International Comparative Jurisprudence 2 (2016) 81–88

Contents lists available at ScienceDirect

International Comparative Jurisprudence

journal homepage: www.elsevier.com/locate/icj

International Criminal Court Facing the Peace vs. Justice Dilemma☆

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ARTICLE INFO

Keywords:
Peace vs. Justice
International Criminal Court
Security Council
prosecutorial discretion

ABSTRACT

The 'Peace versus justice' debate has been a central theme when analyzing the politics of international criminal justice. The role of the permanent International Criminal Court may be portrayed as an obstacle to peace processes but it may as well facilitate those processes. The present paper, by juxtaposing sometimes diverging views, argues that a more nuanced approach is needed for properly assessing the impact of the ICC. In fact, the Court may play neither role exclusively. Instead, there are different mechanisms enshrined in the Rome Statute, for accommodating the demands of peace and justice. They are addressed within the present study.

1. The problem

There exist a variety of possible relationships between peace and justice. When considering the troubled interrelationship, one may start with the famous rule: *Fiat iustitia pereat mundus*. But the traditional understanding of delivering justice at all costs ("even if the world should perish") refers to the ideal. The spectrum of possible scenarios may be extended from the two values being mutually exclusive to "no peace without justice" formula at the other end of the scale.

The aim of the present contribution is to sketch the problems underlying the presented interrelationship from the perspective of international law, and, more precisely, that of international criminal law and to pay particular attention to the International Criminal Court facing the conundrum defined above.

In most general terms, the goals of international law (peace and security for collective groups, nations states and peoples) can only be realized through the prosecution of particular individuals (Ohlin, 2009, p. 191). As famously stated by the International Military Tribunal, "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced" (International Military Tribunal (Nuremberg), 1947, p. 221). The experience of both Nuremberg and Tokyo Military Tribunals is of course quite telling, but when taking it into consideration one has to be aware of its limited value for the present examination. Both Tribunals indeed delivered "victor's justice" in the aftermath of the World War II. Their paradigm, which precluded any need to balance the demands of peace and justice, may thus only partly be applicable within this study.

From a slightly different perspective, punishing the individual perpetrators and rehabilitating the individual victims, and thereby avoiding collective guilt and collective myths of victimhood and eliminating the strife for vengeance, all contribute to the so-called pacifying effect of international criminal justice. They altogether strengthen the culture of peaceful settlement of conflicts (Nitsche, 2007, p. 303). Such an approach integrates, rather than counterbalances the values in question. To some extent this is also reflected by the former Deputy ICT Prosecutor when noting that "the ICTY is essentially an instrument of peace: the criminal prosecution of persons responsible for serious violations of international humanitarian law is regarded as being central to the peace process in the

Peer review under responsibility of Mykolas Romeris University.

☆ This is the publication of the WISE project, commemorating the 70th anniversary WWII end, implemented with the support of 'Europe for Citizens Programme' of the EU.

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http://dx.doi.org/10.1016/j.icj.2017.01.001
Received 23 October 2016; Received in revised form 7 January 2017; Accepted 8 January 2017
Available online 09 January 2017

former Yugoslavia. The same is true of the ICTR in Rwanda" (Blewitt, 2006, p. 146).

In a similar vein, one may use another formula "no peace without justice" to address the interplay and to present the two values in question. But this is definitely not the only possible option – to mention now more confrontational versions. For example, Payam Akhavan famously distinguished between "judicial romanticism" blindly pursuing justice and cynical "political realism" seeking peace by appeasing the powerful (Akhavan, 2009, pp. 624ff.). There are, then, different stages for addressing the issue. In a document prepared for the Review Conference in Kampala entitled "Managing the Challenges of Integrating Justice Efforts and Peace Processes" Priscilla Hayner identified different sets of challenges concerning the relations between justice and peace processes: 1. negotiating justice (how accountability for serious crimes might be addressed in the course of peace negotiations), 2. the impact of international justice (how international criminal justice efforts may affect ongoing (or intended) peace talks), and 3. the implementation of justice (in the aftermath of the peace agreement where there is still strong resistance to accountability) (Hayner, 2010). It is the first two layers that are mainly addressed here.

The dichotomous vision of the titular dilemma is also shared by the Truth And Reconciliation Commission for Sierra Leone: "those who argue that peace cannot be bartered in exchange for justice, under any circumstances, must be prepared to justify the likely prolongation of an armed conflict" (Report, vol. 3b, §11). This goes in line with the academic visions of the tension between the two ideals: the pursuit of justice entails the prolongation of hostilities, whereas the pursuit of peace requires resigning oneself to some injustices" (Manas, 1996, p. 43). In most explicit terms, a war crimes tribunal/court may be seen as "a bargaining chip" (D'Amato, 1994, p. 503). Prosecution may create a disincentive for peace thus prolonging the atrocities, it is therefore justified to consider "the dangerous slippage between peace and justice" (Clarke, 2012, p. 309).

In a widely quoted contribution to Human Rights Quarterly, an anonymous official dealt with the distribution of responsibilities: the task of ending war is definitely the task of a peace negotiator warned against the latter becoming prosecutor (Anonymous, 1996, p. 256). The possible variations on the theme include a situation when prosecution serves as a disincentive to negotiations for negotiators may at the same time fear arrest or prosecution as the accused perpetrators. In that regard, the ICC may be considered "an unwelcome intrusion of albeit laudable ideals on a terrain that requires some very hard and unpalatable bargains to be driven" (Gissel, 2015, p. 429). Prosecutions may be considered generally as serving to obstruct or inhibit the possibility of bringing conflict to an end.

On the other hand, the very prospect of negotiations may also induce several positive aspects (Sriram, 2009, p. 306), including the internationalization of the negotiating context, contribution to short- or medium-term deterrence in respect of ongoing abuses, as well as identification of the negotiation parties and the discussed issues, in particular excluding the possibility of introducing amnesties (Gissel, 2015, p. 429). In this regard one may speak of a stabilizing effects of the mere threat of the prosecution, in particular by undermining the power of leaders responsible for the atrocities and their reliability in conducing peace negotiations (Akhavan, 2009, p. 629). However, this approach may have some drawbacks, for the mere simplification of strictly equating adjudication with justice. It is also difficult to consider those leaders as rational actors. Thus, it may be suggested to discard such a raw peace-justice binary as it reduces the relationship in question to oversimplified mechanisms neglecting some justice-providing quality of peace and the complexity of prosecuting international crimes.

So far the mechanisms of international criminal justice have been created mainly in an *ad hoc* manner, mostly at the end of conflicts. Now, with the entry into force of the Rome Statute establishing the International Criminal Court, the situation has thoroughly changed. The present position goes in line with that of the Secretary-General expressed in the report on "The rule of law and transitional justice in conflict and post-conflict societies". While considering the ICC as "the most significant recent development in the international community's long struggle to advance the cause of justice and rule of law", the Secretary-General underlined already in the summary that "[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities". It was also suggested to "adopt an integrated and comprehensive approach to the rule of law and transitional justice, including proper sequencing and timing for implementation of peace processes, transitional justice processes, electoral processes and other transitional processes". Further in the report, it was clarified that "Justice and peace are not contradictory forces. Rather, when properly pursued, they promote and sustain one another. The question, then, can never be whether to pursue justice and accountability, but rather when and how" (Secretary-General, 2004, §21, p. 8).

This paper also proposes to take a holistic view to transcend the divide in question. There have been already some detailed scholarly examination of the impact of prosecuting specific leaders, such as Kony or al Bashir on peace processes (see, e.g. Clarke, 2012; Oette, 2010). The limits of the present analysis do not allow for repeating those considerations. Instead, out of the options available under the Rome Statute we shall first consider the deferral under Article 16 and then move on to analyse the issue through the lens of prosecutorial discretion. In addition, several other alternative devices which may address the peace versus justice debate will be also discussed from a more general perspective.

2. The goals of international criminal justice

In broader terms, the potential conflict between peace and justice may be seen as yet another reflection of the debate on the goals (and means) of international criminal justice. Given the still scarce practice of the permanent ICC it is necessary to pay attention to the respective jurisprudence of international criminal tribunals. Notwithstanding the differences between those judicial institutions, the main choice has always been between retribution and deterrence.

Perhaps one of the best references to retribution in the context of international criminal justice was made in Nicolić when it was understood as "recognition of the harm and suffering caused to the victims" and "a clear statement by the international community

that crimes will be punished and impunity will not prevail" (ICTY, 2003, §§ 86–7).

In the Celebici judgment, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia discarded retribution as the one and only goal of international criminal justice. According to the Trial Chamber, the theory of retribution, being rooted in the primitive theory of revenge, when being used as the only factor in sentencing is likely to be counterproductive and disruptive of the entire purpose of the restoration and maintenance of peace in the territory of the former Yugoslavia. Accordingly, retributive punishment by itself does not bring justice (ICTY, 1998, §1231). Instead, the Trial Chamber clearly favoured deterrence (calling it probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law) (at §1234).

To put the problem in perhaps too blunt terms, retribution, against this particular background, would favour "blind justice", whereas deterrence seems to contribute more to the achievement of peace. Still, it is impossible to consider simply and exclusively, the one and only aim of international criminal prosecution. There are several other goals, which go hand in hand. Reliance on identification or singling out only one of them to determine the outcome of the analyzed troubled relationship would be counter-productive. There are, of course, also other objectives of prosecuting international crimes, like rehabilitation of offenders, establishing the historical report or the post-conflict reconciliation, to mention but few of them.

In broader terms, one may consider another dilemma between retributive and restorative justice. The latter, as contrasted with the traditional understanding relying on culpability, is based on accountability and paying more attention to the relationships among offenders, victims and their communities. This was perfectly what the Secretary General meant when, while honoring the Geneva Conventions, he mentioned "The debate on how to "reconcile" peace and justice or how to "sequence" them has lasted more than a decade. Today, we have achieved a conceptual breakthrough: the debate is no longer between peace and justice but between peace and what kind of justice" (Secretary-General, 2009).

3. The deferral

One of the most obvious reflections of the tension under consideration would be a blunt juxtaposition of the respective mandates of the International Criminal Court and the Security Council. The latter's involvement in addressing international crimes is nothing new – suffice here to mention that both *ad hoc* international criminal tribunals (for the former Yugoslavia and Rwanda, respectively) were created as subsidiary by the Council, which had used its powers under Chapter VII of the United Nations Charter. There exists a critical link between combating impunity and maintaining international peace and security (Kirsch, Holmes, & Johnson, 2004, p. 281). Accordingly, international crimes constitute, at the very least, a threat to international peace and security and therefore they may be addressed by the Security Council.

The permanent ICC enjoys a separate, independent status being created by means of an international treaty. Yet, the Rome Statute addresses several functions to be exercised by the Security Council - ranging from the special role with regard to the crime of aggression, via referral, to the enforcement powers (Krzan, 2009, pp. 65ff.). Against the particular background scrutinized here, it is the power to defer proceedings under Article 16 that needs to be paid special attention to. According to the said provision, "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".

However, it would be too simple to consider the ICC merely a tool of justice and, respectively, the main political organ of the United Nations as the sole representation of the interests of peace. The permanent Court is independent in relationship with the United Nations system but bound with the Purposes and Principles of the Charter of the United Nations (Preamble of the Rome Statute, paras. 7 and 9). Thereby, both the UN and the ICC share common values. This reaffirmation in the Rome Statute of the Charter principles seem to justify the opinion that the Statute is 'a supplement to the UN Charter' (Tomuschat, 1998, p. 337). Furthermore, the Preamble of the Statute recognises (at paragraph 3) the instrumental critical link that grave crimes within the jurisdiction of the ICC threaten the peace, security and well-being of the world. Such a wording might, as envisaged by some authors, provide the Security Council with an 'open-ended license to meddle' (Elaraby, 2001, p. 45). Opinions of that kind seem exaggerated although it is a fact that the Court might be regarded as a very valuable instrument at the disposal of the Council in its responsibilities to maintain international peace and security (Kirsch et al., 2004, p. 290). Similarly, during the debate in the Security Council, the President of the ICC Sang-Hyun Song recognized that "While the ICC's contribution is through justice, not peacemaking, its mandate is highly relevant to peace as well. The Rome Statute is based on the recognition that the grave crimes with which it deals threaten the peace, security and well-being of the world. The Statute's objective is [...] laying the foundation for a sustainable peace" (UN Doc. S/PV.6849, p. 4).

Correlating the acts of the permanent ICC with those of the Council is problematic, especially if one takes into consideration that a price for achievement of peace may be high. The Council may well decide that the saving of lives resulting from peace accords is more important that prosecution of the perpetrators of the most serious international crimes. For these reasons it was clear for the drafters of the Statute of the projected ICC that a respective provision should be included. Despite being regarded one of the most dangerous and sensitive provisions in the ICC Statute (El Zeidy, 2002, p. 1509), Article 16 of the Rome Statute can be regarded as the vehicle for resolving conflicts between the requirements of peace and justice where, in the view of the Security Council, the peace efforts need to prevail over international criminal justice (Bergsmo & Pelić, 1999, p. 378). Some serious problems regarding the selectivity and political control might however result from it.

It is the application of the said provision in practice that merits special scrutiny. Initially, the resolutions were adopted under the threat that the US would not participate in UN peacekeeping operations unless granted immunity from the jurisdiction of the ICC

(Krzan, 2009). The whole series of the UN SC actions started with the unanimously adopted resolution 1422, providing for the suspension from the jurisdiction of the International Criminal Court the members of peacekeeping troops. Surprisingly enough, it implicated that jurisdiction of the ICC over peacekeepers from states which were not parties to the Rome Statute may constitute a threat to international peace and security. Arguably, however, should the ICC jurisdiction be a threat to international peace and security in general then the exemption given by a resolution should be much broader in its scope, not limited to peacekeepers from non-parties.

Resolution 1422 did in fact create a bad precedence. It called for a renewal for further 12-month period. A new discussion within the Council began in June 2003 resulting in resolution 1487 whose text was identical with that of its predecessor.

Soon thereafter, the Security Council adopted Resolution 1497 concerning peace support mission in Liberia and without mentioning Article 16 decided not a suspension but practically a total exclusion of the ICC jurisdiction for 'current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, [...] for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia' over an indefinite period of time.

Another attempt to renew the suspension was made in May 2004 but eventually abandoned because of the devastating impact of the resolution 1497 that could be regarded as a factor preventing the states from adopting another resolution in such a manner. The lack of support for deferral resolutions could also be, at least to some extent, explained with reference to the situation in the Abu Ghraib prison (Abbas, 2005, p. 265; Zappalà, 2003, p. 677).

Apart from merely suspending or, in the worst cases, excluding the ICC jurisdiction, one needs also to take note of the Security Council's referrals of the situation in Darfur or in Libya. Neither Resolution 1593(2005) nor Resolution 1970(2011) relied on the referral's actual legal basis, i.e. Article 13 of the Rome Statute, but instead explicitly mentioned Article 16. Be that as it may, both Resolutions decided, again as in Resolution 1497, that officials or personnel from a contributing state not party to the Rome Statute should be subject to the exclusive jurisdiction of that contributing State. The practice has shown that instead of immunizing individual leaders, the Security Council has chosen to offer general deferral.

Some additional light on Article 16 has been also shed by further unsuccessful attempts by the African Union to defer the ICC investigation into the situation in Darfur. After the Prosecutor applied for the arrest warrant for al Bashir on 14 July 2008 the African Union Peace and Security Council requested a one-year deferral by the UN Security Council based on the procedure provided by the Rome Statute (PSC/MIN/Comm(CXLII), Rev.1). The request met with no positive response by the Court, to the regret of the African Union, which formally decided not to cooperate with the ICC for the arrest and surrender of the Sudanese President (Assembly/AU/Dec.245(XIII) Rev.1, § 10).

In a similar vein the Court disregarded Kenya's request that the Security Council defer the Court's investigations into the 2007-8 postelection violence. Several proposals by the African Union Assembly produced no expected results. A draft resolution on the Kenya deferral request (UN Doc. S/2013/660) was voted in the Security Council in Mid-November 2013 and received only seven affirmative votes (UN Doc. S/PV.7060).

Additionally, one may also refer to attempts to invoke Article 16 in the context of the investigations into Uganda, Côte d'Ivoire and the Central African Republic (Mistry & Ruiz Verduzco, 2012, p. 15). Now, these attempts are accompanied by the announcements of the intention to withdraw from the Rome Statute (so far by Burundi, South Africa or Gambia).

Finally, one needs to mention the controversies surrounding the amendment of Article 16 of the Rome Statute. The mentioned controversies around the arrest warrant for the President of Sudan stirred up a proposal by African states to amend this provision which relied on the disputable Uniting for Peace formula. Accordingly, where the UN Security Council fails to decide on the request by the state with jurisdiction over a situation before the Court within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility (ICC-ASP/10/32. Annex V). Such a proposal is yet another reflection of the controversial character of the Article 16. The chances for adopting the proposed amendment seem limited. It is to be expected that Article 16 remains one of the most problematic provisions.

4. The role of the Prosecutor and the interests of justice

Apart from looking at the problem from an external perspective (by including the UN organ), it is inevitable to analyse the ICC's internal mechanisms to compromise the demands of peace. The financial resources of the Court, and consequently those of the Office of the Prosecutor, are not unlimited and the budget does not allow to investigate and prosecute every crime potentially within the ICC jurisdiction. Therefore, the Prosecutor may exercise his/her discretion at different stages of the proceedings: when defining a situation, initiating the investigation and halting a prosecution, after an investigation has begun. It is thus the Prosecutor that must diplomatically manage tension between the pursuit of peace and the pursuit of justice (Mnookin, 2013).

Crucial in that regard is Article 53 of the Rome Statute, which encompasses considerations that may lead the Prosecutor not to proceed with the investigation of a situation if an investigation "would not serve the interests of justice".

The very phrase is open to different, sometimes diverging interpretations. After the ceremony of sworning in, the first ICC Prosecutor mentioned the need to take into account the existing interdependence of other important institutions and governmental organisations dedicated to the enhancement of the rule of law, humanitarian assistance and conflict resolution and also noted that "the ICC is independent and interdependent at the same time. It cannot act alone. It will achieve efficiency only if it works closely with other members of the international community". This formulation levelled some strong criticism.

The subsequently issued (September 2003) 'Paper on some policy issues before the Office of the Prosecutor' did not refer to the demands of peace. Instead, while mentioning the limited resources of the Court, it was underlined that the Office would function

with a two-tiered approach to combat impunity. Beside initiating prosecutions of the leaders who bear most responsibility for the crimes, the OTP should namely "encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means". It is the latter phrase that opens a floor for further considerations of other available options. However, those options would be most available only to "other perpetrators", i.e. not the main political or military leaders. For those other offenders, as later stated, "alternative means for resolving the situation may be necessary, whether by international assistance in strengthening or rebuilding the national justice systems concerned, or by some other means" (OTP, 2003, p. 3).

In his second report to the Security Council pursuant to UNSCR 1593 (2005) of 13 December 2005, Luis Moreno Occampo announced that in considering whether a prosecution is not in the interests of justice, the Prosecutor would "follow the various national and international efforts to achieve peace and security, as well as the views of witnesses and victims of the crimes" (OTP, 2005, p. 6).

Such a position was subsequently rejected in another report of 2007. In the Policy Paper on the Interests of Justice, the Prosecutor underlined a difference between the concepts of the interests of justice and the interests of peace, the latter falling "within the mandate of institutions other than the Office of the Prosecutor". As a preliminary conclusion, the OTP considered the issue of the interests of justice, as reflected in Article 53 of the Rome Statute, to be one of the most complex aspects of that treaty (OTP, 2007, p. 2). With regard to other justice mechanisms the Office reiterated the need to integrate different approaches, which may be complementary. Accordingly, domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms may play a role in the pursuit of a broader justice and in addressing the impunity gap (OTP, 2007, p. 8). The subparagraph devoted to peace processes starts with the general statement that "[t]he ICC was created on the premise that justice is an essential component of a stable peace". Having referred to the Preamble to the Rome Statute recognizing that the crimes under the Court's jurisdiction threaten the peace, security and well-being of the world the Prosecutor nevertheless pointed that the concept of the interests of justice "should not be conceived of so broadly as to embrace all issues related to peace and security". The said concept established in the Statute, "while necessarily broader than criminal justice in a narrow sense, must be interpreted in accordance with the objects and purposes of the Statute".

The most important part of this statement is the recognition of other comprehensive solutions. Particular attention was paid to the role of the Security Council and its power to defer the proceedings before the ICC under Art. 16 of the Rome Statute. But any respective action by the Security Council does not absolve, so the Report, of the obligation of the Prosecutor to take into account the interests of justice under Article 53. In most explicit terms it was indicated that "the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions" (OTP, 2007, p. 9).

Given the objectives of the Court (to put an end to impunity and to ensure that the most serious crimes do not go unpunished), according to the position of the OTP presented in the report, "a decision not to proceed on the basis of the interests of justice should be understood as a course of last resort". Conversely, the 'interests of justice' might be considered exceptional in nature. The Paper might be said to set out a general presumption in favour of investigations and prosecutions. The conditions mentioned are also very abstract in nature and "divorced from application in particular cases. They do not provide a closed/exhaustive system of elements to be taken into consideration and is, as vigorously mentioned by Ohlin, "completely skeletal" for they do not even address the relationship with the Security Council (Ohlin, 2009, p. 201).

The most troubling aspect of the Policy Paper is the impression that the Prosecutor chose justice to the exclusion of peace, as "either/or choice" (Mnookin, 2013, p. 158). Of course, the value of the Policy Paper is not to be overestimated. The position offered by the OTP is not legally binding – it does not represent any of the judicial arms but only the vision of the (current) OTP and might be withdrawn or changed if situation so requires. In any case, it contains important information even if the formula under art 53 concerning the interests of justice should be linked to justice in a specific case (Stahn, 2005, p. 718). Perhaps the future prosecutors might change the position and adopt a more nuanced one accepting the possibility of balancing the interests of justice with peace in a different manner enabling their accommodation.

The negative position towards the consideration of the interests of peace did also find its reflection in the 2009 Regulations of the Office of the Prosecutor. Against this particular background, one needs to underline that the project of Regulations of 2003 referred to a potential elements of the definition of what may constitute "interests of justice" in a footnote appended to Regulation 12 concerning the decision to start or not to start investigation. Accordingly, the experts were not in a position to make a recommendation on whether the Regulations should contain a detailed definition, but should that be the case, the definition could comprise the following factors: (a) the start of an investigation would exacerbate or otherwise destabilise a conflict situation; (b) the start of an investigation would seriously endanger the successful completion of a reconciliation or peace process; or (c) the start of an investigation would bring the law into disrepute (Draft regulations, 2003). Such formulation may be objected and it indeed met with strong criticism from various actors. In the Policy Paper: the meaning of "The Interests of Justice" in Article 53 of the Rome Statute, Human Rights Watch objected against viewing "considerations of peace and stability to be appropriate considerations under Article 53". The Policy paper contained also own recommendations for the respective regulations where it explicitly stated that "A decision whether or not to initiate an investigation or proceed to trial must not be influenced by: a. possible political advantage or disadvantage to the government or any political party, group or individual; b. possible media or community reaction to the decision" (HRW, 2005). As mentioned earlier, the eventually adopted Regulations contain no reference to considerations of peace and could thus be of no help in addressing the demands of practice.

Some valuable light on the issue in question is shed by the positions taken by the leading officials of the Office of the Prosecutor. In a Key note address at the Seminar organized by the Institute for Security Studies (ISS), in Pretoria, on 10 October 2012. Fatou Bensouda confirmed that the "interests of justice" 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. In advancing her argument Bensouda argued that the Court and the Office of the Prosecutor itself were not involved in political considerations since they had to respect legal limits. Consequently, "[t]he prospect of peace negotiations is therefore not a factor that forms part of the Office's determination on the interests of justice" (Bensouda, 2012). Referring to the Court's experience parallel to conflict management and often specific peace negotiations, the Prosecutor mentioned the important role the arrest warrants played role in bringing the LRA to the negotiating table in the Juba Peace Process. On the other hand, however, with regard to Joseph Kony, Bensouda mentioned perverse side-effects from deferring judicial proceedings in the name of peace and security. Succumbing to pressure to restrain justice may send out a message to perpetrators that arrest warrants can be stayed if only they commit more crimes or threaten regional peace and security. Court proceedings or the possibility of Security Council deferrals should not be used by alleged war criminals as a tool to divide the international community.

In the almost parallel conducted Open Debate of the United Nations Security Council on "Peace and Justice, with a special focus on the role of the International Criminal Court", Mr. Phakiso Mochochoko, then Director of the ICC's Jurisdiction, Complementarity and Cooperation Division, spoke of "no dilemma or contradiction between peace and justice". According to his position, "The role of the ICC has never precluded or put an end to such processes; in some cases, it has even encouraged them. The policy of the Office is to pursue its independent mandate to investigate and prosecute those few most responsible, and to do so in a manner that respects the mandates of others and seeks to maximize the positive impact of the joint efforts of all. To pursue its judicial mandate and preserve its impartiality, the Office cannot participate in peace initiatives, but it will inform the political actors of its actions in advance, so that they can factor investigations into their activities (UN Doc. S/PV.6849, p. 7).

Overall, one may note a change in the Prosecutor's position towards the interests of peace. Human rights are best promoted not by compromising justice in the interests of peace, but by applying criminal law even-handedly (Rodman, 2009, p. 112). Undoubtedly, requiring the Prosecutor of the ICC to make prosecutorial decisions based on political factors, taking into account such far-reaching political imperatives as peace and security, would undermine both the perception and reality of the Prosecutor as an independent organ beyond political influence (Peschke, 2011, p. 199).

Needless to say, the impact of prosecution on peace is difficult to assess. International criminal justice may of course have destabilizing consequences on consolidating post-conflict peace. The prosecution may have the purported impact in exacerbating intercommunal divisions and impeding reconciliation (Rodman, 2011, p. 824; Rodman, 2014). Much depends on an individual strategy adopted to a concrete situation, not only by the Prosecutor, but also, even more importantly, by the Court itself.

As observed by the Pre-Trial Chamber I, article 53(2) of the Statute does not provide for a definition of the expression "interests of justice". It only refers by way of example to some issues which are part of the notion of interests of justice" (PTC, 2009, § 17). Relying on that, the ICC concluded (at §18) that the Prosecution had been granted by the States Parties discretion in this regard and that one of the factors that the Prosecution must take into consideration is whether proceeding would be detrimental to the interests of justice (§18). In addition, the Pre-Trial Chamber alluded to the fact that the States Parties had not established in the Statute or in the Rules a closed list of criteria, according to which the Prosecution must exercise its discretion.

As underlined in the Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation of 16 July 2015, "The prosecutorial discretion expresses itself only in paragraph (c) of Art. 53(1), i.e. in the Prosecutor's evaluation of whether the opening of an investigation would not serve the interests of justice (PTC I, 2015, § 14). Against this particular background it is also worth noting, as the Pre-Trial Chamber II did in its Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya of 31 March 2010, that "Unlike sub-paragraphs (a) and (b), which require an affirmative finding, sub-paragraph (c) does not require the Prosecutor to establish that an investigation is actually in the interests of justice. Indeed, the Prosecutor does not have to present reasons or supporting material in this respect" (PTC II, 2010, § 63 and fn. 35 to § 24). Without doubt, a prosecution could threaten to derail peace negotiations or deter tyrants from relinquishing power.

Given the hitherto judicial practice it may be too early to assess the overall mutual impact of peace considerations and the prosecution of international crimes.

5. Other devices for compromising the values

To take the interests of justice into account is directly linked with other considerations also relevant in terms of our dilemma. Obviously, the Court may declare the proceedings inadmissible under Article 17 or simply refer to the principle *ne bis in idem* under article 20 and thus defer the proceedings as well. When discussing the issue of complementarity, the point was made that the ICC should only exercise its jurisdiction in the aftermath of the conflict, due to scarcity of resources and potential bias, when expecting the cooperation from one part of the conflict (Razesberger, 2006, p. 186). The relevance of the stability in a given territory is of course beyond question for the proper exercise of criminal jurisdiction. But any unconditional acceptance of such a proposal would mean that the whole prosecution would have to wait until the peace process is completed. This brings the issue of proper sequencing.

Accordingly, one may try to circumvent the potential clash between the values by pursuing a sequential approach, i.e. by concentrating on peace agreement first and only later on to start addressing the "justice issue". However, it has to be borne in mind that peace and justice do not necessarily follow a linear peace-the-justice trajectory (Moreno-Ocampo, 2006, p. 498). International prosecutions may also have the effect of obliterating the local incentives to negotiate, in consequence prolonging the conflict (Grono & O'Brien, 2008, p. 15). Still, it would be rather strange, to expect that an operation of a judicial institution is to depend to such an extent on the outcome of peace talks.

From such a perspective, the ICC might be seen "not just as a challenge to impunity, but also as a potential challenge or

impediment to peace negotiations and agreements" (Sriram, 2009, p. 305). This is especially true in case of amnesties, that rely on the assumption that they are more conductive to long-term peace and stability than criminal trials, which could create new tensions and friction (Clark, 2011, p. 539). In other words, amnesty trades justice for peace. This has been the case of Latin America and South Africa. Definitely, there is a danger that peace deals sacrificing justice may eventually fail to produce peace, as evidenced e.g. by the violent aftermath of Foday Sankoh after the failed amnesty agreement in Sierra Leone (Grono & O'Brien, 2008, p. 18). However, it may be claimed that justice, in the form of prosecution, must take priority over peace and national reconciliation (Dugard, 2002, p. 702), which goes in line with the prevailing view of inadmissibility of amnesties. Altogether, it reduces the practical importance of amnesties as means for addressing the dichotomy between peace and justice.

The question of the compatibility of the two concepts and the potential sequence between them could take another form, i.e. the one encompassed in a formula: Peace via justice. Peace might be brought through justice, but one should be aware of the danger that thereby the ICC's integrity as an impartial instrument of justice may be undermined (Kerr, 2007, p. 383). Be that as it may, the traditional understanding of peace is getting expanded and would probably need some further examination, which is beyond the scope of present considerations.

6. Concluding remarks

Even a cursory (as the present one) outlook at the analyzed topic provokes some at least interim conclusions to be drawn. First of all, generally, peace and justice are inextricably connected. International peace and international criminal justice are not mutually exclusive. Their promotion, despite being complex and tricky, should be attempted at since the former cannot be completely achieved at the cost of the latter and *vice versa*. Both values reinforce and complement each other. The need of peace can and should be accommodated with demands of justice. However, if handled improperly, the two may clash. Yet, the facilitation of peace may not be equated to an acceptance of impunity.

Despite different numerous problems the ICC may be and is ready to face the dilemma mentioned in the title to this paper. The Court may use different numerous means to provide justice, its record may also reveal additional impacts on peace, much depending on specific decisions. Hence, numerous theoretical debates notwithstanding, it is for the International Criminal Court, through its growing jurisprudence, as well as for the Office of Prosecutor, to answer but above all to newly define the peace vs. justice question.

The eventual result depends also on a number of external factors including the respective position of States and other actors. In the latter regard the hitherto practice of the United Nations Security Council and the growing opposition from the African Union is of particular importance.

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