

The ICC & the Tension between Peace and Justice

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The *International Criminal Court* was established in 2002 with a multilateral treaty, the Rome Statute. It can prosecute “the most serious crimes of international concern,”¹ limiting its jurisdiction to “the crime of genocide; crimes against humanity; war crimes and the crime of aggression.”² In this framework, the ICC can prosecute citizens of a country part of the Rome Statute and any criminals involved in an attack on the soil of a country which ratified the Rome Statute.³ Also, the Security Council itself, acting in the name of “international peace and security”⁴ can refer the case to the ICC.⁵

While the preamble of the Rome Statute includes as its sole provision the “enforcement of international justice,”⁶ the ICC incontestably influences peace and politics through its impact on the internal balance of power of a country. The perceived gap between the ICC’s ambition to enforce impartial and independent justice and its impact on the political life of a country can be re-examined in light of deeper conceptualizations of the concepts of peace and security. While the negative meaning of peace as the absence of war is easily measured, its positive sense of reconciliation remains a more intangible concept.⁷ Similarly, justice is a deeply subjective concept that is not limited to the narrow concept of “retributive justice” and hence ought to be contextualized.

This essay tackles the question of whether the ICC offers a positive contribution to both peace processes and justice. In this context, the quality of the connection between both aims will be scrutinized in order to assess whether the pursuit of accountability fosters or hinders the aim of peaceful conflict resolution. As Clark argues, the impact of ICC retributive justice needs to be contextualized as a number of complex interaction factors play out.⁸

In order to do so, I will analyze the cases of Uganda and Libya, while underscoring their similarities and divergences with regard to their respective contexts and the different outcomes of ICC’s intervention in both cases. In the case of Uganda, the ICC launched the investigation and prosecutions against five members of the rebel group, the Lord’s Resistance Army (LRA), after referral to the Court by the Ugandan government. In contrast, it was the Security Council who decided to refer the Libyan case to the ICC with Resolution 1970.⁹

I will argue the thesis here that a tension between peace and justice in the framework of the ICC’s intervention can exist; however, both aims can be reconciled if the ICC strives for a more serious engagement with political and diplomatic factors and actors on the ground.

¹ UN General Assembly. (1998). *Rome Statute of the International Criminal Court (last amended 2010)*. Art 1. ISBN No. 92-9227-227-6.

² Ibid, Art 5.

³ Ibid, Art 12.

⁴ United Nations. (1945). *Charter of the United Nations*. 1 UNTS XVI. Art 1.

⁵ Ibid, Art 16.

⁶ Rome Statute, Preamble.

⁷ Clark J. N. (2011). Peace, Justice and the International Criminal Court: Limitations and Possibilities. *Journal of International Criminal Justice*, pp. 523. URL:

<http://www.brandeis.edu/ethics/pdfs/internationaljustice/bij/BIIJ2013/clark.pdf>

⁸ Ibid, pp. 545.

⁹ UN Security Council, *Security Council resolution 1970* (2011). [on establishment of a Security Council Committee to monitor implementation of the arms embargo against the Libyan Arab Jamahiriya]. S/RES/1970 (2011).

First, the extent to which the ICC can achieve justice will be assessed, in light of a re-conceptualization of justice taking into account the dimension of “restorative” justice (I). Secondly, the conditions under which the ICC acts as obstacle or facilitator to peace will be assessed, with regard to its effects on peace negotiations and on broader positive peace in Uganda and Libya (II). Lastly, the way and extent to which the aims of peace and justice are reconciled in the Rome Statute and jurisprudence of the ICC will be scrutinized (III).

I. Limitations and opportunities to ICC’s power to exercise justice

A) Limitations to the judicial power of the Court

1) Allegation of bias undermining the credibility of the Court

First, the allegation of bias towards the ICC encroaches on its credibility and capacity to act. The most important bias registered in the history of the court is the broad “African bias,” as arrest warrants have until today only been issued to African countries (DRC, Uganda, Sudan, CAR, Kenya, and Libya).¹⁰ This perceived bias resulted in the African Union’s decision in 2009 not to cooperate with the ICC in the arrest of Bashir in Sudan.¹¹ Moreover, the lack of resources of the Court only enables the prosecution of two or three cases per year, further exacerbating the problem of selective justice. Based on the grounds of gravity, ICC’s prosecutions can potentially be disconnected from grassroots understandings of impartiality. In Uganda for instance, the prosecution of five LRA commanders and no government members was broadly considered by the local population as the continuation of injustice.¹² Furthermore, ICC’s intervention is not sheltered from states’ manipulation for political motives, as the Ugandan government’s referral to the ICC, by casting aside the rebels, largely contributes to entrench its own power. It also sends us back to the realist view according to which ICC’s justice acts as vehicle through which the political rule of powerful states is legitimized. For instance, the Court is powerless towards the US as it is not part of the Rome Statute and has signed immunity agreements with some countries in order to prevent the indictment of US soldiers for war crimes.¹³ Lastly, the perceived asymmetry between UNSC referrals and self-referrals to the ICC contributes to these allegations of bias. While self-referrals only contributed to the promotion of state interests by the persecution of non-state actors in the cases of Uganda, Congo, and Mali, UNSC referrals essentially target government actors (i.e., Libya and Darfur) contributing to the promotion of international peace, but not necessarily of justice.

¹⁰Gegout, C. (2013). The International Criminal Court: limits, potential and conditions for the promotion of justice and peace, *Third World Quarterly*, 34:5, pp. 805. DOI:10.1080/01436597.2013.800737

¹¹ Ibid, pp. 806.

¹² Clark, pp. 524.

¹³ Gegout, pp. 808.

2) Institutional limitations of the Court: The lack of an independent enforcement mechanism

As part of the interstate system, the Court enjoys a special status, implying its dependence on state cooperation as it cannot rely on international police forces to enforce warrants.¹⁴ However, the dependence on states can be problematic as systematic cooperation from states is not precluded.

On the one hand, since three out of five permanent members are not party to the Rome Statute, the referral capacity of the Security Council is impeded; however, China, the US, and Russia did not block the Sudan and Libyan referrals. On the other hand, the cooperation of states where the prosecuted crimes have been committed can also be prevented as the prosecuted could release information about crimes committed by the government itself to the ICC. In the Ugandan case, this resulted in the offer of the government to the LRA members to try them at the national level.¹⁵

While the ICC was entirely dependent on the Ugandan government to enforce the arrest warrants,¹⁶ Libyan refusal to extradite the perpetrators and insistence on a national trial demonstrates how problematic the reliance on state cooperation for the enforcement of ICC's justice can be.¹⁷

3) Promotion of a limited conception of justice by the ICC

ICC's mandate to enforce international justice assumes the primacy of retributive justice, without sufficiently taking into account restorative justice. In fact, the ICC is often accused of acting detached from the daily concerns of local people according to a "strict retributivism" paradigm.¹⁸ ICC's intervention in Uganda, for instance, failed to recognize the implicit complicity of the government and the society for the crimes committed in Uganda,¹⁹ having particularly negative effects on the Acholi people who felt left out by the justice process.

In contrast, in South Africa, a "Truth and Reconciliation Commission" was established by Mandela, implying a policy of amnesty in exchange for the wider "truth." This approach was supported by most black South Africans, as it permitted to "offer a comprehensive picture of individual and institutional instigation of and complicity in the crime against humanity,"²⁰ and the censure of institutional actors who were complicit of the crimes committed. Since it focused on public recognition of these crimes and a reaffirmation of the rights of the victims, *the South Africa Truth and Reconciliation Commission* constituted an appropriate alternative to criminal prosecution, which enabled, according to Mendes, the "peaceful transition to a multiracial democracy."²¹

¹⁴ Roach, S. (2013). How Political Is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy. *GLOBAL*

GOVERNANCE, 19, pp. 508.

¹⁵ Gegout, pp. 805.

¹⁶ Clark, pp. 525.

¹⁷ Hayner, P. (2013). Libya: The ICC enters the war. European Council on Foreign Relations, pp. 5.

URL: https://www.ecfr.eu/page/-/IJP_Libya.pdf.

¹⁸ Mendes, E. P. (2010). *Peace and Justice at the International Criminal Court: A Court of Last Resort*. Northampton, MA: Edward Elgar Publishing Limited, pp. 140.

¹⁹ Ibid, pp. 143.

²⁰ Ibid, pp. 146.

²¹ Ibid, pp. 142.

B) *Potential of the ICC in fostering a more comprehensive conception of justice*

1) Potential for the ICC to enforce a more holistic view of justice

As Gegout argues, the ICC exercises a form of symbolic retributive justice, as it has sometimes been used by domestic actors to promote reconciliation (i.e., Namibia).²² However, criminal justice has proven insufficient to respond to victims' and local perceptions of justice, which are more reliant on notions of economic and social justice. Nevertheless, the Rome Statute incorporates certain elements of restorative justice taking into account the need for the "protection of victims and witnesses"²³ and their participation into the justice process. Article 75 implies the possibility of reparative justice to the victims, containing "restitution, compensation and rehabilitation"²⁴ and article 79 establishes a "trust fund for victims." Even though the Rome Statute corresponds, from the victims' perspective, to real progress in comparison to the ad hoc tribunals of former Yugoslavia and Rwanda, which were representative of a clear "strict retributivism" (Blumenson). There however remains the need for enhanced clarity and visibility of these restorative aspects, remaining opaque within the Rome Statute.

On the one hand, the enforcement of the rights of the victims established under the Rome Statute, Clark argues, is hindered by the lack of clear guidelines in Article 75 and does not include any cooperation with local victims' organizations. In fact, the inability of the Office of the Prosecutor to engage with local stakeholders in Uganda manifested itself in the opposition by the Acholi civil society to ICC's intervention, as it excluded any possibility of a negotiated end to the war and was contrary to the local conception of justice. Also, in order to reach local conceptions of justice, there remains the necessity for the ICC to increase its visibility by reaching out to the locals. In Uganda, for instance, the ICC responded to the large protest from the Acholi community through large-scale outreach work established in 2004 including radio and TV programs such as "*ICC at a glance*." However, the high rates of illiteracy and the lack of appropriate infrastructures in the country hindered the outreach work of the ICC.²⁵

2) ICC's role in enforcing proactive complementarity

Roach suggests the development of a proactive approach to complementarity, according to which the ICC would take an active role in promoting the rule of law in developing countries by providing legal assistance.²⁶ In the case of Uganda, the constructive relationship between the ICC and national officials in Uganda resulted in the adoption of the ICC Act 2010, incorporating the Rome Statute into national law, as well as the establishment in 2008 of a War Crimes Division of Uganda's High Court corresponding to the catalytic effect of the ICC.²⁷ Furthermore, the development of proactive complementarity by enhancing national ownership of the judicial process could contribute to counter local protests against multilateralism triggered by the Court's intervention. For instance, ICC's arrest warrant against Bashir in Sudan reinforced its legitimacy and caused a nationalist backlash while undermining the legitimacy of the Court. This could supposedly have been prevented by ICC's re-enforcement of its proactive complementarity.

²² Gegout, pp. 511.

²³ Rome Statute, Art. 68.

²⁴ Rome Statute, Art. 75.

²⁵ Rodman, K. A. (2012). Why the ICC Should Operate within Peace Processes. *Ethics & International Affairs*, 26, 70.

²⁶ Roach, S. (2013). How Political Is the ICC? Pressing Challenges and the Need for Diplomatic Efficacy. *GLOBAL GOVERNANCE*, 19, 520.

²⁷ Clark, pp. 535.

However, the adoption of a proactive approach to complementarity poses certain limitations, as it could encourage the development of political strategies aimed at challenging the ICC by diminishing the weight of its requests and undermining the credibility of the Court. Furthermore, it could potentially undermine local ownership of the judicial process as it encourages the promotion of the homogeneous conception of justice by the ICC, while local practices remain excluded.

3) Enhanced role in providing justice through the development of its “soft power”

The ICC’s effectiveness in delivering justice largely depends on political factors, such as coordination and consultation with other actors involved in the conflict, whether international or local.²⁸ Roach argued in this context that the tension between the judicial ambitions inscribed in the Rome Statute and the lack of an independent enforcement mechanism can be reconciled through the expansion of ICC’s “political efficacy” understood as the development of its soft power.²⁹ As the Rome Statute provides no elements permitting the accommodation of outcomes for the ICC and other political actors involved in a conflict, the ICC has to develop its own political efficacy by developing a diplomatic function to create trust and gain leverage among political actors. The political role of the ICC would preserve cooperation through the balance of its interests against state politics.³⁰ In a practical perspective, ICC’s use of political resources would involve trial sequencing as well as expanded dialogue with the Security Council, involving state officials and local populations. In Congo, ICC’s cooperation with the Security Council enabled the disarmament by MONUC of those the ICC aimed to investigate, establishing the link between conflict resolution and justice.

With regard to our Libyan case, however, it can be argued that the failure of the ICC to ensure compliance from the Libyan government and the Security Council is due to ICC’s lack of a strategy to reach a solution taking into account political factors. In the context of the Libyan government’s filing of a “challenge of admissibility,” permitted by Article 17 of the Rome Statute, ICC’s lack of cooperation with state officials resulted in the detention of four ICC special advisors to the prosecutor for failure to gain permission to investigate. The failure for the ICC to clearly define its own political capacity led to conflicts within the Court, when after the challenge of admissibility filed by the Libyan government, ICC’s prosecutor, Ocampo, recognized Libya’s sovereignty over the judicial proceedings leading to the Appeals Chamber’s official declaration that his decision injured the integrity of the Court. Roach argues in this context that the ICC’s loss of credibility to administer international justice could have been prevented if the ICC had maintained better relations with the Security Council and Libyan officials, enabling the attainment of mutual accommodation outcomes.³¹ Similarly in Uganda, ICC’s officials developed no practical strategy to reach accommodation, manifested by its unwillingness to wait until the Ugandan government had amended its Amnesty Law before launching the prosecutions.

²⁸ Rodman, pp. 68.

²⁹ Roach, pp. 512.

³⁰ Ibid, 513.

³¹ Roach, 517.

Another compromise could have been reached through indicting Kony and letting the other commanders be tried by national courts, in congruence with the complementary principle.

To conclude this part, the enhancement of ICC's contribution to justice is dependent on its capacity to develop a more comprehensive conception of justice by responding to popular justice needs as well as its capacity to foster cooperation with the Security Council and national officials. This is particularly relevant as these are the local populations who, to a great extent, bear the consequences for the political turmoil engendered by a justice process that does not consider political considerations.

II. ICC's relationship to peace: ICC as facilitator or obstacle to peace in the cases of Uganda and Libya?

A. ICC's interventions as obstacles to peace underlined by "peace vs. justice" paradigm

1) The ICC within Peace vs. Justice paradigm

The peace vs. justice paradigm implies that justice, understood through the prism of cosmopolitan norms of equality transcending (cultural) particularizations, is coterminous with the goal of peace reached through diplomacy.

This paradigm is illustrated by the conception of peace as "impunity" by the supporters of the Court in the case of Uganda, as news media propagated descriptions of LRA commanders escaping justice, since they are submitted to local forms of justice.³² Similarly, Libyan newspapers have often argued that ICC arrest warrants against the Libyan government hindered the peace process. In this framework, the African Union declared, with the "Decision on the Implementation of the Assembly decisions on the ICC,"³³ that it would not implement the warrants.

The assumption that "in some contexts, justice institutions actively uphold laws, power structures and norms that entrench inequality and threaten peace"³⁴ can hence be relevant to the ICC, according to the following diverse reasons.

2) ICC's action as hindering the participation of those indicted into peace negotiations

The assumption that the integration of opposing forces into the peace process is necessary for the establishment of a durable positive peace after the war is well-entrenched in common narratives of peace resolution.³⁵ In this framework, it is particularly relevant to analyze the impact of ICC's interventions on the integration of those opposing forces into the peace process.

³² Armstrong, K. (2014). Justice without Peace? International Justice and Conflict Resolution in Northern Uganda. *Development and Change*. 45, 592.

³³ Hayner, pp. 3.

³⁴ The Guardian (2015). Justice and peace go hand in hand – you can't have one without the other.

URL: <https://www.theguardian.com/global-development/2015/oct/26/justice-peace-conflict-affected-societies>.

Regarding ICC's intervention in northern Uganda, some authors have argued that arrest warrants have discouraged LRA members from coming forward and negotiating a peace agreement. Against the main narrative framed by Fatou Bensouda that ICC indictments were the main catalyst for the launch of the Juba Peace talks in 2006, Armstrong points at factors establishing a favorable environment for negotiations between the LRA and the government, as the Nairobi agreement signed in 1999 between the Ugandan and Sudanese governments required both to cease supporting rebels.³⁶ The view vehiculated by news media according to which justice was a necessity for durable peace was contradicted by Kony's insistence on the withdrawal of arrest warrants as condition to its signature of the peace agreement. However, by asserting that warrants were non-negotiable, the ICC prosecutor excluded the possibility of the involvement of Kony and the LRA in the peace process. Furthermore, the Ugandan case points out the extent to which the indictment of leaders involved in further regional conflicts can hinder peace negotiations in other regions, as LRA leaders were motivated after the release of ICC's arrest warrants to commit crimes in the Democratic Republic of Congo, the Central African Republic, and Darfur.³⁷

In Libya, similarly, it can be argued that ICC indictments fostered the continuation of criminal activities and violence on the part of the regime³⁸ and the delegitimization of members of the old regime, making their participation in the peace process impossible and thus hindering peace negotiations. As Hayner reports, a confidant of Gaddafi admitted that the old president felt trapped by ICC warrants and saw no other option than continuing the fights, preventing the possibility of a non-military end to the conflict.³⁹

However, this ought to be nuanced as there remains no substantial evidence that Gaddafi's attitude towards a negotiated settlement was actually affected by ICC's actions, given the existential threat posed by the NATO-led intervention to the regime.⁴⁰

3) Legitimization by ICC arrest warrants of "non-targets" hindering peace negotiations

In both northern Uganda and Libya, ICC's intervention legitimized the ICC "non-targets" and fostered their commitment to a military solution of the conflict and their rejection of a political compromise. By asserting particular narratives about a conflict, ICC interventions framed a simple dichotomy between the targets of the warrants, perceived as the "evil side" bearing the ultimate responsibility for the conflict, and the non-targeted, re-asserted as the "legitimate" side, the "good."⁴¹ This asymmetrical distribution of responsibility hinders the possibility of peaceful approaches to the conflict by increasing the cost of negotiations with ICC targets through their demonization.

In the case of Uganda, it can be argued that the state referrals to the ICC were inscribed in a wider strategy to obtain international legitimacy for the militarization of the conflict. Since the arrest warrants for the senior commanders of the LRA benefited government members by granting them a legal

³⁵ Marschall M. C. & Ishiyama J. (2016). Does political inclusion of rebel parties promote peace after civil conflict? *Democratization*, 23:6, 1009-1025, DOI:10.1080/13510347.2016.1192606.

³⁶ Armstrong, pp. 594.

³⁷ Gegout, pp. 805.

³⁸ Ibid, pp. 801.

³⁹ Hayner, pp. 4.

⁴⁰ Kersten, M. (2017). Targeting justice: targets, non-targets and the prospects for peace with justice. *Canadian Foreign Policy*. 23, 250.

⁴¹ Ibid, pp. 251.

“stamp of approval,”⁴² they were free to use military means against the rebels in the context of *Operation Lightning Thunder*. In fact, while LRA members responded to the ICC’s intervention by challenging the dominant conflict narrative and choosing to commit to peace negotiations, the government pursued the strategy to distort the peace process by dividing LRA members through secret cash payments.

In Libya, similarly, the SC referrals resulted in the targeting of some government members, the participation in the criminalization of the regime, and the delegitimization of any negotiations with past government members. The roadmap drawn by the African Union, which included official peace talks and also provisions for delivery of humanitarian aid, was rejected by the NTC, but accepted in April 2011 by Gaddafi. By ignoring the reports highlighting the use torture within detention centers controlled by the NTC, the ICC further entrenched the biased Manichean narrative of the conflict.

4) Clash between the SC and ICC as clash of peace vs. justice

Included in the Rome statute is the Security Council’s ability to refer a case to the ICC, in congruence with Article 15.⁴³ However, the possibility that ICC’s jurisdiction induces a judicial process insensitive to the peace concerns of the Security Council subsists.

In this context, the case of Libya represented the conflict between the Security Council and the ICC, and specifically between their respective goals towards peace and retributive justice, since the adoption by the Security Council of the Resolution 1970. This led to the opening of the investigation by Ocampo less than a week after the referral of the case. The rapid pace of action was sharply criticized by the African Union. After the realization of an even balance of power through NATO aid supporting the rebels, a stalemate was reached, providing a promising opportunity for negotiations. ICC’s arrest warrants were then seen by the SC as an obstruction to the possibility for a political resolution of the conflict. Hence, when the NTC came to power and refused to execute the warrants, the Security Council took no credible measures to pressure Libya to cooperate with the ICC, revealing the discrepancies between the two institutions.⁴⁴

This raises the question of whether the Security Council has an obligation, of any nature, to the ICC. Should the Security Council have enforced ICC’s arrest warrants in the case of Libya? Does one of the institutions prevail? These questions remain unresolved.

To conclude this part, I argue that the ICC intervenes in contexts of multiple conflict dynamics, while creating incentives and disincentives for negotiation for both the targeted and the non-targeted. However, can we assert that the ICC is an obstacle to peace, considering that no real peace took place in northern Uganda since 1986 and that the use of violence by Gaddafi might have been inevitable? The peace vs. justice paradigm applied to the Ugandan and Libyan cases suggests that ICC justice prevented a peace agreement, hence assuming that a peace agreement is a guarantee for peace. If one considers the broader sense of peace, can ICC intervention also facilitate peace?

⁴² Kersten, pp. 252.

⁴³ Rome Statute, Article 15.

⁴⁴ Kyle, J. (2016). "The "New Legal Reality"?: Peace, Punishment, and Security Council Referrals to the ICC." *Transnational Law & Contemporary Problems*. 25 (1): 131.

B. ICC as facilitator to peace, inscribed in the “peace via justice” paradigm

1) The ICC within the “Peace via justice” paradigm

The possibility of reconciliation of peace and justice has been re-formulated by Porter, who argues that “peace provides the conditions in which law and order can be restored and all forms of justice considered.”⁴⁵ Here, the link established between peace and justice sends us back to a positive conception of peace, which puts emphasis on structures of violence and war. Positive peace, Galtung argues, aims at solving the root causes of conflicts, providing the basis for long-term peace, in contrast to negative peace characterized by the absence of war (Galtung’s distinction).

ICC’s justice, through the punishment of individual perpetrators and the rehabilitation of individual victims, can strengthen the culture of peaceful settlements of conflict by eliminating the strive for vengeance on the part of the victims and avoiding collective guilt and myths of victimhood.⁴⁶ Louise Arbour, former President of International Crisis Group, has argued that “justice and peace are interdependent, the challenge is to reconcile the inevitable tensions.”⁴⁷ Similarly, Bensouda asserted that “the road to peace should be seen as running via justice, and thus peace and justice can be pursued simultaneously.”⁴⁸

2) Preventive effect of the ICC

The “peace via justice” paradigm is underscored by ICC’s role in preventing future crimes, both on the national and international levels. Shifting away from the utilitarian basis of deterrence, one could argue that “prevention” of future conflicts is one of the most important impact ICC’s arrest warrants can exercise on the peace process.⁴⁹ By impacting the moral standing of government members indicted by the Court and conferring them a global pariah status, ICC indictments can deter other heads of state from conducting similar crimes. The new international moral culture framed by the ICC entrenches the possibility of heightened respect for the rule of law and the emergence of a new “global dynamic of accountability.”⁵⁰

Also, by marking the end of the impunity of national leaders, ICC action could encourage the government to reduce violence and bring national courts to act against criminals, and hence contribute to the implementation of the “Responsibility to Protect” on the national level.⁵¹ In Libya, the indictment of government members enabled the reduction of political support given to the government, responsible for numerous human rights abuses, and encouraged Libyan politicians to distance themselves from indicted government members.⁵² Similarly, the preventive effect of the ICC could participate in the dismantlement of violent groups through their delegitimization. ICC sidelining of the LRA encouraged the population to distance itself from indicted individuals and from the use of political violence. Also, one could argue that ICC’s intervention encouraged Nigeria to organize trials to judge members of Boko Haram. However, the preventive effect of the ICC ought to be nuanced, as the ICC’s intervention in Libya has not prevented Assad’s abuses on human rights, according to the UN’s report. Similarly, the ratification by the Mali government of the ICC treaty in 2000 did not prevent governmental troops and rebels from committing war crimes in northern Mali in 2012.⁵³

⁴⁵ Porter, E. J. (2015). *Connecting peace, justice, and reconciliation*. London: Lynne Rienner Publishers, pp. 113.

⁴⁶ Krzan, B. (2017). International Criminal Court Facing the Peace vs. Justice Dilemma. *International Comparative Jurisprudence*, pp. 82. URL: <https://doi.org/10.1016/j.icj.2017.01.001>

⁴⁷ The Guardian (2015). Justice and peace go hand in hand – you can’t have one without the other. URL: <https://www.theguardian.com/global-development/2015/oct/26/justice-peace-conflict-affected-societies>

⁴⁸ Kersten, pp. 256.

⁴⁹ Mendez, pp. 148.

⁵⁰ Ibid, pp. 145.

⁵¹ Gegout, pp. 812.

To conclude this part, the debate on whether the ICC is an obstacle or facilitator of peace is underscored by the “peace vs. justice” and “peace via justice” debate, underlying different conceptualizations of peace and justice. While proponents of the “peace vs. justice” paradigm often focus on the conception of peace in its negative meaning as short-term peace agreement, the “peace via justice” paradigm rather entrenches a more positive conception of peace in its sense of long-term reconciliation. In the following section, I will hence demonstrate how peace and justice can be reconciled in the framework of ICC’s intervention through an analysis of their link in the Rome statute and ICC jurisprudence.

III. The link between peace and justice in the Rome Statute and ICC’s jurisprudence

The complementarity of peace and justice was already affirmed in the Nuremberg Declaration on Peace and Justice of 2008, stating that, “Peace and justice, if properly pursued, promote and sustain one another. The question can never be whether to pursue justice, but rather when and how.”⁵⁴ Within the Rome Statute itself, several instruments are provided in order to take into account the interests of peace, going beyond the goal of “international justice” provided by the Preamble.

A. Role of the deferral to the SC

The Security Council posed certain limits to the unlimited exercise of retributive justice by the ICC through its special power to defer proceedings provided by Article 16 of the Rome Statute. In fact, the legitimization of SC’s deferral power is based on the connection established between combating impunity and maintaining international peace and security.

Some limitations of Article 16 ought however to be highlighted by the Ugandan case, as deferring proceedings in the name of peace and justice can be used by governments and potential indicted criminals like Kony as a means to divide the international community.⁵⁵

Similarly, in Darfur, after the African Union attempted to defer the ICC arrest warrant of Bashir in 2008 and the Court refused, the African Union used the deferral to legitimize its choice not to cooperate with the ICC for the arrest of the Sudanese president.⁵⁶

⁵² Kersten, pp. 260.

⁵³ International Criminal Court. Mali: Situation in the Republic of Mali ICC-01/12. URL: <https://www.icc-cpi.int/mali>

⁵⁴ UNGA (2008). Nuremberg Declaration on Peace and Justice. A/62/885. URL: https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/Stocktaking/Nuremberg%20Declaration%20UNGA.pdf

B. Reconciliation of peace with justice through positive international complementarity

First, the Rome Statute enables the realization of positive international complementarity by permitting the OTP to publish the preliminary examinations and monitoring activities of the ICC before launching an investigation, according to Article 15 of the Rome Statute. Third parties such as IOs, NGOs, and national authorities are hence granted increased leverage and are given the possibility participate in the fulfillment of the ICC mandate to combat impunity. It has been argued that this provision has impacted the level of ongoing violence in Kenya, Georgia, and Cote D'Ivoire, with rates of violence decreasing sharply following the publishing of the preliminary and monitoring activities.⁵⁷

Secondly, the ICC jurisprudence permits the establishment of alternative justice mechanisms with the goal of enhancing prospects for peace. In the Ugandan case, the referral to the Court gave rise to the enforcement of proactive complementarity permitting the establishment of the "Ugandan Truth Commission" and the Mato Oput process. Even though the Ugandan Truth Commission never materialized, and the Mato Oput Process did not prove to be a realistic option for reconciliation, the AJMs have the capability to fulfill restorative justice through truth telling and reporting on individual and institutional causes of conflict.

The ICC could thus act as a catalyst in the global fight against impunity, promoting peace with justice through a positive complementary strategy going beyond blind justice and adapting to the different contexts on the ground. This positive complementary strategy was reinforced by the international community as an agent of "global peace within justice," in the context of the development of universal jurisdiction.

C. Role of the discretion of the prosecutor

The prosecutor has some discretion on which cases to investigate, according to Article 13 of the Rome Statute. Luis Moreno-Ocampo has influenced the role of the prosecutor in the framework by focusing its role in managing the tension between the peace and justice and arguing that the Prosecutor should "follow the various national and international efforts to achieve peace and security, as well as the views of witnesses and victims of the crimes."⁵⁸ Moreno-Ocampo suggests that there is no "proper linear peace-to-justice" trajectory,⁵⁹ as the ICC has the double potential to challenge impunity and impact peace negotiations. In this framework, the Court has the ability under Article 17 to defer proceedings as well as refer to the principle "bis in idem" under Article 20 of the Rome Statute.

However, the role of Prosecutor is subject to controversies within the Court, as the Office of the Prosecutor considered in 2007 that "the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions,"⁶⁰ in contrast to the view of Moreno-Ocampo.

⁵⁵ Krzan, pp. 86.

⁵⁶ Ibid, pp. 85.

⁵⁷ Mendes, pp. 146.

⁵⁸ Chrzan, pp. 85.

⁵⁹ Ibid, pp. 86.

Conclusion

While the ICC can exert a positive effect on peace through its preventive influence, the ICC can also have a negative effect on peace settlements through the exclusion of targeted actors from the peace process and the legitimization of a military solution or lack of compromise from the non-targeted actors of a conflict. However, some mechanisms such as deferral, enhanced discretion of the prosecutor and international complementarity are provided within the Rome Statute and the ICC jurisprudence in order to reconcile both aims.

I would suggest that we move beyond Walzer's ethic of legalist justice, overestimating the power of International Criminal Law and its capacity to be delivered in the absence of politics, in order to fully accept its interdependence with (other) political actors.⁶¹ In fact, the contribution of the ICC to both justice and peace and its ability to reconcile both aims depend on structural and agency factors, such as ICC legitimacy among states and the support it can gain from the international community.⁶² In fact, member states play a crucial role in creating a safe environment for victims of crime and implementing arrest warrants, for instance.

⁶⁰ International Criminal Court (2007). Policy Paper on the Interests of Justice. URL: <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF0973422BB23528/143640/ICCOTPInterestsOfJustice.pdf>

⁶¹ Rodman, pp. 69.

⁶² Gegout, pp. 813.

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