Why the International Criminal Court Must *Pretend* to Ignore Politics

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Since the International Criminal Court (ICC) prosecutes crimes of mass violence that are inherently political in nature, its actions will inevitably have political consequences about which the prosecutor and judges should be as well informed as possible. As some of the other contributors to this roundtable note, the ICC's actions and inactions may even have life-and-death consequences in the real world. It is ethically irresponsible for the ICC's officers to ignore those concerns. At the same time, the court's moral and legal authority derives entirely from its claim that it applies universal rules wherever it has jurisdiction.[1] In order for the International Criminal Court to build legitimacy over time, it must both act and be seen to act in a neutral way that transcends political pressures. Rule-of-law courts do not derive their authority from their ability to command the use of force. Nor do they have the legitimacy of elected political officials who act as the representatives of a political community. The legitimacy of courts is a function of their claim to uphold universal rules of law that the community has chosen to adopt, regardless of whether doing so is popular or even prudent in a particular case with particular constituencies. Consequently, court officers in their formal actions—including prosecutorial requests for investigations, issuing arrest warrants, and filing charges, as well as in the judges' decisions on those questions—should always ground the rationale for their decisions in the pretense that they act only to uphold the law and without regard for political considerations.

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Nevertheless, there is some scope for ICC decision-makers to consider the immediate practical consequences of their actions for nonlegal reasons. Court officers should use that discretion as wisely and sparingly as they can. For example, states may often be reluctant to expend the resources necessary to effectively stop ongoing crimes of mass violence. Because the court has to rely on states to enforce its decisions, pragmatic concerns may justify delays in issuing warrants. They should not, however, admit that these political considerations play a part in their decision-making.[2] Acknowledging that political factors shape the court's actions may encourage negative behavior by parties that could be subject to its jurisdiction, and it could undermine the long-term legitimacy of the court itself. If political leaders who are guilty of serious international law crimes know that they will be treated more leniently if they can threaten more victims, and thereby trade the protection of those would-be victims for some form of amnesty or judicial leniency, then they will have every incentive to increase their commission of serious international law crimes. In a world of practical moral considerations, this is at least as great a risk as the possibility of indicted international criminals prolonging peace negotiations in order to avoid their own pending arrest and trial.

If the ICC's officers acknowledge that there are nonlegal reasons why they depart from the central mission of the court, they run the risk of jeopardizing the gradual acceptance of the norm that committing serious international law crimes is no longer an acceptable political strategy and that such crimes always ought to result in punishment for the perpetrators. This larger goal may have long-run benefits that are difficult to estimate in any short-term cost-benefit analysis. The goal of a world where the use of mass violence is substantially constrained by law is certainly worth pursuing, even if we assume it will be a long road to approach that ideal.

The normative view presented here starts with the assumption that law and legal institutions are constitutive of our larger political and social environments. Anthony Lang has argued convincingly that punishment is essential for the construction of norms that shape the international political environment.[3] If the global community fails to punish the most serious crimes under international law, this suggests a lack of seriousness about respecting the rules of the international legal system in general. Precisely because mass atrocities have not been routinely punished in the past, it is essential that the ICC be as consistent as possible in pursuing the worst offenders. I assume that some will still escape the judicial process, at least for a period of time. The International Criminal Tribunal for the former

Yugoslavia, like other international tribunals of the last two decades, has often faced delays in bringing the accused to justice because of pragmatic political concerns and an unwillingness by states to move quickly on arrests. But as the arrest of Ratko Mladić in 2011 shows, avoiding capture for a long time does not ensure impunity as long as court officers remain tireless in their efforts to push for arrests and for transfers to international tribunals or other legitimate courts. This is one of the reasons it is so important that court officials never acknowledge the role of political factors in shaping their pursuit of justice; that is, to acknowledge that political factors can lead to delays exposes courts to the charge that they provide uneven justice, and that some perpetrators may escape justice altogether by playing their political cards well. Pretending that legally warranted prosecutions will always be pursued without respect to political consequences is essential for upholding the law's claim to universality.

The ethical force of law and courts comes from their claim to be the neutral application of general rules to particular situations. Following Jürgen Habermas, I see legal discourses grounded in formal adjudicative procedures as foundational for the legitimacy of law itself.[4] For the International Criminal Court in particular, this means that the legitimacy of decisions about when to impose international criminal law must always be justified by appeals to the legal discourse grounded in positive international law. While it makes sense for the ICC to be sensitive to pragmatic ethical concerns, it should have an eye toward the long-term consequences of building and maintaining legal constraints on the use of force as well as the humanitarian concerns of improving the lives of victims in particular cases. When these long-term consequences are properly considered, the tensions between pursuing peace and pursuing justice are not as powerful as is sometimes argued. While pretending that political factors are irrelevant may appear dishonest, and therefore unethical, forcing the court to pretend to rely on exclusively legal reasons for its actions actually ensures its future integrity as an institution guided by positive international law.

On Peace and Justice

Kenneth Rodman and Benjamin Schiff, in their contributions to this roundtable, raise serious consequentialist arguments about the ethical flaws of ICC decisions to indict. But the problem with such arguments is the assumption of near perfect knowledge about whether short-term harms avoided by forgoing international

justice weigh more than the long-term benefits of building an international political order in which the political use of mass violence is broadly condemned and treated as criminal. I assume that no one really possesses the information needed to make that particular utilitarian cost-benefit calculation. What we do know is that the officers of the ICC have a fiduciary duty to be the consistent voice for upholding the rule of law. This does not mean that the court will always get its way. Arrests may be delayed, states may withhold evidence, and it is possible that political bodies, such as the UN Security Council, will sometimes act as obstacles to justice processes. Accordingly, the realpolitik voices that complain that the actions of international judicial institutions can prevent desirable political settlements with potential or actual ICC indictees overstate the dangers of "judicial absolutism."[5]

The ICC indictment of Sudanese president Omar Hassan al-Bashir in early 2009 led him to immediately ban a number of international humanitarian groups from the Darfur region, which in turn led to increased suffering and mortality. Schiff points out that short-run humanitarian costs such as these are only ethically justifiable for a time, and I agree. But the essential question is how long is too long, and my position is that we must be very patient with international criminal legal processes. We also have to recognize that it is President al-Bashir who ordered the expulsion of humanitarian groups from Darfur, and so we ought not lay most of the blame at the feet of the International Criminal Court. It is at least logically possible that al-Bashir (and others like him in the future) would cause even more humanitarian harm if the International Criminal Court did not exist at all.

Now that we are nearly two decades removed from the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), we have a better empirical basis for understanding how large the humanitarian gains may be over the timescale of a generation. In a recent book, Lara Nettelfield shows that over time the ICTY has had positive and underappreciated effects on the societies where the violence took place. Nettelfield offers substantial evidence that war crimes trials can do more than just punish a few individuals who are guilty of atrocities; they can also create a record of facts and help to build the culture of accountability that is an essential component of peace processes and transitions to democracy.[6] Perhaps most important, war crimes trials delegitimize certain acts of violence as acceptable ways of conducting politics, and thus isolate the extremists who use and advocate such violence. Trials allow for the parties to a conflict to give contesting interpretations of the mass atrocities that have taken

place, but they structure that interaction through legal rules, in a civil discourse where judges ultimately rule on which interpretations are most valid.[7] Mark Osiel's work gives us theoretical reasons to think that such narrative disagreement in a legal structure may actually help societies transition to a political culture where political disagreements can be managed through institutionalized discourse rather than violence.[8] Thus, the humanitarian costs of postponing or forgoing justice altogether may be much higher than it would at first appear.

People with a history of committing international crimes of mass violence are unlikely to voluntarily change their own behavior. Ervin Staub has conducted the most thorough psychosocial analysis of the motivations for genocide and mass violence, concluding that there will always be some fanatical individuals, disposed toward mass violence, who offer themselves as leaders. Therefore, explaining and understanding when and where mass violence occurs turns much more on understanding why groups of people, in institutional settings, follow such homicidal leaders.[9] It is also true that once cycles of mass violence have begun, they tend to escalate. All of the evidence from the historical record suggests that once a leader has pursued a course of mass violence, he is unlikely to stop until he is forced to do so by a superior outside force. This is why trading justice for a temporary peace is itself an ethically dubious strategy: if the homicidal leader strengthens his own power in a peace deal, there is every reason to think he will return to the use of violence in the future.

Schiff is correct to draw attention to the problem of "responsibility shifting," which is the idea that if international criminal justice is viewed as an alternative to more forceful international intervention, the very existence of the ICC may provide an excuse for forgoing action against atrocities. But this critique misses the point that the ICC is a legal institution that will always require the support of states, the UN Security Council, or other international organizations with the ability to enforce its legal actions. In fact, in the example of the Darfur investigation by the ICC, we have already seen that the ICC prosecutor's office itself can be a useful voice for pressuring the Security Council to take responsible humanitarian action.

The fact that force is almost always required to remove violent leaders from power has a crucial consequence for the debate about peace versus justice and the warnings about the dangers of the judicialization of international politics. In conflict situations, where mass violence has already occurred, may be ongoing, or may occur again, little is lost by indicting the leaders who are most responsible for the crimes. Such international criminals likely will not stop their use of

violence until they are physically forced to do so. This means that the charge that international prosecutions make peace deals or accommodations with sitting leaders more difficult is essentially a false one. In fact, an international indictment raises the costs of *followership* and it works to de-normalize the cultural milieu in which followers persuade themselves that participating in programs of political mass violence can be justified. Leaders with a propensity for mass violence do not give up until they are forced to, either by the application of superior outside force or the withdrawal of support from the followers within their own regimes. In the vast majority of cases, ICC indictments will tend to encourage and support both internal and external actors, who ultimately will have to take steps to bring about the overthrow of such leaders. All of this means that reliance by the ICC on essentially legal reasons for its actions is less dangerous than is often suggested in peace versus justice debates, precisely because other actors can consider the pragmatic ethics of when and how to act given their capabilities and the likely consequences of their actions.

Consider the case of Chile's Augusto Pinochet, one of the favorite cases for proponents of the notion that transitional justice processes unnecessarily limit the possibility for peace settlements when human rights violators are still in power. It is true that Chile's transition to democracy was a negotiated one, in which the authoritarian military controlled many of the terms for the reemergence of democratic politics and was able to protect an existing amnesty law for a decade following the transition. However, that amnesty was eventually undone, as a matter of both international and domestic law.[10] Moreover, Pinochet, as head of the army, was not ready to give up the Chilean presidency, even after he lost a referendum on his government in 1988 and his supporters lost the ensuing presidential election in 1989. He only agreed to cede power when his principal supporters, the heads of Chile's navy and air force, announced their support for the electoral result.[11] This pattern is more of a rule than an exception, and it strongly suggests that very few leaders will agree to leave power just because they are offered guarantees that they will not be subject to prosecution.

The Space for Discretion

The prosecutor's space for discretion is limited to deciding whether people who are probably guilty of serious international law crimes should avoid prosecution and when warrants should be issued. Thus, most of the discretion of prosecutors

is in the realm of case selection and timing. Judges, at least in the ICC structure, do not have the same role as gatekeepers. The power they do have is far more important: they make the final decisions. Accordingly, judges have a crucial role in checking the political actions of the prosecutor's office. Prosecutors' actions make headlines. Judges' decisions make history.

Trials that are not likely to lead to successful prosecutions should be avoided. This includes areas that might be technically within the legal jurisdiction of the court, but where mounting a successful prosecution is unlikely. The use of this type of discretion can be justified on legal grounds, even though it might be subject to pragmatic political considerations as well. For example, the court is unlikely to have a successful conviction in a case where the national of a permanent member of the Security Council not a party to the Rome Statute commits a crime on the territory of a state party but then escapes to his home territory. In such a circumstance, the ICC should pretend that its decision not to pursue the crime has an entirely legal logic—namely, that insufficient evidence is available to ensure conviction. For the ICC to admit that it thinks it would be politically foolish to challenge a powerful state could be devastating to the overall integrity of their office. And the powerful (if truly guilty) will have more to fear from a potential future prosecution that has been deferred than they would from an actual attempted prosecution they can easily crush through political means.

Prosecuting crimes that are not "the most serious" violations of international criminal law should not be pursued. Many war crimes that arise out of neglect rather than a systematic pattern of abuse will fall into this category. But here, too, some pretending is required. It would not be ethical for the ICC prosecutor to announce a general policy that war crimes committed due to a lack of proper training at a fairly low level of command will not be pursued. Instead, prosecutors must limit themselves to saying that they chose to stop pursuing a particular case because, given the gravity of the crime, doing so would not serve the interests of justice.[12] But this actually offers enough legal cover for the consideration of a wide range of political factors, as long as the court *pretends* not to do so. Notice, too, that a prosecutorial decision on this point is reviewable by the pretrial panel of judges.

Justice deferred for political reasons couched in legal cover is not necessarily justice forgone forever. As I have already suggested, the ICC prosecutor enjoys the most discretion in regard to timing. Having chosen to stop an investigation for any reason, the prosecutor can reopen it under paragraph 3, article 53, of

the Rome Statute. Of course, there will come a point in time when unexpressed pragmatic concerns of judges and prosecutors cannot be squared with the range of legal discretion available to them under the Rome Statute. That, I would suggest, is the point at which the officers of the court must actually choose in favor of law, and act in ways that are consistent with their professional mandate to follow the Rome Statute.

What Happens if the ICC Is Viewed as Directly Political?

As long as the ICC takes on a range of cases from different parts of the world, the danger of it being viewed as partisan lessens over time. Nevertheless, Schiff is correct when he notes that every indictment and every trial will be viewed as an attack by some parties to an ongoing conflict, and a propaganda victory by the other side. This is precisely why it is essential that the court's acts should always be justified on entirely legal grounds, even in cases where pragmatic political considerations also play a role in the behind-the-scenes thinking of the court's officers. There is plenty of evidence that such political considerations do play into the courses of action taken by the prosecutor's office.[13] As many have pointed out, the imposition of law is always political. Sarah Nouwen and Wouter Werner point out that in its very claim to be enforcing universal rules, the ICC demonizes its indictees as enemies of all humankind, and this very process serves to weaken them politically.[14] This labeling power is tremendous, and can be used wisely or poorly. But this is why the prosecutor's office is right to pretend that all such labeling is justified on the basis of universal legal rules and not the pragmatic particulars of certain political situations. To acknowledge the role of nonlegal factors would be to open the court up to accusations of bias, and would serve to undermine the entire project of setting up legal rules that identify certain uses of violence as being socially unacceptable.

Over time it should become obvious that the court tends to treat like cases alike, regardless of the identities of alleged perpetrators and how much political power they have at a given moment. There is evidence again from the experience of the ICTY that international justice can gradually build that sort of respect over long periods of time. It is well known that the ICTY was initially perceived as having an anti-Serb bias, and that a series of prosecutors, but especially Carla Del Ponte, sought to alleviate that bias by targeting non-Serbs for prosecution. It is also fairly well understood that the notion of moral equivalence on all sides, advocated at

points by various governments, was substantially disingenuous, and the Serb military groups did choose the targeting of civilians, genocide, and brutal war crimes as part of their political strategy for winning the war in Bosnia and Herzegovina to a much greater extent than their adversaries.[15] Over the long haul, the body of work by the ICTY has in fact shown that the majority of the worst atrocities were committed by the Serbs, and the political notion that all parties were equally guilty of crimes has been discredited by that court's work. Still, many Serbs and Bosniaks alike gradually came to respect the ICTY's work and to see it as somewhat neutral, as Lara Nettelfield shows in her recent book.[16] In order for the ICC to build a similar reputation for credibility over time, it must consistently show that legal criteria, and not politics, guide prosecutorial decisions. Prudent ICC prosecutors and judges will be aware of the real-world consequences of issuing particular decisions. From time to time, particularly in the immediate aftermath of violence, those consequences may be so great that the court should delay actions it actually has a legal duty to pursue. Of course, to say this is to recognize that courts are political actors. Given the political nature of ICC crimes, every indictment and conviction will tend to support some parties to a conflict, while discouraging others. While ethical prudence requires ICC officers to think about the consequences of their actions, legal ethics also requires them never to admit that such considerations play a role in their thinking.

NOTES

[1] My view of law is based on Kratochwil's analysis of law as a form of pragmatic reasoning that exists alongside justifications for actions based on purely utilitarian goals and moral reasoning but cannot be reduced to either. See Friedrich Kratochwil, *Rules, Norms, and Decisions* (Cambridge: Cambridge University Press, 1989), pp. 210–48.

[2] Moreover, observers of the court should not expect them to acknowledge such political elements to their thinking, unless it is off the record or long after the fact.

[3] Anthony F. Lang, Jr., *Punishment, Justice and International Relations: Ethics and Order After the Cold War* (London: Routledge, 2008), pp. 131–32.

[4] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, Mass.: MIT Press, 1996), pp. 229–37.

[5] The phrase "judicial absolutism" is used by George Friedman in "Libya and the Problem with The Hague," STRATFOR, July 11, 2011; http://www.stratfor.com/weekly/20110711-libya-and-problem-hague.

[6] Lara Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State* (Cambridge: Cambridge University Press, 2010).

[7] Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, N.J.: Transaction Publishers, 2000).

[8] Ibid.

[9] Ervin Staub *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge: Cambridge University Press, 1989), p. 31.

[10] Naomi Roht-Arriaza, "The Multiple Prosecutions of Augusto Pinochet," in Ellen Lutz and Caitlin Reiger, eds., *Prosecuting Heads of State* (Cambridge: Cambridge University Press, 2009), pp. 77–94.

[11] David Pion-Berlin, "To Prosecute or to Pardon? Human Rights Decisions in the Latin American Southern Cone," in Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Vol. 1: General Considerations* (Washington, D.C.: United States Institute of Peace Press, 1995).
[12] See the Rome Statute for the International Criminal Court, art. 53.
[13] On the court's decisions to open investigations and issue indictments, see Sarah Nouwen and Wouter Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," *European Journal of International Law* 21, no. 4 (November 2010), pp. 941–65.
[14] Ibid., p. 963.
[15] See Paul Williams and Michael Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia* (Lanham, Md.: Rowman and Littlefield, 2002); Pierre Hazan, *Justice in a Time of War: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia* (College Station, Tex.: Texas A&M University Press, 2004); and John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (Chicago: University of Chicago Press, 2003).
[16] Nettelfield, *Courting Democracy*, pp. 200–202.