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POLICY BRIEF

***When Should the ICC Prosecutor Defer Investigations or
Prosecutions in Situations of Active Armed Conflict in Favor of
Peace Negotiations?***

Talita de Souza Dias & Dapo Akande

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Introduction

A key reform that has the potential to make the international criminal justice project stronger, more efficient and more effective is the consideration of peace negotiations as an additional factor in the Prosecutor's decision of whether or not to pursue an investigation or prosecution 'in the interests of justice', in accordance with Article 53(1)(c) and 2(c) of the Rome Statute. At present, this would require a revision of the Policy Papers issued on this question, in particular, the 2013 Policy Paper on Preliminary Examinations and the 2007 Policy Paper on the Interests of Justice. Significantly, such reform has the potential to prevent or alleviate, at least in part, some of the most pressing problems encountered by the ICC Office of the Prosecutor (OTP), namely, the lack of state cooperation, limited budget, and lengthy or complex proceedings.

1. Four Considerations on peace, justice and political solutions

Our argument – that certain kinds of peace negotiations should be considered as part of the 'interests of justice' justifying the deferral of criminal investigations or prosecutions in situations of active armed conflict – departs from four main considerations.

First, although it is difficult to measure the actual impact of both prosecutorial and political solutions in situations of ongoing armed conflict where atrocity crimes have been committed, each plays an important role in the achievement and sustenance of peace, as well as the protection of human rights.

Secondly, while justice is an important component of the attainment of sustainable peace in situations of armed conflict that have been marred by violations of human rights and international humanitarian law, retributive justice in the form of criminal prosecutions is not the only way in which justice can be achieved for victims of those violations. Attention should be paid to a variety of justice mechanisms that can also bring the healing that international criminal justice promises.

Third, it may be the case that the political mechanisms aimed at achieving peace and judicial, particularly, criminal, accountability mechanisms – cannot be conducted at the same time. Indeed, in some circumstances, the situation of violence or conflict on the ground may be so extreme that, for peace to be ultimately achieved, the judicial or prosecutorial component can only start after certain minimum conditions are secured through a politically negotiated process. Even in cases where violence has been temporarily contained, the situation may be so uncertain or unstable that the initiation of criminal proceedings could jeopardize what has been achieved so far through a peace negotiation. This would most likely occur when those accused in the criminal proceedings are in a position to effectively conduct the peace talks or to influence the situation of

violence on the ground.¹ The combination of the second and third considerations may mean that in certain circumstances, particularly, where peace negotiations are attentive to justice concerns and the interests of victims, the setting aside of criminal prosecutions may lead to justice which in terms of quality and scope is more desirable.² Thus, it may be in the very interests of justice in the long-run that certain criminal proceedings are temporarily set aside so that peace negotiations can be attempted.³

Fourth, a prosecutorial policy that takes those considerations into account can contribute to preventing or remedying some of the challenges that the Court currently faces as regards state cooperation, budgetary constraints and lengthy or complex procedures. This is because, as we will explain in more detail later on, by knowing that the Prosecutor has the ability and willingness to defer an investigation or prosecution for the sake of peace negotiations with a justice component, states can be reassured that the Court will not interfere when a political solution is necessary. This can lead to more state cooperation in specific cases and to greater overall support for the Court, including of a financial nature. In the same vein, by allowing peace negotiations to be tried out first, the Prosecutor can avoid the initiation of criminal proceedings which, at a certain point in time, would be too cumbersome or costly in the face of difficult security or political conditions on the ground. Furthermore, if the political solution turns out to be successful both with regard to the attainment of peace and with regard to instilling local justice mechanisms which might be of the restorative variety, no investigation or prosecution might need to be initiated at all.⁴

2. The legal interpretation of the ‘interests of justice’ under Article 53(1)(c) of the Statute

Let us now turn to the legal basis of our argument. As has been extensively discussed elsewhere, Article 53(1)(c) and 2(c) allows the Prosecutor of the ICC to use her discretion for the purposes of temporarily setting aside a criminal investigation or prosecution ‘in the interests of justice’. In more detail, the language of Article 53(1)(c) of the Statute

¹Talita De Souza Dias, *‘Interests of justice’: Defining the scope of Prosecutorial discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court*, 30 LEIDEN JOURNAL OF INTERNATIONAL LAW 731, 742–743 (2017); Kenneth A. Rodman, *Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court*, 22 LEIDEN JOURNAL OF INTERNATIONAL LAW 99, 101–102 (2009); Linda M Keller, *The False Dichotomy of Peace versus Justice and the International Criminal Court*, 3 HAGUE JUSTICE JOURNAL 12–47, 13 (2008); Matthew R Brubacher, *Prosecutorial Discretion within the International Criminal Court*, 2 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 71–95, 82 (2004); GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 222 (2000); Priscilla Hayner, *The Challenge of Justice in Negotiating Peace: Lessons from Liberia & Sierra Leone*, in EXPERT PAPER “WORKSHOP 6 – NEGOTIATING JUSTICE” , 2 (2007), https://www.ictj.org/sites/default/files/ICTJ-Liberia-SierraLeone-Workshop-2007-English_0.pdf.

² Priscilla Hayner, *Chapter 8: Acting in the Interests of Justice*, in THE PEACEMAKER’S PARADOX: PURSUING JUSTICE IN THE SHADOW OF CONFLICT , 9 (2018).

³ *Id.* at 9.

⁴ *Id.* at 12.

treats the interests of justice as countervailing consideration to the gravity of the crime and the interests of victims,⁵ which, at the stage of the initiation of a formal investigation, following preliminary examinations, are more likely to weigh in favor of criminal proceedings.⁶ On the other hand, Article 53(2)(c) treats the interests of justice as a balancing test under which ‘all the circumstances, including the gravity of the crime, the interests of victims, the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime’, should be weighed with the view of making a decision not to bring or proceed with criminal charges against specific individuals.⁷

Aside from the text of those provisions, three principal interpretative tools favor a broad interpretation of the interests of justice. First, the word ‘justice’ is ordinarily broad, and, even in the context of international criminal justice, its use has not been restricted to criminal proceedings or retributive justice in a strict sense.⁸ Rather, and because we are talking about what are ‘*the interests of justice*’ – not justice in itself –, any factors that are beneficial to international criminal justice, in the pursuance of its diverse aims or functions, could be considered as such interests. Those functions include, in particular, retribution, crime deterrence and prevention, symbolic or expressive justice and reparations or restorative justice.⁹ The same outcome would be justified by the multifaceted object and purpose of the Rome Statute, as reflected in its Preamble.¹⁰ Similarly, other provisions that form part of the context of Article 53 of the Statute, such as Articles 13 and 16, allow criminal proceedings to be either initiated or deferred for the purposes of upholding goals such peace and security and alternative justice mechanisms.¹¹ Thus, an interpretation of Article 53(1)(c) and 2(c), in accordance with Article 31 of the Vienna Convention on the Law of Treaties, would support a broad reading of the ‘interests of justice’, including all factors that are broadly considered to be goals of international criminal justice, in all of its functions.

Furthermore, it is important to stress that the broad discretion enjoyed by the Prosecutor under Article 53(1)(c) and 2(c) is countered by the mandatory nature of the judicial review of her decision not to proceed with the interests of justice, in accordance with Article 53(3)(b) of the Statute.¹² This contrasts with the initiation of preliminary examinations under Article 15(1) and (2) (which has no mechanism of judicial review) and

⁵ ICC OTP, POLICY PAPER ON THE INTERESTS OF JUSTICE 2 (2007), <https://www.legal-tools.org/en/doc/bb02e5/>; Maria Varaki, *Revisiting the ‘Interests of Justice’ Policy Paper*, 15 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 455–470, 459 (2017).

⁶ Varaki, *supra* note 5 at 735–738, 743–744, 751.

⁷ De Souza Dias, *supra* note 1 at 737, 739, 751.

⁸ *Id.* at 740–741.; Varaki, *supra* note 5 at 457–458.

⁹ De Souza Dias, *supra* note 1 at 740–741; Keller, *supra* note 1 at 36–47; Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 510, 543 (2003).

¹⁰ De Souza Dias, *supra* note 1 at 745–747; Varaki, *supra* note 5 at 463.

¹¹ De Souza Dias, *supra* note 1 at 745; Varaki, *supra* note 5 at 464.

¹² De Souza Dias, *supra* note 1 at 744; Varaki, *supra* note 5 at 459.

with the non-mandatory review process for the Prosecutor's decisions on the jurisdiction of the Court and the admissibility of a case, pursuant to Article 53(3)(a). This is yet another indication that the array of factors that can be considered under the interests of justice provision is wider than those that come within the scope of other discretionary decisions. A mandatory review process also dispels criticisms of politicization that are normally associated with a strict view of the interests of justice. Lastly, Article 53(4) of the Statute reaffirms the temporary nature of a decision based on the interests of justice. It provides that the Prosecutor may reconsider her decision at any time based on new facts or information. This demystifies the common assumption that stopping an investigation or prosecution for the sake of policy factors may have a definite blow on international criminal justice.

Despite such ample interpretative support for a broad approach to the interests of justice, the OTP's current view on the considerations coming within the scope of Article 53(1)(c) and 2(c) is quite narrow. As summarized in the 2013 Policy Paper on Preliminary Examinations and the 2007 Policy Paper on the Interests of Justice, the OTP does not presently consider that peace processes or other justice mechanisms can be considered by the Prosecutor when using her discretion not to initiate an investigation or prosecution.¹³ Rather, these are said to be 'complementary' to international criminal justice, and within the mandate of other institutions.¹⁴ Only those factors explicitly listed in Article 53(1)(c) and 2(c) can be considered as 'interests of justice'.¹⁵ At most, the interests of victims could be defined more broadly and eventually encompass concerns with their security and psychological well-being that would weigh against the initiation of criminal proceedings.¹⁶ Yet the fact that other institutions have the primary purpose of addressing peace and security and alternative justice mechanisms does not exclude the ICC's crucial role in managing its own impact on those considerations, nor does it mean that those considerations fall outside the scope of Art. 53's provisions on the 'interests of justice'.¹⁷

Moreover, as we hinted earlier, factors such as the security situation on the ground and the prospects of a successful prosecution can be important indicators of whether or not it is appropriate to initiate or continue criminal proceedings in the midst of peace negotiations. Indeed, although it is debatable whether the security situation on the ground and the prospects of a successful prosecution are, in themselves, 'interests of

¹³ ICC OTP, *supra* note 5 at 1, 4–9; ICC OTP, POLICY PAPER ON PRELIMINARY EXAMINATIONS 67–71 (2013), <http://www.legal-tools.org/doc/acb906/>. See also ICC OTP, POLICY PAPER ON CASE SELECTION AND PRIORITISATION 33 (2016).

¹⁴ ICC OTP, *supra* note 5 at 1, 7–9; ICC OTP, *supra* note 13 at 69.

¹⁵ ICC OTP, *supra* note 5 at 4–7, 9.

¹⁶ *Id.* at 5–6.; ICC OTP, *supra* note 13 at 68.

¹⁷ Certain Expenses of the United Nations (Article 17, Paragraph 2 of the Charter), Advisory Opinion, 163 (1962); De Souza Dias, *supra* note 1 at 743.

justice’,¹⁸ they can certainly be relevant factors when considered in connection with an ongoing peace process that has the prospect of achieving forms of justice other than the retributive. Despite this connection, the OTP does not presently consider that the security situation on the ground, the prospects of a successful prosecution, or even the inclusion of other justice mechanisms in a peace process could be part of the interests of justice analysis, not even in connection with other factors. Paradoxically, the office has openly acknowledged that those two criteria must inform the selection and prioritization of cases for prosecution, in accordance with Article 54(1)(b).¹⁹ However, unlike the OTP seems to suggest, it is difficult to separate, both temporally and substantially, the discretion that the Prosecutor exercises for the purposes of ‘prioritizing cases’ from a decision to initiate a prosecution based on the interests of justice.²⁰ The two happen virtually at the same time and are based on the same evidence and context. Furthermore, the discretion used in the selection and prioritization of cases does not differ, in nature or degree, from the one that the Prosecutor exercises when deciding, at an earlier stage, whether or not to proceed with an *investigation* in the interests of justice. Significantly, by removing those factors from the scope of Article 53(1)(c) and 2(c), especially when they are related to a peace negotiation, the Prosecutor escapes the mandatory judicial oversight which should exist for decisions involving such sensitive political issues.²¹

As was mentioned earlier, we believe that the time has come for the OTP to revise its policy on the interests of justice. In the next 10 years of the Rome Statute, the ICC and the broader project of international criminal justice would benefit enormously from the inclusion of peace negotiations, particularly those with a justice component within the scope of Article 53(1)(c) and 2(c).

3. Peace negotiations as ‘interests of justice’

Despite the OTP’s current reluctance to consider issues of peace and security under Article 53(1)(c) and 2(c), there is a significant and increasing number of scholars who support the inclusion of those factors as part of the interests of justice test, on both legal and political grounds.²² As we explained earlier, it is our own view that peace and

¹⁸ See, in favor of including those factors within the scope of Article 53(1)(c) and 2(c), Danner, *supra* note 9 at 544–545; Linda M Keller, *Comparing the “Interests of Justice”: What the International Criminal Court Can Learn from New York Law*, 12 WASH U GLOBAL STUD L REV 1, 10 (2013); Philippa Webb, *The ICC Prosecutor’s Discretion Not to Proceed in the “Interests of Justice,”* 50 CRIMINAL LAW QUARTERLY 305, 316 (2005).

¹⁹ ICC OTP, *supra* note 13 at 4–5, 15, 51.

²⁰ *Id.* at 33, 49.

²¹ Varaki, *supra* note 5 at 465–466, 470.

²² See, e.g., PRISCILLA HAYNER, *THE PEACEMAKER’S PARADOX: PURSUING JUSTICE IN THE SHADOW OF CONFLICT* (2018), Chapter 8, “Acting in the Interests of Justice”; Varaki, *supra* note 5 at 467–470; De Souza Dias, *supra* note 1 at 751; Rodman, *supra* note 1; Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR J INT LAW 481–505, 493–498 (2003); Brubacher, *supra* note 1 at 81–84; Webb, *supra* note 18 at 316; Michael P Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INTERNATIONAL LAW JOURNAL 23, 524 (1999).

security, and in particular peace negotiations, are broadly within the realm of interests pursued by international criminal justice and by the ICC itself, especially in the context of its deterrent and preventive functions.²³ Indeed, unlike some have argued, it is not as if the ‘interests of justice’ will suddenly be equated to the broader ‘interests of peace’ once the Prosecutor decides to defer an investigation or prosecution in favor of peace negotiations.²⁴ Rather, peace is temporarily favored *because and to the extent that it is also an interest pursued by international criminal justice*.²⁵ Peace may not only contribute to better justice in the future, but it is also an inherent aim of justice.²⁶ In sum, international criminal justice and its various functions might be better served if one or more specific criminal prosecutions or investigations are *temporarily* set aside for the purposes of attempting a peace settlement.

Although the OTP has refused to acknowledge this openly, an earlier Policy Paper has stressed that ‘no investigation can be initiated without having careful regard to all circumstances prevailing in the country or region concerned, including the nature and stage of the conflict and any intervention by the international community. Furthermore, the Prosecutor will have to take into account the practical realities, including questions of security on the ground’.²⁷ Similarly, in a document commissioned by the former Prosecutor, entitled ‘Draft Regulations of the Office of the Prosecutor’, experts suggested that the ‘interests of justice’ should be defined to include the following factors: (a) the start of an investigation would exacerbate or otherwise destabilise a conflict situation; (b) the start of an investigation would seriously endanger the successful completion of a reconciliation or peace process’.²⁸ In a more recent expert paper drafted upon request of the OTP, experts suggested that approaches other than prosecution should not be summarily dismissed by the Prosecutor.²⁹

We believe that this is a better approach than the one adopted in the 2007 and 2013 Policy Papers. This is because it takes due account of the legal and factual justifications we set out earlier for including peace negotiations within the scope of the ‘interests of justice’ test. Indeed, this approach is in line with an interpretation of Article 53(1)(c) and 2(c) of the Rome Statute that takes into account the text, context and object and purpose of this provision, in accordance with Article 31 of the VCLT. Moreover, as we mentioned earlier, from a factual perspective, allowing investigations and prosecutions to be temporarily hold off for the benefit of political processes can contribute to the

²³ See para 5 of the Preamble to the Rome Statute.

²⁴ ICC OTP, *supra* note 5 at 1, 4.

²⁵ De Souza Dias, *supra* note 1 at 741; Hayner, *supra* note 2 at 9.

²⁶ Hayner, *supra* note 2 at 9.

²⁷ ICC OTP, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 2 (2003), <https://www.legal-tools.org/en/doc/f53870/>.

²⁸ ICC OTP, DRAFT REGULATIONS OF THE OFFICE OF THE PROSECUTOR (ANNOTATED) 47, note 79 (2003).

²⁹ ICC OTP, INFORMAL EXPERT PAPER: THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE 23 (2009).

achievement of both peace and justice in the long run. Lastly, we believe that this approach can better contribute to addressing some of the ICC's present challenges relating to state cooperation, budgetary constraints and lengthy or complex proceedings. Indeed, having an OTP that is more willing to defer criminal proceedings in favor of peace negotiations is conducive to more state cooperation and overall political and financial support for the ICC. This is particularly the case where failure to cooperate is due to a state preference for a political rather than a judicial solution to a certain conflict or situation. Furthermore, if the peace settlement turns out to be successful, the initiation of a complex criminal procedure would be avoided, with all the financial, human and operational costs that this would have entailed.

4. Useful criteria for assessing whether peace negotiations are in the 'interests of justice' in concrete cases

Having established that on both legal and policy grounds the 'interests of justice' test should include peace negotiations, it is perhaps useful to draw some criteria or guidelines that could assist the Prosecutor in making such an assessment in particular situations or cases.³⁰ We are mindful of the fact that there is no one-size-fits-all solution to this question and that the evaluation of whether or not a certain political settlement is 'in the interests of justice' is to be conducted on a case-by-case basis. However, it is possible to set out some parameters that could be applied in particular cases. For this purpose, some of the documents issued by the OTP itself, especially the earlier ones, are particularly helpful.

a) Support from relevant stakeholders, particularly victims

The first criterion which can be useful in assessing whether it is appropriate to set aside an investigation or prosecution in favor of a peace negotiation is the level of support that the latter has from those that have been affected by the conflict or situation, including the general public in the domestic community concerned and, particularly, the victims.³¹ Support from the international community, as represented by groups of states or international institutions, may also be relevant in assessing whether or not a peace negotiation is in the interests of justice.³² This 'support' criterion is justified on both legal and policy grounds. On the one hand, the interests of victims, including direct and indirect ones, is an explicit factor listed in both Article 53(1)(c) and 2(c) of the Statute. Thus, it is only natural that the victim's views and interests should also inform the consideration of

³⁰ See, in support of clear guidelines and proposing a series of criteria for assessing issues of peace and security and alternative justice mechanisms, Hayner, *supra* note 2 at 13–14; Keller, *supra* note 18 at 10–11; Webb, *supra* note 18 at 316–118; Danner, *supra* note 9 at 543–545; Robinson, *supra* note 22 at 497–498.

³¹ Hayner, *supra* note 2 at 13; ICC OTP, *supra* note 29 at 24, note 73.

³² ICC OTP, *supra* note 29 at 23, note 73.

whether peace negotiations are in the interests of justice. Consideration of support from the general public is grounded on the widespread recognition of self-determination and democratic governance as a human right and a general principle in international law.³³ Lastly, support from the international community may be a good indicator that other international rules and standards are being complied with, particularly international human rights law.³⁴ On a policy level, it appears that peace processes that have the support of victims, the domestic community and the international community have greater chances of success.

b) Social inclusiveness

As with the previous criterion, the degree of participation that a certain political settlement affords to the relevant stakeholders can assist the prosecutor in determining whether or not it is in the interests of justice to give such a settlement a try. Inclusiveness refers not only the elites or those holding a position of power in the conflict or situation, but also those that have been marginalized by it, such as victims and political minorities that are otherwise affected by the alleged crimes.³⁵ Considering how inclusive is a certain political settlement is also a good measure of its democratic pedigree and its prospects of success.

c) Transparency and public scrutiny

For a peace negotiation to have better chances of succeeding and for it to ensure the continued participation and approval of the relevant stakeholders, it is necessary that the relevant process is carried out in a transparent manner and is subject to some form of public scrutiny. Scrutiny, in this context, does not necessarily mean judicial control, but an accessible way in which the general public and other stakeholders can continue to express their views and measure the success and appropriateness of the peace talks. This form of scrutiny can be express or implied in the terms of the peace settlement, or it can be set up by a subsequent agreement or instrument. However established, public scrutiny plays a key role in the Prosecutor's continued assessment of whether or not the peace negotiation remains in interests of justice. Indeed, in accordance in Article 53(4) of the Statute, the Prosecutor can, at any time, decide to resume the investigation or prosecution. Significantly, mechanisms of public scrutiny can provide the OTP with the

³³ Article 21(3), UNIVERSAL DECLARATION OF HUMAN RIGHTS, General Assembly Resolution 217 (III) (1949); Articles 19, 21, 22 and 25, UN GENERAL ASSEMBLY, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS UN GENERAL ASSEMBLY RESOLUTION 2200A (XXI), 999 UNTS 171 (1976); UN GENERAL ASSEMBLY, RESOLUTION 64/155: STRENGTHENING THE ROLE OF THE UNITED NATIONS IN ENHANCING PERIODIC AND GENUINE ELECTIONS AND THE PROMOTION OF DEMOCRATIZATION (2010). See also Robinson, *supra* note 22 at 497.

³⁴ ICC OTP, *supra* note 29 at 23, note 73; Robinson, *supra* note 22 at 498.

³⁵ CHRISTINE BELL, WHAT WE TALK ABOUT WHEN WE TALK ABOUT POLITICAL SETTLEMENTS: TOWARDS INCLUSIVE AND OPEN POLITICAL SETTLEMENTS IN AN ERA OF DISILLUSIONMENT 9–10.

necessary information on how the public views the peace settlement over time, after the initial buzz about it has settled down.

d) The extent of a ‘justice component’

Since we are talking about a peace negotiation being in ‘the interests of justice’ it is crucial that its goals include the achievement of justice in one or more of the senses or functions that we mentioned earlier, i.e. retribution, deterrence, crime prevention, restoration, reparations or symbolic justice. Indeed, for a political process to be able to contribute to achievement of long-lasting peace and the establishment of a solid foundation for international criminal justice, it must, to some extent, contemplate one of the latter’s aims or functions. In the context of a peace agreement, a ‘justice component’, in this broader sense, can include the following non-prosecutorial forms of justice: the provision of reparations for victims, a broad judicial reform, new vetting mechanisms, the establishment of a truth and reconciliation commission, or other alternative forms of justice.³⁶

e) Security situation on the ground, particularly risk of escalation of violence

As we mentioned earlier, the security situation on the ground can be a useful way to measure, in concrete situations, whether a peace negotiation is indeed necessary or more pressing than a prosecutorial solution at a certain point in time.³⁷ In particular, if the risk of escalation of violence is high, whether it is due to the initiation of the criminal proceedings or not, then it might be necessary and appropriate give some space to a political settlement.

Some commentators have referred to this criterion within the broader consideration of the ‘necessity’ of setting aside the investigation or prosecution.³⁸ Indeed, given the exceptional nature of an interests of justice decision,³⁹ necessity is an overriding criterion to be considered when balancing all the specific factors coming within Article 53(1)(c) and 2(c). Necessity tells us that it is only when the investigation or prosecution cannot be carried out, i.e. when a deferral is *the only means* to ensure that the ‘interests of justice’ are satisfied, that a decision pursuant to Article 53(1)(c) and 2(c) can be made.⁴⁰ Significantly, one of the factors that can render a deferral necessary is the security

³⁶ See Hayner, *supra* note 2 at 9; ICC OTP, *supra* note 29 at 23, note 73; Robinson, *supra* note 22 at 497–498; Danner, *supra* note 9 at 544.

³⁷ See ICC OTP, *supra* note 13 at 50(e), 51(e); ICC OTP, *supra* note 27 at 2; ICC OTP, *supra* note 28 at 47, note 79; ICC OTP, *supra* note 29 at 74. See also Hayner, *supra* note 2 at 13; Keller, *supra* note 18 at 10; Danner, *supra* note 9 at 544–545.

³⁸ De Souza Dias, *supra* note 1 at 742–743; Robinson, *supra* note 22 at 495–497; ICC OTP, *supra* note 29 at 23, note 73.

³⁹ De Souza Dias, *supra* note 1 at 735, 739, 742, 746; ICC OTP, *supra* note 5 at 1, 3–4, 9; Robinson, *supra* note 22 at 486, 493, 497.

⁴⁰ De Souza Dias, *supra* note 1 at 742; Robinson, *supra* note 22 at 496.

situation on the ground, in particular the risk of escalation of violence.⁴¹ In fact, if the security and lives of those involved in the conflict or situation are at risk, it may be unwise and reckless to start or continue a criminal investigation or prosecution. This is not only to avoid the escalation of violence (in cases where the criminal proceedings themselves risk having such an effect), but also to preserve the lives and security of those within the OTP itself in charge of conducting the investigation on the ground.⁴²

In sum, in the specific context of a peace negotiation, the security situation on the ground is an additional criterion that can inform the Prosecutor's assessment of whether or not the political solution is more appropriate than the judicial one at a certain point in time. In addition, the security situation on the ground can also influence the prospects of a successful investigation or prosecution, which is also a criterion that the Prosecutor can take into account when assessing whether or not a peace negotiation is in the 'interests of justice'. Indeed, without a safe environment on the ground, there is no way investigations can be conducted, particularly for the purposes of gathering the necessary evidence.⁴³

f) Prospects of a successful investigation or prosecution

As we mentioned earlier, the prospects of a successful prosecution are already being considered by the Prosecutor as part of her case selection and prioritization strategy, i.e. when selecting which prosecutions to initiate after conducting investigations. However, we believe that this criterion should also inform the evaluation of whether or not it is in the interests of justice to suspend an investigation or prosecution for the sake of attempting a peace negotiation. This is because, if the prospects of conducting successful investigations or prosecution are low, especially due to an ongoing armed conflict or difficult security conditions on the ground, this should weigh in favor of attempting a peace negotiation. Indeed, in those circumstances, allowing some space for a political solution can either avoid the initiation of a disastrous investigation or prosecution, or allow successful prosecutions to be established in the future. Thus, the prospects of a successful investigation or prosecution can also be a relevant criterion for evaluating the appropriateness of a peace negotiation under Article 53(1)(c) and 2(c).⁴⁴

By 'successful investigation or prosecution' we not only mean those that will eventually lead to a conviction. Rather, in the present context, being successful means that the Prosecutor foresees that she will be able gather the necessary evidence and support to secure an arrest warrant or summons to appear, to present a plausible case at

⁴¹ De Souza Dias, *supra* note 1 at 742–743.

⁴² ICC OTP, *supra* note 27 at 2, 6.

⁴³ *Id.* at 2, 6.

⁴⁴ *Id.* at 7.; Webb, *supra* note 18 at 315–316; Danner, *supra* note 9 at 545; Keller, *supra* note 18 at 10.

the Confirmation of charges hearing, or to continue pursuing a case that is already in the trial stage, even if, at the end, the accused is acquitted. In considering whether there are good prospects of gathering evidence, the following factors can be relevant: i) security on the ground; ii) state cooperation in allowing access to evidence; iii) complexity of documentary evidence, including translation, volume and content; iv) difficulties with obtaining witness or expert testimony.⁴⁵ Aside from evidentiary considerations, prospects of success also include proceedings that the Prosecutor foresees will run smoothly. Smooth proceedings are those which tend to be free from procedural embarrassments such as accused persons who have demonstrated an unwillingness to be present at trial, or the inability to protect witnesses or court officers, all of which might lead to excessively lengthy or cumbersome trials.

g) Other criteria

Aside from the criteria listed above, and the other factors already listed in Article 53(1)(c) and 2(c), other commentators have proposed the following factors to be considered in the context of a peace negotiation: i) compliance with international rules or standards, ii) absence of an intent to shield the perpetrators, iii) effectiveness of the bodies in charge of implementing the agreement, iv) provision of a sense of closure or justice to victims.⁴⁶

It is worth noting that the list of criteria to be considered in the interests of justice test, either in the context of peace negotiations or in different circumstances, is not closed. Indeed, as can be inferred from the wording of Article 53(1)(c) (implicitly) and 2(c) (explicitly), all the relevant circumstances must be taken into account for the purposes of balancing out the interests of justice.⁴⁷ Thus, the list of criteria suggested above is merely indicative. Other criteria may become relevant in concrete scenarios and it is difficult to predict of all factual considerations that may come within the scope of Article 53(1)(c) and 2(c). It is also important to note that the various criteria suggested above overlap among themselves and with other factors that are explicitly or implicitly recognized in Article 53(1)(c) and 2(c). In any event, the point is that clear guidelines, and in particular, examples of criteria to be taken into account by the Prosecutor in the context of peace negotiations can not only assist her in making an informed decision, but also provide more transparency and accountability to this process.

Conclusion

In sum, we believe that a key reform that would be instrumental in making the ICC and

⁴⁵ ICC OTP, *supra* note 13 at 51; ICC OTP, *supra* note 13 at 70; ICC OTP, *supra* note 27 at 1–2.

⁴⁶ Hayner, *supra* note 2 at 13–14; ICC OTP, *supra* note 29 at 23–24, note 73; Robinson, *supra* note 22 at 497–498.

⁴⁷ De Souza Dias, *supra* note 1 at 739, 751.

the bigger project of international criminal justice stronger, more efficient and effective is the inclusion of peace negotiations and related criteria in the analysis of whether or not to pursue an investigation or prosecution in the 'interests of justice' under Article 53(1)(c) and 2(c) of the Rome Statute. This is grounded on both legal and factual considerations. Crucially, as we mentioned earlier, the consideration of peace negotiations as part of a decision not to initiate an investigation or prosecution in the interests of justice would prevent or alleviate, at least in part, some of the current challenges that the ICC has faced in terms of state cooperation, budgetary restrictions and length or complexity of criminal proceedings. Moreover, in practical terms, this reform would require very little operational or financial resources. Indeed, aside from a change of heart within the OTP (which is arguably the most difficult part), all that our proposed reform would require is the revision of the existing Policy Papers issued by the Office on the interests of justice. A new Policy Paper on this question should be drafted and published to explicitly include peace and security considerations and, in particular, peace negotiations together with the more specific criteria suggested above. These could be incorporated in the form of clear guidelines. This reform would take very little time and effort, and yet it could contribute to making the next 10 years of the Rome Statute less turbulent than its first 20.