



Paul Seils

## The Impact of the ICC on Peace Negotiations

Expert paper “Workshop 7 – The Impact of the International Criminal Court (ICC)”

Chaired by the government of Jordan with support from the International Centre for Transitional Justice (ICTJ)

International conference  
Building a Future on Peace and Justice  
Nuremberg, 25 – 27 June 2007

Conférence internationale  
Bâtir l'avenir sur la paix et la justice  
Nuremberg, 25 – 27 juin 2007

Conferencia internacional  
Paz y Justicia – Elementos Conformadores del Futuro  
Núremberg, 25 – 27 de junio 2007

Internationale Konferenz  
Frieden und Gerechtigkeit – Bausteine der Zukunft  
Nürnberg, 25. – 27. Juni 2007

## Nuremberg Peace and Justice Conference

### The Impact of the ICC on peace Negotiations

Hannah Arendt memorably noted that “men are unable to forgive what they cannot punish and are unable to punish what turns out to be unforgivable” (The Human Condition, 1958, p241). The arguments that are presented against the pursuit of justice may often present very stark moral and political dilemmas and no doubt this will continue for a long time to come: the first impact of the Rome Statute however is to change the parameters, and to a large extent the usefulness, of such discussions. This is for the simple reason that it states what the law is now. The time for rhetorical discussions and genuine philosophical debate may not be over, but it will often be beside the point if not conducted with a clear understanding of the implications of the new legal realities. The Rome Statute provides the legal framework in which the discussion about the pursuit for peace must be circumscribed. If the pursuit of peace cannot come to an accommodation with the obligations to which States have voluntarily bound themselves, States simply cannot endorse such agreements. Denial of the legal reality is unhelpful as are attempts to undermine it— what is needed is detailed understanding of it.

There should be no hiding the fact that the Statute represents a seismic shift in international criminal law generally and in the context of conflict resolution in particular. The most obvious impact of the ICC in the issue of justice and peace is that making peace with parties who are suspected of having committed war crimes, crimes against humanity or genocide is harder because such parties can no longer exchange a cessation of violence for impunity. The prospect of lasting peace in the absence of justice has often been shown to be little more than an illusion. While justice alone may not guarantee a lasting peace, it is now understood as a vital component in the complex mix of measures needed to bring lasting solutions: this is the clear statement of the States Parties in creating the Rome Statute.

Negotiators can of course still offer amnesties; States can decide for themselves which kinds of amnesties they are prepared to concede and how these square with their international obligations, but the ICC will not be bound by any such amnesty or amnesty-type arrangements. The protection afforded by such deals therefore becomes considerably less attractive. The Prosecutor of the ICC has made it clear that his primary focus will be on those bearing the greatest degree of responsibility for crimes, subject always of course to where the evidence leads. It is likely to be true that those bearing such responsibility will also often be the very people with whom negotiations are being pursued. This is nowhere clearer than in the current situation of northern Uganda.

Among the elements worth considering in the context of the Rome Statute and the pursuit of peace I will highlight the following; the concepts of complementarity, the interests of justice, and Security Council deferral all of which arise from the Statute itself. I will also emphasise the positive aspects that the Rome Statute can bring to conflict resolution contexts.

The Rome Statute establishes a system of which the ICC is an instrument of last resort. 104 States have voluntarily bound themselves to a Statute that says three

key things: impunity is over; national jurisdictions will deal with those responsible through their criminal law; if they cannot or will not, the ICC will step in.

The issue of complementarity may be of central importance in the context of peace negotiations. A challenge on the admissibility of a case can be made at any point up to the beginning of a trial, even after warrants have been issued. Exceptionally a challenge can even be brought after a trial has begun. The question that should be asked of States involved in negotiations is how they can meet their obligations to exercise their criminal jurisdiction; the question that should be asked by negotiators is how to make it clear to the parties concerned that the options have changed and that impunity is no longer available. Any other message is misleading and potentially damaging. What everyone should understand is that the Rome Statute does not make peace deals impossible: it makes impunity for war crimes, crimes against humanity and genocide an unacceptable condition for peace. The decision therefore lies entirely with those suspected of such crimes and perhaps it is there that the focus of persuasion ought to be trained.

The Rome Statute does require a change of mindset. What was once accepted as an acceptable price to pay for peace is no longer a legal possibility. This is the decision of the States who created the Rome Statute. This is the legal reality.

The complementarity regime defined in the Rome Statute establishes that the ICC is a court of last resort - that States with jurisdiction have the duty to exercise that jurisdiction and that the Court will only act where they fail to act or do so in a manner not considered genuine. At this stage no one knows *precisely* how the judges will decide what would be needed of a national proceeding, including the proposed punishment, for it to be deemed genuine. Since the object and purposes of the Statute including putting an end to impunity it can be reasonably suggested that national proceedings must include some kind of meaningful punishment, but the judges will have to decide exactly what this means in practice, should the matter ever arise.

What has become clear in the light of a number of judicial decisions is that where there has not been any Article 18 ruling on admissibility, a subsequent challenge to admissibility under Article 19 to be successful would almost certainly have to demonstrate that national proceedings were dealing with the same suspects for the same conduct which was the subject of the case brought before the Court by the Office of the Prosecutor: that is to say the matter becomes a very specific one and requires the same case to be prosecuted at the national level. This has been made clear both in the Pre-Trial Chamber's decision in granting the application for an arrest warrant against Thomas Lubanga in the DRC case, and again in the decision to issue warrants for Ahmed Harun and Ali Kushayb in Darfur. In addition, the Office noted that both Harun and Kushayb had joined together to commit their crimes in a crucial way that defined the nature of their criminal conduct. In this sense, the conduct included the joint responsibility they had for organizing the crimes in question. The Office believes that national prosecutions to address the same conduct should take into account the same considerations.

A second issue relates to the concept of the interests of justice found in Article 53 of the Rome Statute. The Office has issued a detailed draft policy paper on this matter. A number of things are worth clarifying: the provisions of the Statute do not entitle the prosecutor to suspend an investigation in the interests of justice. He can seek to stop an investigation or prosecution on such grounds subject to the approval of the Pre-Trial Chamber. He may recommence the proceedings only in the light of new facts or information. Secondly, the Office has indicated that the concept of the interests of justice is narrower than some parties may believe. In particular the Office does not consider that the interests of justice is either synonymous with or subsumes the concept of the interests of peace.

Article 16 of the Rome Statute allows the UN Security Council under Chapter VII authority to require the deferral of any investigation or prosecution for a (potentially renewable) period of twelve months. It is entirely a matter for the members of the Security Council. It is not a matter on which the Prosecutor would comment beyond noting the existence of the provision in the Statute.

The fourth issue worth considering is that the creation of a permanent criminal court can bring a number of positive factors to the context of peace negotiations. In the first place, as in northern Uganda, it can galvanise international opinion and energy to focus on an otherwise forgotten crisis; secondly, it can force unwilling parties to the negotiating table; thirdly, it can help to marginalise unsavoury characters who are deemed not to have the legitimacy necessary to negotiate. In a very real and practical way, the prospect of criminal prosecution can have and has had a positive impact on the pursuit of peace, including in northern Uganda.

It is important to recognise these kinds of contributions, but what is required is a clear understanding of what the States Parties, including Uganda and the other states where there are ongoing investigations, voluntarily created. They created a system where impunity for war crimes, crimes against humanity and genocide is simply no longer a legal possibility. If the international community wishes the system it has created to work, and crimes to be prevented in the long term, it requires sending out an unequivocal signal to those stalling on peace because of arrest warrants that they will have to face justice for the crimes committed.

The impact of the Rome Statute on the issues of peace and justice therefore can be seen to work on a number of different levels. It removes the value of the offer of amnesty, thus limiting the options available to negotiators; it places an onus on anyone suspected of having committed war crimes, crimes against humanity or genocide to accept that they cannot expect to trade immunity from for. It requires States with jurisdiction to think carefully about how they can genuinely implement their solemn obligations under the Statute in terms of complementarity; it requires the States Parties who created the Rome System to ensure there is unequivocal understanding that impunity is not an acceptable condition for peace. In particular, if the Court is to be regarded as an effective instrument of justice, the States who created it must ensure that peace negotiations progress efficiently, taking due account of relevant international obligations and, do all that is necessary to bring the subject of such warrants to trial.