Hum Rights Rev (2017) 18:395–416
https://doi.org/10.1007/s12142-017-0481-3

International Criminal Justice Between Scylla and Charybdis—the "Peace Versus Justice" Dilemma Analysed Through the Lenses of Judith Shklar's and Hannah Arendt's Legal and Political Theories

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Published online: 20 November 2017

Abstract The present article discusses the "peace versus justice" dilemma in international criminal justice through the lenses of the respective legal (and political) theories of Judith Shklar and Hannah Arendt—two thinkers who have recently been described as theorists of international criminal law. The article claims that in interventions carried out by the International Criminal Court (ICC), there is an ever-present potentiality for the "peace versus justice" dilemma to occur. Unfortunately, there is no abstract solution to this problem, insofar as ICC interventions will in some cases be conducive while in others, they will be deleterious to peace. If a tension between peace and justice arises in a particular case, the article asserts, the former must be prioritised over the latter. Such a prioritisation, however, requires a vision of the ICC as a flexible actor of world politics which is situated at the intersection of law, ethics and politics, rather than a strictly legalistic view of the court. Ultimately, then, the present article seeks to probe whether the legal and political theories of Shklar and Arendt—in isolation, but ultimately also in combination—support such a flexible vision of the ICC.

Keywords International criminal court · "Peace versus justice" dilemma · Legal and political theory · Hannah Arendt · Judith Shklar

Introduction

In 2011, David Luban published an article in which he portrays Hannah Arendt as a "theorist of International Criminal Law". Despite Arendt's unconventional use of terminology—unconventional at least from a legal perspective—Luban asserts that

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"no theorist has thought more perceptively than Arendt about the basis of international criminal liability in mass atrocities" (2011, 3–4) and that "Arendt's ideas are of great pertinence to students of international criminal law" (2011, 2).

More recently, Samuel Moyn wrote about the political theorist Judith Shklar that she may have "anticipated the most productive way of looking at the institution (of the International Criminal Court), since she was the rare thinker to offer a serious account of international criminal justice as a deeply and inescapably political enterprise". Shklar's "forgotten" book *Legalism*, Moyn continues, "stands out as the single most significant reckoning with the politics of international criminal justice ever written" (2013, 481).

We are told, then, that both Arendt and Shklar had interesting things to say not just about the post-Second World War criminal tribunals which they analysed more directly, but also about "modern" international criminal law. The purpose of this article is to put this claim to the test and, more precisely, to compare the potential of both political theorists' accounts of international criminal law with regard to the so-called peace versus justice dilemma.[1] The methodological choice to place this problem at the centre of this article's attention is based on two reasons: First, many commentators—myself included—regard the "peace versus justice" dilemma as a, probably even *the*, central theoretical and practical conundrum of modern international criminal law; and secondly, while there have been significant, and at times impressive, empirical studies on this issue, there is still a shortage of investigations from the perspective of legal and political theory. This article, then, represents an attempt to narrow this yawning gap in the literature on international criminal justice.

In a nutshell, the argument I will develop is the following: The nature of the ICC as an *ex-ante* tribunal which is supposed to intervene during ongoing conflicts means that the "peace versus justice" dilemma will continue to haunt (some) international judicial interventions. There is, however, no abstract solution to this problem, insofar as ICC interventions will in some cases be conducive while in others they will be deleterious to peace. The dilemma, in other words, constitutes an ever-present potentiality in international judicial interventions by the ICC. This makes it inevitable to take a stance on the "priority question": I maintain that if a tension between peace and justice arises in a particular case, the former must be prioritised over the latter. Such a prioritisation, however, requires a vision of the ICC as a flexible actor of world politics which is situated at the intersection of law, ethics and politics. While Shklar's analysis of the instrumental role of law and her interpretation of legalism as a flexible ideology chimes perfectly with this vision, Arendt's rather conventional notion of the purpose of international criminal law and tribunals, at least at first glance, seems to be incompatible with it; eventually, though, Arendt's highly perceptive conception of "crimes against humanity" also provides strong support for such an "anti-legalistic" vision of the ICC.

[1] The parallels between the two thinkers are striking: Both were female Jewish intellectuals; both grew up in important Baltic cities (Arendt in Königsberg, Shklar in Riga); both were forced to flee from the Nazi regime; and both found asylum in the USA were they had successful academic careers as political theorists. However, not only their biographies but also their respective political theories overlapped in important ways—I shall come back to this point in the last Section. Therefore, it is somewhat surprising that few attempts to juxtapose the political theories of these two thinkers have been made; one notable exception is Honneth (2014, 248–262).

This article, then, does not seek to propose an abstract solution to the "peace versus justice" dilemma—in fact, it claims there is none. The dilemma, as I see it, is an ever-present potentiality in international judicial interventions which will arise in some but not all cases. The purpose of this article, rather, is to defend the idea that in the absence of an abstract solution, the "peace versus justice" problem can only be addressed on a practical level and through the exercise of reflective judgement. This, in turn, requires a rather unconventional, that is, "anti-legalistic" vision of the ICC as a flexible actor of world politics, a vision that finds a powerful ally in Shklar and her controversial notion of law as a political tool and, despite initial appearances to the contrary, also in Arendt and her conception of "crimes against humanity".

I will develop this argument in four Sections: The first two provide an overview of Shklar's and Arendt's respective and, at first glance, contrasting accounts of international criminal law. The third Section sketches the "peace versus justice" dilemma. In the fourth Section, finally, I will demonstrate that and how Arendt's and Shklar's political theories converge on a fundamental point—namely, the centrality of human plurality as the prime value of social life—and show how the combination of Arendt's and Shklar's insights can yield powerful ideas of how to address one of the modern international criminal law's most obdurate theoretical and practical conundrums.

(International Criminal) Law as a Political Tool—Judith Shklar on Legalism

If the relative dearth of secondary literature is anything to go by, then Judith Shklar's importance as a political theorist is still underappreciated.[2] Despite her nine books, countless articles and the profound influence she exercised on many prominent scholars (Yack 1996), her writings have remained something of a hidden gem. This, undoubtedly, is unfortunate because Shklar, who served as the president of the American Society for Legal and Political Philosophy between 1989 and 1990, straddled the disciplines of political theory and legal theory more perceptively than almost anyone before or after her. Her most elaborate attempt to do so culminated in the book *Legalism—Law, Morals and Political Trials* (thereinafter *Legalism*). The book was first published in 1964 after it had been written, according to Shklar's own words, in "a state of considerable innocence"; being surprised that the book had "offended almost all the lawyers who read it", Shklar felt compelled to shed light on some of the controversies it had caused in a new Preface in 1986 (1986, VII). So, what is the central argument of *Legalism* and how can it be made fruitful for the theory of modern international criminal law?

"Law is politics…but not every form of politics is legalistic", Shklar writes in a passage that might well be regarded as the encapsulation of Legalism's central argument (1986, 144). The first part of this quotation immediately illustrates what legal

[2] The secondary literature on Shklar's life and her philosophical project is indeed still rather sparse. Notable exceptions are Magnette (2006), Bajohr (2014) and Hess (2014). Yack (1996), moreover, is a valuable collection of essays by prominent thinkers who are influenced by Shklar's political theory. See also Bernard Williams' discussion of the "liberalism of fear" (2005, 52–61) and (from the perspective of International Relations theory) Nick Rengger's sympathetic critique of Shklar's "dystopian liberalism" (2017, Chapter 6). In the field of international criminal justice, it is, most notably, Gerry Simpson (2007) who draws on Shklar's ideas.

purists might have agitated so much: What Shklar does here is nothing else than to deny the autonomy of law as a realm detached from politics. This, of course, is anathema to all those legal theorists (and practising lawyers) who believe in a "pure theory of law" (Kelsen 2009). For Shklar, however, nothing was more obtuse than the idea of separating social life in distinct "spheres" which exist in isolation from each other. Precisely, this tendency to squeeze social phenomena in ready-made and autonomous categories such as law, politics, morality and economics, is, according to her, one of the central hallmarks of what she calls "legalism". She defines legalism as "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules" (1986, 1). As such, legalism is based on the idea that it is "following rules, pre-established, known, and accepted, that gives actions their worth in every case" (Shklar 1986, 104). Shklar's crucial—and controversial—step is to insist that legalism, despite claiming that it is exclusively interested in following objective and impartial rules, is, in fact, an "ideology", that is, an expression of "political preferences" (1986, 4). Her argument is not only that rules are never truly objective and value-free (for Shklar, this is a fact beyond question anyway) but, rather, that the very faith in objectivity and the accompanying belief that rigid rule-following is the best way to conduct social and political affairs is inherently ideological—it is simply the expression of a very subjective political preference. The logical conclusion of this ideological character, and this explains the latter part of the above quotation, must be that legalism is just one way among many of doing politics—legalism is politics by other means (Shklar 1986, 109, 143). Crucially, though, for Shklar, legalism's ideological nature is by no means reprehensible; in fact, ideology is an inevitable dimension of practical and theoretical social life because, as she puts it, "it may well be doubted whether political theory, of which legal theory is a part, can be written without some sort of ideological impetus" (1986, 4). Hence, despite—or better, because of—legalism's inability to transcend ideology, she can speak of the "enormous potentialities of legalism as a creative policy", the "greatness of legalism" (1986, 112) and the great "social value of legalist politics" (1986, 170). The great potential of legalism, according to Shklar, lies in the fact that it can serve as a useful tool to promote certain liberal values which she deems essential for any society. In a passage that nicely captures the gist of Shklar's entire political theory, she makes clear that the defence and promotion of this particular vision of liberalism are the ultimate purpose of the book (1986, 5):

> It is, at its simplest, a defense of social diversity, inspired by that barebones liberalism, which, having abandoned the theory of progress and every specific scheme of economics, is committed only to the belief that tolerance is a primary virtue and that a diversity of opinions and habits is not only to be endured but to be cherished and encouraged. The assumption…is that social diversity is the prevailing condition of modern nation-states and that it ought to be promoted. Pluralism is thus treated as a social actuality that no contemporary political theory can ignore without losing its relevance, and also as something that any liberal should rejoice in and seek to promote, because it is in diversity alone that freedom can be realized.

It is absolutely crucial, at this point, not to misunderstand Shklar's central argument: For her, legalism must be subordinated to liberalism, that is to say, the accomplishment

of liberal aims is always of higher priority than the mere following of rules; legalism, then, is a "useful ideology" if it proves to be conducive to achieving liberal ends; *e contrario*, it is not useful, if it is deleterious to liberalism.

Here, it gets interesting for modern international criminal law. For the argument I have just sketched forms the basis of Shklar's powerful defence of "political trials". Shklar thinks that political trials are indefensible from a legalist perspective which measures the legitimacy of trials exclusively against the "principle of legality"; ultimately, she maintains political trials have to be defensible on political grounds (1986, 152, 154). "There are", she asserts (1986, 145),

> occasions when political trials may actually serve liberal ends, where they promote legalistic values in such a way as to contribute to constitutional politics and to a decent legal order. The Trial of the Major Criminals by the International Military Tribunal at Nuremberg probably had that effect. To be sure, within a stable constitutional order political trials may be a disgrace, a reversion to the politics of repression, but it is not the political trial itself but the situation in which it takes place and the ends that it serves which matter. It is the quality of the politics pursued in them that distinguishes one political trial from another.

As we can see, therefore, Shklar regards the Nuremberg trials as "political trials", but she is nonetheless determined to defend their legitimacy.[3] Shklar's ingenious move here is to defend the creation and the activities of the Tribunal—an institution which she sees as the epitome of legalistic politics—against the views of legalists precisely by attacking their inflexible views of the ideology of legalism. Yes, the establishment of the Tribunal might have been an expression of victor's justice; yes, the Allied powers might have violated the *nulla poena sine lege*[4] principle when they invented the categories of "crimes against peace" and "crimes against humanity"; yes, Nuremberg might have been a political trial whose very purpose was (as is the purpose of any political trial) to eliminate a political enemy (Shklar 1986, 149). However, all these standard objections to Nuremberg are based on a narrow and inflexible view of legalism as an "either-or" ideology; either there is perfect compliance with the principle of legality, or trials are illegitimate and illegal. Shklar, in turn, insists that legalism must be understood as a much more flexible ideology. One element of this ideology—indeed the most important element of it—is the achievement of certain political results, for "ultimately it is the political results that count" (Shklar 1986, 151). In her opinion, the Nuremberg trials served as a useful tool to promote the political values that lie at the heart of her vision of a "barebones liberalism". They did so in a twofold manner: First, the trials were a "legalistic means of eliminating the Nazi leaders", the ultimate enemies of her vision of a decent, minimal-liberal society (Shklar 1986, 155–156). And secondly, the trials "replaced private uncontrolled vengeance with a measured process of fixing guilt" and thereby averted "a perfect blood bath, with all its dynamic possibilities for anarchy and

[3] In contradistinction to the Tokyo War Crimes trials which she criticised as the imposition of an alien "natural law framework" upon a society which had no natural law tradition, Shklar could not defend these trials because, in her view, "they achieved nothing whatever" (1986, 180). For a thoughtful "reappraisal" of the Tokyo Military Tribunal, one that rejects Shklar's critique of the Tribunal, see Boister and Cryer (2008, especially at 195-196).

[4] Latin for "no penalty without a law".

conflict" (Shklar 1986, 158). The second element of her flexible account portrays legalism as a matter of degree, especially at the international level. International trials are not either "perfectly legal" or "illegal" but have to be "measured on a scale of degrees of legalism" (Shklar 1986, 169). Nuremberg, according to Shklar, was a remarkable legalistic achievement despite the fact that it never achieved the "perfect degree of legality" of domestic trials. Nuremberg was "a great legalistic act, the most legalistic of all possible policies and…a powerful inspiration to the legalistic ethos" (1986, 170).

The great strength of Shklar's account, in my view, is its acknowledgement, even endorsement, of the inescapable political nature of international criminal law. Unlike many contemporary visions, Shklar refuses to rely on lofty, and often vacuous, ideas and puts the problem of mass atrocities in the political context where it ultimately belongs. To put it differently, Shklar gives a concrete answer to the question why mass atrocities have to be confronted, because they pose a threat to the liberal values of tolerance and pluralism which she thinks are indispensable for any decent society. Her answer, then, is, to use John Rawls' famous expression, "political, not metaphysical" (1985). She defends the Nuremberg trials because she sees them as a useful tool to achieve favourable political outcomes in that particular historical situation (1986, 147), but also because of the high degree of legalism that the trials involved. Nuremberg was such a remarkable legalistic achievement because of its "inner structure and its aim" (Shklar 1986, 169) which are the two central elements of her flexible account of legalism. That is not to say, of course, that she thinks of international legal trials as the "solution to all the problems of international conflict" (1986, 139)—doing so would, indeed, handcuff her to the inflexible standpoint of legalism and its absolute faith in consistency, objectivity and rigidity that she criticised. Rather, what is of crucial importance for Shklar is to realise and acknowledge "that law is a form of political action, among others, which occasionally is applicable and effective and often is not. It is not an answer to politics, neither is it isolated from political purposes and struggles" (1986, 143). It is this pragmatic realism which provides an enormously fruitful approach to many of the central conundrums surrounding and haunting modern international criminal law and justice.

Hannah Arendt's Inconsistent Account of International Criminal Law

Despite the fact that *The Human Condition* (1998) is Hannah Arendt's philosophical *magnum opus*, she has become even more famous—and infamous—for her report on the trial of the Nazi war criminal Adolf Eichmann in Israel. *Eichmann in Jerusalem* (thereinafter *EJ*) may owe its prominence to the controversial thesis of the "banality of evil",[5] but it is also Arendt's most direct discussion of international criminal law.[6]

[5] The phrase expresses that "evildoers" do not necessarily have to possess Satanic greatness, rather it is, as the Eichmann case illustrates, often a shallowness and thoughtlessness that drives their evil deeds. It is therefore possible to do evil without being evil.

[6] In contrast to Shklar, the secondary literature on Arendt has grown exponentially over the last decades, so that it is futile to try to give a concise overview of the literature on Arendt. Suffice it to say that scholars have only recently begun to discover Arendt's potential for thinking about legal matters and law more generally. An outstanding collection of essays in this context is Goldoni and McCorkindale (2013); on Arendt's account of "constitutionalism", see Volk (2015).

Shklar, of course, was not impressed with the book. Not only did she think that the Eichmann trial did "not really create new problems for legal theory" (1986, 154–155), she also found Arendt's contribution to legal theory not particularly interesting: "Arendt", she wrote "had nothing… new to say… about… the great puzzles raised by the trials of war criminals" which she "discussed in a derivative and amateurish way". This is hardly surprising, Shklar tartly concluded, because "legal theory was not her (Arendt's) forte" (1998, 372).[7] So what is Arendt's contribution to the theory of international criminal law?

Arendt was certainly a complex thinker who refused to spoon-feed her readers, whose political theory was not developed as a coherent system and who had an infamous penchant for paradoxes. On one issue, though, she could not have been clearer: The ultimate—and only—goal of criminal trials is the attainment of justice. In this regard, she insisted, there can be no difference between domestic and international criminal trials: "The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes…can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment" (2006a, b, 253). Hence, when Adolf Eichmann, the Nazi *Obersturmbannführer* responsible for the logistical organisation of death camp transports, was brought to trial in Jerusalem, Arendt insisted that neither more nor less than justice was at stake. Although she confessed in a letter to her mentor Karl Jaspers that she was sceptical as to law's potential to adequately capture the true dimensions of Eichmann's crimes, she also held that "we have no tools to hand except legal ones with which we have to judge and pass sentence" on them (Kohler and Saner 1960, 417). In short, in the Eichmann case, justice had to be done and it had to be done for justice's sake. This is precisely the view she articulates in a fictional verdict drawing to a close the densely argued Epilogue of *EJ*. In this fascinating passage, Arendt used her "banality of evil" argument to justify the punishment of Eichmann on purely consequentialist grounds. Eichmann had supported a "policy of not wanting to share the earth with the Jewish people and…a number of other nations" (2006a, b, 279). In so doing, he had violated "the order of mankind"; thus, in comparison to an "ordinary criminal", Eichmann had broken an "altogether different order" and violated an "altogether different community" (Arendt 2006a, b, 272). The consequence of his evil actions is that "no member of the human race can be expected to share the earth with (him)" (Arendt 2006a, b, 279). That is the ultimate and only reason why he had to hang. "It is…the law…that must prevail" (Arendt 2006a, b, 261).

It is not difficult to see why Shklar was not impressed with Arendt's contribution to international criminal law and justice. Whereas Shklar conceived of law, especially international criminal law, as a political tool, Arendt insisted on the separate status and function of law. Arendt explicitly pointed out that perpetrators of mass atrocities had to be brought to justice "because they violated the order of mankind, and not because they killed millions of people" (2006a, b, 272). For Arendt, the purpose of criminal law, including international criminal law, was strictly limited to retributive justice as she

[7] That is not to say that Shklar did not admire Arendt and her ideas. In an eulogy in *The New Republic*, shortly after Arendt's death, Shklar wrote that "a shattered culture had lost one of its very last and finest voices" (27 December 1975). Despite her admiration for Arendt's *philosophical* and *political* thought, though, Shklar remained sceptical as to Arendt's significance as a *legal* theorist. And it is indeed one of the aims of the present article to show that Shklar's scepticism was not without some merit.

thought that the punishment of evildoers like Eichmann was neither more nor less than an imperative of justice.

This, however, was not all Arendt had to offer on the subject of international criminal law and justice. In fact, there is a much more interesting, much more original dimension to it, a dimension that emerges from Arendt's conception of "crimes against humanity". For Arendt, this label had a very special meaning. She categorically rejected the German translation of the term as *Verbrechen gegen die Menschlichkeit* because it wrongly signified that the Nazi atrocities had merely been a lack of human kindness; this, as she put it, was "certainly the understatement of the century" (2006a, b, 275). Instead, something incomparably more terrifying had happened: "It was when the Nazi regime declared that the German people…wished to make the entire Jewish people disappear from the face of the earth that the new crime – the crime against humanity – in the sense of a crime 'against the human status', or against the very nature of mankind – appeared" (Arendt 2006a, b, 268). The Nazi crimes were unprecedented because they constituted attacks "upon human diversity as such" (Arendt 2006, 268–269), upon the ontological condition which characterises the "human status without which the words 'mankind' or 'humanity' would be devoid of meaning" (Arendt 2006a, b, 269). This dimension of the Nazi atrocities, in Arendt's view, was never fully understood by the Israeli court which presented Eichmann's evil actions "merely" as crimes against Jews. The idea of Nazi atrocities as crimes against the human status, different from ordinary crimes "not only in degree of seriousness but in essence" (Arendt 2006a, b, 267), drove her critique of Israel's exercise of jurisdiction in the Eichmann case. "The very monstrousness of the events", Arendt thought, "is minimized before a tribunal that represents one nation only" (2006a, b, 270). The Nazi perpetrators, in other words, did not only attack certain segments of humanity but humanity itself, and this is precisely why Eichmann should have been tried before an international (rather than a domestic) tribunal. Another way to put Arendt's point is to say that the truly cosmopolitan evil of the atrocities would have required a response from a truly cosmopolitan institution, and this, I believe, is an astute and compelling argument for the creation and the existence of international criminal law and tribunals.

There is, however, a subtle but important tension between these two thrusts of Arendt's account of international criminal law, to wit, a tension between the claim that in international criminal law justice and nothing else is at stake, and her belief that the Nazi atrocities constituted an attack upon humanity itself. The problem here is the following: Arendt's defence of the idea of international criminal law and tribunals is ultimately predicated upon the idea that mass atrocities are so fundamentally distinct that they cannot be dealt with in the same way as "ordinary crimes". These crimes threaten humanity itself and, therefore, can only be dealt with by a cosmopolitan institution. And yet, Arendt insisted that in international criminal law and trials nothing else than justice is at stake. Arendt, in other words, comes close to portraying the idea of humanity itself as the supreme value in social life, but she also seems to indicate that as soon as international criminal law comes into play, this supreme value vanishes and is replaced with justice. Entering the distinct sphere of law, Arendt argues, completely changes the calculus: all we ought to be interested here is the attainment of justice. It is precisely this tendency to isolate law from its broader social environment that Shklar identified as one of the hallmarks of legalism. While humanity itself might be the primary value in politics and ethics, law is exclusively concerned with justice. This,

indeed, is the sort of legalism that Shklar found so unpersuasive and the reason why she was unimpressed with Arendt's deliberations on international criminal law and justice. And I would side with Shklar on that point. Arendt's account of international criminal law, I believe, would be more convincing if she had not found it necessary to detach it so strictly from other forms of social action. Curiously, Arendt found it difficult to accept that in international criminal law more than justice is at stake, even though she used precisely this argument to provide a compelling *raison d'etre* for international criminal law. This is by no means only a minor flaw. In contradistinction to Shklar's instrumental notion of law, Arendt's justice-centred account of international criminal law has little potential to deal with the problem that the imperatives of protecting humanity and pursuing justice are sometimes at odds. Admittedly, it would be unfair to criticise Arendt for not having anticipated the "peace versus justice" dilemma to which I will turn in the next Section (Shklar did not do so either), but the point is that Arendt's legalism has little potential to address one of modern international criminal law's most obdurate theoretical and practical problems. Ultimately, this flaw stems from the fact that Arendt astoundingly did not take the fundamental differences between domestic and international criminal law seriously. Arendt conceived of international criminal law simply as a mirror image of domestic criminal law where really nothing else than justice seems to be at stake. It is striking that Arendt asserted that the Nazis had done something completely unprecedented, something which should have been dealt with by a cosmopolitan institution, but then simply drew the "domestic analogy" and transferred the notion that in criminal law, nothing else than justice is at stake to the international realm. While Arendt herself chided the Israeli court for not realising what was really at stake when the Nazis started the genocide, she did not seem to fully understand either; otherwise, she would not have drawn a simplistic domestic analogy and insisted so vehemently that in criminal law—domestic as well as international—nothing else than justice is at stake.

The shortcomings of Arendt's account of international criminal law are by no means only of a theoretical nature. On a practical level, they become relevant at the moment when the imperatives of protecting humanity and pursuing justice clash. This quandary—known as the so-called peace versus justice dilemma—has become one of the modern international criminal law's most intractable problems in theory and practice. It is to this debate that I now turn.

The "Peace Versus Justice" Dilemma—a Sketch

Arendt's *Eichmann in Jerusalem* first appeared in 1963. The original version of Shklar's *Legalism* was published one year later in 1964. *Legalism*, as we have seen, mainly focuses on the trials before the International Military Tribunal in Nuremberg (and to a lesser degree on the war crimes trials in Tokyo); *EJ* is essentially a report on the trial of a Nazi criminal before a national Court and outlines some thoughts on international criminal law only in the Epilogue and the Postscript. In spite of their obvious differences, the trials in Nuremberg and Jerusalem had one important common feature: both were conducted when the war was already over, Germany lay defeated, and the prosecution and punishment of her war criminals could not influence the dynamics of the conflict anymore. This temporal distance between legal prosecution

and ongoing conflicts, however, was largely abandoned when international criminal law entered into its "modern age" with the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993. The Tribunal was established by the UN Security Council which acted under Chapter VII of the UN Charter and thereby confirmed that the situation in the region constituted a threat to international peace and security.[8] The ICTY, then, was created *during* an ongoing military conflict, operated in the midst of appalling cruelties and was ultimately supposed to contribute to the restoration and maintenance of peace in the region.[9] What soon became clear, though, was that the operation of an international criminal tribunal during ongoing hostilities can seriously influence the dynamics of the conflict on the ground. The prosecution and punishment of prominent war criminals, the experiences in the former Yugoslavia showed, can be a powerful tool to bring about peace and security in some situations, but also runs the risk of creating martyrs, rekindling nationalist sentiments and racism, impeding reconciliation processes and fostering political alienation in others.[10] In short, it turned out that seeking justice – retributive justice, to be more precise – sometimes comes at the price of jeopardising peace (Schuett 1997). This, undoubtedly, was a rather disillusioning lesson for many champions of the global justice movement who up to this point had believed in the popular slogan that there can be "no peace without justice" because they regarded peace and justice as mutually reinforcing. To be sure, the ICTY was certainly not a "failure"; but what the experiences in the former Yugoslavia demonstrated was that the relationship between peace and justice is, in fact, much more complex than many proponents of international criminal law had assumed and what these experiences exposed were the limits of the "no peace without justice" mantra (Anonymous 1996).

Thus the "peace versus justice debate" in modern international criminal law was born, and the problem that lies at its very heart has remained one of the central practical and theoretical conundrums haunting the discipline ever since. In simplified terms, the debate boils down to two largely antithetical views: Proponents of international criminal trials, on the one hand, argue that there can be "no peace without justice" (Ellis 2006, 113), sceptics and critics, on the other, believe there can be "no justice without peace" (Chesterman 2001, 145–163). While the former group insists that "ending impunity" is an indispensable presupposition for peace and security, the latter camp points out that criminal prosecution—especially during ongoing conflicts—instigates hatred and violence, undermines peace negotiations and prolongs bloody conflicts. It is hardly surprising, then, that the debate has also come to play a significant role in the theory and practice of the International Criminal Court (ICC).

The ICC is, of course, the first permanent international criminal court in the history of humankind. Yet, despite the experiences in the former Yugoslavia and the shortcomings of the ICTY and other international criminal tribunals (Zacklin 2004), the creation of the ICC was heralded as an unqualified triumph of international criminal

[8] S/Res/827 (1993)

[9] The fact that the ICTY was seen as a tool of conflict resolution is explicitly mentioned in numerous UN Security Council resolutions, including S/Res/808 (1993) and S/Res/827 (1993). A comprehensive overview of the UN international criminal tribunals not only in the former Yugoslavia but also in Rwanda and Sierra Leone gives Schabas (2010); on the ICC exclusively, see Kerr (2004).

[10] Strictly speaking, of course, the problem that seeking justice during ongoing conflicts can have deleterious effects on peace processes was "already present at the very birth" of the ICTY (Goldstone 2006, 421).

justice. Cherif Bassiouni, for example, couched his speech at the end of the "Rome Conference" in the following lofty terms (1998, 555):

> The world will never be the same after the establishment of the International Criminal Court…(which)…symbolizes and embodies certain fundamental values and expectations shared by all peoples of the world and is, therefore, a triumph of all peoples of the world. The ICC reminds states that *realpolitik,* which sacrifices justice at the altar of political settlement, is no longer accepted. It asserts that impunity for…perpetrators…is no longer tolerated. In that respect, it fulfils what Prophet Mohammed said, that 'wrongs must be righted'. It affirms that justice is an integral part of peace and thus reflects what Pope Paul VI once said, 'If you want peace, work for justice'. These values are clearly reflected in the ICC's Preamble.

Similarly, the UN felt compelled to claim that the newly created Court can achieve all the following tasks simultaneously (1998):

> achieve justice for all…; end impunity…; help end conflicts…; remedy the deficiencies of ad hoc tribunals…; take over when national criminal justice institutions are unwilling or unable to act…; and deter future war criminals….

At first glance, these triumphant statements seem to succumb to a rather naïve "judicial romanticism", to use Peyam Akhavan's memorable phrase (2009). The ICC is a force for good, the ultimate triumph of an enlightened cosmopolitan morality, a legal bulwark against evil and *realpolitik*, the defender of justice in an unjust world. Yet, despite this grandiloquent rhetoric, it would be unfair to ridicule the architects of the Court as quixotic moralists and legalists who are oblivious to the harsh political realities surrounding the newly created Court. The clearest indication that they indeed anticipated and acknowledged possible clashes between the imperatives of law and politics, that is, clashes between peace and justice is the existence of Article 16 of the Rome Statute of the International Criminal Court (1998)—the founding treaty of the ICC—which provides for the possibility to defer investigation or prosecution:

> 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.

There are two closely related reasons which made the adoption of this provision necessary—one is backward-looking and one looks to the future: First, Article 16 can and should be seen as one of the lessons learned from previous international criminal tribunals—especially the ICTY—that sometimes criminal investigations and prosecutions (and even the threat thereof) can become a serious obstacle on the road toward peace and security. And secondly, it is a testament to the fact that the ICC has been established to intervene in *ongoing* conflicts, indeed, as a tool of conflict resolution (Cryer 2012, 174–179). This intended role of the Court, as its architects knew well,

gives rise to the problem that in some cases, the legal prosecution and punishment of perpetrators will serve as a catalyst rather than as a restraint for conflict and violence; the fact, however, that its architects refused to squander the ICC's potential as a powerful tool of conflict resolution perpetuates the "peace versus justice" dilemma as the central conundrum of modern international criminal law. Its most obvious manifestation in practice is the long-running conflict in Uganda where the Lord's Resistance Army, led by Joseph Kony, has been accused of heinous war crimes and crimes against humanity. While Kony is still at large, the LRA has declared to put down its arms and even to be willing to sign a peace deal if the ICC drops the charges made against its leaders (Allen 2006). What this case clearly demonstrates is that establishing and maintaining peace in conflict areas is sometimes overshadowed and complicated by the threat of legal prosecution. It is important to note that while the ICC was created to remedy some of the deficiencies of ad hoc tribunals, its permanent nature perpetuates the "peace versus justice problem" because it transforms international criminal law from a "post-conflict" into an "in-conflict" system. "The ICC is the archetypal *ex ante* tribunal", Mahnoush Arsanjani and Michael Reisman note, because it is "established *before* an international security problem has been resolved or even manifested itself, or is established *in the midst* of the conflict in which the alleged crimes occurred" (2005, 385). Empirically, the view that the ICC "has shown a strong desire to respond to high-intensity conflicts" (Roach 2009, 225) is confirmed by the practice of the Court which has intervened during ongoing conflicts in Uganda (2003), the Democratic Republic of Congo (2004), the Central African Republic (CAR) (2004), Sudan (2005), Libya (2011), Mali (2012) and the CAR (2014). What emerges from both the theory and the practice of the ICC, Mark Kersten points out in a recent study of the debate, is that "as a permanent institution with a mandate to 'end impunity', the ICC is tailored and expected to intervene in ongoing wars" (Kersten 2016, 8). This, as I have already mentioned, perpetuates the "peace versus justice debate" and calls for a solution to its central quandary. Indeed, there is a tendency among international lawyers (and others) to claim that it is both necessary and possible to transcend the dilemma. They try to do so, in essence, by pursuing two different strategies. The first is to simply deny that there is a problem at all. This is often done implicitly as the following statement by the former president of the ICC, Judge Sang-Hyun Song, illustrates (UN Security Council 2012):

> While the ICC's contribution is through justice, not peacemaking, its mandate is highly relevant to peace as well. The Rome Statute is based on the recognition that the grave crimes with which it deals threaten the peace, security and well-being of the world. The Statute's objective is to ensure their effective prosecution at the national or ICC level, putting an end to impunity and thereby…laying the foundation for a sustainable peace.

A slightly more sophisticated strategy is to acknowledge that the "peace versus justice" problem can and often does arise, but, these commentators hasten to add, its occurrence is always the consequence of some sort of error: in actual fact, these authors assert, "both values reinforce and complement each other", and only if they are "improperly handled, they may clash" (Krzan 2016, 87). Both camps, therefore, display a clear desire to move beyond the "peace versus justice" dichotomy. Both camps, I

believe, are wrong. For the "peace versus justice" problem remains—and in a certain way has to remain—unresolved. Rachel Kerr and Eirin Mobekk, for example, write that "the ICC demonstrates that the two (peace and justice) are not mutually exclusive, but nor are they mutually reinforcing. What is required for it (the ICC) to function properly is the proper balance between the two" (2007, 58–59). Michael Scharf (2007, 248), in a similar vein, observes:

> Notwithstanding the popular catch phrase…"no peace without justice"…achieving peace and obtaining justice are sometimes incompatible goals – at least in the short term. In order to end an international or internal conflict, negotiations often must be held with the very leaders who are responsible and crimes against humanity. When this is the case, insisting on criminal prosecutions can prolong the conflict, resulting in more deaths, destruction and human suffering.

And it is surely telling that even Kersten (2016, 201), after having carefully analysed the conflicts in Uganda and Libya, concludes:

> there may never be a consensus regarding the effects of the ICC on peace, justice and conflict processes. The 'peace versus justice' debate is a, if not *the*, dominant framework within which the appropriateness of ICC interventions is contested. While there is a desire amongst many to move beyond the 'peace versus justice' debate doing so might, in fact, be impossible.

This, undoubtedly, is a rather agnostic stance, but, it seems to me, it is also the only realistic conclusion: For neither is there an inevitable tension between peace and justice nor is there an inherent, natural harmony between them. All we have are individual cases, context-specific dynamics and peculiar circumstances; in some, the prosecution and punishment of individual perpetrators will have the effect of promoting peace and security; in others, it will exacerbate hostility and conflicts. At any rate, though, as long as the ICC is determined to intervene in ongoing conflicts, the "peace versus justice" dilemma will be an ever-present potentiality which has to be dealt with on a practical rather than on an abstract level.

Thus, the previous Section leads to the following picture: Modern international criminal tribunals, most importantly the ICC, frequently operate in the midst of conflicts in which gruelling mass atrocities occur because they are supposed to act as tools of conflict resolution. Criminal prosecution becomes a double-edged sword in these contexts: On the one hand, it has considerable potential to facilitate the resolution of conflicts and contribute to peace, security and stability; it is precisely this potential that the international community is determined not to squander. On the other hand, international judicial intervention[11] in ongoing conflicts can easily backfire and exacerbate conflicts, insecurity and instability in a region. As William Schabas and Ramesh Thakur (2007, 281) conclude: "This Scylla and Charybdis of peace and justice, far from being resolved by the Rome Statute and the growing commitment to accountability, seems destined to emerge as one of the great challenges of the future". Somehow, then, we have to get to terms with this central "peace versus justice" dilemma, and it seems clear that

[11] The term "international judicial intervention" was coined by David Scheffer (1996).

formulas like "no peace without justice" or "no justice without peace" are overly simplistic and ultimately unhelpful solutions for a complex problem. For this problem, as I have already pointed out, there exists no *abstract* solution; this does not mean, however, that it is insoluble per se, but only that we have to stop looking for answers on an abstract level. It is, I suggest, to the *practical* level that is to the level of the Court's decision-making in individual cases, to which we should turn if we want to address the "peace versus justice" dilemma. And it is the purpose of the next Section to probe the potential of Shklar's and Arendt's accounts of international criminal law in this regard.

Scylla or Charybdis? Facing the Tragic Choice Between Peace and Justice

Odysseus, in his attempt to traverse the Strait of Messina, faced a tragic choice: Either coming too close to Scylla and risk the lives of his men or approaching Charybdis and risk his entire boat being devoured. He opted for the former—the lesser evil, as he thought. What the story of Odysseus teaches us is that if it is true that the "peace versus justice" dilemma will remain an ever-present potentiality in international judicial interventions—and I think it is—one is forced to make a tragic choice: Should justice be done even if the world perishes—*fiat iustitia pereat mundus*—or is the world to be protected from Iustitia's celebrated blindness? The stance I would like to defend here is that in situations in which the imperatives of peace and justice clash, the lesser evil—the Scylla, as it were—is to sacrifice justice for the sake of peace. In these cases, I assert, the price for blind justice, judicial romanticism and rigid legalism is simply too high. As one commentator eloquently and rightly observed, "the quest for justice for yesterday's victims of atrocities should not be pursued in such a manner that it makes today's living the dead of tomorrow" (Anonymous 1996, 258). The question then arises what Shklar's and Arendt's accounts of international criminal law can contribute to this debate, and if their respective and, as we have seen, quite contrary positions can be used to defend my argument or if they ultimately refute it.

Let me first, however, elaborate my position in a bit more detail: My stance that sometimes justice has to be sacrificed for the sake of peace is hardly compatible with law's traditional virtues of objectivity, impartiality and consistency; it requires, as we shall see in a moment, a flexible court with the ability to exercise reflective judgement as to whether its judicial intervention in a particular case would jeopardise peace. It should also be clear that this question is not one with which domestic criminal courts normally have to concern themselves. The traditional legalist approach, nonetheless, is based on a "domestic analogy"[12] which insists that the ICC has to be a mirror image of national criminal tribunals. The ICC, according to strict legalists, must isolate itself from the social environment in which it operates, act beyond political dynamics and moral considerations and constitute, as it were an "island" of justice over which Iustitia's blindness reigns. Asseverations of the court's strict adherence to law are, of course, legion; a particularly illustrative example can be found in the Max Planck Encyclopaedia of International Law where the author insists that "the ICC must be detached from political and other inappropriate considerations" and that "it remains essential that the ICC continues to

[12] I follow Hidemi Suganami's definition of "domestic analogy" as the "transfer to the domain of international relations (of) those legal and political principles which sustain order within states" (1989, 1).

show—through the way it conducts all…activities—that it is a purely judicial, objective, neutral, and non-political institution" (Kaul 2010, 686). Even more importantly, both the previous and the current Chief Prosecutor of the ICC have emphasised that the Office of the Prosecutor (OTP) does not take the "political question of peace" into consideration (OTP 2007, 9; Bensouda 2012); the OTP, according to both Chief Prosecutors, is exclusively interested in justice since it is the mandate of other international organs (i.e. the UN Security Council) to deal with matters of international peace and security. Now, it is tempting to dismiss such statements as a form of blind legalism or disregard of the political nature of international criminal law. In truth, however, there are very good reasons for the Prosecutor's disavowal of politics, and it is indeed of vital importance that she continues to claim that political considerations do not influence her judgement. The reason for this is that the appearance of "acting political" comes at the cost of losing legitimacy (Hurd 2007, 183–184; Hansen 2014); and since the ICC does not have its own police force, the Court is dependent on states' willingness to enforce its arrest warrants which, in turn, depends on their perception of the ICC being a legitimate actor (Struett 2012). It is also important, however, not to overstate the legitimacy problem for two reasons: First, perfect consistency and objectivity is an illusion. At the international level, where there is no central law-making organ, no compulsory jurisdiction for courts and a lack of enforcement mechanisms, an international criminal court cannot exist and operate beyond politics. The architects of the Rome Statute were aware of this: Not only did they decide to tie the ICC closely to the UN Security Council[13]—a political rather than a legal organ—they also vested the Prosecutor with a considerable degree of prosecutorial discretion which gives the Prosecutor a "significant degree of autonomy to select his cases" (Danner 2003, 518) and, ultimately, "the…primary competence in proceeding with an investigation and in determining the charges to be brought against an indictee" (Brubacher 2004, 71). The point is that despite all the asseverations that the ICC is a purely legal actor, its pivotal organ's significant discretion is exercised largely beyond strictly legal criteria (Davis 2015; Schiff 2015, 160) The second reason is that the question of the ICC's legitimacy can also be approached from an opposite angle: While the standard argument portrays the ICC's ability to detach itself from politics as its main source of legitimacy, it is often overlooked that the perception of the ICC as an institution pursuing blind justice which ultimately exacerbates and prolongs devastating conflicts is an equally serious threat to the ICC's legitimacy. Again, the ICC seems to find itself between Scylla and Charybdis: Either being regarded as a prudent political actor or being seen as an insensitive legal institution pursuing blind justice whatever the cost; in both scenarios the court loses legitimacy. Importantly, though, there is a way to reduce the legitimacy costs for the ICC in this context. As Michael Struett (2012) argues, ICC officials—most importantly the Chief Prosecutor—must "pretend to ignore politics" while, in fact, rendering prudent judgement as to whether ICC intervention would exacerbate and/or prolong bloody conflicts. The Prosecutor's (and the ICC's) disavowal of politics, then, is not necessarily a testament to her political blindness but can also be seen as a "noble lie" with the intention to keep to a minimum the ICC's inevitable loss of legitimacy.[14]

[13] See, in particular, Arts 13b and 16 of the Rome Statute of the ICC.

[14] Whether or not the disavowal of politics is really a cunning strategy to bolster, the ICC's legitimacy is of course extremely difficult to prove.

Yet for the academic analyst who wants to develop a better understanding of the ICC and its role in international politics, the task is very different. The analyst must understand that the Prosecutor's extra-legal considerations in selecting her cases are not to be deplored but to be endorsed. For an *international* criminal court—and here our discussion returns to the main theme of this article—there is more at stake than the blind achievement of justice—and the "peace versus justice" debate is the clearest manifestation of this "more". To put it in more concrete terms, the Prosecutor's significant degree of discretion gives her a pivotal role in the structure of the ICC and, by extension, in the "peace versus justice" debate.[15] To be sure, the Prosecutor must be adamant that political questions are of no concern to her; in actual fact, however, no international Prosecutor can legitimately make "*fiat Justitia pereat mundus*" his or her leitmotif. Precisely, because the stakes are so much higher in international than in national trials, it is incumbent upon the Prosecutor to decide prudently whether or not international judicial intervention would be detrimental to peace in a particular case (Mnookin 2015). And this decision necessarily takes place beyond purely legal considerations—in fact, it must be based on an ethical-political judgement anticipating the future ramifications of judicial intervention in a particular situation. This, finally, creates a vision of the ICC underlining the requirement of a less legalistic approach to the study of the court; in this vision, the ICC exists and operates as an actor of world politics situated at the intersection of law, ethics and politics (Roach 2006a, b).

It is, I think, rather obvious that Shklar's view of law in general, and her account of international criminal law in particular, chimes with this vision of the ICC as an actor of world politics situated at the confluence of law, ethics and politics. And it is also apparent that Arendt's account of international criminal law is difficult to reconcile with this vision. In Shklar's eyes, law can never escape ideology and is thus always a tool to achieve political ends.[16] Probably, the most salient feature of legalism, according to her, is that it thinks of itself as something morally superior to other forms of social practices, as virtually the only legitimate key to the solution of social problems. Paradoxically, this is at once the source of its strength but also its greatest weakness. Legalism's ignorance, even hostility toward other forms of social action, most importantly, of course, politics, has sometimes served liberalism well, but Shklar does not fail to point out that legalism's blindness to its own ideological roots can also become a threat to liberal values. Samuel Moyn interprets *Legalism* as a "vindication of legalism by way of a critique of its traditional defences" (2013, 478). As I have shown above, this is certainly the correct interpretation of this sophisticated work. *Legalism* is an attempt to save legalism from the inflexible views of many legalists. It is a study of the fundamental ambiguity of legalism, an analysis of its undeniable social power but also a scrutiny of its apparent "absurdities"[17]; *Legalism*, in short, is at once a praise and a critique of certain interpretations of legalism. What renders it such a highly relevant

[15] See Art 53 of the Rome Statute of the ICC. In this context it is noteworthy that even when states or the UN Security Council refer cases to the ICC, the Prosecutor is under no obligation to launch an investigation or prosecution (Schabas 2004: 123–124).

[16] Shklar's view of law closely resembles Otto Kirchheimer's, a critical theorist who saw law as a tool to achieve political goals.

[17] Shklar herself used the term "absurdities" in the context of legalism in a follow-up article to the book (1966, 58).

book today is that it helps us to think of the ICC in terms of an actor of world politics and of international criminal law as a deeply political enterprise. Moyn confirms this view when he writes "Legalism…stands out as the single most significant reckoning with the politics of international criminal justice ever written" (2013, 481). Shklar's controversial view of law as "a form of political action, among others" completely delegitimises the notion that the ICC must seek justice whatever the cost; rather, Shklar allows—indeed, forces—us to regard the court as a political weapon whose actions require political (and ethical) justification. What *Legalism* vindicates is the view that the ICC is a legalistic tool "which occasionally is applicable and effective and often is not" (1986, 143). International judicial intervention, in other words, can be a legalistic answer to *some* international political questions; in these cases, the ICCs aim to eliminate *hostes humani generis* and its "inner structure" which ensures that even these enemies of all mankind receive a fair trial, render international trials a great legalistic act (Shklar 1986, 169–170). However, international judicial intervention is certainly not an answer to *all* international political questions, and if there is no political and ethical justification for ICC intervention, Shklar tells us, there is simply no justification for its use—not even from a legalistic perspective.

Yet, to accept the notion that international judicial intervention has to be justified primarily on political and moral grounds leads to the question of what this justification could be. The ultimate purpose of Shklar's *Legalism*, as I have shown above, is to defend her "barebones liberalism" committed to the normative value of pluralism, tolerance and human freedom. Shklar feels compelled to defend legalism primarily because she believes in its potential to defend the basic liberal values she regards as essential for every society. It is fair to presume, then, that although Shklar did not anticipate the "peace versus justice" debate, she would prioritise peace over justice. While bloody conflicts, mass atrocities and heinous human rights violations are almost by definition threats to plurality, tolerance and human freedom, the prosecution and punishment of evildoers do not necessarily ameliorate these "illiberal situations" but will, in some cases, aggravate them. Shklar, in other words, would defend ICC intervention only if it facilitates the establishment or maintenance of peace; faced with a clash between the imperatives of peace and justice, though, she would almost certainly prioritise the latter and sacrifice the former.[18]

What about Arendt, can we derive any valuable insights for the "peace versus justice" debate from her account? I think we can—and should—but we have to delve a bit deeper into her political theory. As we have seen above, Arendt's account of international criminal law and justice was haunted by a contradiction: On the one hand, she found the *raison d'etre* of international criminal law and tribunals in the fact that certain crimes are of such a magnitude that they are literally crimes against the very idea of humanity; on the other, she insisted that in trials dealing with the perpetrators of these atrocities, in trials dealing with *hostes humani generis,* nothing else than justice is at stake. Leaving aside this contradiction for the moment, let us look more closely at Arendt's highly interesting concept of "crimes against humanity". For Arendt, as we

[18] One possible objection here is to point out that the realisation of Shklar's liberal order is a long-term goal which requires the consistent punishment of human rights violators and ultimately leads to a "climate of accountability". This objection is certainly not without merit, but it overlooks that Shklar prioritised the short-term effects of judicial intervention over the long-term effects. As she put it, beyond the immediate future "lies madness" (1986, 165).

have seen, such atrocities are crimes against the human status because they constitute attacks "upon human diversity as such" (2006a, b, 268–269). While Arendt uses the word "diversity" in *EJ*, she prefers the term "plurality" in her philosophical masterpiece *The Human Condition*. There she writes: "plurality is not only the *conditio sine qua non* but the *conditio per quam* of all political life" (Arendt 1998, 7). There is thus a striking parallel between the "human status" and "political life": both are based on the fundamental ontological condition of human plurality; put differently, without a plurality of human beings, both the idea of humanity and the concept of politics are virtually unthinkable. Indeed, for Arendt, the concepts of humanity and politics are ultimately one and the same: to be human means to participate in political life and vice versa. The true horror of the Nazi regime, she maintained, was that it embarked on "an organized attempt…to eradicate the concept of human being" (Kohler and Saner 1992, 69) by trying to reduce society to "One Man of gigantic dimensions" (2009, 466). This, then, is precisely the point where Shklar's and Arendt's views converge: Both theorists place the concept of human plurality at the very centre of their respective political theories, and both regard human plurality as an ontological feature of the human condition as well as a normative value which has to be cherished and protected. While Shklar does so from an avowedly liberal perspective, Arendt never had any sympathies for such labels because, as she told her friend Hans Morgenthau, she did not think that "the real questions of this century will get any kind of illumination by this kind of thing" (quoted in Bernstein 1996, 3). Nonetheless (and notwithstanding some important differences), there is a striking similarity between Shklar's "barebones liberalism" and what Patrick Hayden labels Arendt's "cosmopolitan realism". Shklar's, as we have seen, is a sceptical liberalism, a stripped-down version committed only to the values of toleration and human plurality. Her's is an anti-utopian "liberalism of fear" which does not "offer a *summum bonum* toward which all political agents should strive, but it certainly begins with a *summum malum*, which all of us know and would avoid if only we could. That evil is cruelty and the fear it inspires, and the very fear of fear itself. To that extent, the liberalism of fear makes a universal and especially a cosmopolitan claim…" (Shklar 1998, 10–11). Arendt's "cosmopolitan realism", in turn, is "a critical cosmopolitanism shorn of historical and moral idealism" that "does not succumb to the dangerous illusions of cosmopolitan idealism" because "it begins from, and continually refers back to, the shared experience of…evil (Hayden 2009, 9-10)". Shklar's "barebones liberalism of fear" and Arendt's "cosmopolitan realism" are thus both entrenched in a non-utopian cosmopolitanism with the political and moral problem of evil at its very heart; both political theories regard the eradication of human plurality as the ultimate evil; both political theories emerge from the real-life experience of an attempted assault on human plurality by the Nazi regime[19]; and both political theories do not attempt, as it were, to bring mankind to heaven but "merely" to save humanity from hell.[20] With so much in common, it is somewhat surprising that Arendt's and Shklar's views diverge so markedly on the question of the purpose of international

[19] Both Shklar and Arendt are therefore members of what Ira Katznelson calls the "political studies Enlightenment", a group of scholars who, deeply influenced by their personal experiences, sought to address the phenomenon of "radical evil" without jettisoning some of the more optimistic beliefs and concepts of the Enlightenment (2003).

[20] I borrow this phrase from the former UN Secretary-General Dag Hammarskjöld, who famously insisted that "the UN was not created to take mankind to heaven but to save humanity from hell".

criminal law and tribunals. While Shklar's account fits seamlessly within her broader political theory, Arendt's seems curiously detached from her political theory. There is thus a yawning gap between Arendt's (sophisticated) political and her (underdeveloped) legal theory. This is unfortunate because Arendt's (legally unorthodox) conception of "crimes against humanity" as "crimes against the human status" is indeed of great pertinence to modern international criminal law in general and the "peace versus justice" problem in particular. Not only does it provide a philosophically powerful *raison d'etre* for international criminal law and its culmination—the ICC—but, taken seriously, it also helps us to identify the primary purpose of international judicial interventions[21]: this primary purpose is the protection of human plurality and, thus, ultimately humanity itself. Hence, whenever judicial intervention is likely to pose a threat to humanity by aggravating conflicts and atrocities, the ICC has to sacrifice justice for the sake of humanity. And thus we arrive at the conclusion that although Arendt is adamant that international criminal law and tribunals are only concerned with the attainment of justice, if we take her idea of "crimes against humanity" seriously, something much more precious—namely, humanity—is at stake. Ultimately, then, faced with the tragic choice between Scylla and Charybdis—justice or peace—Arendt's political theory provides strong reasons to opt for Scylla and prioritise peace and humanity over justice.

Conclusion

There is something dangerously utopian about the idea that international judicial interventions will *always* be conducive to peace; equally, however, the idea that they can *never* have this effect is unnecessarily pessimistic. Both categorical views are untenable because they unduly oversimplify the complexity of international political life. International judicial intervention in ongoing conflicts renders the "peace versus justice" dilemma an ever-present potentiality. That is not to say, though, that the two imperatives will necessarily clash in each and every case. There is neither an inherent harmony nor an inevitable tension between peace and justice. The task of the political and legal theorist, I believe, is not to embark on a futile search for absolute and abstract solutions to the vexing problems but to ask how we can get to grips with the intricacies and imponderables of international political life. This article represents an attempt to do so.

Throughout this article, I have argued that the "peace versus justice" dilemma constitutes an ever-present potentiality in the context of international judicial interventions. Despite my emphasis on context-specific reflective judgement, I have insisted on one rigid principle: Facing the tragic choice between Scylla and Charybdis, it is the lesser evil that must be chosen; that is to say, if a clash between peace and justice arises in a particular situation, the latter must be sacrificed for the sake of the former (even if Court officials have to pretend that the ICC does not concern itself with political considerations). Some commentators, I presume, will find this position problematic; however, I have yet to see a compelling defence of the view that justice must be done even if the world perishes. The central idea I have presented in this article is a vision of the ICC as a flexible actor of world politics, situated at the intersection of law, ethics

[21] For a discussion of the "primary purpose" of international criminal law, see Damaška (2009, 177-186).

and politics. Judith Shklar, with her controversial notion of the instrumental purpose of law and her flexible account of the ideology of legalism, is certainly a powerful ally in this context. Arendt, as we have seen, has a rather conventional view of the purpose of international criminal law and tribunals and seems to be a less ideal candidate to defend a political vision of international criminal justice. Ultimately, however, Arendt's isolation of law from politics and the yawning gap she herself created between her political and her legal theory remains unconvincing. As I hope to have shown, a more consequent use of Arendt's ingenious conception of "crimes against humanity" can lead to a conclusion which accommodates Shklar's and Arendt's combined wisdom: In politics—of which international criminal law is a part—humanity (rather than justice) is at stake.

Acknowledgments I would like to thank Professor Anthony Lang for reading and commenting on a previous draft. The usual disclaimer applies. I also would like to thank the two anonymous reviewers for their insightful comments.

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