

DELINEATING THE INTERESTS OF JUSTICE

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INTRODUCTION

The Chief Prosecutor (the Prosecutor)¹ of the International Criminal Court (ICC) has the discretion to forego investigations as well as prosecutions in the “interests of justice.” This mechanism is one means by which the demands of the nascent international criminal law regime could be reconciled with the desirability of achieving stable and secure peace agreements and democratic transitions. However, there has been some debate as to the correct interpretation of the phrase “interests of justice.” This paper reviews several of the suggestions put forward, with a particular focus on the approach taken by Human Rights Watch (HRW) in a recent policy paper.

There are advantages to the approach taken by HRW in focusing on maintaining the legitimacy of the Office of the Prosecutor (OTP) and of the ICC as an institution. Nonetheless, this study concludes that it would be inadvisable for the “interests of justice” to be construed in such a manner as to effectively render the UN Security Council (UNSC) the sole body competent to decide whether or not any investigation or prosecution would be in the interests of justice. Rather, it would seem preferable for this discretion to remain within the ICC, circumscribed by regulations designed to ensure that the 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 ICC (the Rome Statute) 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. 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

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1. References to the Prosecutor are to the Chief Prosecutor personally; at the time of writing, Luis Moreno-Ocampo. Where appropriate, reference is also made to the office headed by the Prosecutor: the Office of the Prosecutor (OTP). The OTP is one of the four organs of the ICC, alongside the Registry, the Presidency and the Judicial Divisions.

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,”² 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.”³ In either case, where the Prosecutor declines to investigate or prosecute in such circumstances, he or she is required to notify the pre-trial chamber of this determination and of the reasons for the decision.⁴ The pre-trial chamber is then entitled to review the Prosecutor’s decision, and, where the chamber undertakes a review, the decision of the Prosecutor will only be effective where it is confirmed by the pre-trial chamber.⁵

The “interests of justice” thus allow the Prosecutor significant scope to exercise discretion as to whether or not to investigate or prosecute a potential case. While this may be welcome in many circumstances, the relatively unfettered extent of this discretion has given rise to much debate. One dispute centers on whether or not the Prosecutor should decline to investigate or prosecute where prosecutorial intervention may have an undesirable effect on peace negotiations or on a domestic transitional justice mechanism, such as a truth and reconciliation commission.⁶ Another dispute centers on whether the Prosecutor can or should use his or 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.⁷

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 recognized.⁸ 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

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

3. *Id.* at art. 53(2). (specifying 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.”).

4. *Id.* at art. 53(1), 53(2).

5. *See id.* at art. 53(3).

6. *See, e.g.*, Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 481-85, 504-5 (2003); Noah Weisbord, *When Peace and Justice Clash*, INTERNATIONAL HERALD TRIBUNE, Apr. 29 2005, available at <http://www.iht.com/articles/2005/04/28/opinion/edweis.php>.

7. *See* Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J. INT'L CRIM. JUST. 695, 699-718 (2005). *See also id.* at 483-85, 489-96; Richard J. Goldstone & Nicole Fritz, *'In the Interests of Justice' and Independent Referral: The ICC Prosecutor's Unprecedented Powers*, 13 LEIDEN JOURNAL OF INTERNATIONAL LAW 655, 659-60 (2000).

8. *See* Antonio Cassese, et al., *Round Table: Prospects for the Functioning of the International Criminal Court*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 300 (Mauro Politi & Giuseppe Nesi eds., 2001).

violations of human rights.⁹ A declaration by the international community at large that criminal prosecution was henceforth to be the only acceptable means of dealing with acts deemed criminal under international law would justifiably be thought presumptuous.¹⁰ Against the backdrop of such concerns, Kofi Annan declared in 1998 that it was “[i]nconceivable 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.”¹¹ Moreover, as seen from a purely consequentialist standpoint, the risk of insisting on criminal prosecutions in all cases must be balanced against the possibility that this could result in the commission of further atrocities.¹²

Conceding that it would be unfortunate if the ICC were to stand in the way of peace agreements and/or national transitional justice initiatives, it has been argued that use of the Prosecutor’s discretion under the rubric of the “interests of justice” would be the most straightforward means for the court to avoid becoming involved in such situations.¹³ One justification for the use of prosecutorial discretion in these circumstances is that the term “justice” can bear many differing meanings depending on context.¹⁴ Also, the broader interests of society would certainly militate strongly against prosecutions where the threat of criminal prosecution might jeopardize a democratic transition.¹⁵

In line with the considerations outlined above, the OTP published draft regulations in 2003 indicating that the Prosecutor might be willing to take into account in determining the interests of justice in any given case “various national and international efforts to achieve peace and security.”¹⁶ While the draft

9. See, e.g., ALEX BORAINÉ, *A COUNTRY UNMASKED* 400 (Oxford U. Press 2000) (“[I]t would be a tragedy if all future ‘interventions in post-conflict societies were to take the form of trials and prosecutions only.’”).

10. See Robinson, *supra* note 6, at 483.

11. Kofi Annan, U.N. Sec’y Gen., Address at the University of the Witwatersrand (Sept. 1, 1998), quoted in Charles Villa-Vicencio, *Neither too much, nor too little justice: Amnesty in the South African context*, 49 MEDIA DEVELOPMENT 26 at 29, available at <http://www.wacc.org.uk/wacc/content/pdf/2437>.

12. Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619, 2620 (1991) (“[A]lmost 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.”).

13. See, e.g., Robinson, *supra* note 6, at 483 (stating “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.”).

14. See Goldstone & Fritz, *supra* note 7, at 662. (explaining “the word ‘justice’ is demanding... [y]et few would aver that it is ‘demanding’ in the sense that it is always retributive.”).

15. *Id.* at 663 (explaining that “[o]n 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.”).

16. 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.

regulations themselves do not give any more specific elucidation, a footnote to the draft suggests that the experts consulted in developing the guidelines leaned towards including consideration of circumstances in which an investigation or prosecution might “exacerbate or otherwise destabilize a conflict situation”¹⁷ or “seriously endanger the successful completion of a reconciliation or peace process.”¹⁸ More 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 Prosecutor 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.”¹⁹

II

Perhaps unsurprisingly, some maintain 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 Watch policy paper entitled “The Meaning of ‘The Interests of Justice’ in Article 53 of the Rome Statute” (the HRW Paper).²⁰ The HRW Paper supports the view that the Prosecutor should adopt a narrow understanding of the term “interests of justice” which would preclude him or her from electing not to investigate or prosecute on the basis of on-the-ground developments including peace negotiations and non-judicial transitional justice processes. The HRW Paper’s conclusion relies on a number of observations.

Firstly, the authors of the HRW Paper note that under the regime established by the Vienna Convention on the Law of Treaties (VCLT), a treaty should be interpreted in accordance with the ordinary meaning of its terms in context and its object and purpose.²¹ Noting that the *travaux préparatoires* of the Rome Statute do not reflect any agreement as to the correct understanding of the term “interests of justice,” HRW suggests that reference should be made to the object and purpose of the Rome Statute.²² Using the preamble of the treaty as a basis, the authors of the HRW paper 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

17. 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.

18. *Id.*

19. See, e.g., Josefine Volqvartz, *ICC Under Fire Over Uganda Probe*, Feb. 23, 2005, <http://www.globalpolicy.org/intljustice/icc/2005/0223iccfire.htm>.

20. See generally Human Rights Watch, *Policy Paper: The Meaning of “The Interests of Justice” in Article 53 of the Rome Statute*, at 2 (June 2005), available at <http://hrw.org/campaigns/icc/docs/ij070505.pdf> (explaining that “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, because that would be contrary to the object and purpose of the Rome Statute.”).

21. *Id.* at 3.

22. *Id.* at 3-4.

established with the purpose of prosecuting the most serious of these crimes.²³ Drawing on this interpretation, they conclude that it would be contrary to the object and purpose of the treaty to construe the “interests of justice” in a manner that would allow amnesties and other domestic developments to influence a decision as to whether or not to proceed with an investigation or prosecution.²⁴

Second, the authors of the HRW Paper maintain that the Rome Statute implicitly gives the United Nations Security Council the prerogative of preventing or halting an investigation or prosecution for “political” reasons.²⁵ 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 is an apolitical officer of the ICC, the authors of the HRW paper 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.²⁶ In support of this position, the authors of the HRW Paper cite commentators who claim that “the duty and power to guarantee international peace and security does belong to the Security Council.”²⁷ The authors go on to conclude that the wording of the Rome Statute requires the adoption of a narrow interpretation of the phrase “interests of justice,” noting the purported allocation of responsibility to the UNSC as well as the desirability on policy grounds of the Prosecutor’s continuing to remain uninvolved in ostensibly non-legal issues.²⁸

The authors of the HRW Paper also note that the Rome Statute should be construed in light of the relevant rules of international law.²⁹ A number of commentators are cited to the effect that there is a customary rule of international law (and potentially also a peremptory norm) requiring the prosecution of persons responsible for committing serious international crimes, including genocide and war crimes. The authors of the HRW Paper also note (citing recent state practice) that there is a developing rule in international law prohibiting the granting of amnesties by states in respect of serious international crimes. On this basis, the paper concludes that “international law does not permit”³⁰ the exemption from prosecution of the most serious crimes under international law and that “[t]he logical construction of Article 53 that is consistent with both the object and purpose of the Rome Statute and the requirements of international law is a narrow one.”³¹

23. *Id.* at 5-6.

24. *Id.* at 3-6.

25. *Id.* at 7.

26. *Id.* at 8.

27. Giuliani Turone, *Powers and Duties of the Prosecutor*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1137, 1143 (Antonio Cassese et al. eds., 2002).

28. See Human Rights Watch, *supra* note 20, at 7-9.

29. *Id.* at 9-14.

30. *Id.* at 11.

31. *Id.* at 14.

In addition to the legal issues highlighted above, the authors of the HRW Paper also argue that policy concerns militate in favor of the Prosecutor adopting a narrow reading of the phrase “interests of justice.”³² The authors argue that allowing the prospects for peace agreements or amnesties to be relevant to decisions as to whether or not to launch investigations or prosecutions may: 1) affect the behavior of local actors, and in particular, result in undesirable pressure being put on the Prosecutor to investigate or prosecute in a situation dependent on the prevailing political situation at any given time; and 2) undermine the legitimacy of the Prosecutor and of the court itself, if similar situations are seen to be treated dissimilarly on the basis of factors that are not integrally related to the acts in question (i.e., the alleged crimes). Moreover, citing examples drawn from the Balkans and West Africa, the authors of the HRW Paper note that the enforcement of justice itself (in the form of investigations, indictments and presumably, prosecutions) can also have a positive effect on the prospects for peace and stability through marginalizing and stigmatizing those responsible for mass violations of human rights and the commission of serious international crimes.³³ As such, the HRW Paper concludes, a narrow reading of the phrase “interests of justice” is warranted.³⁴

III

The position taken in the HRW Paper is far from uncontested. Indeed, some commentators simply disagree with the conclusion that a narrow reading of the term “interests of justice” is required under international law and the VCLT.³⁵ Darryl Robinson, for example, comes to a polar opposite conclusion, 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.³⁶ 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. The court 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 states only that the ICC is bound to apply “where appropriate, applicable treaties and the principles and rules of international law.”³⁷ It seems far from certain, therefore, that the exercise of discretion by the Prosecutor requires reference to or application of all such treaties, principles and rules in all cases. Moreover, treaty provisions and customary rules binding individual states may not bind the ICC and its constituent organs to a similar extent.³⁸

32. *Id.* at 14-15.

33. *Id.* at 15.

34. *Id.* at 14-15.

35. *See, e.g.*, Robinson, *supra* note 6, at 504-5.

36. *Id.* at 488.

37. Rome Statute, *supra* note 2, at art. 21(1)(b).

38. It seems to be generally accepted that international organizations, and especially bodies concerned with ensuring and developing the rule of law internationally, should abide by the relevant

Concerns have also been raised with regard to certain other propositions put forward in the HRW Paper. For example, in view of the working practices of the UNSC, it seems unsustainable to maintain that the drafters of the Rome Statute intended to allocate to that body the prerogative of intervening to forestall investigations/prosecutions in deference to national democratic preferences or peace initiatives. Moreover, while the authors of the HRW Paper may be correct in observing that “[j]ustice itself can have tremendous value in contributing to peace and stability,”³⁹ this will not necessarily be the case in every instance: it is readily conceivable that in certain circumstances the importance of obtaining peace and stability will militate strongly against prosecution in front of the ICC. In addition, the view that the “interests of justice” can only be given a narrow construction would seem to support the position that the ICC ought to undertake a potentially large number of prosecutions. This may be neither desirable nor practicable. Last, were an obligation always to prosecute certain serious international crimes to exist, it is difficult to comprehend how the authors of the HRW Paper can reasonably suggest that it would be acceptable for the UNSC to forestall prosecutions.

The above difficulties notwithstanding, one key advantage of the narrow interpretation put forward in the HRW Paper should be noted: this interpretation would limit the likelihood of the Prosecutor electing not to prosecute for reasons that might not be fair and non-discriminatory.⁴⁰ As pointed out by Allison Danner, the manner in which prosecutorial discretion is exercised may be a vital element in generating and maintaining the legal legitimacy of the ICC, where legitimacy is understood to underpin the court’s exercising of authority.⁴¹ The maximizing of the values of impartiality and fairness in all aspects of the court’s work, including the exercise of discretion by the Prosecutor, should therefore strengthen the legitimacy of the court as an institution. This strengthening can be considered desirable both in terms of developing a working international rule of law and in furthering the court’s objectives of ending impunity for acts falling within its jurisdiction.

Nevertheless, certain elements of the arguments put forward in the HRW Paper require further consideration. The allocation of the discretion not to prosecute on political grounds to the UNSC, in particular, appears problematic.⁴² In allowing the UNSC such a role, the authors seem to recognize that it would be unfortunate if ICC investigations or prosecutions could not be forestalled on the

rules of international law. This point also seems to be assumed by Human Rights Watch. Nonetheless, it would seem odd as a matter of public international law to treat the ICC as a ‘state party’ for the purposes of treaty-observance etc. (i.e., The ICC is neither a state nor a party to many of the international legal agreements that are binding on states. Moreover, the ICC may simply lack many of the capacities of states to comply with international treaty and/or customary law). See Human Rights Watch, *supra* note 20, at 9-14.

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

40. See Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510, 536 (2003).

41. *Id.* at 535.

42. See Human Rights Watch, *supra* note 20, at 7-8.

basis of changing facts on the ground. However, consideration of its manner of working, as well as of its mandate, suggests that the UNSC is ill-suited to such a role that HRW suggests it adopt. The UNSC is, as the authors of the HRW Paper recognize, a political body.⁴³ As such, it might not be hamstrung by the legal considerations that restrict a court. However, the UNSC should not be allocated a legal responsibility under the Rome Statute.

Firstly, it should be appreciated that a close reading of Article 16 of the Rome Statute does not place on the UNSC any duty whatsoever.⁴⁴ 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.⁴⁵ Moreover, applying basic common law principles of privity, it would seem anomalous for the Rome Statute to be understood as conferring a prerogative, let alone an obligation or duty, on the UNSC, as there appears to be no basis for holding that the UNSC has, or would have, accepted such a role.

As indicated above, the authors of the HRW Paper, referring to the work of other authors, assert 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.⁴⁶ However, such a view would seem rather short-sighted, as well as impractical. Under the terms of the UN Charter, and Chapter VII in particular, the UNSC does not appear to be under an absolute duty to guarantee peace and security in each and every instance. Rather, the operative article of the Charter (Article 39) can be read merely as conferring on the UNSC the prerogative (i.e. at the expense of the other organs of the UN) of determining when there is a threat to the peace, and of what the appropriate steps to take might be in such circumstances.⁴⁷ Moreover, the history of the organization shows that the UNSC

43. Nabil Elaraby, *The Role of the Security Council and the Independence of the International Criminal Court: Some Reflections*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY*, *supra* note 8, at 43 (“The abuse of the veto has, for many years, frustrated all hopes to consider the Council as a custodian for the application of the rule of laws.”).

44. *See* Rome Statute, *supra* note 2, at art. 16 (“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”).

45. This point is made, of course, solely on the basis that in the ultimate analysis the ICC is not a UN body, notwithstanding e.g., the conclusion in 2004 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations. Nothing in this agreement, it should be noted, appears to affect the conclusions arrived at in this paper, nor the assumption as to the legal status of the ICC and UN as bodies independent of one another on which the current argument is partly predicated. *See* Negotiated Relationship Agreement, ICC-UN, April 10, 2004, ICC-ASP/3/Res.1, http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf.

46. *See* Turone, *supra* note 28, at 1143; Human Rights Watch, *supra* note 2, at 8.

47. U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken... to maintain or restore international peace and security.”).

has not always acted in a fashion that would evince an understanding of a duty to guarantee international peace and security.⁴⁸ Rather, in keeping with its political nature, the UNSC has taken such action as is politically expedient in any given situation, given the interests and considerations of its veto-wielding members. In short, allocating to the UNSC any duty to intervene under the Rome Statute would make the decision as to whether or not the Prosecutor should investigate or prosecute subject to the vagaries of international politics. While this may preserve the legitimacy of the Prosecutor's office, it seems a poor way of ensuring optimal outcomes if it is conceded that it may, on occasion, be preferable not to investigate or prosecute in deference to national transitional justice or peace initiatives.

The legal high ground assumed by the authors of the HRW Paper is also undermined by a willingness to defer to the judgment of the UNSC.⁴⁹ If the authors are correct in their assertion that there is a duty incumbent on states to ensure that certain crimes under international law are prosecuted, then they appear to be advocating two inconsistent positions. Specifically, it is difficult to see how the authors of the HRW Paper can take the view that while it is unacceptable for individual states to forego prosecutions it is somehow 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 positions can be reconciled from a principled perspective.⁵⁰

Last, 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.⁵¹ On this reading, the UNSC's responsibility could not extend to situations which do 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 threaten or breach international peace and security.⁵²

48. See, e.g., Uniting for Peace Resolution, G.A. Res. 377(V), ¶ 1, U.N. GAOR, 5th Sess., 302 plen. mtg., (Nov. 3 1950).

49. See Human Rights Watch, *supra* note 20, at 7-9.

50. Consistent with their view that there is an absolute duty under international law to prosecute serious international crimes, the authors of the HRW Paper 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 20, at 8, n.31. Given the UNSC's behavior 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.

51. See U.N. Charter art. 24, para. 1 ("In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security.").

52. This does not, of course, mean that a primarily domestic issue cannot have ramifications for international peace and security that would justify UNSC action under Chapter VII (e.g. the genocide in Rwanda). It does mean, however, that there is no necessary connection between the two, and that an episode or set of events may fall under the ICC's jurisdiction as comprising potentially criminal acts, yet not be of concern to the UNSC under Chapter VII.

While the authors of the HRW Paper suggest that “[w]ar crimes of the scope addressed in Article 8 of the ICC Statute as well as crimes against humanity are often likely to affect international peace and security,”⁵³ there can be no guarantee that this will always be the case. As such, it is difficult to see how the authors of the HRW Paper can maintain that the UNSC should and ought to be able to forestall investigations and prosecutions in situations where international peace and security are not threatened.

An additional consideration is that if the authors of the HRW Paper are correct that there is a duty incumbent on all states, and on the ICC, to ensure that the perpetrators of serious international crimes are always prosecuted, this could place immense strain on the ICC itself. If exceptions to this obligation cannot be made under international law generally, then the Prosecutor would have to endeavor to prosecute, or to have prosecuted, all those who might be responsible for crimes committed in violation of the Rome Statute in situations where national courts have declined to act.⁵⁴ At the very least, such a position would greatly diminish the scope for selective prosecution by the Prosecutor. Moreover, were such a position adopted by the court, the legitimacy of the institution may be diminished by its being obliged to strive towards unrealistic goals.

Some final points should be made as to the empirical evidence proffered in support of the HRW Paper’s contentions. While the authors of the paper may be correct in maintaining that “justice itself can have tremendous value in contributing to peace and stability,”⁵⁵ there is nothing preordained about the relationships between justice, peace and stability.

Empirical evidence is cited by the authors of the HRW Paper in an attempt to square the circle formed by the demands of *realpolitik*⁵⁶ - the practice of which has been the best means of ensuring peace - and prosecutions - which might be considered necessary for just outcomes to be achieved. Those who aver that justice can serve the ends of peace often cite to the indictment of Radovan Karadzic and Ratko Mladic prior to the Dayton Accord negotiations, for example, or evidence of the stigmatizing and marginalizing effect of prosecutions.

The authors of the HRW Paper may be correct in holding that ICC indictments can have a positive impact on the prospects for peace and security. Such an impact is far from guaranteed, however. ICC investigations and/or prosecutions could equally have a deleterious effect on situations where warring

53. Human Rights Watch, *supra* note 20, at 8 (emphasis added).

54. It might be worth noting at this juncture that, as recognized in the South African context “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.” 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. DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* 51 (1999).

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

56. That is, an approach to international relations whereby it is preferred that state behavior be based on practical exigencies and on prudential reasoning rather than on any moral or other ideological principles. *See, e.g.*, NICCOLO MACHIAVELLI, *THE PRINCE* 98 (Marriot ed. 1960) (1513).

factions are engaged in fragile peace negotiations or where a country is undergoing a democratic transition.⁵⁷ As Darryl Robinson concedes, it may even be necessary to forego prosecutions in order to forestall the perpetration of increasingly severe human rights abuses.⁵⁸ In short, while the authors of the HRW Paper may be lauded for their desire 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 or a bloodless democratic transition, this price may be worth paying.

CONCLUSION

The single most attractive aspect of the HRW Paper is the authors' evident concern with maximizing the legal legitimacy of the Prosecutor and of the OTP, and thereby of the ICC. Moreover, the arguments put forward in the HRW Paper derive support from an apparently conservative approach to interpreting the relevant law, as well as from a relatively high degree of internal consistency. That said, though, the solution presented in the HRW Paper seems to fail on grounds of both legal interpretation and practicality. Put simply, while the UNSC may have the right to intervene in order to prevent an investigation or prosecution, this does not mean it will be obliged to do so. Thus, it would seem unwise to entrust to the UNSC decisions as to whether or not to act in any given case. Further, while the end of impunity may be a laudable goal, common sense suggests that it would be injudicious 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. Moreover, forcing the ICC to aspire to undertake a caseload it would be ill-equipped to handle could jeopardize, rather than enhance, the court's legitimacy.

Doubtless, in many instances it will indeed be difficult for the Prosecutor to decide whether or not it will be in the interests of justice to investigate or prosecute. This does not lead to the conclusion, however, that such a determination can only be made at the cost of sacrificing institutional legitimacy. While it may not be possible for the Prosecutor to determine the intentions and *bona fides* of those involved in peace negotiations with an optimal degree of accuracy, this does not mean that the Prosecutor should be prevented from making such determinations altogether, nor that the Prosecutor should not be required to consider carefully the potential implications of his or her decisions. Some of the difficulties involved may also be mitigated by the adoption of a rigorous set of *ex ante* standards and regulations,⁵⁹ such as are in any event under consideration by the OTP. Indeed, while it may well be a challenging task, there is no reason why it should not be possible to construct a set of guidelines which would preserve the discretion of the Prosecutor, as well as ensure the legitimacy and credibility of the

57. The Northern Irish context, in which prisoners were released early under the Good Friday Agreement, comes to mind as an example of an occasion when strict understandings of legally 'correct' process took second place to the practical requirements of peace-making.

58. See Robinson, *supra* note 6.

59. See Danner, *supra* note 40, at 535-36.

OTP and of the ICC.⁶⁰ In any event, it seems clear that, for legal and policy reasons, discretion as to whether or not to proceed with investigations or prosecutions should be retained, in one way or another, within the ICC.

60. The possibility that such guidelines may later be publicly challenged might also encourage the Prosecutor to exercise discretion cautiously.