Introduction

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Within a short period the International Criminal Court (ICC) has become central to world politics. The dramatic diplomatic process that produced the Rome Statute in 1998 was followed by an unexpectedly rapid succession of state ratifications and the establishment of the court in 2002. As of late 2011 the ICC has indicted twenty-six individuals related to seven official investigations, all in Africa. Proceedings against one of these individuals were dismissed. Two other indictments, including one for Libya's Muammar Qaddafi, became moot because the individuals were killed before arrest or trial. The remaining list includes a sitting head of state, Sudanese president Omar al-Bashir, as well as Kenya's sitting deputy prime minister, Uhuru Kenyatta. The United Nations Security Council referred both the Sudan and Libya situations to the court; three African states requested investigations of their own situations. The ICC prosecutor independently started an investigation in Kenya. Despite efforts by Kenyan state officials to halt ICC proceedings related to the widespread violence and killings following the 2007 national elections, opinion polls suggest that 73 percent of Kenyans want the ICC to remain involved.[1]

The ICC is the product of gradual normative changes in world politics since World War II. Since the founding of the United Nations, traditional practices of sovereign immunity have been challenged by a principle of individual criminal liability for the worst violations of morality and international legal prohibitions. War crimes, crimes against humanity, genocide, and even aggression (which may be subject to the ICC's jurisdiction within the decade) are now viewed as universal and unequivocal wrongs, and no guilty individual—whether acting in an official capacity or not—is excused by appeals to particularistic goods, such as national security or in-group solidarity, or by such exigencies as suppressing

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revolution or terrorism, or fighting an unjust government. With nearly 120 states parties, the 1998 Rome Statute consolidates a significant normative shift in world politics.

Denying moral permission or a legal right to commit atrocities and affirming individual criminal liability for international crimes is one thing. Deciding which actors or authorities should then carry out the relevant policing, judicial, and punitive processes raises a separate, more difficult set of issues. Before the establishment of the ICC, the questions of how to apportion and institutionalize a duty to punish were unsettled. The Rome Statute locates responsibility in the first instance with state parties, and then—should a state be unable or unwilling to discharge a duty to punish guilty individuals—with the ICC. The ICC's political fortunes are influenced by the extent to which this regime for apportioning duties is accepted as the basis for moral action in world politics.

This roundtable focuses on the tensions between the political and ethical dimensions of the ICC. Some of these tensions are rooted in general factors that predate the ICC as a particular institution; they emerge with any effort to institutionalize ethics in a decentralized political order. From the League of Nations Covenant, to the United Nations Charter, to various human rights conventions, to the ICC, states have created obligations for themselves and others, only to observe prevailing political forces within and among their ranks prevent the achievement of their collective moral ambitions. When this occurs, it raises questions about whether the effort to institutionalize a new, higher ethical code was premature. To quote E. H. Carr's conclusion to *The Twenty Years' Crisis*, utopian designs for "a world federation or a more perfect League of Nations" are vital, but "those elegant superstructures must wait until some more progress has been made in digging the foundations."[2] The contributors to this roundtable question not just whether the ICC is built on strong or weak political foundations but also whether the court's officers have a moral responsibility to take politics into account in decision-making.

In his contribution to the roundtable, Kenneth Rodman argues that the ICC ought to be mindful of the political limits related to the complexities of international conflict resolution. Benjamin Schiff suggests that because of a gap between the ICC's mandate and its capabilities, and the limited support of states, the court's actions could inadvertently contribute to immoral consequences. Michael Struett argues that the ICC's legal powers allow it to adjust to, challenge, and change enduring political realities. Drawing on Kant's political theory, my

essay suggests the ICC should adapt to and fit alongside existing political foundations of sovereign authority. Schiff and Rodman emphasize consequentialist ethical reasoning in light of political realities; Struett and I emphasize rules-based ethical reasoning, but with strong concessions to political pragmatism.

Some dilemmas and tensions that the ICC faces are rooted in more particular moral values and objectives. First, the court is premised on *legalism*, the idea that problems in the political domain should be settled on the basis of "impartial judgement, according to rules," as Judith Shklar writes.[3] Legalism is undoubtedly appropriate for criminal justice problems. However, the ICC operates in a very different political and institutional context from criminal justice systems within states. For instance, the criminals often have the ability to not just resist the ICC but to cause considerable harm to large numbers of innocent civilians. As Rodman and Schiff observe, if legalism encourages not just impartiality but blindness to these contextual realities, it raises the question of whether more harm than good is done. Struett counters that the ICC corrects a preexisting blindness on the part of the international community to international justice, and that the court should not be timid in the face of violent criminal actors.

Second, the court is grounded in the principle of *accountability* or, stated negatively, the notion of *anti-impunity* for atrocities and aggression. This is not simply an offshoot of legalism. For decades, advocates of a permanent criminal court have held that permitting impunity for the worst crimes is an anachronistic mistake rather than simply a by-product of the state system. They claim that unpunished criminal offenses on a massive scale are an affront not just to individual victims but to the moral integrity of the larger world society. But the ICC does not promise absolute accountability in world politics or to prosecute individuals for every international crime that occurs. Rather, the Rome Statute makes it clear that the court will focus on the "most serious crimes of concern."[4] The crimes are defined in ways that emphasize acts with a widespread, systematic, and large-scale impact.[5] Nonetheless, ICC officials confront the difficult problem of maintaining the appearance, if not reality, of ensuring that no individual is above the law. As Struett argues, this may require the ICC to pretend it is a purely legal actor that makes decisions without any consideration of political realities.

A significant political reality facing the court is the power imbalance among states and societies. The barriers to investigating and prosecuting individuals from the United States or other major powers are practically insurmountable. The fact that the ICC's casework has thus far concentrated on Africa suggests

that obstacles to mounting anti-impunity efforts are lower in the politically weakest continent. This has opened the ICC to charges of discrimination against Africa and of neo-imperialism. But the ICC can scarcely ignore its mandate to enforce accountability by ignoring crimes on that continent. Contributors to this roundtable observe there is perhaps little the ICC can do to eliminate perceptions of unfairness rooted in the power asymmetries of world politics. Schiff nevertheless urges that the court behave cautiously, as it may unintentionally exacerbate harms in the particular places where it does choose to act. Similarly, Struett claims the ICC has no choice but to avoid pursuing an unlikely conviction of a state leader or military official from among the permanent members of the Security Council. Indeed, the prosecution of virtually any U.S. citizen would raise the same prudential concerns. Nonetheless, Struett suggests the ICC must at least give the appearance that the reasons for not seeking the prosecution of individuals from powerful states are entirely legal rather than political.

The third element specific to the ICC relates to the uneasy fusion of values contained in the Rome Statute's "complementarity" principle. The ICC's legal authority is complementary to national legal systems. This means the ICC is permitted to act as a replacement for—and potentially against the will of—a state party deemed unable or unwilling to discharge a duty to prosecute the core crimes. On the one hand, complementarity seems to rest firmly on the existing constitutional principles of international society, which validate a decentralized legal order among sovereign states. On the other hand, it establishes the reality of a supranational legal authority acting on the values and interests of a cosmopolitan world society, thus potentially creating a legal hierarchy at odds with state sovereignty.[6] The tensions between state and ICC authority are apparent in many of the ICC's official investigations. Drawing on Kant's political theory, I argue that the ICC's authority is *provisional* and contingent upon a serious failure of sovereign authority within a state. Moreover, the ICC's authority is asserted in place of or alongside state sovereignty rather than legally *above* a national political community. This is a difficult position to achieve in practice, particularly when a state treats the ICC as an enemy institution rather than as a friend.[7]

The court also carries the burden of representing an ostensibly universal world society that contains deep political, cultural, economic, and social divisions. When in the ICC's judgment a particular state is unable or unwilling to act on a duty to prosecute, the ICC faces the problem of weak or limited support by the wider international society of states for the prosecutor's efforts to hold criminals

accountable. The case of Sudan is illustrative. As Rodman and Schiff observe, the international community's peacemaking strategies have often run counter to the accountability agenda. ICC officials face the problem of convincing many skeptical audiences that its actions are both necessary and legitimate. Struett suggests that, precisely because of its role as a world legal authority, the ICC is uniquely positioned to legitimize the international justice agenda. In spite of divisions in world politics, the ICC has the power to delegitimize political indifference to atrocity crimes.

Dialogue about the political ethics of the International Criminal Court is ongoing. As the contributors to this roundtable acknowledge, it is still early in the life of the ICC—too early to make definitive judgments about the court's legitimacy, authority, and moral contribution to world politics. Yet the speed with which the ICC has become central to the events, crises, and dilemmas of our times makes ethical reflection on this institution all the more urgent.

NOTES

[1] "The ICC and Africa: Dim Prospects," *Economist*, February 17, 2011.
[2] E. H. Carr, *The Twenty Years' Crisis* (Basingstoke, U.K.: Palgrave Macmillan, 2001[1939]), p. 219.
[3] Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge: Harvard University Press, 1964), p. vii.
[4] Rome Statute of the International Criminal Court, art. 5
[5] Ibid., arts. 7 and 8.
[6] Jason G. Ralph, *Defending the Society of States: Why America Opposes the International Criminal Court and Its Vision of World Society* (Oxford: Oxford University Press, 2007).
[7] For an argument about the ICC in relation to Carl Schmitt's friendship/enemy dichotomy, see Sarah M. H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," *European Journal of International Law* 21, no. 4 (2010), pp. 941–65. The ICC has developed two means to help resolve tensions of promoting international justice in a decentralized political order: First, it has accepted and encouraged "self-referrals," where states declare themselves unable to carry out the duty of prosecuting the core crimes. The Democratic Republic of Congo, Uganda, and the Central African Republic referred their own situations in this manner. Second, the ICC has promoted a doctrine of "positive complementarity." This means that the ICC aims to support states' efforts to act domestically on a duty to prosecute.