The ICC and Transitional Justice: Should the Prosecutor Exercise Discretion in the Interests of Peace?

KENNETH A. RODMAN

In a 2006 interview with the *Economist*, Desmond de Silva, the Chief Prosecutor of the Special Court for Sierra Leone, recounted his first visit to an amputee camp for victims of the Revolutionary United Front (RUF), a rebel group that had used child soldiers to hack off the limbs of civilians during that country’s brutal civil war.2

I saw a little girl with no arms saying to her mother: “Mummy, when will my arms grow again?” Near by was a baby sucking at her mother’s breast: neither had any arms. These were sights that said to me: do something. This is evil beyond belief.

One of the men most responsible for this “evil beyond belief” is the former President of Liberia, Charles Taylor, who had supported the RUF and other rebel groups in West Africa in order to increase his control over the region’s resources. Taylor was recently extradited to The Hague to be tried by the Special Court using the premises of the International Criminal Court (ICC) and his upcoming trial has been rightly hailed as an important step in challenging the culture of impunity in which tyrants and rebel leaders believe they will never be held accountable for their crimes. The indictment of Taylor, however, was unsealed by De Silva’s predecessor, David Crane on June 4, 2003, when Taylor was still president of Liberia. It was timed to coincide with his arrival in Accra for a regional peace conference designed to end the Liberian civil war by persuading Taylor to step down and accept asylum in Nigeria. As soon as Taylor learned of the indictment, he immediately returned to Liberia, triggering the collapse of the negotiations.3 While Taylor’s resignation and departure were secured two months later, an opportunity to end the violence earlier was effectively vetoed by the prosecutor. It is estimated that roughly 1000 people were killed by both government and rebel forces in stepped up political violence between the breakdown of the talks in Accra and Taylor’s eventual resignation.4

These two features of the Taylor case illustrate one of the central tensions likely to confront the ICC and other international criminal tribunals — namely, the potential conflict between the legal goal of enforcing the rule of law to end impunity and the political requirements of bargaining and conflict resolution. This will be particularly acute during transitions from dictatorship and armed conflict when those accused of international crimes still retain considerable power and a negotiated solution is the most viable strat-

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1 Colby College, Department of Government.
egy for political change. Should the Prosecutor recognize an amnesty or simply hold back from criminal proceedings if he is persuaded that prosecution could interfere with negotiated transitions? Article 53 of the ICC’s founding Rome Statute allows the Prosecutor to exercise his discretion not to investigate or prosecute if he believes it would not serve “the interests of justice.” Should that phrase be construed broadly enough to include the interests of peace?

To many of the court’s strongest supporters in the NGO and international legal community, the answer to that question is no (although some qualify that ‘no’ more than others). Two of the more systematic expositions of this position are policy papers drafted by Human Rights Watch and Amnesty International. Both were issued in response to indications by ICC Prosecutor, Luis Moreno Ocampo, that he might use Article 53 to suspend criminal proceedings against the Lord’s Resistance Army (LRA) for atrocities committed in Northern Uganda if he was persuaded that they interfered with peace negotiations designed to end a two-decade old civil war. Even though the arrest warrants were eventually issued, both papers objected to this statutory construction of prosecutorial discretion as contrary to the ICC’s mission as a legal institution designed to root out impunity for the gravest international crimes.

The arguments presented by the NGOs are part of a broader legalist approach to international relations that has been advocated by many prominent human rights lawyers and international legal scholars. It holds that international legal institutions should be insulated as much as possible from politics so as to enforce the international rule of law impartially. With respect to the ICC, this means that narrowing prosecutorial discretion to preclude policy considerations will better enable the court to act on a duty to prosecute the worst international crimes. Proponents of this view, including the two NGO papers, also make a policy argument for acting on this duty, challenging the claims of “pragmatists” who warn against the destabilizing consequences of a rigid legalism. Long-term stability, they claim, is more likely to come from an uncompromising approach to criminal justice, both in terms of deterring gross human rights abuses and in consolidating transitions to peace and democracy.

This article challenges the empirical premises that underlie the policy argument for narrow prosecutorial discretion. Legalists assume that law can and should be decontextualized from politics, and that in doing so, it can transform politics. This reverses the actual causal relationship between politics and law evident in the history of international war crimes tribunals. Those episodes demonstrate that political factors — most notably the power of the perpetrators relative to those of the forces arrayed against them — determine when a criminal law approach can be effective and whether it contributes to de-

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Hence, the Prosecutor should construe the “interests of justice” test
broader in order to assess the political context in which international criminal law oper-

The International Criminal Court and Transitional Justice

Transitional justice involves the choice of accountability mechanisms for abuses com-
nitted by repressive governments in the transition to democracy or by the parties to an
armed conflict as part of a peace settlement. Sometimes it involves prosecution. This
was the approach adopted by the allies against German and Japanese leaders after the
Second World War and by the United Nations in establishing the International Cri-
minal Tribunal for the Former Yugoslavia (ICTY) and Rwanda (ICTR) in the 1990s. It
was also the choice of some transitional democracies after the collapse of military dictator-
ships, most notably in Greece, Argentina, and South Korea.

More often, transitional bargains either forego or limit prosecution because criminaliza-
tion can impede negotiations and prolong a conflict. As a result, the leaders of abusive
regimes and rebel movements are often granted formal amnesties or asylum abroad in
order to facilitate bargaining and advance reconciliation. These instruments are often
accompanied by non-penal forms of justice, such as truth commissions, reparations, or
lustration. The best known example is South Africa’s Truth and Reconciliation Com-
mission (TRC) in which amnesty was made conditional on the public confession of
political crimes committed by all sides during the apartheid era. The TRC has been
credited with playing an important role in facilitating South Africa’s relatively peaceful
transition from apartheid to majority rule in the mid-1990s.

Even without formal amnesties, conflict resolution often involves subordinating pro-
scription to expedient bargaining when the leaders a prosecutor might want to put in the
dock are still in power and their cooperation is necessary to end violent conflicts. This
was the U.S.-led NATO strategy toward Serbian President Slobodan Milošević in ne-
gotiating the Dayton Accords, which ended the Bosnian civil war. It was also the
premise underlying the invitation to Charles Taylor to attend the peace talks in Accra.

Should the Prosecutor hold back from criminal proceedings in such circumstances if
the parties believe that they are necessary for transitions from repressive rule or armed
conflict? Should he make an independent judgment of the political legitimacy of alter-
natives to criminal justice or assess whether they are necessary for peace processes or
democratization?

The language of the Rome Statute creates a strong presumption against making such
determinations. The preamble lays out the ICC’s mission, which is to ensure prosecution of “the most serious crimes of concern to the international community” in order

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13 Bas, Stay the Hand of Vengeance, pp. 227-231.
to “put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.” Its only reference to peace is that “such grave crime threaten the peace, security and well-being of the world.” The implication is that peace is more likely to result from a consistent policy of prosecution rather than from deferring prosecution to political negotiations. As Darryl Robinson notes, “the very purpose of the ICC was to ensure the punishment of serious international crimes and prompt states to override considerations of expediency and realpolitik that had so often led them to trade away justice in the past.”

The preamble also emphasizes that the ICC “shall be complementary to national criminal jurisdictions” and Article 17 declares a case to be inadmissible if the latter is doing its job. The court can only investigate or try a case if a state with jurisdiction over it is unwilling or unable genuinely to carry out the investigation or prosecution.” Some commentators contend that a genuine investigation need not be a criminal one, allowing the Prosecutor to defer to arrangements like the TRC. Article 17(1)(b), however enables the court to assert jurisdiction when an investigation that did not lead to prosecution “resulted from the unwillingness or inability of the State genuinely to prosecute” and Article 17(2)(c) defines “unwillingness” as a process “inconsistent with an intent to bring the person concerned to justice.” Even though the TRC’s amnesty was conditional upon truth telling and was ratified by South Africa’s first multi-racial majoritarian parliament, there was no intention to bring to trial those perpetrators who publicly confessed political crimes. Hence, a strict reading of the text of Article 17’s admissibility criteria would not distinguish the TRC from less politically legitimate amnesties, such as the one that the Pinochet government granted itself prior to the return of constitutional rule in Chile.

The only provisions that can be plausibly construed as allowing the Prosecutor to make such distinctions are the rules governing prosecutorial discretion in Article 53. Article 53(1)(c) allows the Prosecutor to decline to investigate if in “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reason to believe that an investigation would not serve the interests of justice.” Article 53(2) establishes when there is an insufficient basis for prosecution and subparagraph (c) includes the same “interests of justice” test as in Article 53(1). The phrase, “interests of justice,” is not defined in the Rome Statute. Some commentators have interpreted the phrase as a form of “creative ambiguity” which could encompass peace processes, like the TRC, whose destabilization could inflict injustices on future victims of political violence. While such a decision would be subject to review and reversal by the pre-trial chamber (Article 53(3)), it does provide a means through which the Prosecutor could consider non-punitive mechanisms when demanding prosecution might prolong a civil war or dissuade a tyrant from stepping down.

The Office of the Prosecutor (OTP) adopted this interpretation in early 2005, just as it was ready to ask the pre-trial chamber to issue arrest warrants for Joseph Kony and the leadership of the LRA, which had abducted 20,000 children as sexual slaves and rebe

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fighters, and was responsible for large-scale atrocities, primarily against the Acholi people in Northern Uganda. The ICC’s intervention was referred by Ugandan President Yoweri Museveni, but was publicly criticized by Betty Bigombe, a former Ugandan minister and World Bank consultant, who was attempting to engage the LRA in a peace process. Bigombe and several Acholi community organizations argued that an indictment would deter the LRA from participating in negotiations and a better strategy was to offer amnesty in exchange for demobilization and employ traditional non-punitive reconciliation strategies to reintegrate perpetrators into Acholi society. In March, Moreno Ocampo met with representatives of these organizations and initiated 20 missions to Northern Uganda to interview victims and civil society organizations. The Prosecutor indicated that the indictments might be delayed to give the peace process a chance. In doing so, his office explicitly cited Article 53, indicating that it might suspend its investigation if “it is in the interests of justice to proceed with a peace settlement,” though it also made clear that this was not the same thing as immunity or a blanket amnesty. The Prosecutor ultimately issued the arrest warrants for Kony and four of his commanders in July and unsealed them in October. It did leave to Uganda the choice as to whether criminal or non-penal approaches for lower level perpetrators better served the interests of peace and reconciliation. One official also suggested to the International Crisis Group that operations might be suspended “based on new facts or information” that they jeopardized the peace process, citing the criteria in Article 53(4) for the Prosecutor to reconsider a decision to investigate or prosecute. This broad view of prosecutorial discretion was challenged by many of the human rights lawyers and NGOs that have been most supportive of the court. Both Human Rights Watch and Amnesty International drafted policy papers that called for construing Article 53 as narrowly as possible. Citing the Vienna Convention on the Law of Treaties, Human Rights Watch argued that the phrase “interests of justice” can only be understood in light of the “object and purpose” of the Rome Statute, which is to end impunity by holding perpetrators criminally accountable, not to maintain international peace and stability. Hence, “the prosecutor may not fail to initiate an investigation or decide not to go from investigation to trial because of developments at the national level such as truth commissions, national amnesties, or the implementation of traditional reconciliation methods, or because of concerns regarding an ongoing peace process.” Should OTP decide otherwise, this would involve making political judgments about peace negotiations or the legitimacy of alternative reconciliation methods, which are inappropriate for a judicial institution whose mission and expertise are in international contexts.

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19 ICG, Shock Therapy for Northern Uganda’s Peace Process, p. 6n145. According to three interviews conducted at the ICC on November 15, 2006, this interpretation is contrary to OTP’s current view of the statute. The Prosecutor recently asserted that it is not possible to withdraw the arrest warrants even if requested by the Ugandan government as necessary for the peace process. See Janet Anderson, “World Court Faces Biggest Challenge,” Institute for War & Peace Reporting (IWPR), June 16, 2006.


21 Ibid., p. 2.
criminal law. Amnesty argues that the kind of consultations necessary to make such determinations would violate the Prosecutor's legal duties, citing Article 42(1) on the dependence of the Prosecutor, which "shall not seek or act on instructions from an external source." Both reports also warned that adopting an expansive view of discretion would set a dangerous precedent, subjecting the court to political manipulation, war crimes factions and interested parties. This, in turn, would undermine the ICTY's reputation for impartiality, and hence, its long-term legitimacy. A narrow construction of Article 53 is therefore necessary to build a strong firewall against politicization.

Both papers concede that if the international community genuinely believes the criminal law approach will jeopardize peace negotiations, the only legitimate venue for that call is the Security Council, as prescribed by the Rome Statute. Under Article 16, the Security Council has the authority to suspend any investigation or prosecution for renewable 12-month periods through passage of a resolution under Chap VII of the UN Charter. Both NGOs opposed this provision at Rome, fearing that would serve as a conduit for politicization, and that their policy papers continue to express reservations about its use. Nonetheless, Amnesty argues that the decision to subordinate prosecution to peace must be made by "a political power that the drafters intended to be exercised only by a political body." The logic, as one scholar put it, is that "political institutions should do politics and policy; judicial institutions should do justice." Moreover, doing justice uncompromised by politics is not just a matter of legal duty but also has preferable policy consequences. First, an unwavering commitment to prosecution maximizes the court's deterrent impact, both on the parties to an ongoing conflict and on others who might contemplate the use of criminal means to achieve politi ends. Second, criminal justice, far from being an impediment to peace, is actually necessary ingredient for its long-term consolidation.

From a social science perspective, the central problem with this analysis is that it takes axiomatic relationships that are conditional. In other words, do international tribunals contribute to deterrence and peace? The answer is sometimes. As will be demonstrated in the next two sections, one of the critical factors that determines the impact of international criminal law on these outcomes is the power of the perpetrators and whether they have been defeated or neutralized to a point where their cooperation is no longer necessary for political transitions. Absent those conditions, tribunals are unlikely to have a deterrent impact and conflict resolution will require a bargaining paradigm that inevitably involves compromises with criminal justice. Hence, the efficacy of prosecution, and its contribution to human rights, broadly defined, are dependent upon political factors that need to be addressed in the exercise of prosecutorial discretion.

22 Amnesty, Open Letter, p. 4. The actual report on the Amnesty website mistakenly cites Article 43(1).
24 Amnesty, Open Letter, p. 1; also see HRW, The Meaning of the 'Interests of Justice,' pp. 7-9.
Deterrence

Proponents of a duty to prosecute contend that one of the central contributions of an uncompromising approach to international criminal justice is the deterrence of future violations. First, a strict policy of prosecution will have a deterrent impact beyond the states where the crimes have taken place because it will strengthen the credibility of international criminal law. If done consistently, "potential violators will be forced to consider the consequences and start to be dissuaded from launching criminal campaigns."

If investigations can be turned on and off in response to political developments, this will weaken the Court’s "object to contribute to the prevention of crimes under international law . . . [and] as an effective catalyst to encourage police, prosecutors, and investigating judges to fulfill their complementarity obligations in other situations to investigate and prosecute the worst possible crimes in the world." Secondly, holding back from prosecution during peace negotiations could eviscerate the ICC’s deterrent impact on the parties during an ongoing war. Historically, war crimes tribunals have taken place after a conflict has ended. Human Rights Watch warned that if the ICC adopts this approach, it "would mean that prosecutions should only occur well after crimes have been committed, long after instability has ceased. This would completely undermine any short-term deterrent value that the court might have through investigating current crimes." Hence, NGOs advocate a strong criminal justice approach regardless of the kind of political negotiations taking place. This is why they placed such a high premium on persuading the Security Council to authorize the ICC to assert jurisdiction in Darfur, where the Sudanese government has supported Arab militias, known as the Janjaweed, in a campaign of ethnic cleansing against the region’s African population. It succeeded in doing so when the Security Council passed Resolution 1593 (March 31, 2005), overcoming the opposition of the United States, which had proposed an African-based alternative because it did not want to legitimize the ICC.

During the debate over the venue for prosecution, Human Rights Watch’s Executive Director, Kenneth Roth, told the columnist Nicholas Kristof that an ICC referral would initiate criminal proceedings more expeditiously than the court in The Hague was already in place: "The I.C.C. could start tomorrow saving lives." Yet, the fact that the level of violence against civilians has actually increased since the ICC referral indicates that the legalist analysis of the relationship between tribunals and deterrence is incomplete. The historical record shows that courts by themselves have no deterrent impact. The Bosnian war and its attendant atrocities continued for more than two years after the creation of the ICTY and the Srebrenica massacre was perpetrated by General Ratko Mladic, who was already under investigation for crimes against humanity. What created impunity in Bosnia and elsewhere was the perpetrators’ belief that the balance of forces enabled them to impose their will without meaningful opposition. That means that mass atrocity can only be deterred, or stopped should deterrence

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27 Amnesty, Open Letter, p. 6.
fail, through the countervailing military power of internal forces, or failing that, through some form of international coercion or intervention.

To provide a historical illustration, one of the quotes frequently cited by anti-impunity advocates is Hitler's statement prior to the invasion of Poland: "Who after all is today speaking about the destruction of the Armenians?" Chervi Bassioumi concludes from this that impunity for Ottoman officials most responsible for the Armenian genocide should remind us of the "serious risks associated with failing to demand accountability for serious political violence." But would the prosecution of officials of a defeated power have deterred Hitler, who expected to win the Second World War? Even after the allies issued the Moscow Declaration that Germans responsible for war crimes would be put on trial, Nazi atrocities continued. The real source of Hitler’s belief that he wouldn’t pay a price for his crimes was Anglo-French appeasement and American isolationism. Bassioumi’s formulation conflates the demand for accountability with military resistance; the latter is necessary to make the former meaningful.

It was the absence of any meaningful international resistance to the atrocities in Bosnia and Rwanda that explains why Bosnian Serb and Hutu extremists believed that they could act with impunity. In the former case, the ICTY was established in 1993 at a time when NATO and the UN were unwilling to deploy anything more than a neutral peacekeeping force with no mandate to stop the violence. Even when that mandate was augmented to enforce "safe areas," there was a reluctance to implement that policy because of the risks to peacekeepers. Ruti Teitel observed that the ICTY was asked to pursue "criminal punishment within a political vacuum" because the court could not rely on the forces on the ground to arrest those indicted let alone protect civilian victims. The violence only stopped when that political vacuum was filled by Operation Deliberate Force, a bombing campaign that was designed to induce Belgrade to sue for peace. And it was only after that intervention, and the subsequent willingness of the United States and the European Union (EU) to link normalized economic relationships to the extradition of indicted war criminals, that the ICTY was able to prosecute anyone of significance.

The ICTR, by contrast, was established after the Rwandan genocide so it was designed to play a retributive rather than a deterrent role. But would the existence of a tribunal prior to the genocide have made a difference? The real source of impunity was the Security Council’s decision to withdraw its peacekeeping force after the outbreak of violence rather than accept General Romeo Dallaire’s advice to augment it into a more robust civilian protection force. And, as in Bosnia, without successful military intervention—in this case, the defeat of the Hutu génocidaires by the Ugandan-based Rwanda...
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38 International Crisis Group (ICG), “Getting the UN into Darfur,” Africa Briefing No. 43, October 12, 2006, pp. 6-7.
41 For an argument advocating the full range of coercive military instruments, see Susan E. Rice, Anthony Lake and Donald M. Payne, “We Saved Europeans. Why Not Africans?” Washington Post, October 2, 2006; The ICG takes a more restrained approach. While mindful of the UN Charter’s rules governing the use of force, it does advocate the imposition of a no-fly zone, but opposes other measures, such as a naval blockade or a non-consensual humanitarian intervention. ICG, “Getting the UN into Darfur,” pp. 15-17.

and Williams Peace with Justice” p. 32.
rise of Universal Jurisdiction in Respect to Gross
ent in International Society (Oxford: Oxford
2 Law,” in Carla Hesse and Robert Post, eds.,
In the Era of American World Power (London:
field: Combating Atrocities While Fighting for
this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State.” Yet many of the cases likely to be examined by the ICC involve governments that are responsible for atrocities within their own territory and strict adherence to non-interference would shield them from accountability. In such cases, ending impunity may require overriding the sovereignty of criminal governments, even without Security Council authorization. Had air power not been used in Bosnia with ambiguous authorization or in Kosovo without Security Council approval, nothing would have stopped ethnic cleansing campaigns against civilians and neither Milošević nor his accomplices would have been held to account in The Hague. This is no less true today in Darfur. International tribunals can be important complements to humanitarian interventions, but they are poor substitutes for them.

Peace

Pragmatists see a frequent collision between the requirements of international criminal law and the kinds of bargaining relationships that are necessary for peaceful transitions from dictatorship or armed conflict. The former seek impartial and consistent enforcement to strengthen the deterrent impact of the law. The latter involve engaging the parties in negotiations. If pressure is used, it is as leverage to change a regime’s behavior, not to build a criminal case against it. In fact, subjecting the parties to criminal scrutiny can impede negotiations and prolong violence. Hence, tyrants and rebel leaders are often granted amnesty or asylum in order to facilitate expedient bargains. Proponents of a duty to prosecute deplore such arrangements as “the domineering influence of realpolitik” prevailing “over more enduring human values.” The ICC is seen as a way of offsetting this tendency by telling the parties that justice is not a bargaining chip to be bartered away. Both NGO studies defend this approach by challenging the central policy premise underlying the pragmatic argument — namely, that criminal justice and peaceful transitions are in conflict with each other. As the Amnesty letter explains: “Investigations and prosecutions of genocide, crimes against humanity and war crimes by the International Criminal Court do not threaten international peace and security; it is the failure of national and international justice systems to do so promptly, thoroughly, independently, and impartially that does so.”

First, they contend that the purported antagonism between peace and justice has been exaggerated. In the Balkans, for example, the 1995 indictments of Mladić and Bosnian Serb President Radovan Karadžić did not derail the Dayton peace agreement nor did the indictment of Milošević prevent a settlement of the war in Kosovo that allowed the

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42 See Wheeler, Saving Strangers, pp. 255-256 (on Bosnia), and 265-267 (on Kosovo).
46 Amnesty, Open Letter, p. 11.
ate Party to intervene in an armed conflict, many of the cases likely to be examined for atrocities within their own state would shield them from accountability, overriding the sovereignty of criminal authorization. Had air power not been used in Kosovo without Security Council cleansing campaigns against civilians and rebels, international tribunals could be important in the United States. They are poor substitutes for them.

The requirements of international criminal law are necessary for peaceful transitions that seek impartial and consistent enforcement. The latter involve engaging the leverage to change a regime’s behavior, investigating the parties to criminal scrutiny. Hence, tyrants and rebel leaders are obsolete expedient bargains. The arrangements as “the dominance of human values” is the ICC is under the parties that justice is not a bar to. The ICC is under the ICJ’s mandate, crimes against humanity outright do not threaten international peace. International justice systems to do so ritually that does so.

The critical factor missing in the legalist analysis of relationship between criminal justice and peace is the power of the perpetrators relative to the power of the forces that are arrayed against them. That was Samuel Huntington’s thesis in his book on the third wave of democratizations in the late 1980s and early 1990s. The choice of accountability mechanisms, he argued, “was shaped almost exclusively by politics, by the nature of the democratization process, and by the distribution of political power during and after the transition.” If the democratization process was initiated by the old regime or was the result of negotiations, amnesty was invariably part of the bargain. Only when dictators

See the comments by Kenneth Roth and Richard Goldstone in Kenneth A. Rodman, “Compromising Justice: Why the Bush Administration and the NGOs are Both Wrong About the ICC,” Ethics & International Affairs 20:1 (Spring 2006), p. 44.


Ibid. p. 55-56.

Ibid., Transnational Justice, pp. 52-54.


tions collapsed was prosecution possible since officials of the old regime no longer had the power to prevent it. Subsequent scholarship has shown that prosecutions are still possible in the former cases, but only after democratic institutions have been consolidated and if prosecutions are crafted so as not to threaten the military as an institution. None of this contradicts Huntington's admonition that if the perpetrators remain strong, "do not attempt to prosecute" because the "political costs will outweigh a moral gain." 

The same dynamic applies to transitions from armed conflict. A criminal justice approach will be effective only if the perpetrator's forces are defeated or neutralized to a point where negotiations are unnecessary. If the countervailing forces are unwilling to do this, then conflict resolution must be based on a bargaining paradigm which will inevitably involve compromises with criminal justice.

In the Balkans, for example, the reason why the indictments of the Bosnian Serb leaders in 1995 and of Milošević in 1999 did not derail agreements to end armed conflict was because of the political context in which those indictments were issued. In the former case, the U.S.-led NATO strategy was one of coercive diplomacy, using bombing campaigns, to convince Milošević that he was overextended, that time was not on his side, and that it was in his self-interest to put an end to the war. A central feature of that strategy was to bypass the Bosnian Serb leadership, which would be delivered by Milošević. Indicting Karadžić and Mladić supported that strategy. Indicting Milošević would likely have had the same effect on the Dayton negotiations that the issuing the arrest warrant for Charles Taylor had on the collapse of Accra talks.

The reason why indicting Milošević was impractical in 1995 was because his cooperation was necessary to make Dayton work, given the political-military constraints in which NATO and the United Nations were operating in Bosnia. This changed the Kosovo War in 1999. When Belgrade did not withdraw after the first few weeks of bombing, the U.S. and NATO concluded that Milošević was not only no longer an interlocutor in the peace process; he was now the main source of instability in the region. Moreover, unlike the Dayton Accords, NATO's war aims did not require Belgrade's continuing cooperation to stabilize the post-conflict environment. All that was possible was the withdrawal of the Yugoslav Third Army from Kosovo. Given NATO's political strategy, the ICTY's indictment of Milošević -- which was actively encouraged by U.S. and UK officials who released previously classified informative about the ICTY Prosecutor and her work -- did not interfere with NATO's strategies of war termination and post-conflict nation-building.

Legalists are correct that attempts to engage serious human rights violators often fail because they remain spoilers who will use a peace agreement as a ruse to regroup and return to political violence. It does not follow from this that a pragmatic approach to justice and conflict resolution is wrong because the alternative requires the deployment of countervailing power, including military power, against those one would like...
since officials of the old regime no longer scholarship has shown that prosecutions are after democratic institutions have been con- as not to threaten the military as an institu- tional admonition that if the perpetrators remain cause the “political costs will outweigh any from armed conflict. A criminal justice ap- proach’s forces are defeated or neutralized to the 1 must be based on a bargaining paradigm, with criminal justice. If the countervailing forces are unwilling or 1 by the indictments of the Bosnian Serb lead- not details agreements to end armed conflict blic those indictments were issued. In the 1 was one of coercive diplomacy, using the 1 to retake the Krajina, and economic sanctions- extended, that time was not on his side, end to the war. A central feature of the strat- egy to bypass the Bosnian Serb leadership, who 1 Karadžić and Mladić supported this strat- egy had the same effect on the Dayton negotia- tor Charles Taylor had on the collapse of the

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serious human rights violators often fail because agreement as a ruse to regroup and re- from this that a pragmatic approach to use the alternative requires the deployment of power, against those one would like to

prosecute. For example, in using the Lomé Agreement in Sierra Leone to refute the pragmatic view, one commentator wrote that:

...blanket amnesties were granted for horrific crimes against humanity in the belief that this was necessary for peace and reconciliation; instead this merely reinforced a culture of impunity in which brutal acts of mutilation and lawlessness continued. After more conflict and more atrocities, the policy was reversed in favor of prosecution and punishment of those bearing the greatest responsibility for international crimes.

What is missing from this narrative is the critical role played by British military intervention after the RUF’s violation of the Lomé Agreement. This strengthened what until that point had been an ineffectual UN peacekeeping mission, first in securing Freetown and then in defeating the RUF. The key point is that the choice in favor of justice over amnesty is not something that simply can be willed; it requires political and military backing in order to make it feasible.

In fact, it was the impending withdrawal of foreign military support that led to the negotiation of Lomé’s amnesty provisions in the first place. Prior to Lomé, the RUF had been kept at bay by a Nigerian-led regional peacekeeping force, which was itself guilty of abuses against civilians. Nigeria’s willingness to continue to play this role, however, diminished as it went through a transition from military dictatorship to democracy, given the unpopularity of the military intervention at home. This led Nigerian President Olusegun Obasanjo to appeal to the United States and the United Nations to provide it with a graceful exit. Hence, the government of Sierra Leone was pressured into a “shotgun wedding” with the RUF. Given these political realities, the alternative to peace with amnesty was not peace with justice, but the continuation of the civil war, and without foreign military support against a rebel group that continued to receive arms from Charles Taylor’s Liberia. What this demonstrates is that the kind of multilateralism needed to challenge impunity is not so much a court as it is an institutional capacity to intervene that is less dependent on the vagaries of Nigerian politics or the noblesse oblige of a former colonial power, and its being able to do so using methods, unlike the Nigerians, that comport with international humanitarian law.

The lesson that should be drawn from these cases is that the feasibility of prosecution and its impact on peace are shaped and constrained by the political strategies designed to end the conflict. In Darfur, to illustrate, a purely legalist approach would require criminal proceedings not only against Janjaweed leaders, such as Musa Hilal, but also against Sudanese President Omar al-Bashir and his inner circle, who have been implicated in the atrocities by the UN Commission of Inquiry and every major governmental and NGO study of the Darfur crisis. Yet this is possible if the strategy of conflict

58 Robinson, “Serving the Interests of Justice,” p. 496.
59 Traub, The Best Intentions, pp. 120–121.
60 Abiodun Alou and Comfort Ero, “Cut Short for Taking Short Cuts: The Lomé Peace Agreement on Sierra Leone,” Civil War 4:3 (Fall 2001), pp. 120–122.
resolution employed by the UN and AU is the kind of neutral mediation that led to the Darfur Peace Agreement on May 5, 2006? That agreement was premised on the willingness of Khartoum to disarm the militias and create a secure environment without a United Nations force. This was the principal reason that it failed, since refugees were unlikely to return to their homes if their security was dependent on the good faith of the Sudanese government. Nonetheless, there is a fundamental incongruence between a judicial strategy that subjects the government to criminal scrutiny and an impartial and non-coercive negotiating strategy that tries to elicit its cooperation.

That incongruence would be mitigated if there were some form of humanitarian enforcement, but it would not disappear. That is because the most serious arguments for intervention involve strategies of coercive diplomacy similar to those employed in Bosnia and Kosovo. This would involve the use of sanctions targeted at Sudan’s leadership or its oil revenues followed with a credible threat of force. The purpose would be to convince the regime that its long-term survival requires it to accept a robust civilian protection force to disarm the militias and create a secure environment for refugees to return to their homes. Such a strategy would almost certainly involve the prosecution of Janjaweed leaders most responsible for the atrocities. Indicting Khartoum’s senior officials would be more problematic if their compliance was necessary to make such an agreement work, as was the case with Milošević at Dayton. A criminal law approach would only be appropriate if the intervention resulted in the removal of the regime – either directly or by triggering a coup – or if a civilian protection mandate does not require the active cooperation of the Sudanese government, as was the case with the Milošević regime after the Kosovo War.

Given the inextricable connection between conflict resolution strategies and international criminal justice, the Prosecutor must exercise political prudence as well as legal discretion in deciding when and how to proceed. The NGO studies are correct that OTP is poorly suited to do this given the ICC’s mission and a staff whose competence is legal rather than diplomatic. Ideally, these are calls that should be made by the Security Council, a political body responsible for maintaining peace and security, but it is not clear that it will always act when there is a potential conflict. As a result, the Prosecutor will have to be both lawyer and diplomat in exercising discretion. This means that he should consult with a wide variety of stakeholders likely to be affected by prosecution, as well as the UN, regional institutions and other mediators involved in political negotiations. The Assembly of States Parties might also provide a venue for political input. This is not to argue that the preferences of political actors should be determinative, but they need to be factored into his decision making.

Legalists will object to such proposals as opening the door for the intrusion of politics to compromise the court’s mandate. Moreover, such compromises are viewed as unnecessary given the transformative impact of justice on politics. The historical experience described above indicates that this argument reverses cause and effect, or as Jack Snyder and Leslie Vinjamuri put it, “Justice does not lead, it follows.” Hence, the “the inter

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63 ICG, “Getting the UN into Darfur,” p. 1.
64 See note 41.
65 See Blumenson, “The Challenge of a Global Standard of Justice,” p 822. Although the Security Council is a political body, its resolutions often reflect least common denominator compromises conflicting state interests rather than a coherent political strategy.
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ests of justice” should include a test of political prudence to ensure both the effectiveness of international criminal justice and its positive impact on peace and stability, which are prerequisites for the development of any rights-based political system, or at least for stopping the kind of political violence whose victims are disproportionately civilian.

Conclusion

One of the principal weaknesses in the legalist thinking of many NGOs and human rights lawyers is the belief that international law can be isolated from politics and power. Many of their arguments seem to be premised – at least implicitly – on the assumption that the ICC can exercise powers similar to courts in domestic criminal law systems or the supranational courts, such as the European Court of Justice and the European Court of Human Rights, which make binding decisions that are enforced by the courts of the member states.

The ICC, however, lacks the kind of powers enjoyed by these institutions. First, when OTP and its NGO supporters call for the execution of arrest warrants against Kony or other perpetrators, they are relying on a misleading analogy between international and domestic criminal law. To illustrate, former ICTY Prosecutor Richard Goldstone attributed Milošević’s belief in his own impunity to launch a campaign of ethnic cleansing to “the failure of the international community to prosecute Pol Pot, Idi Amin, Saddam Hussein and Mohammed Aaid.”67 But bringing to justice any of these murderers would have involved something more than executing arrest warrants. Take Goldstone’s last two examples. With Saddam Hussein, it would have required a decision in 1991 to march to Baghdad, with all of the attendant costs and risks that have been made evident by the second Iraq war. With Aaid, one could argue that the Security Council issued its first arrest warrant when it passed Resolution 837 which called for bringing to justice those who ambushed and murdered 24 Pakistani peacekeepers serving in the UN mission in Somalia. The attempt to apprehend Aaid led to an escalation of conflict between US and international forces and Aaid’s clan, culminating in the tragic battle of Mogadishu, which precipitated the withdrawal of those forces.68 Similarly, executing an arrest warrant against Kony would entail defeating a well-armed militia with hundreds of child soldiers, something the Ugandan military has so far been unable to do.69 Comparable difficulties are likely complicate compliance with the Prosecutor’s request that states and international institutions assist in the arrest of LRA leaders in their bases in Sudan or Congo. The Sudanese government, which had armed the LRA, has agreed to work with the ICC to bring Kony to justice. Currently, however, it is allowing the political authorities in southern Sudan to mediate a negotiated solution with the LRA rather than seek a military confrontation with it.70 In northeastern Congo, there is a UN peacekeeping force (MONUC) operating under a

Standard of Justice,” p 822. Although the Security reflect least common denominator compromises of political strategy.

69 For a military analysis of the difficulties facing the Ugandan army, see ICG, A Strategy for Ending Northern Uganda’s Crisis, Africa Briefing No. 35, January 11, 2006, pp. 10-12.
70 ICG, Peace in Northern Uganda?, Africa Briefing No. 41, September 13, 2006, pp. 5-7.
Chapter VII mandate to enforce a peace agreement against warring factions in the Ituri region, not far from where the LRA had sought refuge in Garamba Park. While MONUC agreed to cooperate with the ICC, arresting LRA leaders would require a significant military operation (a skirmish with the LRA in January 2006 left eight peacekeepers dead), which would divert resources from its mandate to protect civilians disarm militias in Ituri.\textsuperscript{71} The central point is that apprehending war criminals during an ongoing conflict is not a police action. It is a military operation that involves a much broader set of calculations than would be considered in domestic law enforcement.

Second, unlike domestic courts, the ICC has no police force and cannot order states to arrest or extradite suspects, produce evidence from national intelligence agencies, or finance its investigations. Nor can it provide effective protection to victims in war zones, which has recently led it to curtail its operations in the Ituri region of the Congo.\textsuperscript{72} Unlike supranational courts, it cannot mandate state cooperation. Its effectiveness depends upon the willingness of the states on whose territory the crimes have taken place to grant it access – something that has been effectively blocked by Sudan and may be blocked by Ugandan President Museveni following a recent denunciation of the ICC and the international community for their failure to apprehend Kony.\textsuperscript{73} In theory, state parties are obligated to cooperate with the ICC (Article 86 of the Rome Statute), as are nonparties whose cases have been referred by the UN Security Council (Article 25 of the UN Charter). However, the enforcement mechanisms for the former are weak and for the latter are dependent upon an institution designed to reflect major power consensus. If states of concern do not comply, the ICC’s effectiveness will be dependent upon the willingness of powerful regional actors or major powers that see their interests and values sufficiently engaged to exercise leverage, as was the case with US and EU economic pressure on Serbia and Croatia to comply with the ICTY.\textsuperscript{74}

It is therefore inevitable that international politics will set limits on the kind of international justice that can take place. NGOs in challenging this and holding a principled position perform an important service in using publicity to shame actors into expanding those limits. Although OTP is moving closer to the NGO position on Article 53,\textsuperscript{75} it is still likely to construe its discretion more broadly through other means. This is because what Allison Marston Danner refers to as “pragmatic accountability” on prosecutorial discretion – i.e., the dependence of the court on the voluntary assistance of states for virtually every phase of its work from investigation to trial.\textsuperscript{76} This will lead the Prosecutor to place a high premium on maintaining his political capital with those state whose cooperation is necessary for a successful prosecution. If he emulates Davis Crainé’s indictment of Charles Taylor through the aggressive pursuit of cases that could jeopardize peace negotiations or fragile political transitions, he is likely to dry up the political capital and weaken the court as an institution.

Such an approach to discretion is likely to be challenged by many within the human rights community as compromising accountability. M. Cherif Bassiouni, who was on

\textsuperscript{71} Ibid., p. 11

\textsuperscript{72} Katy Glasbrow, “ICC Inquiries Jeopardized,” \textit{IWPR}, July 6 2006


\textsuperscript{75} Not for attribution interviews, International Criminal Court, November 15, 2006.

\textsuperscript{76} Allison Marston Danner, “Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the ICC,” \textit{American Journal of International Law} 97:3 (July 2003), pp. 526-532.
of the pioneers in the anti-impunity movement, put the issue starkly in a way that informs much of the current human rights movement.\textsuperscript{77}

The human rights arena is defined by a constant tension between the attraction of realpolitik and the demand for accountability. Realpolitik involves the pursuit of political settlements unencumbered by moral and ethical limitations. As such, this approach often runs directly counter to the interests of justice, particularly as understood from the perspective of victims of gross violations of human rights.

The goal of institutions like the ICC is to insulate international criminal law from politics as much as possible so as to make justice less vulnerable to the compromises imposed on it by diplomacy and statecraft: “Compromise is the art of politics, not of justice.”\textsuperscript{78}

This formulation creates a false dichotomy between realpolitik and justice. As Gary Jonathan Bass notes, “legal justice is one good among many . . . not a duty that trumps all others.”\textsuperscript{79} Ethical decision-making requires that it be weighed and balanced against other values, such as peace, stability, and democracy. Factoring power realities into this equation is not necessarily surrendering to realpolitik; it is indispensable in determining what kinds of justice and accountability mechanisms are possible and assessing their consequences for other values.\textsuperscript{80} Pursuing justice in ways that are blind to power realities will either be futile exercises in high-mindedness or counterproductive to political settlements that are necessary to end political violence. International law can not be isolated from the political context in which it has to operate.

This latter point was the central thesis of Judith Shklar’s Legalism, which challenged those legal purists who saw the Nuremberg trials simply as political justice. Shklar acknowledges that Nuremberg was a political trial, but not every form of politics is the same. The Soviet “show trials” of the 1930s were designed to consolidate totalitarian control, Nuremberg, by contrast, had a positive impact on the postwar transformation of the West German political system, particularly its legal profession, which came to understand from it what was frightfully wrong in the 1930s. Shklar concludes from this: “The question, in short, is not ‘is law political’ but ‘what sort of politics can law maintain and reflect? . . . It is the quality of the politics pursued in them that distinguishes one political trial from another.’”\textsuperscript{81} This essay extrapolates Shklar’s arguments about political trials to the exercise of political discretion not to prosecute. Not every choice to set limits on international criminal justice is the same. Rather than denounce all such decisions as politicization, amoral realpolitik, or disreputable expedience, they should instead be assessed on the judgment and moral character of the politics that sets those limits.

\textsuperscript{77} Basiouni, “Justice and Peace,” p. 191.
\textsuperscript{80} On the tendency of legal absolutism to ignore the consequences of its advocacy, see David Kennedy, The Dark Sides of Virtue: Reassessing International Humanitarianism (Princeton: Princeton University Press, 2004), p. 31.