

Rethinking the Tension Between Peace and Justice: The International Criminal Prosecutor as Diplomat

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ABSTRACT

Using the war in Afghanistan as a backdrop, this paper asks: in deciding whether to investigate or prosecute possible war crimes, should the Prosecutor of the International Criminal Court take into account the possibility that her actions might jeopardize ongoing peacemaking efforts? The Office of the International Prosecutor has claimed it should not. A 2007 Policy Paper narrowly construes the “interests of justice” provision of Article 53 and then suggests that the Prosecutor should be exclusively concerned with enforcement of the law and should ignore the possible impact her prosecutorial decisions may have on broader concerns relating to peace or reconciliation. This essay counters that narrow view of the Prosecutor’s institutional role under the Rome Statute. I argue that the Prosecutor should not ignore the tension between the pursuit of peace and the pursuit of justice, but instead must diplomatically manage this tension. It is both prudent and proper for the Prosecutor to take into account the interests of peace, if not under Article 53 then in two other ways: (1) in exercising the Prosecutor’s broad discretion to control timing – i.e., by choosing *when* investigations and prosecutions should begin; and (2) by embracing a policy of proactive complementarity until Article 17 and encouraging member states to pursue crimes on their own. The essay concludes by providing a set of practical guidelines the

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Prosecutor should follow in managing the tension between peace and justice. While the Prosecutor should not explicitly bargain with offenders or acknowledge the validity of blanket amnesty programs, the Prosecutor has other more subtle means to minimize the risks that her actions will unduly jeopardize peacemaking efforts.

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I. INTRODUCTION

Imagine you are the Prosecutor of the International Criminal Court. The year is 2014, and the war-torn country of Afghanistan is hobbling toward a fragile ceasefire. Hamid Karzai and the Taliban

have struck a tentative deal, which a war-weary American government supports. The Taliban will renounce Al Qaeda and terrorism. All remaining NATO combat troops will leave Afghanistan. The peace accord contemplates regional power sharing and national reconciliation. Mullah Omar and other exiled Taliban leaders will be allowed to return to the country and participate openly in Afghan politics. An essential element of the deal is a general amnesty, in which all combatants, including Mullah Omar, will be given immunity in Afghan courts from prosecution for crimes committed during the hostilities.

You suspect that during the civil war combatants on all sides, including members of the Taliban and various warlords supporting the Karzai government, may have committed war crimes and crimes against humanity, as defined by the Rome Statute of the International Criminal Court.¹ American and United Nations diplomats informally tell you that prosecutorial actions on your part are likely to derail the fragile peace process and risk plunging the ravaged country back into deadly civil war. How would you respond? To what extent, if any, should you, as a responsible prosecutor charged with enforcement of the Rome Statute, consider the potential impact your actions may have on efforts to end armed conflict and promote national reconciliation?

For Afghanistan or other countries struggling to move beyond violent conflict, there may be a tension between the pursuit of peace and the pursuit of justice. The pursuit of peace often requires a negotiated resolution of armed conflict. The prospect of criminal prosecution may cause offenders to fight it out to the bitter end if they believe a negotiated “peace” means they will be exposed to severe criminal sanctions. The pursuit of justice often requires that the victims of heinous war crimes are heard and the guilty are punished.

History demonstrates this tension is not hypothetical. Foregone justice – for example, amnesty from imprisonment – is often “the price for getting rid of tyrants and their associates” and “one of the

1. See Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90 (July 17, 1998) [hereinafter Rome Statute], available at untreaty.un.org/cod/icc/statute/romefra.htm. There is substantial evidence that the Taliban committed war crimes and crimes against humanity during the conflict. See *Afghanistan: Taliban Should Stop Using Children as Suicide Bombers*, HUMAN RIGHTS WATCH Aug. 31, 2011, available at <http://www.hrw.org/news/2011/08/31/afghanistan-taliban-should-stop-using-children-suicide-bombers>; *Afghanistan: Taliban Should be Prosecuted for War Crimes*, Aug. 10, 2010, available at <http://www.hrw.org/news/2011/08/31/afghanistan-taliban-should-stop-using-children-suicide-bombers>.

techniques for ending civil wars or enabling transitions from authoritarian to democratic governments.”² As Alexander Hamilton recognized more than two centuries ago, “in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore tranquility to the commonwealth.”³ On the other hand, allowing perpetrators to bargain for immunity offends our sense of justice and hardly serves deterrence. How should the Prosecutor manage this tension?

The Prosecutor appears to ignore the tension and honor only the demands of justice. A 2007 Policy Paper interpreting Article 53 of the Rome Statute provides that the Prosecutor may decline to investigate or prosecute an accused when doing so is not “in the interests of justice.”⁴ The announced policy precludes any consideration under Article 53 of the potential impact of prosecutorial decisions on peacemaking efforts. Instead, the Policy Paper indicates that the Prosecutor should be exclusively concerned with the pursuit of justice, narrowly conceived as the enforcement of law.⁵ The Policy Paper then goes on to suggest that under the Rome Statute generally, the possible impact a prosecution may have upon ongoing peace processes is irrelevant, and that broader issues of morality, politics, and peacemaking are not to be taken into account when deciding whether to

2. Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 495 (2003) (quoting Mahnouch H. Arsanjani, ‘The International Criminal Court and National Amnesty Laws,’ *ASIL Proceedings*, at 65 (1999)).

3. THE FEDERALIST, No. 74 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In the words of David Scheffer, the former U.S. Ambassador-at-Large for War Crimes Issues, “one must understand, amnesty is always an option on the table in [peace] negotiations.” Michael P. Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41, 60 (1996) (quoting Remarks of David Scheffer at International Law Weekend (Nov. 2, 1996)). See also José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425, 1429 (1991-1992) (“Political leaders cannot afford to be moved only by their convictions, oblivious to real-life constraints.”). Amnesties have been used with success in the past, including in conjunction with the South African Truth and Reconciliation Commission of the 1990s, the 1995 Dayton Accords for peace in Bosnia and Herzegovina, and at the conclusion of the American Civil War to reintegrate Confederate soldiers back into American society. See Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 508-09 (1999).

4. Int'l Criminal Court [ICC], *Policy Paper on the Interests of Justice*, at 1 (Sept. 2007), available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf> [hereinafter *Interests of Justice*].

5. *Id.* at 4.

initiate an investigation or begin a prosecution.⁶ Instead, according to the Policy Paper, issued by Luis Moreno-Ocampo (who was the first ICC Prosecutor), these broader issues are the responsibility of the Security Council.⁷ Moreno-Ocampo's successor, Fatou Bensouda, has since reaffirmed this reading of the Rome Statute.⁸

I reject the suggestion that the Prosecutor has an absolute obligation to investigate and prosecute crimes irrespective of its impact on peace negotiations. Even if one accepts the Prosecutor's narrow reading of the Article 53 provision, the broader suggestion that considerations of peacemaking and politics are irrelevant to the exercise of prosecutorial discretion under the remainder of the Rome Statute is unwise. The Prosecutor is a political actor embedded in international politics, a diplomat representing the interests of both the International Criminal Court and the party States and their citizens. In that role the Prosecutor must constantly assess the effect her actions will have on both the Court and its member states. She cannot ignore the tension between the pursuit of peace and the pursuit of justice, but instead must diplomatically manage this tension. I suggest how this might best be accomplished.

This essay proceeds as follows: Part I assesses the Prosecutor's arguments in the Policy Paper relating to Article 53 against the broader purposes of the Rome Statute and the Prosecutor's underlying interests and institutional role. I suggest that managing that the tension between peace and justice does not as a general proposition require a categorical either/or choice of one value to the exclusion of the other. In Parts II and III, I reject the broad suggestion that the Rome Statute entirely precludes the Prosecutor from taking account of political and peace-related considerations in the exercise of her prosecutorial discretion. Part II closely examines the prosecutorial

6. *Id.* at 9. "[T]he broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions."

7. *Id.* at 1, 8.

8. In an October 2012 speech in Pretoria, South Africa, Bensouda stated: I should stress here that the 'interests of justice' [of Article 53] must not be confused with the interests of peace and security, which falls within the mandate of other institutions, notably the UN Security Council and the African Union. The Court and the Office of the Prosecutor itself are not involved in political considerations. We have to respect our legal limits. The prospect of peace negotiations is therefore not a factor that forms part of the Office's determination on the interests of justice.

Fatou Bensouda, Prosecutor of the International Criminal Court, Reconciling the independent role of the ICC Prosecutor with conflict resolution initiatives (Oct. 10, 2012), available at <http://www.issafrika.org/uploads/10Oct2012ICCKeyNoteAddress.pdf>.

process specified by the Rome Treaty and demonstrates that the Prosecutor has largely unfettered discretion to control timing – the choice of *when* to begin an investigation or prosecution. These discretionary timing decisions can take into consideration the impact of prosecutorial action on peace processes and reconciliation. Part III demonstrates that the Prosecutor can also forge an accommodation between the interests of peace and justice through the use of Article 17's complementarity provision. In Part IV, I develop four guidelines from these insights to assist the Prosecutor when she is confronted with a tension between peace and justice. The conclusion follows in Part V.

II. THE ROME STATUTE, THE INTERESTS OF JUSTICE PROVISION, AND THE TENSION BETWEEN PEACE AND JUSTICE

The Rome Statute provides a framework for the investigation, prosecution, and punishment of genocide, war crimes, and crimes against humanity.⁹ The Prosecutor may only investigate and prosecute crimes that fall within the jurisdiction of the International Criminal Court,¹⁰ and it would appear that the crimes that have allegedly occurred in Afghanistan would meet the statute's jurisdictional standards.¹¹

Parties to the Rome Conference did not overlook the tension between peace and justice; in fact, they hotly debated the extent to which political considerations should temper the decision to prosecute genocide, war crimes, and crimes against humanity. The United States argued in Rome that prosecutions should be limited to cases referred to the Prosecutor by the Security Council.¹² This would have

9. Situations come before the Prosecutor in one of three ways: a state party to the Rome Statute requests under Article 14 that the Prosecutor investigate the situation, the Security Council lodges a similar request under Article 13(b), or the Prosecutor initiates an investigation *proprio motu* (of his own initiative) under Article 15. Rome Statute, *supra* note 1, art. 14, 13(b), 15.

10. First, the Court's jurisdiction is limited to "the most serious crimes of concern to the international community as a whole," including genocide, war crimes, and crimes against humanity. *Id.*, art. 5(1). Second, there is a temporal aspect to jurisdictional: the ICC only has jurisdiction over crimes committed after the Rome Statute entered into force in July 2002. *Id.* at art. 11. Third, the Court only has authority over states that submit to the jurisdiction of the Court. *Id.* at art. 12.

11. All three jurisdictional criteria are likely to be satisfied in Afghanistan: sufficient evidence probably exists to give a "reasonable belief" that serious crimes have been committed; Afghanistan is a party to the Rome Statute; and many alleged crimes postdate 2002. Thus the Court would likely have jurisdiction over the Afghan situation.

12. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 15 (2001).

provided a robust political check on the power of the Prosecutor, and would have limited the ability of the prosecutor to pursue the alleged war crimes in Afghanistan if the United States objected. But this view did not win the day because “the prevailing parties in Rome believed that the Security Council – and in particular the opportunistic votes of veto-wielding permanent members – was part of the problem.”¹³ Instead, they provided a much more limited political check: the Security Council may vote to delay prosecutions for twelve months.¹⁴ The absence of Security Council or great power veto came at a high cost: the United States, Russia, and China all declined to sign the Rome Statute and grant the Prosecutor jurisdiction over their territory, for fear that there were insufficient political checks on the power of the Prosecutor to act.

As enacted, the Rome Statute thus created an Office of the Prosecutor with the power to investigate and prosecute crimes without having to obtain prior approval of the Security Council. This does not mean that the Prosecutor is not subject to a variety of “softer” political constraints, including diplomatic pressure. The Office of the Prosecutor has limited financial resources and must rely on appropriations for its annual budget.¹⁵ The Prosecutor also lacks a police force, and must therefore rely on the cooperation of states during the investigation and prosecution of crimes. But the significant point is that state parties lack significant means under the Rome Statute to force the Prosecutor to drop a prosecution because they believe that an investigation or prosecution (the pursuit of justice) will undermine the pursuit of peace.

That the Rome Statute limits the power of *states* to override prosecutions that interfere with peace-making processes does not mean that the Statute necessarily precludes the *Prosecutor* from considering the interests of peace in the exercise of her prosecutorial discretion. What guidance does the statute itself offer? The statute mentions the word “peace” only once, in the preamble, and is silent on whether the Prosecutor should consider peace-making processes

13. Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 90 (2003).

14. As Professor Goldsmith points out, this is a substantially weaker check than the requirement of prior Security Council *approval* sought by the United States. As adopted, the Rome statute “reverses the burden of Security Council inertia by permitting an ICC case to go forward as long as a single permanent member supports prosecution and thus vetoes any delay.” *Id.* at 90–91.

15. See William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L.J. 53, 57, 66 (2008).

while exercising prosecutorial discretion. One section of the Rome Statute, however, expressly acknowledges that the Prosecutor might sometimes choose not to investigate or prosecute a crime when doing so is not in the “interests of justice.”

A. *Article 53 of the Rome Statute*

Article 53 of The Rome Statute explicitly provides that the Prosecutor may decline to investigate or prosecute crimes squarely within the ICC’s jurisdiction because he believes pursuing the crime does not serve “the interests of justice.” The Prosecutor may decline to *investigate* a crime 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*.”¹⁶ The language with respect to a decision not to *prosecute* is more open ended: in determining the “interests of justice” the Prosecutor may “tak[e] into account *all the circumstances*,” including not only “the gravity of the crime [and] the interests of victims,” but also “the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.”¹⁷

The words of Article 53 are hardly self-defining. On the one hand, there is no reference to peacemaking or reconciliation. On the other hand, considerations of peacemaking might be included in the “interests” of justice, or “all the circumstances.” Article 53 might be read broadly enough to permit the Prosecutor to defer an investigation or prosecution that might obstruct peace and reconciliation efforts and lead to “many more civilian deaths.”¹⁸

It appears this ambiguity was a deliberate choice.¹⁹ The parties to the Rome Convention could not agree on the Court’s role in cases where crimes are within the Court’s jurisdiction, but a party state

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

17. *Id.*, art. 53(2).

18. Brian D. Lepard, *How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles*, 43 J. MARSHALL L. REV. 553, 566 (2009-2010) (“[I]f a prosecution is likely to stall settlement efforts and thereby result in many more future civilian deaths, then ‘justice’ may not be served in this larger sense, even if it is served by reference to a narrow concept of criminal justice focusing only on the gravity of the particular past crime being charged.”).

19. For a discussion of the drafting of the “interests of justice” and complementarity provisions of the Rome Statute, *see, e.g.*, William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT’L CRIM. JUST. 731, 749 (2008); Daniel D. Ntanda Nsereko, *Prosecutorial Discretion Before National Courts and International Tribunals*, 3 J. INT’L CRIM. JUST. 124, 138 (2005); Robinson, *supra* note 2, at 483; Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22, 38 (1999); Scharf, *supra* note 3, at 521–22.

decides not to pursue criminal prosecutions. A number of delegations argued that the Statute should be flexible and not require the Prosecutor to pursue every crime within the Court's jurisdiction.²⁰ But other delegations were opposed to considering the interests of peace out of principle: to them, it was unthinkable that those who commit genocide might get away without punishment.²¹ They argued that permitting an exception to prosecution would swallow the rule.²² "[Any] attempt at definition would have broken down at the Rome Conference, given profound disagreements about how the Prosecutor should be governed in situations like that posed where a peace process requires justice to take a back seat."²³ At an impasse, the parties opted for "creative ambiguity."²⁴

B. *The Prosecutor's Policy Paper on the Interests of Justice*

It was against this background that the Prosecutor issued the 2007 Policy Paper.²⁵ The Policy Paper categorically stated that considerations of peacemaking or reconciliation would not be taken into account in the exercise of prosecutorial discretion under the "interests of justice" provision of Article 53. In doing so, the Policy Paper also suggested that these considerations would not influence the exercise of his prosecutorial discretion under the Statute as a whole.²⁶

20. Nsereko, *supra* note 19, at 138; Robinson, *supra* note 2, at 483 (some delegations were hesitant to lay down "an iron rule for all time mandating prosecution as the *only* acceptable response in all situations").

21. Robinson, *supra* note 2, at 483.

22. *Id.* ("the very purpose of the ICC was to ensure the investigation and punishment of serious international crimes, and to prompt states to overcome the considerations of expedience and *realpolitik* that had so often led them to trade away justice in the past").

23. Schabas, *supra* note 19, at 749.

24. *Id.*, at 521–22 (1999) (quoting Phillipe Kirsch, chairman of the Rome Diplomatic Conference).

25. *Interests of Justice*, *supra* note 4, at 1.

26. *See id.* The Prosecutor's views appear to have changed over time. In 2003, the Prosecutor had indicated a willingness to consider "various national and international efforts to achieve peace and security" under the "interests of justice" inquiry. Henry Lovat, *Delineating the Interests of Justice*, 35 DENV. J. INT'L L. & POL'Y 275, 277 (2007) (quoting 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/LMOUNSC-ReportBEN.pdf>). But by 2007, with the publication of the Policy Paper on the Interests of Justice, the Prosecutor's views had shifted away from those hinted at in the 2003 report, and the Prosecutor explicitly rejected the view that he may consider the interests of peace. *Id.* This view – that peace may not be considered – is captured not only in the 2007 Policy Paper, but also in the 2009 Regulations of the Office of the Prosecutor, which not state that the Prosecutor may consider the interests of peace when deciding when to prosecute.

The Prosecutor begins the Policy Paper by claiming that the Rome Statute establishes a “presumption in favour of investigation or prosecution” of crimes within the Court’s jurisdiction. The Rome Statute embraces the idea that the best way to prevent the most serious crimes of concern to the international community is to end impunity for those crimes today.²⁷ According to the Prosecutor, Rome has established the prosecution of genocide, war crimes, and crimes against humanity (subject to the interests of justice inquiry) as a non-negotiable legal requirement.²⁸ According the Policy Paper, the Prosecutor should “only in exceptional circumstances” decide to defer investigation or prosecution based on a determination that prosecutorial action would not serve the interests of justice.²⁹

Then the Policy Paper turns squarely to giving some meaning to the ‘interests of justice’ inquiry. Article 53 lists three factors that the Prosecutor may consider under the interests of justice: gravity of the crime, the interests of the victim, and the interests of the accused. Gravity, the paper argues, focuses squarely on the nature, scale, and manner of the crime.³⁰ To evaluate the interests of the victim, the Prosecutor must consider both victims’ interest in seeing justice done and their need for “safety, physical and psychological well-being, dignity and privacy.”³¹ As for the accused, the Policy Paper emphasizes that investigations must focus on those leaders “bearing the greatest degree of responsibility” for the crimes.³² But even these leaders may be spared prosecution if, for example, they were terminally ill, or had themselves been victims of human rights violations.³³

After putting to one side issues of complementarity,³⁴ the Policy Paper turns to its most contentious question: may the Prosecutor consider issues of peace when deciding whether to investigate and prosecute crimes? The paper suggests a categorical rule excluding any

27. *Interests of Justice*, *supra* note 4, at 1.

28. *Id.* at 4.

29. *Id.* at 3.

30. *Id.* at 5.

31. *Id.*

32. *Id.* at 7.

33. *Id.*

34. *Id.* In the Policy Paper, the Prosecutor emphasizes that the ICC’s actions should be consistent with the pursuit of justice at the local level. The paper indicates that a wide range of domestic justice mechanisms may satisfy complementarity, including “domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice.” The list of processes that may satisfy complementarity will change over time, as advances are made in the “development of theory and practice in designing comprehensive strategies to combat impunity.” *Id.* at 7–8. I discuss complementarity in Part IV of this paper.

consideration of the impact of its actions on peace processes because of the Rome Statute's deterrence goal, and because of the Prosecutor's institutional role.

Although peace processes are important, the paper argues that the mandate of the Office of the Prosecutor, as an institution responsible for enforcing the Rome Statute, is to be exclusively concerned with the pursuit of justice, narrowly conceived as the enforcement of law. After noting that under Article 16 the Security Council may defer ICC action for up to 12 months at a time,³⁵ the Policy Paper emphatically states: "[T]he broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions."³⁶

As suggested earlier, this was not the only plausible reading of the interests of justice language in Article 53. The drafters did agree to the goal of ending genocide, war crimes, and crimes against humanity. But there was no agreement that criminal *investigations and prosecutions* must be exclusive means to achieve that end.³⁷ Article 53 might have been interpreted to contemplate that the Prosecutor will consider each situation on a case-by-case basis, perhaps declining to prosecute if the political demands are pressing enough.³⁸ Some commentators go so far as to say that the Prosecutor's Policy Paper interpretation of the Rome Statute is *contrary to* the Framers' intent, and that the Policy Paper is "trying to impose a literal approach to legal interpretation on an expression that was intended to leave the exercise of prosecutorial discretion unfettered."³⁹

Why would a Prosecutor want to constrain its own discretion when the language of the Statute did not require it? The Policy Paper might best be understood as a self-imposed commitment device to strengthen the Prosecutor's bargaining position. The Policy Paper ties the hands of the prosecutor and would eliminate her discretion to use the "interests of justice" provision of Article 53(2)(c) to consider

35. *Id.* at 8.

36. *Id.* at 9.

37. See HUMAN RIGHTS WATCH, POLICY PAPER: THE MEANING OF 'THE INTERESTS OF JUSTICE' IN ARTICLE 53 OF THE ROME STATUTE 4 (2005), noting that "neither the language of the Rome Statute nor actual language in the *travaux préparatoires*" reflects any definitional agreement on the meaning of "interests of justice," including whether or not the Prosecutor may "consider the existence of a national amnesty or truth commission process, or ongoing peace negotiations as factors to be evaluated."

38. *Id.* at 4–5.

39. Schabas, *supra* note 19, at 749 ("In attempting to codify how the discretion created by Article 53 should be exercised, the Prosecutor, with the encouragement of certain states and NGOs, is indirectly amending the ICC Statute.").

trading a grant of immunity for peace. Thomas Schelling has described how commitment strategies that remove a party's freedom of action increase their bargaining power.⁴⁰

That the Prosecutor would want to adopt a public posture that claims to preclude consideration of peace-making efforts is understandable from this perspective. If the Prosecutor acknowledged in the Policy Paper that her Office would take into account the impact of prosecutorial decisions on peace-making, this would both mitigate deterrence and give her less leverage to encourage state parties themselves to undertake prosecutions. To acknowledge a willingness to consider peacemaking invites external pressure and even negotiations.⁴¹

Plea-bargaining and deal-making with accused criminals is common in American jurisdictions but not in most civil law jurisdictions. Moreover, the possibility of a grant of immunity might well vitiate deterrence: would-be war criminals might figure that even if they didn't win the war, they could bargain for immunity when they sued for peace. The incentive effects might be very perverse. A cruel dictator in the midst of a civil war might accelerate his atrocities in order to make the demands for peace so great that the criminals are given immunity in exchange for abdicating power.

By establishing a credible threat that she will prosecute war criminals, the Prosecutor also makes it more likely that member states will investigate and punish these crimes, thus conserving the International Prosecutor's scarce resources. The decisions of member states to pursue crimes are made in the Prosecutor's "shadow,"⁴² and Moreno-Ocampo has recognized the importance of this "shadow effect."⁴³ If a member state knows the Prosecutor is likely to investigate or prosecute crimes, the state is probably more likely to investigate and prosecute itself. Essentially, Moreno-Ocampo has indicated that his goal is to stand tall to cast a long shadow.⁴⁴

40. See THOMAS C. SHELLING, *THE STRATEGY OF CONFLICT* (1960).

41. Of course, the aspirational statement that "justice will be done," uncoupled with action, is unlikely to deter would-be war criminals. The Prosecutor's rhetoric must be coupled with the willingness and political ability to pursue these crimes.

42. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L. J.* 950, 968 (1979).

43. Luis Moreno-Ocampo, Keynote Address to the Council on Foreign Relations 9-10 (Feb. 4, 2010).

44. *Id.* at 9-13.

One more consideration – not mentioned in the Policy Paper – may have influenced the Prosecutor as well. The Prosecutor’s decisions not to investigate or prosecute pursuant to Article 53 are subject to judicial review by the Pre-Trial Chamber. If the Prosecutor declines to investigate or prosecute “solely” because he believes pursuing the crime is not in the interests of justice, the Chamber may review the decision of its own initiative. The Chamber’s powers in this area are great, because it may effectively countermand the Prosecutor’s decision. According to the Statute, the Prosecutor’s decision not to prosecute because of the interests of justice is “effective only if confirmed by the Pre-Trial Chamber.”⁴⁵ By refusing to rely on the interests of justice provision, the Prosecutor insulates his decisions from review by the Pre-Trial Chamber.

On balance these considerations might well justify reading Article 53 narrowly, to preclude consideration of peacemaking under that provision. But the Policy Paper ignores two constraints that as a practical matter must inform the Prosecutor’s decision-making. The first has to do with resource constraints. The Prosecutor cannot investigate or prosecute every war crime or crime against humanity that is covered by the Rome Statute, just as a United States Attorney cannot prosecute every crime falling within his jurisdiction. As then-Attorney General Robert Jackson explained about the federal prosecutor in America, “[o]ne of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints.”⁴⁶ The exercise of prosecutorial discretion is unavoidable.

Regarding the question of choosing prosecutorial targets, the Prosecutor has suggested his efforts will be primarily directed towards those leaders who bear the greatest responsibility for the crimes.⁴⁷ He is implicitly acknowledging that other guilty parties will not be prosecuted. This shows a willingness to sacrifice or trade-off some “justice” to conserve prosecutorial resources and perhaps promote reconciliation.

The second constraint relates to the fact that the Prosecutor lacks enforcement powers.⁴⁸ As noted earlier, the Prosecutor has no

45. The Pre-Trial Chamber, a judicial body, exercises oversight of the Prosecutor’s decisions. Rome Statute, *supra* note 1, art. 53(3)(b). As I will show in Part III and IV of his paper, the Prosecutor’s decisions with respect to timing and complementarity are less constrained by judicial review.

46. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM L. & CRIMINOLOGY 3, 5 (1940).

47. *Interests of Justice*, *supra* note 4, at 7.

48. See Goldsmith, *supra* note 13, at 92.

police force. The support of relevant member states is indispensable in gaining access to relevant witnesses, evidence and suspects. As a practical matter an investigation or prosecution is unlikely to succeed without such support. And any investigation or prosecution taken without regard for the interests of peace is unlikely to succeed when centrally important state parties refuse to cooperate because they believe the prosecutor's actions would jeopardize a vital interest in peacemaking.

What is most troubling is not the Policy Paper's conclusion with respect to Article 53 but its more sweeping rhetoric that appears to suggest that the prosecutor had to choose between peacemaking or justice – i.e., one value to the exclusion of the other. A “peace vs. justice” frame suggests a zero-sum, either/or choice, that more of one means less of the other. This is a gross simplification.

Prosecutions may inhibit or inflame conflict.⁴⁹ Sometimes pursuing criminal sanctions through an adversarial adjudicatory process may facilitate a more peaceful transition in a war-torn society.⁵⁰ But at other times, transitions require political actors to bargain, compromise, and forego a certain amount of justice. Perhaps most importantly, there is not usually an “all-or-nothing” tradeoff between the pursuit of justice and the pursuit of peace. A society may honor the policies said to underlie either concept to a greater or lesser degree, and it may be possible to have some of each. The Prosecutor would do well to keep this in mind when deciding whether and when to pursue crimes.

I believe that the Prosecutor cannot ignore the tension between peace and justice and forge ahead with investigations and prosecutions without considering the impact her actions will have on ongoing peace processes. Instead, I believe the Prosecutor must diplomatically manage this tension. Despite the Prosecutor's insistence to the contrary, the Rome Statute actually provides the Prosecutor with ample tools to consider the interests of peace. Although I would not have shut the door so firmly on using Article 53 to import peace considerations, I can understand why the Prosecutor took this position. Nonetheless, I strongly reject the broader suggestion that considerations of peacemaking and politics are irrelevant to the exercise of prosecutorial discretion under the remainder of the Rome statute and

49. See 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 (1990-1991).

50. See Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANS-NAT'L L. 801, 825-26 (2005-2006).

the implication that the Prosecutor has an obligation to investigate and prosecute crimes irrespective of its impact on peace negotiations.

III. TIMING AS A TOOL TO CONSIDER THE INTERESTS OF PEACE

One powerful tool the Prosecutor has to manage the tension between peace and justice is her power to decide *when* to commence an investigation or prosecution. The Prosecutor has no absolute obligation to investigate and prosecute crimes, and once commenced, she has ample power to delay those investigations and prosecutions. This is because of the Prosecutor's resource constraints, the limited power of external bodies like the Security Council to force her hand to act, and the discretionary nature of the judgments the Prosecutor must make in deciding whether a crime within her jurisdiction has been committed. When the immediate pursuit of crimes might threaten peace processes, the Prosecutor should defer investigations and prosecutions until the future.

I begin with the obvious: given the limited financial resources available to the Prosecutor, not all offenders can be investigated or prosecuted; choices must be made. Resource constraints are often particularly acute in the context of international criminal prosecutions,⁵¹ and the ICC is no exception. The ICC's total budget for 2012 is €108.8M (\$142M),⁵² enough to conduct only a limited number of investigations and prosecutions. Investigations into genocide, war crimes, and crimes against humanity require substantial resources, and the Prosecutor's budget is insufficient to investigate and prosecute every crime within the Court's jurisdiction. According to one estimate, the Prosecutor's budget permits her to conduct only three meaningful investigations at a time.⁵³ Indeed, the ICC budget submissions explicitly suggest that the Prosecutor should manage her limited resources by engaging in a rotation investigation system, beginning new cases only as the investigation of older ones wrap up.⁵⁴

51. Burke-White, *supra* note 15, at 54; MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* (1999).

52. ICC, *Programme Budget for 2012*, at 24, Assembly of State Parties, Res. ICC-ASP/10/Res.4, 10th Sess. (Dec. 21 2011).

53. Burke-White, *supra* note 15, at 66. Additionally, the Rome Statute requires that the Prosecutor investigate both incriminating and exonerating circumstances equally. Rome Statute, *supra* note 1, art. 54(1)(a). This provision of the Statute ensures that "the cost involved in the investigation is enormous." Nsereko, *supra* note 19, at 125 n.2.

54. ICC, *Proposed Programme Budget for 2010 of the International Criminal Court*, at 31, Assembly of State Parties ICC-ASP/8/10 (Jul. 17, 2009).

One way to mitigate this constraint is to urge state parties to investigate, with an implicit warning that the Prosecutor may initiate actions in the future if member states do not act on their own.

The structure of the Rome Statute also permits, and in many cases requires, delay. The Rome Statute does not impose on the Prosecutor an affirmative duty to prosecute every crime within her jurisdiction. The Statute contains a variety of “provisions mandating time-consuming procedures but none encouraging haste.”⁵⁵ And just as the Security Council and other political actors cannot force the Prosecutor *not* to investigate and prosecute certain crimes, so too do they lack formal mechanisms to force the Prosecutor to investigate and prosecute. To illustrate this point, I consider the three stages of investigation and prosecution, and I demonstrate that the Prosecutor has substantial discretion to weigh concerns about the impact her actions will have on the pursuit of peace and reconciliation. The first stage involves a determination that a “situation” exists that warrants a preliminary examination. The second stage involves the initiation of an “investigation,” which requires approval by the Pre-Trial Chamber of the Court. The third stage involves the actual prosecution in the trial itself.

Stage One: Defining a Situation. The Prosecutor’s first task is to consider whether there exists a “situation” that merits a “preliminary examination” into whether some person or group has committed crimes within her jurisdiction. Under the Rome Statute, a “situation” can arise in three ways: (1) referral by a State Party that suspects a violation of the Rome Statute may have occurred in its country; (2) referral by the United Nations Security Council; or (3) on the Prosecutor’s own initiative (“*proprio motu*”).⁵⁶ When there is a referral from either a State Party or the Security Council, the Prosecutor is *obligated* to conduct a preliminary examination. But absent a referral, the Prosecutor has unreviewable discretion to decide whether to act *proprio motu* to initiate a “preliminary examination.”⁵⁷ And even when the Prosecutor is obligated to conduct a preliminary examination, the Prosecutor has unreviewable discretion to decide the extent

55. Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT’L L. 79, 140 (2009-2010). Thus the Rome Statute requires a pre-trial hearing to confirm criminal charges (Article 61), while Article 82 provides broad permission for interlocutory appeals. Rome Statute, *supra* note 1, art. 61, 82. All this has earned the ICC the derisive moniker of the “slowest institution of its kind” since the birth of international criminal justice at Nuremberg. Schabas, *supra* note 19, at 758.

56. Rome Statute, *supra* note 1, art. 13.

57. *Id.* at art. 15.

to which she will devote financial and human resources to a particular preliminary examination, so she can effectively stall an investigation that she believes is not in the interests of peace.

Stage Two: Initiating an Investigation. After conducting the preliminary examination, the Prosecutor may request authorization to investigate from the Pre-Trial Chamber if she believes that “there is a reasonable basis to proceed with an investigation.”⁵⁸ If the Prosecutor determines that “there is no reasonable basis to proceed,” however, she need not initiate an investigation.⁵⁹ This broad standard permits the Prosecutor substantial discretion to decline to pursue crimes, including for the reason that the pursuit of a crime will not further the interests of peace.

The Prosecutor’s decision not to prosecute is also not subject to significant judicial review. If the Prosecutor’s decision not to investigate is based on any reason other than the “interests of justice” exception of Article 53, the Pre-Trial Chamber may review only at the request of the Security Council or the referring State Party. The Chamber’s power is very limited: it lacks the power to reverse the Prosecutor’s determination, and may only “ask the Prosecutor to reconsider that decision.”⁶⁰ If the Prosecutor’s decision is based *solely* on the “interests of justice” exception, the Pre-Trial Chamber has broader powers of review: it may review that decision on its own initiative, and it has the power to reverse the Prosecutor’s decision.⁶¹ This means that the Prosecutor can effectively insulate from review her decision not to prosecute crimes by framing her decision as not based *solely* on the interests of justice.

Stage Three: Halting a Prosecution After an Investigation Has Begun. Even after an investigation has been initiated and approved by the Pre-Trial Chamber, the Prosecutor can decide not to actually prosecute the crimes. The Statute makes plain that after a formal “investigation” has been approved, the Prosecutor must notify the Pre-Trial Chamber *and* the State Party or the Security Council of a decision not to prosecute, along with reasons for her decision. But the Pre-Trial Chamber’s review power here is just as limited as it was at Stage Two. Where the Prosecutor’s decision not to prosecute is based on a conclusion that there “is not a sufficient legal or factual basis” for prosecution, or that the case is “inadmissible” for some other reason (perhaps because the state party is pursuing the crime,

58. *Id.* at art. 15(3).

59. *Id.* at art. 53.

60. *Id.* at art. 53(3)(a).

61. *Id.* at art. 53(3)(b).

or because the crime falls outside the jurisdiction of the Court), the Pre-Trial Chamber may review only at the request of the Security Council or referring State Party, and it may only “request the Prosecutor to reconsider that decision” – it cannot compel a prosecution.⁶² If the decision of the Prosecutor is based solely on the “interests of justice” exception, however, the Pre-Trial Chamber may review “on its own initiative” and reverse the decision of the Prosecutor.⁶³

In sum, the Prosecutor has very broad – but not unlimited – discretion to delay prosecution, and even to entirely decline to pursue certain allegations. Absent a referral by a State Party or the Security Council, the Prosecutor has unreviewable discretion to determine whether or not there is a “situation” that requires a “preliminary examination.” After a referral, where the Prosecutor’s decision not to proceed is based on either (1) the lack of a legal or factual basis to prove a crime, or (2) her judgment that the case is inadmissible due to complementarity or insufficient gravity, then the Pre-Trial Chamber can review the decision only upon the request of the referring State Party or the Security Council. More importantly, the Pre-Trial Chamber cannot reverse the Prosecutor’s decision.

Finally, the nature of the Prosecutor’s judgments about the adequacy of evidence admits substantial discretion and leaves room for the Prosecutor to delay investigation or prosecution where delay serves the interests of peace. In assessing the Prosecutor’s discretion, one must underscore that there are many mixed questions of law and fact relating to the adequacy of proof. Consider, for example, whether Mullah Omar could be convicted of having committed war crimes or crimes against humanity. Suicide bombings targeting civilians might qualify as both war crimes and crimes against humanity. But a crime against humanity would require that the suicide attacks are “committed as part of a widespread or systematic attack directed against a civilian population.”⁶⁴ This requires “a course of conduct involving the multiple commission” of such acts “pursuant to or in furtherance of . . . organizational policy to commit such attack.”⁶⁵ Is there proof that the perpetrators were members of the Taliban? Since the Taliban is not a State, could it be proven that it used suicide bombings as part of an “organizational policy”? Similar questions would arise for prosecution of a war crime under the Rome

62. *Id.* at art. 53(3).

63. *Id.*

64. *Id.* at art. 7(1).

65. *Id.* at art. 7(2)(a).

Treaty.⁶⁶ Even when an offence falls within the definitions of crimes under the Rome Statute, there is still an additional jurisdictional requirement: the crime must be of “sufficient gravity” to be admissible under Article 17.⁶⁷

To understand the complexity of these judgments, consider again the introductory hypothetical. Under the Rome Statute, the Prosecutor must decide whether (1) the Taliban acts in question would constitute a crime under the Rome Statute; and (2) the Afghan case would be “admissible” under the jurisdictional requirements of Article 17.⁶⁸ The ICC can convict a defendant only if the Prosecutor proves beyond a reasonable doubt that a particular accused is criminally responsible for acts defined as crimes under the Rome Statute.⁶⁹ In the hypothetical, neither the Security Council nor Afghanistan has referred the case to the Prosecutor. In deciding whether to investigate, the Prosecutor would know that (1) she cannot be legally compelled to declare Afghanistan a “situation” and conduct a preliminary examination; (2) even if she proceeded *proprio motu*, there would be no review of her decision not to initiate an investigation unless that decision was based on the “interests of justice” exception; and (3) even if she began an investigation, her decision not to prosecute would not be subject to reversal by the Pre-Trial Chamber unless it was based solely on the interests of justice exception. If the Prosecutor fears that taking action against Mullah Omar might well jeopardize the peace process, she has substantial ability to delay prosecution.

Indeed, this cautious wait-and-see approach is exactly how Moreno-Ocampo and Bensouda have approached Afghanistan. The Office of the Prosecutor has been conducting a “preliminary examination” of Afghanistan since 2007, and sent a request for information to

66. “Willful killing,” *id.* at art. 8(2)(a)(i), is a war crime only if it is “part of a plan or policy or part of a large-scale commission of such crimes,” *id.* at art. 8(1). For example, the conflict within Afghanistan may not be “of an international character.” *Id.* at art. 8. While “violence to life and person” including “murder of all kinds” may be a war crime, *id.* at art. 8(2)(c)(i), the Rome Treaty does not apply to “situations of internal disturbances and tensions, such riots, *isolated and sporadic acts of violence* or other acts of a similar nature,” *id.* at art. 8(2)(d) (emphasis added).

67. *Id.* at art. 17.

68. The Prosecutor must also decide whether the “interests of justice” exception would not apply and whether, under the complementarity doctrine, there should be no deference to the State that would have jurisdiction. I address these two additional issues in the next section (Part V).

69. Rome Statute, *supra* note 1, art. 66.

the Afghan government in 2008.⁷⁰ Under the guise of research and fact-finding, the Prosecutor has effectively stalled any ICC action in Afghanistan, presumably pending the resolution of the war. I believe this use of the Prosecutor's discretion is both wise and permitted by the Rome Statute. A formal investigation or prosecution at this time would not only be practically very difficult (particularly regarding gathering evidence and apprehending suspects like Mullah Omar, who is still on the run), but might also threaten to derail any future peace processes. If the ICC indicts Mullah Omar and his cohorts, they might choose to fight to the end rather than face criminal prosecution. This could prolong the war by deterring Taliban leaders from coming forward to engage in a peace deal.

The Prosecutor has taken a similar approach to Palestine's 2009 request that the ICC investigate Israel's actions in Gaza. The Prosecutor took over three years to determine whether Palestine may properly bring an action before the ICC. In April 2012, the Prosecutor decided that Palestine is not a "State" within the meaning of the Rome Statute, and thus the ICC lacked jurisdiction to hear the case.⁷¹ The Prosecutor argued that it is for the General Assembly, not the Prosecutor's Office, to decide whether an entity is a "State," and that because the General Assembly has only designated Palestine as an "observer" rather than a "Non-member State," the ICC lacked jurisdiction.⁷² The Prosecutor emphasized that, although Palestine had submitted an application for admission to the U.N. in September 2011, the Security Council and General Assembly have yet to act on the application.⁷³ While the question of Palestine's rights under the Rome Statute may be a challenging legal issue, it certainly could have been answered in fewer than three years. The Prosecutor's delay, like his final decision denying jurisdiction, was a shrewd political act: permitting a Palestinian action against Israel would

70. See International Criminal Court, Report of the International Criminal Court to the United Nations for 2009/10, at 16; International Criminal Court, *Afghanistan*, available at http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/afghanistan/Pages/afghanistan.aspx.

71. ICC, *Situation in Palestine* at 1-2 (April 3, 2012), available at [http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/Situation in Palestine030412ENG.pdf](http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/Situation%20in%20Palestine030412ENG.pdf).

72. *Id.*

73. *Id.* at 2.

throw a monkey wrench in the difficult Israel-Palestine peace process. The Prosecutor effectively decided that the ICC would sit this dispute out, letting political actors decide the case.⁷⁴

IV. COMPLEMENTARY AS A TOOL TO CONSIDER THE INTERESTS OF PEACE

Article 17 of the Rome Statute, relating to “complementarity,” also gives the Prosecutor substantial latitude in managing the tension between the pursuit of peace and the pursuit of justice. As was true for Article 53, political disagreements led the drafters of the Rome Statute to leave the precise scope of this provision somewhat vague.⁷⁵ The Prosecutor’s narrow reading of the interests of justice provision has been matched by a relatively expansive view of complementarity. This is wise. I believe that complementarity, rather than the interests of justice, is the more effective provision for managing the tension between peace and justice, particularly when one considers the impact on out-of-court negotiations in the Prosecutor’s shadow.

Article 17’s complementarity provision states that the Prosecutor may not investigate or prosecute crimes if a state party with jurisdiction has made a genuine investigation or prosecution of the crimes.⁷⁶ A state can meet the requirements of complementarity even if it does not prosecute crimes, so long as that decision not to pursue the crimes does not result from “the unwillingness or inability of the State genuinely to prosecute.”⁷⁷ In Rome, there was a debate over whether a *criminal* investigation was necessary to satisfy complementarity, or whether an alternative justice mechanism like a South Africa-style truth and reconciliation commission (“TRC”) might suffice. Even delegations strongly committed to criminal prosecutions were hesitant to lay down “an iron rule for all time mandating prosecution as the only acceptable response in all situations.”⁷⁸ The South African delegation argued that the Statute should explicitly provide

74. In this regard, the Prosecutor’s decision may be analogized to the political question doctrine sometimes employed by U.S. courts to avoid deciding sensitive political issues. See *Baker v. Carr*, 369 U.S. 186, 209 (1962).

75. Indeed, the chairman of the Rome Diplomatic Conference has characterized the interests of justice provision as encompassing “creative ambiguity.” Scharf, *supra* note 19, at 521–22 (quoting Phillipe Kirsch, chairman of the Rome Diplomatic Conference).

76. Rome Statute, *supra* note 1, at art. 17(1)(a).

77. *Id.* at art. 17(1)(b).

78. Robinson, *supra* note 2, at 483.

that TRCs satisfy complementarity.⁷⁹ The Statute does not resolve this problem, but Article 17 is susceptible to a reading that permits the Prosecutor to defer prosecution in the face of a wide range of domestic “investigations” including TRCs.⁸⁰

Moreno-Ocampo has indicated that he will take a broad view of complementarity, arguing in his 2007 Policy Paper that “truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice” may all satisfy Article 17.⁸¹ More recently, he has refused to foreclose the possibility that national proceedings not strictly prosecutorial in nature may satisfy complementarity.⁸² Moreno-Ocampo’s prosecution strategy recognizes that part of his job is to help state parties “better identify the steps required to meet national obligations to investigate and prosecute serious crimes.”⁸³

The Prosecutor’s reading of Article 17 is not only sound statutory interpretation; it is smart policy. Creating a robust exception on the basis of complementarity creates incentives for states to more precisely tailor justice mechanisms to local needs. By proactively using complementarity, the Prosecutor may encourage war-torn countries to take greater ownership of the peace process and pursue justice wherever possible.⁸⁴ The purpose of complementarity in the first instance was to preclude the Prosecutor from meddling with domestic investigations and prosecutions. But by using complementarity as an offensive tool and by implicitly threatening to investigate if the state with jurisdiction does not, the Prosecutor can help create the space for more active and effective domestic investigations. These domestic

79. *Id.* at 499.

80. Article 17 never specifies that the “investigation” must be a *criminal* investigation; Rome Statute, *supra* note 1, at art. 17, thus so long as there is a minimum level of investigation and inquiry, TRCs and similar alternative justice mechanisms should satisfy Article 17. *See* Blumenson, *supra* note 50, at 871 (“Such institutions as the South African TRC, with its amnesties conditioned on confession, should also be recognized as a human rights advance, and in certain circumstances a necessary and morally acceptable option for the ICC.”); Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J. INT’L CRIM. JUST. 695, 711 (2005).

81. *Interests of Justice*, *supra* note 4, at 8.

82. ICC, *Policy Paper on Preliminary Examinations*, at 10–13, The Office of the Prosecutor (Oct. 4, 2010).

83. ICC, *Prosecutorial Strategy 2009–2012*, at 10, The Office of the Prosecutor (Feb. 1, 2010).

84. Decisions not to prosecute on the basis of complementarity have another advantage: they typically are not subject to judicial review by the Pre-Trial Chamber. Decisions not to act under the “interests of justice” exceptions always are. *See infra* Part IV.

investigations are also more likely to be in tune with local understanding of the best way to pursue justice.

By cabining the interests of justice, the Policy Paper has made it even more important that the Prosecutor avail herself of the substantial wagon room that complementarity affords. Thus, to return to the Afghanistan hypothetical, the Prosecutor should encourage the Afghans to take ownership of the justice process and investigate the crimes, even if this investigation does not culminate in a traditional criminal trial.

Prosecutor Moreno-Ocampo's preliminary examinations in Guinea and Kenya illustrate what this proactive complementarity might look like. The Prosecutor has visited those countries and issued statements and press releases in order to pressure those countries to investigate crimes that might otherwise fall within the Court's jurisdiction.⁸⁵ Of course, for proactive complementarity to work, bold statements must be coupled with a willingness to take action and actually investigate or prosecute where domestic states are unwilling to do so. Otherwise, war criminals will easily see past the rhetoric and be undeterred by the threat of criminal prosecution. But an effective policy of complementarity necessarily provides time and space for states to pursue justice in ways that do not threaten peace.

V. SOME GUIDELINES FOR THE PROSECUTOR

The Prosecutor faces an abiding tension between peace and justice, but this tension is manageable. The Prosecutor, as a political actor responsible for a nascent legal institution, may wisely and diplomatically manage the inescapable tension between the pursuit of justice and the pursuit of peace. I suggest four guidelines to help the Prosecutor navigate this task.

1. *The Prosecutor should never acknowledge the validity of unconditional blanket national amnesty programs negotiated as part of a peace process*

The Rome Statute does not explicitly address the amnesty question, probably because the framers could not agree on the issue one

85. HUMAN RIGHTS WATCH, COURSE CORRECTION: RECOMMENDATIONS TO THE ICC PROSECUTOR FOR A MORE EFFECTIVE APPROACH TO "SITUATIONS UNDER ANALYSIS" 7-8, n.14 (2011).

way or the other.⁸⁶ Different provisions of the Statute point in conflicting directions.⁸⁷ The Preamble appears to rule out the possibility of amnesty, declaring, "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured."⁸⁸ Meanwhile, Article 17 complementarity requires the Prosecutor to act where a "State is unwilling or unable genuinely to carry out the investigation or prosecution."⁸⁹ As discussed earlier, however, complementarity can be satisfied even if there is no criminal prosecution, so long as the investigations are legitimate.

Explicitly acknowledging the validity of an unconditional blanket amnesty would hurt the Prosecutor's goal of deterrence. Blanket amnesty undermines the Prosecutor's efforts to create international legal norms against genocide, war crimes, and crimes against humanity. It also tells warlords that they may bargain for immunity and thus gain impunity, eliminating the ICC's deterrent force. If blanket amnesty from *criminal* prosecution is granted, the Prosecutor should insist the parties to engage in some form of alternative justice, like a non-criminal truth and reconciliation commission.

In dealing with the Afghanistan hypothetical, the Prosecutor should not acknowledge the validity of any absolute national amnesty program that provides blanket amnesty to every individual. This does not mean that the Prosecutor must insist that every wrongdoer must be prosecuted, or that the prosecutions must be criminal in nature. However, if the Prosecutor turns away completely from the atrocities, she would abdicate her institutional role and send an encouraging message to future warlords that they too may escape their crimes with impunity. Because the overarching goal of the Rome

86. There is an extensive literature on the extent to which under the Rome Statute an amnesty may be recognized or taken into account. *See, e.g.*, John Dugard, *Dealing with Crimes of a Past Regime. Is Amnesty still an Option?*, 12 LEIDEN J. INT'L L. 1001, 1013-15 (1999) (suggesting that the Rome statute left the issue ambiguous, and was a compromise package that should be interpreted to recognize that the Prosecutor has the discretion to recognize an amnesty in limited circumstances). Dugard believes the unsettled nature of the present state of international law is desirable because it would allow "prosecutions to proceed where they will not impede peace, but at the same time permit societies to 'trade' amnesty for peace where there is no alternative." *Id.* at 1015. He would not permit unconditional amnesties, especially for "atrocious crimes," but would allow Truth and Reconciliation Commissions for those crimes. *Id.*

87. The drafting of the Rome Statute has been called "schizophrenic," perhaps because different subcommittees drafted different parts. *See* Scharf, *supra* note 19, at 522.

88. Rome Statute, *supra* note 1, at pmb1.

89. *Id.* at art. 17(1)(a).

Statute is to deter “the most serious crimes of international concern” and put an “end to impunity for perpetrators of these crimes,”⁹⁰ the Prosecutor can hardly suggest a broad interpretation that would provide discretion for her to approve a broad grant of amnesty or be drawn into explicitly bargaining with someone like Mullah Omar.

2. *The Prosecutor should not be party to a bargain where a particular leader escapes all punishment by laying down his arms or giving up power*

Just as the Prosecutor should not approve unconditional blanket amnesties, nor should her Office directly participate in any bargain with a particular leader who seeks to lay down his arms in exchange for immunity. Many of the same arguments against blanket amnesties pertain to individual cases. Thus the Prosecutor should not sit at the table with Mullah Omar and negotiate over who will be investigated and what those investigations should look like. This does not mean that the Prosecutor should necessarily choose to prosecute these crimes, but there is a critical difference between delaying prosecution and waiting for domestic institutions to act on the one hand, and explicitly guaranteeing immunity on the other hand. There is a difference between granting impunity – which may be seen as a politically charged decision – and acknowledging that ICP prosecution is not always and everywhere appropriate, which is a practical legal decision. By refraining from entering these negotiations, the Prosecutor ensures that she is seen as a legal rather than a political actor.

3. *The Prosecutor should use timing, including the delay of investigation or prosecution, to take into account considerations of peace and reconciliation*

The Rome Statute does not force the Prosecutor to commence her investigations or prosecutions within any particular time period. To the contrary, the Prosecutor has ample space to delay bringing an indictment or commencing a trial. The Rome Statute lends itself to procedural delay because it “has provisions mandating time-consuming procedures but none encouraging haste.”⁹¹ I am not suggesting that the Prosecutor should permanently stay her hand under circumstances where the process of reconciliation turns out to be a sham and the concerns of victims are forever ignored. But delay can be a powerful tool, whereby the Prosecutor can stall investigation while

90. Rome Statute, *supra* note 1, arts. 1, 17.

91. Galbraith, *supra* note 55, at 140.

she gives time for domestic justice mechanisms to address the situation and satisfy complementarity. Rather than rushing to indict, the Prosecutor should wait patiently to see how the situation develops on the ground. This would be the wise approach in Afghanistan.

Along these lines, there should be a strong presumption against bringing indictments *during* a civil war. Wars are terrible events that beget awful atrocities, and in the midst of a war, the priority must be placed on removing the tyrant and ending the war as soon as possible. Often this requires granting a dictator exile in exchange for abdicating power. Indictments eliminate the full range of negotiated options for dealing with tyrants, including not simply foreign exile but also deals that would have the leader remain in the country and even retain some power during a transition to a more democratic regime. As distasteful as it is, the better part of wisdom often requires diplomats to bargain with devilish tyrants. An indictment while a war is still going on, can interfere with diplomatic negotiations that might save lives.

Libya represents an example of this. The International Criminal Prosecutor brought an indictment against Muammar Gaddafi and two top deputies in the midst of the civil war. The rebels, aided by NATO support, eventually ousted Gaddafi. But the indictment of Gaddafi in the middle of a civil war was probably a mistake because it precluded diplomatic options that might have ended the bloodshed earlier, and hampered the West's ability to offer Gaddafi exile in order to end the bloodshed.

The indictment occurred after the Security Council unanimously referred the Libya situation to the Prosecutor. Gaddafi had few friends in the international community, and the Prosecutor no doubt wanted to be responsive to the Security Council. This was the first and only instance the Security Council referred a case to the Prosecutor. Now, however, it seems apparent that the Prosecutor acted in haste. In less than three months, the Prosecutor investigated and persuaded the Court to issue arrest warrants for Muammar Gaddafi, his son Saif, and the Libyan head of intelligence for alleged crimes against humanity. One can doubt whether the speed of the process allowed for an investigation of the possible war crimes committed by Gaddafi's opponents, or even satisfied Article 54's requirement that the Prosecutor "investigate incriminating and exonerating circumstances equally."⁹²

92. Rome Statute, *supra* note 1, at art. 54(1)(a).

Human rights champions applauded the Prosecutor's actions because they believed his actions underscored that dictators could now be held legally accountable under the Rome Treaty, and the indictments bolstered the rebels' morale. But the indictments may have cut off certain routes to a negotiated solution and an earlier end to the conflict. As the International Crisis Group warned, to insist that Gaddafi "both leave the country *and* face trial in the International Criminal Court is virtually to ensure that he will stay in Libya to the bitter end and go down fighting."⁹³ In fact, as the war dragged on, news reports suggested that diplomats from Great Britain and France – as well as some Libyan rebel leaders – sought (unsuccessfully) to interest Gaddafi in a negotiated deal whereby he gave up power in exchange for immunity. As it turned out, the issuance of the arrest warrants might not have made any difference because Gaddafi was perhaps unwilling to accept a negotiated diplomatic deal under any circumstances. But I believe the Prosecutor should not have proceeded so hastily with his investigation, and should have deferred seeking an indictment until the civil war ended.

4. *The Prosecutor should proactively use complementarity to encourage the development of institutions of accountability*

The Prosecutor has limited resources and could not possibly intervene in every instance where a crime within the Rome Statute's jurisdiction has been committed. Even if the Prosecutor *could* always intervene, it is doubtful that she *should* always intervene. The pace of international criminal justice is slow, and the one-size-fits-all response of criminal prosecution is not always the best means to achieve justice.⁹⁴ And litigation is a slow, blunt instrument often ill-suited for untangling the complex web of responsibility for genocide, war crimes, and crimes against humanity.⁹⁵ That is why transitional societies often choose to respond to past events by something less than full-scale criminal prosecutions. It would be better for the Prosecutor to encourage member states to take up for themselves the mantle of investigation and prosecution, adopting more tailored local solutions while permitting the Prosecutor to save her resources for cases where the state is unwilling or unable to prosecute. Indeed, Moreno-Ocampo has suggested that he would like to see a world

93. INTERNATIONAL CRISIS GROUP, MIDDLE EAST/NORTH AFRICA REPORT NO. 107, POPULAR PROTEST IN NORTH AFRICA AND THE MIDDLE EAST (V): MAKING SENSE OF LIBYA 1 (2011).

94. Galbraith, *supra* note 55, at 139.

95. MINOW, *supra* note 51, at 87 (1998).

where ICC prosecutions are unnecessary because matters are fully addressed by the sovereign states.⁹⁶

These domestic accountability mechanisms need not be criminal in nature.⁹⁷ Alternative justice mechanisms like truth and reconciliation commissions are consistent with the Statute's text and the intent of the framers, and they may also be more effective at helping a war-torn country move past atrocities it has suffered. Certain contexts may call for less aggressive solutions that permit a society to come to terms with and make a break with the past without meting out formal criminal punishment.⁹⁸ Often, much of the benefit comes not from sending people to jail, but from having them publicly admit the truth.⁹⁹ The key question is whether the state has taken steps to discover "the truth about victims and attribute individual responsibility to perpetrators."¹⁰⁰

The Prosecutor should proactively use complementarity to insist on a baseline of domestic investigation and prosecution.¹⁰¹ This approach has several virtues. It permits the Prosecutor to discuss with government officials of state parties the various ways they might be responsive to victims and provide a degree of accountability, without actually requiring her to sit down at the negotiating table and thus appear to be a political actor with whom parties may bargain. Instead, the parties will bargain in the shadow of the law that she has cast. She can then monitor the domestic institutions over time to ascertain whether the investigations are in fact genuine. She can always initiate an investigation or prosecution if she is unsatisfied with the domestic actions and if she believes doing so will not unduly interfere with the peace.

VI. CONCLUSION

The Prosecutor faces a paradox of sorts. On the one hand, the exercise of discretion is inevitable. The Prosecutor lives in a world of limited resources, and she must pick and choose which cases are

96. Moreno-Ocampo, *supra* note 43, at 9–13.

97. One commentator has argued that the Geneva Convention or the Genocide Convention may require criminal prosecution, and thus limit the Prosecutor's ability to accept blanket amnesty or even non-criminal prosecutions. Scharf, *supra* note 19, at 523–24.

98. MINOW, *supra* note 51, at 2–3.

99. CHANDRA LEKHA SRIRAM, CONFRONTING PAST HUMAN RIGHTS VIOLATIONS: JUSTICE VS. PEACE IN TIMES OF TRANSITION 9 (2004).

100. Scharf, *supra* note 19, at 526.

101. Burke-White, *supra* note 15, at 57.

worth his time and money.¹⁰² Her budget is not large enough to investigate and prosecute every crime within the Court's jurisdiction.¹⁰³ And investigations cannot be entered into lightly. Article 54's requirement that the Prosecutor "investigate incriminating and exonerating circumstances equally"¹⁰⁴ entails that "the cost involved in the investigation is enormous."¹⁰⁵ Furthermore, the Article 53 admissibility inquiry, which requires the Prosecutor to determine whether complementarity and gravity are satisfied, demands that the exercise of discretion. The complementarity inquiry requires a judgment as to the genuineness and sufficiency of domestic prosecutions. The gravity criterion demands that the Prosecutor determine whether the crimes committed are serious enough to merit investigation and prosecution. These are standards, not rules, and they demand interpretation.

On the other hand, the explicit acknowledgment that the consideration of peace-making efforts will be taken into account in the exercise of discretion threatens to undermine the Prosecutor's goal of establishing the ICC's legitimacy. Much of the Court's influence will come not from its prosecution in discrete cases, but from its ability to deter future crimes. The Prosecutor claims that his goal is to grow the shadow of the International Criminal Court – to influence the behavior of a large number of actors through his conduct in a small number of investigations and prosecutions. By ending impunity and refusing to engage in political negotiation and bargaining with war criminals, he will deter the would-be war criminals of the future from committing their acts in the first place. As the Prosecutor has said in a more informal setting, he must "stand tall to cast a long shadow."

The pursuit of international criminal justice through judicial means has both benefits and costs. On the one hand, actions by the Prosecutor punish criminals, and they aim to deter heinous conduct during wars and violent conflict. On the other hand, by initiating an investigation or bringing criminal charges, a prosecutor may inhibit and constrain delicate diplomatic efforts aimed at ending a bloody violence through negotiation. Recent events in Libya suggest as much. Moreover, in some circumstances, post-war reconciliation may

102. See MINOW, *supra* note 51 (noting that resource constraints are particularly acute in the context of international criminal prosecutions).

103. Burke-White, *supra* note 15, at 66.

104. Roman Statute, *supra* note 1, at art. 54(1)(a).

105. Nsereko, *supra* note 19, at 125 n.2.

be better fostered by means other than the pursuit of criminal sanctions through a formal judicial process. The experience in South Africa with “truth and reconciliation” demonstrates the possible value of alternative, non-criminal justice mechanisms.

In deciding whether to initiate action in a specific case at particular time, the Prosecutor has the discretion to consider both potential costs and benefits. The Prosecutor’s chief policy goal is to deter the war crimes of tomorrow by ending impunity for those crimes today. The Prosecutor rightly recognizes that to achieve this goal, she must engender a commitment to the rule of law. Nonetheless, the law hardly requires the Prosecutor to ignore the impact of her possible actions on the pursuit of peace and reconciliation. As I have shown, there is substantial discretion built into the Rome Statute, principally through Article 17 complementarity and the Prosecutor’s ability to delay prosecution. Where wisdom suggests that the costs in terms of peace and reconciliation outweigh the benefits of immediate investigation and prosecution, the Prosecutor has ample room to legitimately decline to pursue a crime. Through proactive complementarity and wise timing, the Prosecutor can more productively engage with transitional states, and more effectively cast a long shadow for the ICC.

In suggesting that wisdom requires that the Prosecutor ignore the more extreme rhetoric found in the Policy Paper – the rhetoric suggesting that peacemaking is never relevant to the exercise of prosecutorial discretion under the Rome Statute – I might be accused of endorsing a degree of hypocrisy: allowing the Prosecutor to say one thing but do another. But as Rochefoucauld once said: “Hypocrisy is the homage vice pays to virtue.”¹⁰⁶

106. FRANÇOIS DUC DE LA ROCHEFOUCAULD, REFLECTIONS; OR SENTENCES AND MORAL MAXIMS, MAXIM 218, available at <http://www.gutenberg.org/files/9105/9105-h/9105-h.htm>.