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# Human Security Perspectives



## Special Focus: Sustainable Peacebuilding

This edition of *Human Security Perspectives* has been edited by

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## **Trading Justice for Peace? Discretionary Possibilities for Renunciation of Criminal Prosecution under the Rome Statute**

### **Abstract**

The demand of “No Peace without Justice” is unalterable if one takes international criminal accountability seriously. This idea is based on the presumption that justice as the only effective accountability mechanism for past atrocities is a necessary element of every sustainable peace process. Taking a look at the Rome Statute of the International Criminal Court it is evident that the ultimate goal of the statute is to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole and thus to contribute to the prevention of such crimes. Nevertheless the question is, if we should detach the legal goal of enforcing criminal prosecution in order to end impunity from the political reality that amnesties are a necessary tool to bring parties of an armed conflict to the peace negotiating table in order to end conflicts? Before touching on the issue if it is desirable that organs of the International Criminal Court as a judicial institution engage themselves not only in judicial but also political matters, as a prerequisite it is necessary to analyze if the Rome Statute provides for possibilities in this aspect. Thus it will be seen, if despite of its ultimate goal to “put an end to impunity” the Rome Statute provides for discretionary possibilities for renunciation of criminal prosecution if this would promote the peace process within a state. Such a possibility is of particular interest to the International Criminal Court since situations under the investigations of the Court are taking place within the context of ongoing violence.

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## A Introduction

The basic tenor within the legal literature and the civil society is the demand “No Peace without Justice”. This proposition is based on the presumption that any trade-off would result in neither justice nor peace.<sup>1</sup> Thus, justice as the only effective accountability mechanism for past atrocities is regarded as a necessary element of every sustainable peace process. The 2009 report of the United Nations (UN) Secretary-General on Mediation confirms that ignoring the demands of justice results in impunity and will undermine sustainable peace. Thus, the International Criminal Court (ICC) should not be affected by political considerations: “[I]f the jurisdiction of the ICC is established in a particular situation, then, as an independent judicial body, the Court will proceed to deal with it in accordance with the relevant provisions of the Rome Statute and the process of justice will take its course.”<sup>2</sup> Taking a look at the Rome Statute of the International Criminal Court (RS) it is evident that the ultimate goal of the statute is “to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole and thus to contribute to the prevention of such crimes”.<sup>3</sup> Nevertheless, the question remains if we should detach the legal goal of enforcing criminal prosecution in order to end impunity from the political reality that amnesties are a potential tool to bring parties of an armed conflict to the peace negotiating table in order to end conflicts. If the leaders of an abusive regime are willing to step down and would not hinder the transitional and reconciliatory process to sustainable peace, renunciation of criminal prosecution could prove to be an effective tool to prevent atrocities from being

1 Ben Ferencz, To the Editors in Chief, in *American Journal of International Law* (Volume 88, Issue 4), October 1994, 717-718, at 718.

2 Report of the Secretary General, *Enhancing Mediation and its Support Activities*, S/2009/189, para. 37.

3 Rome Statute of the International Criminal Court, 2187 UNTS 90, entered into force 1 July 2002, preamble.

committed. This paper will analyze if despite its object and purpose to end impunity, the RS provides for discretionary possibilities for renunciation of criminal prosecution, if this might be necessary to achieve peace.

## **B The Peace vs. Justice Dilemma at the International Criminal Court**

The challenge the ICC is faced with at the moment is that it is seeking justice and started criminal investigations at a time when the war is not over, i.e. in ongoing conflicts. One might ask if the Security Council (SC) when referring the situations in Darfur<sup>4</sup> and Libya<sup>5</sup> to the ICC was not actually outsourcing its task to restore or maintain peace to the ICC, or when Uganda through the referral of its own situation<sup>6</sup> to the ICC tried to outsource its inability to end a long-lasting civil war within its national borders? It remains to be seen if the ICC, although being a judicial institution through this outsourcing would be better advised to keep political considerations like the restoration or maintenance of peace in mind.

Furthermore, although it is evidentially true that the court shall enforce criminal justice on the international level, nevertheless in order to achieve this task – since the ICC is not equipped with a police force it can rely to in order to execute its arrest warrants – it has to rely on co-operation. The ICC shall bring to justice those persons bearing the most responsibility for the commission of the most serious crimes of concern to the international community as a whole, i.e. war crimes, crimes against humanity, genocide and in the future aggression. However, the effective prosecution of these persons might not be in the interests of all actors the ICC has to rely on since in their view considerations for justice might have to yield to considerations for peace.

Consequently, possibilities for a renunciative approach to criminal prosecution under the Rome Statute shall be elucidated from the points of view of the actors concerned, i.e. states parties to the RS, the SC and the organs of the ICC.

## **C Different Forms of Justice and Justice Mechanisms at, and Deferrals of, Cases to the National Level**

When facing conflicts how could and should national authorities react to the commission of international crimes in order to deliver justice? This question can only be answered if we define justice in the first step. In the narrow sense we might understand justice as “criminal justice” as a form of “retributive justice”, a system of criminal courts that holds individuals accountable on the basis of criminal laws. In a

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4 United Nations Security Council, Resolution 1593 (2005), S/RES/1693 (2005).

5 United Nations Security Council, Resolution 1971 (2011), S/RES/1971 (2011).

6 ICC Press Release, President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, ICC-20040129-44.

broader sense justice might, however, also be interpreted as “restorative justice” that focuses on the reconciliation and rebuilding of societies rather than criminal accountability.<sup>7</sup> A crime under the “restorative justice” system is regarded as a violation of the person and the community relationship that needs to be healed by other means than criminal courts for example via truth and reconciliation commissions<sup>8</sup> or traditional justice mechanisms such as the “Gacaca courts”<sup>9</sup> in Rwanda or the “matu oput”<sup>10</sup> of the Acholi tribe in Northern Uganda. One might argue that from these different forms of justice the state is free to pick and choose from. Reliance on other forms of justice thereby might not necessarily have to lead to criminal prosecutions since the state in order to restore society and peace might choose alternative justice mechanisms and grant amnesties. We shall elucidate if the RS provides for options in this regard.

The RS is guided by the principle of complementarity. The Preamble in para. 10 stipulates that “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions”. Under the issues of admissibility under Art. 17 RS “having regard to paragraph 10 of the Preamble” the ICC shall declare a case inadmissible where the case is being investigated or prosecuted by a State which has jurisdiction over it. The responsibility to prosecute suspected persons who allegedly have committed international crimes, thus, lies primarily with the national states and the ICC shall only function as a complimentary fall back institution<sup>11</sup> if the national state is unwilling or unable to carry out the investigations or prosecutions. These two terms are clarified in paras. 2 and 3 of Art. 17 RS: A state is

- 7 Timothy Longman, Justice at the grassroots? Gacaca trials in Rwanda, in Naomi Roht-Arriaza and Javier Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century – Beyond Truth versus Justice*, Cambridge University Press, Cambridge, 2006, at 213.
- 8 Alex Boraine, South Africa’s Truth and Reconciliation Commission from a Global Perspective, in Chandra Lekha Sriram and Suren Pillay (eds.), *Peace versus Justice? The Dilemma of Transitional Justice in Africa*, University of KwaZulu-Natal Press, Scottsville, 2009, at 137.
- 9 Gacaca means “lawn-justice” and is a pre-colonial court of the communities where the Inyangamugayo (“elders of honorable/exemplary conduct”) deliver justice on five principles: truth telling, the promotion of reconciliation, ending impunity, speeding up trials and the demonstration to solve Rwanda’s problems on its own. Cf. Helen Scanlon and Motlafi Mompumelelo, *Indigenous Justice or Political Instrument? The Modern Gacaca Courts of Rwanda*, in Chandra Lekha Sriram and Suren Pillay (eds.), *Peace versus Justice? The Dilemma of Transitional Justice in Africa*, University of KwaZulu-Natal Press, Scottsville, 2009, at 301.
- 10 Matu Oput means to “taste the drink made out of the bitter fruit of the Oput tree”. It is a traditional ritual where compensation is offered and the wrongdoer and the victim share this bitter drink to accept the bitterness of the past. Cf. Kasajja Phillip Apuuli, *The ICC’s Possible Deferral of the LRA Case to Uganda*, in *Journal of International Criminal Justice* (Volume 6, Issue 4), September 2008, 801-813, at 806.
- 11 Cf. *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06), Pre-Trial Chamber I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, para. 34, FN 38.

unwilling if the national prosecution is made “for the purpose of shielding the person” or if there “has been an unjustified delay in the proceedings” or if the proceedings were “not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice”. A state is unable to carry out investigations or prosecutions if the national judicial system collapsed or is unavailable.<sup>12</sup>

This leads us to the question if the renunciation of criminal prosecutions as a component of a peace agreement is a sign of the “unwillingness” or “inability” of the national state to investigate or prosecute? While blanket amnesties could not be subsumed under the conditions of Art. 17 RS it might be argued that other forms of justice could be interpreted as “investigations” or “prosecutions” within the meaning of Art. 17 RS even if they might end in a decision not to bring criminal charges against the person concerned.<sup>13</sup> The RS leaves considerable room for these considerations since the prerequisite of “criminal investigation” or “criminal prosecution” is nowhere to be found within Art. 17 RS. A prosecution, however, normally implies the imposition of criminal sanctions.<sup>14</sup> Fact finding through truth and reconciliation commissions or traditional justice mechanisms might however qualify as “investigations”. Nevertheless, it seems that “investigations” by truth and reconciliation commissions or traditional justice mechanisms are rather to be characterized as signs of the “unwillingness” of the state concerned, since the use of these mechanisms are exactly for the purpose of shielding the person concerned from criminal responsibility and are inconsistent with an intent to bring the person concerned to justice. This seems to be especially true if one interprets Art. 17 RS in accordance with the object and purpose of the Rome Statute since it shall “put an end to impunity” and recalls that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” and that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured.”<sup>15</sup> Consequently, the RS favors “retributive justice” requiring the state party to conduct criminal investigations and prosecutions.

This position is in accordance with the view that amnesties are generally no longer permitted under international law in relation to international crimes.<sup>16</sup> It is easy to establish both a customary and a treaty duty to prosecute in relation to genocide,

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12 Cf. Art. 17 (2) and (3) Rome Statute of the International Criminal Court.

13 Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, in: *Connecticut Journal of International Law* (Volume 23, Issue 2), Spring 2008, 209-279, at 256.

14 *Ibid.*

15 Cf. Rome Statute of the International Criminal Court, paras. 4, 5 and 6 of the preamble.

16 Cf. Commission on Human Rights, *Impunity, Resolution 2002/79*, 25 April 2002, paras. 1 and 2; Matwijkiw, Anja, *The No Impunity Policy in International Criminal Law: Justice versus Revenge*, in: *International Criminal Law Review* (Volume 9, Issue 1), 2009, 1-37, at 2; M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability over Realpolitik*, in *Case Western Reserve Journal of International Law* (Volume 35, Issue 2), Spring 2003, 191-204.

acts of torture and grave breaches of the Geneva Conventions.<sup>17</sup> However, the situation for other crimes within the jurisdiction of the ICC is less clear. There is no treaty provision explicitly stipulating a duty to prosecute - to the contrary there is state practice that affirms that amnesties can be granted.<sup>18</sup> Nevertheless, it seems that this position shifts. Recent state practice supports that there is indeed a duty to bring to criminal justice persons bearing the most responsibility for the commission not only of genocide, torture and grave breaches, but also of crimes against humanity and other war crimes.<sup>19</sup> If we not only speak of an emerging rule of customary law but already an established customary norm, any amnesties granted by national authorities are thus to be considered a violation of international law.

The question is, however, who should make the admissibility decision according to Art. 17 RS: organs of the ICC or the national state? For instance, Uganda's President Museveni has stated that Uganda's referral to the ICC was necessary "because he [Kony – leader of the Lord's Resistance Army (LRA)] was not under our jurisdiction, we sought the assistance of the ICC. If he [Kony] signs the peace agreement and returns to our jurisdiction it becomes our responsibility not any other party's, including the ICC."<sup>20</sup> Thus, it is evident, that President Museveni considers a deferral of the LRA case to Uganda back to the national level obligatory. However, in case of the signing of a peace agreement between the LRA and the government of Uganda, it seems that criminal proceedings are not guaranteed, since according to the Annexure to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the LRA Movement the government shall ensure that the crimes are "addressed by the special Division of the High Court; traditional justice mechanisms; and any other alternative justice mechanism established under the principal agreement".<sup>21</sup> It is thus questionable if LRA leaders

17 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS (1951) 277, Art. 4; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 ILM (1984) 1027, Art. 7; Geneva Convention relative to the Protection of Civilian Persons in Times of War, 75 UNTS (1950) 287, Arts. 146, 147; cf. Robinson, Darryl, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, in: *European Journal of International Law* (Volume 14, Issue 3), 2004, 481-505, at 490.

18 Cf. John Dugard, *Possible Conflicts of Jurisdiction with Truth Commissions*, in Cassese, Antonio et al. (eds.) *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, New York, 2002, at 698; Robinson (FN 17), at 491.

19 For a detailed analysis see Robinson (FN 17), at 491; compare also the ICRC Study on Customary International Humanitarian Law, Rule 159 – Amnesty, available online at: [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule159](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule159) and the corresponding practice relating to rule 159, especially Section B, available online at: [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule159\\_sectionb](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule159_sectionb) (All websites used in this essay were last checked on 15 March 2011).

20 As quoted in Apuuli (FN 10), at 801.

21 Annexure to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army Movement, 19 February 2008, as quoted in Keller (FN 13), at 219.

had to stand trial at a criminal court or “merely” face traditional justice mechanisms. The ICC reacted promptly within ten days requesting information from Uganda on the status of execution of its arrest warrants and the competences of the special division of the High Court of Uganda and the traditional justice mechanisms.<sup>22</sup> In a further decision the pre-trial chamber cleared the “uncertainty as to who has ultimate authority to determine the admissibility of the Case: it is for the Court, and not for Uganda, to make such determination” and that “there is no reason for the Chamber to review the positive determination of the admissibility”.<sup>23</sup>

## **D Security Council Deferrals and Referrals**

According to Art. 16 RS no “investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.” This article is the most visible evidence where political considerations can take precedence over justice. It seems evident that the SC who bears the primary responsibility for the maintenance of international peace and security according to Art. 24 UN Charter shall also be the forum to decide if there shall be a renunciation of criminal prosecution under the Rome Statute in the interests of peace. This seems even more convincing against the background that political organs shall be concerned with politics while judicial institutions shall deliver justice.<sup>24</sup> However, looking at Art. 16 RS it is evident that a SC Deferral is subjected to a condition since, as a formal requirement, the SC shall do so only under the authority of Chapter VII of the UN Charter. It has been questioned how to “contemplate a situation in which refusal to recognize a national amnesty could constitute a threat to international peace”?<sup>25</sup> While this criticism has a point, however, we stand again before the sufficiently known problem of who should challenge and decide upon allegedly ultra vires SC decisions in relation to a threat or breach of peace?<sup>26</sup> Nevertheless, the SC is best advised to adhere to a restricted application of

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22 Pre-Trial Chamber II, in the Case of The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, Request for Information from the Republic of Uganda on the Status of Execution of the Warrants of Arrest, ICC-02/04-01/05, 29 February 2008.

23 Pre-Trial Chamber II, Decision on the Admissibility of the Case under Art. 19 (1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, paras. 51-52.

24 Eric D. Blumenson, The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court, in *Columbia Journal of Transnational Law* (Volume 44, Issue 3), 2006, 801-874, at 820.

25 Dugard (FN 18), at 701-02.

26 Cf. Ebere Osieke, The Legal Validity of Ultra Vires Decisions of International Organizations, in *American Journal of International Law* (Volume 77, Issue 2), April 1983, 239-256; Thomas M. Franck, The “Powers of Appreciation”: Who is the Ultimate Guardian of UN Legality, in *American Journal of International Law* (Volume 86, Issue 3), July 1992, 519-523.

this provision. Only in exceptional circumstances where granting of amnesties is an inevitable precondition for the establishment of peace shall the SC temporarily suspend ICC investigations and prosecutions.<sup>27</sup> It is interesting to see that the SC in its referral of the situation in Libya to the ICC included a reference to Art. 16 RS in the preamble of the resolution.<sup>28</sup> A SC deferral in the interest of peace is therefore a possible scenario. However, it seems questionable if the temporary suspension of an investigation or prosecution which needs to be renewed every 12 months offers enough incentive for leaders of an abusive regime to step down. This implicates political bargaining: As long as an abusive leader alleged of having committed horrible crimes is a political factor for the stability of a region or country, the SC could and probably should renew the deferral under Art. 16 RS. As soon as the leader forfeits his political importance there is no need for the SC to prolong his impunity, leaving the door open for criminal prosecution.

Despite Art. 16 RS we shall have regard to another provision of the RS: According to Art. 13 (b) RS the ICC jurisdiction can be triggered by a SC referral where a "situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations". It needs to be determined who shall define the situation and identify individuals who shall be put on trial. While the SC referred the situation in Libya since 15 February 2011 "nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State".<sup>29</sup> This excludes the ICC's jurisdiction over peacekeepers of non-state parties if operations are authorized by the SC.<sup>30</sup> Similarly, when Uganda referred its internal situation to the ICC it wanted to make sure that the ICC would only prosecute the leaders of the LRA and not its own army leaders. The Prosecutor responded by stating that "the scope of the referral encompasses all crimes committed in Northern Uganda in the context of the ongoing conflict".<sup>31</sup> However, no such remarks were made in relation to

27 Note however that the SC is not convinced that this shall be applied with regard to peacekeepers since the SC suspended ICC investigations with regard to nationals of non-state parties relating to established or authorized operations by the SC. Cf. United Nations Security Council, Resolution 1971 (2011), S/RES/1971 (2011); United Nations Security Council, Resolution 1593 (2005), S/RES/1693 (2005); United Nations Security Council, Resolution 1422 (2002), S/RES/1422 (2002).

28 Cf. United Nations Security Council, Resolution 1971 (2011), S/RES/1971 (2011), Preamble.

29 *Id.*, para. 6.

30 Compare also Neha Jain, A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court, in *European Journal of International Law* (Vol. 16, Issue 2), 2005, 239-254.

31 Situation in Uganda (No. ICC-02/04-01/05), Prosecutor v. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen, Decision to Convene a Statute

the exclusion of jurisdiction over peace keepers when the SC referred the situation to the Court.<sup>32</sup> Could the SC when referring the situation in a country on the basis of Art. 13 (b) RS thus also exclude the ICC jurisdiction for certain individuals, such as peace keepers or even abusive leaders if the SC considers them necessary for the establishment of peace and stability? This would definitely impede the impartiality of the ICC. The court is thus advised to address these issues, stipulating that while the jurisdiction is triggered through a referral of a situation, it is the task of the office of the Prosecutor to identify individual cases.

## **E Peace – A Decisive Factor for ICC Organs?**

The previous two chapters have been described as a fight of the ICC versus national states and the SC in the pursuit for justice since the ICC is regarded as “a legal bastion immune from politics”.<sup>33</sup> However, we shall now consider if the agenda for peace might also be in the interest of justice.<sup>34</sup> Admittedly a renunciation of criminal prosecution seems to be at odds with the object and purpose of the RS. The only possible provision for Court organs to take recourse to considerations of peace in order to preclude criminal prosecution seems to be Art. 53 RS, which is dealing with the initiation of an investigation by the prosecutor.<sup>35</sup> According to this article the Prosecutor can abstain from the initiation of investigations or prosecutions if “taking into account the gravity of the crime and the interests of victims” there are nonetheless substantial reasons to believe that an investigation or prosecution is “not in the interests of justice”.<sup>36</sup> The wording “interests of justice” is nowhere defined within the RS and thus it has been used to debate if peace might also be an integral part of the interests of justice.<sup>37</sup> In 2007 the Office of the Prosecutor took position in a Policy Paper on the Interests of Justice.<sup>38</sup> The paper stated that while there was no

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Conference on the Investigation in the Situation in Uganda in Relation to the Application of Art. 53 (PT), 2 December 2005, para. 4. Note however that up until now arrest warrants were only issued for LRA members.

32 As was done before when the SC referred the situation in Darfur and now again with regard to the situation in Libya. Cf. William A. Schabas (ed.), *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, at 308 (FN 20).

33 Sarah M.H. Nouwen and Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, in *European Journal of International Law* (Volume 21, Issue 4), 2010, 941-965, at 941.

34 On this topic compare particularly Kenneth A. Rodman, *Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court*, in *Leiden Journal of International Law* (Volume 22, Issue 1), 2009, 99-126.

35 *Id.*, at 103.

36 Cf. Art. 53 para. 1 lit. c and para. 2 lit. c.

37 Compare further Keller (FN 13), at 246; Rodman (FN 34), at 103.

38 Office of the Prosecutor, *Policy Paper on the Interests of Justice*, September 2007, available online at: <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf>

clear guidance in relation to the clear meaning of the wording of “interests of justice” the RS stipulates a presumption in favor of investigation or prosecution and that justice is an essential component to peace.<sup>39</sup> Furthermore the “broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions”<sup>40</sup> such as the SC. Seemingly the prosecutor detaches his task to achieve justice from the political responsibility to achieve peace. However, in a later decision the pre-trial chamber affirmed that the prosecution “has been granted by the States Parties discretion” to decide whether to initiate investigations or prosecutions and that one “of the factors that the Prosecution must take into consideration at that stage is whether such a way of proceeding is detrimental to the interests of justice”.<sup>41</sup> Furthermore the “States Parties have not established in the Statute or in the Rules a closed list of criteria, according to which the Prosecution must exercise its discretion”.<sup>42</sup> The pre-trial chamber thus assumes that the prosecutor has been granted considerable room for maneuver in this regard. Nevertheless, if the prosecutor decides to investigate and prosecute even if this decision is contrary to the peace process, there is nothing the court could do. Art. 53 para. 3 lit b RS gives the pre-trial chamber only the authority to review a decision of the prosecutor not to proceed with the investigation or prosecution, it could however not enforce a decision on the prosecutor that he has to abstain from the initiation of investigation or prosecution in the interests of justice.<sup>43</sup> This decision is solely up to the prosecutor and as the Policy Paper on the Interests of Justice shows, he doesn’t have an intention to make use of this provision in relation to issues of peace.

## **F Conclusion**

It seems that SC deferrals according to Art. 16 RS are the only viable approach for trading justice for peace at the moment. The advantages are clear: The SC as a political organ shall also take the responsibility when making such a highly controversial political decision. Although the Rome Statute’s ultimate goal is to end impunity the possibilities of SC deferrals can be seen as a sacrifice when considerations for peace surpass the urge to deliver justice via criminal prosecutions. Nevertheless, the renunciation of prosecution according to Art. 16 RS is only of temporary nature and needs to be renewed every 12 months. It needs to be seen if the prospect of a “Get out of Jail” Card for only a limited time is enough incentive for abusive leaders to step aside preventing them from being a factor of interference in the transitional and reconciliatory process to sustainable peace.

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39 Id., 3 and 8.

40 Id., 9.

41 Pre-Trial Chamber I, Situation in Darfur, Sudan, Decision on Application under Rule 103, ICC-02/05, 4 February 2009, para. 18.

42 Ibid.

43 Id., paras. 19-22.

Amnesties or alternative justice mechanisms at the national level are not to be considered consistent with the RS. As shown it is the ICC that decides if a case is admissible or not, and thus, only a genuine effort in relation to criminal investigations or criminal prosecutions at the national level could convince the court to defer a situation or case. The general attitude of the court in relation to issues of peace is characterized by a rather cautious approach. The Office of the Prosecutor avoids considering peace as an integral part of the interests of justice according to Art. 53 RS. This decision might be seen as a precaution not to defeat the Rome Statute's own purpose. However, as shown, the prosecutor has been granted discretion when interpreting the interests of justice. It will be interesting to see, if the next prosecutor, who is to be elected for 2012, will alter this course, taking the political issue of peace into account when deciding upon the legal interests of justice. Only if a decision not to proceed with investigations or prosecutions is delivered upon the interests of justice by the prosecutor could the pre-trial chamber address this issue according to Art. 53 para. 3 RS.