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☆

Bartłomiej Krzan

University of Wrocław, Poland

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.

E-mail addresses: bakr@prawo.uni.wroc.pl, bartlomiej.krzan@uwr.edu.pl.

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