

## The “Peace versus Justice” Debate at the International Criminal Court

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The mission of the International Criminal Court (ICC) is to end impunity for the worst international crimes by holding perpetrators criminally responsible. This legal mandate is sometimes at odds with the political requirements of negotiating with those accused of criminal violence in order to end armed conflicts. The court’s founding Rome Statute allows the Prosecutor to exercise his discretion not to investigate or prosecute if he concludes that 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 ICC’s strongest supporters in the human rights community, the answer is no. If the Prosecutor were to defer to political negotiations or peace processes, he would be acting contrary to the court’s duty as a legal institution to end impunity for the gravest international crimes through prosecution. Moreover, if the court acts on a duty to prosecute uncompromised by politics, this is likely to have preferable consequences in terms of deterring gross human rights abuses and in consolidating transitions to peace and democracy.

The case for a “duty to prosecute” is implicitly or explicitly informed by what Judith Shklar (1986) calls legalism, which assumes that international law can be decontextualized from politics, and that in doing so, can transform politics. This reverses the actual causal relationship between politics and law evident in both the history of international war crimes tribunals and the cases currently under review by the ICC. Those episodes demonstrate that political factors – most notably the power of the perpetrators relative to the forces arrayed against them and the political strategies of conflict resolution used by the latter – determine when criminal law is effective and whether it contributes to peace. Hence, the Prosecutor should construe his discretion broadly in order to assess the political context in which international criminal law has to operate.

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## **The Rome Statute: Can the Prosecutor Exercise Discretion in the Interests of Peace?**

Does the ICC prosecutor have a duty to prosecute crimes of sufficient gravity within its jurisdiction when criminal justice might undermine peace processes? This is an important question because states have usually chosen alternatives to prosecution in transitions from dictatorship or armed conflict – i.e., amnesty or exile, often accompanied by non-retributive forms of justice such as truth commissions or reparations. The best-known example, South Africa’s Truth and Reconciliation Commission (TRC), conditioned amnesty on truth-telling and played an important role in the transition from apartheid to majority rule (Hayner 2001:154-159). Even without formal amnesties, conflict resolution often involves subordinating justice to expedient bargaining when leaders a prosecutor might want to put in the dock are still in power and their cooperation is necessary to end political violence (Snyder & Vinjamuri 2003). This was the rationale behind negotiating with Serbian President Slobodan Milošević at Dayton in 1995 to end the Bosnian War (Bass 2000: 227-231). Pushing ahead with prosecution under these circumstances could prolong a conflict, as occurred when the Special Court for Sierra Leone unsealed an indictment of Liberian President Charles Taylor just as he arrived in Accra for peace talks designed to end the Liberian civil war by persuading him to step down and accept asylum in Nigeria. As soon as Taylor learned of the indictment, he immediately returned to Liberia and the negotiations collapsed. While Taylor’s departure was secured two months later, an attempt to end the war earlier was scuttled by the prosecutor (Moghalu 2006: 109-111).

The Rome Statute establishes a presumption against deferring to peace processes. Its 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 to “put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.” A few commentators have suggested that the Rome Statute’s complementarity provisions could be used to defer to an amnesty or alternative justice mechanisms. Under Article 17(1)(a), a case is inadmissible unless a state with jurisdiction “is unwilling or unable genuinely to carry out the investigation or prosecution.” In theory, a genuine investigation need not be a criminal one, allowing the Prosecutor to defer to

arrangements like the TRC (Roche 2005: 568). Yet, the complementarity language agreed to at Rome is more consistent with a duty to prosecute. Article 17(2) defines “unwillingness” as (a) a national process “made for the purpose of shielding the person concerned from criminal responsibility” and (b) an “unjustified delay . . . inconsistent with an intent to bring the person concerned to justice.” Even though the TRC’s amnesty was conditioned on truth telling and was ratified by South Africa’s first democratically-elected parliament, there was no intention to bring to trial those perpetrators who publicly confessed political crimes. Hence, a strict reading of Article 17 would not distinguish the TRC from less politically legitimate amnesties, such as the one that the Pinochet dictatorship granted itself prior to the return of constitutional rule in Chile (Dugard 2002: 700).

The only provisions that can be plausibly construed as leaving open the possibility for making such distinctions are the rules governing prosecutorial discretion in Article 53. Article 53(1)(c) allows the Prosecutor to decline to investigate crimes that satisfy the Rome Statute’s jurisdictional and admissibility criteria if “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.” Under Article 53(2)(c), the Prosecutor can decline to move from investigation to prosecution if it “is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.” The phrase, “interests of justice,” is not defined in the Rome Statute. Some commentators have interpreted it as a form of “creative ambiguity” which could encompass alternative justice mechanisms, like the TRC, whose destabilization could inflict injustices on future victims of political violence (Scharf 522). While the prosecutor is required to justify his decision to the pre-trial chamber, which would review and possibly reverse it, it theoretically enables the Prosecutor to “arbitrate between the imperatives of justice and the imperatives of peace” (Côté 2005: 178).

The Office of the Prosecutor (OTP) confronted the need to address these value tradeoffs 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 has abducted over 20,000 children as foot soldiers and sex slaves, and is responsible for large-scale

atrocities, primarily against the Acholi population of Northern Uganda. The court accepted the case on June 28, 2004, following a referral from Ugandan President Yoweri Museveni on December 16, 2003. Betty Bigombe, a former Ugandan minister, who was attempting to engage the LRA in peace talks, publicly criticized the decision. Bigombe and several Acholi community organizations argued that indictments would dissuade the LRA leadership from participating in negotiations. A better strategy, they argued, was to offer amnesty in exchange for demobilization and employ traditional non-punitive reconciliation strategies to reintegrate the LRA back into the community (Allen 2006:117-127). Between March and May, ICC Prosecutor, Luis Moreno Ocampo, met with representatives of these organizations and initiated several missions to Northern Uganda to interview victims and civil society groups. The Prosecutor suggested that the indictments could be delayed to give the peace process a chance. In doing so, his office 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 (ICG 2005, 5-6). Nonetheless, arrest warrants for Kony and four of his commanders were applied for in May, issued in July, and unsealed in October.

### **The Duty to Prosecute and the Case for Narrow Prosecutorial Discretion**

The suggestion that Article 53 could be used to defer to peace processes provoked a sharp challenge from many human rights lawyers and NGOs. Human Rights Watch (2005) and Amnesty International (2005) each drafted policy papers that argued the Prosecutor’s duties under the Rome Statute required a narrow construction of the “interests of justice” test since the “object and purpose” of the Rome Statute is to end impunity by holding perpetrators criminally accountable, not to assist political negotiations (HRW 2005a: 3-4). It would also be a violation of his duties under international law, since the crimes subject to the ICC involve an obligation to prosecute as a result to treaty and custom (HRW 2005a: 12), and his duties to victims, for whom the ICC was created (AI 2005: 3). 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” (HRW 2005a: 2).

Should the prosecutor decide otherwise, he would be making political judgments about peace negotiations or the legitimacy of alternative justice mechanisms, which are inappropriate for a judicial institution whose mission and expertise are in international criminal law (AI 2005: 4). Both papers concede that if the international community is genuinely concerned about the impact of prosecution on peace negotiations, the only legitimate place to make 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 Chapter VII of the UN Charter. Both NGOs opposed this provision at Rome, fearing that it would serve as a conduit for politicization, and 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” (AI 2005:1). The court itself has moved closer to this position in the wake of the LRA controversy. A 2007 policy paper stated that the “interests of justice” test should not be “conceived of so broadly as to embrace all issues related to peace and security” and that “the broader matter of peace and security is not the responsibility of the Prosecutor” (ICC-OTP 2007: 8-9).

The case for a narrow prosecutorial discretion is premised not only on the court’s legal duty, but also on its superior policy consequences for making and consolidating peace. First, the NGOs challenge the claim that prosecution is incompatible with peace negotiations, noting that the 1995 indictments of Karadžić and Mladić did not derail the Dayton peace agreement and the 1999 indictment of Milošević did not prevent a resolution of the Kosovo war in which the Albanian refugees could return to their homes (AI 2005: 7-8). Second, prosecution can play an important role in peacemaking – first, by marginalizing criminal spoilers, such as Milošević or Taylor, and second, by individualizing guilt in criminal leaders rather than allowing the victims to collective it on entire groups, thereby breaking the cycle of violence and revenge that keeps many ethnic conflicts going (HRW 2005a: 14-15). Finally, anti-impunity advocates see

criminal accountability as necessary to establish the rule of law and deter a return to political violence in post-conflict societies. “Impunity for atrocities committed in the past,” by contrast, “sends the message that such crimes may be tolerated in the future” (Dufka 2004: 54). The 1999 Lomé accords ended the civil War in Sierra Leone by providing a blanket amnesty to the Revolutionary United Front (RUF), despite having used drug-addicted child soldiers in a campaign of murder, mutilation and sexual violence, and appointed its leader, Foday Sankoh, Vice President and Minister of Mines. Within less than a year, the RUF violated the agreement by attacking UN peacekeepers and taking them hostage, thereby demonstrating the tenuousness of peace without justice (Dufka 2005: 55-56).

### **The Consequentialist Case for Broad Prosecutorial Discretion**

The central weakness of the consequentialist case for a duty to prosecute is that it implies that political analysis is superfluous; pursuing justice over impunity is simply a matter of making the right choice regardless of power realities, and if the law leads, politics will inevitably follow. Leila Sadat (2002: 70) suggests such an approach when she uses the Balkan and Sierra Leone cases to argue that it is short-sighted to subordinate justice to realpolitik in peace negotiations:

Examples such as Milošević and Sankoh suggest that granting impunity rather than *definitively settling a conflict* simply encourages the resurgence of criminal behavior. If one of the most important purposes of criminal law is to remove dangerous individuals from society, it suggests that Slobodan Milošević and Foday Sankoh should have been tried and indicted years ago (emphasis added).

Note the implication that the key to “definitively settling a conflict” is a more aggressive judicial strategy. However, the alternative to engaging criminal leaders is the deployment not of law, but of countervailing power, probably involving the use or threat of force. This is because the real source of impunity in places like Bosnia and Sierra Leone is the perpetrators’ belief that the military balance of forces enables them to impose their will without meaningful resistance. That can only be challenged through the military power of internal forces, or failing that, through some form of international coercion or intervention. International criminal law can build on the capability and willingness of

political actors to wield such instruments, but it cannot help settle a conflict without them.

In Bosnia, for example, the Security Council authorized the creation of the International Criminal Tribunal for Yugoslavia (ICTY) in 1993 at 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 it because of the risks to peacekeepers (Wheeler 2000: 253). In such a political vacuum, it is unlikely that a more aggressive judicial strategy could have had a meaningful impact on ethnic cleansing. In fact, the worst single atrocity of the Bosnian war – the Srebrenica massacre – was perpetrated by forces under the command of General Mladić two years after the creation of the ICTY (Bass 2000: 229-231). The impunity to use criminal violence was effectively challenged only after NATO was willing to use force – both directly through Operation Deliberate Force and indirectly through assisting Croatian and Bosnian military offensives – in order to convince Belgrade to rein in its Bosnian Serb allies (Burg 2003: 65-66). This, in turn, was a prerequisite for the ICTY to prosecute anyone of significance and make a contribution to the peace process by removing criminal spoilers from the political scene.

In Sierra Leone, it is clear that engaging the RUF was a mistake, as was releasing Sankoh from prison to lead the RUF delegation in Lomé. However, keeping Sankoh in prison and issuing indictments of rebel leaders still at large would not have ended the RUF’s reign of terror since it had not been defeated. More importantly, Nigeria, which led the West African force that had kept the RUF at bay, was no longer willing to keep its troops in Sierra Leone and the UN was only willing to replace them with a neutral peacekeepers. Therefore, the alternative to peace with amnesty was not peace with justice, but the continuation of the civil war – and without foreign military assistance against a rebel group that was still being armed by Charles Taylor’s Liberia. Impunity was a symptom of political realities that no criminal justice mechanism could have erased. And as in Bosnia, it only ended with military intervention, in this case from Great Britain, in response to a plea from Kofi Annan after the RUF returned to criminal violence and took 500 UN peacekeepers hostage. This strengthened what had been a

neutral peacekeeping operation into an enforcement mission that eventually defeated the RUF (Traub 2006: 117-122).

Moreover, the feasibility of prosecution and its contribution to peaceful transitions are dependent upon the political strategies designed to bring a conflict to an end. If the perpetrators' forces have been defeated or weakened to a point where negotiations are unnecessary, criminal leaders could be put on trial without a serious risk of violent backlash. This was the historical experience after World War II with the Nuremberg and Tokyo War Crimes Tribunals, and in Rwanda and Sierra Leone. Prosecutions under these circumstances entail the risk of partisan justice in which the losers are tried and the victors are immune. Nonetheless, defeating criminal actors, or weakening them to the point where their cooperation is not needed to end a conflict, is a prerequisite for discounting the potential impact of criminal justice on peace negotiations.

If, by contrast, the perpetrators are not defeated and retain significant power, conflict resolution has to be based on a bargaining paradigm that involves some compromises with criminal justice. This most clearly applies when the UN or other mediators adopt an impartial Chapter VI approach to conflict resolution, as was the case in El Salvador and Mozambique (Snyder & Vinjamuri 2003: 34-35). That conflict would still exist, though it would be mitigated, if the strategy of conflict resolution moved beyond neutral mediation to coercive diplomacy, since its purpose is to use pressure to change a perpetrator's behavior. In Bosnia, for example, the purpose of NATO's use of force was not to defeat the Serbs the way international forces had defeated the RUF. Rather, it was to convince Milošević that the continuation of the war was no longer in his interest. A central feature of the negotiating strategy of U.S. envoy Richard Holbrooke was to bypass the Bosnian Serb leadership – whom he characterized as “useless interlocutors” for renegeing on every commitment made to international mediators – and rely on Milošević to deliver them (Bass 2000: 232). Goldstone's indictment of Karadžić and Mladić assisted this strategy. Indicting Milošević, by contrast, would likely have had the same impact on Dayton that unsealing the arrest warrant for Charles Taylor had on the collapse of the Accra talks.

The reason why indicting Milošević was impractical in 1995 was because his cooperation was necessary both to negotiate and to maintain Dayton, given the political-

military constraints under which NATO and the UN were operating. This changed with the Kosovo War in 1999. When Belgrade did not withdraw after the first few weeks of bombing, the US and NATO concluded that Milošević was not only no longer the key to the peace process; he was now the main source of instability in the region (Burg 2003: 94-96). Moreover, unlike the Dayton, NATO's war aims did not require Belgrade's continuing cooperation to stabilize the post-conflict environment. Given NATO's political strategy, the ICTY's indictment of Milošević – which was encouraged by US and UK officials who released previously classified information to the ICTY Prosecutor (Williams & Scharf 2003: 206-207) – did not interfere with NATO's strategies of war termination and post-conflict nation-building.

The lesson that should be drawn from these cases is that the feasibility of prosecution and its impact on peace are dependent on the political strategies designed to end a conflict. This is relevant to the cases currently investigated by the ICC, since each is taking place in the context of ongoing political violence, creating tensions between international criminal justice and conflict resolution. As a result, the prosecutor will need to find some means of injecting political prudence into his discretion in order to be effective without undermining negotiations or disrupting fragile peace processes.

The Darfur case, to illustrate, has become the subject of an intense “peace versus justice” controversy after the Prosecutor's application for an arrest warrant for Sudan's president, Omar Hassan al-Bashir, on charges of genocide. Anti-impunity advocates contend that indicting a sitting head-of-state, the man most responsible for a massive ethnic cleansing campaign against the region's African population, could make a contribution to ending criminal violence (Goldstone 2008). That will only happen if the judicial process triggers a change in the political strategies used by powerful states and international organizations to resolve the conflict.

It has been the mismatch between legal and political strategies that explains the limited impact of the ICC up to this point. When the Security Council referred the Darfur case to the ICC on March 31, 2005, it created a criminal justice process unaccompanied by enforcement actions against behavior deemed to be criminal. Although the Security Council had passed several resolutions under Chapter VII calling for Khartoum to disarm the janjaweed and end the violence, there were no meaningful sanctions for

noncompliance, nor was there explicit linkage to future compliance. The only international presence on the ground was an underfunded and understaffed AU force that had been deployed a year earlier to monitor a non-existent cease-fire. When the Security Council later authorized a more robust civilian protection force, it never moved beyond what amounted to a pacific settlement approach in which deployment would depend on Sudanese consent. No penalties were imposed or threatened when that consent was withheld, following the authorization of a civilian protection force in August 2006, and when it later accepted deployment of a hybrid UN-AU Mission in Darfur (UNAMID), but imposed conditions that amounted to obstruction (Rodman 2008: 543-548).

Given the unwillingness of the Security Council to authorize enforcement, the principal instrument of conflict resolution has been impartial mediation through the good offices of the UN and AU. Such an approach is incompatible with the ICC referral because one cannot simultaneously subject the government to criminal scrutiny and non-coercively seek its cooperation. It is also incongruent with conditions on the ground. For such an approach to succeed in ending a civil war, the parties must be in a “mutually hurting stalemate” (Zartman 1989: 268) in which they recognize that they cannot achieve their objectives militarily and that the continuation of the war will make them worse off. The ruling party in Khartoum, however, believes that maintaining its power is better served by the continuation of the war than by a negotiated settlement, which the International Crisis Group pinpoints as one of the central reason for the failures of the peace process (ICG 2007: 8-11). As long as that does not change, a pacific settlement approach to large-scale ethnic cleansing is incompatible with both criminal justice and conflict resolution.

For a higher profile prosecutorial strategy to be something more than naming and shaming, it will have to provoke a unified Security Council to move from pacific to some form of coercive conflict resolution. This could involve the use of sanctions targeted at Sudan’s leadership or its oil revenues, followed possibly by a credible threat of force – actions that have so far been blocked by China’s threatened veto given its economic and strategic relationship with Sudan (Rodman 2008: 550-554). The publicity surrounding the indictments – augmented by civil society groups - could increase the reputational costs to China in playing this role, dissuading it from vetoing sanctions resolutions or

encouraging it to put pressure on Sudan to comply with Security Council mandates (Prendergast & Thomas-Jensen 2007: 72). It could also cause Western governments to press the matter more forcefully in the Security Council or even to take action outside it. In fact, some ICC supporters have suggested that the Bashir indictment itself could be used as a source of leverage to get Sudan to end the conflict, or at least allow greater humanitarian access and a more robust peacekeeping presence (Grono & Hara 2008)

If the indictment does indeed serve as either a prod to enforcement or a source of leverage, success will almost certainly require compromises with criminal justice. That is because the purpose of pressure is to change regime behavior – i.e., increasing the costs and risks of the war for Khartoum to a point where ending it serves its interests. A principled approach to international criminal justice, however, would be a call for regime change since the prosecutor and major UN and NGO studies have attributed responsibility not only to President Bashir, but also to the most senior officials in the government and the military (ICID 2005: 133-143, HRW 2005b: 58-63, ICC-OTP 2008: 6). Moreover, as with Dayton, the successful deployment of a peacekeeping force will probably require the cooperation of the Sudanese government to negotiate and maintain a cease-fire and to disarm the militias, which the UN peacekeepers would monitor rather than enforce. Ending criminal violence will therefore require some short-to-medium term compromises on criminal justice, such as the invocation of Article 16 by the Security Council to suspend criminal proceedings for renewable 12-month periods, restrictions on UN peacekeepers in enforcing arrest warrants, or the prosecutor exercising his discretion and lowering his profile approach if genuine progress is being made. A more assertive criminal law approach would only be feasible if international intervention resulted in the removal of the regime - either directly or by triggering a leadership change – 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 relationship between conflict resolution and international criminal justice, the Prosecutor will have to exercise both political and legal discretion, evaluating not only the gravity of the crime and the admissibility of the case, but also the likely impact of investigations or indictments on prolonging a conflict or destabilizing a political transition. While OTP's review of Article 53 would seem to rule out such an

approach, it does acknowledge that the interests of victims includes their security and protection, which in turn, requires an “ongoing risk assessment” (ICC-OTP 2007: 4). This should be defined broadly to include consultations with a wide variety of stakeholders likely to be affected by the consequences of prosecution, as well as the international institutions, states and NGOs involved in mediation efforts. This is not to argue that those preferences should necessarily prevail, but they need to be factored into his discretion so as not to foreclose options to end the kind of political violence whose victims are disproportionately civilian.

## **Conclusion**

The central philosophical question underlying this legal controversy is whether justice in the aftermath of war and atrocity requires the application to criminal justice to its sponsors. In a book that takes politicians, diplomats, and even the ICTY Prosecutor to task for subordinating justice to accommodation during the Bosnian war, Paul Williams and Michael Scharf (2003: 17) answer that question affirmatively and support that claim with a passage from Michael Walzer’s (1977: 288) classic work on just war theory:

the assignment of responsibility is the critical test of the argument for justice . . . If there are recognizable war crimes there must be recognizable criminals . . . The theory of justice should point us to the men and women from whom we can rightly demand an accounting, and it should shape and control the judgments we make of the excuses they offer (or are offered on their behalf) . . . There can be no justice in war if there are not, ultimately, responsible men and women.

This, however, is an incomplete reading of Walzer’s treatment of the subject. Following the excerpted quote, he explains that he is discussing moral responsibility rather than guilt or innocence as determined by judges and he goes on to argue that considerations of proportionality mean that there are “often prudential reasons for not calling judges” (Walzer 1977: 117). That is because the apprehension of criminal leaders requires something different from domestic law enforcement and that difference is more potentially threatening to the rights and lives of innocent civilians. Walzer illustrates this point through a quote from U.S. Secretary of State Dean Acheson defending the US decision to cross the 38<sup>th</sup> parallel during the Korean War as necessary to “round up the people who were putting on the aggression.” This, however, required military escalation

rather than police work, and it inflicted harm “far beyond the people who are rounded up” (Walzer 1977: 119). Walzer is prepared to accept those costs on proportionality grounds in order to remove from power and try the leaders of a radically evil regime, such as Hitler’s Germany, but not for lesser despotisms, such as Imperial Japan or Communist North Korea. Whether or not one agrees with this position, the argument requires us to consider the humanitarian costs that would have to be accepted to bring to justice leaders who have not yet been defeated.

Yet many of the arguments marshaled by NGOs and international lawyers ignore these tradeoffs by using the language of domestic law enforcement as if what is needed is the simple execution of arrest warrants. To illustrate, former ICTY Prosecutor Richard Goldstone attributed Milošević’s belief in his own impunity to “the failure of the international community to prosecute Pol Pot, Idi Amin, Saddam Hussein and Mohammed Aidid” (Scharf 1999: 298). But bringing any of these malefactors to justice 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 Aidid, 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 Aidid led to an escalation of conflict between US and international forces and Aidid’s clan, culminating in the tragic battle of Mogadishu, which precipitated the withdrawal of those forces (Wheeler 2000: 194-197).

Similarly, executing an arrest warrant against Kony, a yet to be defeated rebel leader, is a military operation, not a police action, and involves a much broader set of political and moral calculations than does domestic law enforcement. As Walzer notes, “war affects more people than domestic crime and punishment, and it is the rights of these people that forces us to limit its purpose” (Walzer 1977: 116) If military escalation is necessary to apprehend the criminal actors and one cannot justify the ensuing loss of innocent life on proportionality grounds, then the perpetrators cannot be “removed from the (moral) world of bargaining and accommodation” (Walzer 1977: 113)

Allowing criminal actors to enter this world rather than the world of crime and punishment is likely to be challenged by many within the human rights community as compromising accountability. Bassiouni (191) put the issue starkly in a way that informs much of the anti-impunity movement:

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” (Bassiouni 1997: 12).

This formulation creates a false dichotomy between *realpolitik* and justice. As Gary Jonathan Bass (2004: 405) notes, “legal justice is one good among many . . . not a duty that trumps all others.” Ethical decision-making requires that it be weighed and balanced against other values, such as stability and peace, particularly since war creates the license for the worst abuses of human rights. 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. 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 cannot 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 legal culture by exposing what had gone so frightfully wrong in the 1930s. Shklar (1986: 144-145) 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.” 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.

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