

BETWEEN THE SCYLLA AND CHARYBDIS OF PROSECUTION AND RECONCILIATION: THE KHMER ROUGE TRIALS AND THE PROMISE OF INTERNATIONAL CRIMINAL JUSTICE

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The issue of “justice versus peace” has long been at the center of the controversy on international prosecutions for crimes in transitional and post-conflict societies. Opponents of international prosecutions have taken umbrage at the presumption that justice can only be rendered through criminal prosecutions by an international tribunal often far removed from local realities and voiced their concern about the destabilizing effects such prosecutions can have on local peace building initiatives that often provide amnesties for participants in mass atrocities.¹ International criminal lawyers have answered these charges by arguing for a more holistic concept of peace in which justice is a prerequisite for a stable society based on the rule of law and prevention of impunity, and put forward holding individuals criminally responsible in a fair and impartial setting as one of the best methods for achieving this objective.² Thus far, this heated debate has rarely progressed beyond the hallowed corridors of the International Criminal Court (“ICC”): there is a rich and growing scholarship exploring the tension between the ICC and alternative justice mechanisms, particularly amnesties and traditional justice practices. The bulk of this literature however, lavishes its attention on the ICC as the prima donna of

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1. See, e.g., Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205 (2000); Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991) (discussing problematic aspects of mandatory criminal prosecutions in the context of President Alfonsín’s prosecutions of human rights violations in Argentina).

2. This is particularly argued in the case of exceptionally grave crimes, the prosecution of which is considered mandatory by some academics. See, e.g., Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Juan E. Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 259-62 (1997); M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 17-18 (1996).

international criminal prosecutions, often treating the individual actors within the institutional structure as minor extras, whose interests come as an afterthought.³ Another strand of writing develops on the role of particular players in the ICC apparatus, but is inconclusive on their precise contribution to the peace versus justice conundrum.⁴ I therefore propose to focus on and develop a more sophisticated theoretical construct of the role of the agent who occupies the preeminent position in confronting and deciding between these opposing camps: the prosecutor of an international or hybrid tribunal.

I will tease out and suggest possible points of resolution in this debate through a study of a recent dispute between the national and international co-prosecutors of the Extraordinary Chambers in the Courts of Cambodia (“ECCC”), tasked with prosecuting seniors leaders of, and those most responsible for the crimes committed during the reign of, the Khmer Rouge.⁵ The dispute centers on how widely the prosecutorial net should be cast so as to best serve the interests of justice. The international prosecutor has argued that enough evidence exists to indict more suspects than the five who have currently been indicted.⁶ The national prosecutor has resisted

3. The omission to specify the exact nature of the contribution or responsibility of individual agents within the ICC structure is conspicuous even in otherwise thoughtful and nuanced scholarship on the subject. *See, e.g.,* Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT’L L. 481 (2003). Notable exceptions include Chris Gallavin, *Prosecutorial Discretion within the ICC: Under the Pressure of Justice*, 17 CRIM. L.F. 43 (2006); Richard J. Goldstone & Nicole Fritz, *‘In the Interests of Justice’ and Independent Referral: The ICC Prosecutor’s Unprecedented Powers*, 13 LEIDEN J. INT’L L. 655, 660-63 (2000).

4. *See, e.g.,* Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510 (2003); Matthew R. Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 J. INT’L CRIM. JUST. 71 (2004).

5. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea art. 1, NS/RKM/1004/006 (Oct. 27, 2004), http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf (last visited Nov. 3, 2009) [hereinafter ECCC law].

6. The five accused, who have been charged with war crimes and/or crimes against humanity, are Kaing Guek Eav (alias Duch), the head of the S-21 prison in Democratic Kampuchea; Khieu Samphan, the DK regime’s former head of state; Ieng Sary, the former Deputy Prime Minister and Minister for Foreign Affairs; Sary’s wife Ieng Thirith, who was Minister for Social Affairs; and Nuon Chea, the Khmer Rouge’s chief ideologue. *See* Extraordinary Chambers in the Courts of Cambodia, Kaing Guek Eav Case Information Sheet, http://www.eccc.gov.kh/english/cabinet/files/Case_Info_DUCH_EN.pdf (last visited Nov. 3, 2009); Extraordinary Chambers in the Courts of Cambodia, Nuon Chea Case Information Sheet, http://www.eccc.gov.kh/english/cabinet/files/Case_Info_Nuon_Chea_EN.pdf (last visited Nov. 3, 2009); Extraordinary Chambers in the Courts of Cambodia, Ieng Sary Case Information Sheet, http://www.eccc.gov.kh/english/cabinet/files/Case_Info_Ieng_Sary_EN.pdf (last visited Nov. 3, 2009); Extraordinary Chambers in the Courts of Cambodia, Ieng Thirith Case Information Sheet, http://www.eccc.gov.kh/english/cabinet/files/Case_Info_Ieng_Thirith_EN.pdf (last visited Nov. 3,

opening judicial investigations into additional suspects on the ground that this would undermine national reconciliation.⁷ This disagreement signals several “firsts” for international criminal law. It is the first ever instance of the prosecutors of an international(ized) tribunal⁸ simultaneously exercising the discretion deemed inherent to their function, and reaching divergent decisions on whether and whom to prosecute. It also places the ECCC Pre-Trial Chamber in the novel position of an international judicial organ having to articulate standards for the review of prosecutorial discretion and decide between competing prosecutorial claims of prioritizing prosecution over rapprochement. The conflict is rendered all the more exceptional because the ECCC is the only hybrid tribunal that has co-equal national and international prosecutors, and which splits the decision-making responsibility evenly between national and international counterparts at all levels of the tribunal, except the judicial body, where the domestic judges are in a majority.⁹ The dispute therefore implicates issues that challenge the seeming coherence of international criminal justice: the divergent aims, functions and constituencies pursued by actors in domestic versus international criminal trials.

I begin with identifying the salient features of the dispute before the ECCC and considering the extent to which the ECCC law and institutional structure provide guidelines for its resolution. I then locate the conflict within the larger debates on exercise of prosecutorial discretion on one hand and the relationship between alternative justice mechanisms and the ICC on the other. I discuss the extent to which these debates will be affected by the unique nature of the ECCC as a hybrid tribunal that must navigate between the interests of its national and international constituencies. Finally, I put forward suggestions for the exercise of prosecutorial discretion and judicial review which are not only directed towards the specific circumstances of the ECCC, but are also instructive with respect to prosecutors and judicial organs of other international tribunals that must find a principled method of exercising and reviewing prosecutorial discretion.

2009); Extraordinary Chambers in the Courts of Cambodia, Khieu Samphan Case Information Sheet, http://www.eccc.gov.kh/english/cabinet/files/Case_Info_Khieu_Samphan_EN.pdf (last visited Nov. 3, 2009).

7. Office of the Co-Prosecutors in the Extraordinary Chambers in the Courts of Cambodia, Statement of the Co-Prosecutors (Jan. 5, 2009), http://www.eccc.gov.kh/english/cabinet/press/84/Statement_OCP_05-01-09_EN.pdf [hereinafter Statement of the Co-Prosecutors].

8. Neha Jain, *Conceptualising Internationalisation in Hybrid Criminal Courts*, 12 SING. Y.B. INT'L L. (forthcoming 2009).

9. ECCC law, *supra* note 5, arts. 9 new, 16, 23 new.

I. BALANCING PRINCIPLES AND PRAGMATISM AT THE ECCC

A. The context of the dispute

In April of 1975, the forces of the Communist Party of Kampuchea, popularly known as the Khmer Rouge, took over Phnom Penh, the capital of Cambodia and unleashed a four year long reign of terror aimed at establishing a socialist, fully independent, and socially and ethnically homogeneous Cambodia. This victory signaled the culmination of a prolonged armed struggle against the government that had begun in the late 1960s and had seen the Khmer Rouge gradually increase its control over Cambodian territory in the period leading up to 1975.¹⁰ The new regime renamed Cambodia Democratic Kampuchea and immediately launched a radical revolution in which all pre-existing economic, social, and cultural institutions were abolished, and the entire population was transformed into a collective workforce.¹¹ Within a few days of taking over Phnom Penh, the capital and other cities were evacuated, and city-dwelling Cambodians were forcibly moved to the countryside for hard agricultural labor.¹² In their pursuit of a rural, classless society, the Khmer Rouge abolished money, private property, and traditional cultural and religious practices. Rural collectives were set up, in which thousands died of disease, starvation, and overwork. Estimates of the dead range from 1.7 million to 3 million, out of a 1975 population estimated at 7.3 million.¹³

The Khmer Rouge followed a ruthless policy of suppression against all elements perceived as a threat to the new order. Central to this policy

10. See The Group of Experts for Cambodia, *Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135*, paras. 14-15, U.N. Doc. S/1999/231, A/53/850 (Mar. 16, 1999) [hereinafter *Report of the Group of Experts*].

11. On the Khmer Rouge's idea of the social revolution, see DAVID P. CHANDLER, BROTHER NUMBER ONE: A POLITICAL BIOGRAPHY OF POL POT 3 (1999); Serge Thion, *The Cambodian Idea of Revolution*, in REVOLUTION AND ITS AFTERMATH IN KAMPUCHEA: EIGHT ESSAYS 10 (David P. Chandler & Ben Kiernan eds., 1983).

12. ALEXANDER LABAN HINTON, WHY DID THEY KILL?: CAMBODIA IN THE SHADOW OF GENOCIDE 8-10 (2005); Karl D. Jackson, *The Ideology of Total Revolution*, in CAMBODIA, 1975-1978: RENDEZVOUS WITH DEATH 37, 46-48 (Karl D. Jackson ed., 1989) (explaining the policy behind forced evacuations); *Cambodia: Long March from Phnom Penh*, TIME, May 19, 1975, available at <http://www.time.com/time/magazine/article/0,9171,945394-1,00.html>.

13. United States Department of State, Background Note: Cambodia (2009), <http://www.state.gov/t/pa/ei/bgn/2732.htm> [hereinafter Background Note: Cambodia]. On the varying estimates, see, e.g., Michael Vickery, *Letter to the Editor*, 20 BULL. OF CONCERNED ASIAN SCHOLARS 377 (1988); Damien de Walque, *Selective Mortality During the Khmer Rouge Period in Cambodia*, 31 POPULATION & DEV. REV. 351 (2005); Patrick Heuveline, 'Between One and Three Million': Towards the Demographic Reconstruction of a Decade of Cambodian History (1970-1979), 52 POPULATION STUD. 49 (1998).

was the necessity of supplanting any identities that may compete with absolute and unconditional loyalty to the state including class, religion, and family.¹⁴ The family having been one of the most traditional and potent of relationships, the survival and success of the state apparatus envisioned by the Khmer Rouge required its destruction.¹⁵ The Khmer Rouge employed several methods to weaken the family structure and sever bonds between family members, including separation of family members during forced urban evacuations, executions, and collectivization of work and family arrangements.¹⁶ Families were no longer allowed to eat together or own property collectively.¹⁷ At the same time, the Khmer Rouge sought to appropriate and transform the traditional attachment to family, by describing “(1) the intended new society as a one-family society”; (2) the Angkar¹⁸ as the people’s provider and protector and therefore the rightful object of their allegiance, much in the same way as parents; and “(3) the political leader Pol Pot as ‘brother number one’ among the people, that is, the first-born” and, as such, the most respected family member.¹⁹

The Khmer Rouge also carried out large scale “purges” and “re-education” programs, not only against segments of society considered enemies of the revolution, such as ethnic minorities, intellectuals, Buddhists, foreigners, and businessmen,²⁰ but also forces loyal to the former Prime Minister Lon Nol and persons considered suspect within their own ranks. It also divided people into “base people” comprising ethnic Khmer peasants and “new people,” which referred to the urban class

14. See Kalyanee E. Mam, *The Endurance of the Cambodian Family under the Khmer Rouge Regime: An Oral History*, in *GENOCIDE IN CAMBODIA AND RWANDA: NEW PERSPECTIVES* 127 (Susan E. Cook, ed., 2005).

15. See ELIZABETH BECKER, *WHEN THE WAR WAS OVER: THE VOICES OF CAMBODIA’S REVOLUTION AND ITS PEOPLE* 237-40 (1986).

16. Siv Leng Chhor, *Destruction of Family Foundation in Kampuchea*, 11 *SEARCHING FOR THE TRUTH* (Documentation Ctr. of Cambodia, Phnom Penh, Cambodia), Nov. 2000, at 22-23.

17. Mam, *supra* note 14, at 140-43.

18. Angkar is Khmer for “organization.” The term was commonly used to refer to the Khmer Rouge regime.

19. Patrick Heuveline & Bunnak Poch, *Do Marriages Forget Their Past? Marital Stability in Post-Khmer Rouge Cambodia*, 43 *DEMOGRAPHY* 99, 102 (2006).

20. See Ben Kiernan, *External and Indigenous Sources of Khmer Rouge Ideology*, in *THE THIRD INDO-CHINA WAR: CONFLICT BETWEEN CHINA, VIETNAM AND CAMBODIA, 1972-1979*, at 187, 192-93 (Odd Arne Westad & Sophie Quinn-Judge eds., 2006); Dan Fletcher, *A Brief History of the Khmer Rouge*, *TIME*, Feb. 17, 2009, available at <http://www.time.com/time/world/article/0,8599,1879785,00.html>.

deemed to be under foreign and capitalist influences, and treated the latter as the enemy.²¹

Cambodia's relations with Vietnam eventually led to the overthrow of the regime. Low intensity border clashes between the two countries from 1975 to 1979 escalated during 1978. In late December 1978, Vietnamese forces launched a full-scale invasion of Cambodia and installed Heng Samrin as head of state in the new People's Republic of Kampuchea ("PRK"). The Khmer Rouge battled the Vietnamese throughout the 1980s, but the PRK and Vietnam managed to maintain control of most of the countryside. By 1989, however, Vietnamese troops had mostly withdrawn from Cambodia and a comprehensive settlement was achieved in the Paris Agreements of October 23, 1991.²²

The impetus for a tribunal to try senior leaders responsible for the crimes committed by the Khmer Rouge came in the form of a letter forwarded by the two co-Prime Ministers of Cambodia, Norodom Ranariddh and Hun Sen, to the UN Secretary General in June 1997, soliciting the assistance of the UN and the international community, similar to that rendered in Rwanda and Yugoslavia, in establishing the truth about, and bringing to justice persons responsible for, the crimes committed during the Khmer Rouge regime.²³ The motivation behind this letter, however, remains unclear. The Hun Sen-dominated Cambodian government which came into power following the UN-sponsored 1993 Cambodian elections was beset with internal as well as external worries. In addition to the bitter struggle between the factions led by the co-Prime Ministers, it was experimenting with various strategies to disarm the Khmer Rouge and try assimilating its cadre into the Royal Cambodian Armed Forces. To this end, it passed a law in 1994 outlawing the Khmer Rouge and encouraged defections by its senior leaders.²⁴ At the same time, it was heavily reliant on international humanitarian aid for reconstruction and could not ignore increasing pressure from the international community, in particular the United States,²⁵ to bring Khmer Rouge leaders to justice

21. See BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE, 1975-79* at 251-309 (2002).

22. Background Note: Cambodia, *supra* note 13; Report of the Group of Experts, *supra* note 10, paras. 36-40.

23. Report of the Group of Experts, *supra* note 10, para. 5.

24. George Chigas, *The Politics of Defining Justice After the Cambodian Genocide*, 2 J. GENOCIDE RES. 245, 250 (2000).

25. The U.S. Congress passed the Cambodian Genocide Justice Act, 22 U.S.C. 2656, Part D, §§ 571-74 (1994), in April 1994 stating in § 572 that "Consistent with international law, it is the policy of the United States to support efforts to bring to justice members of the Khmer Rouge for their crimes

for crimes committed during the DK regime. Thus, while nominally supporting a possible trial, it also introduced the rhetoric of “national reconciliation” into the debate, placating Khmer Rouge fears by emphasizing the potential disruptive effects of legal proceedings on peace and stability.²⁶

In any event, the Secretary General responded positively to the letter of the co-Prime Ministers by establishing a Group of Experts committee to look into the nature of the crimes and explore options for prosecution.²⁷ The Group of Experts was sensible of the political context in which the trials would occur. They noted that though the Khmer Rouge could no longer be considered a fighting force, it still retained a key position in domestic politics. This was due to the fact that several of its former members had defected to and occupied important positions in Cambodia’s two major political parties and that these parties counted on Khmer Rouge members for support in the areas they still commanded allegiance.²⁸ This was reflected in the carrot and stick approach adopted towards the Khmer Rouge cadre, including granting of de facto amnesties for crimes perpetrated in the post-1979 period, and the amnesty granted to Ieng Sary, a former Deputy Prime Minister in the DK Government. The aim, which was to encourage defections within the Khmer Rouge ranks and put an end to the insurgency, met with some success in the form of Khmer Rouge forces loyal to Ieng Sary being formally brought within the Government, and the surrender of Nuon Chea and Khieu Samphan, two of the DK Government’s most senior officials, in 1998.²⁹

Mindful of these constraints, the Group of Experts emphasized the twin goals of individual accountability and national reconciliation in its choice of the category of persons who should be targeted for investigation as well as the modalities of bringing them to justice. Maneuvering between demands for a large scale prosecution effort that might undermine political stability on the one hand, and a focus on only a handful of senior DK regime officials that would challenge true accountability on the other, the Report of the Group of Experts (the “Report”) recommended that the proposed tribunal focus on those most responsible for the atrocities

against humanity committed in Cambodia between April 17, 1975, and January 7, 1979” and encourage “the establishment of a national or international criminal tribunal for the prosecution of those accused of genocide in Cambodia.”

26. See Chigas, *supra* note 24, at 251.

27. Report of the Group of Experts, *supra* note 10, para. 6.

28. See *id.*, *supra* note 10, paras. 95-98.

29. See *id.*, paras. 44-45.

committed during the DK regime. While it did not specify any numerical limit, it envisaged about twenty to thirty persons being indicted by the prosecutor, based solely on his discretion, taking into account the needs of reconciliation and accountability.³⁰

The Group also considered various possibilities for conducting these trials, finally recommending the establishment of an international tribunal, similar to the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”), instead of a trial by a Cambodian court, or a court of mixed composition.³¹ This was mainly prompted by fears of undue political interference by the Cambodian government in the functioning of a domestic or mixed court, thus risking the independence and impartiality of the trial process.³² The Report was also cautious about the possible creation of a truth and reconciliation commission in parallel with an international tribunal, and clearly prioritized the latter, which it hoped would in any event be able to contribute to bringing to light the range of atrocities perpetrated by the Khmer Rouge and knowledge and reconciliation through the trial process.³³

The recommendation to establish an international tribunal was rejected by the Cambodian government, leading to prolonged and difficult debates on the “ownership” of the tribunal. Indeed, the increasingly contumacious attitude of the Cambodian administration towards the tribunal in these tense negotiations led many commentators to speculate whether the government had ever genuinely wanted prosecutions, or whether they were simply a threat calculated to bring the Khmer Rouge to heel.³⁴ The UN was unwilling to compromise on adherence to what it deemed minimum standards for an international tribunal, which it interpreted to include provisions for an independent international prosecutor and a majority of foreign judges. The Cambodian government was open to allowing international participation, but only in a Cambodian-controlled trial that would take place in Cambodia, be governed by Cambodian law, and have a majority of Cambodian judges and

30. *See id.*, paras. 102-11.

31. *See id.*, paras. 122-84.

32. *See id.*, paras. 133-38.

33. *See id.*, paras. 199-209.

34. Thomas Hammarberg, *How the Khmer Rouge Tribunal was Agreed: Discussions Between the Cambodian Government and the UN*, SEARCHING FOR THE TRUTH (Documentatation Centre of Cambodia, Phnom Penh, Cambodia), July 2001, at 42, 43-44, available at <http://www.dccam.org/Projects/Magazines/Previous%20Englis/Issue19.pdf>; Khamly Chuop, *Examining the Cambodian View of a Khmer Rouge Tribunal*, SEARCHING FOR THE TRUTH, (Documentatation Centre of Cambodia, Phnom Penh, Cambodia) Special English Edition, Third Quarter, 2003, at 46, 51-52.

prosecutors.³⁵ At one point in the negotiations, the Cambodian government even sent a letter to the UN outlining its view on the options for international participation in the tribunal: providing a legal team to help Cambodian lawyers draft laws and assigning judges and prosecutors in Cambodia's existing courts; providing a legal team alone without participation in the trial; or withdrawing completely from the proposed trial.³⁶

A compromise was finally brokered under significant pressure from countries such as the United States, France, and Japan,³⁷ culminating in the establishment of the ECCC as a tribunal within the Cambodian system and controlled by Cambodians, but involving significant international participation in the form of assistance by the UN.³⁸ Strictly speaking, the ECCC has been set up as an independent institution within the Cambodian judiciary³⁹ by a statute passed by the Government of Cambodia,⁴⁰ which incorporates the provisions of the 2003 Agreement between Cambodia and the UN.⁴¹ It is the only indisputably hybrid tribunal which has a majority of national judges both at the Trial Chamber (three Cambodian and two foreign) and the Supreme Court Chamber (four Cambodian and three foreign) level.⁴² Decisions have to be adopted as far as possible, by unanimity, and in the absence of that, by a “super-majority rule,” that is, at least four out of the five Trial Chamber judges and five out of the seven Supreme Court Chamber judges must have voted in favor of the decision.⁴³

35. Chigas, *supra* note 24, at 256-57.

36. *Id.* at 257.

37. See David J. Scheffer, Op-Ed., *Justice for Cambodia*, N.Y. TIMES, Dec. 21, 2002, at A21, available at <http://www.nytimes.com/2002/12/21/opinion/justice-for-cambodia.html>.

38. See Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L.F. 185, 188-90 (2001).

39. See *Prosecutors v. Kang Guek Eav*, Criminal Case File No. 001/18-07-2007-ECCC-OCIJ (PTC01), Decision on Appeal Against Provisional Detention Order of Kang Guek Eav alias “Duch”, para. 19 (Dec. 3, 2007).

40. See Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, U.N.-Cambodia, art. 2, June 6, 2003, <http://www.eccc.gov.kh/english/agreement.list.aspx> (last visited Oct. 23, 2009) [hereinafter Framework Agreement].

41. See Sarah M. H. Nouwen, Research Paper, “Hybrid courts”: *The Hybrid Category of a New Type of International Crimes Courts*, 2 UTRECHT L. REV. 190, 200 (2006) (outlining that though the statute was passed two years before the 2003 Agreement, it was later amended to incorporate the provisions of the Agreement); Sarah Williams, *The Cambodian Extraordinary Chambers—A Dangerous Precedent for International Justice?*, 53 INT’L & COMP. L.Q. 227, 232 (2004) (stating that the constitutive instrument for the ECCC is the statute, and not the 2003 Agreement).

42. See ECCC law, *supra* note 5, art. 9 new.

43. See *id.* art. 14 new.

The prosecution team is headed by co-equal Cambodian and international prosecutors.⁴⁴ The ECCC is also unique in that all judicial investigations are the responsibility of two co-investigating judges: one Cambodian and one international.⁴⁵ All disputes between the national and international co-prosecutors and co-investigating judges are to be settled by a Pre-Trial Chamber which has a majority of national judges and must adopt decisions in accordance with the super-majority rule.⁴⁶ The Supreme Council of the Magistracy, a national organ, appoints Cambodian staff, and also appoints international personnel from nominees provided by the Secretary-General.⁴⁷ The Office of Administration is headed by a Cambodian Director and an international Deputy Director who is appointed by the Secretary-General.⁴⁸

The current structure of the tribunal bears all the scars of the compromises necessitated by the Cambodian government's intransigence and the UN's conciliatory position towards the end of the negotiations, and is at the heart of the dispute between the co-prosecutors.

B. National Versus International at the Pre-Trial Chamber

The political wrangles characterizing the inception of the ECCC⁴⁹ foreshadowed the current dispute between the co-prosecutors on who should stand trial before the court. The ECCC has currently indicted five suspects, four of whom were high ranking members in the DK government, while the fifth, Duch, headed the infamous Tuol Sleng prison in Phnom Penh which was the site of horrific political assassinations.⁵⁰ The International Co-Prosecutor now wants to commence investigations against additional suspects on the basis that there is sufficient evidence to establish a *prima facie* case that crimes within the ECCC's jurisdiction were committed by these persons. The National Co-Prosecutor has curiously enough, at least in her public statement on the disagreement, not opposed

44. *See id.* art. 16.

45. *See id.* art. 23 new.

46. *See id.* arts. 20 new, 23 new.

47. *See id.* arts. 11 new, 18 new, 26.

48. *See id.* arts. 13, 30, 31 new.

49. For an overview of the troubled negotiating history of the ECCC, see Yale Univ., Cambodian Genocide Program, Chronology 1994-2004, http://www.yale.edu/cgp/chron_v3.html (last visited Oct. 24, 2009).

50. *See supra* note 6. *See* STEPHEN HEDER WITH BRIAN D. TITTEMORE, WASHINGTON COLL. OF LAW, AMERICAN UNIV. & COAL. FOR INT'L JUSTICE, SEVEN CANDIDATES FOR PROSECUTION: ACCOUNTABILITY FOR THE CRIMES OF THE KHMER ROUGE 12 (2001) (stating Duch's position and the function of the prison in the Khmer Rouge regime).

this claim on evidentiary or jurisdictional grounds.⁵¹ She has instead adduced purely political and policy arguments against further prosecutions: they would undermine national reconciliation efforts, especially in light of Cambodia's history of instability; the spirit of the ECCC law does not contemplate further prosecutions; and the Court's limited duration and resources support a narrower range of potential suspects for trial.⁵²

The body that is being urged to make this unprecedented ruling is the Pre-Trial Chamber ("PTC") of the ECCC, an organ specifically mandated to resolve disputes between the Co-Prosecutors. The PTC is composed of three national and two international judges and follows the "super-majority rule" to adopt decisions—thus, no decision can pass without at least one international judge having voted in its favor.⁵³ In the event the national prosecutor fails to obtain this super-majority, the default position favors prosecution and moving forward with the investigation.⁵⁴ It is important to examine, however, whether apart from this skeletal structure, there is anything in the ECCC law that the PTC may look to in order to reach a decision.

1. Prosecutorial discretion in the ECCC law

At first glance, the discretion afforded to the ECCC Co-Prosecutors seems rather limited. The obvious limits of temporal, material, and personal jurisdiction contained in the ECCC law serve as the initial limitation as to whom the Co-Prosecutors may indict. Thus, only "senior leaders of Democratic Kampuchea . . . [or] those most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia . . . committed during the period . . . April 17, 1975 to January 6, 1979," may be brought to trial.⁵⁵ Additionally, the Internal Rules outlining the functions of the prosecutors are closer—compared to the ICTY and the ICTR—to the civil law model of *Legalitätsprinzip*⁵⁶ that casts a duty on the prosecutor

51. See Statement of the Co-Prosecutors, *supra* note 7.

52. See Statement of the Co-Prosecutors, *supra* note 7.

53. See ECCC law, *supra* note 5, art. 20 new.

54. See *id.*

55. *Id.* art. 1.

56. See John H. Langbein & Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549, 1561-62 (1978). This is in contrast to the more open policy of "l'opportunité des poursuites" in the Statutes of the International Criminal Tribunals for Yugoslavia and Rwanda which grant the Prosecutor a wide margin of discretion on whether or not to prosecute. See Luc Côté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162, 165 (2005) (referring to ICTY Statute, art. 18 (1) and ICTR Statute, art. 17(1)).

to prosecute every serious crime falling within his or her mandate.⁵⁷ Rule 53(1) states that if the Co-Prosecutors “have reason to believe that crimes within the jurisdiction of the ECCC have been committed, they *shall* open a judicial investigation by sending an Introductory Submission to the Co-Investigating Judges, either against one or more named persons or against unknown persons.”⁵⁸ Moreover, in the event of a disagreement, the default position is that unless a majority of the PTC decides against proceeding with the investigation, it shall go forward.⁵⁹ The obligation to investigate seems to extend to the Office of the Co-Investigating Judges (“OCIJ”), where the Internal Rules declare a judicial investigation to be compulsory for crimes within the ECCC’s jurisdiction.⁶⁰ The only factors compelling dismissal of a case by the OCIJ are lack of jurisdiction, insufficiency of evidence, or non-identification of the perpetrators.⁶¹

On closer inspection though, quite like in civil law systems,⁶² the Co-Prosecutors enjoy considerable latitude in the operationalization of the duty to prosecute.⁶³ They are at liberty to define whether they have “reason to believe” that crimes within the ECCC’s jurisdiction have been committed, before launching an investigation.⁶⁴ They are also in charge of determining who and how many persons they consider to be “senior leaders” or those “most responsible” for the crimes committed during the DK regime and what factors they will take into account in reaching this conclusion. The Co-Prosecutors determine whether to commence investigations or prosecutions on their own discretion or on the basis of information such as victims’ complaints received,⁶⁵ and are also authorized to change their decision on this matter.⁶⁶ There is no explicit standard of review provided for any of these vital decisions.

Apart from this inherent discretion crucial to the independence of the prosecutorial mandate, ECCC law does not appear to contemplate situations where the Co-Prosecutors may decline to investigate or prosecute

57. See Mirjan Damaška, Comment, *The Reality of Prosecutorial Discretion: Comments on a German Monograph*, 29 AM. J. COMP. L. 119, 119 (1981).

58. EXTRAORDINARY CHAMBERS IN THE COURT OF CAMBODIA, INTERNAL RULES, R. 53(1) (Rev. 3, 2009), http://www.eccc.gov.kh/english/internal_rules.aspx [hereinafter ECCC INTERNAL RULES].

59. See ECCC law, *supra* note 5, art. 20 new.

60. ECCC INTERNAL RULES, *supra* note 58, R. 55(1).

61. *Id.* R. 67(3).

62. See, e.g., Damaška, *supra* note 57, at 121.

63. See, e.g., Damaška, *supra* note 57, at 122-23.

64. ECCC INTERNAL RULES, *supra* note 58, R. 53(1).

65. See *id.* R. 49.

66. *Id.* R. 49(5).

on policy or political grounds. There is no provision explicitly authorizing such a power of refusal in the ECCC Statute, the Framework Agreement, or the Internal Rules. The only leeway for introducing such considerations is provided in the Preamble of the Agreement, which emphasizes the aims of the ECCC to include justice, stability, peace and security, as well as national reconciliation.⁶⁷ The latter concept is not elaborated upon anywhere in the subsequent provisions, and in fact must be read in light of the substantive law recognizing the Cambodian government's commitment not to seek amnesties and pardons for persons investigated or convicted by the ECCC.⁶⁸

In the event of a lacuna or ambiguity in the procedural law of the ECCC, it may take into account relevant international rules of procedure.⁶⁹ The procedural rules of the ad hoc and mixed international criminal courts do not deal with standards for the negative exercise of prosecutorial discretion. While the practice of these courts suggests that prosecutors have exercised their discretion on whether and whom to prosecute based on a host of factors, including the political implications of the indictment, pragmatic considerations such as difficulty in obtaining evidence, and ensuring a geographic spread of defendants so as to paint a complete picture of the context of the dispute,⁷⁰ there is no consensus on when and to what extent it is appropriate to do so.⁷¹

The Rome Statute of the ICC is the only constitutive instrument of an international tribunal that expressly envisages the Prosecutor's choosing not to proceed with an investigation or prosecution "in the interests of justice."⁷² While the need for national reconciliation and the provision of alternative justice mechanisms is certainly acknowledged as a possible

67. Framework Agreement, *supra* note 40, Preamble.

68. *See id.* art. 11; ECCC law, *supra* note 5, art. 40 new.

69. *See* Framework Agreement, *supra* note 40, art. 12.

70. *See, e.g.,* Hassan B. Jallow, *Prosecutorial Discretion and International Criminal Justice*, 5 J. INT'L CRIM. JUST. 145, 149-54 (2005); Morten Bergsmo, Catherine Cissé & Christopher Staker, *The Prosecutors of the International Tribunals: The Cases of the Nuremberg and Tokyo Tribunals, the ICTY and the ICTR, and the ICC Compared*, in THE PROSECUTOR OF A PERMANENT INTERNATIONAL CRIMINAL COURT 121, 135 (Louise Arbour et al. eds., 2000).

71. Indeed, Prosecutors of international tribunals have usually denied being influenced by political considerations in their work. *See* Côté, *supra* note 56, at 178 (quoting Louise Arbour and Richard Goldstone).

72. Rome Statute of the International Criminal Court, arts. 53(1)(c), 53(2)(c), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

interpretation of this mandate,⁷³ the ICC Prosecutor has thus far been steadfast in refusing to bow to purely political constraints⁷⁴ and there is no clarity on how he is expected to balance the need for prosecution versus the interests of justice in the Statute or in the practice of other tribunals.

It is difficult to see, in any case, where precisely the specific factors mentioned by the National Co-Prosecutor for challenging further investigations fall within this framework. Neither the spirit of the ECCC law, nor limited duration and resource constraints suggest a numerical limit as small as five persons on the mandate of the ECCC to call to account those most responsible for international crimes committed by the Khmer Rouge. The latter has indeed never been proposed as a barrier to indicting those considered to bear a high level of responsibility before other tribunals faced with similar limitations.⁷⁵ The former appears illogical given that the limb of the ECCC's personal jurisdiction over those "most responsible" for the atrocities has, till this point, only been used in relation to Duch, the other four suspects having been indicted as "senior leaders" of the Khmer Rouge. It is unlikely that this extension of personal jurisdiction was targeted at only one individual.⁷⁶

The National Prosecutor's invocation of the needs of national reconciliation in light of Cambodia's past instability is slightly trickier to understand. Past instability is surely only a relevant factor in proceeding with investigations if it impacts current public order concerns in Cambodia. Even on this kinder interpretation, the potential danger to public order has never been a factor against charging particular individuals before other tribunals. If anything, the solution has been to shift the trial to another jurisdiction, as with Charles Taylor's trial having been shifted to The

73. See, e.g., Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J. INT'L CRIM. JUST. 695, 700 (2005); Robinson, *supra* note 3, at 488-98; Goldstone & Fritz, *supra* note 3, at 660-63.

74. See Luis Moreno-Ocampo, Prosecutor of the ICC, Building a Future on Peace and Justice, Address at the Nuremberg Conference (June 25, 2007). In the context of Uganda, see Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT'L L. 209, 222 (2008).

75. The completion strategy of the ICTY as well as the ICTR simply provides for resources and time to be concentrated on senior leaders instead and transfers cases of lower and intermediate level accused to national jurisdictions. See ICTY Completion Strategy, <http://www.icty.org/sid/10016>; Completion Strategy of the International Criminal Tribunal for Rwanda, Enclosure, paras. 6-7, U.N. Doc. S/2003/946 (Oct. 6, 2003).

76. See Elena Rose, *A Predictable Disagreement with an Uncertain Outcome* 3, (Oxford Transitional Justice Research Group Working Paper Series, 2009), available at <http://www.csls.ox.ac.uk/documents/RoseFinal.pdf>.

Hague.⁷⁷ Moreover, evidence that public order will be disrupted in the event of additional investigations has been purely speculative. It is true that the current Cambodian Prime Minister has gone so far as to assert that additional trials would risk plunging the country back into civil war.⁷⁸ This fear is perhaps not entirely fanciful given the enduring influence of the Khmer Rouge in Cambodian politics till the late 1990s and the deals struck in order to co-opt them into mainstream Cambodian life and politics.⁷⁹ In fact, it is widely supposed that at least two of the potential additional suspects currently occupy senior positions in the Cambodian army and that any further investigations would risk unsettling troops loyal to them, especially those stationed in the northwest of Cambodia, a former Khmer Rouge stronghold.⁸⁰ However, there has been no concrete study or survey that either refutes or supports these allegations.

While the PTC has cited studies that predict a possible resurgence of “‘anxieties’ . . . [and accompanying] ‘negative social consequences’”⁸¹ as a result of the commencement of trials as a basis to refuse provisional release of the accused pending trial,⁸² there is little specific evidence supporting such disruption. Indeed, one could argue that given the tremendous interest displayed by the Cambodian people, including former victims, in the conduct of proceedings before the ECCC,⁸³ any sign that they are being dictated by external political considerations precluding further investigations is far more likely to endanger political stability. This also makes the argument on national reconciliation hard to stomach. Unless the National Co-Prosecutor is suggesting that selective silence and historical

77. S.C. Res. 1688, U.N. Doc. S/RES/1688 (June 16, 2006), *available at* http://www.un.org/Docs/sc/uncs_resolutions06.htm (Click on “S/RES/1688 (2006)” hyperlink).

78. *See* Ek Madra, *Cambodia PM rejects wider Khmer Rouge trials*, REUTERS, Mar. 31, 2009, <http://www.reuters.com/article/worldNews/idUSTRE52U11Z20090331>.

79. *See supra* text accompanying notes 28-29.

80. *See* Rose, *supra* note 76, at 2-3.

81. *See* Decision on Appeal Against Provisional Detention Order of Ieng Sary, Criminal Case File No. 002/19-09-2007-ECCC/OCIJ (PTC03), para. 113 (Oct. 17, 2008).

82. *See id.* paras. 111-17.

83. *See, e.g.,* The Cambodian Trial Monitor, News Articles (old), http://www.cambodiatribunal.org/index.php?option=com_content&view=article&id=60&Itemid=60 (last visited Oct. 24, 2009); Grant Peck, *Long-Delayed Khmer Rouge Genocide Trial Opens*, ASSOC. PRESS, Mar. 29, 2009, *available at* <http://abcnews.go.com/International/WireStory?id=7201040&page=1>; *Cambodia to Resume KRouge Prison Chief Trial*, AFP, Mar. 29, 2009, *available at* http://www.channelnewsasia.com/stories/afp_asiapacific/view/418741/1/.html. In July 2009, the ECCC reported that the number of visitors who had attended the first ever trial at the ECCC of Kaing Guek Eav (alias Duch) had reached the 12,000 mark. Extraordinary Chambers in the Courts of Cambodia, More than 12,000 visitors have attended the Duch trial, (July 22, 2009), http://www.eccc.gov.kh/english/news.view.aspx?doc_id=299.

forgetting are a surer recipe for reconciliation in Cambodian society than a more complete accounting of the past,⁸⁴ limiting the trial process to a mere five defendants is unlikely to achieve any lasting peace or stability in Cambodia. In a similar vein, simply appeasing former Khmer Rouge cadre by withholding investigations or any other kind of enquiry into, or acknowledgement of, their past conduct, is a very limited understanding of what “national reconciliation” entails.⁸⁵

2. Judicial review

The ECCC Law and Internal Rules expressly designate the PTC as the sole and final organ for adjudicating disputes between the Co-Prosecutors as well as the Co-Investigating Judges.⁸⁶ There is no provision concerning the extent of review afforded to the PTC in this respect. The PTC has not had occasion to exercise this responsibility thus far, and its pronouncements on its powers of review have been in the exercise of its other function—decisions on appeals against certain decisions of the Co-Investigating Judges.⁸⁷ For instance, in the appeal against the Closing Order issued by the Co-Investigating Judges in the case of Duch, the Co-Prosecutors requested the PTC to add a mode of liability and additional charges in the closing order against the accused.⁸⁸ The PTC acknowledged the lack of an express standard of review in the ECCC Law, and gleaned support for the scope of its review jurisdiction by likening its mandate to that of the Cambodian Investigation Chamber.⁸⁹ It noted that the latter had broad powers of review, including examining the regularity of the procedure followed and ordering further investigations into additional persons as well as offences.⁹⁰ Drawing on this analogy and in light of the

84. On truth as a double-edged sword in reconciliation efforts, see David A. Crocker, *Reckoning with Past Wrongs: A Normative Framework*, 13 ETHICS & INT'L AFF. 43, 49-51 (1999). A country wide survey carried out by DC-Cam, one of the foremost not-for-profit organizations working in Cambodia in 2002, revealed that an overwhelming number of respondents affected by the Khmer Rouge atrocities did not consider forgetting the past as part of any reconciliation effort. See SUZANNAH LINTON, RECONCILIATION IN CAMBODIA 26-27 (2004).

85. On the uncertainty of appeasement leading to lasting peace or stability, see Kai Ambos, *The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC*, in BUILDING A FUTURE ON PEACE AND JUSTICE 19, 25 (Kai Ambos et al. eds., 2009).

86. See ECCC law, *supra* note 5, arts. 20 new, 23 new; ECCC INTERNAL RULES, *supra* note 58, R. 71, 72.

87. See ECCC INTERNAL RULES, *supra* note 58, R. 74.

88. *Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias “Duch”*, Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC02), para. 30 (Dec. 5, 2008).

89. See *id.* paras. 40-41.

90. See *id.* paras. 41-43.

Internal Rules, the PTC interpreted its authority to extend to conducting an independent and de novo assessment of the legal characterization of the facts decided by the Co-Investigating Judges.⁹¹

While appeals against Closing Orders of the Co-Investigating Judges bear certain similarities to a dispute between the Co-Prosecutors on whether to proceed with an investigation—in that both signal the conclusion of an investigation into a particular suspect and a specific charge—there are important differences between the two. The standard used by the PTC to decide in the appeal against the Closing Order was simply whether the acts that were part of the investigation *can* be accorded the legal characterization requested by the Co-Prosecutors, and whether this should have been acceded to by the Co-Investigating Judges.⁹² On the other hand, in a dispute between the Co-Prosecutors concerning a matter involving political judgment and prediction, it is extremely likely that the facts are capable of supporting both non-prosecution in the interests of stability and national reconciliation, as well as prosecution so as to serve accountability. The standard used to assess the soundness of a different legal characterization of facts is thus rather unhelpful in resolving disputes between two co-equal Prosecutors, both of whose submissions may have considerable merit. Is there then anything in the ECCC law or the instruments of other tribunals that indicates a presumption in favor of either position or a burden of proof requirement?

A tentative case can be made that the burden of proof would be on the National Co-Prosecutor arguing for non-prosecution. This follows from the default position in the Internal Rules that unless the majority of judges in the PTC vote against it, the investigation should proceed.⁹³ While other international tribunals have not had to confront this challenge, the Rome Statute of the ICC would also support a higher level of proof for declining investigation or prosecution in the “interests of justice” than for moving forward with the prosecution. This follows from the scheme of the Statute, which accords a greater scope of review of prosecutorial discretion in the event that the Prosecutor decides not to proceed with an investigation or prosecution, despite the existence of a reasonable basis to do so.⁹⁴ In addition, the responsibility of the Prosecutor to prosecute or investigate contingent upon his having a “reasonable basis” to believe that a crime

91. *See id.* paras. 43-44.

92. *See id.* para. 44.

93. *See* ECCC INTERNAL RULES, *supra* note 58, R. 71(4).

94. *See* Rome Statute, *supra* note 72, art. 53.

within the Court's jurisdiction has been committed must be contrasted with his duty to demonstrate that there are "substantial reasons" to believe that an investigation will not be in the "interests of justice."⁹⁵

3. The implications of the ECCC decision

The inconclusive nature of ECCC law enabling a resolution of the dispute between the Co-Prosecutors has implications that reverberate far beyond the trial of the Khmer Rouge suspects. It is not simply ECCC law that does not have concrete answers to the challenges facing the exercise and review of prosecutorial discretion; the law and practice of other international and hybrid criminal tribunals is also equivocal on this matter. Thus far this has, strictly speaking, not been a problem that the majority of these tribunals have had to confront and therefore the incentive to develop principled guidelines has been marginal. The ICC, however, being not only a post-conflict tribunal, but also an international court that has the authority to investigate and prosecute while a conflict is on-going,⁹⁶ will undoubtedly have to address this dilemma. It is no surprise then that the legal scholarship on this question has revolved around the legal provisions of the Rome Statute and the status of the ICC. It is these debates that we shall now consider in order to be able to develop a foundation for dispute resolution by the ECCC.

II. THE ICC AND THE "INTERESTS OF JUSTICE"

A. The Quest for Accommodating Prosecution and Peace at the ICC

The question of whether an international criminal tribunal such as the ICC should pursue investigations or prosecutions into a situation where it has good reason to believe that international crimes have been committed is, at first glance, a peculiar one. The aim of these tribunals, after all, is to ensure that serious crimes do not go unpunished and "to put an end to impunity for . . . [their] perpetrators," thus contributing to general as well as specific deterrence.⁹⁷ The actualization of these lofty goals however has proved more problematic and is now the subject of an oft rehearsed debate between champions and detractors of a "duty" to prosecute individuals

95. *Id.* art. 53(1)(c). This requirement of "substantial reasons" is curiously enough not repeated in the corresponding provision concerning prosecutions. *See* Rome Statute, *supra* note 72, art. 53(2)(c).

96. On the distinction between ex post and ex ante tribunals, see Mahnouch A. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L L. 385, 385 (2005).

97. Rome Statute, *supra* note 72, Preamble.

alleged to have committed international crimes.⁹⁸ It is worth setting out the gist of the arguments of the opposing sides.

Starting from more modest and traditional assumptions of the benefits of conducting international criminal trials for mass atrocities, which include retribution, deterrence, incapacitation, and rehabilitation, proponents of these trials have come to see the process as embracing increasingly more ambitious goals. International criminal trials are now touted as “venue[s] for giving voice to” victims of mass violence, expected to create a historical record of wrongdoing, and even to contribute to prevention of conflict.⁹⁹ Retribution and deterrence feature particularly strongly in arguments for international prosecutions. The retributive argument works at the individual as well as community level—trials are considered an effective substitute for the individual retributive sentiments of victims,¹⁰⁰ as well as a way for the international community to absolve itself of blame for failing to act to prevent wrong doing.¹⁰¹ Punishment is also considered vital as an end in itself—crimes that are so horrific so as to shock the conscience of mankind should not go unpunished.¹⁰² Deterrence as an aim of international criminal trials is more ambitious in scope than its purely domestic counterpart. In addition to the more limited objective of “specific deterrence”—preventing a repetition of atrocities in the context of the specific countries and situations for which the trials are held through isolating and incarcerating the perpetrators of violence—it also encompasses “general deterrence” which looks at the global effect of

98. See the classic debate between Orentlicher (arguing for a “duty to prosecute” serious violations of human rights) and Nino (rebutting this claim as excessively rigid and emphasising the importance of political context in designing transitional strategies). Orentlicher, *supra* note 2; Nino, *supra* note 1; Diane F. Orentlicher, *A Reply to Professor Nino*, 100 YALE L.J. 2641 (1991).

99. Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT. L. REV. 329, 331 (2008) [hereinafter Damaška, *International Criminal Justice*]; Minna Schrag, *Lessons Learned from ICTY Experience*, 2 J. INT’L CRIM. J. 427, 428 (2004); *Developments in the Law – International Criminal Law*, 114 HARV. L. REV. 1943, 1961 (2001) [hereinafter *Developments*].

100. See Richard J. Goldstone, *Justice as a Tool for Peace-making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INT’L L. & POL. 485, 491 (1996); JUDITH N. SHKLAR, *LEGALISM: LAW, MORALS, AND POLITICAL TRIALS* 158 (1964).

101. See Claude Jorda, *The International Criminal Tribunal for the Former Yugoslavia: Its Functioning and Future Prospects*, 3 HOFSTRA L. & POL’Y SYMP. 167, 201 (1999); Gabrielle Kirk McDonald, Address, *International Support for International Criminal Tribunals and an International Criminal Court: The International Criminal Tribunal for the Former Yugoslavia*, 13 AM. U. INT’L L. REV. 1413, 1436 (1998).

102. Security Council Resolutions seem particularly prone to this rationale. See *Developments*, *supra* note 99, at 1969 (citing U.N. SCOR, 52d Sess., 3842d mtg. at 19, U.N. Doc. S/PV.3842 (1997); U.N. SCOR, 49th Sess., 3453d mtg. at 3-4, U.N. Doc. S/PV.3453 (1994); U.N. SCOR, 48th Sess., 3,175th mtg. at 19, U.N. Doc. S/PV.3175 (1993)).

prevention of impunity through criminal trials in one state that will affect the behavior of individuals in others.¹⁰³

A more nuanced analysis of the benefits of international criminal tribunals and their capacity for preventing mass atrocities has been suggested with reference to the potential effect the threat of prosecutions can have on altering the cost benefit calculus of using atrocities as a means of obtaining and consolidating political power. It is asserted that the initial practice of the ICC demonstrates that the threat of prosecution and the issuing of arrest warrants, far from damaging prospects for stability, can be one of the factors preventing an escalation of violence, stigmatize and politically isolate powerful actors, as well as prompt internal divisions within and weaken the bargaining positions of established elites.¹⁰⁴ There is also emphasis on the potential didactic function of these trials—creating a public sense of accountability for severe violations of human rights through exposure, stigmatization, and internalization of norms and values that respect human rights.¹⁰⁵ Pro-prosecution advocates assert that it is only through justice—establishing accountability for abuses, creating an accurate historical record, and providing some relief for victims—that a conflict society can transition to a peaceful and stable one based on the rule of law.¹⁰⁶

Opponents of international criminal prosecutions pose several challenges to holding out prosecutions as the panacea for all ills confronting conflict and transitional societies. The first set of arguments constitutes a weak challenge to the idea of international prosecutions and is born out of a political realist stance.¹⁰⁷ It holds that while prosecutions are

103. See LEYLA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW* 73-75 (2002); David Wippman, *Atrocities, Deterrence and the Limits of International Justice*, 23 *FORDHAM INT'L L. J.* 473, 473 (1999).

104. See Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 *HUM. RTS. Q.* 624 (2009) [hereinafter Akhavan, *Disincentive to Peace*]; Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 *AM. J. INT'L L.* 7 (2001) [hereinafter Akhavan, *Beyond Impunity*].

105. See Damaška, *International Criminal Justice*, *supra* note 99, at 345-47; Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 *HUM. RTS. Q.* 737, 741-42, 746-51 (1998).

106. See Alexander K.A. Greenawalt, *Justice without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 *N.Y.U. J. INT'L L. & POL.* 583, 602 (2007). Jose E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 *MICH. L. REV.* 2031, 2031-32 (1998); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 28 (2001); Juan E. Méndez, *In Defense of Transitional Justice*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES* 1, 7 (A. James MacAdams ed., 1997).

107. Akhavan characterizes the debate on peace versus justice as a debate between judicial romantics and political realists. This is certainly part of, but not the entire, picture as some opponents of

undoubtedly a useful tool in the fight against impunity and establishment of the rule of law, they are not appropriate in all cases. This is especially true of fragile and post-conflict societies, where unless non-prosecutorial alternatives such as amnesties or truth commissions are employed, the country may never be able to transition towards peace and stability.¹⁰⁸ While this compromise is born out of pragmatism to some extent—we are reminded that leaders and powerful figures in a conflict situation will never agree to relinquish power unless they have some assurance that they will not be subject to criminal sanctions¹⁰⁹—the ultimate goal, peace and future justice, is certainly an equally important moral good as the prevention of impunity.¹¹⁰

The second set of claims is a much stronger challenge to the very notion that prosecutions are the best response to mass atrocity.¹¹¹ Proponents of this line of reasoning put forward alternative justice mechanisms such as truth commissions and selective amnesties as alternatives that may accord more with restorative justice needs, and promote societal healing and reconciliation between victims and perpetrators.¹¹² Mechanisms such as truth commissions are seen as being able to provide a more accurate historical account of the causes and consequences of mass violence that would be difficult within the narrow confines of the traditional model of an adversarial criminal trial.¹¹³ They

international prosecutions challenge them on normative rather than pragmatic grounds. See Akhavan, *Disincentive to Peace*, *supra* note 104.

108. See, e.g., Goldstone & Fritz, *supra* note 3, at 662-63; Jaime Malamud-Goti, *Transitional Governments in the Breach: Why Punish State Criminals?*, 12 HUM. RTS. Q. 1, 1-6 (1990); José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425 (1992).

109. See Nick Grono & Adam O'Brien, *Justice in Conflict? The ICC and Peace Processes*, in *COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA* 13, 14 (Nicholas Waddell & Phil Clark eds., 2008); Kenneth A. Rodman, *Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court*, 22 LEIDEN J. INT'L L. 99, 102 (2009).

110. See Rodman, *supra* note 109, at 125 (quoting Bass who classified legal justice as one good among many, rather than a good that trumps all others. Gary Jonathan Bass, *Jus Post Bellum*, 32 PHIL. & PUB. AFF. 384, 405 (2004)); Anonymous, *Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 249, 252, 258 (1996).

111. For an excellent overview of the development of this movement in transitional justice literature, see Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915, 926-29 (2009).

112. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 88-89 (1998); Kent Greenawalt, *Amnesty's Justice*, in *TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS* 189, 198 (Robert I. Rotberg & Dennis Thompson eds., 2000).

113. See Alice H. Henkin, *State Crimes: Punishment or Pardon (Conference Report)*, in 1 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 184, 186

are also considered to be part of the quest to find specific solutions to particular conflict and transitional situations that contribute to the building of a stable social order, as contrasted with a generic idolization of criminal prosecutions as universally applicable solutions.¹¹⁴

Yet another set of challenges casts doubt on some of the stronger justifications and aims of criminal prosecutions. For instance, suspect as deterrence may be as a viable goal in domestic prosecutions, its efficacy is even more doubtful when transposed to the international context.¹¹⁵ It would be fanciful to suggest that rational calculations of the probability of being held liable before an international criminal tribunal enter into the thoughts of leaders or lower level perpetrators engaged in mass atrocities.¹¹⁶ Moreover, in light of the small number of accused that international tribunals proclaim as the target of their prosecution, this threat is highly unlikely to deter the vast number of perpetrators, especially given the relative lightness of the sentence an international tribunal can mete out.¹¹⁷ Taken together with the fact that unlike domestic acts of violence, mass atrocities are frequently committed in a moral climate of societal approval and encouragement, perpetrators often do not perceive the “wrongness” of their actions and cannot therefore be expected to enter into cost-benefit analyses on which deterrence relies.¹¹⁸ Critics also question the merit of arguments valorizing the pedagogic and truth telling functions of criminal prosecutions.¹¹⁹

(Neil J. Kritz ed., 1995); Harvey M. Weinstein & Eric Stover, *Introduction: Conflict, Justice and Reclamation*, in *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY*, 1, 13-14 (Harvey M. Weinstein & Eric Stover eds., 2004).

114. See Richard Goldstone, *Preface* to *HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA* 9, 9 (Carla Hesse & Robert Post eds., 1999); José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints*, 13 *HAMLIN L. REV.* 623, 628 (1990).

115. Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 *STAN. J. INT'L L.* 39, 72 (2007). The logic of deterrence assumes that the probability combined with severity of punishment will outweigh the potential benefits of committing the criminal act. See, e.g., Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 *U. PA. L. REV.* 949, 960, 964 (1966).

116. See Damaška, *International Criminal Justice*, *supra* note 99, at 344-45.

117. See *Developments*, *supra* note 99, at 1964-65; Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 *AM. U. INT'L L. REV.* 321, 367, 382-83 (1999).

118. Akhavan, *Beyond Impunity*, *supra* note 104, at 11; Naomi Roht-Ariazza, *Punishment, Redress and Pardon: Theoretical and Psychological Approaches*, in *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 13, 14 (Naomi Roht-Ariazza ed., 1995).

119. See, e.g., Gerry J. Simpson, *Didactic and Dissident Histories in War Crimes Trials*, 60 *ALB. L. REV.* 801 (1997) (highlighting some of the concerns with law as history and ultimately arguing that “[A]n international war crimes regime founded on a concern for consistency, legality and impartiality

The issue of potential conflict between investigations and prosecutions sought to be undertaken by the ICC and alternative justice measures aimed at peace and stability introduced by individual states was expressly addressed in the negotiations during the drafting of the Rome Statute and was deemed incapable of resolution at that stage.¹²⁰ While models such as the South African Truth and Reconciliation Commission were readily approved of,¹²¹ concerns were expressed about Pinochet-style amnesty provisions.¹²² The drafters ultimately opted for a “creative ambiguity” in favor of foreclosing the debate, thus providing some room to maneuver for the prosecutor as well as the judges of the ICC to recognize an exception to prosecution in exceptional circumstances, for instance in the case of some amnesties.¹²³

would be a valuable addition to the international legal system.”); Vivian Grosswald Curran, *The Politics of Memory/Erinnerungspolitik and the Use and Propriety of Law in the Politics of Memory Construction*, 14 LAW & CRITIQUE 309 (2003) (arguing that the post-WWII trials for crimes against humanity risk destroying established legal principles in their attempt to represent historical pronouncement and national values); Martii Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK U.N. Y.B. 1 (2002) (addressing the difficulty encountered in establishing an unambiguous historical truth in international criminal trials).

120. Robinson, *supra* note 3, at 481; Jessica Gavron, *Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court*, 51 INT’L & COMP. L.Q. 91, 107 (2002). One camp firmly favored prosecutions as the sole response while the other was reluctant to lay down a strict rule that would mandate prosecutions in all cases. The U.S. delegation went so far as to circulate a “non-paper” advocating the latter stance. Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT’L L. 93, 96 (1999).

121. The assumption that “legitimate” forms of truth commissions would never fall foul of the ICC is echoed in Kofi Annan’s statement: “It is inconceivable that, in such a case, the Court would seek to substitute its judgement [sic] for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.” Kofi Annan, Speech at the Witwatersrand University Graduation Ceremony (Sept. 1, 1998) *quoted in* Villa-Vicencio, *supra* note 1, at 222.

122. Greenawalt, *supra* note 106, at 617-18.

123. See Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT’L L.J. 507, 522 (1999) (quoting Phillippe Kirsch, who contends that the provisions to the Rome Statute reflect “creative ambiguity”). There is significant controversy on the extent to which the Rome Statute provides a leeway for non-prosecutorial alternatives. Most commentators suggest that will be permitted only in the most exceptional of circumstances. See, e.g., John Dugard, *Possible Conflicts of Jurisdiction with Truth Commissions*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 693, 701 (Antonio Cassese et al. eds., 2002); Stahn, *supra* note 73, at 708. There are also those, however, who fear that the ICC has, or may be interpreted, however falsely, to have foreclosed alternative justice mechanisms. See, e.g., John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law?: Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55 (2003); Villa-Vicencio, *supra* note 1, at 205 (“[T]he advent of the International Criminal Court (ICC) represents a major triumph over lawlessness that is . . . legally a little frightening . . . because it could be interpreted, albeit incorrectly, as foreclosing the use of truth commissions, which could otherwise encourage political protagonists to turn away from ideologically fixed positions that make for genocide and instead to pursue peaceful co-existence and national reconciliation.”).

The initial practice of the ICC has already invited staunch supporters as well as critics on the peace versus justice conundrum. For instance, the ICC's intervention in Uganda at the behest of the Ugandan government and its issuance of arrest warrants against top Lord's Resistance Army ("LRA") leaders has been criticized as having put an end to all hope for a cessation of the conflict by removing any incentive for the LRA to negotiate, thus jeopardizing local peace initiatives and rendering the local civilian population increasingly vulnerable to attack.¹²⁴ It has also been accused of prioritizing a particular version of retributive justice over local values that embrace acknowledgement, forgiveness, reconciliation, and integration, such as culturally enshrined traditional Acholi rituals of reconciliation.¹²⁵ Pro-ICC interventionists have simultaneously applauded the ICC's actions in Uganda for having weakened the LRA by pressuring Sudan, which had been crucial to the LRA's success, to stop harboring rebels, and by creating divisions within the LRA leadership by isolating top leaders.¹²⁶ They emphasize that Uganda's referral of the situation to the ICC dramatically altered the political and military situation in which the LRA was able to operate with impunity—with its atrocities having peaked in the period immediately preceding the referral—by weakening the LRA's military base and forcing formerly defiant leaders to come to the negotiating table.¹²⁷

The controversy still defies an easy resolution and various suggestions have been put forward as to how the ICC should go about walking the tightrope between prosecutions and respect for alternative justice mechanisms and peace processes in the societies in which it could potentially intervene.¹²⁸ One of the more promising solutions advocated is that the ICC should defer to non-prosecutorial alternatives only when they serve the same goals, in equal or better measure, as those that the ICC has been set up to achieve: prevention of impunity, retribution, general and

124. See, e.g., Josefine Volqvartz, *ICC under fire over Uganda probe*, CNN, Feb. 23, 2005, <http://www.cnn.com/2005/WORLD/africa/02/23/uganda.volqvartz/index.html>; Kasaija Phillip Apuuli, *The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda*, 4 J. INT'L CRIM. JUST. 179, 180 (2006).

125. David Lanz, *The ICC's Intervention in Northern Uganda: Beyond the Simplicity of Peace vs. Justice*, 9-10 (The Fletcher Sch. Inst. for Hum. Security Working Paper Series, May 2007), available at [http://www.reliefweb.int/rw/RWFFiles2007.nsf/FilesByRWDocUnid?File/PANA-78VKGJ-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFFiles2007.nsf/FilesByRWDocUnid?File/PANA-78VKGJ-full_report.pdf/$File/full_report.pdf).

126. Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403, 416-20 (2005) [hereinafter Akhavan, *Lord's Resistance Army*]; Grono & O'Brien, *supra* note 109, at 15-16.

127. Akhavan, *Lord's Resistance Army*, *supra* note 126, at 404, 416-20; Grono & O'Brien, *supra* note 109, at 15-16.

128. See Dugard, *supra* note 123, at 701-03.

specific deterrence, truth telling, and reparations for victims.¹²⁹ Commentators have especially proposed criteria that alternative justice mechanisms like truth commissions should satisfy if they are to be considered legitimate and necessary bodies for promoting these goals of international justice.¹³⁰ While the exact requirements vary,¹³¹ most insist upon the commission's being independent of the government and the result of a democratic decision making process. It should be adequately resourced so as to be able to conduct thorough investigations and hold perpetrators publicly accountable. Victims should be closely involved in the processes of the commission and the information obtained from the process should be widely disseminated.¹³²

Perhaps the most interesting interpretation of the ICC's obligations in such a situation comes from the Office of the Prosecutor's (OTP) own understanding of the "interests of justice" provision in Article 53 of the Rome Statute, which is a legitimate ground for the Prosecutor to not proceed with an investigation or prosecution.¹³³ The OTP's Policy Paper is explicit that in all cases of international crimes that meet the jurisdiction and admissibility tests of the Rome Statute, given the international trend towards accountability and the object and purpose of the Statute itself, the presumption will always favor investigation or prosecution.¹³⁴ The paper recognizes the "complementary role" that national prosecutions, reparations programs and other truth and reconciliation seeking traditional mechanisms can play as part of a more comprehensive approach to justice.¹³⁵ However, it cautions that while the "interests of justice" do not only encompass a narrow vision of purely criminal justice, they are also not

129. Linda M. Keller, *The False Dichotomy of Peace versus Justice and the International Criminal Court*, 3 HAGUE JUST. J. 12, 34-47 (2008). On the goals of international criminal justice, see, e.g., MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 149 (2007); Ralph Henham, *The Philosophical Foundations of International Sentencing*, 1 J. INT'L CRIM. JUST. 64, 80-81 (2003); Danner, *supra* note 4, at 531 (noting the ICC's aims as including the promotion of retribution and reconciliation so as to preserve international order).

130. Goldstone & Fritz, *supra* note 3, at 664-65.

131. See, e.g., Villa-Vicencio, *supra* note 1, at 216-17; Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROBS. 197, 219-20 (1996); Priscilla Hayner, *International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal*, 59 LAW & CONTEMP. PROBS. 173, 178-80 (1996).

132. Goldstone & Fritz, *supra* note 3, at 664.

133. Int'l Crim. Ct. [ICC], Office of the Prosecutor, *Policy Paper on the Interests of Justice*, 1 (Sept. 2007), http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-Interests_ofJustice.pdf.

134. *Id.* at 2-4.

135. *Id.* at 7-8.

broad enough to include all issues of peace and security. The latter are best addressed by other institutions such as the UN Security Council.¹³⁶

The Policy Paper is perhaps more interesting for what it is silent on, rather than for what it affirms. It refuses to go into any details on the criteria it will use, for instance, in considering whether or not to proceed in the interests of justice. While it acknowledges the complementary role of non-prosecutorial mechanisms as part of a broader understanding of justice, through its default presumption favoring prosecution it implicitly suggests a hierarchy of strategies for dealing with international crimes, in which criminal prosecutions occupy the top tier. Moreover, its compartmentalization of issues of “justice” and issues of “peace” is quite artificial, especially in the absence of any elucidation on the bright line dividing the two.¹³⁷ One would imagine that in most cases of conflict and post-conflict societies confronting the challenge of bringing the perpetrators to justice and establishing a stable society, the two would be too closely intertwined for any institution to be able to decide on one, without having to automatically assess the other.

B. The Institutional Balance Struck at the ICC

Decisions on whether to investigate or prosecute a “situation” before the ICC depend on the collective functioning of, and consensus between, three different bodies, of which one is independent of the ICC structure—the Security Council. Not only may the Security Council trigger the ICC’s jurisdiction by referring to it any situation where it believes a crime within the Court’s mandate has been committed,¹³⁸ in one of the more controversial additions to the ICC Statute, the Security Council has been accorded the power to defer prosecution or an investigation by the ICC for a period of 12 months by passing a Resolution under Chapter VII of the UN Charter. The deferral is renewable and, theoretically, there is no limit to the number of deferrals the Security Council may seek.¹³⁹ The drafting history of Article 16 suggests that the provision did not intend to accord a

136. *Id.* at 8-9.

137. *Contra* Jens David Ohlin, *Peace, Security and Prosecutorial Discretion*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 183, 199 (Carsten Stahn & Göran Sluiter eds., 2008) (suggesting a distinction between the two as individual (interests of justice) and collective (interests of peace and security). For criticism that this distinction unnecessarily fetters prosecutorial discretion and indirectly amends the Rome Statute, see William Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 *J. INT’L CRIM. JUST.* 731, 749 (2008).

138. Rome Statute, *supra* note 72, art. 13(b).

139. *Id.* art. 16.

subordinate status to the ICC vis-à-vis the Security Council, or to compromise its functional independence.¹⁴⁰

A strong case has been made that political concerns such as national reconciliation and stability are the exclusive preserve of the Security Council acting under its Chapter VII mandate to maintain international peace and security. Thus, any such policy matters should be a matter for the Security Council to decide on, and if warranted, defer prosecution or investigation into a matter that could otherwise potentially be prosecuted before the ICC.¹⁴¹ This would also be the only way to safeguard the position of the ICC and its prosecutor as independent and apolitical bodies impartially administering justice.¹⁴² It is further argued that the Rome Statute does not provide any basis for the prosecutor exercising his discretion on whether and whom to prosecute on purely political considerations. Not only would such politicization severely undermine the prosecutor's mandate to indict senior leaders allegedly responsible for mass atrocities, but it is also a convenient shield that countries could easily invoke to avoid ICC investigation. There is a danger that the ICC would then end up treating identical cases differently based on a political judgment and also compromise the possibility of short-term deterrence as a goal of international criminal justice processes.¹⁴³

These are powerful and legitimate concerns that should undoubtedly give the prosecutor some pause for thought before allowing political considerations to influence a decision on whether the prosecution would be in the interests of justice. Nevertheless, the institutional role of the prosecutor of an international or hybrid court is inevitably political to some

140. The initial draft by the International Law Commission provided that a prosecution arising from a situation dealt with by the Security Council could not be initiated by the ICC unless authorized by the Council. "This formulation was opposed on the ground that it would disrupt the ability of the ICC to function independently. A compromise was sought by the Singapore proposal, whereby no prosecution or investigation could be commenced by the ICC in the event of a 'direction' to this effect by the Security Council. In addition to the terms of the Singapore proposal, Canada recommended a 12-month renewable deferral period. The final changes were made with the Costa Rican and the British proposals, which required a formal and specific decision of the Security Council, and replaced the word 'direction' with 'request'." Neha Jain, *A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court*, 16 EUR. J. INT'L L. 239, 246 (2005).

141. See generally HUM. RTS. WATCH, HUM. RTS. WATCH POL'Y PAPER: THE MEANING OF "THE INTERESTS OF JUSTICE" IN ARTICLE 53 OF THE ROME STATUTE (June 2005), http://www.hrw.org/sites/default/files/related_material/2005_ICC_Interests_of_Justice.pdf [hereinafter HRW PAPER].

142. *Id.* at 7-8; Giuliano Turone, *Powers and Duties of the Prosecutor, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1137, 1142-3 (Antonio Cassese et al. eds., 2002).

143. HRW PAPER, *supra* note 141, at 14-15.

extent.¹⁴⁴ Since no international court, including the ICC, has any powers of arrest to enforce its warrants, or the organizational apparatus to compel states to assist in investigative and other efforts, the successful functioning of these courts depends greatly on the cooperation of states and other non-governmental and civil society bodies.¹⁴⁵ Thus, decisions on whom to prosecute or investigate, and when and how to do so, inevitably contain an underlying political component. The prosecutor can afford to ignore these considerations only at the risk of endangering the entire trial process.¹⁴⁶ Moreover, it is overly optimistic to expect the Security Council always to act to defer investigation or prosecution whenever a situation could potentially threaten national stability or peace processes.¹⁴⁷ Absolving the prosecutor of all responsibility of the destabilizing effects of prosecution would be an extreme agent relativistic position that assumes one is only responsible for one's actions, never mind someone else's actions in relation to the same matter.¹⁴⁸ This would be a naively myopic attitude to the problems of international peace and justice and makes the stance of former Prosecutors¹⁴⁹ as well as academics¹⁵⁰ who argue that an international prosecutor must be above all political considerations hard to understand. While it is certainly true that the Prosecutor should not compromise his independence by giving in to political or other pressures from different interest groups, to ignore important policy issues that would greatly impact the legitimacy as well as efficacy of prosecution efforts would be a

144. See Côté, *supra* note 56, at 169-71 (arguing that it is hard to imagine a Prosecutor would always be immune from political considerations in matters that are closely allied with wide reaching political interests).

145. See Arsanjani & Reisman, *supra* note 96, at 399-400; Jan Wouters et al., *The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability?*, 8 INT'L CRIM. L. REV. 273, 285-86 (2008). This has been the case even for UN backed tribunals such as the ICTY and the ICTR. See, e.g., RACHEL KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY 90-91 (2004); KINGSLEY CHIEDU MOGHALU, GLOBAL JUSTICE: THE POLITICS OF WAR CRIMES TRIALS 61 (2006).

146. See Brubacher, *supra* note 4, at 92-94.

147. See Rodman, *supra* note 109, at 120.

148. On agent relativism, see John Gardner, *Complicity and Causality*, CRIM. L. & PHIL. 127, 132 (2007).

149. See, e.g., RICHARD GOLDSTONE, FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR 132 (2000); Louise Arbour, Keynote Speech at the International Conference on War Crimes Trials (Nov. 8, 1998), *quoted in* KERR, *supra* note 145, at 178.

150. See, e.g., Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 312-13 (1997).

seriously misguided stance to the dilemmas posed by the quest for justice.¹⁵¹

The ICC and its Prosecutor have indeed been compelled to recognize this constraint to their mandate in the recent furor over the decision of the Pre-Trial Chamber granting the Prosecutor's request for an arrest warrant against incumbent President Al-Bashir in Sudan for war crimes and crimes against humanity committed in Darfur.¹⁵² The move prompted immediate opposition by the Sudanese government and its allies—the African Union and the Arab League—in addition to support from China and Russia.¹⁵³ Bashir also took strong retaliatory measures, expelling and shutting down international and domestic aid groups providing critical humanitarian assistance to civilians from Sudan, thus underscoring the international community's co-dependent relationship with Sudan and engineering a conflict between the demands of peace versus justice.¹⁵⁴ The prospects of the arrest warrant being executed grew dimmer as Bashir continued to travel freely in Africa. The Arab States¹⁵⁵ and the Arab League,¹⁵⁶ as well as the African Union,¹⁵⁷ decided to follow a policy of non co-operation with the ICC on execution of the arrest warrant. This is not to suggest that the Prosecutor should not have pursued the situation in Sudan at all; it simply signals the importance of the Prosecutor and the ICC's being

151. In a similar vein, see Kenneth A. Rodman, *Darfur and the Limits of Legal Deterrence*, 30 HUM. RTS. Q. 529, 557 (2008) (“Given the dependence of law on politics, it is incumbent on the prosecutor to adopt a ‘do no harm’ approach to any political processes that might put an end to criminal violence and establish the conditions under which international criminal justice can play a role—even if that role is circumscribed by power realities.”).

152. Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>.

153. Victor Peskin, *Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan*, 31 HUM. RTS. Q. 655, 675 (2009).

154. *Id.* at 676. See also Stephanie McCrummen & Colum Lynch, *Sudan Ousts Aid Groups after Court Pursues President*, WASHINGTON POST, Mar. 5, 2001, at A01; Lynsey Addario & Lydia Polgreen, *Aid Groups' Expulsion, Fears of More Misery*, N.Y. TIMES, Mar. 22, 2009, at A6.

155. Peskin, *supra* note 153, at 676-77.

156. Michael Slackman & Robert F. Worth, *Setting Aside Divisions, Arab Leaders Rally Behind Sudan's President at a Meeting*, N.Y. TIMES, Mar. 31, 2009, at A5.

157. South Africa later defied this Resolution by stating that it is under an international legal obligation to co-operate with the ICC. *SA will Enforce Bashir Warrant*, TIMES (London), July 31, 2009, available at <http://www.thetimes.co.za/News/Article.aspx?id=1042521>. Uganda and Botswana also chose to ignore the decision. *Botswana Rebels Against AU over Bashir*, ABC NEWS, July 5, 2009, available at <http://www.abc.net.au/news/stories/2009/07/05/2617219.htm>; Cherie Booth & Max du Plessis, *Africa's Obstruction of Justice*, THE GUARDIAN (London), July 18, 2009, available at <http://www.guardian.co.uk/commentisfree/2009/jul/18/darfur-bashir-african-union-icc>.

sensitive to the political context in which they operate and the possible repercussions of their actions in the communities affected by their actions.

The other two organs charged with the responsibility of deciding on investigations and prosecutions, and which are within the ICC structure, are the Prosecutor and the Pre-Trial Chamber. As mentioned earlier, the Rome Statute provides the Pre-Trial Chamber with *proprio motu* powers to review a decision of the Prosecutor based entirely on the “interests of justice” only when the Prosecutor decides *not* to proceed with the investigation or prosecution, whether it relates to the investigation into a certain situation or to prosecutions against specific individuals. This was confirmed by the Pre-Trial Chamber in its decision in the *Situation in Darfur, Sudan*¹⁵⁸ where the Chamber emphasized that the meaning of the phrase “interests of justice” was not fixed and the Prosecutor was authorized by the Rome Statute to exercise his discretion on whether to prosecute or investigate based on a non exhaustive list of factors.¹⁵⁹ The Chamber could review the exercise of the Prosecutor’s discretion based on this criterion only when he chose not to proceed with the investigation and not in the case when he concluded that an investigation or prosecution would not be detrimental to justice.¹⁶⁰ In the latter scenario, the power as well as the responsibility for the assessment lay solely with the Prosecutor.¹⁶¹

The Pre-Trial Chamber thus sets up a clear division of authority within the ICC framework for decisions related to investigation and prosecution, and in doing so, indirectly creates a hierarchy between the different goals that can be pursued by international criminal tribunals. In deciding that it has no power of review when the Prosecutor decides that continuing the investigative or trial process would not hurt the interests of justice, and that there is no obvious limit to what factors fall within the definition, the Chamber adopts a subordinate position compared to the Prosecutor in the decision making process on proceeding with a case (with the limited exception of reviewing the admissibility criteria). In contrast, it is silent on the extent of its review jurisdiction in the event that the Prosecutor decides not to prosecute, while acknowledging that it has *proprio motu* powers of oversight in this situation. This scheme strongly suggests that the Chamber views prosecution of individuals reasonably believed to have participated

158. *Situation in Darfur, Sudan*, Case No. ICC-02/05, Decision on Application Under Rule 103, Pre-Trial Chamber I (Feb. 4, 2009).

159. *Id.* paras. 17-18.

160. *Id.* paras. 21-24, 29-30.

161. *Id.* paras. 29-30.

in mass crimes to be the default or main mandate of the ICC, and any decisions not to prosecute as the exception, which must be justified. The standard of review in the latter case is the Prosecutor being able to demonstrate that there are “substantial reasons” to believe that the prosecution will adversely impact the interests of justice.¹⁶² There is no decision of the ICC, however, elucidating how this standard would be applied in practice.

The same ambiguity applies to what yardstick should be used by the Prosecutor to measure the potential adverse impact of prosecutions or investigations on the interests of justice.¹⁶³ Negotiations leading up to the adoption of the Rome Statute indicate that the specter of a freewheeling unaccountable Prosecutor was one of the major sticking points for countries, including those with adversarial systems such as the United States.¹⁶⁴ Prosecutorial discretion under the Rome Statute is therefore subject to various checks and balances. Apart from the supervisory powers of the Pre-Trial Chamber and the deferral authority of the Security Council mentioned above, the Prosecutor is obligated to inform all State parties, especially those that would normally exercise jurisdiction over the relevant crimes, when he commences an investigation on his own, or pursuant to a State party referral.¹⁶⁵ He must also notify the Security Council, the Pre-Trial Chamber and the referring State Party of his decision not to prosecute based on the interests of justice.¹⁶⁶ Further, any person under investigation or prosecution may seek the Prosecutor’s disqualification on grounds of partiality.¹⁶⁷

Despite these and other limitations, commentators have voiced their skepticism that given the ambivalence of the discretionary power not to pursue further investigations or prosecutions based upon the demanding language of “justice” it is not easy to be confident that a “judgment of high politics and prudence” will be made on a principled basis by the Prosecutor.¹⁶⁸ Apart from the general proposals adverted to earlier for the

162. Rome Statute, *supra* note 72, art. 53(1)(c).

163. Academic writing also mostly does not provide detailed criteria on this matter. *See, e.g.,* Brubacher, *supra* note 4, at 83-84.

164. Chris Gallavin, *supra* note 3, at 44-45; Silvia A. Fernández de Gurmendi, *The Role Of The International Prosecutor*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 175, 181 (Roy S. Lee ed., 1999).

165. Rome Statute, *supra* note 72, art. 18(1).

166. *Id.* art. 53(2)(c).

167. *Id.* art. 42(8)(a).

168. Ruth Wedgwood, *supra* note 120, at 97 (1999). *See* Ohlin, *supra* note 137, at 188 (arguing that it would in fact be difficult to think of a factor that could not be subsumed within the meaning of

ICC's potential reconciliation of peace and justice needs,¹⁶⁹ most suggestions regarding this dilemma have posed a "procedural solution" to prosecutorial decision ostensibly making the exercise of discretion by the Prosecutor more objective and susceptible to external assessment.¹⁷⁰ An excellent example of this is the system of ex ante prosecutorial guidelines advocated by Danner, who focuses on enhancing the legitimacy of prosecutorial decision-making. Danner grounds her analysis of legitimacy in the work of Abram and Antonia Chayes, to argue that an international norm is legitimate if it emanates from fair and accepted procedure; is applied equally and without invidious discrimination; and does not offend minimum standards of fairness and equity.¹⁷¹ She puts forward a model of prosecutorial legitimacy where ex ante guidelines that are publicly promulgated provide neutral and transparent criteria to independently assess whether decisions have been made in a fair and equal manner by the Prosecutor.¹⁷² While this model undoubtedly would be helpful in constraining arbitrariness, it has been powerfully criticized on two main counts. First, it fails to directly confront the substantive policy conflicts faced by the ICC Prosecutor, who can hardly claim special expertise in resolving them in the context of a post-conflict society he may have little knowledge of. Second, it ignores the "democracy deficit" of international institutions such as the ICC when compared with national legal systems that provide for such guidelines. While domestic prosecutors are ultimately accountable to the democratic national processes of their countries and can be expected to reflect societal values in making substantive policy decisions, this is not true of the ICC and its Prosecutor, which must find some way to reduce the tension between its own institutional goals and the issues confronting the country that is affected by their actions.¹⁷³

"interests of justice"); Alfred P. Rubin, *The International Criminal Court: Possibilities for Prosecutorial Abuse*, 64 L. & CONTEMP. PROBS. 153, 162-63 (2001) (considering the various possible meanings of justice in the context of the Rome Statute).

169. See *supra* text accompanying notes 129-133.

170. There is considerable support for this solution in literature. See, e.g., Avril McDonald & Roelof Haveman, *Prosecutorial Discretion – Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC*, 2 (Apr. 15, 2003), available at http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/mcdonald_haveman.pdf; Héctor Olásolo, *The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body?*, 3 INT'L CRIM. L. REV. 87 (2003); Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L L. REV. 293 (2005); Robinson, *supra* note 3.

171. Danner, *supra* note 4, at 535-36.

172. *Id.* at 552.

173. Greenawalt, *supra* note 106, at 653-58.

The debate on the best institutional fit between various organs of the ICC who could potentially decide on when not to prosecute in the interests of justice thus appears to be highly fractured and no viable solution seems readily forthcoming. Moreover, any proposal that relies on according more power to the Security Council for this decision would not be of much value for other international or hybrid tribunals that do not envisage the Council playing a role in the trial process apart from the inception stage.

III. LESSONS FOR CAMBODIA AND OTHER INTERNATIONAL(IZED) TRIBUNALS

It may appear questionable to employ the disputed and half formed proposals of the ICC debate to resolve the problem of prosecutorial discretion at the ECCC, which is, moreover, a hybrid tribunal with a very different history and structure from the ICC. These very differences, however, have the potential to help us inch closer to developing a principled solution.

Amongst the most telling points of difference between the ECCC and the ICC are that the former is a post-conflict tribunal, and a hybrid one. While this does not mean that the ECCC can predict for certain the consequences of its actions for Cambodian society, it nevertheless has the luxury to be able to operate in less volatile conditions than the ICC and to assess the possible repercussions of its actions. Partly because of the situations of ongoing conflict in the countries in which the ICC has opened investigations and issued arrest warrants, the various actors in these situations have been compelled to play a highly speculative game with each player—including the ICC, the government, the warring factions, human rights bodies, victims' representatives, and the international community—acting and reacting to what they suspect other actors will do in response to the ICC's involvement. In the chaos of competing voices and positions, one can hardly wonder at the fact that the ICC, ultimately an outsider and a relative newcomer to the politics of the countries it is now trying to operate in, has struggled to find its feet and occasionally floundered. It has therefore been seen as easy prey for condemnation on account of taking sides in the domestic affairs of a country simply by virtue of factoring political considerations into its decision making, and has also been charged with being the tool of a particular constituency such as the government in its selection of the category of individuals it has chosen to pursue.¹⁷⁴ Similar accusations are harder to level against a hybrid tribunal such as the

174. See Arsanjani & Reisman, *supra* note 96, at 385-86, 393-95; Peskin, *supra* note 153, at 679.

ECCC, which encompasses international as well as national personnel, many of whom have been working in Cambodia on matters related to the Khmer Rouge atrocities for decades and have a much better understanding of the political situation at hand.¹⁷⁵ Cambodia also has an extremely dynamic civil society and the ECCC has ample scope for being able to hone its political radar by relying on the wealth of literature, surveys and reports, both current and those produced over the course of the years,¹⁷⁶ that provide empirical evidence for the various political positions. It can therefore factor in policy considerations in its decision making with more assurance and with far less fear of “Western” bias than the ICC can afford.

Second, while the ECCC is a hybrid tribunal, it has more “national” presence in its laws, administration, and personnel than almost any other international or internationalized court. It therefore simply cannot afford to ignore its domestic constituency. This is not, however, a statement of despair, but rather an argument that should impel the international criminal law community to look more closely at the interests and incentives of its domestic constituency. While there has been some recognition even in the context of the ICC that international crimes are at the same time local crimes with local effects and costs flowing from whatever response is taken towards them by the international community,¹⁷⁷ international law practitioners and academics are naturally more prone to being concerned about the long term effects of a single case of non-prosecution on global governance and deterrence efforts, rather than on immediate local exigencies.¹⁷⁸ These local effects are far more acute and pressing in the case of a hybrid court such as the ECCC,¹⁷⁹ which furthermore operates in

175. Steven Heder and Craig Etcheson, for instance, are both renowned experts on Cambodian history and politics and are currently associated with the Office of the Co-Investigating Judges and the Office of the Co-Prosecutors respectively.

176. For a sampling of various databases that carry literature and reports on the Khmer Rouge atrocities see Yale University, Cambodia Genocide Program, <http://www.yale.edu/cgp/databases.html>; Documentation Centre of Cambodia, Databases, <http://www.dccam.org>.

177. See Newman, *supra* note 170, at 346.

178. See, e.g., Akhavan, *Disincentive to Peace*, *supra* note 104, at 646 (arguing that the Acholi community in Northern Uganda with their desire for a grassroots victim centric approach is not the only interested party in the Uganda referral before the ICC; an amnesty for LRA leaders in Uganda could have devastating consequences for the much larger constituency of international criminal justice, for instance by damaging the ICC’s credibility in Africa and elsewhere).

179. Hybrid courts are partly preferred over international tribunals because they are usually located in the countries they serve, and thus are considered to contribute to building local capacity and suffer less from a legitimacy deficit. See Laura A. Dickinsin, *The Promise of Hybrid Courts*, 97 AM. J. INT’L. L. 295, 306-07 (2003); Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT’L & COMP. L. 347, 360, 367-68 (2006).

Cambodia, the site of the crimes, the perpetrators, and the victims. The hybrid structure may also have consequences for the roles that the international and national co-prosecutors can, and indeed were, expected to play in exercising their discretion on whom to prosecute.¹⁸⁰ The ICC prosecutor and the international co-prosecutor of the ECCC can legitimately be more interested in prioritizing the long-term goals of international criminal law in achieving retribution and deterrence, at the expense of local short-term goals of reconciliation, and thus aim to cast the prosecutorial net fairly widely in the name of impartiality and creating a historical record.¹⁸¹ The same incentives do not operate for their national counterparts. National prosecutors operate in a very different political climate and are susceptible to influence by national executives and elite groups, making it unavoidable that they play by different rules, which sometimes cater to an exclusively national audience.¹⁸² Thus an inevitable concern of the national prosecutor is to construct a narrative of mass atrocity that suggests that responsibility for it was not widely shared, and especially did not extend to institutions or groups that have enduring political power and influence.¹⁸³ These different interests are not only vital to factor in when assessing the roles of prosecutors working in international criminal courts as concerns their decisions on whom and how many persons to indict or prosecute, but the kind of evidence led, as well as the theories of criminal responsibility employed.¹⁸⁴ Even more importantly perhaps, these seemingly divergent motivations of international and national actors engaged in international criminal prosecutions should invite a serious rethinking of the aims and purposes of the enterprise of international criminal law as a whole, which should seek to develop a more coherent conceptual account of what the discipline is trying to achieve.

Third, the ECCC, unlike the ICC, does not contemplate any role for the Security Council in its functioning and, even if it were desirable to do so, cannot hope to outsource the problem of deciding when not to prosecute in the interests of national reconciliation to a political organ. In fact, the structure of the tribunal, as discussed earlier,¹⁸⁵ expressly suggests that this was a matter to be considered by the co-equal prosecutors, and in the event

180. See Rose, *supra* note 76, at 2.

181. See Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1815-17, 1822 (2005).

182. See *id.* at 1820, 1826.

183. See *id.* at 1806-07.

184. See *id.* at 1806-29.

185. ECCC law, *supra* note 5, art. 20 new; ECCC INTERNAL RULES, *supra* note 58, at 50.

of a dispute, the task of final adjudication would rest with the Pre-Trial Chamber. The negotiating history of the ECCC Agreement moreover indicates that the Prosecutors were meant to take into account the needs of national reconciliation in choosing whom to prosecute.¹⁸⁶ Thus, a political or policy function was consciously entrusted to the ECCC prosecutors, with a clear oversight by a judicial body.

All these factors suggest that local political considerations, especially domestic peace and stability, are elements that were meant to be taken into consideration in the ECCC trial process, and that the ECCC co-prosecutors were the first organ within the tribunal's structure to be charged with this function in their decision on whom to prosecute. The unique structure of the tribunal, the history of its establishment, and its need to balance domestic as well as international interests in its functioning dictate that rather than taking away from its legitimacy, heeding these concerns would lend it greater efficacy and authority. The crucial issue is to what extent it would be appropriate to let these factors override the ECCC's mandate of ensuring accountability for the crimes committed during the Khmer Rouge.

The similarities between the ECCC and the ICC are of assistance in answering this question. While both tribunals, as well as other international criminal courts, are undoubtedly envisaged as one component of the various mechanisms a society may employ in order to move from a conflict society to a stable one, their own mandate is a very specific and limited one—to hold accountable persons allegedly responsible for having participated in mass atrocities in the setting of a criminal trial. This is in some ways an obvious point, but one that cannot be emphasized enough, given the increasing tendency to view international tribunals as a magic antidote to all that ails a post-conflict society. This mandate should not be discharged carelessly or in disregard for other equally pressing concerns in these societies, but must nevertheless form the priority for international tribunals. This default position is already implicitly recognized in the constitutive instruments of the ECCC as well as the ICC. Both charge a judicial body with assessing the exercise of prosecutorial discretion *not* to proceed with a case because of countervailing factors such as national reconciliation. Given the default presumption in the ECCC that the prosecution should go forward, a requirement that the ECCC Prosecutor has to demonstrate “substantial reasons” for a decision not to prosecute, similar to that of the ICC Prosecutor, should be adopted. In addition, one can build upon the debate on the legitimacy of alternative justice

186. *See supra* text accompanying notes 29-32.

mechanisms that would justify non-prosecution in the context of the ICC, to develop standards by which the ECCC Pre-Trial Chamber would be guided in its assessment of these substantial reasons. I propose a set of negative as well as positive guidelines that should guide prosecutorial discretion and which would render its exercise capable of rational evaluation by the Pre-Trial Chamber.

The negative guidelines require that the prosecutorial discretion should not be discriminatory or exercised in bad faith.¹⁸⁷ The duty of the Prosecutor to be fair and impartial has already been recognized in some decisions by tribunals.¹⁸⁸ In general, the accused would need to show evidence both of an unlawful or improper intent, as well as how the exercise of that intent has a discriminatory effect, such that other similarly positioned individuals were not prosecuted based on impermissible grounds such as ethnicity or religion.¹⁸⁹ This is in keeping with the prosecutor's discretion to choose the individuals and crimes worthy of judicial attention, given the limitations of the court's financial and human resources.¹⁹⁰ The standard of proof should also be demanding. Evidence must be adduced from which a clear inference can be drawn that the Prosecutor was motivated by a discriminatory desire. Further, in order to establish discrimination, the appropriate comparison must be between individuals who are similarly situated.¹⁹¹ Thus, in the present scenario, it would need to be proved that the national Prosecutor was acting with an impermissible motive in not proceeding with the additional indictments and that the non-prosecution of the potential suspects has the effect of unlawfully discriminating between them and the accused currently before the tribunal. Factors that would be unacceptable bases for discrimination would include the political influence exerted by the accused in Cambodian society and their ties to the current military or government institutions.

In order to formulate positive guidelines for the exercise of prosecutorial discretion, I rely heavily on constitutional rights theory and the exercise undertaken by courts when confronted with conflicts between fundamental or constitutional rights, or between these rights and competing

187. See Danner, *supra* note 4, at 536-37.

188. See, e.g., *Prosecutor v. Akayesu*, Case No. ICTR 96-4-A, Judgment, ¶¶ 94-96 (June 1, 2001); *Prosecutor v. Barayagwiza*, Case No. ICTR 97-19-AR72, Decision, ¶ 68 (Mar. 31, 2000) (Separate Opinion of Judge Shahabuddeen).

189. See *Akayesu*, *supra* note 188, ¶ 96; *Prosecutor v. Delalic*, Case No. IT-96-21, Judgment, ¶ 611 (Feb. 20, 2001).

190. See *Akayesu*, *supra* note 188, ¶ 94; *Delalic*, *supra* note 189, ¶ 602.

191. See *Delalic*, *supra* note 189, ¶ 611.

important and sometimes compelling state interests. While there are individual significant differences and points of tension, a significant proportion of courts around the world favor some form of “balancing” or “proportionality” analysis in order to resolve these conflicts.¹⁹² It is not my purpose here to enter into a detailed justification of balancing as an appropriate adjudicative device for deciding on matters related to constitutional rights.¹⁹³ Instead, I draw support, in particular, from the influential work of Robert Alexy¹⁹⁴ in extracting principles for a balancing test in the exercise of prosecutorial discretion.¹⁹⁵ Alexy’s theory of proportionality in the context of constitutional rights takes as its starting point a recognition of constitutional rights as “principles” rather than “rules.” Rules are definitive commands—norms that can either be fully realized or not. A conflict between rules can therefore only be addressed by either creating an exception to one of them, or declaring either to be invalid.¹⁹⁶ In contrast, the conception of constitutional rights as principles understands rights as “optimization commands,” that is, norms requiring that the rights be optimized or realized to the greatest possible extent given the “legal and factual possibilities.”¹⁹⁷ Optimization given the factual possibilities involves the principles of “suitability” and “necessity.”

192. See generally Steven Greer, “Balancing” and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate, 63 CAMBRIDGE L. J. 412 (2004); DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004); NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY (1996); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 967 (1987).

193. Thoughtful critiques of balancing as a method in constitutional rights reasoning from a conceptual, historical and institutional point of view include Aleinikoff, *supra* note 192; Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 256-59 (William Rehg trans., MIT Press 1996). For an excellent summary of the primary arguments regarding balancing from a comparative constitutional law perspective, see Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789 (2007).

194. ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., 2002). Alexy’s theories have been widely debated since the publication of his book in Germany and elsewhere. For a representative sample, see the collection of essays in LAW, RIGHTS AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY (George Pavlakos ed., 2007).

195. A less developed and slightly different use of Alexy’s theory has been proposed by Kai Ambos in the case of amnesties. See Ambos, *supra* note 85, at 54-57. Ambos’s adaptation of the theory to the peace versus justice debate differs greatly in substance from my own, not least in imposing certain material and personal jurisdiction limitations on its application. Ambos also fails to discuss any principled reasons for his appropriation of Alexy whereas I see the value in acknowledging that neither peace nor justice need be values that have an absolute character.

196. Robert Alexy, *On the Structure of Legal Principles*, 13 RATIO JURIS 294, 295 (2000) [hereinafter Alexy, *Legal Principles*].

197. *Id.*; Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 RATIO JURIS 131, 135 (2003) [hereinafter Alexy, *Constitutional Rights*].

“Suitability” is violated when a measure m is adopted in order to promote right x , but is not suitable for this purpose and instead obstructs the realization of another right or goal y .¹⁹⁸ “Necessity” requires that when measures m and n are both equally suitable for promoting right x , then the measure that would least interfere with principle or goal y should be adopted.¹⁹⁹ Optimization, in light of what is legally possible, involves what Alexy labels “proportionality in the narrow sense” or the rule of balancing: “the greater the degree of non-satisfaction of, or detriment to one principle, the greater the importance of satisfying the other principle.”²⁰⁰

The particular merit of Alexy’s analysis in the context of the peace versus justice debate lies in its recognition that principles or statements of value need not be of an absolute character but can take the form of balancing norms that are sought to be realized to their fullest extent given other considerations, and that this fact does not denude them of their moral stature. Alexy’s analysis would need to be adapted to take into account the need for the presumption in favor of prosecution alluded to earlier. Thus, the burden of proof in the balancing exercise between prosecutions before a tribunal versus alternative measures or the possible endangerment of peace would lie on the party advocating the latter. In order for the Prosecutor to defer prosecutions in the interests of peace or national reconciliation, he would have to demonstrate (a) that non-prosecution is being adopted in order to promote the goal of national reconciliation (or any other goal that he considers a vital interest) and that this is a suitable measure for achieving this goal; (b) that of all the measures that are open to the Prosecutor, non-prosecution is the one that would least interfere with the aim of preventing impunity and encouraging general as well as specific deterrence; and (c) the greater the adverse impact on the aim of prevention of impunity and establishment of a global norm of deterrence, the greater should be the importance of preserving peace or national reconciliation in the particular situation.

Let us see how this test may be operationalized in the context of Cambodia. Since in the ECCC’s case, it is the national Co-Prosecutor who is arguing for non-prosecution, the burden of proof would be on her to adduce grounds to substantiate this claim. As mentioned earlier, of the

198. Alexy, *Legal Principles*, *supra* note 196, at 297-98; Alexy, *Constitutional Rights*, *supra* note 197, at 135.

199. Alexy, *Legal Principles*, *supra* note 196, at 297-98; Alexy, *Constitutional Rights*, *supra* note 197, at 135-36.

200. Alexy, *Constitutional Rights*, *supra* note 197, at 136; *see also* Alexy, *Legal Principles*, *supra* note 196, at 298.

three grounds alluded to by the national Co-Prosecutor, the only one that would even qualify for the proportionality analysis is that additional prosecutions would undermine national reconciliation.²⁰¹ The first step of the proportionality analysis would therefore be an assessment of non-prosecution of the additional suspects as a suitable measure for achieving national reconciliation. In this exercise, it would be of vital importance then for the national Prosecutor to first outline what she views as “national reconciliation.” This concept rarely commands a clear definition. While it is perhaps easier to define what would constitute a disruption in political stability or civil war or armed conflict within a country as a potential fall out of a prosecution effort, national reconciliation is a more amorphous concept.²⁰² An understanding of reconciliation can range from a fairly content-thin one to a richer more full-blown concept.²⁰³ Various definitions stress different aspects of reconciliation: mere peaceful co-existence; achieving a “narrative equilibrium” between contradictory accounts of events;²⁰⁴ the development of viable democratic institutions;²⁰⁵ and a quasi-religious concept that involves confession, contrition, forgiveness, and restitution.²⁰⁶ Regardless of where one chooses to place oneself on this spectrum, it is widely accepted that ersatz forms of “reconciliation” that involve denial or lack of acknowledgement by perpetrators of the injustices committed by them against those harmed would not meet the minimum requirement of the establishment of sustainable trust between parties that is a prerequisite for reconciliation.²⁰⁷

The national Co-Prosecutor would thus need to prove that non-prosecution of additional suspects is suited to achieving the building of lasting trust between alleged perpetrators and victims, and contributing to enduring peace and stability in Cambodian society. Naturally, one cannot

201. See *supra* text accompanying notes 72-85.

202. See, e.g., Piet Meiring, *The Baruti Versus the Lawyers: The Role of Religion in the TRC Process*, in LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 123 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000) (discussing the debates regarding the work of the South African Truth and Reconciliation Commission).

203. Crocker, *supra* note 84, at 60-61.

204. Susan Dwyer, *Reconciliation for Realists*, 13 ETHICS & INT'L AFF. 81, 89-91 (1999).

205. See Trudy Govier & Wilhelm Verwoerd, *Trust and the Problem of National Reconciliation*, 32 PHIL. OF THE SOC. SCI. 178, 184 (2002) (citing Jakes Gerwel, the former director general in the office of President Mandela, as acknowledging that before the work of the TRC in South Africa, reconciliation was understood as the formal political and constitutional unity of the country). See generally Jonathan Allen, *Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 315 (1999).

206. See Govier & Verwoerd, *supra* note 205, at 180 (citations omitted).

207. See *id.* at 183; Mendez, *supra* note 2, at 273-74.

expect the Prosecutor to demonstrate an exact causal relationship between non-prosecution and national reconciliation. Also, local actors are likely to be better placed to decide on the form of national reconciliation (excluding false reconciliation efforts) most suitable and practicable for their particular social and political situation. It would thus be appropriate for the ECCC to accord a “margin of appreciation”²⁰⁸ to the national Prosecutor in evaluating the need for reconciliation and the measures required for it, as long as this is based on robust engagement with persons directly affected by this decision, especially victims, in reaching this conclusion. The national Prosecutor will also, at the very least, have to persuade the court that even though prosecutions that have already commenced did not adversely affect national reconciliation, further prosecutions will do so.

At the second stage of the balancing exercise, the national Co-Prosecutor would have to demonstrate that of all the measures that could have been taken to promote national reconciliation, non-prosecution of additional suspects would involve the least interference with the goal of prevention of impunity and deterrence of mass atrocities. This is perhaps one of the most difficult challenges for the national Co-Prosecutor, given that the Cambodian government has largely failed to enact any other measures aimed at promoting reconciliation. The integration of the Khmer Rouge cadre into the government forces and the cessation of armed conflict were taken by the government to have achieved reconciliation and it emphasized forgetting and forgiving of the past, instead of making any effort to truly undertake social repair.²⁰⁹ Ironically, the establishment of the ECCC and its prosecution of those considered most responsible for the Khmer Rouge atrocities was itself considered as part of the project of reconciliation. Most other measures aimed at reconciliation have been introduced by civil society groups active in Cambodia. Notable among these is the institution of the Documentation Centre of Cambodia (“DC-Cam”)²¹⁰ which documents and preserves the history of the Khmer Rouge

208. On the doctrine of “margin of appreciation” used by the European Court of Human Rights, see generally, Michael R. Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 48 INT’L & COMP. L.Q. 638 (1999); George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL. STUD. 705 (2006). On extending the margin of appreciation to apply as a general doctrine in international law encouraging restraint by international judicial authorities when evaluating national decisions, see Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT’L L. 907 (2005).

209. Linton, *supra* note 84, at 12.

210. DC-Cam was initially founded by an Act of the U.S. Congress in 1994, which established the Office of Cambodian Genocide Investigations. The Office gave grants to Yale’s Cambodian Genocide Program to conduct research into Khmer Rouge atrocities, leading to the formation of DC-Cam as a

regime for posterity and which was instrumental in compiling and organizing information that now serves as one of the primary sources of evidence for the ECCC prosecution process.²¹¹ Cambodia could have pursued any number of measures directed towards the goal of reconciliation; standard measures including the establishment of democratic institutions, public acknowledgements or apologies for past wrongs, post-conflict mediation efforts between different parties, commissions of enquiry, reparations programs, and government programs that focus on victim rehabilitation.²¹² It is difficult to see how any of these would have adversely impacted the achievement of deterrence or prevention of impunity. The national Co-Prosecutor would be hard-put to justify why, when the government chose not to implement any of the above measures in its stated reconciliation policy, it now wants to argue that non-prosecution of additional suspects would be the least detrimental way to achieve reconciliation, even though it may have a negative impact on the goals of international criminal prosecutions.

The third and the final step in the analysis would involve a balancing exercise or proportionality in the narrow sense between the positive impact on reconciliation and the negative effect on impunity prevention and deterrence. The greater the negative impact on the latter, the stronger must be the evidence supporting the claim that non-prosecution of additional suspects would promote national peace and stability. It is important to note here that the negative impact would be assessed not only in light of the situation in Cambodia and prospects for the establishment of a society based on the rule of law in Cambodia, but also the long reaching and wider global impact of non-prosecution of accused against whom there is enough *prima facie* evidence to suggest that they committed horrific war crimes and crimes against humanity.

This proportionality exercise I propose is intended as a device for self-evaluation by the prosecutor of an international criminal court, who is caught in the unhappy situation of having to choose between prosecution and peace, and has to justify this choice. It is also suggested as an adjudicative tool that can be employed by the court in deciding whether the exercise of prosecutorial discretion has been guided by objective and

field office of the program in 1995. It became an independent Cambodian research institute in 1997. History and Description of DC-CAM, <http://www.dccam.org/About/History/Histories.htm> (last visited Oct. 23, 2009).

211. *Id.*

212. Govier and Verwoerd, *supra* note 206, at 182 (footnote omitted).

rational standards that further the ultimate goal of international criminal justice.

CONCLUSION

Given that international and hybrid criminal tribunals are of relatively recent vintage in the realm of international law and relations, their speedy ascent to the top of the pecking order of mechanisms to deal with mass atrocities is nothing short of astonishing. Ubiquitous and multifaceted, there seems to be no limit to what they are expected to achieve—in addition to the usual goals of criminal justice, they are tasked with achieving peace, telling a much contested truth, creating historical records for societies, and educating the world against the horrors of mass violence.

The proposals in this paper with respect to the ECCC betray a far more modest concept of a criminal tribunal as only part of the complex and shifting strategies that are needed to address the causes and consequences of conflict. It is this vision that holds that the mandate of the tribunal is, first and foremost, to achieve accountability. It cannot, however, reach this goal in a vacuum and must be conscious of the political context in which it operates and be prepared to accommodate, and if necessary defer, to other mechanisms and processes that complement its quest to establish a stable society based on the rule of law. Particularly in the context of a hybrid tribunal such as the ECCC, this entails due respect for national needs such as reconciliation, recognition of the interests motivating national actors, and giving voice to the interests of people who will be most affected by the processes of the tribunal. These factors will operate with varying intensity depending on the composition and structure of different tribunals and the societies in which they operate.

This conflict between values is not unique to the arena of international criminal justice, but is pervasive in the law, and is ultimately a reflection of the incommensurability at times of the various purposes that the law seeks to achieve and on which reasonable people can differ. While it may then be naive to assume that these conflicts can always be resolved in a manner that provides for a single appropriate solution, the construction of an objective and principled methodology that can make sense of this incommensurability and assist in resolving conflicts is a worthy and necessary enterprise. I have proposed an impartial way for prosecutors and judges to be able to balance these legitimate concerns against the demands of prevention of impunity through a balancing or proportionality analysis that views both prevention of impunity and promotion of deterrence through criminal trials on the one hand, and the pursuit of peace and

national reconciliation on the other, as values or principles that should be optimized to the greatest possible extent. This is, however, simply the beginning of a much larger project that must engage more deeply with theorizing international criminal law to develop a comprehensive account of its aims, methods, and limits.