

“Delineating the Interests of Justice: Prosecutorial Discretion and the Rome Statute of the International Criminal Court”

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Abstract

Article 53(1) and 53(2) of the Rome Statute allow the prosecutor of the International Criminal Court (ICC) to decline to pursue an investigation or prosecution in the ‘interests of justice’. Some commentators have taken the view that the Office of the Prosecutor of the ICC should not invoke this ground for declining to act in situations where there is a possibility that investigations or prosecutions might impede or interfere with local peace and reconciliation initiatives such as amnesties or truth commissions. According to at least one prominent non-governmental organisation, such decisions are properly the domain of the UN Security Council, rather than of the Office of the Prosecutor. This paper argues, however, that it is neither necessary nor desirable for the ICC prosecutor to defer to the Security Council in such circumstances. The interests of justice would best be served if discretion remains with the prosecutor.

Introduction

The possibility that the prosecutor of the International Criminal Court might decide to forego investigations and/or prosecutions in the ‘interests of justice’ is often cited as one of the means by which the demands of the nascent international criminal law regime might be reconciled with the desirability of achieving stable and secure peace agreements and democratic transitions. Given the oft-cited centrality of this concept to such reconciliation it is unsurprising that there has been a great deal of debate over what the correct interpretation of the phrase ‘interests of justice’ might be. This paper reviews some of the suggestions put forward and certain of the arguments raised in support of these views, focusing particularly on the approach taken by Human Rights Watch in a recent policy paper.

This study concludes that while there are advantages to the approach taken by Human Rights Watch, and particular merit in the focus on maintaining the legitimacy of the prosecutor’s office and of the ICC as an institution, it would nonetheless be inadvisable for the ‘interests of justice’ to be construed in such a manner as to effectively render the UN Security Council the sole body capable of deciding whether or not to proceed with an investigation and/or prosecution when the facts on the ground may militate against such steps being taken. Rather, it would seem to be preferable for this discretion to remain within the ICC, albeit circumscribed by regulations designed to ensure that this discretion is exercised in such a manner as to maintain (and if at all possible bolster) the legitimacy and credibility of the ICC.

I

The Rome Statute of the International Criminal Court (ICC) gives the prosecutor discretion to decide not to initiate either an investigation or a prosecution on the grounds that to proceed would be contrary to the ‘interests of justice’. Specifically, under Article 53(1), where there is a reasonable basis to believe that an alleged crime falls within the jurisdiction of the court and the situation in question would otherwise be admissible for investigation under the statute, the prosecutor may nevertheless decline to initiate an

investigation on the grounds that an investigation “would not serve the interests of justice”,¹ having taken into account the gravity of the crime in question and the interest of the victims. In similar fashion, Article 53(2) allows the prosecutor to conclude that there is not a sufficient basis for a prosecution when a prosecution would not be in the interests of justice.² In either case, where the prosecutor declines to investigate or prosecute in such circumstances, he/she is required to notify the pre-trial chamber of this determination and the reasons for the decision. The pre-trial chamber is then entitled to review such a decision by the prosecutor and, where the chamber undertakes such a review, the decision of the prosecutor will only be effective where it is confirmed by the pre-trial chamber.

As may be evident from the above, the ability to decline to investigate or prosecute on the grounds of ‘interests of justice’ provides the prosecutor with a relatively high degree of discretion. While this may be welcome in many circumstances, the relatively unfettered extent of this discretion has given rise to much debate, specifically as to whether or not the ability of the prosecutor to decline to investigate or prosecute should be exercised in circumstances where it is conceivable that an investigation or prosecution may have a deleterious effect on the prospects for a peace agreement (to end a conflict) or on a domestic transitional justice mechanism (e.g. a truth and reconciliation commission). It is similarly debated as to whether the prosecutor can or should use his/her discretion to decide to respect a domestic decision to grant amnesties to perpetrators of crimes that would otherwise fall within the remit of the ICC.

The risk that the ICC would ‘foreclose’ the use of truth commissions and other transitional justice mechanisms falling short of prosecution – particularly in cases involving the granting of amnesties - has long been recognised. Some authors, moreover, have expressed concern at the prospect that criminal trials might come to be viewed as the only acceptable means of addressing serious and extensive violations of human rights,³ while others have noted the risk of hubris that might accompany a declaration by the international community at large that criminal prosecution was henceforth to be considered the only possible means of dealing with acts that have been declared criminal under international law.⁴ Underlining such concerns, Kofi Annan is often cited as having declared in 1998 that it was “inconceivable that... the Court would seek to substitute its judgment for that of a whole nation, which is seeking the best way to put a traumatic past behind it and build a better future”.⁵ Similarly, as seen from a purely consequentialist standpoint, the risk that insisting on criminal prosecutions in all cases might in fact result in the commission of further atrocities has also given a number of those concerned pause to consider the wisdom of insisting on prosecutions ‘come hell or high water’.⁶

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¹ Rome Statute of the International Criminal Court, Art. 53(1). Available at: <http://www.un.org/law/icc/statute/rome.htm>.

² *Ibid.* at Art. 53(2). Note – Article 53(2) specifies that a determination as to the interests of justice should be made “taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.”

³ In a 2000 article for example, Charles Villa-Vicencio observed that “it would be regrettable if the only approach to gross human rights violations comes in the form of trials and punishment.” (Villa-Vicencio, C. (2000) “*Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*” *Emory Law Journal* 49 at 205. Cited in Robinson, D. (2003) “*Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*” *European Journal of International Law* 14, 3 at 482.)

⁴ See Robinson, *ibid.* at 483.

⁵ Quoted in Villa-Vicencio, C. (2002) “*Neither too much, nor too little justice: Amnesty in the South African context*” at 5. Available at: <http://www.wacc.org.uk/wacc/content/pdf/2437>.

⁶ As Carlos Nino has put it: “almost all who think momentarily about the issue are not prepared to defend a policy of punishing these abuses once it becomes clear that such a policy would probably provoke, by a causal chain, similar or even worse abuses.”

Recognising that it would be unfortunate were the existence and operation of the ICC to stand in the way of peace agreements and/or national transitional justice initiatives, many authors have taken the view that use of the prosecutor's discretion under the rubric of the 'interests of justice' would be the most likely means by which the court might decline to become involved in situations where the facts on the ground militate against investigation or prosecution.⁷ The most often cited justification for the use of prosecutorial discretion in these circumstances is recognition that the term 'justice' can mean different things to different people and in different situations,⁸ and, moreover, that where the threat of criminal prosecution might in fact threaten a democratic transition the broader interests of society would seem to militate strongly against prosecutions.⁹

In line with the considerations outlined above, the Office of the Prosecutor (OTP) has recently indicated an apparent willingness to consider as a factor in determining the interests of justice in any given case "various national and international efforts to achieve peace and security."¹⁰ Similarly, while the draft regulations published by the OTP in 2003 decline to give any more specific elucidation as to what the OTP is considering including as factors relevant to determining the interests of justice, a footnote to the draft does suggest that the experts consulted in developing the draft guidelines leaned towards including consideration of circumstances in which an investigation or prosecution might "exacerbate or otherwise destabilise a conflict situation"¹¹ or in which the start of an investigation would "seriously endanger the successful completion of a reconciliation or peace process".¹² Most recently, in considering whether or not the prosecutor ought to proceed with investigations and with potential prosecutions relating to the conflict between the Lord's Resistance Army and the Ugandan government, some have taken the view that the perseverance of the OTP in issuing indictments at a sensitive time during negotiations could have adverse effects on the outcome of the negotiations and, as such, would not be in the 'interests of justice'.¹³

II

Perhaps unsurprisingly, however, there are also others who are concerned that it is not appropriate for the prosecutor to take such factors into account in determining the scope of the interests of justice. Some of the legal and policy considerations relevant to this view are articulated particularly well in a 2005 Human Rights

(Nino C. (1991) "The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina" Yale Law Journal 100 at 2620. Cited in Robinson, *supra* note 3 at 496.

⁷ See e.g. "the most likely point at which the ICC will determine whether to defer to national programmes is pursuant to the discretion of the Prosecutor to decline to prosecute when it would not be in the 'interests of justice'... there may be exceptional circumstances where it would not be in the interests of justice to interfere with a reconciliation mechanism, even though that mechanism falls short of prosecution of all offenders." Robinson, *ibid.* at 483.

⁸ See Goldstone, R & Fritz, N. (2000) "'In the Interests of Justice' and Independent Referral: The ICC Prosecutor's Unprecedented Powers" Leiden Journal of International Law 13 at 662: "the word 'justice' is demanding... yet few would aver that it is 'demanding' in the sense that it is always retributive."

⁹ *Ibid.* at 663: "On occasions the interests of justice might compel that the transition to democracy not be imperilled and that the threat of prosecutions and punishment not be brought to bear."

¹⁰ International Criminal Court, "Second Report of the Prosecutor of the International Criminal Court, Mr Luis Moreno Ocampo, to the Security Council pursuant to UNSC 1593 (2005)", 13 December 2005, at 6. Available at: http://www.icc-cpi.int/library/organs/otp/LMO_UNSC_ReportB_En.pdf.

¹¹ International Criminal Court, "Draft Regulations of the Office of the Prosecutor", 3 June 2003, at 47. Available at: http://www.icc-cpi.int/library/organs/otp/draft_regulations.pdf.

¹² *Ibid.*

¹³ See eg. Volqvartz, J., "ICC Under Fire Over Uganda Probe", 23 February 2005. Available at: <http://www.globalpolicy.org/intljustice/icc/2005/0223iccfire.htm>.

Watch (HRW) policy paper.¹⁴ In this paper, HRW put forward the view that the OTP should in fact adopt a narrow understanding of the term ‘interests of justice’ which would preclude the prosecutor from electing not to investigate or prosecute on the basis of ‘on the ground’ developments including peace negotiations and/or non-judicial transitional justice processes. HRW’s argument relies on a number of observations.

Firstly, applying the rules of the Vienna Convention on the Law of Treaties (VCLT), HRW note that a treaty should be interpreted according to the ordinary meaning of its terms in context, and the object and purpose of the treaty. Noting that the travaux preparatoires of the Rome Statute do not reflect any agreement as to the correct understanding of the term ‘interests of justice’, HRW suggest that, as the ordinary meaning is unclear, reference should be made to the object and purpose of the Rome Statute. Using the preamble of the treaty as a basis, HRW then argue that the self-evident object of the treaty is to end impunity for the crimes within the court’s jurisdiction, and that the court was established with the purpose of prosecuting the most serious of these crimes. Drawing on this interpretation, they conclude that construing the ‘interests of justice’ in such a fashion as to allow amnesties and/or other domestic developments to be considered relevant to the decision as to whether or not to proceed with an investigation or prosecution would be contrary to the object and purpose of the treaty.¹⁵

In a second ‘interpretative’ argument, HRW take the view that the Rome Statute implicitly gives the United Nations Security Council (UNSC) the prerogative to prevent or halt an investigation or prosecution for ‘political’ reasons. Noting that Article 16 of the Rome Statute gives the UNSC the right to stop the prosecutor taking action in respect of investigations or prosecutions, and that the prosecutor’s office is apolitical in nature, HRW draw the conclusion that the drafters of the treaty intended the UNSC to retain the ‘decisive role’ in determining whether or not it is appropriate to halt or prevent prosecutorial action in order to forestall untoward political fallout. As authority for this conclusion, they cite commentators to the effect that; “the duty and power to guarantee international peace and security does belong to the Security Council.”¹⁶ Noting this purported allocation of responsibility, as well as the desirability on policy grounds of the prosecutor’s continuing to remain uninvolved in political issues in order to maintain credibility and legitimacy, HRW go on to conclude that the wording of the Rome Statute itself requires a narrow interpretation of the phrase ‘interests of justice’ to be adopted.¹⁷

As an additional interpretative reason for excluding amnesties etc. from consideration as factors in deciding whether to proceed or decline to investigate and/or prosecute in any given instance, HRW also note that the Rome Statute should be construed in light of relevant rules of international law. They cite a number of commentators to the effect that there is a customary international law rule (and potentially also a pre-emptory norm) requiring the prosecution of persons responsible for committing serious international crimes including genocide and war crimes, and also to the effect that (citing recent state practice) there is a developing trend in international law that prohibits the granting of amnesties by states in respect of serious international crimes. On this basis, HRW conclude that “international law does not permit”¹⁸ the exemption from prosecution of the most serious crimes under international law and that “the logical construction of Article 53 that is

¹⁴ See Human Rights Watch, “*Policy Paper: The Meaning of “The Interests of Justice” in Article 53 of the Rome Statute*”, June 2005. Available at: <http://hrw.org/campaigns/icc/docs/ij070505.pdf>.

¹⁵ *Ibid.* at 3-6.

¹⁶ Turone, G., “*Powers and Duties of the Prosecutor*” in Cassese, A., Gaeta P. & Jones, J. (eds.) (2002) The Rome Statute of the International Criminal Court: A Commentary: OUP, Oxford, at 1143. Cited in Human Rights Watch, *supra* note 14 at 8.

¹⁷ See Human Rights Watch, *supra* note 14 at 7-9.

¹⁸ Human Rights Watch, *supra* note 14 at 11.

consistent with both the object and purpose of the Rome Statute and with the requirements of international law is a narrow one.”¹⁹

In addition to the purely legal issues highlighted above HRW also note that policy concerns militate in favour of the OTP adopting a narrow reading of the phrase ‘interests of justice’. Principally, HRW note that allowing the prospects for peace agreements and/or amnesties to be relevant to decisions as to whether or not to launch investigations or prosecutions may 1. affect the behaviour of actors on the ground, and in particular, result in undesirable pressure being put on the prosecutor to investigate/prosecute or not in any given situation dependent on the prevailing political situation at any given time, and 2. undermine the legitimacy of the OTP and of the court itself, if similar situations (as regards the crimes in question) are seen to be treated dissimilarly on the basis of factors that are not integrally related to the acts in question. Moreover, HRW note – citing examples drawn from the Balkans and West Africa – that it is at least arguable that the enforcement of justice itself (in the form of investigations, indictments and presumably, prosecutions) can have a positive effect on the prospects for ‘peace and stability’ through marginalising and stigmatising those responsible for mass violations of human rights and the commission of serious international crimes.²⁰ As such, HRW conclude, a narrow reading of the phrase ‘interests of justice’ is warranted.²¹

III

HRW’s position that a legal analysis unquestionably requires the OTP to press for prosecution in all cases is far from uncontested. Indeed, some commentators simply disagree with HRW’s conclusion that a narrow reading of the term ‘interests of justice’ is required under international law and the VCLT. Robinson, for example, comes to a polar opposite conclusion in his analysis, maintaining that the ‘interests of justice’ must be construed broadly, taking into account the ordinary meaning of the text and the object and purpose of the Rome Statute.²² Similarly, despite the existence of an international legal duty on states to prosecute many of the crimes falling within the jurisdiction of the ICC this may not necessarily result in a similar duty being placed on the ICC (which in the ultimate analysis is neither a party to the relevant treaties, nor necessarily a subject of customary international law in this regard). Article 21 of the Rome Statute, for example (which is relied on by HRW for this purpose) states only that the court is bound to apply “where appropriate, applicable treaties and the principles and rules of international law”.²³ It seems far from certain firstly, that the exercise of discretion by the prosecutor necessarily specifically requires reference to and/or application of such treaties, principles and rules, while notwithstanding HRW’s assertion to the contrary, specific treaty and customary rules that might be binding on individual states may not necessarily bind the ICC and its constituent organs to a similar extent.

Similar concerns may also be noted as to certain other of the propositions put forward by HRW, on both legal and policy grounds. Specifically, the contention that the drafters of the Rome Statute must have intended to allocate to the UNSC (and not to the prosecutor) the prerogative of intervening to forestall investigations/prosecutions in deference to national democratic preferences (or peace initiatives) seems potentially problematic. Moreover, while HRW may be correct in observing that “justice itself can have tremendous value in contributing to peace and stability”,²⁴ this will not necessarily be the case in every

¹⁹ Human Rights Watch, *supra* note 14 at 14. See also generally at 9-14.

²⁰ Human Rights Watch, *supra* note 14 at 15.

²¹ See Human Rights Watch, *supra* note 14 at 14-15.

²² See Robinson, *supra* note 3 at 488.

²³ See Rome Statute of the International Criminal Court, *supra* note 1 at Art. 21(1)(b).

²⁴ Human Rights Watch, *supra* note 14 at 15.

instance, and it is conceivable that in certain circumstances the importance of obtaining peace and stability will in fact militate strongly against prosecution by the ICC. It should also be noted that taking the view that the ‘interests of justice’ can only be construed narrowly would seem to militate in favour of the ICC undertaking a potentially very large number of prosecutions – which may not be desirable, let alone practicable. Lastly, were an obligation always to prosecute certain serious international crimes to exist, it seems difficult to then see how HRW can then take the view that it is somehow permissible for the members of the UNSC to act to forestall such prosecutions in the face of such a universal obligation. Before going on to consider the above drawbacks to the position put forward by HRW, however, one key advantage of the narrow interpretation put forward by HRW should be noted.

Perhaps the single greatest strength of the position put forward by HRW is that it restricts the likelihood of the prosecutor electing not to prosecute for reasons that might not be fair and non-discriminatory.²⁵ As pointed out by Allison Danner, the actions of the prosecutor, and the manner in which prosecutorial discretion is exercised, may be a vital element in generating and maintaining the ‘legal legitimacy’ of the ICC itself, where legitimacy is understood to underpin the court’s exercising of authority generally.²⁶ In Danner’s reading, therefore, the maximising of the values of impartiality and fairness (in all aspects of the court’s work – including the exercise of discretion by the prosecutor) might be considered to strengthen the legitimacy of the court as an institution. Such strengthening could be considered to be desirable both in terms of developing a working international rule of law, as well as in furthering the court’s objectives of ending impunity for acts falling under its jurisdiction.

That said, it must also be conceded that certain other of the elements of HRW’s argument at minimum require further consideration. The ‘allocation’ by HRW of the discretion not to prosecute on ‘political’ grounds to the UNSC, in particular, seems rather problematic. In allowing the UNSC such a role, HRW seem to recognise that it would be unfortunate if ICC investigations and/or prosecutions were absolutely unable to be forestalled on the basis of changing ‘facts on the ground’. However, consideration of its manner of working as well as of its mandate in fact suggests that the UNSC is actually rather less well suited to this role than HRW’s analysis might suggest. More specifically, the UNSC is, as HRW recognise, a political body. As such, it might not be said to be ‘hamstrung’ by the ‘legal’ considerations that restrict a court, and it may well be preferable for a political body to make decisions with political implications, rather than a quasi-judicial body (such as the ICC and/or the prosecutor). For this same reason, however, the UNSC is ill-suited to be ‘allocated’ responsibility under the Rome Statute.

Firstly it must be recognised that a close reading of Article 16 of the Rome Statute does not explicitly place on the UNSC any duty whatsoever. Rather, the UNSC seems to have merely a right to intervene to forestall action by the prosecutor. A reading of Article 16 which provides that the UNSC has only a right rather than an obligation to intervene would be consistent with the status of the ICC as a non-UN body, as well as with the fact that neither the UN per se nor the UNSC are parties to the Rome Statute. Moreover, applying basic common law principles of privity, it would seem odd for the Rome Statute to be understood as conferring a prerogative (let alone an obligation or duty) on the UNSC, rather than merely a right, as there seems to be no basis for holding that the UNSC has (or would have) accepted such a role.

²⁵ Danner, A. (2003) “*Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*” *American Journal of International Law* 97, 3 at 536 (paraphrased).

²⁶ *Ibid.* at 535.

As indicated above, HRW attempt to overcome this difficulty by citing other authors to the effect that it was understood by the diplomatic conference that drew up the Rome Statute that the UNSC should make political decisions rather than the prosecutor.²⁷ Such a view seems to be rather short-sighted, as well as impractical, however. Most essentially, under the terms of the UN Charter itself, and under Chapter VII in particular, the UNSC does not necessarily appear to be under an absolute duty to guarantee peace and security in each and every circumstance. Rather, the operative article of the Charter – Article 39 – could equally be read merely as conferring on the UNSC the prerogative (i.e. at the expense of the other organs of the UN) to determine when there is a threat to the peace, and what the appropriate steps to take might be. Moreover, the history of the organisation itself shows that often the UNSC has not in fact either always guaranteed or taken steps that would evidence an understanding of a duty to guarantee international peace and security in every relevant situation.²⁸ Rather, the UNSC has – in keeping with its ‘political nature’ - taken such action as might be politically expedient or possible in any given situation, given the often divergent interests and considerations of its members and particularly of its permanent members. In short, ‘allocating’ to the UNSC any ‘duty’ to intervene under the Rome Statute appears to be tantamount to making the decision as to whether or not the prosecutor should investigate or prosecute in light of potentially relevant facts on the ground subject to the vagaries of international politics (not to mention issue linkage and horse trading between the permanent members of the UNSC). While this may preserve the ‘legitimacy’ of the prosecutor’s office, it may be a very poor way of ensuring optimal outcomes if it is at all conceded that it may sometimes be preferable not to investigate/prosecute in deference to national transitional justice or peace initiatives.

Practical considerations aside, moreover, the ‘legal’ high ground assumed by HRW is perhaps also undermined somewhat by an apparent willingness to defer to the judgment of the UNSC as far as foregoing prosecutions is concerned. In particular, if HRW are correct in holding that there is a duty incumbent on states to ensure that certain crimes under international law are prosecuted, then it would appear as if – by making it incumbent on the members of the UNSC to determine the circumstances in which this duty should be dis-applied – HRW are advocating two apparently inconsistent positions. How can it be unacceptable for individual states to forego prosecutions of those responsible for serious international crimes, but acceptable for the UNSC to allow states to behave in this fashion? While such inconsistency may be defensible on policy grounds, it seems difficult to see how the two views can be reconciled from a principled perspective – if individual states (and/or the ICC in HRW’s reading) will always be obliged to prosecute certain crimes, it is difficult to understand the basis upon which HRW can view it as acceptable for the UNSC to authorise derogations from these duties.²⁹

Lastly, with regard to the legal extent of the UNSC’s potential responsibility, it should be noted that the UNSC’s role under Chapter VII of the UN Charter extends formally only to breaches and threats to *international* peace and security. On this reading, the UNSC’s responsibility could therefore not extend to situations which may not constitute threats to *international* peace and security, notwithstanding that the ICC’s jurisdiction includes criminal acts committed in situations (i.e. ‘domestically’) which may not

²⁷ See Turone, *supra* note 16 at 1143. Cited in Human Rights Watch, *supra* note 14 at 8.

²⁸ See e.g. the paralysis of the UNSC during the Cold War and the consequent use of the ‘Uniting for Peace’ resolution on occasions when the UNSC failed to act (such as in the 1950 Korean crisis).

²⁹ It should be noted that consistent with their view that there is an absolute duty under international law to prosecute serious international crimes, HRW caution that “the Security Council’s twelve month deferrals under Article 16 should not be renewed over and over... as that would result in de facto immunity.” (Human Rights Watch, *supra* note 14 at 8.) Given the UNSC’s behaviour to date, however (including the granting of effective immunity from ICC prosecution to UN peacekeeping troops) it is difficult to see how HRW can assert that the UNSC ought to be relied on not to forestall such actions absolutely. Moreover, if in any event prosecutions ought to go ahead, and the prosecutor retains some discretion as to the timing of investigations/prosecutions, then this somewhat begs the question of why it is deemed necessary by HRW to defer to the UNSC in the first place.

threaten/breach international peace and security. While HRW suggest that “war crimes of the scope addressed on Article 8 of the ICC Statute as well as crimes against humanity are *often likely* to affect international peace and security”³⁰ there can be no guarantee that this will be the case. As such, it is difficult to see how HRW can maintain that the UNSC should and ought to be able to act to forestall investigations and/or prosecutions in situations where international peace and security are not expressly threatened.

An additional factor that may be considered is that if HRW are correct that there is a duty incumbent on all states, in every situation (and on the ICC) to ensure that the perpetrators of serious international crimes are always prosecuted, this could cause immense strains not just on national peace initiatives, but also on – in the worst case scenario – the ICC itself. If exceptions to prosecutions cannot be made under international law generally, then it seems difficult to see how the prosecutor could justify failing to prosecute all those who might be responsible for crimes committed in violation of the ICC statute in situations where national courts decline to so prosecute (perhaps even for reasons of amnesties).³¹ Certainly, such an absolutist position would greatly diminish the scope for ‘selective’ prosecution of the ICC prosecutor and may result in the legitimacy of the institution actually being diminished by virtue of its being obliged to set unrealistic goals for itself.

Before drawing some preliminary conclusions as to the strengths and weaknesses of the case made by HRW, some final points should be made as to the empirical evidence put forward by HRW to support its contentions. Specifically, while HRW may be correct in maintaining that “justice itself can have tremendous value in contributing to peace and stability”³² it must be noted that the authors of this sentence have themselves conceded that while this might sometimes be the case, there is nothing preordained about the relationships between justice (by prosecution or otherwise), peace and stability.

That said, numerous commentators have attempted to cite empirical evidence to square the circle formed by the generally considered polar opposites of ‘realpolitik’ (which might be considered to provide the best means of ensuring peace) and prosecutions (which might – at least in HRW’s reading – be considered necessary for ‘just’ ends to come about). Those who aver that justice can serve the ends of peace often cite the indictment of Radovan Karadzic and Ratko Mladic prior to the Dayton Accord negotiations as an example of the stigmatising and marginalising effects of prosecutions. Similarly, the fact that the indictment of Slobodan Milosevic did not appear to have had any bearing on the negotiations to end NATO’s bombing campaign in Kosovo is also often cited as evidence that peace and justice are not necessarily mutually exclusive (although in this case it should be noted that the indictment of Milosevic does not appear to have had any positive effect on the results of negotiations either – rather it was simply not a factor in the discussions).

The above examples notwithstanding, however, it is not difficult to see how commencements of investigations and/or prosecutions might have a deleterious effect on situations ‘on the ground’ in circumstances where warring factions are engaged in fragile peace negotiations or in a democratic

³⁰ Human Rights Watch, *supra* note 14 at 8 (emphasis added).

³¹ It might be worth noting at this juncture that, as recognised in the South African context at least, it has been said that “it is also not true that the granting of amnesty encourages impunity in the sense that perpetrators can escape completely the consequences of their actions, because amnesty is granted only to those who plead guilty, who accept responsibility for what they have done.” (Tutu. D. (1999) *No Future Without Forgiveness*: Rider, London at 51.) If this is the case, and amnesties do not necessarily imply impunity, then the extent to which the Rome Statute itself also requires prosecution may well be questioned.

³² Human Rights Watch, *supra* note 14 at 15.

transition.³³ As Darryl Robinson concedes, it remains conceivable that in situations of ‘drastic necessity’ – for example to prevent the perpetration of increasingly severe violations of human rights – it may be necessary to forego prosecutions altogether. With this in mind, it should be noted that while indictments by the ICC may indeed have a beneficial effect on bringing about peace and security, this is far from necessarily the case. Thus, while HRW may remain justifiably concerned to ensure that the prosecutor is not manipulated by combatants eager to avoid being indicted, if the net result of such manipulation is the gaining of a stable peace and an end to conflict, this price may well be worth paying.

Conclusion

The single most attractive aspect of HRW’s position is that it endeavours to maximise the legal legitimacy of the OTP, and thereby of the ICC. Moreover, in great part HRW’s arguments derive strength from an apparent legal conservatism in interpreting the relevant law and from a relatively high degree of internal logical consistency. That said, ultimately the solution presented by HRW seems to fail on grounds of legal interpretation as well as on considerations of practicality: the fact that the UNSC may have the right to intervene to prevent an investigation or prosecution does not mean it will be obliged to do so in situations where an objective appraisal of the facts on the ground might militate strongly in favour of not taking such steps. With this in mind it would seem unwise to leave decisions as to whether or not to act in any given case to the UNSC. Similarly, while it may be laudable to advocate the end of impunity in one manner or another, common sense would seem to suggest that it would perhaps not be altogether wise to advocate a way forward which would result in the removal of a great deal of the prosecutor’s discretion in deciding which cases to pursue. It is not difficult to see how forcing the ICC to take on a caseload it might be ill-equipped to handle might in fact jeopardise whatever added legitimacy is gained from refusal to accept the authority to decide not to act in any given set of circumstances.

That said, just because the decision as to whether or not it might be in the interests of justice to investigate/prosecute in any given case might be difficult does not mean it will be impossible to make such a decision without sacrificing the legitimacy of the OTP and of the ICC as a whole. While it may indeed not be possible for the prosecutor to determine with an optimal degree of accuracy the intentions and bona fides of those involved in peace negotiations (for example), this does not in itself mean that the prosecutor should be prevented from making such determinations, nor that the prosecutor should not be required to consider carefully the potential implications of his decisions. Some of these difficulties may be minimised (as Danner suggests)³⁴ by the adoption of a rigorous set of ex ante standards and regulations – and indeed, this seems to be the approach currently under consideration by the OTP. Indeed, while it may well be a difficult task there does not seem to be any reason why it would not ultimately be possible to craft a set of guidelines which will both preserve the discretion of the prosecutor as well as ensure the legitimacy and credibility of both the OTP and the ICC as a whole.³⁵ In any event, however, on the basis of the above analysis it seems clear that it may well be advisable for both legal and policy reasons for the discretion as to whether or not to proceed with investigations or prosecutions to be retained – in one way or another – within the ICC.

³³ The situation of Northern Ireland, where prisoners were released early under the Good Friday Agreement, comes to mind as an example of an occasion when traditional understandings of legally ‘correct’ process might have been deemed to have taken second place to peace negotiations.

³⁴ See Danner, *supra* note 25.

³⁵ Additionally, it should be noted that the possibility that such guidelines may later be publicly challenged might also encourage the prosecutor to exercise discretion cautiously.