The Problem of Selective Prosecution and the Legitimacy of the ICC

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(very rough draft)

One of the most often mentioned but rarely analyzed problems of the International Criminal Court is the problem of selective prosecution. The existence of selective prosecution appears to many to pose a problem of legitimacy for the ICC, but the exact nature of the problem is not very carefully discussed. In this paper I want to lay out the phenomenon of selective prosecution in some of the different guises it takes. I want to say something about the underlying features of the ICC that seem to generate the phenomenon. Then I want to discuss the normative question of what might be said to be wrong about selective prosecution at least in some of its forms. I want to say something about how this difficulty might contribute to our assessment of the legitimacy of the ICC. This paper is exploratory.

The most obvious way of pointing to the selective prosecution of the ICC is the fact that it has yet to bring charges or even carry out serious investigations regarding any but sub-Saharan African militia leaders or officials. And these never include allies of the major Western powers. So we have the picture of a Prosecutor that seems to investigate individuals, who are African and unfriendly to Western powers. At the same time the major supports for the Court arise primarily from Western powers. So one might have the impression that the Court is an institution that represents Western and developed country interests and that focuses on African persons unfriendly to those Western powers. In the meantime, we have good reason to think that the United States has engaged in aggressive war (or at least something that looks very much like aggressive war), torture and war crimes in Iraq and Afghanistan. Great Britain has engaged in activities that can qualify as war crimes in Iraq. There is at least a pretty serious case that Israel has engaged in war crimes in Gaza and ethnic cleansing in the West Bank. And yet these cases have not gotten past preliminary examinations, some for clear legal reasons and some not. Meanwhile the states of the African Union have gone from enthusiastic supporters of the ICC to skeptics while the United States has become a half-hearted supporter.¹

There is a related form of selective prosecution that may be problematic as well. In the main situations that it has dealt with, the ICC seems to go after one of the parties to the conflict and not the others. It has gone after Joseph Kony in Uganda but not Museveni; it has gone after militia leaders in the Congo but not the government. In all

these situations, the people the Court has not gone after have committed crimes against humanity and war crimes of immense gravity.

To be clear, this paper is not meant to provide a legal analysis or argument, though it does draw on legal sources. I am concerned here to articulate some basic moral principles relevant to assessment of institutions such as the International Criminal Court. One way to understand what I am doing here is to see that I am trying to give a kind of rational explanation of a worry about the moral legitimacy of the ICC. This worry is not primarily a concern about the legal legitimacy of the ICC. But I want the moral argument to be properly moored to the underlying features of the system and its possibilities for transformation.

First I will lay out some basic principles for the court: the principle of proportionate equality and the principle of non-discrimination. I will lay out the problems of selective prosecution and a conception of the legitimacy of courts. I will look at some different ways in which selective prosecution seems to occur: (1) restrictions on the jurisdiction of the court, (2) restrictions on availability of evidence for investigations, and (3) the need for the ICC to secure the good will of the major powers. I will argue that they share an underlying unity. Then I will say what I think the problems of legitimacy are that arise from selective prosecution. I will also explore some ways in which the effect of selective prosecution on the legitimacy of the ICC may be mitigated.

**Proportionate Equality**

What is at issue with selective prosecution? The main problem of selective prosecution is that it seems to violate a basic principle of natural justice namely that like cases ought to be treated alike. Another way to put this is that the court seems to fail to realize the kind of impartiality in its operation that we have come to demand, though by no means have fully realized, in domestic systems of criminal justice. In a domestic criminal justice system it would be an unmitigated outrage if the only people ever convicted of murder were black despite widespread knowledge that many murders have been committed by white people. This would be taken as clear evidence of extensive invidious bias in the criminal justice system against blacks and it would be a severe defect on the legitimacy of the court.²

But it is hard to get a clear understanding of the idea of treating like cases alike since we don’t really understand the principle until we understand what the appropriate

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criteria of likeness are or what like treatment consists in. Furthermore, we need to understand whether this is a fundamentally comparative or non-comparative principle. It might sound initially like a comparative principle but I think the best understanding of this principle in the context of trial and punishment is as a non-comparative principle. Still there may be comparative injustices that arise from the violation of this non-comparative principle.

interpretation of a principle such as the requirement that one treat like cases alike must start with an understanding of the legitimate purposes of the institution or practice to which the standard is being applied and some sense of what the institution does. The International Criminal Court is concerned to prosecute, try and decide on punishment for cases of individuals in terms of some of the gravest crimes known to human beings. The main kinds of crimes are crimes against humanity, war crimes, genocide and the crime of aggression3. And the purpose of the ICC is to prosecute individuals and try them for commission of these crimes in accordance with the basic principles of a fair trial and then settle on acquittal or some form of punishment. The more distant purposes of the Court in punishing those who have committed the grave crimes are to express the outrage of humanity with regard to these crimes and hopefully to deter the agent and others from committing these crimes.

This already gives us a basic picture of what treating like cases alike involves. The likeness of the cases to be treated is determined by the gravity and type of crime; the main categories are: genocide, war crimes, crimes against humanity and the crime of aggression. Cases are alike to the extent that they are similarly grave instances of one of these four categories of crimes. To be sure there is only a very rough way of comparing crimes especially across categories, but this will imply only that the principle of formal justice applies in a way that acknowledges difficulties of comparison.

Furthermore, in assessing the likeness of cases we have to take into account some secondary issues. Lack of available evidence for determining who has committed the crime may also be a good reason for not prosecuting the crime. And in the case of the ICC we must take account of whether the crime is being effectively investigated by the state whose members have committed them or on whose territory the crime was committed. And we must think of whether the state is a party to the treaty establishing the Court and thus whether crimes committed by its citizens or on its territory can be prosecuted.

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Treatments include investigation, prosecution, trial and punishment. Unlike many courts, the ICC includes the prosecutorial function as well as the trial and punishment functions. And the function of these treatments is the expression of moral condemnation for the crimes as well as solidarity with the victims of the crimes and the deterrence of crimes by the agents being prosecuted as well as agents in the future who might be tempted to commit these crimes under circumstances of severe conflict.

Likeness of treatment is complex in some similar ways to likeness of crimes because there are a number of different elements of treatment. This is because some elements of the treatment do not entirely depend on the court that is supposed to investigate the crime. There are preliminary examinations, investigations, prosecutions, trials and punishments. There may be conditions under which the court is powerless to undertake an investigation or in which it has no jurisdiction.

I want to lay out the idea of the justice as it applies to the ICC in stages. Since the principle of treating like cases alike is a formal principle of justice, there is a constraint on the notion of likeness of cases that has to do with the nature of the crime that is alleged. Initially we might have a standard of simple equality. For all crimes that are suitably similar or on a par, investigation, charges and trial ought to be similar and punishments ought to be similar. Furthermore, we need to expand the formal principle to include the idea that crimes that are more grave ought to be punished more harshly than crimes that are less grave. And we might even say that the more grave crimes ought to be initially investigated more quickly than less grave crimes. So we develop a principle of proportionate equality.

Qualifications to Proportionate Equality

There are a number of ways in which this principle is qualified in the Rome Statute. First, there is the principle of complementarity. This states that a crime should be investigated by the ICC only if the domestic courts of the relevant country are unable or unwilling to try the crime. The crime can and should be prosecuted within the domestic criminal justice system first. Only if this is not possible or the state is unwilling, must the crime be prosecuted by the ICC. On its face, this is a reasonable principle. First it conserves the resources of the ICC while making sure that the crime is actually investigated. It also tries the crime within well developed legal systems and it respects some degree of sovereignty for each society.

Complementarity suggests a revision of the above principle of proportionate equality. The idea is not that the activities of the ICC should display this proportionate equality.

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4 See Article 17 of the Rome Statute.
equality but that the criminal justice system of the world should display it. The ICC performs an essentially residual function of trying crimes that states are unable or unwilling to try. In this way we can say that the principle of proportionate equality is not undermined by the principle of complementarity. Complementarity simply requires that we enlarge the scope of the principle of proportionate equality.

The restrictions on the jurisdiction of the Court are more problematic and raise some of the problems of legitimacy we started with. This is the idea that crimes committed by citizens of a state on its own territory cannot be investigated by the court unless the state is a party to the Rome Statute, or the state itself requests such an investigation (Article 12 (3)), or the case is referred to the ICC by the Security Council.\(^5\) Currently the world’s greatest military powers are not parties to the Rome Statute and they are members of the permanent five group in the Security Council and so can veto any referral by the Security Council of a situation in which its citizens have taken part. The only ways that crimes perpetrated by one of these powers can be tried are if the state asks for it to be investigated or if they commit a crime on the territory of a state that is a party to the Rome Statute.\(^6\) And even then the Security Council can defer any investigation or prosecution for a year at a time and indefinitely renew that deferral.

Obviously this is a problem if we accept the principle of proportionate equality on a global level. Crimes committed by Russia, China or the United States that are not on the territory of a state that is party to the Rome Statute cannot be prosecuted. Hence, US activities in Iraq are not pursued even though it is widely thought that the US or its citizens have engaged in war crimes and crimes against humanity there and in other places and most of these crimes will not be investigated by the United States. It is not hard to imagine that Russia and China are engaged in similar activities.

This kind of qualification has proven to be a severe challenge to the legitimacy of the Court. But it is complex because it is rooted in a fundamental principle of international law. That principle affirms that states cannot be bound to a treaty unless they have consented to it. To be clear, the United States, China and Russia are legally and morally bound not to commit war crimes and crimes against humanity. But they are not legally bound to accept the jurisdiction of the ICC if it wants to investigate or prosecute such crimes on their territory and by their citizens since they have not ratified

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\(^5\) See Articles 12 and 13 of the Rome Statute.

\(^6\) Currently, allegations of crimes against humanity and war crimes by the United States and its allies in Afghanistan are being examined in a preliminary way by the ICC prosecutor. See the Office of the Prosecutor, *Report on Preliminary Examination Activities of 2014* (The Hague: International Criminal Court, 2014) pp. 18-24. This is not yet an investigation but an examination of the admissibility of the situation for an investigation but it does take very seriously the allegations of war crimes and crimes against humanity.
the treaty establishing the Court. We will explore this problem in more detail in what follows.

**Proportionate Equality and the Selection Principles**

Some deviations from proportionate equality may be defensible, however. A court like the ICC will not be able to prosecute every crime that comes under the Rome Statute. That will simply be for lack of resources, presumably. Indeed this is a feature of all prosecutorial systems. Some discretion is required to conserve resources and attend to the most important cases. But here we need supplementary principles, which I will call the **selection principles**. I will not give a complete account of the principles here. I will only state necessary conditions and not sufficient conditions. I am not prepared at this point to say when more resources ought to be devoted to international criminal justice, which implies that they ought to be transferred from some other international concern.

One principle must give priority to the more grave cases over the less grave cases, when a choice of what to investigate must be made. I do not think that the more grave ought to have lexical priority; one can imagine a situation in which it would be defensible to prosecute a lot of very grave cases rather than one even more grave case, supposing that one had to make the choice. The reasons for investigating the more grave cases have greater weight than those for investigating the less grave cases. We might call this selection principle, the **principle of gravity**.

There is another principle that is central to the issue we are examining here. Departures from proportionate equality can be defensible only if they are not systematically explained in terms of some irrelevant feature of persons that divides the class of persons investigated from those who are not investigated. For example, any tendencies to investigate on the basis of race, gender, religion, economic status or nationality seem like especially indefensible departures from proportionate equality. This supplementary principle would be a natural extension of the idea, expressed everywhere in international documents, that persons are equal in terms of their inherent dignity. This **principle of non-discrimination** is often enshrined in law generally. And it is often implemented by selecting certain protected categories of persons (such as the one listed above) and insisting that one may not discriminate against someone on the basis of membership in that category.

One might think that the principle of non-discrimination is being violated in a straightforward way to the extent that only sub-Saharan Africans are being investigated. This seems to suggest that nationality or race are the factors that explain investigation. But I do not think that this is the fundamental explanation. These are incidental
consequences of the more basic explanation. The more basic explanation has to do with the alignment of political forces in the international system. Cases are being investigated when they involve those who are not members of major powers or friends of major powers. The cases involving those who are members of major powers or their friends are not investigated. I want to argue in what follows that when investigation and prosecution are only of those who are not members of major powers or friends of major powers, there is a violation of the principle of non-discrimination.

The preliminary case for such an extension of the principle of non-discrimination for a criminal court follows from the basic purposes of the court, which are the deterrence of crime and the expressions of condemnation of crime and solidarity with the victims. All potential victims ought to be protected and not just those who are victims of the opponents of the major powers. Furthermore, if only crimes by opponents of major powers are condemned, then this undermines in some significant degree the condemnatory force of the punishment. All of these points are themselves underpinned by a principle of equality. But I will develop these ideas in what follows.

**Legitimacy and the ICC**

What does legitimacy in the ICC consist of? It is authorized to investigate cases without interference. It has the power to issue arrest warrants. It has a right to indict and try persons for crimes and to impose a sentence if it has followed the principles of due process. Once an accusation has been made a court has the power to determine whether it is true and thus can decide guilt and innocence and decide an appropriate sentence, thus imposing punishment. They decide on condemnation of actions. Even when others disagree, they can condemn and censure. Others must go along with the process it chooses: witnesses can be summoned, arrest warrants can be served. They can also acquit and exonerate. Others cannot once this has been done. One thing that is important to the legitimacy of a court is that it is meant to preempt the political processes of a political society with regard to the crimes a person commits. In the context of the ICC, this is extremely important. It means that once the ICC enters into a conflict zone and indicts someone, it is no longer permissible to negotiate with that person for the purpose of establishing amnesty of one form or another. This means that fundamental tools for the resolution of political conflict are preempted. The political participants have duties to ignore these possibilities. This is one of the things that make the ICC and its prosecutorial arm so contentious. The question of its legitimacy comes down to whether it can genuinely impose duties on all the players in a difficult conflict situation to put aside the possibilities of compromise and negotiation with a party that has been indicted.
There are really three basic dimensions of legitimacy to a court. The first is that the court is properly established by a political society in whose name it acts. The second is that the court applies the law of that political society. The third is that the court applies that law effectively and impartially to the members of the society in a way that observes due process of law. Let us call these the political, the legality and the impartiality conditions of legitimacy for courts.

The ICC is meant to satisfy these three dimensions. Thus it is established by means of a treaty by the international community, which is a distinctive type of political society. It is meant to apply the law of the political community, which is specified in the treaty. And it is supposed to apply that law effectively and impartially to that political community.

I will not comment on the second dimension of legitimacy, which has been the subject of interesting commentary to the extent that there is a worry that the ICC may engage in excessive law making.7 This is of course a traditional problem of courts since they are required to apply the law to many circumstances not initially envisioned by the law makers and so must engage in complex processes of legal interpretation and construction to decide these cases. Domestic courts and international courts share this problem but international courts tend to have it to a greater degree since the law they apply tends to be a lot more abstract and so more open to differing interpretations.

Legitimacy and Jurisdiction

Let us return to the qualification concerning jurisdiction. It looks here as if there may be a conflict between two aspects of the legitimacy of the ICC. On the one hand, we might think of the legitimacy of the ICC as being properly grounded in the consent of the states that are party to it. On the other hand the legitimacy of the ICC would seem to be evaluable in terms of whether it respects the basic principles of proportionate equality and non-discrimination that I have articulated.

The problem is that many of the major powers have not ratified the treaty establishing the court and so do not come under the jurisdiction of the court except if they commit crimes on the territory of a member state. But these powers seem to have committed crimes or at least there is plenty of warrant for an investigation. And so

failure to investigate or prosecute seems to involve a failure to realize proportionate equality.

There is a very quick response to the apparent conflict. We might say that the ICC cannot fail to realize proportionate equality in areas where it has no jurisdiction. As an instance of this we do not charge domestic courts for failures of justice when they do not try cases in other countries. Proportionate equality applies only within the jurisdiction. So why shouldn’t we say the same thing about the ICC?

This is too quick for a number of reasons. The main reason is that it is possible to think that the jurisdiction or action of a court is arbitrarily circumscribed given the function of the court. A possible example of this might be the failure of courts in the south of the US to try slaveholders for killing their slaves. This failure accorded with law but we think of it as a severe challenge to the legitimacy of the court in addition to the law more generally.

Another related reason is that the international community seems to take a general interest in the perpetration of the major crimes the ICC pursues. This can be seen in the Security Council Resolution 1593 of March 31, 2005 referring the situation in Darfur to the Prosecutor of the ICC. Sudan is not a member of the ICC, but its actions are seen to come in some way under the purview of the ICC. The Security Council’s official reason is that the situation in Darfur constitutes a threat to international peace and security but this seems to apply to situations in which there are large scale crimes against humanity, war crimes, genocide and aggression.8 The way the Security Council seems to be reasoning is that crimes against humanity, genocide and war crimes are threats to international peace and security, these threats are the proper concern of the ICC and so it refers the case to the ICC.

These considerations suggest that the ICC or the international criminal justice system is meant to have a kind of global reach. First, it is a recognized aim of the international community that it should attempt to protect people generally from severe and widespread human rights violations such as war crimes and crimes against humanity. To the extent that there is any developing international political community, it is hard to see how this wouldn’t be a basic element of its moral legitimacy. The ICC is one of the principal institutions designed for this purpose. Hence it makes sense to think of the point of the ICC as in some way being to investigate, try and punish the most serious crimes generally.

The above considerations are interpretive ones. I want to suggest that there is another reason for thinking that the conflict between the political and the impartiality conditions of legitimacy are not in as much tension as might appear. This resolution, however, will imply that there is a potentially severe challenge to the legitimacy of the court. I want to argue that the international community is a distinctive kind of political community. It is a community of independent states that are bound to cooperate in the pursuit of morally mandatory aims such as international peace and security, the protection of persons against widespread human rights violations, the avoidance of environmental disaster and the alleviation of severe global poverty. States are bound to pursue these aims in cooperation with other states. They cooperate primarily by consenting to arrangements that help pursue these aims.

State consent is still an important source of legitimacy because states are still the primary vehicle by which political power is accountable to persons in the international system. States can represent the persons who are citizens. Furthermore, there is room for refusal of consent insofar as people and the states that represent them can reasonably disagree about how to pursue the mandatory aims, but the room for refusal of consent is limited to good faith and reasonable disagreement. When states refuse to consent but not on the basis of reasonable disagreement and without any alternative arrangement in mind, it is not impermissible to attempt to pressure them into participation with the cooperative arrangement. The cooperative arrangement takes on a kind of legitimacy even when it is applied to those who have not consented at least to the extent that the non-consenters have no reasonable grounds for dissent and have no alternative proposals. This is because it is in pursuit of a morally mandatory aim.9

In this way, the moral scope of an institution that establishes cooperation for the achievement of mandatory aims reaches beyond those who have consented to those who refuse to consent for no good reason and who have no alternative practical plan. For example, I think we can make sense of the kind of pressure that is brought to bear by the international community on states that refuse to participate in nuclear non-proliferation arrangements. We can also see why it makes sense to allow the Security Council to refer situations to the ICC even if the perpetrator and the territory are not of a state party to the Rome Statute.

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The ICC, since it is a key element in the effort to stop widespread human rights abuses, does depend for its legitimacy on the consent of states. But in the case of unreasonable refusal of consent and the absence of any alternative effort to pursue the same aim on the part of a state, the ICC can have the legitimate power to investigate and try persons who come from that state. This seems to be the idea behind the Security Council referral to the ICC Prosecutor of the situation in Darfur. If Sudan were capable and willing to try persons for grave and widespread violations of human rights, there presumably would be no need to refer the case to the prosecutor.

This reasoning presumably applies to all states who unreasonably refuse participation in the ICC. To the extent that they are not willing to pursue alternative means to the same aim, the moral reach of the ICC extends to them. But this must include the major powers who do not consent at least to the extent that we regard their refusal of consent as unreasonable or merely self-serving.

To the extent that the moral reach of the international criminal justice system includes the non-consenting major powers and they are engaged in activities that clearly warrant further criminal investigation and this is not happening, there is a genuine failure of proportionate equality and non-discrimination. In a way, all of this is an argument for a kind of moral principle of complementarity with regard to the prosecution of the most grave crimes.

A Further Problem of Selective Prosecution

There two others kinds of cause of selective prosecution. The ICC has very little in the way of resources for pursuing investigations on its own. It is essentially dependent on the cooperation and support of states to pursue these. It is dependent on financial support, intelligence gathering, and gathering of information in conflict zones by powerful states. It simply cannot investigate or prosecute crimes without this support. But states, members and non-members, offer support in accordance often with their own interests or the interests of allies. Hence, one cause of selective prosecution is that the prosecutor may have little or no hope of collecting the necessary evidence without the support of one of the major powers. And so it may choose not to investigate a case for that reason alone. A second reason is that one secures the good will of the major powers by not investigating their nationals or those of their allies and by only pursuing cases that the major supporters favor. This establishes a kind of inherent bias in the process of
investigation that systematically explains the lack of proportionate equality in prosecution.\textsuperscript{10}

So we have three fundamental causes of the fact that the ICC only investigates parties that are not major powers or their allies and only investigates situations which major powers favor. The first is that the major powers are not party to the treaty; the second is that the court can only investigate a situation if major powers give it help; the third is that the court must seek the good will of the major powers to do its work and avoiding prosecution of the major powers and their allies is a principal condition of that good will.

The first two conditions are, in a sense, external to the court. The first involves a legal constraint on the court, the second involves the difficulty of getting evidence. A court can be doing the best it can in the circumstances and these first two conditions will provide a limit. The third condition is more internal to the court. The prosecutor will exercise discretion in a way that favors the major supporters of the court in order to secure their support. She does so for obvious reasons that have some weight but she nevertheless makes decisions in a way that is systematically biased in favor of the courts major supporters.\textsuperscript{11}

These three conditions are distinct and have different causes but I want to argue that they share an underlying unity. They involve ways in which the court’s actions are systematically biased in favor of the major powers and their allies. The bias I am alleging is not racial bias but it is a kind of invidious bias that undermines the claim to impartiality of the court. It is a bias that is akin to nepotistic bias. The bias implies a kind of impunity for the major powers and their friends.

Even though the bias generated by the first two conditions is external to the ICC in sense, I want to argue that they are internal in a deeper sense. Given the fragmentary nature of the international system, states play the main role in the maintenance, support and direction of international institutions. This does not mean that international institutions have no independence; but it does mean that they depend for enforcement and implementation on the states that are members. So when we think of an institution like the ICC and we are thinking of it as an institution that makes a difference, we must think

\textsuperscript{10} This seeking of the good will of the United States by the prosecutor of the ICC from 2002 to 2005 is extensively documented by David Bosco, Rough Justice, in chapter 4 and the maintenance of the good will is documented in chapters 5-7.

\textsuperscript{11} See, for example, the case studies in David Bosco’s Rough Justice: The International Criminal Court in a World of Power Politics (New York: Oxford University Press, 2014).
of it in a way that includes the main backers and supporters of the court. They are an integral part of what makes the institution an effective one. The major powers are essential to the ICC’s functioning. I want to say that the major supporters are a part of the institution. Furthermore, their support would not occur but for the favoritism shown them by the ICC. The jurisdictional restrictions, the restrictions on the availability of evidence and the explicit choices of who to prosecute are all among the conditions of major power support. They are among the enabling conditions of the activity of the ICC. Hence, the favoritism is in this sense a favoritism shown by the institution.

**Impartiality and Legitimacy**

Why does the evident lack of impartiality detract from the legitimacy of the Court? Legitimacy involves the moral power to impose duties and other reasons for action. And this moral power is one that the institution can hold even when people disagree with the exercise in particular cases. This is the basic function of legitimacy: it is meant to provide a morally satisfactory answer to the question, who decides?, when there is a need for collective action and there is disagreement on how to pursue it. The possession of such a moral power on the part of some group of people must be justified. The most obvious concern regarding the justification of a moral power that some hold over others is that it does not treat the parties as equals. I think this is a fundamental moral principle and I think that this principle is one that holds sway in the contemporary international community. I will take that as given here and develop an account of its implications.

An institution can treat people as equals in three distinct ways, each of which is important for its legitimacy. First, it can treat people as equals in the sense that the process by which it was established treated them as equals. For example, how the court was established and how the law it applies was created can be assessed in this way. In the case of courts in domestic societies, they are established by the democratic process and they apply law that has been made democratically. In the case of international courts, they have been established by state consent and do not apply to non-consenters unless the latter unreasonably refuse consent. And these courts apply law that has the consensus of societies behind it. These are admittedly precarious though not insubstantial ways by which the people of the world participate in the creation of these institutions.

Second, it can treat people as equals in the process by which it exercises its authority. For example, is there an inherent bias in the very structure of the institution? An institution can suffer a severe defect of legitimacy to the extent that some hold a great deal of power over the exercise of its authority while others are mostly just subject to it. This is a kind of defect in the democratic credentials of the institution.
Third, it can treat people as equals in the outcomes of its exercise of its authority. An institution can fail to exercise its authority in the content of its decisions as well as the process by which they come about. A democratic assembly, for example, can pass severely discriminatory laws against some group. In this way it can fail to treat the members of the society as equals. A court can fail in a similar way. It can engage in extremely selective application of law to the members of society in a way that seems to suggest the inferiority of one group relative to another. In what follows, I will focus on the second and third concerns.

To be clear, when a court prosecutes the crimes of some and not others, it is not engaged in action that is in itself inegalitarian. The prosecution of Africans does not imply inequality in itself. Indeed, there is something good about it to the extent that other Africans could be protected by the prosecution. At least some people are being deterred from bad actions and at least some crimes are being condemned. This is what I want to say about the proportionate equality principle. It is not essentially a comparative principle. One does not satisfy it in the current circumstances by lessening the prosecution of those who are being prosecuted.¹²

Two Defects in the Legitimacy of the ICC

Here I want to give two arguments for the defective legitimacy of the ICC. First, the nature of the problem of selective prosecution has to do with the exercise of authority itself. With the discrimination involved in the current situation, the suggestion is that some are in a sense above the authority while others are subject to it. In the case of political authority, this is an extremely problematic position to maintain because of the fundamental commitment in the modern world to equality of persons. The kinds of situation in which we accept asymmetric authority without much question (though within limits) are in the parental relationship and in the relation of guardian to ward as in the cases of severely handicapped persons. In the case of a political authority this is sometimes described as one person being above the law. Though there are some important ways in which this can involve a kind of unequal concern for the interests of the different parties, the basic phenomenon suggests a basic inequality of political status.

The argument I am giving harks back to Locke’s conception of legitimate authority in that equality is one of the fundamental standards regulating it, indeed,

¹² This is on the assumption, which I am not questioning here, that the prosecutions the ICC is pursuing are fairly carried out. There has been some doubt about this. See Mahmood Mamdani, Saviors and Survivors: Darfur, Politics and the War on Terror (New York: Doubleday, 2009) pp. 282-86 for a critique of the performance of the ICC regarding the Darfur situation.
equality is one of the main reasons why authority poses a problem. However, I do not intend my argument here to require quite as strong a premise as Locke’s. Locke argues against Hobbes that a sovereign would be fundamentally in violation of his conception of justified authority because the sovereign is above the law. I agree with Locke that there is a problem here, though I am not sure I agree with Locke on the seriousness of the problem. Locke seems to think this would be worse than the state of nature, I don’t see that that must be true. I think the problem in the case of the ICC is in some ways more serious than the problem of Hobbesian sovereignty and in some ways less. It is less serious in one respect because the powers that are above the international criminal law adjudication are effectively bound by international law in many other respects. It is potentially more serious because the inequality involved in international criminal law adjudication because the inequality is so systematic. It is an inequality that places the major powers above the law and the others beneath. Hobbes’s inequality is potentially one that is determined by chance, whoever happens to be in the right place at the right time gets to be sovereign. This inequality simply by its nature favors the powerful. They can avoid prosecution and they can undermine the investigation of their friends. Of course, this holds primarily for the first two underlying causes of selective prosecution, namely the jurisdictional limits and the availability of evidence problem. It holds less strongly for the form that involves the court attempting to secure the good will of the major powers.

This ties in with some traditional unjust inequalities that have a long and terrible history. Here the fact that all investigations have been of African persons should give us pause. It could be forgiven if someone thought that this was a kind of continuation of a long and disastrous colonial history. We are not merely speaking of someone being above the authority and others subject to it. We are speaking of powers that have traditionally been oppressive colonial or neo-colonial powers being above the law and powers that have traditionally been colonized powers being subject to the law.

What we have here are two inegalitarian mechanisms working at the same time. The first is that the court investigates some cases and not others for systematic reasons that favor a particular group of people. This places some persons above the enforcement power of the international community, while subjecting others. The second is that that group of people in some way plays an important role in directing the efforts of the court while some play little or no role. These two features together pose an severe challenge to the legitimate authority of the court assuming the centrality of equality as a ground of legitimate authority. It implies in some sense that complying with the demands for open investigation, the arrest warrants, the indictments and convictions and sentencing of the

court amounts to a kind of subordination of the persons who comply to those who are privileged by the court. I think it makes sense to see this as a public realization of inequality among persons. To the extent that the duty to treat one’s fellow human beings as equals is part of what grounds the duty to comply with authoritative commands, this undermines the legitimacy of those commands.\textsuperscript{14}

I want to make this discussion less abstract by discussing one of the deep kinds interests that can be at stake in the activities of the court and how these interests appear to be treated quite unequally by the court. Typically, the court concerns itself with activities undertaken in civil wars or interstate wars. And the current activities of the ICC often involve introducing a criminal proceeding into an ongoing conflict.\textsuperscript{15} Such a criminal proceeding can change the dynamics of a conflict situation in a way that can sometimes interfere with the making of a political solution to the problem. This is where the prosecutorial power of the ICC seems to take on special importance. It introduces the possibility that a situation of conflict is now turned into a criminal justice process, with all the complexity that this brings to the situation. Suppose you have an ongoing negotiation between two parties and both of them have engaged in very bad behavior, partly in response to each other. Sometimes these negotiations have a chance of actually resolving the problem between the parties and in the country as a whole. Now a prosecutor steps in and decides to investigate one and then issues an arrest warrant for that one. This may seriously disrupt the negotiations because a criminal procedure is meant to preempt any negotiation between persons and the party who has been indicted. It may prolong the conflict.

To be sure, this only happens when people in the conflict respect the judgment of the court. This may not happen in a lot of circumstances. But the point here is to explore the legitimacy of the court and thus whether people have duties to respect the judgment of the court.

The ICC introduces itself during the conflict thus potentially seriously changing it. This poses a problem of legitimacy because there are legitimate interests in a society being able to negotiate itself out of a conflict and the intervention of the ICC in the middle of a conflict may retard this development.

\textsuperscript{14} I develop this idea in some detail in \textit{The Constitution of Equality: Democratic Authority and Its Limits} (Oxford: Oxford University Press, 2008) chap. 6.

\textsuperscript{15} This is a difference between many of the situations the ICC is introducing itself into and the Special International Tribunals in that the latter are generally introduced after the conflicts were over.
Admittedly the ICC may help the process by deterring people from committing

Admittedly the ICC may help the process by deterring people from committing
crimes or by bringing a measure of truth and respect for human rights and the rule of law
to the process. But it also risks damaging the processes of negotiation.

To be sure, the ICC Prosecutor can decide not to investigate a situation in the
“interests of justice.” It is unclear what this means, but it may refer to the possibility
that prosecution of the crimes of one of the parties could make things worse than they are
already. It would no doubt be sound policy not to interfere in this kind of case. But
notice the underlying assumption here, which is that the prosecutor can now make
decisions about matters of central political importance. Here we have the prosecutor
substituting her judgment for that of the persons who are in the conflict and whose
greatest interests may lie in finding a peaceful solution to the problem at hand.

We know that prosecution for crimes is often taken off the table in conflicts or
particularly in the negotiations to end the conflicts. Many societies opt for truth and
reconciliation commissions; some opt for complete or partial amnesty. And these
decisions reflect the judgment that the offending party is powerful enough to upend the
negotiations and prolong the conflict. These are ways in which, in the judgment of the
persons in the conflict, the conflict is ended and a better political arrangement arises.
This shows the extent to which the act of prosecution is a political act.

Usually the prosecution attempts to enter into a conflict by taking sides in a
conflict that is usually brutal on both sides. If it tries to be even handed it risks
undermining the investigation altogether. No one will cooperate. But the tendency to
take sides is one that leaves the losing side with a strong sense of unfair dealing. It can
often see the Court and its major power backers as trying to tilt the conflict towards an
outcome favored by the major powers.

There is an analog to the problem of humanitarian intervention here. We have a
power that is not from the society at issue making decisions about how best to advance

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16 See Article 53 of the Rome Statute. See for discussion of this expression, William
Schabas, “Prosecutorial Discretion v. Judicial Activism at the International Criminal
Court,” Journal of International Criminal Justice 6 (2008), 731-761, 748.
17 See Carlos Nino, “The Duty to Punish Past Human Rights Abuses Put into Context,”
Yale Law Journal 100 (1991) pp. 2619-2640 for a discussion of the political complexities
in the particular case of Argentina.
18 See Kathryn Sikkink, “From Pariah State to Global Protagonist: Argentina and the
Struggle for International Human Rights,” Latin American Politics and Society vol. 50,
n.1, p. 18. See also Colleen Murphy, “Political Reconciliation and International Criminal
Trials,” in International Criminal Law and Philosophy (Cambridge: Cambridge
University Press, 2010), pp. 224-244 for discussion.
justice in that society. Usually the intervener is from a very powerful society, which is not itself likely to be subject to this treatment. Humanitarian intervention is not usually very successful because it is not accountable to the society which it is claiming to try to help.

Of course these are the reasons the US refuses to be a party to the Rome Statute. It does not want an unaccountable prosecutor investigating American citizens. The consequence of this strategic ploy was that the prosecutor of the ICC spent a number of years trying to show the US that it was not unfriendly to its interests. It finally succeeded in getting the US to offer some support to the ICC.

The facts that the ICC activities can impose such great risks to the political processes of states that are in civil wars and that it cannot do so with the major powers does seem to me to impugn the legitimacy of the ICC. It may not make the ICC illegitimate but it does diminish the force of the duties of parties in conflict zones to allow the ICC to preempt their negotiations. I am not in a position to know exactly how serious the risks are. Sometimes they are probably quite high and other times not. But this is an effect that must be taken into account in assessing the legitimacy of the ICC.

The second legitimacy worry is connected with the expressive or symbolic character of investigation, trial and punishment. The ICC seems to be saying something like, crimes committed by those who are not friends of the most powerful states are serious and it is condemning them, those committed by the major powers and their allies and friends are not so serious and it does not condemn them. This is an important dimension of the issue of legitimacy because part of the basic point of a court such as the ICC is expressive. It is to condemn certain outrages against persons in the name of the whole of international society and to express solidarity with the victims. It is the international society’s condemnation of the behavior and it is a condemnation in terms of the laws of that international society. Of course, part of the purpose of a court is to bring about punishment for offenders that has the effect of deterring them and others from committing the same crime. But it is also essential to a court that it engages in

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21 The deterrent effect of international tribunals is still quite uncertain. Some have argued that the deterrent effect is quite small. See Mark Drumbl, Atrocity, Punishment and
condemnation of certain behaviors of agents and the punishment that it inflicts on those agents is meant to communicate to them and to others the gravity of the crime they have committed and the extent of the condemnation of that crime from the international community.

The condemnatory effect of a verdict is significantly reduced when other similar crimes are not being prosecuted for no apparent reason other than that the criminals are friends of the powerful. First, it suggests that the international community does not condemn the crime per se but only the commission of the crime by certain actors who are not, or do not have the protection of, major powers. And the international community is not expressing solidarity with the victims as such but only with those who are properly connected. The fundamental message the international community is concerned with sending is that grave crimes against human beings are to be condemned and the victims in some way vindicated. But this cannot be so clear in the case of such systematically biased trials and punishments. Second, it suggests that it is not the international community per se that is condemning the action. For the international community’s action must take on an impartial character. It cannot merely single out some violations of a law as condemnable. For condemnation to be in the name of the international community it must be one that attends a crime because it is a violation of the law of that international community. But this is at least partly defeated by the idea that only some violators of the law are condemned, ones who are not friends of the powerful and where the explanation of this selection is rooted in the very structure of the court.

The consequence of these two observations is that the expression of condemnation and solidarity is muted or uncertain. And to the extent that the punishment is in part justified because it is such an expression, the justification is lessened. Furthermore, since the court seems so strongly biased in this way the legitimacy of the court is impugned. What this implies is that the duties to comply with the court’s directives are lessened. Investigations, arrest warrants, indictments and convictions are weaker reasons for action than they would be were the court to act more impartially. This plays some role then in undermining the capacity of the court to play the role that legitimate institutions are to play, namely settle issues in a morally satisfactory way when there is disagreement. In particular, a legitimate court should be able to create reasons for compliance even for those who disagree with its verdict and ultimately even when it is mistaken. But given the lack of impartiality, the reasons the court gives may be weak and may not be sufficient to justify compliance when there is significant disagreement.

This may not imply that the court’s actions give no reasons for compliance; it still stands up to some extent for the rule of law. It may still correctly convict and condemn persons who ought to be convicted and condemned. It may still be capable of some deterrence and thus may protect some people from terrible treatment. It may represent some progress over the past. And it may still be the best hope humanity has for pursuing criminal justice on the international level.\textsuperscript{22} Of course all of these considerations need to be empirically assessed and we do not have a great deal of information about the effectiveness of the court even in the situations in which it is allowed to operate.

My argument does not rely in any way on the idea that states are sovereign and that they should therefore be immune to prosecution. My argument is meant to proceed from an essentially cosmopolitan standpoint. But it does accord significant respect to actors in societies that are in conflict. Even if they have engaged in very bad action, they may still have significant capacities to negotiate reasonable deals with their opponents that can help their societies emerge from conflict and heal.

\textit{Conclusion}

I think of myself as a supporter of the basic project of the ICC. This paper has attempted to explore some puzzles about the legitimacy of the ICC in the light of its selective prosecution of cases. The basic worry is that the Court may look like it is acting against the interests of conflict prone societies in order partly to advance the interests and concerns of the major powers. As it is currently constituted it is hard to avoid this conclusion. It may be that changes to the institution could alter this effect. For instance, it may perhaps be that a system of courts would work better if they each had some significant regional character. Some successful experience with regional and hybrid courts in West Africa, which would be more responsive to the interests of the people whose lives are at stake, might be an improvement.\textsuperscript{23}

I have only attempted here to argue how the selective prosecution of the ICC may undermine its legitimacy at least to some extent. This cannot be a full account of its value. There may be reasons for continuing to support the ICC despite the worries I have tried to articulate. A fuller examination would explore these concerns.
