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JUDGING GLOBAL JUSTICE: ASSESSING THE INTERNATIONAL CRIMINAL COURT

DIANE F. ORENTLICHER*

When Trinidad and Tobago suggested in 1989 that the United Nations establish a permanent international criminal court, its proposal seemed nothing if not quixotic. After all, proposals to create such a court had disappeared into diplomatic oblivion for roughly half a century. And so the entry into force of the Rome Statute of the International Criminal Court ("Rome Statute") just four years after its adoption surprised even the court's most ardent proponents. After a protracted period of gestation, the international criminal court (ICC) seemed, proverbially, to be an idea whose time had come.

Yet the court has been steeped in controversy since its statute was adopted over the strenuous objection of the United States in July 1998. Although largely isolated in its particular brand of opposition to the ICC, the United States has been a formidable (if lonely) adversary. It has waged pitched battles against the court on numerous fronts, threatening, for example, to: veto United Nations Security Council resolutions extending the mandate of peacekeeping operations unless U.S. forces are

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4 The United States was one of seven states that voted against the Rome Statute in July 1998, but it has been almost singular in its muscular opposition to the court in the period since then. While several other states, including Israel, remain opposed to ICC jurisdiction over nationals of non-party states, no other country has mounted a concerted campaign to undermine the court.
assured immunity from ICC jurisdiction,\(^5\) deny bilateral military assistance to states that have ratified the Rome Statute, and invade ICC detention facilities in the event an American national is ever detained there.\(^6\)

In my view, the United States has raised a number of serious and legitimate concerns. But as I will elaborate later, the U.S. government has undermined its position by advancing its concerns through strategies that are counter-productive at best.

Unfortunately, too, U.S. opposition has tended to eclipse other challenges surrounding the first international criminal court in history with a potentially global remit. Yet with the ICC now open for business, it is more important than ever to attend to the full range of challenges surrounding its operation. And so I would like to place U.S. concerns about the ICC in a broader framework of questions that deserve attention at the dawning of the ICC's operational life.\(^7\)

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\(^6\) These and other measures are authorized by the American Servicemembers' Protection Act [hereinafter ASPA]. Section 2005(a) directs the President to use the U.S. vote in the U.N. Security Council to ensure that any resolution authorizing a peacekeeping operation exempt “at a minimum, members of the Armed Forces of the United States participating in such operation from criminal prosecution or other assertion of jurisdiction by the International Criminal Court for actions undertaken by such personnel in connection with the operation.” Section 2007 prohibits U.S. military assistance to “the government of a country that is a party to the International Criminal Court,” subject to various exceptions. Section 2008(a) authorizes the President to “use all means necessary and appropriate to bring about the release of any [US national or ally] who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.”

\(^7\) The Rome Statute entered into force on July 1, 2002, in accordance with Article 126(1) of the statute. The ICC's first panel of judges was sworn into office on
I start with the basic proposition that we should approach the ICC with a fairly clear sense of what we expect it to achieve. More particularly, we need to identify benchmarks for assessing its performance. How will we know if it has succeeded in its mission—and how will we know when it is falling short? Before I proceed, let me emphasize that this essay only begins to tackle this question, focusing on several benchmarks of success particularly pertinent in the early years of the court’s work.

I. THE ERA OF ASSESSMENT

Fortunately, in addressing these questions we no longer write on a blank slate. We can now tap a rich reservoir of experience in clarifying our expectations of the ICC. For the new court joins a diverse and growing repertoire of courts and other institutions designed to respond to mass atrocity. Best known among these are two tribunals created by the United Nations Security Council in the early 1990s to prosecute individuals responsible for “ethnic cleansing” in the former Yugoslavia and genocide in Rwanda; I will mention other models later.


This is not to say, however, that our expectations should be cast in iron. As the work of the ICC progresses, our sense of what it can reasonably achieve and contribute will doubtless evolve.

For a while, it was a commonplace that legal experts most familiar with these tribunals were hesitant publicly to criticize flaws in their operation. These experts wished the tribunals well, and worried about undermining the new institutions at a time when they seemed too fragile to withstand substantial criticism. Today, that reticence has given way to a robust industry of assessment, much of it critical, most of it constructively so.

A recurring theme in this emergent literature is to challenge the canonical claims espoused by champions of global justice. To be honest, proponents of international criminal courts and other institutional responses to mass atrocity have left ourselves open to this sort of challenge, for we have at times made strong claims without providing much in the way of empirical support for our underlying assumptions. Familiar examples include: A standing international criminal court will be a powerful antidote to the impunity that abets mass atrocity. Or this: By individualizing responsibility, criminal prosecutions avoid the taint of collective

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(1998); S.C. Res. 1329, supra; S.C. Res. 1411, supra; and S.C. Res. 1431, 57th Sess., 4601st mtg., U.N. Doc. S/RES/1411 (2002) [hereinafter “ICTR Statute”]. In this essay I will refer to the Yugoslavia tribunal as the ICTY, and will refer to the Rwanda tribunal as the ICTR.


And this familiar claim was an asserted basis for two Security Council resolutions establishing war crimes tribunals for the Balkans and Rwanda, respectively: Without justice, there can be no lasting peace. A variation on the same theme has been a guiding principle for proponents of truth commissions: Without truth, there can be no genuine reconciliation.


Both the ICTY and ICTR were established by the U.N. Security Council as enforcement measures adopted under Chapter VII of the U.N. Charter with the aim of restoring international peace and security. Security Council Resolution 827 (1993), supra note 9, which established the ICTY, included the following preambular language:

Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would . . . contribute to the restoration and maintenance of peace.

Security Council Resolution 955 (1994), supra note 9, which established the ICTR, included similar preambular language, with the additional phrase “would contribute to the process of national reconciliation and” before “to the restoration and maintenance of peace.” Similarly, a resolution of the U.N. General Assembly requesting the Secretary-General to resume negotiations with the government of Cambodia aimed at establishing a court to prosecute those most responsible for Khmer Rouge-era atrocities “[r]ecogniz[ed]” that criminal accountability of the perpetrators is “a key factor in ensuring . . . ultimately, reconciliation and stability within a State.” G.A. Res. 57/228A, U.N. GAOR, 57th Sess., Agenda Item 109(b), pmbl, U.N. Doc. A/RES/57/228 (2002).

Skeptics have challenged these and other articles of faith on various grounds. Here are a few: There is no evidence that existing tribunals have deterred atrocious crimes; in fact, those who are inclined to commit appalling crimes are unlikely to be deterred by the remote possibility that they will one day be called to account before an international court. And this: Proponents of punishment do not understand that prosecution can stand in the way of peace. Leaders with blood on their hands may cling more tenaciously to power if they cannot secure an airtight amnesty. Another: Prosecutions (as well as truth commissions) may stir the pot of ethnic grievance rather than promote reconciliation.

While these views challenge the empirical assumptions underlying claims in support of prosecutions, other critiques question basic premises of proponents' claims. Against the claim that prosecutions avoid the taint of collective guilt, for example, Laurel Fletcher and Harvey Weinstein suggest that this may be a defect rather than virtue. In their view, prosecuting perpetrators of mass atrocity may enable others who aided the defendants’

18 For a variant of this claim, see Madeline Morris, Lacking a Leviathan: The Quandaries of Peace and Accountability, in Post-Conflict Justice 135 (M. Cherif Bassiouni ed., 2002). Cf. Carlos Santiago Nino, Radical Evil on Trial x (1996) (“the risk of being punished for human rights violations tends to make the leaders of authoritarian regimes reluctant to surrender power in the first place”).
19 This appears to be the prevailing view in Mozambique, which has apparently achieved a significant measure of stability in the aftermath of brutal civil war by agreeing not to “dig up the past.” See Hayner, supra note 15, at 186-95. Cf. Mark A. Drumbl, Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda, 75 N.Y.U.L. Rev. 1221, 1233 (2000) (asserting that “postgenocidal legal initiatives can play only a small role in promoting long-term peace in Rwanda, but can present significant impediments to the emergence of this peace”).
20 That is, the critiques summarized above take the form, “Proponents of prosecutions believe that trials will have X effect, but prosecutions are just as/more likely to have Y effect.”
crimes to avoid confronting their own responsibility if criminal trials are not accompanied by other measures of social repair.\textsuperscript{21}

These and other critiques provide a salutary invitation to bring greater rigor to bear in assessing the contributions of international tribunals and other responses to appalling crimes. Particularly welcome is Fletcher's and Weinstein's call for empirical testing of the effects of prosecutions and other mechanisms of transitional justice.\textsuperscript{22} Yet some critiques suffer from the same infirmities they have faulted in the claims of tribunal proponents. Various critiques have been flawed by internal inconsistencies as well as by manifestly fewer inhibitions about making unsupported claims than their authors would allow proponents of prosecutions. For example, skeptics who question the deterrent power of international tribunals on the ground that dictators are unlikely to be constrained by the risk of prosecution seem confident that those same dictators would be deterred from relinquishing power if they faced prosecution before an international tribunal.\textsuperscript{23}

Another recurring feature of critiques of international tribunals is their reliance on short-term measures. For example, the efficacy of the Yugoslavia war crimes tribunal has frequently been called into question on the ground that the court has had little discernible impact on public attitudes in the former Yugoslavia relating to war crimes.\textsuperscript{24} Yet the Yugoslavia Tribunal has

\textsuperscript{21} See Fletcher & Weinstein, \textit{supra} note 11, at 580-81. \textit{But see id.} at 628 (suggesting that the record of a trial "permits unindicted perpetrators and bystanders to confront their complicity in the atrocities").

\textsuperscript{22} See, e.g., \textit{id.} at 584-85, 592, 595.

\textsuperscript{23} See, e.g., Goldsmith & Krasner, \textit{supra} note 17, at 54-55.

\textsuperscript{24} See, e.g., Fletcher & Weinstein, \textit{supra} note 11, at 601, 603.
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not even completed its most important case to date—the Prosecutor v. Slobodan Milošević. I do not believe that any proponent of the Tribunal's work has claimed that the court would revolutionize opinion in the former Yugoslavia overnight.

As has often been noted, the Nuremberg trial had little discernible effect on German public opinion right away. Instead, its lessons apparently took root only a generation later, when Germany undertook its own prosecutions of Nazi criminals beginning in the 1960s. This experience reinforces what common sense suggests: We should not be surprised to find initial resistance to the ICTY's lessons in individual responsibility among many citizens of the former Yugoslavia—or to see a different judgment emerge with the passage of time.

And so it is noteworthy that there are already early indications that the trial of Milošević is having some impact on public

25 Fletcher and Weinstein challenge the efficacy of the ICTY in part by citing the views of thirty-two judges and prosecutors in Bosnia and Hercegovina whose views, the authors say, undercut assumptions behind ICTY proponents' claims about the contributions of prosecutions to reconciliation. See Fletcher & Weinstein, supra note 11, at 580-81 & n. 20, 585 & n. 36. Leaving aside issues bearing on the representativeness of this sample, the study reflected interviews undertaken in 1999—the year that the ICTY indicted its symbolically most important defendant, former Yugoslav President Slobodan Milošević. See Initial Indictment, The Prosecutor v. Slobodan Milošević et al., No. IT-02-54 (ICTY May 24, 1999), available at http://www.un.org/icty/indictment/english/mil-ii990524e.htm. Also, the ICTY did not undertake significant efforts to educate legal professionals in the former Yugoslavia about the Tribunal's work until 1999. See Tolbert, supra note 11, at 11. It should be noted that Fletcher and Weinstein acknowledge in general terms the temporal limitation on their conclusions. See Fletcher & Weinstein, supra note 11, at 585-86. See also Report: Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors, 13 BERKELEY J. INT’L L. 102, 113 (2000) (noting limitations in the study data stemming from the "small size and non-random nature of the sample").

26 As this observation suggests, another recurring feature in the new genre of critique is a tendency to overstate the claims asserted by proponents of prosecution. For example, Fletcher and Weinstein say that "many trial advocates justify their efforts under the assumption that a focus on legal processes is adequate to resolve the individual and social harm" resulting from mass atrocity. Fletcher & Weinstein, supra note 11, at 584. While leading proponents of prosecutions place considerable emphasis on the value of criminal trials, I am not aware of any that would accept this characterization of his or her position. Still, the perception of Professors Fletcher and Weinstein suggests that many advocates of prosecutions may not be expressing clearly their view that prosecutions do not by themselves address the multiple needs of societies that have been ravaged by mass atrocity.

opinion in Serbia. Bogdan Ivanišević, a Serbian staff member of Human Rights Watch, has seen inklings of progress in the year since the trial of Milošević began:

Even though they have resistance to hearing non-Serb witnesses, people do take into consideration what they hear. The trial has caused reduced myth-making in Serbia. You don’t hear, as you did prior to the trial, . . . that [the massacre at] Srebrenica didn’t happen or that the Muslims killed themselves. I wouldn’t minimize this reduced space for rewriting history. As for acknowledgment of our side’s crimes, it’s a psychological barrier too difficult [to cross—admitting] that the policy we supported was criminal. It will take time. It may take a new generation that was not implicated.28

In sum, then, the ICC will doubtless benefit from a rich and deepening experience with evaluating the court’s two most important contemporary precursors. Yet we need to make further progress in the direction that has been charted by recent attempts to assess the contributions of international criminal tribunals and other forms of justice for mass atrocity. We must do better not only at defining our expectations, but in testing them through empirical assessments. More broadly, rigorous assessments are indispensable to the legitimacy of international tribunals—a point to which I will return.

II. BENCHMARKS OF SUCCESS

By what standards, then, should we judge the ICC?29 Some are self-evident: Clearly, for instance, the court must scrupulously adhere to internationally-recognized standards of fair process. Bearing in mind the court’s legacy, its judgments must be able to withstand the test of historic scrutiny. A key challenge

29 As noted earlier, this essay touches on only a few benchmarks for assessing the court. This section focuses on assessment criteria that are especially relevant in the early years of the ICC rather than on the broader aims underlying the court’s creation, such as deterring future crimes and contributing to social reconstruction in societies ravaged by mass atrocity.
will be to sustain the relentless scrutiny necessary to ensure consistent compliance with standards that assure the integrity of judicial process. Also, our experience with the Yugoslavia and Rwanda tribunals leaves little doubt that the ICC will be judged in part by its success in apprehending those whom its prosecutor has indicted and on its ability to complete trials efficiently.

More difficult questions of assessment—at least those I will mention here—fall into two broad categories. The first relates to how the prosecutor exercises his discretionary power and how well he is constrained in the exercise of that discretion. This category covers a cluster of interrelated concerns. A key question in this regard is how broadly the prosecutor will interpret his mandate to prosecute only "the most serious crimes of concern to the international community as a whole." At least some human rights advocates will press for a comparatively broad interpretation. But an interpretation that is excessively broad would surely fan skeptics' fears of a global Kenneth Starr.

A second and central concern falling into the first category relates to the all-important question of how the prosecutor and judges will interpret and enforce the Rome Statute's principle of complementarity. Here, too, the ICC's chief officers will be subject to significantly different expectations from vocal constituencies. Since this issue has received considerable attention, I would like to focus instead on a somewhat distinct aspect of prosecutorial discretion that has received comparatively little attention. The question I have in mind relates to how the ICC fits in—more particularly, how it should fit in—to the increasingly

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30 Cf. Tolbert, supra note 11, at 9 (noting that more than three years after its creation, the ICTY "had only a handful of [indicted suspects] in custody . . . , causing at least one leading commentator to call for its disbandment").

31 Rome Statute, supra note 2, pmbl. The Rome Statute allows some berth here. For example, Article 8 establishes the ICC's jurisdiction over war crimes "in particular"—rather than only—"when committed as part of a plan or policy or as part of a large-scale commission of such crimes."

32 See Rome Statute, supra note 1, pmbl., ___ 10; arts. 1, 17. Pursuant to this principle, the ICC may not proceed with a case that is being or has been investigated or prosecuted by a state that has jurisdiction, unless the domestic proceedings have been tainted by the state's inability or unwillingness to conduct a genuine inquiry or prosecution. See id., art. 17(1)(a)-(b).

33 See, e.g., William A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 66-70, 101-03 (2001); Alvarez, Lessons from Rwanda, supra note 11, at 476-79.
crowded landscape of institutions newly able and willing to enforce international humanitarian law.

Besides the two ad hoc tribunals I have already mentioned, in recent years the United Nations has created and administered a new breed of court, constructed out of national and international elements, in the post-conflict regions of Kosovo and East Timor.\textsuperscript{34} Another type of hybrid court has been established in Sierra Leone.\textsuperscript{35} In each instance, a majority of senior court officials are "international"\textsuperscript{36} jurists appointed by the United Nations, while the rest are nationals of the country or region in question. Each of these courts applies an amalgam of international and local law.\textsuperscript{37}

Alongside international and mixed tribunals, national courts have lately assumed growing responsibility for prosecuting violations of international humanitarian law. Many are prosecuting crimes committed in their own territory, but the past few years have also seen growing recourse to universal jurisdiction. This principle, widely associated with European proceedings against former Chilean president Augusto Pinochet, authorizes every state to prosecute a small number of atrocious crimes, such genocide and crimes against humanity. Meanwhile, dozens of countries have established truth commissions, non-judicial bodies established to investigate past patterns of mass atrocity, usually


\textsuperscript{35} The Special Court for Sierra Leone was established pursuant to a bilateral agreement between the United Nations and Sierra Leone. \textit{See id.} A different type of hybrid court may be established for Cambodia. \textit{See id.}

\textsuperscript{36} This term has come to be used to refer to jurists who are not nationals of the country in which the hybrid court operates. \textit{See, e.g., Report of the Secretary-General on Khmer Rouge Trials}, U.N. GAOR, 57th Sess., Annex, Agenda Item 109(b), \textsection 33-34, 36, 38, 44 (2003).

during a specified period in a particular country or region. Although most truth commissions have been established at the national level, some have been established by the United Nations.

These institutions are key components of a new architecture of transnational justice still taking shape. The emergent system presents new challenges as well as opportunities. In particular, the proliferation of institutions newly able and willing to seek justice for atrocious crimes presents a challenge that long seemed unimaginable—the need to craft principled guidelines for choosing among a diverse range of courts empowered to bring wrongdoers to account.

Although the Rome Statute provides some guidance concerning which court should have priority when more than one venue is available, it leaves many questions unanswered. For example it is not altogether clear whether the ICC would or should have priority over a national court exercising universal jurisdiction (as distinct from a national court prosecuting crimes committed in its territory or by its nationals). Nor does the Rome Statute tell us when it might make sense to establish new hybrid courts in countries recovering from savage conflict rather than leave the onus of prosecution to the ICC.

Of course, these decisions will not fall solely to the ICC prosecutor. After all, he will not have the authority to create a

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38 The leading treatment of truth commissions is Hayner, supra note 15.
39 These include commissions established in respect of El Salvador and Guatemala.
40 The outlines of some principles are already taking shape. This may seem the antithesis of a guideline, but one principle that has already garnered wide support is that there is no one-size-fits-all response to mass atrocity. See, e.g., Kritz, Coming to Terms with Atrocities, supra note 13, at 152; Druml, supra note 19, at 1225; Alvarez, Lessons from Rwanda, supra note 11, at 370; M. Cherif Bassiouni, Searching for Peace and Achieving Justice: The Need for Accountability, 59 Law & Contemp. Probs. 9, 23 (1996). Another widely accepted insight is that criminal prosecutions, when appropriate, hardly exhaust the needs of societies emerging from mass atrocity. Thus, for example, truth commissions and reparations programs are rarely seen today as mutually exclusive alternatives to prosecutions. See, e.g., Druml, supra note 19, at 1225-26 (arguing that, in the wake of genocide, it is not necessary to "select either criminal trials or truth commissions or amnesties" since post-genocide policies "are not mutually exclusive").
41 For analysis of this ambiguity, see Orentlicher, The Future of Universal Jurisdiction, supra note 34.
42 In respect of this last question, I find the basic concept of hybrid courts appealing—in some respects more attractive than the prospect of prosecutions before the ICC. By bringing justice home, mixed tribunals can contribute more effectively
new hybrid court. But the prosecutor can and surely will play an important role in shaping public expectations and diplomatic positions concerning the appropriate forum for prosecution.\footnote{43} And, of course, the prosecutor will play a key role in ICC determinations of admissibility when he wishes to proceed with an investigation over the objections of a state that seeks exclusive jurisdiction in its courts.\footnote{44}

While the ICC must be able to act when national systems fail to provide justice for mass atrocity, its success will also be measured by its ability to bolster domestic judicial systems. Even the ICTY, which does not have a mandate to provide assistance to domestic courts in the Balkans, has been justifiably faulted for failing to contribute to "the development of courts and justice systems" in the former Yugoslavia, "particularly in relation to... to national processes of reckoning with mass atrocity than the remote justice dispensed in The Hague and Arusha or by national courts exercising universal jurisdiction. Also, by including national judges, prosecutors and staff, mixed tribunals can bolster the rule of law in countries whose judicial system has been decimated. But this view comes with a strong caveat: The potential advantages of hybrid tribunals can be realized only if we do the job right. With the possible exception of the Special Court for Sierra Leone, the new generation of mixed tribunals has fallen short of its full potential. That said, the prosecution team in Dili has recently defied expectations by indicting senior Indonesian officials and other leading suspects in relation to the sweeping violence that surrounded the 1999 plebiscite in East Timor. \textit{See} Jill Jolliffe, \textit{Wiranto Faces UN Counts Over Timor, The Age} (Melbourne), Feb. 26, 2003, at 12; Guido Guilart, A.P., \textit{U.N. Indicts 8 on War Crimes in E. Timor}, Feb. 25, 2003; Guido Guilart, A.P., \textit{East Timor War Crimes Panel Indicts 49}, Feb. 28, 2003; Serious Crimes Unit, Information Release: Crimes Against Humanity, \textit{Rape Charges for Five TNI Soldiers} (Apr. 10, 2003). Still, gaining jurisdiction over the indicted suspects presents a daunting challenge.

\footnote{43} The first chief prosecutor of the ICTY and ICTR, Richard Goldstone, may have helped persuade the U.N. Security Council to link the two tribunals institutionally. Goldstone took up his post as chief prosecutor of the ICTY in August 1994. The Security Council established the ICTR in November 1994. When creation of the ICTR was under discussion, Goldstone took the position that linking the two courts through a common prosecutor and appeals chamber would avoid inconsistency in the development and interpretation of legal principles.

\footnote{44} Under the Rome Statute, the determination of admissibility is made by ICC judges. \textit{See} Rome Statute, \textit{supra} note 2, art. 17. The prosecutor will, however, play a key role in initiating investigations and countering state objections to the admissibility of a case. No less important, he may – and at times surely will – encourage states to carry out their own criminal proceedings and provide practical assistance to enable them to do so effectively. \textit{See} International Criminal Court Office of the Prosecutor, "Paper on some policy issues before the Office of the Prosecutor,” at 5 (2003).
The case for ICC assistance to domestic legal systems is even stronger. Although the ICC does not have an explicit mandate to strengthen domestic judicial systems, "such assistance is within the spirit of the ICC Statute."46 In contrast to the ICTY, which has primacy over domestic trials,47 the ICC prosecutor must defer to a state that has jurisdiction and is pursuing the crime in question, unless that state is unwilling or unable genuinely to conduct the criminal proceeding.48 While not an explicit mandate to assist domestic prosecutors and judges, this feature of the Rome Statute reflects a strong bias in favor of local justice. More than that, it signifies the ICC's unique potential to enlarge the space for domestic prosecutions by providing a credible threat of international prosecutions if domestic institutions fall short.49 And so a key test of the ICC's success will be the extent to which the looming prospect of prosecution in The Hague inspires governments to undertake credible domestic investigations and, where warranted, prosecutions.

Finally, another broad test of the ICC's success sifts down to that all important but notoriously elusive notion of legitimacy. We do not yet know much about how perceptions of the legitimacy of an international tribunal affect its impact. For reasons I suggested earlier, this question deserves serious study. But it seems reasonable to suppose that the ICC's effectiveness in deterring crimes and, perhaps, contributing to national processes of reconciliation will turn in significant measure on perceptions of its legitimacy.50

Some of the issues I have already mentioned are surely relevant to the question of ICC legitimacy. For example, public perceptions of how responsibly the ICC prosecutor exercises his discretionary charging power will be crucial. In addition, the

45 Tolbert, supra note 11, at 12.
46 Id. at 17.
47 See ICTY Statute, supra note 9, art. 9(2). See also ICTR Statute, supra note 9, art. 8(2) (similarly establishing primacy of ICTR over national courts).
48 Rome Statute, supra note 2, arts. 17(1)(a), 18(2).
49 Anecdotal evidence suggests that the ICC has already performed this function.
50 Perceptions of the court's legitimacy will doubtless vary among and within various political and professional communities.
court’s standing will turn in large measure on the perceived quality of judicial rulings and the reasoning provided in support of judgments.\footnote{Cf. Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 YALE L.J. 273, 318-23 (1997) (identifying the quality of judicial reasoning as a key factor in the comparative success of supranational tribunals).}

\section*{III. A Plea for Integrity in Argument}

But of course the ICC came under fierce attack even before its judges rendered an opinion or its chief prosecutor was named. U.S. officials and other critics have challenged the legitimacy of the ICC on two principal grounds relating to its basic structure.

One challenge relies on a certain understanding of state sovereignty. In brief, U.S. officials and other critics of the ICC assert that the Rome Statute violates basic tenets of international law by allowing an international court to exercise jurisdiction over nationals of states that have not adhered to the court’s statute.\footnote{See, e.g., Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies, American Foreign Policy and the International Criminal Court (May 6, 2002), available at http://www.state.gov/p/9949pf.htm; David J. Scheffer, U.S. Policy and the International Criminal Court, 32 CORNELL INT’L L.J. 529, 532-33 (1999).} In the interests of brevity, I will leave aside legal arguments relating to ICC authority over nationals of non-consenting states\footnote{I have addressed this subject in Orentlicher, The Future of Universal Jurisdiction, supra note 34; and Diane F. Orentlicher, Politics by Other Means: The Law of the International Criminal Court, 32 CORNELL INT’L L.J. 489 (1999).} and simply say here that there has been a disturbing dearth of intellectual honesty in the way this challenge has often been framed.

For example, some U.S. critics claim or imply that international law has never countenanced the possibility of a treaty providing for jurisdiction over nationals of non-party states.\footnote{For example, two writers breathlessly assert: “In an astonishing break with the accepted norms of international law, the Rome treaty would extend the ICC’s jurisdiction to the citizens of countries that have not signed and ratified the treaty.” Lee A. Casey & David B. Rivkin, Jr., The International Criminal Court vs. The American People, The Heritage Foundation Backgrounder No. 1249, Feb. 5, 1999, at 2 [hereinafter Casey & Rivkin, ICC vs. American People].} Yet the United States has adhered to various treaties that do just
that. These include treaties dealing with war crimes,55 torture56 and terrorism.57 Each of these conventions requires states parties to prosecute or extradite persons in their territory who are alleged to have committed defined offenses. These provisions apply regardless of the nationality of the suspect or the site of the alleged crime.

This is not to suggest that the concerns underlying objections to ICC jurisdiction over non-party states are wholly without merit.58 The point rather is that legitimate concerns relating to the Rome Statute would be more persuasive to those who need to be convinced if they were advanced without resort to hyperbole or misstatement.

The second key challenge focuses on issues of democratic legitimacy. To some extent this challenge mirrors criticisms premised on sovereignty: Critics have charged that the ICC lacks democratic legitimacy over nationals of states that have not accepted the court’s authority.59 Another dimension of the democracy critique is the claim that the ICC is not sufficiently hedged with the sort of checks and balances that constrain officials in

56 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, arts. 5 & 7, 1465 U.N.T.S. 85.
58 The most sophisticated presentation of these concerns is in Madeline Morris, High Crimes and Misconceptions: The ICC and Non-Party States, 64 LAW & CONTEMP. PROBS. 13 (2001).
democratic states.\textsuperscript{60} Many worry as well that ICC judges will engage in expansive lawmaking from the bench by necessity – international crimes are defined with less precision than most national crimes.\textsuperscript{61}

We must take very seriously indeed the need for safeguards that ensure ICC accountability. But the United States government and its intellectual allies have diminished the persuasive power of their arguments by overplaying their hand. For instance, the United States is right to insist upon an accountable prosecutor. But to say that the ICC prosecutor is largely unconstrained, as the U.S. government and its surrogates routinely charge,\textsuperscript{62} is at best disingenuous. Thanks in large part to effective U.S. negotiating in Rome, the ICC prosecutor is constrained by multiple layers of institutional oversight.\textsuperscript{63}

The unfortunate irony is that, by deploying disingenuous arguments, ICC skeptics diminish the quality of public debate about their concerns and thereby undermine one of the most important constraints on the court’s operation. Citizens who are accurately informed about the ICC are far better equipped to provide oversight than a public that has been fed a steady diet of inaccurate and misleading claims.

The Bush administration has compounded these problems by refusing even to participate in ICC-related meetings aimed at

\textsuperscript{60} See, e.g., Goldsmith & Krasner, supra note 17, at 53-54; Henry A. Kissinger, The Pitfalls of Universal Jurisdiction, 80 FOREIGN AFF. 86, 90-91 (July/Aug. 2001).


\textsuperscript{62} See, e.g., Grossman, supra note 52 (asserting that the Bush administration believes “the ICC is an institution of unchecked power” and that “there was a refusal [in Rome] to constrain the Court’s powers in any meaningful way”); Casey & Rivkin, ICC vs. American People, supra note 54, at 3 (“the ICC treaty is an unchecked invitation to abuse”); Lee A. Casey & David B. Rivkin, Jr., Court Dismissed: The ICC is a snare and a monstrosity—with no standing, NAT’L REV., Nov. 11, 2002 (asserting that the U.S. considers the Rome Statute “an open invitation to abuse by ambitious and/or biased prosecutors and judges”).

\textsuperscript{63} See Marlise Simons, supra note 12; Diane F. Orentlicher, No Frankenstein’s Court, WASH. POST, July 31, 1998, at A25. See generally Scheffer, supra note 52.
defining ground rules for the court, and has instead resorted to strong-arm tactics to secure state-by-state immunity agreements for U.S. citizens. By all accounts, the latter have antagonized allies who might readily accommodate reasonable U.S. concerns. Surely those concerns would receive a far more sympathetic hearing if they were framed with a deeper regard for the perspectives of those who do not yet agree.

IV. CONCLUSION

In closing, I would like to return to a theme I mentioned earlier: the central importance in its own right of assessing the ICC. The most effective insurance against abuse of discretion by the ICC prosecutor and judges will come from the ongoing and vigilant monitoring of the court’s performance. Friends of the court should not hesitate to cry foul when criticism is warranted. As for those who oppose the court in principle, I would hope to see at the very least a basic regard for responsible argumentation. The court will be strengthened by critical scrutiny—but not by disingenuous charges and overwrought fears.

\[64\] See Peter Slevin, U.S. Presses Allies on War Crimes Court; Aid Wielded in Push for Immunity Pacts, WASH. POST, Aug. 27, 2002, at A12.

\[65\] Resentment over U.S. opposition toward the Rome Statute and several other treaties that enjoy strong support in Europe spilled over into, and aggravated, disagreements between the United States and many European countries over Iraq policy in 2002-03. See Josef Joffe, Continental Divides, NAT’L INTEREST, Spring 2003; J.F.O. McAllister, Mad at America, Time Magazine, Jan. 20, 2003.