

“The Interests of Justice” under the ICC Prosecutor Power:
Escaping Forward

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Abstract: This paper examines the application of article 53 of the Statute of the International Criminal Court (ICC), which provides the prosecutor with the discretionary power to decline to investigate or prosecute, if the ‘interests of justice’ would not be served. First, it will analyse the scope of the concept of the ‘interests of justice’. Second, it will consider whether the prosecutor should take into consideration alternative justice mechanisms when making the decision. It will further investigate whether ‘peace processes’ can be under the consideration of the prosecutor when deciding on the ‘interests of justice’.

This issue is part of my wider research project, which provides an analytical discussion of the prosecutorial discretion of the prosecutor. It reflects on the approaches to the relationship between international law and politics advanced by Martti Koskenniemi. His theory aims to help decision-makers to work objectively whenever a tension arises between concrete and normative demands in international legal institution.

Key words: International Criminal Court, peace processes, international law, politics

Introduction

The debates about the use of the discretionary power of officials within any legal system always raise the question of political influence. This is the case in international law, in general, and in the work of the International Criminal Court (ICC), in particular. Article 53 of the Statute of the ICC is one of the Statute articles, which raises such concern. Subparagraphs (1) (c) and (2) (c) confer on the prosecutor the prerogative to decline an investigation or prosecution in ‘the interests of justice’. The article provides the prosecutor with a critical power, which she can exercise in a broad discretionary manner.

The significant aspect of article 53 is driven from two main issues. The first is that, since the establishment of the ICC in 2002, the prosecutor has not used her discretion to decline any investigation or prosecution in ‘the interests of justice’. Despite the fact that the article has never been invoked, there has been much speculation within the Court and beyond about the scope of this article. Second, sub-paragraphs (1) (c) and (2) (c) of article 53 raises two main concerns, resulting from its non-application and the loose meaning of the term ‘the interests of justice’. These concerns are related to questions over what is the scope of the ‘interests of justice’? And when can the prosecutor decide not to open an investigation or prosecute a certain situation or a case? The next concern is that, if the prosecutor made her decision to decline a situation or a case, what other alternative justice mechanisms would be acceptable to the prosecutor? The latter concern opens another discussion about whether or not ‘peace processes’ can delay or cease the criminal proceedings.

Much of the current literature indicates concerns about the ability of the prosecutor to decline an investigation or prosecution, as they believe that the latter has no such a right.¹ However, other scholars argue that the prosecutor has a power of declination, and that such power would be consistent with the Statute.² My discussion will seek to interpret the scope of article 53, which apparently provides the prosecutor with this power, instead of discussing whether or not the prosecutor has such a right. It addresses the main problem, raised essentially by scholars who want to avoid politically motivated decisions. The paper will argue that the prosecutor can decline the proceedings, without being politically-motivated.³ In addressing this

¹ Policy Paper: The Meaning of “The Interests of Justice” in Article 53 of the Rome Statute, *Human Rights Watch*, June (2005), available at < <http://www.hrw.org/legacy/campaigns/icc/docs/ij070505.pdf>>, arguing in favour of committing to criminal justice. See also Martin Macpherson, Open letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice, *Amnesty International*, June 2005, available at < <http://www.amnesty.org/en/library/info/IOR40/023/2005>>. see also Richard J. Goldstone and Nicole Fritz, ‘In the Interests of Justice’ and Independent Referral: The ICC Prosecutor’s Unprecedented Powers, *Leiden Journal of International Law*, Vol. 13, Issue 03 (2000), 655- 667, see also Dražan Djukić, Transitional Justice and the ICC: in the ‘Interests of Justice’, *Centre Universitaire de Droit International Humanitaire* (2006), P. 1- 69 June (2005), available at < <http://www.hrw.org/legacy/campaigns/icc/docs/ij070505.pdf>>, arguing in favour of committing to criminal justice.

² Henry M. Lovat, Delineating the Interests of Justice: Prosecutorial Discretion and the Rome Statute of the International Criminal Court, *bepress Legal Series*, Paper, 1435 (2006), See also, Darryl Robinson, Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court, *European Journal of International Law*, Vol. 14 (2003), P 481- 505, see also Matthew R. Brubacher, Prosecutorial Discretion within the International Criminal Court, *Journal of International Criminal Justice*, Vol. 2, No. 1 (2004), 71- 95

³ These arguments will be presented by depending on the objectivity theory of an international legal discourse, advanced by Martti Koskeniemi. This theory provides helpful lens in understanding the exercise of discretion, as his complex defense of international law from just being politics is what such an exercise of discretion entails to consider. The objective international legal discourse needs two requirements: normativity and concreteness. The

issue, I draw on the experience of previous international criminal tribunals, where the prosecutors faced the same dilemma in an effort to establish whether any lessons can be learned. I will also rely on interviews I conducted with four members of staff of the Office of the Prosecution (OTP), as an inductive study that has had shaped my views on several points.⁴

Prosecutorial Discretion under Article 53

Article 53 first deals with the investigation stage and provides the prosecutor with a power not to open an investigation in a certain situation on the basis of ‘the interests of justice’.⁵ It provides two criteria that the prosecutor should consider when making a negative decision: ‘the gravity of the crime and the interests of victims’. These criteria do not seem exclusive, as the article continues, ‘there are *nonetheless* substantial reasons to believe that an investigation would not serve the interests of justice’. The word ‘*nonetheless*’ indicates that the prosecutor could also consider other factors. This can give an implication that the Statute is inclined to adopt a wide interpretation of the meaning of ‘the interests of justice’.

In sub-paragraph (2) (c), the provision also deals with the prosecution stage.⁶ If the prosecutor decides to open the investigation in the given situation, she, then, will move on to the prosecution stage and may decide whether or not to prosecute. At this stage, the prosecutor is entitled to select cases within the given situation to which the prosecutor has opened the investigation. In addition to the above two criteria, this sub-paragraph adds two more criteria that the prosecutor is required to consider when making a decision: ‘the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.’

The wording of the text implies that the prosecutor may utilize a broad meaning of justice when making a decision not to proceed, as the Statute adds two further factors to be balanced. As Dražan Djukić expressed, ‘the article speaks of “all the circumstances, including...” (emphasis added) which renders the list of factors illustrative instead of exhaustive.’⁷ However, apart from the scope of the prosecutor’s power in defining the scope of the ‘interests of justice’, the article subjects the decision not to proceed in ‘the interests of justice’ to the Pre-Trial Chamber, which

normativity of international law assumes that international law should be based on principles and can be applied regardless of the subjective will, interest, and behaviour of a state. But in this case, this law, which is regulated and not based on actual practices of the state, is merely utopian, as it cannot be verified by reference to the actual practice of states. With respect to concreteness, it runs in an opposing way. It assumes that international law should be regulated and based in accordance with the actual practice of states in the sense that makes it able to be verifiable by reference to the will, interest, and behaviour of a state. But this law, which sets a distance between itself and a natural morality, seems mere apology. Koskenniemi opines that we need to balance between these requirements so we can come up with objective discourse, see Martti Koskenniemi, *From Apology to Utopia, the Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005)

⁴ I conducted these interviews from 11th to 20th March, 2013. I followed semi-structured interviews with four members of staff of the OTP: Head, International Relations Task Force, OTP, Senior Appeal Counsel, Trial Lawyer, and Prosecutor during the trial stage. Each interview took around one hour

⁵ The sub-paragraph reads ‘In deciding whether to initiate an investigation, the Prosecutor shall consider whether: Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.’

⁶ The sub-paragraph reads, ‘If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because: A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;’

⁷ *Supra* n. 1, Dražan Djukić, P. 26

can review the decision on its own initiative.⁸ More than that, if the Pre-Trial Chamber dismisses the negative decision of the prosecutor, it can oblige the latter to proceed with the investigation or prosecution.

The Decision's Timing

The big challenge in this regard is when are the most appropriate times that the prosecutor can apply article 53? Drawing on my initial contact with the Prosecutor and other evidence in the public domain, it appears that the OTP would construe the term narrowly and not take into account any alternative to the criminal justice system, on the ground that the task of the Court is confined to criminal prosecutions.⁹ The underlying reason behind this policy is the principal policy that the OTP has sought to develop. They seek to adopt a zero-tolerance policy against perpetrators of serious crimes of concern to the international community and, therefore, put an end to the era of impunity. While it seems that such a policy has merit, there is a doubt about its success, since, as a matter of fact, such tribunals, however, work within a political environment, and exercise their jurisdiction over crimes that also have, to a large extent, political dimensions.

However, article 53 still provides four circumstances in which the prosecutor might decline the ongoing proceedings. It is very important to bear in mind that most of these criteria are of a dual nature, and rather, could function in two different ways. The Statute does not show how much weight will be given to each factor. However, the OTP in its policy paper on 'the interests of justice' suggests three basic priorities will be considered when dealing with these criteria.¹⁰ First is the exceptional nature of 'the interests of justice', which supposes that there is a presumption in favour of investigation and prosecution, even if the criteria are met. Second, the objects and purposes of the Statute will guide the exercise of the discretionary function when considering these criteria. Third, the OTP presumed that there is a difference between 'the interests of justice' and the interests of peace. The latter falls within the mandate of other international institutions, in particular the United Nations Security Council. It appears, then, that the OTP is inclined to favour the demands of criminal justice ahead of the demands of alternative justice.

a. The gravity of the Crime

The first factor is 'the gravity of the crime'. The inclusion of the gravity test within this article, where the prosecutor has a large discretion, indicates that the gravity concept serves a

⁸ The Pre-Trial Chamber is an important judicial part of the Court, whose function starts at the early stage of the judicial proceedings, when the Prosecutor presents a situation or a case to it, until the confirmation of charges. For more information about this body see, ICC, Pre-Trial Division, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/pre%20trial%20division/Pages/pre%20trial%20division.aspx>

⁹ This was Prosecutor Fatou Bensouda's answer to my question about the prospects of the application of Article 53. She stated that if the current works of the Court disturbed national activities of the given situation, she would reconsider her proceedings and apply Article 53. This was during a lecture run by Prosecutor Fatou Bensouda at Birkbeck College on 29 November, 2012. For more information about the other evidence (such as the policy paper issued by the OTP), see, *Supra* n. 1 and 2

¹⁰ ICC, Office of Prosecution, Policy Paper on the Interests of Justice, September, 2007, available at <<http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf>>, Pp. 3-4

discretionary function.¹¹ This criterion seems to function in two opposite ways. In other words, the prosecutor can consider the severity of the situation or the case as a basis for proceeding with the investigation or prosecution. This can be deduced from the general priorities that the OTP developed for the evaluation of ‘the interests of justice’. On the other hand, the prosecutor may use the potential reverse effects of the initiation of the criminal proceedings, as a basis not to proceed with the investigation or prosecution. This seems a difficult assessment that the OTP might face. However, history has shown over time that there are some particular egregious offences, which are so grave in their nature, that should be always prosecuted, whatever the consequences of initiating criminal proceedings. The International Tribunal of Former Yugoslavia (ICTY) and International Tribunal for Rwanda’s experiences have demonstrated several lessons that the ICC should develop. For example, these Tribunals have sought to concentrate on situations and cases that have ‘particular historical resonance, such as the shelling of the marketplace in Sarajevo and the Srebrenica massacre.’¹² Although all crimes under the jurisdiction of the Court are serious enough, nevertheless, crimes such as genocide and crimes related to sexual violence should be always considered as grave crimes that warrant the attention of the Court.¹³

b. The Interests of Victims

‘The interest of victims’ is a second factor that the prosecutor can use to stop proceeding with either the investigation or prosecution. This particular factor was well established in the practice of the ICTY’s jurisprudence. The decision not to indict Slobodan Milosevic on the eve of the Dayton Peace Agreement, although the latter was allegedly responsible for several serious crimes, is an example that showed how Prosecutor Richard J. Goldstone was aware of this particular criterion: ‘the interests of victims’.¹⁴ This decision was still necessary in order not to make the situation of the victims worse. This also shows how ‘the interests of victims’ and ‘the role of the perpetrators’ overlapped.

These interests are often varied across time and geography. While some victims of a certain situation might demand that criminal justice be done, ‘others would prefer to bury the past’.¹⁵ This prospect is highly likely linked to certain circumstances, where several factors can shape the demands of those victims. The most preeminent one is the role of the perpetrators in the given situation, where they still hold office or military command. For example, those perpetrators, by virtue of their strong positions, may oblige the victims to be satisfied with peaceful settlements, as a strategy to avoid a criminal justice fate. The absence of conditions, in which a criminal trial could be held, such as the lack or the unavailability of effective enforcement mechanisms, is another consideration that might make this approach inapplicable. So depending on the given factors, the prosecutor is required to determine which demands would be considered. The dual nature of this criterion makes the evaluation of this factor by the prosecutor

¹¹ Ignaz Stegmiller, The Gravity Threshold under the ICC Statute: Gravity Back and Forth in Lubanga and Ntaganda, *International Criminal Law Review*, Vol. 9, No. 3 (2009), Pp. 561-5

¹² Allison Marston Danner, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, *American Journal of International Law*, Vol. 97 (2003), P. 543

¹³ The crimes that are under the jurisdiction of the Court are: genocide, crimes against humanity, war crimes, aggression, see articles 5, 6, 7, and 8 of the ICC Statute

¹⁴ Slobodan Milosevic was a President of Federal Republic of Yugoslavia, indicted by the ICTY for several international crimes, and died during his trial in 2006

¹⁵ Making Kampala Count: Advancing the Global Fight against Impunity at the ICC Review Conference, *Human Rights Watch* (2010), P. 95, available at <<http://www.hrw.org/reports/2010/05/10/making-kampala-count-0>>

unpredictable. As the prosecutor is required to protect the victims by bringing justice to them, she might decide not to initiate a criminal prosecution. In the latter case, the prosecutor sometimes needs to consider any serious bad effect on the victims' life or dignity that could result from the investigation or prosecution.¹⁶

The prosecutor might be required to weigh these factors to adopt a certain strategy; not necessarily to stop a prosecution, however. This is exactly what happened in the ICTY's experience, where these two factors played essential role in mapping the strategy of prosecution followed by Goldstone, alongside with the then available enforcement mechanisms.¹⁷ For example, although the position of Milosevic at that time constituted a fundamental reason that required Goldstone not to indict him on the eve of the Dayton Peace Agreement, this situation was changed later, when the Prosecutor found that his role no longer constituted any risk to the interests of victims. The availability of the political wills of powerful states was another critical factor that encouraged the Prosecutor, based on the other two factors, to make a case against Milosevic.

Such an overlapping relationship between these criteria requires the prosecutor to examine the given situation by considering all details of it, as these interests are 'by nature a case-by-case affair'.¹⁸ It is not necessary that the prosecutor should decide not to prosecute to save 'the interests of justice'; she can also exercise a comprehensive strategy by depending on the relevant circumstances to decide on the issue. For example, the postponement of the decision, as in the case of Milosevic, can be one of the strategies that the prosecutor can follow. Thus, even if the initiation of investigation or prosecution is not in 'the interests of justice', based on the examination of 'the interests of victims', this does not mean that the prosecutor should make a final decision not to proceed. The prosecutor can utilise her power and exercise a comprehensive strategy and delay the timing of the decision, based on the given circumstances of the situation or case.¹⁹

c. The Role of the Alleged Perpetrators

'The role of the alleged perpetrators' is an additional criterion that was mentioned only in the context of the prosecution stage, along with 'the age and infirmity of the alleged perpetrator'. This criterion also can be interpreted by the prosecutor in two opposite ways. While it can be a reason for rejecting the case, it also can serve for initiating it. In other words, the duality nature of this test leaves the prosecutor with a broad space to decide on the issue. The ICTY again gives an example, where remarkably this factor again was tested. For instance, Goldstone indicted Ratko Mladic and Radovan Karadzic despite their role at the time of indicting them. There was a fear that the indictment of those people might have adverse effects on the then peace negotiations and that the prosecutor should consider the positions of those criminals. However, the prosecutor believed that the indictments of such people would help to weaken their role in the Balkan conflict. And this is exactly what happened. The ICTY's experience showed first how Goldstone first identified these criteria that have been codified now in article 53, on the international level, and, second, how these criteria can be used in opposite ways. However, it is very important to bear in mind that the political environment at that time was in favour of issuing

¹⁶ The English Code for Crown Prosecutors (2013) has mentioned this particular case, see P. 4.12

¹⁷ For more information about prosecution' strategy of Goldstone, see Gary Jonathan Bass, *Stay the Hands of Vengeance*, (Oxford: Princeton University Press, 2002)

¹⁸ Alexander K. A. Greenwalt, Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court, *Virginia Journal of International Law*, Vol. 50, No. 1 (2010), P. 145

¹⁹ An interview with a staff member of the Office of the Prosecution conducted on 12 March, 2012

such decisions against those perpetrators, while the same environment was not conducive for indicting Milosevic.

d. The Age or Infirmary of the Alleged Perpetrator

‘The age or infirmity of the alleged perpetrator’ seems the clearest factor that is not open to various interpretations. Augusto Pinochet’s case is a good example to discuss this factor. Although Pinochet was indicted for serious crimes, including crimes against humanity, he never stood trial.²⁰ It is true that the Spanish court had already issued the prosecution decision, and later on, the full trial processes were completed by British court. However, the trial process was ended when Pinochet appealed the decision on the basis of his health condition. Pinochet made two appeals, based on his health condition, before the British Home Secretary accepted it.²¹ The latter rejected all appeals on the basis of humanitarian considerations, and decided to complete all judicial and appeal processes before making the decision on his health condition. On 8th of October 1999, the British Home Secretary, Jack Straw, announced that Pinochet would not be extradited, in view of his poor health.²²

This example seems to indicate that the health condition should be interpreted in a narrow way. Although Pinochet was in a poor health, the full trial processes took place. Therefore, if poor health can exclude the individual criminal responsibility of the alleged perpetrator, that does not preclude the prosecutor from the very beginning of the criminal proceedings from prosecuting him or her. It is only when the investigative and/or prosecutorial proceedings affect the mental or physical health of the alleged perpetrator that the prosecutor should stop the proceeding with the trial.²³ However, the prosecutor is still able to exercise more than one strategy in such situation. The prosecutor, for example, can follow the policy of postponement, in the same way that the ICTY dealt with Milosevic's ill-health through adjournments and postponements.²⁴

Possible Alternative Justice Mechanisms

The next concern of the article is whether other alternative justice mechanisms would be acceptable to the prosecutor, as an alternative to ICC proceedings. The significance of this concern is the current discussions that argue that the prosecutor should not defer the situation or case to any alternative mechanism, and should commit only to the criminal justice approach.²⁵ Advocates of this view developed their arguments on a theoretical basis, which implies that the

²⁰ For information about Pinochet case, see Eamon C. Merrigan, *The General and his Shield: the Extradition Process Against General Pinochet Ugarte*, *Temple International and Comparative Law Journal*, Vol. 15 (2001), 101- 119

²¹ See *R v. Secretary of State for the Home Department Ex p. Pinochet Ugarte* CO/1786/99 (Q.B. 1999), or *Pinochet Ugarte, R (on the application of) v Secretary Of State For Home Department* [1999] EWHC Admin 505 (27th May, 1999), *Judgmental UK Case Law Made Public*, available at < [http://judgmental.org.uk/judgments/EWHC-Admin/1999/\[1999\]_EWHC_Admin_505.html](http://judgmental.org.uk/judgments/EWHC-Admin/1999/[1999]_EWHC_Admin_505.html)>

²² See News Flash: Pinochet Case, Chile’s request to release Pinochet on health grounds: a medical and judicial matter, not a political one, *Amnesty International*, AI INDEX: EUR 45/40/99 (1999), available at <<http://www.amnesty.org/fr/library/asset/EUR45/040/1999/fr/dad588c0-aedf-447c-978f-4dd37540c126/eur450401999en.pdf>>

²³ see P. 6.5 (g) of the Code

²⁴ Philippa Webb, *The ICC Prosecutor's Discretion Not to Proceed in the "Interests of Justice"*, *Criminal Law Quarterly*, Vol. 50 (2005), P. 333

²⁵ *Supra* n. 1 and 2

retributive justice can serve better to end the era of impunity and violence.²⁶ In addition, they exploited the looseness of the meaning of the term ‘interests of justice’ and followed the aims of the given institution, as a second source for the interpretation of the norm.²⁷ By following this source, they found that the main aim of the ICC is to insist on bringing criminal justice to both victims and perpetrators.²⁸ Accordingly, it is the criminal justice approach that the prosecutor should consider, when making a decision. The arguments were mainly based on the indeterminate meaning of justice, which implies that the wording of the text of the article cannot be used to find out the exact meaning of the term. To reply to this inquiry, it seems that the interpretation of the wording of article 53 is possible, and can find out what kinds of mechanisms the prosecutor can defer to, without resorting to the purposes of the Court that are laid down in the preamble of the Court’s Statute.²⁹

To discuss the above point, we need first to distinguish between the investigation phase and the prosecution phase. From a legal point of view, before the prosecutor makes a decision to investigate, she first seeks to receive information, and collect evidence, via communications and referrals. This early stage of investigation is called a preliminary investigation. Now, the sort of decision that the prosecutor can make at this stage is the decision of investigation (investigative proceedings). At this stage (investigation stage), the investigative proceedings are not conducted, such as identifying alleged perpetrators, exact incidents, victims, the sort of criminal responsibility, the link between the incidents and their perpetrators, and bringing witnesses. Therefore, if the prosecutor decided to stop the investigation at this particular stage, then, it seems that any justice alternative may be acceptable, even if the latter alternative does not include any investigative proceeding. This can be deduced from the wording of the text of article 53.³⁰

Now, the same argument made above can be applied to the second phase: the prosecution stage. However, this needs a further explanation. If the prosecutor decided to investigate the given situation and then decided not to prosecute any case on the basis of ‘the interests of justice’, different mechanisms would be relevant. At the prosecution stage, it seems again that the criterion ‘the interests of justice’ might be used to cease a prosecution, but not an investigation. The prosecutor, at this stage, completed the investigative proceedings and declined to prosecute any case. This means that the prosecutor, at this stage, can defer to other mechanisms that do not involve prosecutorial decisions. However, the alternatives do need to involve investigative proceedings. Therefore, the prosecutor should be strict, at this particular stage, when interpreting the term of ‘justice’. For example, a truth commission approach, in its narrow meaning, which involves investigative proceedings and not the decision to prosecute, may be an acceptable

²⁶ They found that the Preamble of the ICC Statute emphasises the necessity of providing criminal justice to both victims and perpetrators of any conflict, see *supra* n. 1 and 2 of the views of those authors

²⁷ They used Article 31 of the Vienna Convention on the Law of Treaties, which set out the general sources of the interpretation of treaties. These sources are in order. The second one is that, if the wording of the text is not clear, then, the main aims and goals of the given treaty can be utilised

²⁸ For example, Paragraph 4 of the Preamble of the Statute provides that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’

²⁹ Most of the scholarships and some international human rights organisations have initially argued against any decision that might stop the proceedings in ‘the interests of justice’. Basically, the latter views were based on the lack of clarity of the phrase: ‘the interests of justice’ that is open for different interpretations. This pushed them to exclude the wording text to interpret the exact meaning of the phrase and use other sources, such as the aims of the Court, to build their views, See *supra* n. 1 and 2 to know further information about the arguments presented by those groups

³⁰ Public apologies, reparatory justice, National Remembrance Day, administrative justice, constitutional justice, historical justice, and peace process are some examples that can be relevant alternatives, as they, sometimes, might not involve any investigative or prosecutorial process or they might result from non-investigative mechanisms

alternative. The truth seeking approach is the ideal approach that refers to the process of investigation and does not end up with any prosecution decision. Ultimately, if the above interpretation is correct, then one can say that the first part of article 53 should be read in a broad way, but the second one in a narrow way. In other words, the discretionary function looks more significant at the prosecution stage than the investigation stage.

Is Peace Process within the Scope of ‘the Interests of Justice?’

A third concern of article 53 is whether or not peace processes can be taken into account. Can the latter prospect come within the parameters of the broad meaning of ‘justice’? Basically, the Prosecutor, the policy paper on ‘the interests of justice’, and most commentators have answered no.³¹ However, the previous Prosecutor³² and the incumbent one³³ seem inconsistent, as both have answered that they would consider the impact of the proceedings on national efforts to achieving peace on some other occasions.

To find out whether peace talks come within the confines of justice, we need to look at article 53, the policy paper on ‘the interests of justice’, and my own data, which I collected by interviewing members of staff of the OTP. Obviously, the wording of the text of the article does not make any reference to peace processes. However, the balancing test that article 53 provides might merit an examination of the position of peace within the article. Among the factors that the article suggests are ‘the role of the alleged perpetrator’ and ‘the interests of victims’. These factors, as was explained above, have a dual nature in the sense that they are open to different interpretations. Having looked at history, one can see that these factors were taken into considerations when handling certain situations.³⁴ In other words, it seems that these factors may be used as bases to defer to peace negotiations, as will explained now.

In order to discuss this point in more detail, we need first to distinguish between stable and unstable situations, whether be it during ongoing conflicts or post-conflicts. During stable situations, criminal prosecution may become a desirable option. This happens, essentially, in situations, where the alleged perpetrators have been defeated, and have had no further role in the given society. The perpetrators usually cease to hold power and can be apprehended with no fear of the renewed explosion of violence. The prosecutor can then ignore this criterion (the role of the alleged perpetrators) and, therefore, proceed with the investigation of prosecution. “The

³¹ “I cannot adjust the law to the political interests. Those who manage political agenda have to respect the law”, An answer of Moreno Ocampo to my own question about the application of Article 53 run via a webcast interaction. See this interview at: Webcast interview with ICC's former Chief Prosecutor, Luis Moreno Ocampo, International Bar Association, 17, October, 2012, at http://wcc.webeventservices.com/eventRegistration/console/EventConsoleMVC.jsp?&eventid=529206&sessionid=1&username=&partnerref=&format=fhvideo1&mobile=false&flashsupportedmobiledevice=false&helpcenter=false&key=47F980F3BD93A69C4C205D63E8B92504&text_language_id=en&playerwidth=800&playerheight=690&eventuserid=70917034&contenttype=A&mediametricsessionid=56952751&mediametricid=963054&usercd=70917034&mode=launch#> (Last Access: 10, October, 2012)

³² See ICC, the Office of the Prosecution, Second Report of the Prosecutor of the International Criminal Court, Mr Moreno Ocampo, to the Security Council Pursuant to UNSC 1593 (2005) (13th December, 2005), P. 7, available at http://www.icc-cpi.int/NR/rdonlyres/2CFC1123-B4DF-4FEB-BEF4-52E0CAC8AA79/0/LMO_UNSC_ReportB_En.pdf

³³ Prosecutor Fatou Bensouda’s answer to my question about the prospects of the application of Article 53, where she stated that if the current work of the Court disturbed national activities on the given situation, she would reconsider her proceedings and apply Article 53. This was during a lecture run by Prosecutor Fatou Bensouda at Birkbeck College on 29 November, 2012

³⁴ *Ibid*

interests of justice” during the Nuremberg and Tokyo tribunals were best promoted by simply delivering criminal justice to the perpetrators, who were not any longer in power. The same can be applied to the Rwanda situation, where the defeat of *genocidiers* made the criminal justice response an ideal mechanism to deal with the post-conflict transition without a fear about “the interests of justice”.

Things look different when it comes to talk about unstable situations, however. Indeed, there are several historical examples that demonstrate that a variety of justice mechanisms (criminal and non-criminal mechanisms) have been applied to such situations (unstable situations).³⁵ However, there was a common shared feature that shaped this situation, where the political and military strategies articulated to end the violence or to boost the fragile peace processes played essential roles in the eventuality of prosecution on peaceful transitions. In other words, articulating “the interests of justice” was, to a large extent, affected by the accompanying political and military circumstances. For example, one of the worst atrocities that was committed in Bosnia and Herzegovina, the Srebrenica massacre by Mladic, happened only two years after the establishment of the ICTY.³⁶

When the perpetrators of this massacre and other crimes, such as Karadzic, no longer held power, Goldstone developed his strategy and, accordingly, decided to indict those perpetrators, as there would be no further atrocity or threat to the ongoing peace talks.³⁷ This happened on the eve of the Dayton Peace Agreement, when Goldstone indicted only Karadzic and Mladic, and totally ignored Milosevic, who was still needed for the process of the Dayton talk.³⁸ It was only after the NATO intervention in Kosovo that made Milosevic no more dangerous for any violent backlash (interests of victims).³⁹ The latter environment, which obviously had political considerations, provided an ideal opportunity for the hunter to hunt his prey. These critical cases are examples that demonstrated that the pragmatic considerations were needed for a better strategy on a prosecutorial discretion. Further, considering these accounts was apparently a part of the decision-making process that provided the Prosecutor with a wide space to move without prejudice to the independence of the Prosecutor, as a body within a judicial institution.

The same argument could be applied to the Darfur situation, where the prosecution approach may have resulted in increasing the level of suffering (interests of victims), and those who were indicted by the ICC and are still in power have still been committing war crimes.⁴⁰

³⁵ El Salvador and Haiti adopted non-criminal mechanisms, while Uganda, Sierra Leone and Rwanda and Former Yugoslavia adopted a criminal approach

³⁶ See *supra* n. 17. Here, I am linking the crimes committed in Balkan wars to the establishment of the tribunal, as this was not all the time a case. Hazan said that “The UN peacekeeping forces present in the former Yugoslavia reported that the warring parties took account of the legal risk during the first few weeks after the creation of the ICTY in 1993. They later realized that the Tribunal was weak and, confident of impunity, committed the Srebrenica massacres.” According to this statement, there was a link between the crimes committed and the establishment of the tribunal, at least, at the beginning of the conflict, see Pierre Hazan, Measuring the Impact of Punishment and Forgiveness: a Framework for Evaluating Transnational Justice, *International Review of the Red Cross*, Vol. 88, No. 861 (2006), P. 35

³⁷ *Supra* n. 17 Bass, Pp. 227-30

³⁸ *Ibid* P.237

³⁹ The NATO war in Kosovo changed the priorities of the war strategies, where Milosevic was considered to be an obstacle to the stability of the region, as he began to lose his power. Then, the political and military environment was ideal for the Prosecutor to indict him as “the interests of justice” were not at risk any more

⁴⁰ When the President of Sudan was indicted by the Prosecutor, who ignored calls by the Arab League, the African Union, several African States, and China not to indict him, Omer Al-Bashir responded to this indictment by suspending the operation of aid groups, which left thousands of people in Darfur, including IDPs with no life

However, there is a preeminent difference between Darfur and Yugoslavia, which is the enforcement problem. In the ICTY situation, despite the fact that the Prosecutor still used his discretion to select his targets in the most relevant circumstances, the Prosecutor was acting within an environment where effective enforcement mechanisms were available.⁴¹ This, first, pushed the decision-makers to approach a criminal prosecution mechanism as a *de facto* approach to address the conflict. Second, it allowed the Prosecutor to use his discretion in a more convenient way, as the prospects of arresting the potential indictees were relatively high.

In the Darfur situation, the enforcement mechanisms are not effective, and the political environment is not helpful for the OTP, as most African states are against the policy of the OTP, in particular in the Darfur situation.⁴² Further, *all* indictees of the Sudanese Government are still at large. Hence, the prosecutor decided not to apply article 53 and indicted the most responsible for committing crimes under the jurisdiction of the ICC, including the President of Sudan, although an effective enforcement mechanism is not available.⁴³ The SC's resolution referring the Darfur situation to the ICC did not provide any serious mechanisms for enforcing the decision.⁴⁴ In addition, the ICC entirely depends on the political will of states in enforcing its decisions. The consequences of this strategy were the failure of any peace process taken to end the conflict and a noticeable growth in the level of violence since the prosecution and indictment decisions against Sudan and those who are still in power, respectively.⁴⁵

This does not mean at all that the Prosecutor should not have indicted the President; instead he could have exercised a better strategy if he had considered these pragmatic considerations. It is true that considering these accounts does not necessarily guarantee the capture of the alleged perpetrators. However, such a strategy, at least, gives a better chance of arresting the fugitives. In other words, bringing the political idea of justice within the legal framework of the ICC by emphasising the discretionary power of the prosecutor can help to exercise a better strategy. For example, he could consider the strong role and position of the President and, therefore, decide not to prosecute him until he has built the case against him when the pragmatic considerations are available.

services, see Kate Allan, Prosecution and Peace: a Role for Amnesty before the ICC? *Denver Journal of International Law and Policy*, Vol. 39, No.1 (2011), Pp. 275-6

⁴¹ The existence of NATO, and the effective supports that were given to the ICTY by the then Governments of the fighting states were some available tools at the time, see more *supra* n. 17

⁴² Most recently, the Chad Government refused to arrest the President of Sudan, who visited the country recently, although Chad is party to the ICC and has an obligation to transfer the President to the ICC, see Chad: Hosting once again President al-Bashir would be a further insult to the victims of Darfur, *No Peace Without Justice* (8th April, 2013), available at <<http://www.npwj.org/ICC/Chad-should-stand-justice-and-not-grant-impunity-President-al-Bashir.html-0>> (Last Access: 12th May, 2013)

⁴³ There are huge concerns about the public nature, benefit, seriousness, and time of the indictment of President of Omar Al-Bashir, as such indictment has only accelerate the rhythm of the violence in Darfur, where people are in desperate need of humanitarian assistance as a consequence of the indictment, see Conor Foley, This Darfur Prosecution is deadly, *The Guardian* (27, May, 2009), available at <<http://www.guardian.co.uk/commentisfree/2009/may/27/hay-festival-icc-darfur-sudan>> (Last Access: 24, November, 2012). See also, James A. Goldstone, More Candour about Criteria, *Journal of International Criminal Justice*, Vol. 8 (2010), P. 385

⁴⁴ UNSC Resolution 1593 (2005)

⁴⁵ *Supra* n. 36, Hazan, P. 35, talking about how the warring parties to the Darfur conflict took the ICC's prosecution into account when committing further crimes. This argument was also asserted by a participant to a Regional Consultation Conference held in South-Africa, see Tim Murithi and Allan Ngari, The ICC and Community-Level Reconciliation: In-country Perspectives Regional Consultation Report, *Institute for Justice and Reconciliation Transitional Justice in Africa Programme*, (21st and 22nd February, 2011), available at <http://www.iccnw.org/documents/IJR_ICC_Regional_Consultation_Report_Final_2011.pdf>

Thus, the reference to pragmatic considerations does not necessarily prevent the prosecutor from making a decision to prosecute a certain perpetrator at all. Instead, it provides her with more options, so she can exercise a better prosecutorial strategy, based on the available options. This also reveals that the prosecutor at this stage is not politically-motivated, as the above strategy comes within the confines of the discretionary power. This is how Kenneth A. Rodman argued when he talked about the relationship between pragmatic and legal considerations by saying ‘those episodes (the latter considerations) demonstrate that political factors -most notably the power of the perpetrators relative to the forces arrayed against them and the political strategies of the latter to address the conflict- determine when a criminal law approach is effective and whether it contributes to peace.’⁴⁶ However, sometimes, in particular, during a point where the alleged perpetrators are still holding significant power or retain remarkable power, the prosecutor might consider ‘some compromises with criminal justice’.⁴⁷ This is a critical point, which it seems that the OTP would not consider, as the latter is quite strict about the policy of bargaining paradigm, where the perpetrators might use to simply avoid any criminal justice fate.

Then, how would the prosecutor behave in such circumstances? Is not the decision to refer to peace processes within the confines of justice (In its broad meaning)?⁴⁸ The probable answer to this inquiry is to know as to whether or not the victims seek the demands of peace ahead of the demands of justice. If that is so, then we can say that the decision to defer to what victims ask for is what justice is. This is not an easy hypothesis, since; first, the perpetrators might impose their conditions on victims as a bargaining chip for their freedom. Second, it is quite difficult to identify the real needs of victims. However, the policy paper that the OTP issued about the interests of justice has made it very clear that the application of subparagraphs (c) of article 53 is exceptional in nature.⁴⁹ This is also how several staff of the OTP answered my inquiry about the general application of article 53, where all of them confirmed that the OTP is extremely strict about the application of this article.⁵⁰ However, the exceptional nature of ceasing criminal proceedings requires additional and external responses so the OTP can exercise and insist on the criminal prosecution. It ‘requires a commitment by international and regional actors to assume those risks’, as the threats posed by the alleged perpetrators are usually ‘proportionately greater’ and imminent.⁵¹ The availability of the latter support might also affect the decision of the prosecutor.

In short, the evaluation of the potential consequences of the decision of investigation or prosecution on the ongoing conflict or a political transition is a matter of policy and definitely not law. Basically, the Prosecutor is a legal body and has nothing to do with diplomatic and political affairs. But that does not mean that the prosecutor might ‘act as both lawyer and diplomat in exercising his discretion, evaluating not only the gravity of the crime and the admissibility of the case, but also the likely impact of an investigation or prosecution on

⁴⁶ Kenneth A. Rodman, *Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court*, *Leiden Journal of International Law*, Vol. 22, Issue 01 (2009), P. 101

⁴⁷ *Ibid* P. 110

⁴⁸ It should be borne in mind that when the OTP decides to stop proceeding with the investigation or prosecution, the particular form of alternative would not be very important, according to an interview I conducted with a member staff of the OTP on 12 March, 2013. Basically, the concept of justice has broad and narrow meanings. The first consists of retributive, restorative, and reparatory justice, while the narrow one consists of only retributive justice. For more information about the meaning of justice see, Priscilla B. Hayner, *Unspeakable Truths: Facing Challenge of Truth Commissions* (New York, Routledge: 2002), and *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, Report of the Secretary- General, UN Doc. S /2011/634, 12 October 2011, at P. 17

⁴⁹ *Supra* n. 1

⁵⁰ Several interviews with members staff of the OTP conducted on 12, 14 of March, 2013

⁵¹ *Supra* n. 46, P. 115

prolonging a conflict or undermining a political transition.⁵² In other words, the prosecutor sometimes might be in contact with the domestic, regional and international actors who are involved in the peace transition for the purposes of examining of the probable effects of criminal proceedings on the given situation.⁵³ This is without any prejudice to the independence of the prosecutor, as the above strategy is under the discretionary power of the prosecutor. Under this power and the above factors, the prosecutor might consider the domestic approach and, therefore, might delay any criminal proceeding or just decline totally the investigation or prosecution. Such decisions are made on a case by case basis, where the prosecutor is required to examine all legal, political, and diplomatic and any other relevant aspect of the situation, bearing in mind the exceptional nature of application of article 53.

The Uganda situation was among the first situations that raised the issue as to whether or not the peace process should be taken into prosecutorial discretion, in particular under article 53. Following the acceptance of Ugandan Government's referral in 2005, some people, including Betty Bigombe, a former Uganda minister, some NGOs, and the Acholi community, criticized this referral, as they believed that the referral would disturb the peace talks. The Court decided to indict several alleged perpetrators from *only* the rebels' side (LRA), including Joseph Kony who was mainly responsible for serious crimes committed against the Acholi community. While this conflict is still in progress, the Government of Uganda has led several initiatives to end the conflict by having a peace negotiation with Kony.⁵⁴ The latter has refused several times to sign any peace talk until the ICC withdraws the arrest warrant issued against him in 2005.⁵⁵ As a consequence, the Ugandan Government has provided a variety of alternatives to all perpetrators, ranging from blanket amnesty to punishment procedures against only those who committed the most serious crimes, without clarifying what kinds of punishments they are.⁵⁶ However, the dilemma of justice and peace in the context of Uganda situation is still unclear, as both sides are still fighting each other on the one hand and seeking for a peaceful solution on the other.⁵⁷ The question is how the prosecutor should respond to this situation.

To accept the peace process as a solution to handling the Uganda situation according to article 53, is only to accept that the peace process can come within the confines of 'the interests of justice'. The legal justification for such a suggestion is to factor the peace process into the decision-making process when the prosecutor evaluates the given situation based on her discretionary power. The objectivity theory advanced by Koskeniemi offers an essential theoretical justification to reflect on the Uganda situation. He stated that an international legal discourse (a decision-making) that is based on the pragmatic and legal considerations is an

⁵² *Supra* n. 46, P. 121

⁵³ An interview with a member staff of the OTP conducted on 12 March, 2013

⁵⁴ Situation in Uganda, *The Hague Justice Portal*, available at <<http://www.haguejusticeportal.net/index.php?id=6175>> (Last Access: 2, April, 2013)

⁵⁵ See *Prosecutor v. Kony*, Case No. ICC-02/04-01/05

⁵⁶ See Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army/ Movement, Juba Sudan, ICC-02/04-01/05-352-AnxA 18-11-2008 2/12 CB PT, available at <<http://www.icc-cpi.int/iccdocs/doc/doc589232.pdf>>, see also another agreement in 2008 about cease-fire, Uganda and Rebels Sign Cease-Fire, *The New York Times* (24 Feb, 2008), available at <http://www.nytimes.com/2008/02/24/world/africa/24uganda.html?_r=0> (Last Access: 26, March 2013)

⁵⁷ Both sides also signed another agreement on 2009; see Agreement on Implementation and Monitoring Mechanisms, Juba, Sudan, available at <<http://northernuganda.usvpp.gov/uploads/images/vy0hCC-IHclHmwkfQyIbPQ/agendaitem6signed.pdf>>. See also, Michael Otim and Marieke Wierda, Uganda: Impact of the Rome Statute and the International Criminal Court, *International Center for Transitional Justice* (May, 2010), available at <<http://ictj.org/sites/default/files/ICTJ-Uganda-Impact-ICC-2010-English.pdf>>, P. 2

objective discourse.⁵⁸ With respect to the pragmatic accounts, it is submitted that several pragmatic factors require the prosecutor to consider the peace efforts that have been called for by the main parties to the conflict. For example, the voice of victims is one important account, where several surveys have shown that a large number of them demanded the peace efforts ahead of justice demands.⁵⁹ The role of the civil society, NGOs, and other domestic actors, who are closely engaged in the conflict and strongly believe in a peaceful solution, is another pragmatic factor. This can be followed by the strong position of the rebels, who are still holding a strong power, as Kony, for example, has refused to sign any peace talk and, therefore, end the conflict until the Court withdraws the arrest warrants issued against his groups. On legal considerations, the prosecutor may consider two criteria provided by article 53 as bases to stop the proceedings against the given situation: ‘the interests of victims and the role of the alleged perpetrator’. The consideration of the latter legal requirement alongside the pragmatic ones seems a possible approach towards handling the atrocities on the one hand, and on the other, avoiding the suspicion that the prosecutor is politically-motivated when considering those pragmatic accounts.

Conclusion

This paper sought to identify the potential prospects of the application of article 53. It showed that the exercise of the prosecutorial discretion in the context of evaluating ‘the interests of the justice’ should be based, at the most relevant circumstances, on legal and policy considerations. The two latter should be balanced in a way that enables the prosecutor to exercise a better strategy of prosecution that can help to give more effect to such a strategy, or find a better solution that corresponds with the national efforts to address the given situation. Therefore, the prosecutor, sometimes, needs to factor other concrete considerations, which are necessary for the exercise of the discretionary function. The unavailability of effective enforcement mechanisms obliges the prosecutor to defer her criminal proceedings and use a broad strategy when assessing the meaning of ‘justice’. Until our global society finds more credible and effective tools, we need to accept both faces of article 53. By then, it could be possible to change the whole argument and to argue for the sole commitment to a criminal justice approach. It, finally, showed that the prospect of the influence of the prosecutor’s decision, based on her discretionary power, by pragmatic considerations is inevitable.

⁵⁸ The Koskenniemi’s theory is not taken for granted. His theory was criticised by a variety of sources, including realism theory and positivism theory, and from within critical legal theory such as Dencho Georgiev. He criticised the approach of the arguments that Koskenniemi used to produce an objective international legal discourse, see Dencho Georgiev, Politics or the Rule of Law: Deconstruction and Legitimacy in International Law, *European Journal of International Law*, Vol. 4, No. 1 (1993), 1- 14. I also criticised him by developing a balance approach between the requirements of the objectivity of an international legal discourse, which I placed in my wider PhD project (Chapter 1)

⁵⁹ For example, two surveys conducted by a group of researchers in 2005 and 2007 showed that the responses of the affected societies are far from uniform. The first one demonstrated that most of the respondents support the criminal prosecution rather than peace talks, while the second survey showed the reverse, see Phuong Pham, Patrick Vinck, Marieke Wierda, Eric Stover, and Adrian di Giovanni, Forgotten Voices: A Population-Based Survey of Attitudes about Peace and Justice in Northern Uganda, *International Centre for Transitional Justice* (July, 2005), available at <<http://ictj.org/sites/default/files/ICTJ-HRC-Uganda-Voices-2005-English.pdf>>. See also, Phuong Pham, Patrick Vink, Eric Stover, Marieke Wierda, Andrew Moss, and Richard Bailey, When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda, *Human Rights Center: UC Berkeley* (January, 2007), available at <<http://www.escholarship.org/uc/item/8m56w3jj#page-2>>

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