III.P.2.

⁷⁸ Budget for the First Financial Period of the Court, OFFICIAL RECORDS OF THE FIRST SESSION OF THE ASSEMBLY OF STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, SEPTEMBER 3–10, 2002, pt. III, at 254, 283, UN Doc. ICC–ASP/1/3, UN Sales No. E.03.V.2 (2002), available at <http://www.icc-cpi.int/> [hereinafter ICC Budget].

⁷⁹ *Id.* at 266.

⁸⁰ Morten Bergsmo, Catherine Cissé, & Christopher Staker, *The Prosecutors of the International Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared*, in THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT, *supra* note 9, at 121, 136–37.

⁸¹ *Statement of United States Delegation*, *supra* note 32, at 149.

⁸² *Id.*; Bergsmo, *supra* note 70, at 39.

⁸³ Philippe Kirsch & Daryl Robinson, *Referral by States Parties*, in 1 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 37, at 619, 620; Antonio Marchesi, *Referral of a Situation by a State Party*, in COMMENTARY ON THE ROME STATUTE, *supra* note 18, at 353, 358; Sharon A. Williams, *Exercise of Jurisdiction: Article 13*, in *id.* at 343, 344 n.9.

⁸⁴ Rome Statute, *supra* note 2, Art. 42(1).

⁸⁵ Bergsmo, Cissé, & Staker, *supra* note 80, at 136.

Council that, even limiting her focus to high-level accused, she has been forced to select cases from “many thousands of significant targets.”⁸⁶

That any prosecutions in an international forum will necessarily involve only a few accused rather than the many that might have been pursued does highlight the principal problem posed by discretion: it can be used in a way that produces arbitrary or—even worse—discriminatory results. As one commentator has noted, discretion “makes easy the arbitrary, the discriminatory, and the oppressive. It produces inequality of treatment.”⁸⁷ The oft-trumpeted prediction by the United States of the “politicization” of the ICC rests precisely on this fear of discriminatory treatment in cases involving U.S. nationals or nationals of other unpopular states.

The Rome Statute is almost totally silent with respect to the larger policy questions about which potential accused should be pursued by the Prosecutor.⁸⁸ It does state that the Court has jurisdiction “over persons for the most serious crimes of international concern,”⁸⁹ but it provides no more specific guidance as to how the Prosecutor should treat this observation.⁹⁰ The Prosecutor will have an important policymaking role in determining what kinds of situations should be adjudicated in the ICC and which accused, among the many potential targets, should face prosecution in an international forum.⁹¹ Even in domestic systems that vest prosecutors with significant discretion, there is a clear assumption that the most serious crimes, like murder, will be fully prosecuted. In the international context, the vast majority of the crimes committed are, by definition, extremely serious; yet not all can be pursued.⁹² The Court’s Prosecutor will make these critical sorting and screening decisions. Furthermore, the enforcement weakness of the Rome Statute makes it likely that at least some accused charged by the Prosecutor will never be arrested and delivered to The Hague.⁹³ The Prosecutor’s charge, therefore, may in some cases represent the ICC’s last word on particular atrocities.⁹⁴

In addition, the Prosecutor will have to determine which charges to bring against the individuals he has decided to prosecute. Deciding how many charges to bring and for what kinds of crimes will significantly affect the complexity, length, and character of the individual cases heard by the Court. The logistical difficulties raised by the ICTY Prosecutor’s decision to charge Slobodan Milošević in connection with crimes that occurred in Kosovo, Bosnia, and Croatia illustrate the ramifications of charging decisions.⁹⁵ Furthermore, the significance of the Prosecutor’s charging decisions takes on heightened importance in light of the Rome Statute’s disavowal of plea bargaining.⁹⁶

⁸⁶ ICTY Press Release GR/P.I.S./642-e, Address by Carla Del Ponte, Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council (Nov. 27, 2001).

⁸⁷ Charles D. Breitell, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 429 (1960).

⁸⁸ Leila Nadya Sadat & Richard S. Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 408 (2000). For a further discussion of these issues in the context of the ad hoc tribunals, see Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 419 n.10 (2001).

⁸⁹ Rome Statute, *supra* note 2, Art. 1; *see also id.*, pmb., Arts. 5, 8.

⁹⁰ Leila Sadat suggests that the Court itself should dismiss cases under the admissibility regime that do not “rise to the level of gravity contemplated by the Statute.” LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* 111 n.36 (2002).

⁹¹ Madeline Morris, *Complementarity and Conflict: States, Victims, and the ICC*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT*, *supra* note 30, at 195, 197; *see also* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 103 (2002) (noting that “in a system with broad criminal liability, screeners are necessarily lawmakers”).

⁹² Arbour, *supra* note 77, at 232.

⁹³ The enforcement regime is discussed further in part III *infra*.

⁹⁴ As one U.S. commentator has observed of the charging power, “What this amounts to is the power—not to put too fine a point on it—to ruin a person’s life.” David A. Strauss, *The Independent Counsel Statute: What Went Wrong?* 51 ADMIN. L. REV. 651, 651 (1999). Being branded as a “war criminal,” even if no conviction obtains, will no doubt exert a similar effect on individuals charged by the ICC’s Prosecutor.

⁹⁵ *See* Prosecutor v. Milošević, Refusal of Appeal from Decision to Impose Time Limits, No. IT-54-AR73, para. 2 (May 16, 2002).

⁹⁶ *See* Alphons Orie, *Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC*, in 2 *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 37, at 1439, 1481.

The Admissibility Determination

The complementarity regime asks that the Prosecutor decide whether or not to challenge a state's assertion of inadmissibility. The Prosecutor's discretion with regard to this question carries unmistakable political overtones. In 1999, for example, Indonesia created special tribunals to prosecute members of the armed forces accused of committing crimes in East Timor. In August 2002, a tribunal acquitted six army and police officers in a trial widely criticized by foreign observers.⁹⁷ Should an ICC prosecutor consider Indonesia "unwilling" to prosecute, given these facts?⁹⁸ Justice Arbour has commented that, if the ICTY had had to operate under an admissibility regime, the Tribunal would still be fighting with some of the republics of the former Yugoslavia over whether they should prosecute the cases themselves.⁹⁹

The admissibility regime, particularly the Prosecutor's ability to challenge a state's willingness to investigate or prosecute, forces the Prosecutor to decide whether and when to pit the credibility of the Court against a state, whose leaders presumably will hotly deny that they are "unwilling" to prosecute. The interaction between the United Kingdom, the United States, and Libya over the site of the trial of the accused in the *Lockerbie* case starkly illustrates the political shock waves that can be generated by an implication that a state's will to prosecute is inadequate. The high-stakes nature of the admissibility question further highlights the importance of the Prosecutor's discretion.

III. MODES OF ACCOUNTABILITY

The states that negotiated the Rome Statute elected to create a prosecutor with a greater amount of independence than the ILC had envisioned. Simultaneously, they constructed a complex pretrial procedure that endows a pretrial chamber with significant oversight over the Prosecutor's activities. Even with these checks, the Prosecutor retains a significant amount of discretion in his investigatory, screening, charging, and admissibility determinations. The magnitude of this discretion, in turn, provokes the question of prosecutorial accountability for its use.

Although the ICC Prosecutor is an unusual entity among international institutions, the question of international institutional accountability extends far beyond the Court. International organizations and states share a complex relationship.¹⁰⁰ States create international institutions, define their limits, and take an ongoing role in their formulation of policy. Nevertheless, by creating an international organization, individual states agree to work through the processes of that institution, often losing direct control over the outcomes of their decisions.¹⁰¹ This loss of control is particularly salient when the international organization in question is a court or other adjudicatory body like the ICC.¹⁰²

⁹⁷ Ian Martin, *No Justice in Jakarta*, WASH. POST, Aug. 27, 2002, at A15; Richard C. Paddock, *Ex-Police Chief, 5 Others Acquitted in East Timor Killings*, L.A. TIMES, Aug. 16, 2002, at A3.

⁹⁸ Michael J. Jordan, *Neighborhood Watch Goes Global*, CHRISTIAN SCI. MONITOR, Sept. 5, 2002, at 14 (discussing the Indonesian cases and the admissibility provisions of the Rome Statute). In February 2003, United Nations prosecutors, working in conjunction with the United Nations Mission of Support in East Timor and under the auspices of the government of East Timor, did indict the former Indonesian armed forces chief and seven others—some of whom had been acquitted in Indonesia—charging them with persecution and murder for crimes committed in East Timor. Guido Guilart, *Wiranto Indicted on Timor but Will Stay Free*, ADVERTISER, Feb. 26, 2003, at 31.

⁹⁹ Arbour, *supra* note 6. The 1996 Rome Agreement on Agreed Measures did lead to the "Rules of the Road" provisions that govern how the OTP reviews cases initiated by Bosnian authorities that allege violations of international humanitarian law. See Mark S. Ellis, *Bringing Justice to an Embattled Region—Creating and Implementing the "Rules of the Road" for Bosnia-Herzegovina*, 17 BERKELEY J. INT'L L. 1 (1999). Nevertheless, the ICTY still retains primacy of jurisdiction over cases from the former Yugoslavia.

¹⁰⁰ See Jan Klabbers, *The Changing Image of International Organizations*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS 221, 224–27 (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

¹⁰¹ ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE 55–57 (2d ed. 1989).

¹⁰² HAROLD K. JACOBSON, NETWORKS OF INTERDEPENDENCE: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL POLITICAL SYSTEM 93 (2d ed. 1984).

Given the complexity of the dynamic between international organizations and their creator states, it comes as no surprise that the accountability of international institutions to states and other actors defies simple analysis. In the direct sense of electoral accountability, meaning a principal-agent dynamic monitored through the mechanism of popular elections,¹⁰³ international institutions are not generally accountable to the people of any particular state or set of states.¹⁰⁴

States do ensure the accountability of international organizations through the governmental representatives of each state that sit as delegates to the organization.¹⁰⁵ In the case of the ICC, each state party sends one member to the Assembly of States Parties. Nevertheless, in many significant cases, member states have proven ineffective at constraining or overriding decisions made by international institutions. The inability of the states of the European Union to reverse decisions taken by the European Court of Justice,¹⁰⁶ and the difficulties faced by members of the World Trade Organization (WTO) in adopting rules in reaction to decisions of the Appellate Body constitute clear examples of this dynamic.¹⁰⁷

In accountability terms, the ICC Prosecutor is a particularly interesting subject. The role of the Prosecutor highlights the tension between independence and accountability endemic to many institutions of delegated power.¹⁰⁸ On the one hand, the Rome Statute explicitly grants the Prosecutor independence from state control, as befits his quasi-judiciary duty of impartially identifying and investigating individuals who may have committed genocide, crimes against humanity, and war crimes throughout the world.¹⁰⁹ On the other hand, prosecutors in states often form part of the executive branch, in some cases may receive instructions from executive officials about particular cases, and generally are regarded as more partisan than members of the judiciary.¹¹⁰ Questions of prosecutorial independence become particularly acute in cases involving accusations against powerful individuals, which no doubt will often be true of the ICC's cases.

The tensions between prosecutors' quasi-judiciary duty to see that justice is done, their desire to secure convictions, and the importance of prosecutors' decisions in high-profile cases create significant theoretical and practical dilemmas in many states' domestic criminal systems.¹¹¹ As the Committee of Ministers of the Council of Europe has observed:

[T]he public prosecutor holds in most countries a position which is unique on two different counts. On the one hand he/she sets an often delicate balance between the executive and the judicial powers of the State. On the other hand, his own powers reflect

¹⁰³ For a summary of this model, see John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, in DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION 131, 133 (Adam Przeworski et al. eds., 1999).

¹⁰⁴ See Ngaire Woods & Amrita Narlikar, *Governance and the Limits of Accountability: The WTO, the IMF, and the World Bank*, 53 INT'L SOC. SCI. J. 569, 573 (2001). The European Parliament constitutes an obvious exception to this observation.

¹⁰⁵ JACOBSON, *supra* note 102, at 102–03.

¹⁰⁶ Robert O. Keohane & Joseph S. Nye, Jr., *Introduction to GOVERNANCE IN A GLOBALIZING WORLD* 1, 32 (Joseph S. Nye Jr. & John D. Donahue eds., 2000).

¹⁰⁷ Marco C. E. J. Bronckers, *Better Rules for a New Millennium: A Warning Against Undemocratic Developments in the W.T.O.*, 2 J. INT'L ECON. L. 547, 551–52 (1999).

¹⁰⁸ For a general discussion of this problem at the international level, see Cary Coglianese, *Globalization and the Design of International Institutions*, in GOVERNANCE IN A GLOBALIZING WORLD, *supra* note 106, at 297. For a consideration of the trade-offs between responsiveness and independence, see Ferejohn, *supra* note 103, at 131–32.

¹⁰⁹ See Turone, *supra* note 57, at 1137, 1142 (arguing that “the Prosecutor of the ICC is a judicial, non-political organ”).

¹¹⁰ See Otto Triffterer, *The Preventive and the Repressive Function of the International Criminal Court*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY, *supra* note 21, at 137, 168. For a discussion of this phenomenon in France, see Jacqueline Hodgson, *Hierarchy, Bureaucracy, and Ideology in French Criminal Justice: Some Empirical Observations*, 29 J.L. & SOC. 227, 252–53 (2002).

¹¹¹ See Johan Goethals, Cyrille Fijnaut, & Stephan Parmentier, *Preface*, 8 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 149, 151–52 (2000) (summarizing studies from various European states and finding this tension to constitute a “burning issue”). For a discussion of this problem in Italy, see Di Federico, *supra* note 68, at 378; for France, see Hodgson, *supra* note 110, at 227. For a comparison between the Rome Statute and the U.S. model for prosecuting senior governmental officials, see Allison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the U.S. Independent Counsel*, 55 STAN. L. REV. 1633 (2003).

another often delicate balance, this time between independence from and subordination to the executive.¹¹²

It is unsurprising that the tensions between independence and accountability should be even more acute at the international level.

In their decision to grant the ICC Prosecutor *proprio motu* powers, the delegates at Rome decided to invest him with a significant degree of independence. In so doing, did they, as the United States charges, render the Prosecutor dangerously unaccountable? The pivotal question from the perspective of states and other international actors with regard to the Prosecutor's accountability is whether they are dependent entirely on the Prosecutor's good judgment to ensure that he takes their desires into account or whether they possess some form of accountability mechanism—even if that mechanism is not as forthright as issuing direct instructions or removing him from office.

Formal Accountability

The Rome Statute makes the Prosecutor formally accountable to the ICC Assembly of States Parties and to the ICC judiciary. Judicial oversight provides the most obvious limit on prosecutorial discretion at the Court. By reviewing the Prosecutor's actions for conformity with the dictates of the Rome Statute, the judiciary guarantees that the Prosecutor will act within the limits of the treaty, and it protects the rights of the accused prosecuted in the Court.

The ASP also provides an important check on the Prosecutor. It both elects him¹¹³ and has the authority to remove him by majority vote if the Prosecutor "is found to have committed serious misconduct or a serious breach of his or her duties" or if he "is unable to exercise the functions required by [the Rome] Statute."¹¹⁴ The Statute does not suggest that the Assembly of States Parties may remove the Prosecutor simply because it disagrees with him on a matter of policy, although it is perhaps significant that ICC judges can be removed only by a two-thirds vote, while the Prosecutor may be removed by a simple majority.¹¹⁵ In addition, the ASP determines the budget for the Court.¹¹⁶ It is not clear whether the ASP could use this power to micromanage the Prosecutor by making specific budgetary allocations for particular prosecutorial investigations.¹¹⁷

It might be argued that the ASP ensures prosecutorial accountability to states. It is doubtful, however, whether the ASP will in fact act as a strong check on the Prosecutor. On the whole, similar bodies in other international institutions have not proven to be strong oversight mechanisms.¹¹⁸ Longtime international observers have privately voiced the opinion that the ASP will prove to be a weak body because of internal policy disputes.

Even if the ASP does take a robust oversight role, it is not a sufficient mechanism of accountability. Jurisdiction under the Rome Statute extends to nationals of states that are not parties to the treaty and whose states are thus unrepresented in the ASP.¹¹⁹ In addition, the Assembly

¹¹² COUNCIL OF EUROPE, WHAT PUBLIC PROSECUTION IN EUROPE IN THE 21ST CENTURY 6 (2000).

¹¹³ Rome Statute, *supra* note 2, Art. 42(4). The Prosecutor serves for one nonrenewable nine-year term of office. *Id.*

¹¹⁴ *Id.*, Art. 46(1).

¹¹⁵ *Id.*, Art. 46(2). Commentators have explained this difference as resulting from the decision to grant the Prosecutor *proprio motu* powers, as well as the fact that in many domestic systems prosecutors are more accountable to elected representatives than are judges. Stéphanie Godart & David Tolbert, *Removal from Office: Article 46*, in COMMENTARY ON THE ROME STATUTE, *supra* note 18, at 655, 660.

¹¹⁶ Rome Statute, *supra* note 2, Art. 112(2)(d).

¹¹⁷ Bergsmo, Cissé, & Staker, *supra* note 80, at 133.

¹¹⁸ JACOBSON, *supra* note 102, at 119 (noting that "representative bodies [of international organizations] often find it hard to frame coherent policies").

¹¹⁹ Some have argued that this aspect of the Rome Statute violates international law. *See, e.g.*, Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 38, at 219, 234. Even if the Rome Statute does not

of States Parties operates on a one-nation, one-vote principle, which does not reflect the weight of various states' vulnerability and interest in the Court's jurisdiction.¹²⁰ Andorra, Nauru, and Honduras formally have equal voting power to that of France, the United Kingdom, and Australia, while the United States, China, Russia, and Israel are not represented in the ASP at all, because they have not ratified the treaty.¹²¹

If the Prosecutor were accountable only to the ASP, the United States and other states with significant military power might well have good reason to fear the ICC. If the Prosecutor chose to pursue a political vendetta against nationals of a particular state, the targeted state would have little recourse against the Prosecutor. If such states were not parties to the Statute, the Prosecutor would not be accountable to them at all. Furthermore, NGOs, which have played an important role in the formation of the Court and will no doubt perform a critical function in its future, are also formally unrepresented in the ASP.

In sum, the formal accountability mechanisms provided by the judiciary and the ASP, while important, exhibit significant limits. The ASP may remove the Prosecutor who manifestly abuses his position but likely will have little impact on a prosecutor who is simply ineffective or demonstrates poor judgment. The judicial review provided for in the Rome Statute, while exerted at every level of prosecutorial decision making, does not extend to judging the wisdom of prosecutorial actions.

Pragmatic Accountability

It would be highly misleading, however, to consider only judicial checks on prosecutorial action or the role of the ASP when assessing the scope of prosecutorial discretion. A close examination of the Rome Statute, as well as the precedents provided by the ad hoc international tribunals, reveals that the ICC Prosecutor will be accountable to a variety of entities, including states that are not party to the treaty, and other actors such as NGOs. Through their reactions to the Prosecutor's discretionary decisions—especially by their choices whether or not to cooperate with the Prosecutor—these entities have the ability to call him “to account” for his discretionary acts.¹²²

This form of accountability can be labeled as pragmatic, both to distinguish it from electoral accountability and other uses of the term, and to attempt to capture its informal, commonsense, and dynamic qualities.¹²³ This form of accountability is informal because it is implied, rather than explicitly described, in the Rome Statute. It is commonsensical, because it rests, not on an exegesis of the formal provisions or institutions created by the Rome Statute, but upon an understanding of how the Prosecutor will actually have to go about his work in order to be effective. It is dynamic because it relies on the Prosecutor's authority as it will

violate international law through its assertion of jurisdiction over nationals of states not party to the treaty, given the political sensitivity of the crimes within the Statute's jurisdiction and the implication of state criminal action inherent in criminal conviction of an official of that state, it is important as a pragmatic matter that nonparty states have a mechanism by which to influence the Prosecutor.

¹²⁰ Cf. HENRY G. SCHERMERS & NIELS M. BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY* §792 (3d rev. ed. 1995); John Washburn, *The International Criminal Court Arrives—The U.S. Position: Status and Prospects*, 25 *FORDHAM INT'L L.J.* 873, 877 (2002).

¹²¹ States that have signed but not yet ratified the treaty may send observers to the ASP's meetings. Rome Statute, *supra* note 2, Art. 112.

¹²² See 1 *OXFORD ENGLISH DICTIONARY* 87 (2d ed. 1989) (defining “accountability” as “the quality of being accountable; liability to give account of, and answer for, discharge of duties or conduct; responsibility, amenableness”); see also Delmer D. Dunn, *Mixing Elected and Nonelected Officials in Democratic Policy Making: Fundamentals of Accountability and Responsibility*, in *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION*, *supra* note 103, at 297, 298 (noting that “[a]ccountability at its most basic means answerability for one's actions or behavior”).

¹²³ I am not using “accountability” either in the sense of electoral accountability or in the sense of a mechanism for determining formal legal responsibility or liability. For an example of accountability used in this latter sense in the context of international organizations, see August Reinisch, *Securing the Accountability of International Organizations*, 7 *GLOBAL GOVERNANCE* 131 (2001).

unfold over time and in response to repeated interactions between his office and a variety of other entities. The kind of accountability that I seek to describe is therefore fundamentally dialectic.¹²⁴

Furthermore, pragmatic accountability is not limited to international institutions. Prosecutors in municipal systems are also subject to a variety of forms of accountability. These controls can be both formal and informal, ranging from hierarchical control to budgetary restraints to internal office policies.¹²⁵ This view of accountability is consistent with other efforts to deepen understandings of accountability beyond the simple mechanism of elections, including accounts of “horizontal”¹²⁶ and “indirect”¹²⁷ accountability.

Unlike the direct prosecutorial accountability to the Security Council demanded by the United States, the pragmatic form of accountability created by the Rome Statute will enhance the long-term viability of the Court without making the Prosecutor dependent on the directives of any particular state. Pragmatic forms of accountability both help protect against prosecutorial overreaching and ensure that other actors—including states that have not ratified the treaty but whose nationals may face prosecution before the ICC—have the ability to influence the Prosecutor’s use of his discretion. If an individual, for example, is being targeted in a way that a state feels is improper or unjust, that state may try to influence the Prosecutor’s investigation or prosecution.

It is possible that the pragmatic forms of accountability described below may apply to institutions other than the ICC Prosecutor. This article, however, does not attempt to provide a general theory of accountability of international institutions, although such an account is noticeably lacking from the scholarly literature on international organizations.¹²⁸ Instead, this article clarifies one piece of the puzzle of international accountability by examining the various modes of accountability to which the ICC Prosecutor is subject.

Agents and Mechanisms of Pragmatic Accountability

States. States constitute the most important agents of pragmatic accountability vis-à-vis the ICC Prosecutor. They also command a variety of mechanisms by which to exercise this power.

The complementarity regime provides the most obvious locus of state control over the Prosecutor’s ability to pursue particular investigations and prosecutions. Because of the Statute’s

¹²⁴ Cf. Jakob de Haan, *The European Central Bank: Independence, Accountability, and Strategy: A Review*, 93 PUB. CHOICE 395, 417 (1997) (describing research on central banks that finds no trade-off between long-term accountability and independence because “a central bank, continuously conducting a policy which lacks broad political support, will sooner or later be overridden”).

¹²⁵ See, e.g., *Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting); BRIAN GROSMAN, *THE PROSECUTOR: AN INQUIRY INTO THE EXERCISE OF DISCRETION* (1969); Hodgson, *supra* note 110, at 235–36; J. R. Spencer, *The English System, in EUROPEAN CRIMINAL PROCEDURES*, *supra* note 12, at 142, 152–53.

¹²⁶ For explanations of “horizontal accountability,” see *THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES* (Andreas Schedler et al. eds., 1999) (focusing on horizontal methods of accountability, particularly through independent, nonelective specialized bodies of oversight that operate intrastate); Woods & Narlikar, *supra* note 104, at 574.

¹²⁷ For references to “indirect accountability,” see Robert Elgie, *Democratic Accountability and Central Bank Independence: Historical and Contemporary, National and European Perspectives*, 21 W. EUR. POL. 53 (1998); Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity*, 16 GOVERNANCE 73, 86–90 (2003); Michael Laver & Kenneth A. Shepsle, *Government Accountability in Parliamentary Democracy*, in *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION*, *supra* note 103, at 279, 279; Joseph S. Nye Jr., *Globalization’s Democratic Deficit: How to Make International Institutions More Accountable*, FOREIGN AFF., July–Aug. 2001, at 2 (arguing that the U.S. Supreme Court and Federal Reserve Board demonstrate indirect accountability).

¹²⁸ See Nye, *supra* note 127, at 2; Bimal N. Patel, *The Accountability of International Organisations: A Case Study of the Organisation for the Prohibition of Chemical Weapons*, 13 LEIDEN J. INT’L L. 571, 574, 595 (2000) (noting the absence of scholarly analysis of the accountability of international organizations). The accountability of certain organizations, however, particularly the international economic institutions, has been examined in some depth. See, e.g., Jonathan A. Fox, *The World Bank Inspection Panel: Lessons from the First Five Years*, 6 GLOBAL GOVERNANCE 279 (2000); Joseph E. Stiglitz, *Democratizing the International Monetary Fund and the World Bank: Governance and Accountability*, 16 GOVERNANCE 111 (2003); Woods & Narlikar, *supra* note 104, at 573.

admissibility provisions, at least one state—inevitably one with a strong interest in the matter—will have the possibility of removing the case from the ICC.¹²⁹ In a real sense, states wield the ultimate power over the Prosecutor’s discretion because they have the ability to take a case out of his purview.¹³⁰

Beyond the complementarity regime, any of the five states that sit as permanent members on the Security Council may bring a special check to bear on the ICC’s Prosecutor, if they can secure the assent of at least eight other members of the Council and prevent a veto. Under Article 16 of the Rome Statute, the Security Council may defer any investigation or prosecution for a renewable twelve-month period.¹³¹

States can also affect the Court financially. The ICC receives its funding from assessed contributions made by states parties¹³² and from the United Nations, subject to General Assembly approval.¹³³ In addition, the Court may receive voluntary contributions from states.¹³⁴ The experience of the ad hoc tribunals demonstrates the importance of the funding mechanism. The tribunals have used voluntary contributions from states to pay for courtrooms, judicial outreach programs, and other critical services. States have not hesitated to use their financial power to affect the tribunals. The United States, for example, has announced that it will not fund the tribunals beyond 2008, and the tribunals have thus been forced to devise a strategy for ending their work before that date.¹³⁵

A more potent, albeit subtle, form of state control over the Prosecutor lies in the Court’s powers relating to international cooperation and judicial assistance. Despite the increasing autonomy granted to the Prosecutor over the course of the negotiating history of the Rome Statute, the Court remains heavily dependent on state cooperation in order to investigate its cases, arrest its suspects, and imprison the individuals it convicts.¹³⁶ As commentators have observed, “[T]he ICC depends upon the compliance of states at virtually every stage of [its] legal procedure.”¹³⁷ Some observers warn that the weakness of its enforcement jurisdiction may “completely undermine the efficacy of the Court.”¹³⁸

All international institutions depend on state cooperation to some degree to effectuate their mandates.¹³⁹ As a criminal court, however, the ICC depends on states in order to perform all of its primary functions.¹⁴⁰ Domestic criminal systems rely on the coercive powers granted to them under municipal law in order to function effectively. Unlike domestic criminal systems, however, the ICC has no associated police and no direct coercive powers over individuals.¹⁴¹ Furthermore, the ICC’s interest in investigating individuals is likely to be met with

¹²⁹ In order to take advantage of the complementarity regime, however, states must enact domestic legislation allowing them to investigate and prosecute the crimes within the ICC’s jurisdiction. States must also enact legislation that allows them to cooperate with the Court on investigative and evidentiary matters. *See* Rome Statute, *supra* note 2, Art. 88; Valerie Oosterveld, Mike Perry, & John McManus, *The Cooperation of States with the International Criminal Court*, 25 *FORDHAM INT’L L.J.* 767, 787 (2002).

¹³⁰ They must, however, be willing to investigate the case and will still be subject to the Prosecutor’s challenge of their ability and willingness to do so.

¹³¹ The Security Council used this power in the first month the ICC came into existence. SC Res. 1422 (July 12, 2002).

¹³² Rome Statute, *supra* note 2, Arts. 114, 115.

¹³³ *Id.*, Art. 115; *see also* Georg Witschel, *Financial Regulations and Rules of the Court*, 25 *FORDHAM INT’L L.J.* 665 (2002).

¹³⁴ Rome Statute, *supra* note 2, Art. 116.

¹³⁵ *See* ICTY Press Release JDH/P.I.S./690–e, Address by Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council (July 26, 2002) (outlining the ICTY’s “exit strategy”).

¹³⁶ Prosecutor v. Blaškić, Request for Review, No. IT-95-14-AR108 *bis*, para. 26 (Oct. 26, 1997).

¹³⁷ Giulio M. Gallarotti & Arik Y. Preis, *Politics, International Justice, and the United States: Toward a Permanent International Criminal Court*, 4 *UCLA J. INT’L L. & FOREIGN AFF.* 1, 28 (1999).

¹³⁸ Sadat & Carden, *supra* note 88, at 415.

¹³⁹ JACOBSON, *supra* note 102, at 77–78.

¹⁴⁰ Oosterveld, Perry, & McManus, *supra* note 129, at 767.

¹⁴¹ *See* Jacob Katz Cogan, *The Problem of Obtaining Evidence for International Criminal Courts*, 22 *HUM. RTS. Q.* 404, 405 (2000) (comparing domestic and international criminal systems).

resistance on the part of their associated states, whose cooperation might be critical to obtaining the information necessary to secure a conviction.¹⁴²

The ICC Prosecutor will be particularly dependent on states in order to perform his investigations.¹⁴³ Even if the crime occurs in a third state, much of the evidence needed to prove the elements of the crime may be controlled by the state whose national allegedly committed the crime. Evidence, for example, about the military command structure or the information available to a suspect about the status of a military target will most often be held by the state whose national stands accused of the crime.¹⁴⁴ The experience of the ICTY demonstrates the need for cooperation. In one case, important information relating to crimes committed by Croats in Bosnia was held by the Croatian government. For several years, Croatia denied that it possessed this information and, in any event, refused to disclose it despite repeated requests from the ICTY.¹⁴⁵ The secret archives were not released to the Prosecutor until a new Croatian government, which is cooperating with the ICTY, took power.¹⁴⁶ Important information may also be held by third states, especially states with significant intelligence-gathering capabilities.

Article 86 of the Rome Statute declares that “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”¹⁴⁷ This confident assertion of authority, however, masks several enforcement problems with the Statute. The law of the requested state—rather than any particular provision in the Rome Statute—determines how requests for assistance from the Court will be executed.¹⁴⁸ Furthermore, the ICC has no enforcement jurisdiction over nonparty states, although they may enter into ad hoc arrangements for cooperation with the Court.¹⁴⁹

The Statute gives the ICC Prosecutor little autonomy to conduct investigations on his own. The Prosecutor may execute requests directly on the territory of a state without the state’s consent only under limited circumstances. If the request can be fulfilled without compulsory measures, such as by interviewing a person who is speaking on a voluntary basis, the Prosecutor may execute the request without the state’s consent “following all possible consultations with the requested state party.”¹⁵⁰ This parsimonious grant of authority has led two commentators to remark that the ICC Prosecutor “seems to be endowed with no more powers than any tourist in a foreign State.”¹⁵¹

In limited circumstances, the pretrial chamber may authorize the Prosecutor to investigate within the territory of an uncooperative state party. The pretrial chamber may grant this authorization, however, only if it has determined that the state is unable to cooperate “due to the unavailability of *any* authority or *any* component of its judicial system competent to execute

¹⁴² Cf. Address of Antonio Cassese, President of the International Criminal Tribunal for the Former Yugoslavia, to the General Assembly of the United Nations (Nov. 7, 1995), 1995 ICTY Y.B. 311, 312–13, UN Sales No. E.96.III.P.1.

¹⁴³ SADAT, *supra* note 90, at 230.

¹⁴⁴ Cogan, *supra* note 141, at 411.

¹⁴⁵ See Marlise Simons, *Archives Force Review of Croat’s Atrocity Case*, N.Y. TIMES, Nov. 21, 2002, at A14.

¹⁴⁶ Dominic Hipkins, *Blaskic Appeal: Defence Lawyer Reveals New Evidence*, IWPR [Institute for War & Peace] REP. (Jan. 28, 2002), at <<http://www.iwpr.net>>.

¹⁴⁷ Rome Statute, *supra* note 2, Art. 86.

¹⁴⁸ *Id.*, Art. 99(1) (“Requests for assistance shall be executed in accordance with the relevant procedure under the law of the requested State . . .”). This provision does not, however, mean that domestic laws may be invoked for denying cooperation with the Court, unless cooperation by that state would violate “an existing fundamental legal principle of general application.” *Id.*, Art. 93(3); Annalisa Ciampi, *Other Forms of Cooperation*, in 2 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 37, at 1705, 1732.

¹⁴⁹ Rome Statute, *supra* note 2, Art. 87(5); Claus Kreß, *Article 86: General Obligation to Cooperate*, in COMMENTARY ON THE ROME STATUTE, *supra* note 18, at 1051, 1051.

¹⁵⁰ Rome Statute, *supra* note 2, Art. 99(4).

¹⁵¹ Bert Swart & Göran Sluiter, *The International Criminal Court and International Criminal Co-operation*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT, *supra* note 37, at 91, 115.

the request.”¹⁵² These stringent conditions would appear applicable only to states in which there is a complete breakdown of public order.¹⁵³

When a state party fails to comply with a request to cooperate from the Court, the Court is limited to making a finding of noncompliance and reporting the matter to the ASP, or to the Security Council if the case formed the subject of a Council referral.¹⁵⁴ It remains unclear whether the ASP can take any action beyond making the finding of noncompliance.¹⁵⁵

Because of these provisions of the Rome Statute, the ICC Prosecutor has fewer powers than national prosecutors typically possess¹⁵⁶ and enjoys even less authority than the Prosecutor of the ICTY and ICTR.¹⁵⁷ The latter, for example, enjoys broad powers to conduct investigations on the territory of states.¹⁵⁸

Other provisions of the Rome Statute also reveal the relative weakness of the ICC Prosecutor. Under the Statute, states may deny assistance to the Prosecutor if his request concerns the disclosure of evidence or production of any documents that relate to national security.¹⁵⁹ These protections are more extensive than the analogous provisions in the statutes of the ad hoc tribunals.¹⁶⁰ While the Rome Statute sets out a detailed procedure for dealing with evidence that might threaten a state’s national security, ultimately the state itself has the final word on this determination.¹⁶¹ As one observer has noted, this provision “makes things rather straightforward for a state that wishes to stonewall the Court.”¹⁶²

Although the Prosecutor of the ad hoc tribunals in theory has more authority than her counterpart at the ICC, the Office of the Prosecutor at the ICTY and ICTR also depends on the cooperation of states and other entities to pursue its cases. Such cooperation has not been easily obtained—even from entities sympathetic to the tribunals’ work. International humanitarian agencies, for example, do not generally provide information to international prosecutions because of the risk that they will appear to be taking sides; journalists, too, are wary of providing information.¹⁶³

The experience of the ad hoc tribunals provides persuasive evidence that the ICC Prosecutor will face difficulties in securing state cooperation in his investigations and prosecutions.¹⁶⁴ Because the ICTY and the ICTR were created by the UN Security Council pursuant

¹⁵² Rome Statute, *supra* note 2, Art. 57(3)(d) (emphasis supplied).

¹⁵³ Fabricio Guariglia & Kenneth Harris, *Article 57: Functions and Powers of the Pre-Trial Chamber*, in COMMENTARY ON THE ROME STATUTE, *supra* note 18, at 743, 751.

¹⁵⁴ Rome Statute, *supra* note 2, Art. 87(7).

¹⁵⁵ Swart & Sluiter, *supra* note 151, at 122. This power has been described as “naming and shaming.” SCHABAS, *supra* note 72, at 107. It is not likely to be particularly effective. Cogan, *supra* note 141, at 424. Some commentators suggest that the ASP might be able, under general international law principles, to consider “the appropriateness of collective countermeasures, such as economic sanctions.” Ciampi, *supra* note 148, at 1635. The Rome Statute does not, however, explicitly contemplate such measures.

¹⁵⁶ SCHABAS, *supra* note 72, at 104.

¹⁵⁷ Swart & Sluiter, *supra* note 151, at 120.

¹⁵⁸ ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE AND EVIDENCE 68 (Rodney Dixon et al. eds., 2003) [hereinafter ARCHBOLD INTERNATIONAL CRIMINAL COURTS].

¹⁵⁹ Rome Statute, *supra* note 2, Art. 93(4).

¹⁶⁰ See Ruth Wedgwood, *International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaškić*, 11 LEIDEN J. INT’L L. 635, 646–48 (1998).

¹⁶¹ Rome Statute, *supra* note 2, Art. 72; ARCHBOLD INTERNATIONAL CRIMINAL COURTS, *supra* note 158, at 29; Peter Malanczuk, *Protection of National Security Interests*, in 2 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 37, at 1371, 1386.

¹⁶² SCHABAS, *supra* note 72, at 129–30. States that stonewall the Court may be pressured by other states or NGOs to cooperate with the Court. Especially if the ICC enjoys some degree of international legitimacy, stonewalling the Court may be a costly strategy for states. This dynamic is further discussed in part IV *infra*.

¹⁶³ Interview with Gavin F. Ruxton, senior legal advisor, Office of the Prosecutor, ICTY, in The Hague, the Netherlands (May 21, 2002). The appeals chamber of the ICTY has concluded that journalists can be compelled to testify only in exceptional circumstances. Marlise Simons, *U.N. Court Grants Special Legal Protection to War Reporters*, N.Y. TIMES, Dec. 12, 2002, at A10.

¹⁶⁴ See STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 263 (2d ed. 2001).

to its Chapter VII powers, in theory all members of the United Nations are obligated to cooperate with orders by either of the tribunals. In fact, both the ICTY and the ICTR—but especially the ICTY—have faced great difficulty in securing compliance with arrest warrants and requests for information. Despite persistent failures of states in the former Yugoslavia, particularly the Federal Republic of Yugoslavia and Croatia, to cooperate with the ICTY's directives, the Security Council, under whose auspices the ICTY operates, has failed to take effective action against these states.¹⁶⁵ Although ICTY officials, like former President McDonald¹⁶⁶ and former Prosecutor Richard Goldstone,¹⁶⁷ warned that the Security Council's tolerance of Yugoslavia's intransigence would serve to condone this behavior, for the most part their appeals have fallen on deaf ears.

If the ad hoc tribunals, which take their power directly from the Security Council, have encountered this much difficulty in securing compliance, a fortiori the less powerful ICC will face even more challenges in this regard. Former ICTY and ICTR Prosecutor Arbour has stated that “the taxing experience of my Office suggests that it is more likely that the Prosecutor of the permanent Court could be chronically enfeebled by inadequate enforcement powers combined with a persistent and widespread unwillingness of States Parties to cooperate.”¹⁶⁸ President McDonald has echoed Arbour's prediction. She has predicted that “the issue that will make or break the [ICC] relates to State cooperation/compliance.”¹⁶⁹

For the sake of descriptive convenience, my analysis of the Prosecutor's accountability to states has treated states as unitary entities. The view of states as undifferentiated actors, however, vastly oversimplifies their behavior in actual practice.¹⁷⁰ Contemporary states interact through a variety of actors within the governmental structure—not simply through their foreign ministries. The ICC Prosecutor will interact with states' executives (through requests for cooperation), with states' legislatures (by seeking legislation enabling cooperation between the state and the Court), and, indirectly, with states' judiciaries (by monitoring whether domestic proceedings fulfill the requirements of the admissibility regime).¹⁷¹ Taken together, these various entities and institutions within states further increase the pressure that states—writ large—can bring to bear on the Prosecutor.

The enforcement weaknesses of the Rome Statute endow states with considerable power to influence the Prosecutor and make him pragmatically accountable to them. The Prosecutor must be both a diplomat and a judicial officer; he will ignore states' wishes at his peril. The experience of the International Criminal Tribunal for Rwanda with the case of Jean-Bosco Barayagwiza provides a clear illustration of this dynamic.

Barayagwiza was charged by the Prosecutor of the ICTR with genocide and other crimes in connection with the Rwandan genocide.¹⁷² Barayagwiza is widely considered to be a major figure in the bloodbath that engulfed Rwanda in 1994. Barayagwiza's case was the subject of a number of pretrial irregularities,¹⁷³ and he filed a motion seeking to nullify his arrest and detention on the grounds of excessive pretrial detention. The trial chamber dismissed his

¹⁶⁵ For a description of the ICTY experience, see Daryl A. Mundis, *Reporting Non-Compliance: Rule 7 bis*, in *ESSAYS ON ICTY PROCEDURES AND EVIDENCE* 421 (Richard May et al. eds., 2001).

¹⁶⁶ Gabrielle Kirk McDonald, Address to the General Assembly of the United Nations (Nov. 19, 1998), 1998 ICTY Y.B., *supra* note 58, at 342, 342.

¹⁶⁷ See Richard J. Goldstone & Gary Jonathan Bass, *Lessons from the International Criminal Tribunals*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT*, *supra* note 30, at 51, 57.

¹⁶⁸ Arbour, *supra* note 77, at 230.

¹⁶⁹ Gabrielle Kirk McDonald, An Effective International Criminal Court: The Principal Legal Concerns, Remarks Made at the Aspen Institute Justice and Society Programme (Mar. 6, 1998), 1998 ICTY Y.B., *supra* note 58, at 403, 403.

¹⁷⁰ See Anne-Marie Slaughter, *The Real New World Order*, *FOREIGN AFF.*, Sept.–Oct. 1997, at 183; Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 *OHIO ST. L.J.* 649, 667–71 (2002).

¹⁷¹ I am grateful to Laurence Helfer for highlighting this point.

¹⁷² William A. Schabas, Case Report: Barayagwiza v. Prosecutor, in 94 *AJIL* 563 (2000).

¹⁷³ *Id.*

motion.¹⁷⁴ The appeals chamber, however, accepted Barayagwiza's argument and found that the length of his pretrial detention violated both human rights standards and the Tribunal's rules.¹⁷⁵ The appeals chamber described the Prosecutor's conduct in Barayagwiza's case as "egregious," and concluded that "the only remedy available for such prosecutorial misconduct is to release the Appellant and dismiss the charges against him."¹⁷⁶

This decision infuriated the government of Rwanda, which suspended cooperation with the ICTR.¹⁷⁷ The European Union and Human Rights Watch also condemned the Tribunal's decision.¹⁷⁸ Without Rwanda's cooperation, the Prosecutor was unable to pursue any of her ongoing investigations into the Rwandan genocide. Rwanda also denied the ICTR Prosecutor a visa to enter the country, and one of the Tribunal's trials had to be suspended because Rwanda refused to allow witnesses to travel to Tanzania, where the ICTR is located.¹⁷⁹

In response, the ICTR Prosecutor submitted a motion to the appeals chamber asking it to reconsider its decision and submitting "new facts" in connection with the case.¹⁸⁰ At the hearing on her motion, the Prosecutor noted that "the government of Rwanda reacted very seriously in a tough manner" to the appeals chamber's decision.¹⁸¹ In addition, the attorney general of Rwanda threatened "the non co-operation of the peoples of Rwanda with the Tribunal if faced with an unfavourable Decision by the Appeals Chamber on the Motion for Review."¹⁸² The appeals chamber eventually granted the Prosecutor's motion to reconsider. It found that Barayagwiza's rights had indeed been violated, but that the new facts brought to light by the Prosecutor rendered the prior appeals chamber's remedy of dismissal of the case "disproportionate."¹⁸³

The *Barayagwiza* case demonstrates the degree to which the Prosecutor is dependent on the state where the crimes occur in order to conduct her investigations. While academic criticism has focused on the motivations of the second decision by the appeals chamber, the Prosecutor was clearly spurred to act in this case in part because of Rwanda's reaction to the first decision. Rwanda's attitude compelled her to request that the appeals chamber reconsider its decision.

The *Barayagwiza* case also demonstrates that pragmatic accountability can motivate the Prosecutor to be sensitive to the political implications of his prosecutorial decision making, especially on the regions involved in the ICC's cases. This dynamic can enhance the effectiveness of the Court. As two commentators have noted, "[T]hat the ICC allows various points of entry for politics may actually facilitate the attainment of even the most sacred of the ICC's mandates—the promotion of retribution and reconciliation in ways that preserve order and stability in the international community."¹⁸⁴ These authors point out that criminal prosecutions, if not sensitive to local conditions, may fuel the commission of additional acts of violence.¹⁸⁵

¹⁷⁴ See Prosecutor v. Barayagwiza, Motion to Review and/or Nullify Arrest and Detention, No. ICTR-97-19-I (Nov. 17, 1998). See generally Schabas, *supra* note 172.

¹⁷⁵ Prosecutor v. Barayagwiza, Appeals Decision, No. ICTR-97-19-DP, paras. 67, 71 (Nov. 3, 1999). It also found that Barayagwiza's detention by the ICTR for eleven months without being informed of the charges against him contravened his human rights. *Id.*, para. 85.

¹⁷⁶ *Id.*, para. 106.

¹⁷⁷ Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 135 (2002).

¹⁷⁸ Mercedeh Momeni, *Why Barayagwiza Is Boycotting His Trial at the ICTR: Lessons in Balancing Due Process Rights and Politics*, 7 ILSA J. INT'L & COMP. L. 315, 319 (2001).

¹⁷⁹ Cogan, *supra* note 177, at 135.

¹⁸⁰ Barayagwiza v. Prosecutor, Request for Review or Reconsideration, No. ICTR-97-19-AR72, para. 7 (Mar. 31, 2000).

¹⁸¹ *Id.*, para. 34.

¹⁸² *Id.*

¹⁸³ *Id.*, para. 71.

¹⁸⁴ Gallarotti & Preis, *supra* note 137, at 31.

¹⁸⁵ *Id.*

The destabilizing effects of misguided prosecutions suggest that the Prosecutor should carefully consider his prosecutorial decisions, in terms of their effects both on the region where the crime occurred and on the prospects for global justice. Pragmatic accountability may help push his decision making in ways that further these goals. The Prosecutor should be sensitive to local attitudes and concerns; if he is not, the affected state may properly hold him accountable. The Rwandan government reacted so fiercely because of the severity of the crimes alleged against Barayagwiza. The Prosecutor should have prosecuted the case more vigorously—out of concern for Barayagwiza's rights, as well as the importance of the case to the victims in Rwanda.¹⁸⁶

While Barayagwiza's case illustrates the mechanism of pragmatic accountability, this example is admittedly somewhat atypical. In the usual case, states are more likely to seek to prevent the Prosecutor from investigating or prosecuting an individual. However, whether states seek to influence a prosecutor they view as insufficiently zealous or one they believe is overly aggressive, they will use the same tools afforded to them by the ICC system: controlling investigations and witnesses, surrendering suspects, and employing the other mechanisms described above.

Nongovernmental organizations. The reaction by Human Rights Watch to Barayagwiza's release also illustrates the involvement of NGOs in international prosecutions. In the context of the ICC, NGOs will presumably seek prosecutions for violations of international criminal law and conduct advocacy on behalf of victims of such violations.¹⁸⁷ NGOs' principal moral claim to prosecutorial accountability stems from their advocacy on behalf of victims, who presumably will have little direct access to the Prosecutor. NGOs active in the International Criminal Court, therefore, will likely press the Prosecutor to act more aggressively and to investigate and prosecute more cases.

NGOs have played a critical role in the formation of the ICC.¹⁸⁸ They will no doubt continue to serve an important function in the working life of the Court. Some have even advanced the idea that the Prosecutor will be accountable only to NGOs.¹⁸⁹ While this assertion seems exaggerated, NGOs are likely to perform several functions vis-à-vis the ICC. To some extent, they may be able to assist the Prosecutor in the face of recalcitrant states. The Prosecutor may be able to rely on NGOs' investigations in cases where states stonewall the Prosecutor's efforts to investigate.¹⁹⁰ Human Rights Watch, for example, has held training sessions with field researchers in the collection of evidence that will help the Prosecutor establish the elements of the crimes within the Rome Statute.¹⁹¹ It is uncertain, however, how much NGOs

¹⁸⁶ Carla Del Ponte, the newly appointed Prosecutor of the ICTR, issued a press release on November 9, 1999, in which she acknowledged the judges' criticism of the prosecution's actions in the case and pledged to "take appropriate measures and . . . ensure that Prosecutions of other cases are conducted with proper dispatch in future." ICTY Press Release PR/P.I.S./446-E, Carla Del Ponte, Prosecutor of the International Criminal Tribunal for Rwanda, Concerning the Case of Jean-Bosco Barayagwiza (Nov. 9, 1999).

¹⁸⁷ Human Rights Watch, for example, describes its mission in the following way: "We stand with victims and activists to prevent discrimination, to uphold political freedom, to protect people from inhumane conduct in wartime, and to bring offenders to justice." Human Rights Watch, About Human Rights Watch, at <<http://www.hrw.org/about>> (visited July 24, 2003). The mission statement for the Lawyers Committee for Human Rights states in part: "Since 1978, the Lawyers Committee for Human Rights has worked in the U.S. and abroad to . . . help build a strong international system of justice and accountability for the worst human rights crimes." Lawyers Committee for Human Rights, Our Mission, at <<http://www.lchr.org/aboutlchr>> (visited July 24, 2003).

¹⁸⁸ William R. Pace & Jennifer Schense, *The Role of Non-Governmental Organizations*, in 1 *ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT*, *supra* note 37, at 105, 106–07.

¹⁸⁹ *The International Criminal Court: Protecting American Servicemen and Officials from the Threat of International Prosecution: Hearing Before the Senate Comm. on Foreign Relations*, 106th Cong. 12 (2000) (statement of Prof. Jeremy Rabkin) [hereinafter *Senate Hearing*].

¹⁹⁰ The Prosecutor of the ad hoc tribunals, for example, has worked with NGOs to provide them with guidelines about the collection of evidence that could be used at trial. *Activities of the Tribunal*, 1994 ICTY Y.B., *supra* note 7, at 28–29 (describing contacts with NGOs). NGOs also played a significant role in gathering the evidence used by Spanish magistrate Baltazar Garzón to issue an arrest warrant for former Chilean leader Augusto Pinochet on charges of serious international crimes, including torture. See Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 *NEW ENG. L. REV.* 311, 318 (2001).

¹⁹¹ Interview with Richard Dicker, director, international justice programs, Human Rights Watch, in St. Louis (Oct. 11, 2002).

can contribute to complex investigations,¹⁹² and especially to challenging issues such as establishing command responsibility, where the relevant information lies principally in the hands of state officials. NGOs may also act as a possible source of funding for the Court.¹⁹³

More importantly, NGOs will inform the Prosecutor about the occurrence of potential crimes within the Court's jurisdiction. Indeed, the Statute specifically authorizes the Prosecutor to "seek additional information from . . . non-governmental organizations" when deciding whether or not to initiate an investigation pursuant to his *proprio motu* powers.¹⁹⁴ John Washburn, coordinator of the American Coalition for the International Criminal Court, has described the Court's office in The Hague as a kind of "citizens' hotline."¹⁹⁵

Beyond providing information, NGOs will presumably advocate that the Prosecutor pursue particular cases, as they have to the Prosecutor of the ad hoc tribunals.¹⁹⁶ NGOs will represent a vocal and potentially influential force on the Prosecutor. While their power to affect the Prosecutor's use of his discretion may not be as immediate as that exerted by states, it will likely prove significant over the long run, especially given the well-organized efforts of NGOs in the creation of the Court.

Just as NGOs have been critical in evaluating states' compliance with other international organizations,¹⁹⁷ they will also pressure states that fail to comply with requests or subpoenas from the ICC. In return for their assistance with compliance, NGOs will no doubt expect the Prosecutor to give their referrals serious attention.

It is surely a good thing for the Prosecutor to be able to call on the resources, expertise, and visibility of NGOs in an effort to secure state compliance. In order for the ICC Prosecutor to be successful, he will likely rely on the informational and financial assistance that NGOs can provide, as well as the political pressure that they can bring to bear on recalcitrant states. While he will not be as accountable to NGOs as to states, the visibility of the most prominent NGOs ensures that he must generally take their views into account.

Depending on one's point of view, the significant power exerted by NGOs in the ICC enhances or weakens the accountability of the Court. If the Prosecutor is accountable in part to NGOs, to whom are NGOs accountable? Some herald the work of NGOs as representatives of a new civil society, in which individual voices and viewpoints can compete with the dominance over international relations traditionally enjoyed by states.¹⁹⁸ In the sense of electoral accountability, however, NGOs are not accountable to any constituency;¹⁹⁹ they are free to pursue specific agendas unfettered by the restraining leash of elections. As one scholar has observed, some argue that NGOs are "part of the accountability problem rather than part of its solution,"²⁰⁰ and an increasing body of literature takes a skeptical view of the accountability of these organizations.²⁰¹

¹⁹² Interview with Graham T. Blewitt, deputy prosecutor, International Criminal Tribunal for the Former Yugoslavia, in The Hague, the Netherlands (May 21, 2002).

¹⁹³ See Rome Statute, *supra* note 2, Art. 116 (stating that "the Court may receive and utilize, as additional funds, voluntary contributions from Governments, international organizations, individuals, corporations and other entities").

¹⁹⁴ *Id.*, Art. 15(2).

¹⁹⁵ Jordan, *supra* note 98, at 14.

¹⁹⁶ Blewitt, *supra* note 192.

¹⁹⁷ ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 251 (1995) ("In a real sense [NGOs] supply the personnel and resources for managing compliance that states have become increasingly reluctant to provide to international organizations . . .").

¹⁹⁸ See, e.g., Dianne Otto, *Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society*, 18 HUM. RTS. Q. 107 (1996).

¹⁹⁹ See Abram Chayes & Anne-Marie Slaughter, *The ICC and the Future of the Global Legal System*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 30, at 237, 242.

²⁰⁰ Peter J. Spiro, *The New Sovereignists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.–Dec. 2000, at 12.

²⁰¹ See, e.g., Peter J. Spiro, *Accounting for NGOs*, 3 CHI. J. INT'L L. 161 (2002); Ramesh Thakur, *Human Rights: Amnesty International and the United Nations*, 31 J. PEACE RES. 143 (1994); Paul Wapner, *Paradise Lost? NGOs and Global Accountability*, 3 CHI. J. INT'L L. 155 (2002).

In the case of the ICC, NGOs will likely push the Prosecutor to act aggressively, even—or especially, perhaps—in politically sensitive cases. This dynamic can be seen in the ICTY investigation of NATO, discussed in part IV below. The danger is that NGOs will try to force the Prosecutor's hand in cases where he considers it imprudent to venture, at least at that time. Sophisticated NGOs can no doubt perceive the danger of overreaching by the ICC and might choose not to push such politically explosive cases. Given the number of NGOs, however, and the diversity of viewpoints within the NGO community, NGOs are unlikely to be completely self-restraining. As Richard Dicker of Human Rights Watch has observed, "[T]here is no one controlling the on/off switch to the Office of the Prosecutor."²⁰²

It would be naive, however, to discount the danger of excessive NGO involvement or influence on prosecutorial decision making. Critics of the ICC routinely charge that the Prosecutor will be dominated by NGOs.²⁰³ Just as the Prosecutor must firmly maintain his independence from states, he must also distance himself from NGOs.

Consequences of Pragmatic Accountability

One conclusion that clearly emerges from this regime of pragmatic accountability is that the Prosecutor is likely to receive conflicting pressures from a variety of entities. Some states and NGOs might urge him to act in particular cases, while other states may express a clear preference for declination. Reconciling these conflicting pressures will constitute an important task for the Prosecutor.

Furthermore, the mechanisms of pragmatic accountability I have articulated do not ensure that the agents of accountability will use them in a way consistent with the purposes and principles of the Rome Statute. In fact, the account of pragmatic accountability I have given assumes that states may choose in some cases to disregard their legal obligations to comply with the Court. While I do not view state noncompliance as a desirable outcome, its occurrence appears inevitable in light of the experience of the ad hoc tribunals.

It will clearly be a problem for the Court if the pragmatic accountability regime operates without any checks on the agents of accountability. Leaving the Prosecutor totally dependent on state consent to his investigations and prosecutions would be unsatisfactory because the Rome Statute would then constitute nothing more than an elaborate Potemkin village. In this scenario, the ICC would essentially rely on consent by the state where the crime occurred in order to prosecute cases, and would simply function as a new facade on the traditional system for enforcing (or failing to enforce) international criminal law. The reason for the independent prosecutor, after all, was to wrest some measure of control over these prosecutions from states.

States with a taste for noncompliance, then, must be pressured to conform with their legal obligations under the Statute. Securing the accountability of the agents of pragmatic accountability to the requirements of the Statute will be achieved through the assistance of other states and the moral, economic, and political force of international public opinion. As discussed below, enhancing the legitimacy of the Prosecutor's decision making provides one of the keys to achieving this second-order accountability.

IV. THE LEGITIMACY OF THE PROSECUTOR: THE IMPORTANCE OF *EX ANTE* STANDARDS

To prevent the regime of pragmatic accountability from paralyzing the Prosecutor, he must have a source of power to assist him in securing compliance from recalcitrant states.

²⁰² Interview with Richard Dicker, director, international justice programs, Human Rights Watch, in New York (July 2, 2002). For this reason, Dicker argues that "there needs to be consultation and exchange among NGOs worldwide." Telephone interview with Richard Dicker (Feb. 18, 2003).

²⁰³ See, e.g., *The International Criminal Court: Hearings Before the House Comm. on International Relations*, 106th Cong. 75 (2000) (prepared statement of John R. Bolton, senior vice president, American Enterprise Institute).

As the experience of the ad hoc tribunals suggests, he will secure this power from the same entities to which he is accountable—namely, other states and NGOs.

The ICTY has relied on public opinion to put pressure on uncooperative states.²⁰⁴ The ICTY and ICTR have also relied on other states to discipline disobedient states. The most spectacular example, perhaps, was the refusal by major donors to fund the reconstruction of Yugoslavia until that country delivered its former leader Milošević to The Hague.²⁰⁵ More recently, the United States announced a \$5 million reward, under its “Rewards for Justice” program, which seeks the arrest of fifteen individuals suspected of high-level involvement in the Rwandan genocide.²⁰⁶ The United States ambassador for war crimes traveled to Congo in July 2002, advocating the arrest of these suspects. On September 29, 2002, the Rwandan who had served as mayor of the capital, Kigali, during the 1994 genocide was delivered to the ICTR. He was the third ICTR suspect arrested after the announcement of the program.²⁰⁷

This kind of pressure exerted by outside entities will be critical to the success of the ICC.²⁰⁸ While states might have strategic reasons to assist the Prosecutor in pursuing his cases, cooperation with the Court will certainly be more attractive to states and other entities if it is widely viewed as an institution with a significant degree of legitimacy.²⁰⁹ This article assumes that these entities will be more likely to support the Prosecutor if the Court is seen as legitimate,²¹⁰ and that actions taken by the Prosecutor can enhance or weaken its legitimacy. In order to cope with the weaknesses of the ICC’s enforcement regime, therefore, the Prosecutor must seek to enhance the Court’s legitimacy.

By legitimacy, I mean justification for the exercise of authority.²¹¹ Conferral of power on officials by means of democratic elections provides the most familiar basis for legitimacy in liberal states. Almost by definition, however, international institutions—and especially international courts—depend on alternative bases for their legitimacy.²¹² Scholars who have offered general accounts of the legitimacy of international actors and institutions have posited a variety of such bases.²¹³ My concern here, however, is not to develop an alternative, comprehensive theory of legitimacy. Rather, it is to demonstrate how the Court and its Prosecutor can operate in ways that will enhance their legitimacy. To this end, I begin with an account

²⁰⁴ Its 1995 annual report declared that “[p]erhaps the most powerful tool at the disposal of the Tribunal is international public opinion.” Fifth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN Doc. A/53/219-S/1998/737 (Aug. 10, 1998), reprinted in 1998 ICTY Y.B., *supra* note 58, at 270, 315; see also MICHAEL IGNATIEFF, *VIRTUAL WAR: KOSOVO AND BEYOND* 126 (2000); Theodor Meron, *Answering for War Crimes: Lessons from the Balkans*, FOREIGN AFF., Jan.–Feb. 1997, at 4.

²⁰⁵ Daniel Williams, *Yugoslavia Feels Pressure to Extradite; Millions Are at Stake over War Crimes*, WASH. POST, Feb. 16, 2002, at A22; see also Ivana Nizich, *International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 ILSA J. INT’L & COMP. L. 353, 355 (2001).

²⁰⁶ Pierre-Richard Prosper, ambassador-at-large for war crimes issues, Remarks, Rewards for Justice: Fugitives from the International Criminal Tribunal for Rwanda (July 29, 2002), at <<http://www.state.gov>>.

²⁰⁷ Press Release ICTR/INFO-9-2-325.EN, First ICTR Suspect Arrested in the Democratic Republic of Congo (Sept. 30, 2002).

²⁰⁸ See Robert Badinter, *International Criminal Justice: From Darkness to Light*, in 2 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 37, at 1931, 1935; Cassese et al., *supra* note 37, at 1901, 1910.

²⁰⁹ For discussion of this dynamic in other contexts, see Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AJIL 596, 603 (1999); David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AJIL 552 (1993).

²¹⁰ I recognize that the legitimacy of the Prosecutor and the legitimacy of the Court may not be coextensive. Other institutions within the ICC—particularly the judiciary—also have an important role in the Court’s legitimacy. In this article, however, I focus only on that aspect of the Court’s legitimacy that derives from the actions of the Prosecutor.

²¹¹ See Bodansky, *supra* note 209, at 601; Jean-Marc Coicaud, *International Democratic Culture and Its Sources of Legitimacy: The Case of Collective Security and Peacekeeping Operations in the 1990s*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS, *supra* note 100, at 256, 258.

²¹² See the essays collected in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS, *supra* note 100; THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 49 (1990); Bodansky, *supra* note 209, at 604.

²¹³ See generally G. C. A. Junne, *International Organizations in a Period of Globalization: New (Problems of) Legitimacy*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS, *supra* note 100, at 189 (describing possible sources of legitimacy).

of legitimacy articulated by Abram and Antonia Chayes. In their view, which was designed to explain the legitimacy of a norm of international law, legitimacy derives from “the extent to which [it] (1) emanates from a fair and accepted procedure; (2) is applied equally and without invidious discrimination, and (3) does not offend minimum standards of fairness and equity.”²¹⁴ Daniel Bodansky describes this view of legitimacy as “legal legitimacy” or “legality.”²¹⁵ While this account offers a theory of how norms can be legitimated within international law, the framework is nonetheless useful as a means of comprehending how institutional legitimacy can be generated by the Prosecutor’s discretionary decision making.

As I use the term “legitimacy” here, it denotes both “actual” legitimacy—that is, whether the Prosecutor’s actions conform to certain objective requirements for legitimate decision making—as well as external perceptions of the Prosecutor’s legitimacy. While I see these concepts as complementary, they are, to some degree, distinct.²¹⁶ It is possible that the Prosecutor may act legitimately, but that outside entities will not perceive him to be acting legitimately, or that the Prosecutor may act in illegitimate ways but be perceived as acting legitimately. Nevertheless, I assume that, over time, external perceptions of his legitimacy will mirror the Prosecutor’s actual practices.

With regard to the first prong of the Chayeses’ definition of legitimacy, the Prosecutor forms part of a treaty-based institution. The treaty clearly contemplates that the Prosecutor will be independent and exercise discretion. Thus, the states that have ratified the treaty have consented to the Prosecutor’s discretionary role, and his power therefore derives from a fair and accepted procedure for the creation of international law.

With respect to the second and third prongs of the definition—equality and nondiscrimination in application and minimum standards of fairness—our focus must shift from the role of the Prosecutor to the quality of his decision making. The Prosecutor possesses what U.S. scholars Henry M. Hart and Albert Sacks labeled “the power of continuing discretion.” That is, the Prosecutor may make decisions “without obligation to relate in any formally reasoned manner the grounds upon which he acts in one instance with those upon which he acts in another.”²¹⁷ This broad grant of discretion leads to a potential for actual or perceived illegitimacy: the Prosecutor may abuse his power, for example, by failing to make decisions in a nondiscriminatory and fair manner.

To some extent, the formal and pragmatic accountability mechanisms of the Rome Statute, described above, will help guard against this problem. They are not sufficient, however, to guarantee the quality of the Prosecutor’s decision making. The formal accountability mechanisms—the oversight provided by the ASP and the judiciary—are designed to protect against gross abuses of power but will not necessarily act against less spectacular misjudgments. The regime of pragmatic accountability, while more sensitive to individual decisions, is dependent on whether or not a state or an NGO that wishes to protest a prosecutorial decision has some point of leverage to use against the Prosecutor at that time. In sum, accountability mechanisms may help push the Prosecutor to act in ways that increase the legitimacy of the Court, but they do not ensure this result.

To reduce the risk of actual or perceived illegitimacy, the Prosecutor must himself take steps to ensure that he reaches his decisions in a fair and nondiscriminatory way. He must, in short, demonstrate that he adheres to good process in his decision making.²¹⁸ The hallmarks

²¹⁴ CHAYES & CHAYES, *supra* note 197, at 127.

²¹⁵ Bodansky, *supra* note 209, at 605.

²¹⁶ See Arthur Isak Applbaum, *Culture, Identity, and Legitimacy*, in GOVERNANCE IN A GLOBALIZING WORLD, *supra* note 106, at 319, 325 (contrasting “empirical legitimacy” with “moral legitimacy”).

²¹⁷ HART & SACKS, *supra* note 63, at 143–44.

²¹⁸ As Robert Howse has noted in the context of the WTO, “[T]he farther removed the decision maker is from responsibility to a particular electorate, the greater the extent to which legitimacy depends on procedural fairness itself.” Robert Howse, *The Legitimacy of the World Trade Organization*, in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS, *supra* note 100, at 355, 377.

of good process in this context are principled decision making, reasoned decision making, and, most important, impartiality.²¹⁹ Impartiality, in turn, suggests qualities of fairness and evenhandedness among the possible targets of investigation and prosecution.

Impartiality is critical in the context of the ICC because its absence constitutes the basis for the charge most frequently leveled at the Court: that it will become a source of “politicized” prosecutions.²²⁰ This fear of politicization is especially acute with regard to the independent prosecutor because of the broad scope of his discretion, the seriousness of the crimes within the jurisdiction of the Court, and the likely stature of many of its accused.²²¹

It is no accident that the qualities of impartiality and fairness have a distinctly judicial quality to them. Unlike the close linkage between prosecutors and the executive in some domestic systems, the ICC Prosecutor is designed to be politically independent of governments. The purpose of this independence is to divorce him from any political objective other than fulfilling the mandate of the Court. If the Prosecutor becomes identified with any political agenda other than seeking justice, the role of the Court in providing an impartial, independent forum for individuals accused of the most serious crimes will be severely compromised.

At trial, the Prosecutor must be an advocate, seeking the conviction of the accused. During the pretrial phase, however, the Prosecutor must exercise his discretion in a much more impartial manner. He must, for example, treat like cases alike and apply a consistent set of criteria to every case. This duty is reflected in a variety of provisions in the Rome Statute, such as the requirement that the Prosecutor investigate incriminating and exonerating circumstances equally.²²² Municipal criminal systems also stress the importance of prosecutorial impartiality. The purpose of the German system of mandatory prosecution (*Legalitätsprinzip*) is to ensure equality before the law and to prevent arbitrary prosecution.²²³ The United Kingdom’s Royal Commission on Criminal Procedure enunciated two criteria by which a prosecutorial system should be judged as fair: it should “bring[] to trial only those against whom there is an adequate and properly prepared case” and it should “not display arbitrary and inexplicable differences in the way individual cases or classes of cases are treated.”²²⁴ The Draft Code of Conduct for the ICC Prosecutor, drafted by the International Association of Prosecutors, includes the following directive: prosecutors should “be, and appear to be, consistent, objective, impartial, and independent.”²²⁵

Ironically, the fear of partiality by the ICC Prosecutor springs partly from the concern that the Court will target nationals from powerful countries solely for the sake of appearing evenhanded.²²⁶ Critics allege that this dynamic has already occurred at the ICTY, where the Prosecutor came under pressure to indict more non-Serbs, even though Serbs had committed the bulk of the crimes in the former Yugoslavia.²²⁷ The U.S. position paper against a prosecutor with *proprio motu* powers that was circulated at Rome relied in part on the concern that

²¹⁹ See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 312–13 (1997).

²²⁰ See, e.g., U.S. Secretary of Defense Donald Rumsfeld, Statement on the ICC Treaty, U.S. Dep’t of Defense News Release No. 232-02 (May 6, 2002), at <<http://www.defenselink.mil/news>>.

²²¹ See Samantha Power, *The United States and Genocide Law: A History of Ambivalence*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 30, at 165, 172.

²²² Rome Statute, *supra* note 2, Art. 54(1).

²²³ See §152 StPO II; SAFFERLING, *supra* note 62, at 172.

²²⁴ ROYAL COMM’N ON CRIMINAL PROCEDURE, REPORT, 1981, Cmnd. 8092-1, at 127–28.

²²⁵ See INTERNATIONAL ASSOCIATION OF PROSECUTORS, THE CODE OF PROFESSIONAL CONDUCT FOR PROSECUTORS OF THE INTERNATIONAL CRIMINAL COURT, Art. 1(9), at <<http://www.iap.nl.com>> (visited July 24, 2003). While this draft code of conduct does not address guidelines regarding prosecutorial discretion, it does emphasize the importance of ethical prosecutorial behavior.

²²⁶ See Beatrice Le Fraper du Hellen, *Remarks at Roundtable Discussion: Prospects for the Functioning of the International Criminal Court*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY, *supra* note 21, at 311, 311; Morris, *supra* note 119, at 243; Weschler, *supra* note 30, at 95.

²²⁷ Weschler, *supra* note 30, at 95.

expanding the number of potential cases within the Prosecutor's purview "inevitably will undermine perceptions of his or her impartiality and subject the Prosecutor to incessant criticism by groups and individuals who disagree with his choices."²²⁸ At bottom, these critics fear that the ICC Prosecutor will engage in what is known in the United States as "selective prosecution": that he will target individuals solely because of their nationality.²²⁹

In cases of delegated power, such as the discretionary power delegated to the ICC Prosecutor, the promulgation of *ex ante* standards has traditionally been proposed to minimize arbitrariness in discretionary decision making.²³⁰ In light of the fears of partiality with regard to the ICC, the Prosecutor can best ensure the consistency and perceived fairness of his discretionary decision making through the consistent application of *ex ante* standards. As the Statement of Prosecution Policy of Hong Kong asserts, "[T]he modern prosecutor, who is trained to conduct his or her duties with skill, industry and vigour, must operate within the ambit of a defined and understandable prosecution policy."²³¹

The utility of such standards clearly emerges from the experience of the ICTY Prosecutor in 1999, when a group of law professors alleged that individuals working under the aegis of NATO during its bombing campaign of Yugoslavia had committed crimes within the ICTY's jurisdiction. Reviewing the course of this case in some detail helps illustrate the importance of clear prosecutorial guidelines in defusing allegations of partiality and politicized prosecutions.

After NATO launched Operation Allied Force against the Federal Republic of Yugoslavia in 1999, the ICTY Prosecutor received a variety of requests to investigate the conduct of the alliance.²³² Several law professors from the Canadian law school Osgoode Hall filed one such request, which they sent to ICTY Prosecutor Arbour, a former professor at Osgoode Hall.²³³

In response to these complaints, on May 14, 1999, Arbour established a confidential internal committee to evaluate the accusations against NATO and to advise her whether the allegations justified a formal investigation.²³⁴ In September 1999, Arbour resigned to take a seat on the Canadian Supreme Court and was replaced by Carla Del Ponte as chief prosecutor of the ICTY and the ICTR.²³⁵ On December 6, 1999, the committee delivered a confidential interim report to Del Ponte.²³⁶ Later that month, the London *Observer* broke the news that Del Ponte had assembled a dossier on alleged war crimes in Kosovo committed by NATO.²³⁷ Some NATO members, especially the United States, were reportedly outraged by the ICTY's

²²⁸ *Statement of United States Delegation*, *supra* note 32, at 149.

²²⁹ Cynics might observe that the U.S. fears that the ICC might engage in selective prosecution derive from the nation's domestic experience, where minorities frequently charge—with some statistical support—that they are unfairly singled out by police when investigating crimes. See Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605 (1998).

²³⁰ DAVIS, *supra* note 65, at 98.

²³¹ HONG KONG SPECIAL ADMINISTRATIVE REGION, DEPARTMENT OF JUSTICE, THE STATEMENT OF PROSECUTION POLICY AND PRACTICE, *Introduction* (Oct. 2002), at <<http://www.info.gov.hk/justice/new/depart>> [hereinafter HONG KONG GUIDELINES].

²³² ICTY, Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, Final Report to the Prosecutor, para. 3 (June 8, 2000), *reprinted in* 39 ILM 1257 (2000), *available at* <<http://www.un.org/icty>> [hereinafter NATO Report].

²³³ Professor Michael Mandel et al., Notice of the Existence of Information Concerning Serious Violations of International Humanitarian Law Within the Jurisdiction of the Tribunal; Request that the Prosecutor Investigate Named Individuals for Violations of International Humanitarian Law and Prepare Indictments Against Them Pursuant to Articles 18.1 and 18.4 of the Tribunal's Statute (May 6, 1999), *available at* <<http://counterpunch.org/complaint.html>>; see also Michael Mandel, *Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to Be Learned from It*, 25 FORDHAM INT'L L.J. 95 (2001).

²³⁴ NATO Report, *supra* note 232, para. 3; Andreas Laursen, *NATO, the War over Kosovo, and the ICTY Investigation*, 17 AM. U. INT'L L. REV. 765, 770–71 (2002).

²³⁵ Charles Trueheart, *War Crimes Court Is Looking at NATO; Prosecutor Reviews Yugoslav Attacks*, WASH. POST, Dec. 29, 1999, at A20.

²³⁶ NATO Report, *supra* note 232, para. 12.

²³⁷ Emma Daly, *Dossier of NATO 'Crimes' Lands in Prosecutor's Lap; Either I Pursue This or I Quit, Carla Del Ponte Tells Emma Daly in The Hague*, OBSERVER, Dec. 26, 1999, at 15.

investigation.²³⁸ Other reports indicated that NATO officials found the charges “ridiculous” and did not think Del Ponte would attempt to make a case against them.²³⁹

The ICTY internal committee delivered its final confidential report to Del Ponte at the end of May 2000. Relying largely on information in the public domain,²⁴⁰ the committee concluded that “neither an in-depth investigation related to the bombing campaign as a whole nor investigations related to specific incidents are justified.”²⁴¹ On June 2, 2000, Del Ponte informed the UN Security Council that she intended to follow the recommendation in the report and would not further investigate Operation Allied Force.²⁴² In addition, she publicly released the internal committee’s report.

Observers have vigorously debated whether Arbour’s decision to establish a committee to inquire into the allegations against NATO, and Del Ponte’s decision not to pursue an investigation, enhanced or weakened the credibility of the Tribunal. Critics of the inquiry have implied that it detracted from the impartiality of the ICTY, labeling it “an exercise in dangerous relativism.”²⁴³ Others have contended that the report was overtly biased toward NATO, “hardly consistent with the Prosecutor’s duty of impartiality and independence.”²⁴⁴ Supporters of Del Ponte’s decision have countered that indicting NATO officials would have weakened international humanitarian law.²⁴⁵

The reaction to the ICTY Prosecutor’s preliminary investigation into NATO’s actions makes clear the kinds of criticisms that high-profile international inquiries attract. The Prosecutor has been accused of partiality both by those who agree and by those who disagree with the committee’s report. Some have lambasted Del Ponte for participating in a “politically inspired investigation.”²⁴⁶ Others have maintained that “political considerations” led to Del Ponte’s reluctance to investigate NATO.²⁴⁷

The ICC Prosecutor will inevitably hear these kinds of charges, especially in cases attracting widespread international attention. The Prosecutor should conduct his investigations according to a procedure that will dampen the viability of such accusations. The political firestorm generated by the Prosecutor’s decision to consider the charges against NATO underscores that the Prosecutor must apply a consistent and publicly articulated standard when deciding which cases to investigate and prosecute. While such a standard does not necessarily guarantee the perception of fairness and impartiality, its articulation would further this goal more than the absence of any standard.

The ICTY report considers a variety of allegations against NATO actions, including charges that NATO unlawfully and deliberately attacked civilian infrastructure targets and that it caused excessive civilian casualties, violating the rule of proportionality.²⁴⁸ At the outset, the

²³⁸ U.S. Secretary of Defense William S. Cohen, for example, reportedly stated: “It was an outrage that the Yugoslav Tribunal challenged us.” *Senate Hearing*, *supra* note 189, at 33 (statement of Prof. Jeremy Rabkin).

²³⁹ Charles Trueheart, *Taking NATO to Court: Tribunal Reviews Professors’ Charges That Alliance Committed War Crimes*, WASH. POST, Jan. 20, 2000, at A15.

²⁴⁰ NATO Report, *supra* note 232, para. 7.

²⁴¹ *Id.*, para. 90.

²⁴² Laursen, *supra* note 234, at 771.

²⁴³ Trueheart, *supra* note 239, at A15.

²⁴⁴ Paolo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 12 EUR. J. INT’L L. 503, 507 (2001); Mandel, *supra* note 233, at 96–97.

²⁴⁵ Sarah B. Sewall et al., *The United States and the International Criminal Court: An Overview*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 30, at 1, 18.

²⁴⁶ Lee A. Casey, *Assessment of the United States Position: The Case Against the International Criminal Court*, 25 FORDHAM INT’L L.J. 840, 848 (2002).

²⁴⁷ Simon Chesterman, *No Justice Without Peace? International Criminal Law and the Decision to Prosecute*, in CIVILIANS IN WAR 145, 151 (Simon Chesterman ed., 2001).

²⁴⁸ NATO Report, *supra* note 232, para. 2.

report declares that it applied to the allegations “the same criteria to NATO activities that the Office of the Prosecutor (OTP) has applied to the activities of other actors in the territory of the former Yugoslavia.”²⁴⁹ It notes that it employed the same threshold test that the Prosecutor had earlier applied in her assertion of her right to investigate allegations of crimes committed by Serb forces in Kosovo.²⁵⁰ The report further explains that this test, which the Prosecutor had articulated as “credible evidence tending to show that crimes within the jurisdiction of the Tribunal may have been committed,” represented a minimum standard, and that any investigation that failed to meet this test should be considered “arbitrary and capricious.” Finally, it notes that the Prosecutor is free to apply a higher threshold to initiate an investigation: “In practice, before deciding to open an investigation into any case, the Prosecutor will also take into account a number of other factors concerning the prospects for obtaining evidence sufficient to prove that the crime has been committed *by an individual who merits prosecution in an international forum.*”²⁵¹

After reviewing all of the major allegations against NATO, the committee states: “In all cases either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences.”²⁵² The committee’s recommendation therefore did not reflect criteria designed to identify all cases falling within the jurisdiction of the Yugoslav Tribunal. The prosecution of low-level officials is certainly within the jurisdiction of the ICTY. The emphasis on high-level offenders results from prosecutorial discretion—not legal directives.

While some of the legal analysis of the ICTY report may be open to criticism,²⁵³ its recommendation not to prosecute any individuals was entirely consistent with OTP’s preexisting prosecution strategy. Targeting high-level officials or individuals who had perpetrated particularly heinous offenses had been the publicly stated prosecutorial policy of the ICTY Prosecutor since at least 1997.²⁵⁴ Graham Blewitt, the deputy prosecutor of the Tribunal, who has worked there since its inception, reports that from the beginning, the ICTY’s Office of the Prosecutor believed that it should concentrate on the leaders responsible for the atrocities in the former Yugoslavia.²⁵⁵

The ICTY report suggests the importance of public, *ex ante* standards governing prosecutorial discretion. If the report itself had been the only suggestion of prosecutorial policy—or, even worse, if the Prosecutor had decided not to release the report and simply stated that she would not investigate NATO—then her critics would have more justification for their assertion that the Prosecutor did not investigate NATO for “political” reasons. In fact, the Prosecutor’s decision not to pursue the NATO investigation tracks her preannounced policy of targeting high-level officials and particularly heinous offenders; a continuing investigation into Operation Allied Force did not appear likely to lead to convictions in either of those categories.

²⁴⁹ *Id.*, para. 5.

²⁵⁰ *Id.*

²⁵¹ *Id.* (emphasis supplied).

²⁵² *Id.*, para. 90.

²⁵³ Many have criticized the report’s analysis. One commentator, for example, has labeled it “incoherent.” Laursen, *supra* note 234, at 776; see also Benvenuti, *supra* note 244, at 526 (describing the report as “largely inadequate to its task”).

²⁵⁴ ICTY Press Release CC/PIU/314, Statement by the Prosecutor Following the Withdrawal of the Charges Against 14 Accused (May 8, 1998) (describing the prosecutorial strategy of the OTP as “maintaining an investigative focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences”); Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AJIL 57, 59 n.4 (1999).

²⁵⁵ Blewitt, *supra* note 192.

V. A CALL FOR PROSECUTORIAL GUIDELINES

The NATO report provides an example of how a standard related to prosecutorial charging decisions enhances the legitimacy of the Prosecutor's declination decision in a controversial case. The ICC Prosecutor should follow and build upon that precedent by promulgating a series of such standards. I propose that, early in his term of office, the ICC Prosecutor should draft a set of prosecutorial guidelines to govern his discretionary decision making.²⁵⁶

The promulgation of such guidelines will materially assist the Prosecutor in accomplishing both the achievement of legitimacy and the perception of legitimacy. By contributing to the impartiality and consistency of his decision making, they will enhance its legitimacy. By announcing a standard by which the Prosecutor's actions may be judged, guidelines provide a tool for holding the Prosecutor accountable to his own policies, contributing to the perception of his legitimacy. In addition, by providing a rubric according to which he can judge the demands of states and NGOs, guidelines help proclaim the Prosecutor's independence from those entities.

Many states whose prosecutors enjoy significant discretion have adopted prosecutorial guidelines to guide that discretion and render its use more transparent. The prosecutorial guidelines of Hong Kong, for example, declare that their purpose is to "promote fair and consistent decision making in relation to public prosecutions [and] to make the prosecutorial process more understandable and open to the people of Hong Kong."²⁵⁷

Other jurisdictions that have also adopted national prosecutorial guidelines include the Netherlands,²⁵⁸ Canada,²⁵⁹ the United States,²⁶⁰ England,²⁶¹ Australia,²⁶² and Belgium.²⁶³ Belgium's prosecutorial guidelines derive their authority from the Belgian Constitution, which permits the minister of justice to issue compulsory prosecutorial guidelines (*directives contraignantes*), including provisions concerning investigations and the charging decision.²⁶⁴ The Belgian guidelines, like all of the national guidelines discussed above, are publicly available on a governmental Web site.²⁶⁵ Italy is currently considering the promulgation of national prosecutorial guidelines.²⁶⁶

Similarly, the Council of Europe has recommended that its member states promote consistency in their criminal justice systems in part through the promulgation of guidelines for

²⁵⁶ As this article was going to press, the ICC's first Prosecutor, Luis Moreno Ocampo, announced that he will promulgate prosecutorial guidelines. An early draft of these guidelines, which are entitled Regulations of the Office of the Prosecutor, is available at <<http://www.icc-cpi.int/otp/>> (visited June 21, 2003). Because of the timing of their issuance, this article does not provide a detailed analysis of them, although it does offer general recommendations as to the advisability of guidelines, as well as their content. The Office of the Prosecutor has also issued a draft policy paper, which discusses some of the issues examined in this article. Draft Paper on Some Policy Issues Before the Office of the Prosecutor for Discussion at the Public Hearing in The Hague on 17 and 18 June 2003, *available at id.* (visited July 31, 2003).

²⁵⁷ *Introduction to HONG KONG GUIDELINES*, *supra* note 231.

²⁵⁸ JAN J. M. VAN DIJK, *THE USE OF GUIDELINES BY PROSECUTORS IN THE NETHERLANDS I* (1983); Chrisje Brants & Stewart Field, *Discretion and Accountability in Prosecution: A Comparative Perspective on Keeping Crime out of Court*, in *CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY 127, 143* (Phil Fennell et al. eds., 1995).

²⁵⁹ For the Canadian guidelines, see CANADA, DEP'T OF JUSTICE, *FEDERAL PROSECUTION SERVICE DESKBOOK* (2d ed. 2000), *available at* <<http://canada.justice.gc.ca/en/dept/pub/>> [hereinafter *CANADIAN PROSECUTION DESKBOOK*].

²⁶⁰ U.S. DEP'T OF JUSTICE, *PRINCIPLES OF FEDERAL PROSECUTION* (Sept. 2000), *available at* <<http://www.usdoj.gov/>> [hereinafter *DOJ PRINCIPLES OF FEDERAL PROSECUTION*].

²⁶¹ ENGLAND AND WALES, *THE CROWN PROSECUTION SERVICE, THE CODE FOR CROWN PROSECUTORS*, *available at* <<http://www.cps.gov.uk/>> [hereinafter *CODE FOR CROWN PROSECUTORS*] (visited July 24, 2003).

²⁶² See COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS (AUSTRALIA), *PROSECUTION POLICY OF THE COMMONWEALTH*, *available at* <<http://www.cdpp.gov.au/>> [hereinafter *PROSECUTION POLICY OF AUSTRALIA*] (visited July 24, 2003).

²⁶³ Brigitte Pesquié, *The Belgian System*, in *EUROPEAN CRIMINAL PROCEDURES*, *supra* note 12, at 81, 91.

²⁶⁴ CONST. Art. 151, §1; Perrodet, *supra* note 16, at 426.

²⁶⁵ The Belgian guidelines do not exist in a single document, but instead in the form of circulars on a variety of topics. They are available at <<http://www.just.fgov.be/>> (visited July 24, 2003).

²⁶⁶ Perrodet, *supra* note 16, at 447-48.

crime policies that involve prosecutorial discretion.²⁶⁷ The COE emphasizes that it is critical that these guidelines be transmitted to the general public, noting that “[t]his is a particularly important requirement in systems where the public prosecutor is independent or enjoys extensive discretionary powers.”²⁶⁸ The United Nations has also called for prosecutorial guidelines in criminal justice systems where the prosecutor is vested with discretionary functions.²⁶⁹

Following these precedents, the ICC Prosecutor should also adopt prosecutorial guidelines. The guidelines should provide information about the factors that the Prosecutor will consider, and those he will not consider, when making his discretionary decisions, particularly with regard to investigating, screening, charging, and admissibility decisions, where his discretion is at its apogee. The guidelines should also include explanatory comments, which will further delineate how the Prosecutor will consider the enumerated factors. While a thorough consideration of the issues raised by such guidelines merits a full-length article in its own right, the following discussion takes one example of the Prosecutor’s discretion—the decision to bring criminal charges after an investigation—and uses it to illustrate some of the most important issues the Prosecutor must consider.

The Decision to Charge

Article 53 of the Rome Statute articulates the following grounds upon which the Prosecutor may choose to decline to prosecute after conducting an investigation:

- (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
- (b) The case is inadmissible under article 17; or
- (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.²⁷⁰

Sufficiency of the evidence and admissibility. All three of these factors should be addressed by the prosecutorial guidelines. The first factor requires that the Prosecutor determine that there are “reasonable grounds” to believe that the person has committed a crime within the ICC’s jurisdiction.²⁷¹ This inquiry will require the Prosecutor to construe the elements of the crimes within the Rome Statute, a difficult task given the complexity of many of the crimes’ definitions. It should also require the Prosecutor to assess the reliability of the evidence. Many national prosecutorial guidelines address how prosecutors should determine the sufficiency of the evidence.²⁷²

The second factor listed in Article 53 concerns the admissibility question, some of whose difficulties have been explored above. While the Rome Statute sets out detailed criteria to be applied to the admissibility determination, the Prosecutor should undoubtedly describe any additional factors he intends to consider when judging whether or not to challenge a state’s assertion of inadmissibility.

The interests of justice. The last factor set out in Article 53—consideration of the interests of justice—is quite elastic. Although the Prosecutor is directed to consider a variety of factors,

²⁶⁷ COE, ROLE OF PUBLIC PROSECUTION, *supra* note 8, at 41.

²⁶⁸ *Id.* at 42.

²⁶⁹ Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Guidelines on the Role of Prosecutors, UN Doc. A/CONF.144/28/Rev.1, at 189 (1990).

²⁷⁰ Rome Statute, *supra* note 2, Art. 53(2).

²⁷¹ *Id.*, Art. 58(1) (a).

²⁷² See, e.g., CANADIAN PROSECUTION DESKBOOK, *supra* note 259, §15.3.1; CODE FOR CROWN PROSECUTORS, *supra* note 261, §§5.1–5.4.

including the gravity of the crime and the role of the perpetrator, the Rome Statute does not indicate how to value them. A variety of complex questions lies embedded in the concept of the “interests of justice.” A prime goal of the prosecutorial guidelines should be to give content to this nebulous phrase.²⁷³

First, the Prosecutor must determine what kinds of cases are most appropriate for the international forum. In making this decision, he will no doubt evaluate the standard philosophical justifications for punishment—deterrence, retribution, rehabilitation, and incapacitation—as well as other frequently cited goals of international prosecutions.²⁷⁴ The practice of the ad hoc tribunals combines a retributive and deterrent methodology.²⁷⁵ Their OTP targets high-level officials and those who have committed particularly egregious offenses.²⁷⁶ In addition, it focuses on situations that might have a deterrent effect, such as the bombing of Zagreb.²⁷⁷ The ICTY OTP also looks for cases that have particular historical resonance, such as the shelling of the marketplace in Sarajevo and the Srebrenica massacre.²⁷⁸

That the international justice forum should be reserved for high-level perpetrators has gained wide acceptance. The ICC Prosecutor’s charging policy should continue this practice. The Prosecutor must make clear, however, that he is not simply selecting all military or political leaders who have been involved in a particular conflict. This policy not only would fail to comport with the Rome Statute—which focuses only on crimes and not on military conflict generally—but also would fuel the politicization of the Court.²⁷⁹ Senior officials of the United States, or those of other countries that engage in military actions, should not fear prosecution by the Court simply from the fact of having used military force.²⁸⁰

The most important policy that the Prosecutor should announce is that he is not targeting potential accused—or even investigating potential situations—simply because of the nationality of the potential wrongdoers.²⁸¹ The prosecutorial guidelines should be clear on this point. Reports that ICTY Prosecutor Del Ponte indicted an ailing Croatian general simply

²⁷³ The British experience with guidelines might prove instructive here. In 1994 the British Crown Prosecution Service revised its Code for Crown Prosecutors. One of the changes made in the revision included articulating specific factors that might be included in prosecutorial assessments of whether a particular prosecution is in the “public interest.” Research on the effects of these changes suggests that they led prosecutors to think more precisely about whether particular charging or declination decisions conformed to the public interest. Allan Hoyano et al., *A Study of the Impact of the Revised Code for Crown Prosecutors*, 1997 CRIM. L. REV. 556, 561.

²⁷⁴ International justice scholarship generally cites five goals for international prosecutions: (1) truth telling, (2) punishing perpetrators, (3) promoting healing for victims, (4) advancing the rule of law, and (5) facilitating national reconciliation. Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 586 (2002).

²⁷⁵ For a discussion of deterrence and retribution as it relates to international sentencing practices, see Danner, *supra* note 88, at 444–53.

²⁷⁶ It should be noted that, despite the relative clarity of this policy, it poses difficulties in implementation. As Prosecutor Del Ponte told the Security Council, one should not “fall into the trap of polarising accused into big fish and small fish. A number of the accused under investigation in the ICTY and the ICTR played a very nasty role somewhere in between these two extremes—as key organisers and motivators at the district or local level.” ICTY Press Release GR/P.I.S./642–e, *supra* note 86. ICTY Deputy Prosecutor Blewitt has emphasized that prosecutorial discretion is especially important when deciding which individuals, while not in the highest echelon of the leadership, merit prosecution in the international forum. Blewitt, *supra* note 192.

²⁷⁷ Blewitt, *supra* note 192.

²⁷⁸ *Id.*

²⁷⁹ The question of the criminal liability of senior officers is essentially one involving the substantive law of the Rome Statute. Judging by the jurisprudence of the ad hoc tribunals, the ICC judges may interpret principles like command responsibility expansively. See Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 455–56 (2001). If the ICC follows a similar course and the Prosecutor aggressively pushes the boundaries of command responsibility, the legitimacy of the Court may decrease.

²⁸⁰ The use of military force alone, however, may constitute a crime in and of itself once the crime of aggression is defined and operational in the Rome Statute.

²⁸¹ This is not to say that the nationality of the accused should play no role in the prosecutorial decisions of whom to indict. Some of the crimes within the jurisdiction of the ICC, particularly that of genocide, require that the accused have acted against a “national, ethnical, racial, or religious group.” Rome Statute, *supra* note 2, Art. 6. In such cases, the nationality of the accused and of his or her victims may be relevant.

out of a desire to “bring a high-ranking Croat to The Hague”²⁸² do not instill faith in the fairness of international justice.²⁸³

Instead of focusing on the nationality of the offenders, the Prosecutor should use as his primary screening criterion the seriousness of the offense committed.²⁸⁴ Although measuring “seriousness” involves philosophical and practical challenges, assessing the harm engendered by a crime is surely a less controversial approach than targeting particular individuals because of their status or nationality. In addition, seriousness of the offense is a commonly accepted criterion for domestic charging decisions.²⁸⁵ Furthermore, the relative clarity of this standard helps address one of the principal criticisms of prosecutorial guidelines—that they are fundamentally indeterminate. A primary focus on the crimes committed will afford the surest foundation for impartial prosecutorial decision making.

In addition to how to select particular situations or defendants, other difficult problems are subsumed under the rubric “the interests of justice.” Should the Prosecutor, for example, consider the impact of prosecutions on the regions where the crimes occurred? This question would be particularly relevant if the Prosecutor believes one of the goals of international prosecutions is to promote national reconciliation, which is often cited as a justification for international trials.²⁸⁶ The effect of prosecutions on the region has been considered in the context of what impact domestic amnesties and/or truth commissions should have on the ICC Prosecutor’s ability to pursue cases. The Rome Statute does not refer to either amnesties or truth commissions. The negotiators decided not to address these issues directly in the Statute, leaving it up to the Prosecutor to consider them in the context of factors such as “the interests of justice.”²⁸⁷

Similarly, are alternative resolutions of disputes, such as the provision of financial reparation, a valid consideration for the Prosecutor to include in his calculus? This question is especially difficult because the ICC operates upon a principle of individual responsibility, while states generally resolve disputes under the guise of state responsibility.

Furthermore, should the Prosecutor worry about the risks of destabilizing delicate political situations through the publicizing of investigations or the bringing of charges? The ICTY Prosecutor faced this question when she indicted Milošević in 1999 during the NATO air campaign. Many observers were quick to point out that the Prosecutor had declined to indict Milošević earlier, when his participation was considered critical to the negotiation of the Dayton Accords, ending the war in Bosnia.²⁸⁸ ICTY Prosecutor Arbour emphatically maintained that she had decided independently to indict Milošević, with no pressure from states.²⁸⁹ She did concede, however, that she had rushed the indictment out of fear that Milošević and NATO members might strike a deal granting him amnesty in return for withdrawing from Kosovo.²⁹⁰ Arbour’s decision to indict Milošević was criticized in many quarters.²⁹¹ With the former Yugoslav president on trial in The Hague, however, these criticisms seem misguided. Nevertheless,

²⁸² Daniel Simpson, *Croatia Protects a General Charged with War Crimes: In Rubble of Village Serb Calls for Vengeance*, N.Y. TIMES, Dec. 3, 2002, at A10.

²⁸³ The ICTY’s indictment of General Janko Bobetko was delivered to him, although the arrest warrant was suspended because of his ill health. He died in April 2003. Gabriel Partos, *Obituary: General Janko Bobetko: Croatian Army Chief Charged with War Crimes*, INDEPENDENT (London), Apr. 30, 2003, at 18.

²⁸⁴ Evaluating the seriousness of a crime might include consideration, for example, of the number of victims and the type of harm suffered by the victims.

²⁸⁵ In their explanation of the “public interest,” the Canadian prosecutorial guidelines, for example, state that “the more serious the offence, the more likely the public interest will require that a prosecution be pursued.” *The Public Interest Criteria*, CANADIAN PROSECUTION DESKBOOK, *supra* note 259, §15.3.2.

²⁸⁶ Fletcher & Weinstein, *supra* note 274, at 586.

²⁸⁷ See generally Goldstone & Fritz, *supra* note 4.

²⁸⁸ Chesterman, *supra* note 247, at 151; Gallarotti & Preis, *supra* note 137, at 35.

²⁸⁹ IGNATIEFF, *supra* note 204, at 119–20.

²⁹⁰ Marlise Simons, *Proud but Concerned: Tribunal Prosecutor Leaves*, N.Y. TIMES, Sept. 15, 1999, at A3.

²⁹¹ Richard Sisk, *A Rush to Indict Sloba: Prosecutor Feared U.S. Would Let Him off Hook*, DAILY NEWS, May 28, 1998, at 8.

the reaction to Milošević's indictment illustrates the importance of guidelines to bolster the Prosecutor's contention that he is following an impartial course when exercising his discretion in controversial cases.

Should the Prosecutor generally investigate and bring charges in situations where the conflict is still ongoing? The ICTY was established before the end of the conflicts in the former Yugoslavia, although it operated with very limited effectiveness until they ceased. Ongoing disputes render investigation and enforcement difficult, and they make the calculation of the "interests of justice" very difficult to assess—especially if the Prosecutor considers that post-conflict resolutions should influence his decision to pursue criminal charges. Assuming that the jurisdictional prerequisites were met, for example, should the Prosecutor bring charges for violations that may have recently occurred in Colombia or Congo?²⁹² Intervening in an ongoing conflict makes the political ramifications of any investigation more acute, yet simply ignoring the violations trivializes the experience of the victims and invites charges that the Prosecutor is functioning in a "political" way.

Finally, should the Prosecutor consider the likely length and financial expense of a trial when deciding whether or not to charge a case?²⁹³ Given the limited resources of the ICC, declining to pursue charges in particularly complex cases might allow the Court to consider more cases. On the other hand, the complexity of the trial will probably increase with the stature of the accused. Furthermore, efficiency is not necessarily an overriding value at the international level. For example, the ICTY OTP is determined to try Milošević on charges based on crimes committed in Kosovo, Bosnia, and Croatia, even though the trial would be much shorter if the prosecution focused on only one of these conflicts.²⁹⁴ The Prosecutor might also take financial or temporal considerations into account when deciding how many charges to bring. The Hong Kong guidelines, for example, state that "every effort should be made to keep the number of charges as low as possible."²⁹⁵ The ICC Prosecutor should consider whether or not to have a formal policy on this topic.

Commentary on the guidelines. To be effective in increasing the quest for legitimacy, these prosecutorial standards must have some explanatory power and constrain prosecutorial choices. In particular, each guideline provision should include commentary that spells out in some detail how the Prosecutor will account for each factor. If the guidelines do not include such commentary, they will simply constitute an empty verbal formula that provides no guarantee of principled decision making. For example, if the Prosecutor elects to make gravity of the offense his primary criterion for charging decisions, the commentary should explain this policy, as well as specify the standard the Prosecutor will use to evaluate the seriousness of the act concerned. The commentary might also describe how the Prosecutor will assess the relevance of a domestic truth commission, and what types of truth commission proceedings might constitute an adequate alternative to international prosecution.²⁹⁶

The Canadian *Federal Prosecution Service Deskbook* provides an excellent example of this technique. The *Deskbook* gives a narrative description of the factors that Canadian federal prosecutors should consider. It also crystallizes these descriptions into "practice directions." For example, following an explanation of the importance of prosecutorial record keeping in

²⁹² In July 2003, the ICC Prosecutor announced that his office was conducting a preliminary examination into atrocities that have occurred in eastern Congo since July 1, 2002. Marlise Simons, *Court Likely to Take up Congo First*, N.Y. TIMES, July 16, 2003, at A3.

²⁹³ The Australian *Prosecution Policy of the Commonwealth*, for example, lists this factor as a consideration in determining whether or not a prosecution is in the "public interest." PROSECUTION POLICY OF AUSTRALIA, *supra* note 262, para. 2.10(p). The British Code for Crown Prosecutors, by contrast, does not mention this criterion.

²⁹⁴ See Chris Stephen, *Comment: Milošević and the Al Capone Dimension*, IWPRREP. (Apr. 16, 2003), at <<http://www.iwpr.net>>.

²⁹⁵ HONG KONG GUIDELINES, *supra* note 231, §11.1(a).

²⁹⁶ For a discussion of factors potentially relevant to the Prosecutor's consideration of this question, see Goldstone & Fritz, *supra* note 4, at 663–64.

charging decisions, a shaded box graphically sets off "Practice Direction #3." The text in this box states, "Prosecutors will keep a record of charge screening in each case indicating what has been done and, where appropriate, the reasons for doing so."²⁹⁷ The practice direction and textual explanation complement each other and make the rule and commentary easy to identify and distinguish.

Record keeping. As the Canadian guidelines suggest, the ICC Prosecutor should also keep records indicating the reasons for his disposition of cases, particularly where he has declined to investigate or prosecute.²⁹⁸ Members of the Office of the Prosecutor should key their decision making to relevant provisions in the guidelines.

These records will form a "governing law" of prosecutorial discretion, which will help promote consistency over time. They will allow the Prosecutor to improve the consistency and coherency of decision making in the long term, as well as yield information that might be useful in amending the guidelines.

Drafting the Guidelines

Recognizing the major effect that would be exerted on the shape and future of the ICC by such guidelines prompts the question whether the Prosecutor should have the exclusive power to determine them. Should the ASP, for example, be able to dictate broad prosecutorial strategies? The ASP's involvement would certainly endow these standards with a stronger democratic pedigree. On the other hand, prosecutorial guidelines require expertise in the realities of criminal prosecution.

On balance, it appears that the ASP should not promulgate these standards but, instead, should leave this task to the Prosecutor. The Prosecutor is likely to possess much greater expertise in prosecutorial decision making than the state representatives who make up the ASP. To be effective, the guidelines must both reflect the Prosecutor's goals and practices and strike a delicate balance between specificity and flexibility. It is relevant that all of the national guidelines referred to in this article were drafted by the body in charge of prosecutions, and not by the parliament or legislature.

That is not to say, however, that the ASP should have no role in reviewing the guidelines. The best resolution to the tension between expertise and accountability posed by the guidelines would be for the Prosecutor first to develop and announce them. If the ASP were concerned about the content of the guidelines, it might then call for their review. The Security Council followed a similar strategy in the case of the ad hoc tribunals, ratifying the Prosecutor's policy of pursuing senior leaders and perpetrators of particularly heinous crimes.²⁹⁹ The first pass at drafting guidelines, however, should be taken by the Prosecutor, the only figure in the ICC that possesses the necessary expertise to do so.

Publication

One of the contentious questions about prosecutorial guidelines is whether they should be made public. Some worry that publication, particularly if the guidelines indicate the kinds of cases that will not be pursued, reduces the deterrent effect of the criminal law by signaling

²⁹⁷ *Charge Screening: General Principles*, CANADIAN PROSECUTION DESKBOOK, *supra* note 259, §13.2.1.

²⁹⁸ The U.S. federal guidelines contain a similar provision. DOJ PRINCIPLES OF FEDERAL PROSECUTION, *supra* note 260, at 9-27.270 (directing that "[w]henver the attorney for the Government declines to commence or recommend Federal prosecution he/she should ensure that his/her decision and the reasons therefor are communicated to the investigative agency involved and to any other interested agency, and are reflected in the office files").

²⁹⁹ SC Res. 1329 (Nov. 30, 2000).

to some potential perpetrators that they will not be prosecuted.³⁰⁰ Nevertheless, publication of the guidelines is critical to ensuring that the Prosecutor in fact complies with them.

“Transparency” has become a rallying cry for achieving accountability in international institutions.³⁰¹ Institutional transparency has been advocated, for example, with respect to many supranational and international institutions, including the European Community,³⁰² the WTO,³⁰³ the International Monetary Fund,³⁰⁴ and the World Bank.³⁰⁵ In addition, the most recent report on recommended rules and practices released by the International Law Association’s Committee on the Accountability of International Organisations lists as its first principle of good governance “transparency in both the decision-making process and the implementation of institutional and operational decisions.”³⁰⁶ The report further recommends that international organizations “should as a general rule formulate and publish plans setting the general orientation of their programmes.”³⁰⁷ It concludes that “compliance with this principle will contribute to greater transparency, it will have an impact on the kind of procedure for the decision-making process, and it will undoubtedly enhance the chances of accountability to operate properly.”³⁰⁸

As this conclusion suggests, publication of the guidelines forms the link between the regime of pragmatic accountability, outlined in part III, and the legitimacy of the Prosecutor’s decision making, described in part IV. In his detailed discussion of the concept of accountability, Andreas Schedler argues that the notion of accountability encompasses two functions: answerability and enforcement. The regime of pragmatic accountability discussed in part III above describes how states and NGOs can enforce prosecutorial accountability. Prosecutorial guidelines, in turn, provide a standard to which the Prosecutor may be made answerable.³⁰⁹

Prosecutorial guidelines also mitigate the problem of second-order accountability by announcing a standard to which the agents of accountability can themselves be made accountable. If a state, for example, demands of the Prosecutor that he provide de facto immunity to any of its nationals, and if the guidelines state that the Prosecutor will not take nationality of the potential accused into account in charging decisions unless germane to the offense, then this demand—which asks the Prosecutor to violate his own guidelines—can be judged by other entities as inconsistent with the Statute’s declaration of prosecutorial independence. On the other hand, if states or NGOs request the Prosecutor to do something that would not violate his own guidelines, this request may be seen as a permissible exercise of pragmatic accountability. I do not suggest that the Prosecutor must accede to the latter type of request, although it would presumably be consistent with the proper exercise of his discretion were he to do so. By contrast, requests that demand that the Prosecutor violate his guidelines should be considered impermissible.

³⁰⁰ See Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 29–30 (1971); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 297 (1979).

³⁰¹ See Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 8 EUR. J. INT’L L. 435, 447 (1997).

³⁰² Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628, 634 (1999).

³⁰³ Nye, *supra* note 127, at 2.

³⁰⁴ Ngaire Woods, *Making the IMF and the World Bank More Accountable*, 77 INT’L AFF. 83, 90 (2001).

³⁰⁵ *Id.*; Fox, *supra* note 128, at 279.

³⁰⁶ International Law Association, Committee on the Accountability of International Organisations, Third Report Consolidated, Revised and Enlarged Version of Recommended Rules and Practices (“RRP-s”) (Jan. 2002), available at <http://www.ila-hq.org/html/layout_committee.htm>.

³⁰⁷ *Id.* at 3.

³⁰⁸ *Id.* at 6.

³⁰⁹ Andreas Schedler, *Conceptualizing Accountability*, in THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES, *supra* note 126, at 13, 14.

Unlike judges, prosecutors have limited ability to speak through written legal documents, and these rarely disclose broad prosecutorial policies. Publicly available guidelines provide a transparent mechanism through which the Prosecutor can explain and justify his actions. In England, for example, informing the public about prosecutorial policies has long been cited as one of the principal benefits of the Code for Crown Prosecutors.³¹⁰ The deputy prosecutor of the ICTY states that it is now relatively easy for the ICTY's Prosecutor to deal with pressure exerted by states and NGOs to investigate or prosecute particular cases because the office has a clear prosecutorial strategy.³¹¹ The first senior official appointed to the ICC maintains that the most important lesson learned from the work of the Yugoslav Tribunal is that the ICC "should be much more transparent about all its work."³¹² In the case of the ICC, which is deracinated from ordinary domestic sources of legitimacy, the value of transparent guidelines surely outweighs the benefits of total secrecy.

Whether or not the Prosecutor should make public his decision making in individual cases is a much more difficult question. Such a policy would enhance prosecutorial transparency, and may conceivably be carried out in a manner sensitive to concerns about confidentiality. For example, the Prosecutor might summarize the reasons for his decisions in tabular form on the ICC Web site, deleting the identity of the potential accused but including a summary of the general contours of the situation and the reason for declination. While balancing confidentiality concerns with transparency is a difficult task, other international institutions must also grapple with similar questions. The Organisation for the Prohibition of Chemical Weapons, for example, must guard sensitive military and trade data, while simultaneously promoting the goal of transparency.³¹³

Nevertheless, the Prosecutor may well conclude that, in the case of individual decisions, the benefits of transparency do not justify the increased risk of breaching the privacy concerns of potential accused or disclosing information with national security implications. I do not advocate a particular resolution of this difficult problem, but it is clear that, in making the decision, the Prosecutor should place a high value on openness and transparency rather than reflexively keeping all decisions confidential.

Judicial Enforcement

A final question that arises from the creation of prosecutorial guidelines involves the mechanism for their enforcement. The benefit of judicial review lies in affording more vigorous enforcement of prosecutorial standards and providing an avenue of relief for accused who are prosecuted in contravention of the guidelines. Absent judicial enforcement, prosecutors might feel free to ignore their own guidelines. Nevertheless, permitting judicial review of discretionary prosecutorial decision making might inhibit the promulgation of guidelines or encourage the drafting of overly vague standards.³¹⁴

Despite the merits of judicial enforcement, the proposed prosecutorial guidelines should not be subject to judicial review and oversight. The Rome Statute already provides for an extremely complex pretrial procedure, especially surrounding the admissibility decision. Adding another layer of potential challenges to the Prosecutor's decisions that must be adjudicated by the pretrial chamber will further increase the length and difficulty of pretrial proceedings. Given the number of complicated questions that will no doubt be litigated in the ICC's first cases, it is unwise to erect a further hurdle that states and the accused can use as a delaying tactic.

³¹⁰ David Calvert-Smith, *The Code for Crown Prosecutors*, 150 NEW L.J. 1494, 1494 (2000).

³¹¹ Blewitt, *supra* note 192.

³¹² Nicholas Kralev, *Tribunal Considers U.S. Job Applicants*, WASH. TIMES, Oct. 22, 2002, at A13 (describing conversation with Bruno Cathala, director of common services).

³¹³ Patel, *supra* note 128, at 582.

³¹⁴ See Abrams, *supra* note 300, at 42, 52.

Finally, states that have adopted prosecutorial guidelines do not typically allow for judicial enforcement.³¹⁵ The U.S. Principles of Federal Prosecution, for example, state:

The principles set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.³¹⁶

The Canadian guidelines contain a similar statement³¹⁷ and the ICC Prosecutor's guidelines should include such a disclaimer as well.

The lack of judicial oversight, moreover, does not necessarily lead to the absence of enforcement. Instead of the strict accountability mechanism of judicial review, in my view prosecutorial decision making is better disciplined through the weapons of transparency and accountability. Once the guidelines are drafted and publicly available, they will provide a basis on which the accused and other outside entities can question the Prosecutor's decisions. In announcing his policies, the Prosecutor will furnish a yardstick by which his future decisions may be measured and challenged. The cases heard by the ICC will have high enough visibility to enable states and NGOs to monitor them and pressure the Prosecutor when he fails to conform to his own guidelines.

As discussed above, the Prosecutor should also take steps to ensure the consistency of internal decision making through record keeping keyed to the guidelines. Investigatory and charging decisions should be reviewed for conformity with the announced guidelines, as well as with prior decisions in similar cases. The Prosecutor should amend or supplement his guidelines as he changes or refines his policies.

An Evaluation of Objections to Prosecutorial Guidelines

Some might argue that prosecutorial guidelines, at least those that a Prosecutor would be willing to make public, are typically so general as to be meaningless. To be sure, the benefits of prosecutorial discretion would be lost if it were subject to rigid criteria, and the guidelines cannot—and, indeed, should not—dictate to the Prosecutor how he should act in every instance. Nevertheless, the guidelines, and their accompanying commentary, should in fact be drafted with some specificity. The Prosecutor might detail, for example, what criteria he will use to evaluate a domestic amnesty and how he will evaluate the seriousness of an offense when making his screening decisions.

In addition, perhaps one of the reasons that prosecutorial guidelines have not been seen as robust constraints on prosecutorial discretion in the domestic context derives from the preexisting prosecutorial ethos of that criminal justice system. In England, for example, it has been said that the Crown Prosecutors do not often consult the Code for Crown Prosecutors because “most prosecutors . . . felt that the Code's general principles had been absorbed into their bloodstream.”³¹⁸ The nascent ICC, by definition, can boast no such preexisting communal standards. For an institution whose prosecutorial staff will presumably be drawn from a variety of legal systems, an overarching set of formal guidelines seems particularly necessary.

The actions of the Prosecutor will inevitably be guided by some principles, even if he does not wish to acknowledge them.³¹⁹ By articulating his guidelines in a public way, the Prosecutor

³¹⁵ See Michael A. Simons, *Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893, 962 (2000) (discussing U.S. guidelines).

³¹⁶ DOJ PRINCIPLES OF FEDERAL PROSECUTION, *supra* note 260, at 9-27.150.

³¹⁷ CANADIAN PROSECUTION DESKBOOK, *supra* note 259, at 2. In England, however, the courts have held that, in extreme cases, prosecutorial contravention of the Code for Crown Prosecutors may be the subject of judicial review. Mandy Burton, *Reviewing Crown Prosecution Service Decisions Not to Prosecute*, 2001 CRIM. L. REV. 374.

³¹⁸ Hoyano et al., *supra* note 282, at 558.

³¹⁹ See David Sklansky, *Starr, Singleton, and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509, 532 (1999).

helps assure that his decisions will be taken in a rational and consistent way. If he announces guidelines and then disregards them, however, this breach is likely to prove more damaging than declining to formulate guidelines in the first place.³²⁰ The Prosecutor must therefore formulate these policies after careful reflection.

Clearly, the first months of the ICC are not the time for the Prosecutor to announce an overly detailed prosecutorial policy. Too much specificity in the absence of concrete cases may lead to poor guidelines. The Prosecutor can supplement his policies as he gathers experience with the prosecution of actual cases. In addition, he must leave enough discretion to allow for case-sensitive decision making. Each conflict that gives rise to potential prosecutions at the ICC will be unique in some way: there can be no one-size-fits-all rule. The Prosecutor must not sacrifice the efficiency and moral benefits of discretion out of a fixation on uniformity.³²¹ He must, therefore, strike a balance between enough specificity to constrain and sufficient flexibility to allow for future learning and developments.

It would be naive to ignore that, in some cases, considerations that he cannot acknowledge will influence the Prosecutor, particularly when sensitive information provided to him by states is involved. Acting in secrecy, however, should be viewed as costly to the legitimacy of the ICC and should be resorted to only in compelling circumstances. Most important, the Prosecutor should not simply rely on this rationale and refuse to promulgate prosecutorial guidelines altogether.

Finally, it should be recognized that promulgating guidelines alone will not guarantee that the Prosecutor will act in an effective and legitimate manner. His professionalism and good judgment will also significantly affect his work. In fact, the guidelines should be seen as an exercise of the Prosecutor's judgment writ large. The Rome Statute requires that the Prosecutor be a person "of high moral character" and "highly competent in and have extensive practical experience in the prosecution or trial of criminal cases."³²² The selection of Luis Moreno Ocampo as the first prosecutor of the ICC has been widely hailed as conforming to this high standard. By its selection of Mr. Moreno Ocampo, the ASP has fulfilled its duty of choosing such an individual.

Nevertheless, the ICC Prosecutor must take further steps to enhance the legitimacy of the Court. In this article I suggest a concrete, practical step that the Prosecutor can take to help secure the abstract but fundamental goals of accountability and legitimacy. Guidelines provide a focal point for the Prosecutor to consider the lessons learned by the ad hoc tribunals and to force himself to think carefully about the goals and purpose of international prosecution. Guidelines set out a standard by which the Prosecutor can judge and respond to the pressures exerted upon him by states and NGOs, thereby maintaining his independence from these powerful and vocal actors. They also provide a rubric by which his actions can be judged and he can be made accountable. Finally, guidelines allow for clarification and publication of the Prosecutor's conclusions about his prosecutorial policies, which may be their most important function of all.

VI. CONCLUSION

The task faced by the ICC's first prosecutor is a daunting one. While the decision to grant the ICC Prosecutor *proprio motu* powers enhances the political independence of the office, it also decreases its institutional support and increases the importance of the Prosecutor's screening

³²⁰ See FRANCK, *supra* note 212, at 179 (noting that "checkerboarding," or inconsistent application of a rule or standard, undermines the legitimacy of that standard).

³²¹ Overreliance on rules without considering changed conditions or the specifics of particular situations is a risk endemic to many international bureaucracies. See Michael N. Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699, 720-21 (1999).

³²² Rome Statute, *supra* note 2, Art. 42(3).

decisions. While it is hazardous to project the reception of an international institution from domestic analogies, it seems reasonable to expect that the Prosecutor will be buffeted by the same kinds of political turbulence that have attended the Spanish *Pinochet* prosecution and the experience of Belgium with its universal jurisdiction statute. These recent examples illustrate both the pressures that the ICC is likely to face, and the ways that the mechanisms and recommendations described in this article can redound to the legitimacy and efficacy of the Court.

The Spanish proceedings against Augusto Pinochet, which resulted in his arrest in London while recovering from back surgery, were triggered in Spain by the actions of NGOs—in the face of explicit opposition from the Spanish prosecutor.³²³ Similarly, until its amendment in April 2003, Belgium's universal jurisdiction statute did not require approval by the Belgian federal prosecutor before criminal cases could be brought by private parties. The April amendments required the federal prosecutor to approve all cases with no direct link to Belgium and then to apply a list of criteria to them when deciding whether or not they should go forward.³²⁴

In one sense, the decision to amend the Belgian statute by providing the public prosecutor with a rubric with which to determine whether these cases should be tried in Belgium resembles the prosecutorial guidelines advocated in this article. The government inserted legal "filters" into the statute to prevent Belgium from becoming a stadium for political grievances. The Rome Statute includes a variety of such mechanisms, primarily in the form of the admissibility regime and the criteria applied by the pretrial chamber. As this article has explained, however, the Prosecutor still retains much discretion in the ICC system. In large part, his decisions will determine which cases will pass into the Court and which will be rejected as inappropriate for this extraordinary forum. Prosecutorial guidelines will act as an additional filter for these decisions.

The Belgian experience is also instructive for the ICC Prosecutor in another respect. Both states and NGOs followed the Belgian cases with much interest. When the Belgian Supreme Court ruled that Israeli Prime Minister Ariel Sharon could be prosecuted in Belgium once he leaves office, Israel recalled its ambassador.³²⁵ When former U.S. President George Bush was named as a defendant, Secretary of State Colin Powell threatened Belgium with the removal of the NATO headquarters from Brussels if the suit continued.³²⁶ When Belgium revised the statute in April, Human Rights Watch warned that "the government has promised that it would step in only in exceptional cases. We will be holding their feet to the fire to keep that promise."³²⁷

Ultimately, however, the political cost of the statute was too much for Belgium to bear. In response to pressure from the United States and other countries, Belgium radically restricted the reach of the law. It will now apply only to cases in which the victim or the perpetrator is either a Belgian citizen or a long-term Belgian resident.³²⁸

Although proponents of the ICC must hope that it will not meet the same fate as the Belgian statute, one can expect the Court to receive similar pressure in high-profile cases. Furthermore, these kinds of reactions from states and NGOs are the kind of mechanisms through which the ICC's regime of pragmatic accountability will operate. Because the Prosecutor derives his political authority from states, he should be accountable to them. He must simultaneously, however, maintain his independence from them.

³²³ Roht-Arriaza, *supra* note 190, at 311. The Spanish criminal procedure system allows criminal prosecutions to go forward without the state prosecutor's agreement and participation. *Id.* at 319.

³²⁴ Marlise Simons, *Belgium Puts Limits on War Crimes Law*, INT'L HERALD TRIB., Apr. 7, 2003, at 7.

³²⁵ Herb Keinon, *Belgian Amendment Likely to End Sharon Prosecution*, JERUSALEM POST, Apr. 3, 2003, at 1.

³²⁶ Richard Bernstein, *Belgium Rethinks Its Prosecutorial Zeal*, N.Y. TIMES, Apr. 1, 2003, at A8.

³²⁷ Human Rights Watch, Belgium, Press Release, Anti-Atrocity Law Limited (Apr. 5, 2003), available at <<http://www.hrw.org/press/2003/04/belgium040503.htm>>.

³²⁸ John Prideaux, *Belgium Votes to Scrap War Crimes Law*, FIN. TIMES (London), July 30, 2003, at 6.

Prosecutorial guidelines will help the Prosecutor negotiate the tension between accountability and independence. In addition, prosecutorial guidelines will assist the Prosecutor in establishing the legitimacy of his discretionary decision making. By providing for a transparent standard that the Prosecutor will consistently apply, guidelines will supplement the protections provided to the accused by the formal mechanisms of accountability. Guidelines will also improve the process employed by the Prosecutor and his staff. Good process, in turn, will enhance the legitimacy of the Prosecutor's exercise of discretion.

More broadly, this article has provided a framework for evaluating the dynamics of accountability at the ICC and assessing the legitimacy of the Prosecutor's discretionary decision making. It remains to be seen how the ICC system will work in practice, and whether its architecture is suitable for other international dispute resolution systems. Already, however, the Court's legitimacy has been questioned by powerful states. Supporters of international institutions must continue to seek to improve the accountability and legitimacy of these bodies if they are to survive in a climate increasingly wary of the delegation of authority to them. As a prominent player in a controversial institution, the ICC Prosecutor will no doubt provide an important reference point in this debate.

By ceding some of the discretion granted to him by committing himself to self-imposed guidelines, the Prosecutor will merit the faith of those at Rome who entrusted an individual with the power to investigate and prosecute heads of states, military leaders, and other high officials. Through sensitive attention to the stakeholders in international justice and through controlled and judicious use of his discretion, he can help ensure that the Court's story is not one of disappointment and irrelevance but, instead, one of success for the international rule of law.

