

Peace versus Justice: A False Dichotomy

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Introduction

The tensions between making peace and promoting justice and accountability have led to the creation of an extensive amount of scholarship on the subject. The essence of the debate is whether or not peace or justice should take precedence over each other, and if so, why? Those who advocate for peace to take precedence defend their argument by claiming that pursuing justice and accountability will only create more conflict in an already difficult situation. Those who advocate for an inclusion of justice and accountability, claim that sustainable peace is not possible without accountability and justice. Primarily, throughout this paper we will argue that the dichotomous debate of peace *versus* justice is false, as it relies on a dubious and narrow understanding of both peace and justice. In contrast, in understanding peace as more than just the cessation of immediate violence, and understanding justice in more than retributive terms, we see justice as a necessary and fundamental aspect of attaining peace. It is important to note that every conflict is *sui generis*; there can be no one-size fits all approach. Furthermore, owing to the textual constraints, we have limited our analysis to focus solely on the particular issue of accountability for atrocity crimes, which we define as that of genocide, crimes against humanity, war crimes, and ethnic cleansing. We also confine our analysis primarily to consider the debate around post-conflict peace agreements. To this extent, we argue that justice should be incorporated into any starting analysis of conflict resolution. One should also note that for each example of a case where one approach did or did not work, there will always be another case to counter it. Ultimately, we will argue that a pro-justice approach offers the best opportunity to foster a comprehensive and sustainable peace. In countenance, we concede that the pro-justice argument is problematized by its assumption of infallibility as embodied in the International Criminal Court (ICC), however, we assert that this is an issue of the Rome Statute, and not of international criminal justice approaches.

A history of the debate

The history of the debate between peace and justice in transitional approaches to post-conflict resolution has largely followed three main phases. Beginning with the Nuremberg and Tokyo trials, which reflected ‘the triumph of transitional justice within the scheme of international law,’ we have witnessed a gradual shift of the paradigm from peace towards the ‘historical pursuit of justice’ (Teitel 2003: 69). This follows the evolving norms of international human rights, which has disseminated into a growing anti-impunity agenda. The first phase in the genealogy of the debate dates back to regime changes in Latin America during the 1980s and early 1990s, where the use of blanket amnesties was justified by outgoing autocratic regimes as a necessary requirement for the shift towards democracy (Renée 2014: 50). Consequently, authoritarian leaders in Argentina and Chile self-granted their own blanket amnesties, arguing for a ‘collective amnesia’ towards the wrongs of the past; assuming ‘at that time the desire for political stability simply out-balanced that of accountability’ (Kushleyko 2015: 32). The 1990s witnessed a paradigm shift in thinking, when the ‘criminal turn’ led to calls for greater accountability to combat perceived impunity. The promotion of prosecution in domestic and international proceedings became an ‘indispensable requirement’ to secure both justice and peace (Sander, 2017). As epitomized in the case of South African Truth and Reconciliation Commission, this phase brought positive erosion from amnetic, unconditional amnesties to smart, conditional ones as a tool of achieving restorative justice (Kushleyko 2015). Finally, in 1999, the UN expressed its official stance not to condone amnesties for serious international crimes, marking the formal beginning of the third phase of the debate, which has been marked by a legal prohibition on granting impunity for atrocity crimes.

The Legal Approach

The legality of amnesties under international law has evolved considerably alongside human rights norms, transitional justice mechanisms, and international criminal law itself. To this extent, atrocity crimes including genocide, ethnic cleansing, crimes against humanity, and war crimes, are all considered to be *jus cogens* norms under international law, entailing obligations *erga omnes* (Bassiouni 1996: 17) under customary international law. States therefore have a duty to prosecute such crimes under international law (Scharf 1999; Freeman 2009: 36). This obligation stems from various international treaties, including the 1949 Geneva Conventions, which established a duty to provide 'effective penal sanctions for persons committing, or ordering to be committed...grave breaches of the Conventions'. Whilst the Geneva Conventions are applicable during armed conflict, the International Committee of the Red Cross recognised the broadening applicability of a duty to prosecute in non-international armed conflicts in 2005. As of 2002 with the entry into force of the Rome Statute, all states parties have a legal obligation under Article 17 to prosecute these crimes under the Court's jurisdiction (Rome Statute 1998).

The obligation to prosecute necessarily entails the illegality of impunity for such crimes, exemplified by blanket amnesty approaches. The shift in international legal thinking on the legality or admissibility of blanket amnesties was crystallised by the Special Court for Sierra Leone in *Prosecutor v. Morris Kallon and Brima Bazzy Kamara*, finding that 'where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty. It is for this reason unrealistic to regard as universally effective the grant of amnesty by a State in regard to grave international crimes in which there exists universal jurisdiction. A State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember' (SCSL: 2004 §67). The Special Court for Sierra Leone therefore rejected blanket amnesties put in place by the 1999 Lomé Peace Accord, which it deemed a domestic agreement that could not supersede international convention. Whilst the Rome Statute itself makes no specific mention of amnesty (Scharf 1999), the obligation *erga omnes* of atrocity crimes means that the ICC can simply refuse to recognize amnesties. Under international law, blanket amnesties covering atrocity crimes are therefore now largely considered to be inadmissible, and international tribunals are not bound to uphold them in practice.

Defining Peace

Johan Galtung's definitions of negative and positive peace are crucial to a better understanding of the debate between peace and justice. He defines negative peace as the absence of violence (Galtung, 1967, p.17), such as when a cease-fire is enacted. In contrast, positive peace necessitates the addition of positive elements including reconciliation, in order to make peace long-term and sustainable. Considering the debate in these terms, attaining a positive, lasting peace necessitates the implementation of justice mechanisms, rendering the justice versus peace debate a false dichotomy. To illustrate, Bassiouni claims that 'peace is not merely the absence of armed conflict; it is the restoration of justice, and the use of law to mediate and resolve intersocial and interpersonal discord.' According to Clark, today's Bosnia-Herzegovina is in a state of negative rather than positive peace, as there is an absence of immediate conflict, but 'no real reconciliation in the sense of a repair and restoration of relationships' (Clark 2009: 363). To this extent, peace must be understood and evaluated as more than a simple and immediate cessation of violence; there can be no positive peace without justice.

Defending Impunity

Certain scholars argue that attempts to combat impunity by promoting accountability in transitional justice mechanisms impedes the peace process and prolongs conflict by destabilizing an already fragile situation (Evans 2008). Threatening punishment may lead to a pre-emptive or retaliatory response, ‘thereby feeding into the spiralling process of escalation’ (Wagner 1988: 6). For example, critics of a justice-based approach argue that Ntaganda’s 2012 M23 rebellion in the DRC was instigated by his personal fear of prosecution (Broache 2015). In addition, proponents of justice are said to pay insufficient attention to the nuances of a political context, as efforts at juridical solutions may in fact lead to a return or worsening of armed conflict (Sriram 2007: 587). Therefore, many peace mediators openly advocate for a post-conflict settlement which compromises or barter away attempts at holding atrocity crimes accountable (Gates et al. 2007: 1). In contrast, offering blanket amnesties, by providing a shield from prosecution (Mallinder & McEvoy 2011: 111), present a necessary evil in convincing parties to a conflict to enter into peace negotiations or to lay down arms. It is precisely the unconditional nature of blanket amnesties in offering impunity that makes them a vital tool in the peacemaker’s toolkit.

However, quantitative studies show that out of the 43 states offering amnesties to rebel groups in order to secure peace deals between 1974 and 2007, 28 states offered the amnesty more than once, and 19 states offered an amnesty more than three times (Renée 2014: 109). The success rate of amnesties is only 34%, and the rate at which amnesties offered to rebels actually bring peace, either in isolation or directly by contributing to a peace deal, is even lower (Renée 2014: 109). This fundamentally undermines the argument that amnesties are necessary in attaining peace, and suggests that they are an ineffective means of ending violence. Furthermore, recent experience in Argentina, Chile, and movements towards the criminalization of Franco-era abuses in Spain, demonstrate the fact that not even the long-term imposition of blanket amnesties results in the desired collective amnesia for atrocity crimes.

Opponents of blanket amnesties raise their concerns over the issue of impunity, as such an approach rewards crimes that go unchallenged. This becomes even more problematic where negotiated peace deals involving amnesties include unity government positions for those guilty of committing atrocities (HRW 2009: 35). In particular, Kritz suggests that the impunity *emboldens* the perpetrators of past atrocities and may lead to further violence; as such crimes go unpunished and undeterred (Kritz 1997: 127). For example, the 1999 Lomé peace accord provided blanket amnesties for the Revolutionary United Front (RUF) and the government, and awarded some RUF members with positions in the unity government. Despite the impunity afforded as an incentive to peace, fighting broke out within two months as the RUF refused to disarm (HRW 2009: 60). Rather than attain peace, successive fighting after the granting of amnesty worsened, as the continued expectation of amnesty for crimes ‘emboldened potential human rights abusers’ (HRW 2009: 61). It was only with the instruction of the Special Court for Sierra Leone and criminal prosecutions in the face of blanket amnesties that violence ceased (Mue 2014). Similarly, the South Sudanese government issuance of de facto amnesties and positions of power to abusive leaders only emboldened those who had committed severe war crimes, and further created a culture of impunity and sense of injustice in the country, contributing to the current crisis and inability to achieve peace (Keppler 2014). This fundamentally problematizes the assertion that blanket amnesties bring about peace, in either positive or negative conceptions.

A Middle Way?

Despite the dichotomous extremes between notions of peace *versus* justice, transitional justice and post-conflict peacebuilding approaches comprise a wide range of nuanced approaches encompassing elements of both peace *and* justice (Evans, 2008). Although both postponement of justice, as exemplified by Argentina and Chile, and lustration as seen in post-World War II Germany, Japan, or 1990s Bosnia, represent subtleties of this approach, proponents of truth and reconciliation commissions (TRCs) assert a middle way in bridging the gap between retribution and reconciliation. This approach to peace is underpinned by the positive conception of peace, in recognising victim's needs towards a process of reconciliation (Renée 2014: 99). TRCs 'attempt to create a historical record of past atrocities to ensure an accurate portrayal of them in the future' (Fiddler 2015), and thereby allow for the 'disinfection' of conflict-inflicted wounds and 'cathartic relief' (Sarkin 2008; Waldman: 2004). For example, South Africa granted conditional amnesties to individual offenders who fully disclosed their political offenses in a truth-telling exercise (Mallinder & McEvoy 2011: 115). This approach has been highly lauded, and attempts have been made to transpose this process internationally to deal with other post-conflict peacebuilding (Freeman 2009: 3). Predominantly, advocates of TRCs assert that offering conditional amnesty for truth-telling attains restorative justice, as truth-telling would 'create peace in communities by reconciling the parties and repairing the injuries caused by the dispute' (Renée 2014: 10). In doing so, the use of amnesty shifted towards a tool of remembrance, acknowledgement, and knowing forgiveness, as opposed to collective amnesia (Porter 2015: 99), in a move that sought to use amnesties to foster accountability.

Despite its international reputation as a success story, South Africans themselves have been less sanguine about the TRC (Gibson 2005: 343). Local critics lament that the process aggravated racial tensions by uncovering the details of the misdeeds of everyone involved, and therefore called into question the future of coexistence under a new democratic regime and, more broadly, the realization of positive peace (Biko, 2000 cited in Gibson, 2005:344). Crucially, whilst the process was cathartic for victims, many felt that the process 'bought their adversaries freedom, but left them (...) emotionally enslaved' (Waldman 2004: 369). Indeed, the quid-pro-quo nature of amnesty conditional on truth raises questions on the legitimacy or ingenuity of a truth that has been effectively bought in a self-interested exchange for amnesty (Porter 2015: 82). Furthermore, a survey conducted by the Centre for the Study of Violence and Reconciliation has found that 44% of white South Africans do not believe the system of apartheid was unjust, whilst a similar proportion of people believe it was a good idea but badly executed. A third believed that apartheid had done more good than harm to South Africa. Crucially, a majority of white South Africans do not believe they bore any responsibility for the crimes of apartheid (Theissen & Hamber 1998). This suggests that the TRC has largely failed in establishing a definitive historical record between both groups, 'apartheid is not perceived as inherently evil by everyone' (Gibson 2005: 335), and in this case, the 'truth' is still relative. Despite its celebrated status, a careful analysis of the South African situation reveals that there has been little real reconciliation. The TRC may have achieved negative peace in avoiding on-going violence, but a positive peace has yet to be attained.

Finally, some scholars argue in favour of the sequencing of peace and justice (Mbeki and Mamdini 2014) as a means of reconciling perceived tensions between peace and justice. This approach suggests that peace should take precedence, whilst at the same time acknowledging the necessity of justice in building a sustainable, positive peace (Kersten 2011). Proponents of this approach often point to the experience of Latin American states in pursuing

blanket amnesties to facilitate the transition of authoritarian regimes towards democracy. However, over the last two decades, judicial bodies have started to challenge amnesty laws in order to justify further investigations (Alihusain 2011). Persistent calls for accountability culminated in 2005, when the Argentine Supreme Court of Justice formally declared blanket amnesties unconstitutional and therefore void¹. Following in the footsteps of Argentina, and in accordance with the principle of compliance with international law, Uruguay, Peru and Chile have all formally or informally annulled their amnesty laws, and are now bringing to justice the architects of the human rights violations committed in the past. However, in contrast to claims that prioritizing peace is a legitimate prerequisite in procuring a stable environment to administer justice, adversaries of the sequencing theory point to a logical fallacy. The utility of a blanket amnesty lies in its unconditionality in shielding the recipient from future prosecution. An amnesty that will be revoked in future is not an amnesty, as it undermines the credibility of the future promise (Kersten 2014: 49). Consequently, the approach may only be utilised a few times before the precedent is realised, challenging its long-term effectiveness as a useful approach to conflict resolution.

No Peace Without Justice

Thus far, we have sought to present fundamental challenges to approaches to conflict resolution that seek to promote impunity. Crucially, we have sought to assert that at best, impunity may attain negative peace but fail to promote genuine reconciliation. To this extent, we assert that narrow conceptions of negative peace (Galtung 1967) fail to promote a holistic approach to peacebuilding that are long-term and sustainable. In contrast, our understanding of a positive peace enlightens the peace versus justice debate as a false dichotomy. The goal of transitional justice is arguably to pursue justice in order to achieve long-lasting peace. Whilst we assert that conceptions of *retributive* justice, including punishment and deterrence, are necessary to achieve many of the aims of long-term peace, real reconciliation requires more than a narrow understanding of justice as retributive. Ultimately, a combination of restorative and retributive justice elements entails principles of deterrence, accountability, the rule of law, breaking the cycle of impunity, and a victim centred approach that focuses on establishing the truth, thereby allowing us to view justice through a wider lens.

It is important to distinguish between the different types of justice, namely retributive and restorative justice. The ICTJ points out that transitional justice is ‘the application of a human rights policy in particular circumstances’ (ICTJ 2009). Transitional justice presents a broad framework, encompassing restorative and retributive approaches within its scope. According to Jallow, transitional justice ‘comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses in order to ensure accountability, serve justice, achieve reconciliation, and possibly deter recurrence’ (Jallow 2009: 77). Within this, retributive justice takes a punitive approach, advocating specifically for punishment of criminals in order to effect deterrence in challenging impunity (Krzan 2017). In contrast, restorative justice takes a victim-centred approach, which views violence as a violation of people’s rights and relationships. Restorative justice seeks to establish individual accountability, deter future violations, establish a historical record, promote healing, provide victims with a means of redress, and support capacity-building (Porter 2015: 14). Retributive justice is concerned with punishing those who have violated the law, while restorative justice sees crime as a violation of people and relationships, and therefore

¹ *Causa No. 17.768 c. Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, No 17.768, Argentina: Corte Suprema de Justicia, 14 June 2005

sees justice as searching for repair, reconciliation and reassurance (Clark 2008: 340). Pursuing both retributive and restorative transitional justice measures therefore provides post-conflict societies with many of the crucial elements needed to foster comprehensive and sustainable peace, by seeking reparations, accountability, deterrence, a truthful historical narrative, and ultimately reconciliation amongst society as a whole. We will now move to analyse each element of transitional justice processes.

Pursuing accountability and justice through prosecution at the international or national level seeks to individualize guilt in order to prevent collective accusations that imply an entire population was responsible for the conflict. Criminal trials play an important role in expressing 'public denunciation of criminal behaviour, providing a direct form of accountability for perpetrators, and ensuring a measure of justice for victims either through reparations or the satisfaction of seeing perpetrators being held to account' (Jallow 2009: 78). This is particularly important, as ending impunity through accountability signals a firm break in the cycle of impunity, helping to build trust in the new government as distinct from the crimes of the past (Gloppen 2005). This helps to build legitimacy in the new government, which in turn can aid long-term stability in attaining peace (Elster 2005).

Furthermore, pursuing accountability fundamentally helps to establish the rule of law in post-conflict societies (King 2013: 91), the breakdown of which allowed impunity and atrocity crimes to flourish in the first instance. The rule of law is usually understood as referring to a principle of governance 'in which all persons, institutions, and entities, including the State itself, are accountable to laws consistent with international human rights norms and standards' (Jallow 2009: 77). Promotion of the rule of law has been seen as a necessary precondition for successful reconciliation in societies struggling with gross violations of human rights such as Sierra Leone, Rwanda or Cambodia. Respect and adherence to the rule of law is a means of promoting peace in a society that has been torn by conflict (Jallow 2009: 78). According to Jallow, approaches taken to pursuing justice and restoring the rule of law after civil conflict, which include recourse to the ICC, international criminal tribunals and ad-hoc tribunals, national trials, truth commissions, and panels of inquiry, clearly show 'seeking justice through institutions of the law is one of the best means of determining responsibility for acts of genocide, war crimes, crimes against humanity, and other gross violations of human rights' (Jallow 2009: 78). Both the ICTR and the ICTY demonstrate the effectiveness of asserting justice and accountability at the international level in situations where national judicial systems have broken down. They also reflect 'a shift in the international community away from a tolerance for impunity and amnesty and towards the creation of an international rule of law' (Jallow 2009: p.79). International tribunals can thus help fill a gap for nations unable to adequately pursue rule of law. Concurrently, the use of local and national justice structures to pursue accountability is integral, where the context and circumstances are amenable and appropriate, as national level trials may deal with a larger number of perpetrators, whilst restoring the rule of law and judicial processes at the local level. Pursuing accountability through transitional justice mechanisms, whether this is through international or national strategies, is therefore integral to rebuilding the rule of law and national trust in governance structures, which are foundational building blocks for peaceful and sustainable societies and the prevention of a return to conflict.

Justice and accountability are crucial elements to achieving long-lasting peace due to their deterrent effect. Holding individuals accountable for atrocity crimes committed makes it clear that these types of acts will not be tolerated, thus seeking to prevent further atrocities. By proportioning individual criminal responsibility, prosecutions can assuage collective anger and

prevent reprisal attacks, therefore contributing to long-term peace (Minow 1998: 11). For example, the theme of deterrence emerged as an important justification for the war crimes trials in Bosnia, wherein the claim ‘no peace without justice’ represented the belief that criminal justice would pave the way towards a sustainable peace. Pro-justice proponents also acknowledged that ‘even if international tribunals fail to deter further atrocities in a particular conflict, they are a sanction that increases the costs to potential future perpetrators’ which gradually leads individuals that might have become perpetrators to comply with human rights and humanitarian law (Vinjamuri 2010).

The notion of deterrence therefore encompasses both local and international elements, by requiring a ‘deliberate attempt to manipulate the behaviour of others through conditional threats’ (Freedman 2004: 2). To illustrate, an indictment by the ICC of parties to a specific context may produce a localised deterrence effect on the parties themselves. To this extent, following the ICC indictments of Joseph Kony and the LRA in Northern Uganda, the LRA no longer operates in this region, although it is still active in other States, arguably owing to an immediate deterrent effect and the consequences of continuing to operate in the region covered by the indictment (Grono & O’Brien 2008: 15). However, prosecutorial justice for atrocity crimes also provides a much wider, international form of deterrence, signalling to the international community that such crimes will not be tolerated. To this extent, pursuing accountability through criminal justice also has a deterrent effect through education and awareness-raising. For example, following Lubanga’s transferral to The Hague in 2006 for charges including the conscription of child soldiers, Human Rights Watch has documented the account of a Congolese General, who, upon learning of the criminal constitution of child soldiers as a war crime, demobilised his child soldier units to avoid criminal prosecution himself (HRW 2009: 125). The international element of deterrence therefore upholds a preventative element in pursuing criminal justice, as it aims to deter both future conflicts and facilitate a cessation of immediate conflict and atrocity crimes (Kersten 2014: 39).

The right to truth is a complex element within the overall debate. It is an important factor both for those pushing for immediate peace regardless of justice, and those pushing for justice to achieve peace. Truth is an integral part of establishing peace post-conflict. For reconciliation to happen, many scholars argue that an exchange of truth is required, whereby each side is able to present its version of the truth, to be heard and to be acknowledged, particularly as there is rarely a black and white demarcation between victim and perpetrator groups. In order to avoid rival narratives fuelling future conflicts, it is imperative that people learn to acknowledge the validity of other people’s truths (Clark 2008: 335). As previously discussed, the South African TRC is often lauded as a beacon of transitional justice. However, the South African TRC failed to apportion responsibility, and has led to competing accounts of truth. In contrast, criminal justice mechanisms necessitate a more stringent evidentiary requirement in promulgating an accurate historical record, thereby conferring legitimacy on the facts (HRW 2009: 6). This prevents different groups, and particularly oppressor groups, engaging in historical revisionism. Establishing an accurate historical record therefore aids reconciliation and sustainable peace by asserting an undisputable truth for both victim and perpetrator groups, a process which may be both cathartic and preventative in mitigating against revisionism.

The process of restoring peace post-conflict without pursuing justice often avoids dealing with the victims’ needs and giving a society a sense of closure. A key element of pursuing justice post-conflict entails establishing the truth, as mentioned above, as well as punishing those directly responsible for the human suffering, offering redress to the victims

and allowing for reconciliation (Bassiouni 2003). Sooka states that efforts to ‘repair victims’ are an essential element of transitional justice, and that reparations programs contributing to justice are a form of recognition that materializes and recognizes that ‘citizens owe to those whose fundamental rights have been violated’ (Sooka 2006: 320). As amnesties effectively grant collective forgiveness (or collective amnesia), it is arguably the place of *victims* to grant forgiveness, and not the place of governments (Bassiouni 1996: 9). The issue of victims’ rights becomes increasingly problematic when viewing amnesties through a gender lens, as peace processes involving impunity often result in a process of ‘men with guns forgiving other men with guns for atrocities carried out against women’ (de Jonge Oudraat et al. 2011: 117). Bassiouni therefore claims that sacrificing justice and accountability for what he calls the ‘immediacy of realpolitik’ represents a ‘short-term vision of expediency over more enduring human values’ (Bassiouni 2003).

Reconciliation and forgiveness are an important part of rebuilding a post-conflict society. According to Sooka, reconciliation measures including reparations must be understood in the context of a set of objectives: justice for victims, accountability of perpetrators, establishing truth and democratic institutions and repairing those destroyed through the conflict, dealing with what gave rise to the conflict, eliminating fear of living together, rebuilding trust in government and its institutions, and building social solidarity amongst citizens (Sooka 2006: 321). These objectives together create a holistic transitional package that contributes to rebuilding democracy and peace. Moreover, justice cannot be solely retributive if the goal is to establish peace in a sustainable and comprehensive manner. A victim-centred approach is necessary, as victim repair and reconciliation are vital in resolving the root issues of a conflict. By acknowledging the pain and suffering that victims went through, establishing the truth, naming the perpetrators, and providing reparations, we allow for reconciliation and provide closure to the victims, reducing the chances of them feeling that justice was not served and thus reducing the chances of conflict re-emerging.

Does justice undermine peace negotiations?

The most potent charge levelled at those who advocate for post-conflict justice is that pursuing justice risks destabilising fragile conflict situations. In pushing for justice, those accused of atrocity crimes will be emboldened to fight for survival, leading to an escalation of violence and a prolongation of conflict (Goldsmith & Krasner 2003: 51; Bratt 1999: 75; Sriram 2007: 587). Furthermore, critics assert that pushing for trials is only likely to undermine attempts to negotiate peace agreements to intractable conflicts, as it provides little incentive for guilty leaders to lay down their arms (Scharf 1999: 509; HRW 2009: 18). Critics point to the ICC’s refusal to withdraw indictments for Joseph Kony and four other LRA commanders in a disavowal of Uganda’s 2000 Amnesty Act as the primary reason for a breakdown in peace negotiations in 2008 (Clark 2011: 541). The problem becomes more acute given the different strategic calculations between rebels and those already in power, as the threat of indictment ‘is a stick that loses much of its deterrent power when it is applied to those still in office’ (Grono & O’Brien 2008: 17). Arguably, the ICC’s initial indictment of Sudan’s al-Bashir for crimes against humanity and war crimes resulted in the expulsion of 13 humanitarian aid agencies, leaving over one million people without access to basic necessities (Akhavan 2009: 648). Consequently, the threat of indictment has incentivised al-Bashir, in addition to other authoritarian leaders guilty of atrocity crimes to cling to power, often by escalating violence and further destabilising conflicts.

However, such an argument wilfully ignores the wealth of evidence that pursuing transitional justice *supports* the pursuit of peace, as indictments and investigations have worked to marginalise and delegitimize actors guilty of atrocity crimes, diminishing their bargaining power (HRW 2009: 4). The ICC will prosecute only those individuals ‘most responsible’ for crimes committed under its subject matter jurisdiction (ICC). Advocates of retributive justice assert that in apportioning individual criminal responsibility (Article 25), criminal justice avoids collective guilt and revenge attacks (Kritz 1997: 128), and leads to marginalisation and delegitimization of those particular actors. In May 1999, the indictment of Yugoslav President Slobodan Milosevic by the ICTY ended in Milosevic accepting a peace agreement only a week later. Similarly, the Special Court for Sierra Leone’s June 2003 decision to unseal an arrest warrant for Charles Taylor for war crimes coincided with the opening of peace talks in Liberia. Rather than undermining the peace talks, the indictment ‘de-legitimized Taylor both domestically and internationally’ (HRW 2009: 22), and he willingly left office on 11 August 2003, having secured safe haven in Nigeria in hopes of staving off prosecution. Returning to the ICC’s indictment against Kony and the LRA, peace negotiations at Juba in 2006 were successfully broached for the first time in over a decade only after the ICC had issued indictments (Akhavan 2009: 642). Although Sudan continued to support the LRA covertly, evidence suggests that indictments for the LRA marginalized Kony and made it exceedingly difficult for Sudan to continue to support them (Kersten 2014: 114). As a result, Sudan agreed to a March 2004 protocol allowing Ugandan forces to attack LRA bases in southern Sudan, weakening the LRA’s military power, and further contributing to the appeal of peace talks (HRW 2009: 31; Akhavan 2009: 643). Whilst the ICC’s refusal to withdraw the indictment likely contributed to the LRA’s ultimate refusal to sign the peace agreement (Kersten 2014: 122), such an argument relies on the counterfactual assumption that impunity would have delivered a peace settlement (Akhavan 2009: 645), or that the LRA would have abided by it. Furthermore, whilst Kony and Vincent Otti continue to evade the ICC, the LRA is no longer active in Uganda and operates through remote mobilization units in the Democratic Republic of Congo, South Sudan, and the Central African Republic.

Is justice neutral?

Whilst the pursuit of justice in post-conflict settlements is vital in attaining sustainable, positive peace, the argument often assumes the infallibility of transitional justice as embodied by the ICC itself. A system of justice needs to be independent and impartial in order to be perceived as *just*, especially if transitional justice frameworks are to adhere to a wider conception of positive peace (Galtung 1967). Justice must not only be done, but must be seen to be done. This necessitates the strict demarcation between political and judicial considerations (Kersten 2014: 53). The ICC itself is premised on the understanding that ‘justice is an essential component of a stable peace’ (OTP 2007: 8), however, it is mandated only to consider issues of justice, ‘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: 9). Tensions therefore arise between the ICC’s strictly judicial mandate and the propagation that justice contributes to peace through the ‘shadow of the court’ (Kersten 2014: 53). Recently, such tensions have manifested in allegations of political bias and selective justice at the ICC, which have undermined its legitimacy and curtailed its capacity to pursue justice effectively.

It is clear that the pursuit of justice through indictments has positively impacted peace in a number of conflicts, however, the particular case of Sudan presents the limitations of international criminal justice as embodied in the ICC itself. Crucially, whilst prior indictments by the Court have proven to marginalize and delegitimize political leaders, al-Bashir has been

effective in presenting a counter-narrative of the ICC as a neo-colonial institution (Wegner 2015: 117; Cryer 2006: 219), problematizing the Court's own legitimacy to promulgate justice. In response to the worsening situation in Darfur, the UNSC referred its first situation to the ICC on 31st March 2005². Shortly after the Resolution's passage, Mr Erwa, Sudan's permanent representative to the UN asserted 'the Council even goes so far as to affirm that exceptions are only for major powers and that this Court is simply a stick used for weak States'³. At the time of the referral, all ICC investigations and indictments had focused on Africa alone, leading to mounting concerns of selective justice, directly solely towards African states (Murithi 2015: 77; Clark 2011: 524), despite a lack of valid reason for the bias (Branch 2012). Allegations of neo-colonialism were compounded by Ocampo's indictment of six individuals for Kenya's post-electoral violence in 2007, including President Kenyatta himself, under proprio motu powers (Murithi 2015: 85). The African bias has fuelled claims that the ICC pursues selective justice only towards weak states, undermining its veneer of impartiality and neutrality. Consequently, marginalisation of al-Bashir was ineffective in the face of a counter-narrative accusing the ICC of neo-colonial selective justice.

In addition to the African bias, the Court's neutrality has been undermined by its political relationship to the UNSC. The adoption of Resolution 1593, referring Sudan to the ICC under Article 16 powers, highlighted the ICC's uneasy status as a political tool of the UNSC. Article 16 of the Rome Statute allows the UNSC to refer a situation to the ICC regardless of whether the State under investigation has ratified the Rome Statute (Rome Statute 1998: §16). This is problematic, as Russia, the USA, and China are not parties to the Rome Statute, and are therefore exempt from prosecution by the ICC. Perceptions of the Court's political tendencies were given further weight in 2004, when Moreno-Ocampo held a *joint* press conference with President Museveni to announce an investigation in Uganda (Kersten 2014: 219). The ICC has been strongly criticised in Uganda for failing to prosecute crimes committed against the Acholi people by the UPDF, choosing to focus only on the LRA under the pretext of *gravity*⁴ (Clark 2011: 524). Furthermore, the AU's non-cooperation policy has highlighted the ICC's reliance on state enforcement, particularly as the UNSC has been unwilling to support the Court in its efforts to hold al-Bashir accountable. As the indictment for a sitting Head of State would set precedent that many AU leaders felt uncomfortable with, the AU has pursued a policy of non-cooperation with the ICC's investigations since July 2009 (Murithi 2015: 81-82). Since his indictment, al-Bashir has travelled freely to ICC member states, including Djibouti, Kenya, South Sudan, Chad, and crucially South Africa, further undermining the authority of the Court.

The final criticism made of international justice concerns the question of *who owns justice?* Critics argue that the ICC adopts a purely retributive brand of justice, delivered in remote courtrooms far removed from the conflict or victims. This is further countenanced by allegations of an imposition of western styles of justice. The argument is most strongly made in the Ugandan case, where the ICC is accused of ignoring the Acholi tribes cultural and traditional understanding of justice as a restorative process (Southwick 2005), achieved

² 31 March 2005, UN Doc. S/RES/1593. The Resolution thus passed 10–0–4. ^[17]_[SEP]

³ UNDoc.S/PV.5158, at 12 (Mr Erwa). ^[17]_[SEP]

⁴ Under Article 17(d) of the Rome Statute, a case is inadmissible if it is 'not of sufficient gravity to justify further action by the Court'. The concept of gravity has been criticized by William Schabas; 'The gravity language strikes the observer as little more than obfuscation, a laboured attempt to make the determinations look more judicial than they really are... They have undoubtedly convinced themselves that they have found a legalistic formula enabling themselves to do the impossible, namely, to take a political decision while making it look judicial.'

through their own *mato oput* reconciliation ceremony (Keller 2008: 225). Such an argument ignores the victims who are not members of the Acholi tribe; as a 2005 survey of Northern Ugandans demonstrated that 76% of respondents believed perpetrators should be held accountable. Additionally, there are questions over the translation and ambiguities of *mato oput*, which suggest that the ritual has been misrepresented internationally (Allen 2008: 49). Regardless, such an argument relies on a narrow understanding of the ICC's justice remit as purely retributive, and ignores the foundational principle of *complementarity* in the Rome Statute. To this extent, the ICC functions as 'a court of last resort', and only has jurisdiction in the event that States Parties prove 'unable or unwilling' to pursue justice (Rome Statute 1998: Article 17). Primary jurisdiction therefore rests with the State. Subsequently, Moreno-Ocampo asserted that 'the absence of trials before this Court, as a consequence of the regular functioning of national institutions would be a major success' (2003: 2).

Fundamentally, attaining a sustainable, positive peace requires restorative justice to deliver a victim-centred approach aimed at reconciliation as well as accountability. The focus of retributive justice on pursuing individual criminal accountability belies the reality that the commission of atrocity crimes requires a *structural* and *social* element (Mamdani 1997). This is particularly emphasised by the crime of Genocide, which needs to be understood as a process and not a single event (Rosenberg 2012). The 2009 trial of Lubanga at The Hague highlighted the issue of whether prosecuting so few individuals for war crimes in place of thousands who bore responsibility was only symbolic in nature (Hochschild 2009). To attain real reconciliation, transitional justice needs to pursue more than retributive justice. To this extent, the Rome Statute aims to place victim's rights at the centre of its mandate, earning it the moniker of 'the victim's court'. In particular, the ICC allows for unprecedented victim participation in the trial process under article 68. Similarly, Article 75 acknowledges reparative justice, which may be availed by the inauguration of a Trust Fund for Victims under Article 79. As of 2016, the Trust Fund boasts €12 million dedicated to assisting victims, providing rehabilitation, and reparations⁵. There is little doubt that restorative justice principles need improvement at the ICC, as lack of understanding of application processes and realistic outcomes is consistently highlighted by the Court's Outreach Unit (Clark 2011: 531). Whilst on going reform in pursuit of a restorative approach to justice is necessary, the ICC bears the foundations of a more restorative approach to international justice.

Concluding Remarks

Ultimately, we have argued that, whilst recognising each individual conflict as *sui generis*, careful analysis and evaluation reveal distinct advantages in favour of pursuing justice as part of post-conflict settlement. Crucially, we have asserted that narrow interpretations of negative peace and retributive justice lead to a false dichotomy between peace and justice. In contrast, a more holistic understanding of positive peace as long-term and sustainable, with a focus on restorative justice, resolves this false dichotomy to reveal that most post-conflict peacebuilding initiatives require a form of justice in order to effectively promote reconciliation. To this extent, we have asserted that pro-impunity approaches advocating for unconditional amnesties have not brought peace and have in many instances contributed to further violence. In contrast, holding perpetrators of atrocity crimes accountable entails their delegitimization and marginalization, which can aid peace negotiations, but also provide for the fulfilment of a whole spectrum of reconciliation measures as key elements in the process of peacebuilding.

⁵ The Trust Fund for Victims Annual Report Summary 2016, available online at http://www.trustfundforvictims.org/sites/default/files/imce/summary_EN_ONLINE.pdf

Whilst we have shown that a justice-based approach can promote sustainable peace, proponents of this approach often assume the infallibility of international institutions of justice as representative of this account. However, transitional justice as represented by the ICC has been fraught with allegations of political interference and selective justice, which have undermined its legitimacy and capacity to pursue justice effectively. In summary, we advocate for a holistic inclusion of accountability measures as a starting point for conflict resolution, but recognise the inherent limits of international justice institutions as they currently exist.

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