Section II:
The Present-Day Impact of Nuremberg on International Law

The International Criminal Court and the Ethics of Selective Justice

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> "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[1]

One of the central concerns expressed by critics of the newly formed International Criminal Court (ICC) is that it will be unfairly selective in its choice of prosecutions. Some of these critics fear that it will target individuals from particularly unpopular nations while giving others a "free pass." Thus, American soldiers, politicians and diplomats, as representatives of the world's sole remaining superpower, will be singled out for prosecution, as would representatives of the perennially unpopular nation of Israel. Meanwhile other international criminals who are citizens of more barbarous states such as Syria, Myanmar, and Egypt would be free to commit whatever bestial acts they wish, without enduring any scrutiny by the court. Alternatively, critics from the third world fear that the court will be used selectively against smaller, weaker countries while leaders of countries like the U.S. and China will remain unmolested. For such critics, international courts represent a form of "victor's justice", representing the interests of wealthy, powerful states and demonizing those unable to stand up to it. To quote Hermann Goering, "The victor will always be the judge and the vanquished the accused." Despite their different interests, both the strong and the weak states on the global scene agree that the ICC's perceived selectivity could harm its legitimacy and, despite the popularity of the tribunal among human rights activists, many political experts express a great deal of wariness toward the court.

The nature of the contemporary international political order, coupled with the unique features of the ICC, only adds to these concerns. The fact that the court functions beyond the control of national political authori-

1 *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: Louisiana State University Press, 1969), 3.

ties means that it would be very difficult for the American government to stop an unpleasant prosecution indefinitely.[2] Such critics claim that the unique roles that the United States plays in global affairs adds to the problem. As the hegemon, the US is often given the responsibility of using its military power to maintain global peace and security in far-flung corners of the world, while simultaneously serving as a political foil for various national governments, leaving American soldiers, politicians, and diplomats in a uniquely vulnerable position. They must do things that are going to be politically unpopular, but they are the only people capable of doing what is required to stabilize the international order and prevent emerging threats (or so it is argued). This concern is magnified when we look at the relative unpopularity of America in the world and the not unrealistic expectation that international lawyers will try to "score points" in world opinion by "picking on" American servicemen.[3] Given this (possible) unfairness, the argument goes, the United States should refrain from participating in the court and, according to the more extreme American opinion makers, actively seek to undermine the ICC as an international institution.[4]

One would be naïve to believe that such critics of the ICC are solely concerned that it will become a "rogue institution." There is good reason to believe that some of these critics are not so much concerned with the ICC's fairness as with its potential impact on American hegemony. The fact that many American critics of the ICC speak with concern solely with regards to the court's possible jurisdiction over *American* citizens, is already grounds for suspicion. However, in this essay, I will take these concerns at face value as genuine assertions about danger that such trials pose. Additionally, I will assume that the court may single out individuals for prosecution while ignoring other suspects who are just as likely guilty of comparable crimes. These, it seems to me are not unlikely possibilities. Nor is it

2 For one particularly strong formulation of this see John R. Bolton, "The Risks and Weaknesses of the International Criminal Court from America's Perspective," *Law & Contemporary Problems* 64 (Winter 2001), 167.

3 Kristafer Ailslieger, "Why the United States Should be Wary of the International Criminal Court: Concerns over Sovereignty and Constitutional Guarantees," *Washburn Law Journal* 39.1 (Fall 1999), 80–105, 81.

4 There have been a number of significant efforts on the part of the US government to undermine the ICC's effectiveness. The two most notable are the so-called "Article 98 agreements" which prevent states from sending Americans to the court and the infamous *American Servicemembers' Protection Act*, which authorizes the President "to use all means necessary and appropriate" to free American citizens from the ICC.

an unrealistic possibility in my estimation that international institutions such as the ICC (and more notorious institutions such as the WTO and the World Bank) may pose a threat to American hegemony or sovereignty.[5] I will assume that these are true, in part, because the political issues related to the ICC do not interest me here. Rather, I'm interested in the moral issues surrounding the critics of the ICC. I'm not interested in the question "is the ICC bad for American power?" but rather, "is the ICC unfair when it prosecutes criminals selectively?"

Similar arguments were presented against the ICC's predecessors. Some complained that the post-World War II prosecutions in Nuremberg and Tokyo in the International Military Tribunal for Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE) ignored the crimes committed by allied powers (such as the bombings of Dresden, Hiroshima, and Nagasaki and the massacre of Polish partisans in Katyn Forest) and focused exclusively on axis misdeeds.[6] The *tu quoque* defense ("you did it too") was eliminated at the IMT, bolstering Goering's assertion that it was a court designed to try and convict the enemy and not a house of justice. Similarly, many in Serbia and Rwanda have complained about alleged anti-Serb and anti-Hutu biases in the two *ad hoc* tribunals that were developed by the United Nations Security Council in the wake of mass atrocities in their respective nations in the 1990s.[7] Few Bosnian Muslims, Croats, or Kosovars have been prosecuted in international tribunals and no Tutsi was put on trial for criminal acts conducted during Rwanda's civil war. Thus while the ICC is a permanent court, which would presumably function differently from these ad hoc institutions, the legacy that the ICC has inherited is littered with examples of selectivity in prosecution, only further arousing suspicion about the court's ultimate role.

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5 See Gary T. Dempsey, "Reasonable Doubt: The Case against the Proposed International Criminal Court," Cato Policy Analysis No. 311, http://www.cato.org/pubs/pas/pa-311.html.

6 For example, see Radhabinod Pal's dissenting opinion in the Tokyo Tribunal: "Judgment of the Hon'ble Mr. Justice Pal, Member from India," *The Tokyo War Crimes Trial*, ed. R. John Pritchard and Sonia Zaide, vol. 21 (New York: Garland Publishing, 1981).

7 "[F]ar from revealing to Serbs the enormity of the crimes committed in their name, the trial has so far only served to reinforce the widespread Serbian prejudice that the tribunal is an anti-Serb kangaroo court and that Milosevic will emerge, as he has already declared, as the 'moral victor'." Tim Judah, "Serbia backs Milosevic in trial by TV: Alarm as former president gains the upper hand in war crimes tribunal," *Observer News Pages*, March 3, 2002: 23.

The idea that selective prosecution is unjust, of course, is intuitively appealing. Normally, when a prosecutor is overzealous in carrying out her duties, or selects one individual as a "scapegoat" for crimes committed by others, many critics maintain that the prosecution is unfair and should not take place. Such critics quickly point to other equally egregious offenders who walk the streets unmolested as a sign of prosecutorial malfeasance. The assumption is that the individual who is being placed on trial is there for reasons other than her criminal conduct, and should be set free. Often they imply bigotry against an unpopular ethnic or religious group of which the defendant is a member. At a minimum, the prosecutor's selectivity is taken as a *prima facie* argument against the prosecution of a particular individual—a position that must be refuted if the prosecution is to go forward. After all, why should one person be punished for a crime when another who did the exact same thing is allowed to roam free?

In this paper, however, I will take a critical look at the concept of selective prosecution, and defend certain forms of selectivity in criminal justice. When we get past the simple principle that selective justice is not true justice and critically ask what it means for criminal justice to be selective and whether or not selective justice is always inherently wrong, the answers are more complicated than they may initially seem. Not all selective justice is unjust and not all selective justice ought to be rejected by ethical people. This, anyway, is what I will argue.

I will begin with a formal analysis of the concept of selective prosecution, outline what I take to be the significant ways that justice can be selective, and additionally, where selectivity can be justified and where it cannot. This will involve discussing selectivity along several different axes: justified and unjustified selectivity, doctrinal and applied selectivity, and procedural and substantive selectivity. Each of these distinctions, I will argue, reveal some of the ways that criminal justice institutions can be selective, only some of which are pejoratively so. Then I will examine the ICC to see whether, and to what extent, it shows features of selectivity in general, and unjustified selectivity in particular.

This project presents one significant problem, however: As of this writing, the ICC has yet to conduct any actual prosecutions. The court has indicted several people in different African conflicts, but only two people, Thomas Lubanga Dyilo and Germain Katanga of the Democratic Republic of Congo has stood before any ICC tribunal and these cases have not progressed far. This means that our answer to this question can only be tentative. There is a possibility that the prosecutor and the court could ignore its strict mandate and expand its powers, or it is possible that the court could shrink back from controversial cases and ignore crimes that clearly

fall under the ICC's jurisdiction and mandate. The only material available for analysis at this point is the documentation surrounding the ICC such as the Rome Statute of the Court, its Rules of Procedure and Evidence, as well as the meeting notes of the Rome Conference, so these will constitute the material for scrutiny. Final judgments on a permanently functioning institution like the ICC are impossible as its performance will undoubtedly change over time as it develops and changes.

The Concept of Selective Prosecution

For most people, *all* violations of *all* criminal law ought to be punished in any decent, law-abiding society. Most believe that this is so regardless of which laws were violated, who violated them, and what the larger consequences of prosecution and punishment might be. Any failure to do so in any case would be anathema to the rule of law. However, such an evaluation of selective prosecution depends on a particular notion of how a criminal justice system functions. It understands criminal justice as a sort of bureaucratic machine that automatically responds to any infraction of a law with a prescribed and predetermined punishment. That is, any individual who violates a law faces a response from the criminal justice system: the police investigate the infraction, prosecutors bring it to trial, and if the accused is found guilty, she is appropriately punished for her infraction. Such a conception of the criminal justice system is a Weberian[8] one and is captured in the symbolism of the courtroom, the blindness of lady justice, the robes of judges (denoting their non-human role), and the abstract language of the attorneys arguing a case ("your honor", "the accused," etc.) all conspire to make the actors in a criminal trial seem inhuman cogs in a "justice machine." In such a view of social organization the discretion practiced by individuals operating with the system appears as deviance from the political and judicial order.[9]

When understood through the discourse of justice and legitimacy, the objection to selectivity and the preference for governing through the application of an abstract rules takes on a different color. When expressed nor-

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8 See Robert J. Holton and Bryan S. Turner, *Max Weber on Economy and Society* (New York: Routledge, 1991), 650–678.

9 As Weber puts it, under a bureaucracy, "The authority to give the commands required for the discharge of these duties is distributed in a stable way and is strictly delimited by rules concerning the coercive means, physical, sacerdotal, or otherwise, which may be placed at the disposal of officials." (Ibid, 650).

matively, Weber's ideology of rule-based governance can be taken as the Aristotelian maxim, "Treat like cases alike."[10] That is to say, two cases that fall under the same rules must apply the rules similarly. To do otherwise is injustice. (Thus, rules do not only organize society, they also justify the choices made by social actors.) The "like cases" principle stands at the core of the rule of law for many theorists of both domestic and international justice. Franck, in particular, links this principle to international law and deduces institutional legitimacy from the equitable application of rules:

> Coherence is a key factor in explaining why rules compel. A rule is coherent when its application treats like cases alike and when the rule relates in a principled fashion to other rules of the same system. Consistence requires that a rule, whatever its content, be applied uniformly in every 'similar' or 'applicable' instance.[11]

Failure to live up to such coherence means that an institution lacks fairness, and thus legitimacy, according to Franck, which, even more than enforcement can compel behavior. Thus the principle of justice is not only an objection to an individual prosecution, it underlies the legitimacy of political institutions and stands at the core of justice as fairness.

Of course, even a superficial examination of actual criminal justice systems reveals that this image does not fit even the most advanced, well organized, and ostensibly fair criminal justice systems. Every level of virtually all criminal justice systems is infused with a number of large spheres of discretion. Each stage of the system is packed with independent decision makers whose choices are not dictated by the mechanical application of a clearly defined set of rules—and often this is perfectly acceptable to everyone involved. A police officer may choose to pull over a speeding driver or let him go. If he pulls him over, he may opt to give the driver a citation or he may opt to let him go with a verbal warning. A prosecutor has virtually complete discretion in choosing who to prosecute, how to prosecute him, and when to prosecute him. During a trial, a jury may opt to nullify a case or a judge herself may prevent a case from going forward. Juries may decide a ruling on grounds that have nothing to do with the guilt or inno-

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10 Aristotle, *Nichomachean Ethics*, Book V. As Hart puts it, "To say that the law against murder is justly applied is to say that it is impartially applied to all those and only those who are alike in having done what the law forbids; no prejudice has deflected the administrator from treating them 'equally.'" H.L.A. Hart, *The Concept of Law* (2nd ed.) (Oxford: Oxford University Press, 1996), 160.

11 Thomas Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1998), 38.

cence of the accused, swayed by any number of factors that are not directly germane to the matter at hand. Finally, even if an individual is convicted, the range of judicial responses varies widely from incarceration to diversion to only a token punishment. All of these different responses to an infraction are perfectly legal and most are quite commonplace. Clearly, the image of the American criminal justice system as a blind machine processing lawbreakers is inadequate.

Moreover, when the independent judgment of criminal justice professionals is taken away and rulings are forced onto them by a set of formal rules, it is often damaging for the criminal justice system as well as for its perceived legitimacy. Judicial discretion, the ability of judges to pick a wide range of possible punishments for offenders has been taken away in a number of different circumstances by so-called "mandatory minimum" sentences required by laws. As one powerful critique of sentencing guidelines put it,

> [T]he sentencing guidelines are based on the fundamental misconception about the administration of justice: the belief that just outcomes can be defined by a comprehensive code applicable in all circumstances, a code that yields a quantitative measure of justice more easily generated by a computer than by a human being.[12]

Similarly, prosecutorial discretion gives prosecutors the ability to handle crimes in ways that are appropriate to the facts at hand. Such laws require that judges give certain levels of punishment for certain infractions, independent of whether or not the individual "deserves" such punishment and ignores any sort of mitigating factors. Mandatory minimums have been established largely for drug offenses, but they also exist for sex and violence crimes.[13] While treating like cases alike is a valid formal principle of justice, not all cases, and not all criminals, are alike. Each individual case has complexities and nuances that could never be captured by an abstract set of rules, no matter how detailed and elaborate they might be.

The fact that all extant criminal justice systems fall short of the idealized bureaucracy that Weber outlined is not, in and of itself, a bad thing. Behind the façade of an impartial "justice-machine" is the reality that the de-

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12 Kate Stith and Jose A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (Chicago. IL: University of Chicago Press, 1998), 168–169. See also David Dolinko, "Justice in the Age of Sentencing Guidelines" (a review of *Fear of Judging*), *Ethics* 110.3 (April 2000), 563–585.

13 The Associated Press, "Sex-Offender Bill Is Passed by House," *New York Times*, July 26, 2006.

cisions regarding life and death, freedom and incarceration are made by human beings with real commitments, experiences, genders, races, ages, etc. There is a sort of Sartrean bad faith involved in the assumption that judges have no human commitment to the justice that they dispense and that judges simply apply rules to facts.[14] They are not empty vessels of law and justice, blindly dispensing it to the matter at hand but are human beings who bear a certain responsibility for their choices and their actions. Equally important, human beings in many cases may make better decisions if they allow personal experiences and hunches into the process.

Philosophical debates about the relation between rules and justice have a long and esteemed intellectual pedigree. Historically, Kant's categorical imperative, asserting that all rational beings must conform to universal laws and Aristotle's ideal that humans must always make moral decisions in human situations have been at odds.[15] For Aristotle, it is not the blind application of rules that determines justice, but rather the practical wisdom (*phronesis*) of the decision maker. Justice is a human endeavor for Aristotle – not a mechanical operation. There is an equivalent to this in debate about the nature of normative reasoning in moral psychology. Kohlberg's emphasis on the manipulation and application of abstract principles as the highest form of moral reasoning conflicted with the "Care ethicists" (including most notably Carol Gilligan) emphasize personal experience and relationships as the centerpiece of a fully realized moral imagination.[16] While, like all philosophical debates, these arguments have been conclusive, it is clear that the abstract application of generic normative rules to *everybody* in every situation is always the appropriate way to understand or construct normative systems. Thus even at the most abstract, philosophical level; there is no reason to believe that principles of justice require the universal application of norms.

Finally, the utility of the principle that "like cases ought to be treated alike" is not always clear when applied to actual cases. While as a formal principle or moral reasoning, this maxim is undoubtedly true and valid, it begs a number of deeper questions: What exactly makes one case "like" another one? What differences are relevant in the application of principles

14 Jean Paul Sartre, *Being and Nothingness*, trans. Hazel E. Barnes (New York: Washington Square Press, 1956), 86–116.

15 See Immanuel Kant, *Critique of Practical Reason*, and Aristotle, *Nichomachean Ethics.* For a more modern take on Aristotle and Kant see Alasdair Macintyre, *After Virtue* (Notre Dame, IN: Notre Dame University Press, 1984).

16 Carol Gilligan, *In a Different Voice* (Cambridge, MA: Harvard University Press, 1983).

justice? The abstract principle that Franck et al rely upon for establishing the legitimacy of international institutions is weakened by its bare formalism, its inability to serve as a guide for existing political institutions. When we seek further detail about the nature of different cases as well as their similarities, it becomes effectively useless for understanding the discretionary application of justice. Clearly, more is required.

Justifiable vs. Unjustifiable Selectivity in Criminal Justice

Whether or not one wishes to take sides on these theoretical debates about ethics and the rule of law, it is undoubtedly true that all criminal justice systems are in some sense "selective," and that such selectivity may be necessary, morally justifiable and need not impugn the legitimacy of a trial or of a criminal justice system. So the next question is what kinds of selectivity are acceptable or unacceptable and why? *Illegitimate* selectivity would be selective prosecutions based on morally indefensible grounds. For example, prosecuting a person solely on the basis of their race would be indefensible. On the other hand, selective prosecution based on neutral or acceptable grounds can be legitimate. If two people are suspected of committing the same sort of crime, but one case would be difficult to prove and would require a great deal of resources, while the other would be a clear case and easily proven, one would be legitimate in prosecuting the latter and not the former. Similarly, if two cases presented themselves, while legally the same (say, both were murders), but one was brutal and vicious and the other less so, one would probably not feel that the two need be prosecuted in the same way. (The Roman army practiced *decimation* as punishment for cowardice on the battlefield: One soldier from a cowardly legion was selected at random for execution, while the others were only punished lightly.[17]) The question, then, is what, exactly determines the limits of just and unjust selectivity?

The distinction between legitimate and illegitimate selectivity depends on a further abstraction: defensible grounds for discrimination. That is to say that any selectivity or discrimination in criminal justice can only be excused by providing morally acceptable grounds for making such a distinction. This, unfortunately, is an abstraction that cannot be developed in detail here, simply because it would require a much deeper discussion about

17 For an example, see Seutonius, *The Twelve Caesars*, trans. Robert Graves (New York: Penguin Press, 1979), 57.

similarities and differences in moral discourse.[18] We can intuit some distinctions that we would accept and some we wouldn't: Distinctions based on race would not be a legitimate ground for treating different cases differently as would the wealth of the defendant.[19] On the other hand, the age of defendants or their personal histories may be legitimate grounds for differing treatment. A prosecutor would probably be justified in not pursuing a juvenile offender for an offence or excusing an offender that may have been acting out in response to a personal tragedy. (Likewise, these factors could change the nature of the prosecution—lowering murder to manslaughter, for example.) Of course, these are debatable issues, but a successful argument would nonetheless validate the point that certain sorts of differences in defendants or in criminal cases can justify different treatments by a criminal justice system.

Selectivity in Doctrine and Practice

Criminal justice can be "selective" in a number of different ways and its best to clarify precisely where the law can be selective before we begin to make the case that the ICC is or is not selective, and in turn then whether or not this selectivity is justified. At risk of being pedantic and making an excess of distinctions, one can distinguish two major categories of selectivity: Doctrinal selectivity, and applied selectivity. *Doctrinal* selective entails selectivity on paper, that is, selectivity where a particular institution draws its normative lines. Doctrinal selectivity breaks down further into *substantive* and *procedural* selectivity, that is selectivity in how crimes are defined and distinguished, on one hand, and selectivity in terms of how suspected criminals are treated on the other. On the other hand, applied selectivity deals with the actual application of justice, that is, who is targeted by the criminal justice system and how they are actually treated once they enter it. In this section, I will elaborate on these points and, once we have sufficiently elaborated on the components of selective justice, we can then turn to the structure of the ICC in order to evaluate whether the selectivity applied there may be justified.

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18 For one effort see Jeffrie G. Murphy, "Justifying Departures from Equal Treatment," *The Journal of Philosophy* 81.10 (October 1984), 587–593.

19 For an argument against the use of race as the basis for different treatment under the "like cases" principle see Richard Wasserstrom, "Rights, Human Rights, and Racial Discrimination," *The Journal of Philosophy* 61.20 (1964), 638–639.

As was previously mentioned, doctrinal selectivity can take two forms: *substantive selectivity*, and *procedural selectivity*. Substantive selectivity is selective in how an institution distinguishes between criminal and non-criminal behavior. If criminal behavior is defined in a way that makes unfair or indefensible distinction between two different behaviors, it is practicing substantive selectivity. Two normatively identical illegal acts are treated differently under the law (one is treated as a more serious crime than another) or the use of one is criminalized while the other is not are examples of substantive selectivity. Scholars and activists who complain about the sentencing disparities between the possession of powder cocaine and crack cocaine are making such an objection as are those who object to the criminalization of marijuana and the legality of alcohol. On the other hand, criminal justice can be *procedurally selective* in how it treats members of one group over another. If certain classes of criminals are provided rights that others are not, and these different forms of treatment lack justification, then they are a form of unjustified selectivity. A system that provided two forms of justice, one for the elites and one for the masses, or one for females and one for males would suffer from such a form of injustice. Doctrinal selectivity then requires that any differences in treatment either in conceptualizing crimes or processing criminals have some sort of normative justification.

The final sort of selectivity, applied selectivity, does not involve an institution's life on paper, but rather examines how real alleged offenders are actually treated by a criminal justice system in practice. As has already been argued, criminal justice systems are not immediately unjust because they do not seek to punish everyone who has violated criminal law—it is natural that criminal justice professionals will make some choices about who to prosecute and who to leave unmolested. Nonetheless, such practices may be considered an unjust selectivity if they are unacceptably carried out: The practical implementation of justice and the decision to overlook some lawbreakers and confront others, or the decision to treat two cases differently (say prosecuting one homicide as murder and another as manslaughter) may be unacceptable in certain situations. This sort of selectivity is much more complex than doctrinal selectivity precisely because it most often requires empirical evidence of wrongdoing over the long term. Because criminal justice is an ongoing process where prosecutors and law enforcement make decisions about complex events, some of which are ongoing, determining who should be prosecuted is never a simple affair. When we evaluate institutions, we can only evaluate their choices over the long term to see whether or not they have been unjustly selective in practice. Just as one swallow does not make a summer, one bad de-

cision from prosecutors or judges does not entail a hopelessly corrupt, biased, or unjustly selective institution.

Many of the critics of international criminal justice refer to this sort of selectivity when they offer their critiques of the ICC. That is, they charge that international courts deliberately overlook the crimes of one group and focus on those of another. Charges that the Serbs were unfairly singled out by the ICTY, commonly asserted by Serbian sympathizers is one example of this. For example, as Diana Johnstone charged in *The Nation* magazine:

> The I.C.T.Y., set up on an ad hoc basis by the U.N. Security Council, has neither the budget nor the control of the terrain necessary to serve up any more than an extremely selective justice, and the selection has from the start centered on the Bosnian Serb leadership, pre-judged as the guilty party.[20]

Johnstone's critique here deserves closer scrutiny: Whether or not the Bosnian Serb leadership were in fact guilty of the crimes with which they have charged is not the basis of the objection, nor (really) that their guilt has been prejudged ("guilt" is something only asserted after the conclusion of a criminal trial). Even if Mladic, Karadic, Tadic, and other Serbian criminals did commit the atrocities that they have been accused (and in Tadic's case, convicted), is immaterial for Johnstone's argument. Rather, her objection is that Serbs were singled out for prosecution (not conviction) while Bosnian Muslims and other participants in the war, not to mention President Clinton and other NATO leaders who ordered the bombings of Yugoslavia to stop ethnic cleansing in Kosovo, are unindicted by the court.

One final issue of selectivity involves the role of sovereignty and the right of states to deal with their own criminal problems in their own distinct way. That is, it is not unusual or unacceptable different states will prosecute different crimes in different ways or that they may prescribe different punishments for similar crimes. This, of course, is not improper in and of itself—different states may perceive threats differently or may have different local crime issues which require different responses from their national criminal justice system. A state with serious drug issues may wish to handle them differently, say, by punishing drug offenders more harshly than another society would. This is significant because an international system may punish crimes more or less harshly than a domestic court. Mass murder would be a potential candidate for capital punishment in the vast

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20 Diana Johnstone, "Selective Justice in the Hague," *The Nation*, September 22, 1997: 16-21.

majority of states that employ such a sanction, but not at the ICC.[21] Moreover, the imprisonment prescribed by the ICC is likely to be different from that of states like Uganda or the Central African Republic—most prisoners will likely serve their time in states like Norway or Denmark (which of course does not mean that they would be in better conditions[22]). If the impartial application of justice entails treating "like cases alike", it is clear that at the international level, the existence of the ICC entails that international criminals will be treated differently from those prosecuted in a domestic trial. Thus, the justice provided for ICC defendants will be selective in the sense that they will be prosecuted under different rules and provided different punishments than those cases adjudicated in domestic forums.

Does the ICC have Unjust Selectivity?

Having provided at least a partial analysis of the formal properties of selective justice as well as the limits of legitimate selectivity, the next question is whether the ICC surpasses these limits. In this section I will examine the ICC through the selectivity matrix that I have just set out. Here, I will argue that there are a few cases where the ICC *could* be unjustifiably selective in practice, but most of these are likely to be exceptional ones and that, on the whole, on paper at least, there are few grounds for asserting that the ICC is illegitimate in its selectivity. While there are numerous avenues that one can take to explore selectivity at the ICC, but I will focus on the role of sovereignty (the limitation of the court's jurisdiction to states parties), the limitation of the jurisdiction to certain crimes (to "the most serious crimes of concern to the international community as a whole"), the role of the Security Council in the court's affairs, and the discretion of the ICC's prosecutor.

Sovereignty and Selectivity—Unlike domestic criminal justice systems, the ICC is constrained by state sovereignty. This is to say that the application of legal rules in international relations is constrained by the right of nations to do what they wish to their own citizens and the right of states to consent to the laws that bind them. This sovereignty is, of course, much more robust than in the domestic sphere. In regards to the ICC, sovereign

21 Article 77. For a criticism of the ICC on this point, see Dempsey, "Reasonable Doubt".

22 BBC News, "Taylor Complains about Hague Jail," July 21, 2006, http://news.bbc.co.uk/2/hi/africa/5203250.stm.

states have numerous powers: They can choose to refer a case to the court and under the complementarity principle,[23] they can assert jurisdiction over an indicted criminal and opt to prosecute him at home. Finally, a state can refuse to sign the ICC charter, meaning that they can deny the court jurisdiction over its nationals or over crimes that occur within their borders. The role of sovereignty in international affairs presents a serious possibility of doctrinal selective justice: the citizens some states will be subject to the court's jurisdiction while others, most notably the US, will not, regardless of whether they have committed putatively international crimes. Clearly, this seems to be an unjustified form of selectivity—national affiliation does not seem to be legitimate grounds for treating similar cases differently, and these states parties should be treated identically to non states parties.

While it is certainly true that the court's inability to prosecute citizens of non-states parties presents a challenge to those who want to defend the court, there are other issues that mitigate a conclusion that this practice is illegitimate. Simply put, there are certain other principles that trump the need for strict uniformity in the application of the law. Consistency and the rule of law must be balanced with principles of national sovereignty and the inherent right of states to refuse to be a party to the ICC. Underlying the principle of national sovereignty and justifying it is a deeper principle of collective self-determination—that groups of people should be able to choose how they wish to live together. For a state to refuse to become a party to the Rome Statute the ICC is a perfectly legitimate use of a group's self-determination and this legitimacy justifies the selectivity that sovereignty forces on to the ICC. For the court to assert jurisdiction over states that do not support the ICC and have not elected to become parties to the ICC is more troubling than cases where the ICC is precluded from investigating a case because the country is not a party to the Rome Treaty.

Thus, from this perspective, the selectivity problem arises not because the US, as a non-state party, is exempt from the ICC's jurisdiction. Rather, the more troubling cases are situations where the ICC at the request of the UN Security Council asserts its jurisdiction over states like Sudan, who are not parties to the ICC.[24] Cases like this, where the Security Council overrides the prerogatives of a sovereign state, represent a more serious form of selective justice than cases where non-states parties are not prosecuted for violations of international criminal law. It is here that the potential for

23 See article: Article 17(1)(a).

24 *United Nations Security Council Resolution* 1593 (2005).

abuse it highest. Of course, Sudan is not a state that represents the interests of its people (particularly those in Darfur), so to this extent Sudan's right to deny the jurisdiction of the ICC on principles of self-determination is sharply limited. While non-democratic states are sovereign according to standards of international law, their sovereignty cannot be premised upon the self-determination of peoples simply because the people do not determine themselves in these political environments.[25]

Jurisdiction and Selectivity—The court's jurisdiction is limited in a number of significant ways that can have an effect on the prosecution of lawbreakers. The most general limitation on the court is spelled out in Article 5 (1) of the Rome Statute. Here the court's jurisdiction is restricted to, "The most serious crimes of concern to the international community as a whole" and not to *every* violation of international criminal law. This means that two individuals who commit roughly equivalent crimes may not face the same sort of justice—one would be a domestic matter for local courts and the other would be an international matter for the ICC. This further entails that different procedures and punishments will be meted out for some crimes and not for others. Is the "concern" of the international community grounds for choosing to treat some criminals differently than others or does this limitation denote an unjustifiably selective form of justice?

The answer depends largely on the meaning given to this ambiguous phrase as well as its moral significance. The term was initially presented to the court as a way to limit excessive prosecutions for relatively trivial violations of the law. Provided that it is used in such a format, there is no reason to believe that Article 5(1) poses any particular challenge to the legitimacy of the tribunal—it simply becomes one more aspect of the prosecutor's discretion (see below). Other sections of Part 2 of the Court's subject matter jurisdiction provide some clues on the meaning of Article 5(1): Article 7 limits "Crimes against humanity" to certain acts "when committed as part of a widespread and systematic attack directed against any civilian

25 A similar problem exists for states that are not democratic but nonetheless accept the jurisdiction of the court over their own nationals. The government does not represent the people and thus they cannot claim the authority of the people to join the ICC. Only democratic states that genuinely embody the will of the people can appeal to self-determination in order to accept or reject international legal obligations. At present, this is merely hypothetical, however, as all of the 100 states that are presently parties to the Rome Statute are democratic (albeit some are imperfectly so). (A list of states parties is available at: http://www.icc-cpi.int/statesparties.html.).

population[26]" and Article 8 limits the court's jurisdiction over war crimes to those acts, "Committed as part of a plan or policy or as part of a large-scale commission of such crimes.[27]" Clearly, it is only under extraordinary circumstances that the ICC will act against international criminals and "ordinary" international crimes will not attract the attention of the court.

If these provisions are meant to give further specificity to Article 5(1) then the next question is whether or not these restrictive definitions of international crimes constitute morally relevant grounds for treating criminals prosecuted by the ICC different from other sorts of international lawbreakers. There are good reasons to think that this is the case. Both the definition of war crimes and that of crimes against humanity emphasize the scale of the crime: that they must be widespread and large-scale crimes. This means that the crimes prosecuted by the ICC will undoubtedly be particularly destructive, causing significantly more harm to life and property than common violations of international law. It is plausible to read the stipulation of Article 5(1) not as a call to the selective attention of the international community, but rather as a statement that only the most violent, destructive crimes ought to be prosecuted and punished by the court. Thus, the morally relevant concern about the ICC's jurisdiction is one of scale and degree—serious and widespread harm clearly merits different treatment from smaller sorts of crimes.

The Security Council—The third major sort of selectivity that one can point to in the construction of the court involves the role of the United Nations Security Council in the Court's functioning. Article 16 of the Rome Statute gives the Council the right to defer an investigation under its Chapter VII powers, which, "May be renewed by the Council under the same conditions." Formally, of course, granting such powers to the Council does not entail an unjustifiable form of selectivity. While the Council cannot stop a prosecution, it can indefinitely postpone one through continually renewing such resolutions. However, were the Council to do this indefinitely, particularly in a manner that seemed arbitrary or capricious, or most importantly lacked a normative justification (say, were it to continually pass resolutions to protect its own nationals while letting the prosecutions of citizens of other states continue), than it could lead to an unjust form of selectivity in practice. Were the Security Council to remain quiet and not check the prosecutor's power to conduct its own affairs, then there is no strong reason to be concerned about its influence.

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26 Article 7(1).
27 Article 8(1).

However, there are some important qualifications that need to be made before the Security Council's power to defer prosecutions is used to criticize the ICC. First, as a practical matter, it would be very difficult for the Council to continually protect an individual suspected of an international crime, simply because of the way that the statute has granted power to the court: The ICC Charter requires that these deferral resolutions be passed annually, which puts the onus on Council members to pass resolutions with the required nine votes of the Council members (and the concurrence of the six permanent members).[28] The political costs of openly defying the ICC, particularly if the court develops a reputation as an impartial tribunal would be high, and would be likely to increase each year. (It is worth noting that the US Proposal at the Rome conference involved requiring Security Council *approval* to commence a prosecution as opposed to a positive resolution to—temporarily—prevent a prosecution.) Likewise, the prosecutions cannot be stopped by a veto from the Security Council's permanent members, meaning that they could not shield their own citizens from the ICC without the collusion of a number of other councilmembers. While it is true that Chapter VII of the UN Charter gives the Council the power to, "determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken… to maintain or restore international peace and security," this power is not absolute. It is limited by other parts of the UN Charter, such as Article 51 which limits states to

The Discretion of the Prosecutor—Probably more important than any other branch of the ICC for its good functioning is the prosecutor. Many complaints about selective justice at the ICC revolve around the powers given to the prosecutor, just as many complaints about its predecessor institutions lay blame at his or her feet—criticizing their choices to pursue one individual or group over others. Similarly, many of those who express fear that the ICC will become a reckless institution cite the discretion given to the prosecutor under the Rome Statute, which they charge empowers him to act as a rogue agent in international politics. As US Ambassador John Bolton states his objections:

> What is at issue in the prosecutor is the power of law enforcement, a powerful and necessary element of executive power. Never before has the United States been asked to place any of that power outside the complete control of our national government. Our main concern

28 UN Charter, Article 27(2).

> should not be that the prosecutor will target for indictment the isolated U.S. soldier who violates our own laws and values, and his or her military training and doctrine, by allegedly committing a war crime. Instead, our main concern should be for our country's top civilian and military leaders, those responsible for our defense and foreign policy. They are the real potential targets of the ICC's politically unaccountable prosecutor.
>
> … In European parliamentary systems… political checks [on the prosecutor] are either greatly attenuated or entirely absent, just as with the ICC's central structures, the court and prosecutor. They are accountable to no one. The prosecutor will answer to no superior executive power, elected or unelected. Nor is there any legislature anywhere in sight, elected or unelected, in the Rome Statute. The prosecutor, and his or her as yet uncreated investigating, arresting, and detaining apparatus, is answerable only to the court, and then only partially. The Europeans may be comfortable with such a system, but that is one reason why they are Europeans and we are not.[29]

Bolton's critique is both a normative and a political one. An unaccountable prosecutor can cause damage to US interests not only because he can label American actions "criminal", but likewise, because he may freely prosecute the leaders of unpopular nations like the US while facing few negative political consequences for these acts. Clearly, if Bolton's conception of the ICC prosecutor's powers were correct, there would be good reason to fear selective justice at the court.

It is certainly true that prosecutors have traditionally been given a large amount of discretion in choosing who to prosecute and the ICC is no exception to this general rule. He may choose to initiate a case that falls under the court's jurisdiction *propio motu* or he may likewise choose to decline to initiate an investigation based similarly on his own judgment. Further, the Rome Statute makes provision for the prosecutor to refrain from investigating a case when he thinks there are, "Substantial reasons to believe that an investigation would not serve the interests of justice[30]"—broad and not well-understood language.[31] However, his discretion it is also limited in some important ways. The prosecutor's discretion is

29 Bolton, "The Risks and Weaknesses".

30 Art. 53(1)(c).

31 For an in-depth discussion of this principle see Darryl Robinson, "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court," *European Journal of International Law* 14.3 (2003), 481–505.

weighed down by the role of the Pre-Trial Chamber, which must authorize the commencement of an investigation by determining that there is a "reasonable basis" to proceed.[32] Similarly, the pre-trial chamber must determine that court has jurisdiction over the case. Even the prosecutor's decision *not* to proceed with a prosecution is reviewable by the Chamber.[33] Thus based on the construction of the prosecutor's authority in the Rome Statute, the likelihood of a rogue prosecutor arbitrary indicting offenders is not very high.[34]

However, in the US and other common law systems, there is an even wider degree of discretion than one finds at the ICC. In most jurisdictions, the prosecution, with the full blessing of law, has absolute discretion over who to prosecute. In most cases, prosecutors are elected by the public, giving them a clear incentive to prosecute criminals when there is strong public interest to do so.[35] While none of these traditions explicitly authorize the prosecutor to refuse to pursue pursuing a case when they have reason to believe that a crime was committed on the basis of other normative principles, one can expect that, in practice, such values may guide domestic prosecutors (at least when they are high-minded). Nonetheless, there is nothing particularly unusual or odious about the ICC's formula for prosecutorial discretion—nothing, at least, that would authorize criticism for unjust selectivity.[36]

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32 Article 15.

33 Article 53(3)(a).

34 For a more detailed study of prosecutorial discretion at the ICC see: Danner Allison Marston, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court," *American Journal of International Law* 97 (2003), 510–552, and Luc Côté, "Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law," *Journal of International Criminal Justice* 3 (2005), 162–186.

35 For a study of Prosecutorial discretion in the US system see: Bruce A. Green and Fred C. Zacharias, "Regulating Federal Prosecutors' Ethics," *Vanderbilt Law Review* 55 (2001), 381, 456.

36 Interestingly, a different criticism of the ICC Prosecutor assumes not that he will use the prosecution in a manner that results in unjust prosecution but rather that a prosecutor will not be selective *enough*:
Another key advantage of national level prosecutions is that they provide an appropriate context for the exercise of prosecutorial discretion. It is widely accepted that prosecutorial discretion is the sine que non of any civilized justice system. The essence of prosecutorial discretion is balancing the ability to obtain an indictment and conviction of a given person, who arguably has violated some law, with broader societal interests. At one level, it entails examining whether the alleged violation was willful and deliberate, whether the individual involved is a repeat

Ultimately, however, the appropriate use of prosecutorial discretion is a matter of practical wisdom (Aristoelian *phronesis*) and the good judgment of prosecutors is essential to the formation of legitimate and well-run criminal justice institutions. The human factor cannot be eliminated from the implementation of criminal justice, whether domestic or international, regardless of how strictly the prosecutor's powers are controlled or guided by normative systems or political bodies. The political checks on prosecutors in American criminal justice that Bolton lionizes can just as easily be used as a tool of demagoguery or organized lynching by an ambitious prosecutor. Words on paper only restrict political entities if they are willing to perceive themselves (and others) as bound by these words. Thus, regardless of whether or not the Rome statute has constructed the prosecutor's powers appropriately, there is no reason to believe that this is enough to ensure that the ICC will not be unduly selective in its choice of prosecutions. This, ultimately, will depend on the ineliminable human factor.

Conclusion

We all know that the world is full of bad people who do bad things. We also know that the capacity of any criminal justice institutions to confront the vast array of evildoers that occupy the world is inevitably going to be limited. Not every crime, not even every serious crime can be prosecuted

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offender, and whether "throwing the book" at him is the right thing to do. While it is not entirely implausible that an ICC or an ICTY prosecutor may be capable of exercising this form of prosecutorial discretion, the odds of this are not very good.

This reality has nothing to do with prosecutorial personnel staffing these international bodies—they can be the most honorable and the most decent individuals in the world - and has everything to do with institutional pressures and imperatives. The Framers of our Constitution would sadly chuckle at the presumption, oft-expressed by ICC supporters, that good persons can salvage flawed institutions. Our own experience with the independent counsel prosecutions shows what happens when even the most honorable individuals are put in a position where they staff a prosecutorial institution which is separate and distinct from the normal justice system and which exercises jurisdiction over a particular category of persons, i.e., senior government officials. This comparison is not far-fetched if we consider that prosecutors of the ICC and the ICTY see their reason d'etre as the prosecution of senior government officials of sovereign states who, in their view, have committed serious violations of international law and gotten away with it. (Rivkin, David B., Jr., "The Pitfalls of International Justice," *Council on Foreign Relations Publication* (2003)).

by a criminal justice system, regardless of whether or not most of us expect it to. Justice is never perfect and it will always be selective in some form or another. If selective justice is inevitable sort then, the only question is whether or not the selectivity will be of a justifiable sort or rather be based on inexcusable criteria.

Perhaps nowhere else in the world are the limitations of criminal justice felt more strongly than at the international level. Unlike a domestic criminal court, the ICC must operate "under fire"—torn between the demands of states and non-state actors, NGOs, and global opinion and stripped of the other institutions (such as law enforcement agencies) that make domestic criminal justice effective. It is practically inevitable that one group or another will feel that they have been unfairly singled out for prosecution. It is likewise inevitable that alongside these prosecutions, others who committed similar crimes will be ignored by the court for a variety of reasons. If a case as clear as Nazi aggression in Europe was subject to charges of victor's justice, there is little hope that more complex conflicts would not engender similar feelings by those targeted by the court. Messy political conflicts, bereft of clear "good guys" and "bad guys" are the ones that are most likely to require intervention from the ICC and thus it is likely that the court will constantly attacked with charges of selective justice by partisans of one side or another.

As I have argued, there are no *doctrinal* grounds for believing that the ICC will be unjustifiably selective on any of the axes that I have set out here. Additionally, there are clear political restrictions that are designed prevent it from becoming a rogue institution, targeting criminals who are citizens of unpopular states like the U.S. and Israel. Of course, this does not mean that the ICC will *necessarily* be fair in its dealing with alleged international criminals. On paper it may be wisely designed, and there may be no prima facie reason to believe that it will be unfair in practice, but this is a far cry from saying that the court *is* fair or that it is unjustly selective in its prosecutions. There are numerous ways that the courts limitations could be overridden by overzealous or reckless jurists and the court *could* become the bogeyman that its American critics contend that it is. This, however, is unlikely and such developments are probably years in the future, if they ever were to appear. The distinction between the law "in books" and the law "in action" can only be made after the court has actually conducted prosecutions, after the law has been practiced, something that the ICC is only now beginning to get a taste of.

Finally, one should keep in mind that the legitimacy of an institution and its *perceived* legitimacy are two different things. The arguments that I have laid out here are normative arguments about principles of justice, not

sociocultural claims about whether or not a group will see the ICC as being "unjust." Much of the concern about the ICC stems from the different perceptions of international institutions. Most people assume that there is the rule of law in domestic affairs and tend to discount contrary data as exceptions. On the other hand, despite the fact that much of global relations are well ordered, people assume that international relations are naturally in a state of anarchy and any evidence to the contrary is discounted as exceptions to this general rule. These differences are not institutional differences and do not stem from the different political structure, but rather they are cultural ones. With a few exceptions, Americans in particular, are taught to believe that, beyond the borders of modern nation state is a Hobbesian state of nature. This ideology will incline many in the US and abroad to view prosecutions by the ICC cynically or at least with a great deal of suspicion.

Skeptics towards the ICC maintain that an international court, without the backing of a traditional, national government cannot provide substantive justice, or put somewhat more abstractly, without a government, there cannot be the rule of law. However, the presence of a state does not guarantee that there will be the rule of law and the absence of a government does not mean that there cannot be justice and a well-ordered society. Many states have effective governments that are recognized by the international community, but nonetheless neither consistently nor fairly apply the law. Similarly, many communities and other forms of political association lack some of the crucial ingredients of a state, but nonetheless fairly and equitably apply rules. Nothing in the construction of the ICC precludes this possibility and given the level of commitment and professional responsibility of those who are helping construct the ICC (speaking from personal experience), there is ample reason to believe that it will be a wise and impartial arbiter of justice. As one important study of selectivity in international criminal justice has asserted:

> Despite the ICC being open to certain criticisms of selectivity, and the questionable aspects of the Security Council's early reaction to the coming into force of the Rome Statute, these blemishes should not encourage forgetfulness about the extent to which the Court represents a dramatic leap forward in enforcement of international criminal law. The ICC is considerably less open to criticism on the basis of selectivity than previous Tribunals or many States' practice in this area. To de-

mand perfection would be to demand the impossible, at the domestic or international level.[37]

37 Cryer, Robert, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge, UK: Cambridge University Press, 2005), 228-229.