

**THE ROLE OF THE PROSECUTOR IN THE INTERNATIONAL CRIMINAL
COURT: DISCRETION, LEGITIMACY, AND THE POLITICS OF JUSTICE**

THE DEGREE OF DOCTOR OF PHILOSOPHY

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ABSTRACT

Under the complex circumstances and the limited capacity in which the International Criminal Court (ICC) operates, the role of its prosecutor has been challenging. The ICC prosecutor cannot pursue all situations for investigation, and cases for prosecution. She has to be selective. Moreover, the individuals and the crimes over which the Court exercises its jurisdiction, and the present circumstances in which it operates raise political sensitivities that might undermine the ability of the Court to deliver its justice effectively. The ICC prosecutor faces a complex dilemma in negotiating a relationship between fealty to the law and the impact and possible benefits of political exigencies in delivering justice. It also raises the problem of the role of political considerations within the decision-making process. The exercise of discretion lies at the heart of these challenges, as the ICC's Statute allows the prosecutor to exercise significant discretion.

This thesis will explore and analyse the discretionary power of the ICC prosecutor. It situates the development of the office historically by referring to the experiences of the War Crimes Tribunals after World War II and the two United Nations Tribunals of the 1990's. Against this background, it examines the scope of discretion and the way the Prosecutor has exercised it. This thesis will suggest that there has been a tendency to overlook the necessity of distinguishing between various senses of discretion open to the prosecutor to exercise. In exploring the scope of discretion, the thesis will argue that there is wider range of discretion with different senses, available to the Prosecutor and that has been exercised by her, when applying legal thresholds. In assessing these legal thresholds, the focus will be on 'sufficient gravity' and 'the interests of justice'. The thesis will suggest that the indeterminacy of the legal thresholds, such as 'sufficient gravity' is the space, which, in effect, allows decision-makers to exercise a wide range of discretion. The thesis refers to this discourse as legal interpretative discretion. This is to be distinguished from prosecutorial discretion, which is a different

concept and allows decision-makers to consider extra-legal considerations, as the case with the term 'interests of justice'. An implication of the interpretation of the terms like 'sufficient gravity', is that the prosecutor can appear to possess almost unlimited power. In exploring the relationship between the two types of discretion the thesis will root the analysis within a close reading of examples of the investigations and prosecutions, and the scholarly literature. The thesis also discusses the relevance of political considerations within the decision-making process in the context of the exercise of prosecutorial discretion. It suggests that there need not be a conflict between the broad sense of justice as outlined in the Statute and political factors in giving effect to decisions. The thesis engages with the repeated statements by prosecutors, which have denied the use of discretion and asserted a fealty to strict legalism. It suggests that beneath these statements lie a resource, discretion, which helps not hinders international criminal justice.

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LIST OF ABBREVIATIONS

African Union (AU)
Assembly of States Parties (ASP)
Comprehensive Peace Agreement (CPA)
Democratic Republic of the Congo (DRC)
European Center for Constitutional and Human Rights (ECCHR)
Executive Committee (ExCom)
Human Rights Watch (HRW)
ICTY Rules of Procedures and Evidence (ICTY RPE)
International Criminal Court (ICC)
International Law Commission (ILC)
International Military Tribunal (IMT)
International Military Tribunal for the Far East (IMTFE)
International Tribunal for Formal Yugoslavia (ICTY)
International Tribunal for Rwanda (ICTR)
Israel Defense Forces (IDF)
Justice and Equality Movement (JEM)
Lord's Resistance Army (LRA)
Non-Governmental Organisations (NGOs)
North Atlantic Treaty Organisation (NATO)
Office of the Prosecutor (OTP)
Peace and Security Council (PSC)
Pre-Trial Chamber (PTC)
Public Interest Lawyers (PIL)
Rules of Procedures and Evidence (RPE)
Rwanda Patriotic Army (RPA)
Rwanda Patriotic Front (RPF)
Security Council (SC)
Sudanese Liberation Army/Movement (SLA/M)
Uganda People Defence Force (UPDF)
United Nations (UN)
United Nations General Assembly (UNGA)
United Nations Hybrid Operation in Darfur (UNAMID)

INTRODUCTION

One of the most remarkable worldwide organisations that has been established since the United Nations (UN) is the International Criminal Court (ICC).¹ As its earlier exemplars the Nuremberg and Tokyo Tribunals, the ICC is a treaty-based court.² However, unlike the UNSC Tribunals,³ set up on an ad hoc basis by the UN to deal with only specific situations, the ICC is a permanent court, with an international jurisdiction that *may* reach any state in the world.⁴ At the conclusion of the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, the Rome Statute of the Court was adopted in 1998, and began to function in 2002 when it received the sixty required ratifications.⁵ The preamble of the Rome Statute lays out the principal aim of the Court as ‘ending impunity’⁶ for those who commit the most serious violations of international criminal law, including war crimes, crimes against humanity, and genocide.⁷ As such, the ICC is considered a court of last resort.⁸ It will only have jurisdiction when national judicial systems are unable or unwilling genuinely to deal with the given crimes.⁹

¹ M. Cherif Bassiouni, *Introduction to International Criminal Law* (2nd ed.) (Dordrecht, Martinus Nijhoff Publishers, 2012), Chapter VI.

² All previous international tribunals were either established in accordance to the agreement between several states to deal with specific situation, such as the Nuremberg Tribunal, or the SC resolutions, such as the ICTY and the ICTR. See, M. Cherif Bassiouni, From Versailles to Rwanda in 75 years: The Need to Establish a Permanent International Court, *Harvard Human rights journal*, Vol. 10 (1997), 11- 62.

³ For more detailed comparisons between these tribunals, see Morten Bergsmo, Catherine Cisse, and Christopher Staker, The Prosecutor of the International Tribunals: the Cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR, and the ICC Compared, in Louise Arbour, Albin Eser, Kai Ambos, and Andrew Sanders (eds.), *The Prosecutor of Permanent International Criminal Court* (Freiburg im Breisgau: 2000).

⁴ For more information about the establishment of the Court see, William A. Schabas, *An Introduction to the International Criminal Court* (4th ed.) (Cambridge, Cambridge University Press, 2011).

⁵ At present, the Rome Statute has been signed by 139 states and ratified by 124 states.

⁶ Paragraphs four and five of the Preamble of the Rome Statute aims at ‘the most serious crimes of concern to the international community as a whole must not go unpunished’ and ‘to put an end to impunity’, respectively.

⁷ Antonio Cassese, *International Criminal Law* (3rd ed.) (Oxford, Oxford University Press, 2013). In relation to the crime of aggression, the Review Conference of Rome Statute held in Kampala on 11th June, 2010 provided that the Court shall exercise its jurisdiction over the crime of aggression after 1st January 2017, when States Parties make a decision for activating this jurisdiction. See Coalition for the International Criminal Court’s website at <<http://www.iccnw.org/?mod=aggression>>.

⁸ Article 17 of the ICC Statute creates the complementarity regime, where the ICC has jurisdiction, only when states are ‘unable or unwilling genuinely to carry out the investigation or prosecution’.

⁹ See Article 17 of the Statute.

The Office of Prosecutor (OTP), and specifically the chief prosecutor, is one of the main bodies of the Court, which attracts much controversy and debate.¹⁰ Unlike the previous international tribunals, the ICC provides its prosecutor with an independent authority to launch the Court's investigations and prosecutions.¹¹ In addition to a complaint from the Security Council (SC) or referral by a State Party to the Rome Statute under Article 13 (a)(b), the prosecutor has also a *proprio motu* power under Article 15 to trigger the jurisdiction of the Court.¹² Under Article 53 (1) (a)(b) and (2) (a)(b), the prosecutor is given a broad power to examine the satisfaction of the legal requirements of initiating investigation and prosecuting cases. Paragraphs (1)(c) and (2)(c) of the same article provide the prosecutor with a prosecutorial discretion not to initiate an investigation or proceed with a case. The matter of what sort of discretionary power the prosecutor has, under which basis the power is exercised, and the scope of this discretion stand at the heart of the examination of these requirements. These questions are crucial to be scrutinised and analysed for a better understanding of the concept of discretion within the ICC.

The current discussion and analysis of the question of *the ICC prosecutor's discretion* in the literature – in addition to the question of its scope¹³ - has extensively focused on only one

¹⁰ Luc Reydam, Jan Wouters, and Cedric Ryngaert, *International Prosecutors* (Oxford, Oxford University Press, 2012). For the purpose of this thesis, the term Prosecutor (with an upper case) refers to one of the Prosecutor of International Tribunals in person, depending on the context of the sentence. However, the term prosecutor (with a lower case) refers to the prosecutor in general.

¹¹ See Bergsmo, Cisse, and Staker, *supra* n. 3.

¹² Kaveri Vaid, Discretion Operationalized through Law: Proprio Motu Decision-Making at the International Criminal Court, *Florida Journal of International Law*, Vol. 25, No. 3 (2013), 359- 416.

¹³ Margaret M. deGuzman, Gravity and the Legitimacy of the International Criminal Court, *Fordham International Law Journal*, Vol. 32, Issue: 5, 2008, 1400- 1465. She discusses the scope of prosecutorial discretion in the context of examining gravity. See also, Daniel D. Ntanda Nsereko, Prosecutorial Discretion before National Courts and International Tribunals, *Journal of International Criminal Justice*, Vol. 3 (2005), 124- 144, analysing the scope of prosecutorial discretion before national and international criminal tribunals, including the ICC. See also, Susana SáCouto and Katherine A. Cleary, The Gravity Threshold of the International Criminal Court, *American Journal of International Law*, Vol. 23, No. 5 (2008), 807- 854, discussing the scope of prosecutorial discretion in the context of assessing 'relative gravity'. See also, 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), 547- 565, discussing the scope of prosecutorial discretion in the context of assessing 'relative gravity'.

sense of discretion, namely *prosecutorial discretion*. Prosecutorial discretion has been the subject of extensive academic commentary and debate. In so doing, some have focused on the question of whether there should be *criteria* to govern the exercise of prosecutorial discretion. This discussion is usually associated with the issue of the relevance of extra-legal factors. For example, in her much cited article, Allison Marston Danner argues that when exercising prosecutorial discretion, ‘the Prosecutor can best ensure the consistency and perceived fairness of his discretionary decision making through the consistent application of *ex ante* standards.’¹⁴ She argues that publishing prosecutorial guidelines, which are rooted in a ‘good process’, will help to enhance the legitimacy of the Court, as they constrain this discretionary power.¹⁵ She suggests that the failure to promulgate these guidelines will risk credibility and legitimacy, which are fundamental to the success of the Court.¹⁶ Philippa Webb also calls for ‘a model of structured discretion’,¹⁷ where *ex ante* criteria should guide the exercise of prosecutorial discretion in the context of the assessment of ‘the interests of justice’. When analysing the criteria of the exercise of prosecutorial discretion, James A. Goldston calls on ‘the OTP to set forth in broad terms the contours which guide its exercise of discretion, and/or delineate further the various factors which may come into play.’¹⁸ For the purpose of guiding the exercise of prosecutorial discretion, Brian D. Lepard offers ‘fundamental ethical principles’.¹⁹ Avril

¹⁴ Allison Marston Danner, Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court, *American Journal of International Law*, Vol. 97, No. 3 (2003), P. 538.

¹⁵ *Ibid*, Pp. 536- 9, and 541.

¹⁶ Allison Marston Danner, Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel, *Stanford Law Review*, Vol. 55, No. 5 (2003), P. 1656.

¹⁷ Philippa Webb, The ICC Prosecutor’s Discretion not to Proceed in the ‘Interests of Justice’, *Criminal Law Quarterly*, Vol. 50 (2005), P. 306.

¹⁸ James A. Goldston, More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court, *Journal of International Criminal Justice*, Vol. 8, Issue: 2 (2010), P. 403.

¹⁹ Brian D. Lepard, How should the ICC Prosecutor Exercise his or her Discretion? The Role of Fundamental Ethical Principles, *John Marshall Law Review*, Vol. 43, No. 3 (2010), Pp. 558- 564.

McDonald and Roelof Haveman call upon the Prosecutor to develop ‘guidelines’ to govern ‘the decision either or not to initiate an investigation.’²⁰

Others have mainly focused on the relevance of political considerations within the decision-making process when exercising prosecutorial discretion. Here, whilst some of them argue for the favour of the possibility of including such considerations within the decision-making process under certain conditions, others strictly argue for the non-inclusion, and irrelevance of such considerations. For example, Kenneth A. Rodman argues that the exercise of prosecutorial discretion should be carried out in a broad way that considers ‘the political context in which international criminal law has to operate.’²¹ Matthew R. Brubacher also discusses the question of the relevance of ‘political factors’, and argues that such factors are necessary for ‘the success of the Court’, but within ‘a policy-based approach’ that justifies such a process.²² In addition, Alexander K.A. Greenawalt calls for a broader exercise of prosecutorial discretion where political considerations may be considered and within a pragmatic model he suggests, which aims at moderating the tension between legalisms’ aspirations and the realities of the work of the ICC.²³ He argues that it is true that the ideal suggests that exercise of prosecutorial discretion should be guided by legal rules, ex ante guidelines, or guides of the Court’s judges.²⁴ However, the plausibility of such appeal ‘depends

²⁰ Avril McDonald and Roelof Haveman, Avril McDonald and Roelof Haveman, Prosecutorial Discretion - Some Thoughts on ‘Objectifying’ the Exercise of Prosecutorial Discretion by the Prosecutor of the ICC: Expert consultation process on general issues relevant to the ICC Office of the Prosecutor (15th April, 2003), P. 9, available at <<http://www.icc-cpi.int/otp/consultations.php>>.

²¹ 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, No. 1 (2009), P. 101.

²² Matthew R. Brubacher, Prosecutorial Discretion within the International Criminal Court, *Journal of International Criminal Justice*, Vol. 2 (2004), 71- 95.

²³ Alexander K.A. Greenawalt, Justice without Politics? Prosecutorial Discretion and the International Criminal Court, *New York University Journal of International Law & Politics*, Vol. 39 (2007), 583- 673.

²⁴ *Ibid*, P. 586.

on the adequacy of its underlying assumptions.²⁵ In the context of the ICC, such an account is not sufficient and a balance is needed between legalism and realism.

The irrelevance of political factors is mainly presented by the Prosecutors and NGOs, who argue that prosecutors are merely to do law and that there is no place for political considerations within their decision-making process. The ICC Prosecutor has always declared that she only applies the law. Both Prosecutors of the ICC have denied the above suggestions by arguing that the current strategy of the prosecution is taken in accordance with the law. The Prosecutor's statements indicate as if the law is clear and does not entail any discretionary fashion (legal interpretive discretion), and that the exercise of prosecutorial discretion has no political dimensions (prosecutorial discretion). In her response to a question of the place of cases that have political indications, Fatou Bensouda answered, '[a]ll I can and will do is to apply the law in strict conformity with the Rome Statute'.²⁶ Her predecessor, Prosecutor Luis Moreno-Ocampo regularly adopted the same stance in public statements: 'my duty is to apply the law without political considerations'.²⁷ He emphasised this stance several times.²⁸ The

²⁵ *Ibid*, P. 586.

²⁶ Aeyal Gross, ICC Prosecutor: Low-Ranking Israeli Soldiers, as well as Palestinians, could be Prosecuted for War Crimes, *Haaretz* (1st May, 2015), available at <<http://www.haaretz.com/news/diplomacy-defense/.premium-1.654516>> (Last Access: 2nd May, 2015).

²⁷ Statement delivered by Moreno-Ocampo, Building a Future on Peace and Justice, Address by Mr. Luis Moreno-Ocampo, Prosecutor of the ICC, *Office of the Prosecutor* (25th June, 2007), available at <http://www.icc.cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/building%20a%20future%20on%20peace%20and%20justice%20%20%20address%20by%20mr%20%20luis%20moreno%20ocampo%20%20p.aspx>.

²⁸ 'I cannot adjust the law to the political interests. Those who manage political agenda have to respect the law.' Moreno Ocampo's answer 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 (17th October, 2012), at <http://wcc.webevents-services.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: 10th October, 2012) (hereinafter: an Ocampo's interview at International Bar Association). Also he said 'This is not the ICC; the ICC is a judicial system' Interview with Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, Global Observatory (25th January 2012), at <<http://www.theglobalobservatory.org/interviews/197-interview-with-luis-moreno-ocampo-chief-prosecutor-of-the-international-criminal-court.html>> (Last Access: 10th October, 2012) (hereinafter: an

prosecutor informs us that her work is based on only law and has nothing to do with preferences, policies, and interests of states. Former ICTY Prosecutor Louise Arbour argues that ‘not only must the Prosecutor stand apart from such [political] considerations, he or she must stand *above* them, and be fully prepared without fear or favour to contradict them or to challenge political pressures which may seek to influence the course of justice.’²⁹ In addition to this, Human Rights Watch (HRW) also strongly argue that ‘[t]he prosecutor should always attempt to steer clear of such politicization of his role, and should certainly not adopt a construction of “the interests of justice” that would favor such politicization.’³⁰

It is true that prosecutorial discretion is a central debate to be raised about the work of the prosecutor. However, discretion as exercised by the OTP has several levels of meaning. As will be analysed in Chapter Three, there may be a degree of discretion that might justifiably be exercised by decision-makers when applying legal categories. Such discretion may either result due to the indeterminate, ambiguous, or open-ended meaning of these legal norms, where no further legal rules or guiding factors exist to elucidate or define them. Professor H. L. A. Hart refers to this sense of discretion when he argues that an ‘open texture’ at the borderlines of legal rules is inevitable.³¹ He opines that legal rules cannot always solve all problems. The characterization of the legal rules of being ‘open-textured’ allows for a space of discretion to be followed. As Kent Greenawalt puts it, ‘since classification by human language cannot provide clear answers to each of the infinite variety of factual situations, some uncertainty

Ocampo’s interview at Global Observatory), also he said ‘re-inforcing hardliners is exactly the problem that the UN Security Council and the AU have to deal with, by having legal decisions respected. If not, they will promote the hardliners’, Interview: Luis Moreno-Ocampo, ICC Prosecutor, The Africa Report, 21, September, 2011, at <<http://www.theafricareport.com/200909213281793/news-analysis/interview-luis-moreno-ocampo-icc-prosecutor.html>> (Last Access: 10th October, 2012) (hereinafter: an Ocampo’s interview at the Africa Report).

²⁹ Louise Arbour, Keynote Speech at the International Conference on War Crimes Trials (8th November, 1998), cited in Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law Politics and Diplomacy* (Oxford, Oxford University Press, 2004), P. 178.

³⁰ Human Rights Watch, The Meaning of ‘The Interests of Justice’ in Article 53 of the Rome Statute (1st June, 2005), P. 14, available at <<https://www.hrw.org/news/2005/06/01/meaning-interests-justice-article-53-rome-statute>>.

³¹ H. L. A. Hart, *the Concept of Law* (Oxford, Oxford University Press, 1961), P. 125.

about the application of rules is unavoidable.³² Thus, in applying the legal rules, Marisa Iglesias Vila argues, there will be a place for discretion to be exercised.³³

In the above sense of discretion and within the ICC, the existing literature has paid scant attention and made superficial reference to this sense of discretion and without analysis and explanation. William A. Schabas, for example, states that the legal criteria of initiating a *proprio motu* investigation ‘provide enormous space for highly discretionary determinations.’³⁴ Kaveri Vaid made reference to the possibility of exercising discretion when applying legal categories. In taking up this issue of the open-ended meaning of the gravity threshold issue, Vaid emphasises that the open-endedness and substantive flexibility of ‘sufficient gravity’ provide the prosecutor with ‘some degree of discretion.’³⁵ She says that gravity is ‘an exceptionally flexible concept’ that is open for varied interpretations ‘in many different and plausible ways.’³⁶ This type of discretion implicitly allows the prosecutor to choose among alternative interpretations. To her, indeterminacy of the concept gives the prosecutor a power to claim authority as to which correct interpretations will be taken when deciding whether to initiate an investigation or not. Therefore, ‘[s]uch interpretive autonomy, when coupled with the flexibility of the concept itself, strongly resembles discretion.’³⁷ However, she does not provide a theoretical and legal context for this discretion.

³² Kent Greenawalt, Discretion and Judicial Discretion: the Elusive Quest for the Fetters that Bind Judges, *Columbia Law Review*, Vol. 75, No. 2 (1975), P. 359.

³³ Marisa Iglesias Vila, Juridical Discretion and Judicial Positivism: the Substantive Criteria of Validity, Discretion and the Rule of Law, P. 135, available at <file:///C:/Users/user/Desktop/prosecutorial%20discretion/discretionary/JUDICIAL_DISCRETION_AND_JUDICIAL_POSITIVISM__THE.pdf>.

³⁴ Schabas, *supra* n. 4, P. 181. See also in general William A. Schabas, Victor's Justice: Selecting "Situations" at the International Criminal Court, *The John Marshall Law Review*, Vol. 43, Issue: 3 (2010), Pp.548-9, arguing that political choices were made under the guise of legal criteria.

³⁵ Vaid, *supra* n. 12, Pp. 377 and 385.

³⁶ *Ibid*, P. 388.

³⁷ *Ibid*, P. 365.

In examining the discretionary power of the ICC prosecutor, the thesis will, therefore, look at these two types of discretion available before the prosecutor and the Court. The first one is a conventional discretion and is called prosecutorial discretion. This discretion permits the prosecutor to exercise a choice having satisfied the legal requirements that the Statute requires for initiating an investigation or prosecuting a case. For this purpose, Article 53 (1)(c) and (2)(c), and Article 15 (1) and (3) will be fully examined. The Article 53 (1)(c) and (2)(c) ‘interests of justice’ provisions *explicitly* authorise the prosecutor to exercise such discretion. Luc Cote says this criterion has ‘yet to be defined in the sphere of international criminal law, where they are called upon to play an important role in the exercise of prosecutorial discretion.’³⁸ The Article 15 *proprio motu* power of the prosecutor may arguably permit the prosecutor to exercise prosecutorial discretion. However, this issue is highly contested, as will be discussed in Chapter One.

The second type of discretion lies in applying the legal requirements (jurisdictional and admissible criteria, in particular ‘sufficient gravity’) that the Statute provides for initiating investigations or prosecuting cases. Before the prosecutor exercises prosecutorial discretion, she needs first to determine the satisfaction of these legal requirements. This thesis will establish that in applying these criteria, the ICC Prosecutor has, in effect, exercised a degree of discretion to interpret the satisfaction of these legal requirements. ‘Sufficient gravity’, as a legal filter by which to determine which situations and cases are admissible, is a key concern among the other criteria to the account of this thesis.³⁹ Article 17 (1) (d) specifies that a case will not be admissible if it ‘is not of sufficient gravity to justify further action by the Court’. This adds an additional complexity to the prosecutor’s policy commitment to concentrate only on the most serious crimes. In determining the meaning of ‘sufficient gravity’, the Prosecutor in fact

³⁸ Luc Cote, Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law, *Journal of International Criminal Justice*, Vol. 3, Issue: 1 (2005), P. 164.

³⁹ Chapter Four will fully discuss this sort of discretion.

deploys a strong degree of discretion to interpret ‘sufficient gravity’, as she has used different factors through different methods to interpret the meaning of ‘sufficient gravity’ and pick up among the different interpretations.

It is true that the exercise of prosecutorial discretion, which authorises the prosecutor to legitimately *choose* among worthy legally situations and cases, raise problems in relation to the consideration of political factors, in fact it is legal interpretive discretion that has been hidden into the interpretation of the legal requirements, which seems more problematic. Whilst it is often supposed the assessment of the legal thresholds should not involve the exercise of discretion, however, in practice it appears as if the Prosecutor had a choice to determine which situations or cases to be investigated or prosecuted upon applying these legal thresholds. Looking at the strong sense of discretion, exercised by the ICC Prosecutor to interpret ‘sufficient gravity’, it seems as if that this practice is ultra vires as multiple interpretations – even opposite or contradictory – of this term have been equally reasonable and possible.

The main contribution of this thesis is to *emphasise* the idea of the strong discretionary fashion that the ICC Prosecutor has used when interpreting the legal requirements of initiating investigations or proceeding with cases. There is a scant research done in this relation. What has been less recognised in the literature is the extent to which the ICC Prosecutor, who is obliged to apply complex legal requirements concerning jurisdiction and admissibility in the process of deciding whether to initiate investigations or prosecutions, is also necessarily engaged in interpretive legal discretion where formulations in the Statute are indeterminate in some way. In addition to this point, the discussion of this discretion is extensively followed by the discussion of prosecutorial discretion. In so doing, the thesis will address the question of the relevance of politics when exercising prosecutorial discretion. The thesis will argue that political influences/repercussions are unavoidable and even desirable. It will suggest a

framework in which reference to political influences/repercussions may legitimately be taken when exercising prosecutorial discretion.

The controversies about the ICC prosecutor are of course connected to the exercise of discretion. Prosecutorial discretion, in particular, is the core concern of these controversies, as it may raise the charge of politicisation or bias. It is normally accepted that the exercise of prosecutorial discretion involves a consideration of extra-legal factors. This in turn may raise the question of whether or in what circumstances political factors can also be taken into account. As will be fully explained, some argue that discretion in general constitutes a threat to the rule of law. Its exercise involves a choice, where decision-makers hold an area of autonomy to make decisions that may give due considerations to political factors, in particular, where guiding standards, factors, or principles of the exercise of this discretion are not available or just vague and open for more different interpretations. This arguable power the ICC prosecutor holds, which was the topic of a heated debate during the Rome Statute negotiations and the Rome Conference, pushed a considerable amount of the current literature to focus their studies on this particular aspect of discretion. What has been less recognised is that the prosecutor may also be able to consider these extra-legal factors, and potentially political ones, as long as a degree of discretion can be – and indeed has been – exercised when deploying discretion on the assessment of the legal categories. This is where these two senses of discretion converge and need to be identified.

In practice, as I have noted, the ICC Prosecutor has always claimed that her decisions are based on the satisfaction of the legal requirements for initiating investigations or prosecuting cases. For example, in the Report on Preliminary Examination Activities 2014, the OTP provides that ‘[w]ith respect to the situation in the Republic of Korea, and the situation on Registered Vessels of Comoros, Greece and Cambodia, following thorough legal and factual assessments of each respective situation, the Office concluded that the statutory criteria for

initiation of an investigation under article 53(1) were not met.’⁴⁰ This scenario pushes us to concentrate on the other sense of discretion that can be – and indeed has been exercised by the prosecutor – which raises the same potential dangers that the exercise of prosecutorial discretion raises.

Therefore, this thesis will investigate and analyse these two types of discretion. The aim of this thesis is to show the current controversies about the ICC Prosecutor are not only linked to the exercise of prosecutorial discretion. There is a need to shed more light on the other sense of discretion that may be exercised by the prosecutor. Thus, providing a better understanding of the concept of discretion within the ICC Statute system will contribute to clarify why and how these controversies arise from the work of the ICC Prosecutor. By focusing on analysing legal interpretive discretion, the thesis aims at clarifying that the current charges of politicisation directed against the work of the Prosecutor might be due to the exercise of a degree of discretion when applying the legal rules, where no extra-legal factors, including political ones should be taken into account. These are legal thresholds, where a consistent application of these thresholds is at least needed, when they are indeterminate, as the case with ‘sufficient gravity’. On the other end of the spectrum, the thesis aims at arguing that political effects/repercussions, are in the context of the current design of the Court unavoidable, and may be legitimately taken into account, when exercising prosecutorial discretion.

This thesis then centres on two main research questions. The first question is what is the scope of discretion that has been exercised by the ICC Prosecutor? The second question is what implications does the exercise of prosecutorial discretion by the ICC Prosecutor have on the administration of international criminal justice?

⁴⁰ ICC, Office of the Prosecutor, Report on Preliminary Examination Activities 2014 (December, 2014), Para. 19, (hereinafter: Report on Preliminary Examination Activities 2014).

There have been charges of politicisation and bias of the work of the ICC Prosecutor. In particular, the accusation of the Court of being an anti-African tool, directed only against African states, is the most recurrent one. In addition, within situations, the Prosecutor has been accused of bias when selecting which cases to prosecute and which to ignore. Although the Court has potential global reach, it has opened investigations into ten situations and 23 cases,⁴¹ all of which are from Africa. This state of affairs has prompted many commentators, scholars, and even states to accuse the ICC of being ‘an African court’.⁴² The African Union (AU), in particular, has launched an aggressive attack against the Court, in general, and the prosecutor, in particular, for targeting Africa. ‘What have we done to justify being an example to the world? Are there no worst countries, like Myanmar [Burma]?’⁴³ This is a direct accusation of the Court of targeting Africa by the AU commission chairman, Jean Ping. He also says ‘[f]rankly speaking, we are not against the ICC. What we are against is Ocampo's justice.’⁴⁴ Also, the then Chairman of the AU Commission said ‘we are not against international justice... it seems that Africa has become a laboratory to test the new international law’.⁴⁵ The AU has kept calling for the deferral of cases, in particular taken against incumbent heads of state, raising political claims that the Prosecutor is showing bias⁴⁶ against the African continent. In the words

⁴¹ See the official website of the Court at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx>.

⁴² See Max du Plessis, Tiyanjana Maluwa and Annie O'Reilly, Africa and the International Criminal Court, *a meeting held at Chatham House* (30th May, 2013). See also Charles Chernor Jalloh, Regionalizing International Criminal Law? *International Criminal Law Review*, Vol. 9, No. 20 (2009), 445- 499.

⁴³ See Farouk Chothia, Africa's Fatou Bensouda is New ICC Chief Prosecutor, *BBC* (12th December, 2011), available at <<http://www.bbc.co.uk/news/world-africa-16029121>> (Last Access: 30th May, 2015).

⁴⁴ This was when Moreno-Ocampo was the Prosecutor at the time. See David Smith, New Chief Prosecutor Defends International Criminal Court, *The Guardian* (23rd May, 2012), available at <<http://www.theguardian.com/law/2012/may/23/chief-prosecutor-international-criminal-court>> (Last Access: 30th May, 2015). See also African Union summit on ICC pullout over Ruto trial, *BBC* (20th September, 2013), available at <<http://www.bbc.co.uk/news/world-africa-24173557>> (Last Access: 30th March, 2015), Rwanda is arguing that ‘international justice is becoming more and more a political matter.’

⁴⁵ Vow to pursue Sudan over 'Crimes', *BBC* (27th September, 2008), available at <<http://news.bbc.co.uk/1/hi/world/africa/7639046.stm>> (Last Access: 8th April, 2015).

⁴⁶ Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (Malta, Gutenberg Press, 2006), P. 99. A representative of the Acholi society who was interviewed by Allen stated ‘how can the ICC be impartial if it is only working on one side of the conflict?... government soldieries committed crimes, should we ignore it?’

of Professor Mahmood Mamdani, it is ‘politicized justice.’⁴⁷ This state of affairs pushed many commentators and international actors to accuse the Prosecutor of a political agenda when looking at the responsibility of the non-African states.⁴⁸ This main charge that the ICC Prosecutor regularly receives and that is mostly linked to the exercise of discretion pushed me to analyse and examine how and where discretion is exercised by the ICC Prosecutor.

As such, discretion is often seen as a threat to the rule of law.⁴⁹ B. S. Chimni provides a common meaning for the concept, saying that ‘[t]he ‘rule of law’ signifies that all persons (natural or juridical), including organs of the state, should comply with laws adopted through prescribed constitutional procedures.’⁵⁰ The ultimate aim of imposing this concept is to make people ruled by the law and abide the law. People should be governed by rule of law, but not by ‘rule of man’ where the power is exercised by an absolute ruler.⁵¹ Those who govern people should not apply the law to serve their own personal ends or to consider interests or orders of extraneous pressures.⁵² Rule of law here is seen then as a concept that prohibits the exercise of arbitrary power. Laws must be clear and legal orders must be governed by clear and general rules. As Richard A. Epstein points out, this generality should be understood in a way that makes the application of law predictable and fairly enforceable by decision-makers.⁵³ The

⁴⁷ Mahmood Mamdani, Darfur, ICC and the new humanitarian order: How the ICC’s “responsibility to protect” is being turned into an assertion of neocolonial domination, *Pambazuka* (17th September, 2008), available at <<http://www.pambazuka.net/en/category.php/comment/50568%20>> (Last Access: 4th May, 2015).

⁴⁸ Jan Wouters and Kenneth Chan, Policies, not Politics: The Pursuit of Justice in Prosecutorial Strategy at the International Criminal Court, *Leuven Centre for Global Governance Studies*, No. 95 (2012), Pp. 12- 14, arguing for example that Israel and Colombia have not been investigated by the Prosecutor.

⁴⁹ There are two major theories that regulate the concept of the rule of law, namely the thin theory and the thick theory. The former deals with the formal aspect of the concept, that is to say with the procedural requirement of exercising the authority by a state. The latter is related to substantive elements, such as justice and fairness. See generally, Paul Craig, Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework, *Public Law* (1997), p. 467-487.

⁵⁰ B. S. Chimni, Legitimizing the International Rule of Law, in James Crawford and Martti Koskeniemi (eds.), *The Cambridge Companion to International Law* (Cambridge, Cambridge University Press, 2012), P. 290.

⁵¹ Simon Chesterman, An International Rule of Law?, *American Journal of Comparative Law*, Vol. 56 (2008), P. 4, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1081738>.

⁵² Peter M. Shane, the Rule of Law and the Inevitability of Discretion, *Harvard Journal of Law and Public Policy*, Vol. 36 (2013), P. 21, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2284222>.

⁵³ Richard A. Epstein, Government by Waiver, *National Affairs*, No. 7 (2011), P. 39, available at <http://www.nationalaffairs.com/doclib/20110317_Epstein.pdf>.

unexpected response that decision-makers can take would violate this principle. This immediately opposes the nature of discretion that may be conducted in a capricious way that makes it difficult for people to expect it. Discretion, Stanley de Smith and J. M. Evans note, means ‘a power to make a choice between alternative courses of action.’⁵⁴ The idea of the exercise of discretion then involves the process of making a choice. Officials will then, as Wendy Lacey says, select between several various, but equally valid, courses of action.⁵⁵ As there will be *various* courses of action, decisions resulting from the exercise of discretion may then involve different and even opposite outcomes. Whatever the sense of discretion we talk about, in the case of the absence of fixed legal rules (open-ended meanings), and the independent capacity officials hold to make choices, the gate is open for the abuse of this discretion. This process may involve consideration of extra-legal factors, personal aims, external pressures, or political influences. In fact, all these potentials are possible. Rule of law here then aims at preventing political advantages or deferential calculations to be considered when making a decision.⁵⁶ In other words, laws should not be applied in an arbitrary manner. Officials must apply the law far from any extraneous pressures that may push the judges to make their decisions on considerations other than the law.

The brief above presentation of some principles of the rule of law at least suggests that making a decision on the basis of irrelevant factors or reasons to obtain personal aims is a threat to this principle. Within international judicial systems, the exercise of prosecutorial discretion, for example, constitutes more serious threat to the rule of law and its principles. Being exposed to external pressures, or able to impose personal ends are some fears that are often associated

⁵⁴ Stanley de Smith and J. M. Evans, *De Smith's Judicial Review of Administrative Action* (4th ed.) (London, Steven and Sons Ltd, 1980), P. 278.

⁵⁵ Wendy Lacey, Judicial Discretion and Human Rights: Expanding the Role of International Law in the Domestic Sphere, *Melbourne Journal of International Law*, Vol. 5 (2004), P. 110.

⁵⁶ Jeremy Waldron, Is the Rule of Law an Essentially Contested Concept (in Florida)? *Law and Philosophy*, Vol. 21, No. 2 (2002), P. 147.

with the exercise of prosecutorial discretion. In other words, the exercise of prosecutorial discretion entails a potential of a noticeable degree of an arbitrary behavior that decision-makers may follow. Carl E. Schneider presents several disadvantages that result from discretion. For example, discretion allows decision-makers to use their own subjective standards that ‘depart from the sources of [their] authority.’⁵⁷ Decision-makers might use improper standards that were not initially intended by the law itself. This makes such decisions less legitimate to the ones that are based on rules. Another drawback mentioned by Schneider is that discretion opens the door for decision-makers to treat like cases differently. Rules, on the other hand, can be employed to avoid this problem as they allow treating like cases alike. In considering whether to initiate an investigation or prosecute a case, the prosecutor (also the judges) is highly engaged in political questions, as the Court works within a highly political environment. In making such decisions, it can be imagined that the prosecutor, for reasons such as the weak of enforcement mechanisms, and the cooperation’s problems, may be vulnerable to extraneous interventions or deferential considerations. Danner argues that

The cases adjudicated by the ICC are infused with political implications and require sensitive decision making by those members of the Court—including the Prosecutor—who are vested with the discretion to exercise its powers. Because of the high stakes of its subject matter and the threat that its decisions can pose to powerful international interests, the ICC will inevitably be subject to charges that it is a purely political institution, remote from both the rule of law and the places where the crimes it adjudicates occur.⁵⁸

⁵⁷ Carl E. Schneider, Discretion and Rules: A Lawyer’s View, in Hawkins K (ed.) *The Uses of Discretion*, (Oxford, Clarendon Press, 1992), P. 69.

⁵⁸ Danner, *supra* n. 14, P. 510.

It is within this domain where prosecutorial discretion and legal interpretive discretion may converge. It is important to identify that the exercise of any sense of discretion, in particular the case of the absence of guiding standards or factors, may involve engagement with political concerns. Whilst such political factors or considerations may be arguably taken in the course of the exercise of prosecutorial discretion alongside extra-legal factors, this should not be the case in the context of the exercise of legal interpretive discretion.

As Hassan Jallow states, '[p]rosecutorial discretion is fundamental to the concept of the independence of the Prosecutor – the notion of independence is tied up with the concepts of fairness, incorruptibility, freedom from outside influences, decision-making based on evidence objectively assessed, and sound public interest principles.'⁵⁹ However, these principles and cautions should not be mixed with the political dimensions, effects, and repercussions that the prosecutor unavoidably and desirably may consider. Although the character of *independence*, in essence, is meant to provide the prosecutor with *discretion*, this thesis suggests that these two values constitute two distinct sides of the same coin. This is an important distinction that needs to be identified. As the prosecutor is required to be independent within the judicial institution (prosecutorial independence), she also needs to remain flexible when drawing the strategy of the prosecution of the Court (prosecutorial discretion).⁶⁰ To be independent is not to succumb to external factors, such as political pressure, coercion, or bribery. To be flexible is to be adaptable to the changing policies and interests that may require decision-makers to consider – *i.e.* political effects/repercussions (prosecutorial discretion). Carsten Stahn points to

⁵⁹ Hassan Jallow, Prosecutorial Discretion and International Criminal Justice, *Journal of International Criminal Justice*, Vol. 3, Issue: 1 (2005), P. 154.

⁶⁰ The idea of the independence of judges when using a discretionary power (this can be also applied to prosecutors) was asserted by Oscar Schachter when says that '[i]f the rules were so flexible as to afford complete discretion to the parties or judges, we would not have law or decisions based on law. We might have negotiation, bargaining, conciliation, or political fiat', see Oscar Schachter, *International Law in Theory and Practice: General Course in Public International Law* (Martinus: Nijhoff, 1982), P. 34. See also in general Norman Abrams, Internal Policy: Guiding the Exercise of Prosecutorial Discretion, *UCLA Law Review*, Vol. 19, No. 1 (1971), 1- 58.

the independence value as a power that ‘help[s] the Prosecutor to withstand pressure and temper political interference by various extraneous actors in the investigation and prosecution of crimes.’⁶¹ Cote also distinguishes between these values, saying:

[W]e have to distinguish between the political dimension of a decision from the political pressures exercised on the person who is making a decision. The former political component, which characterizes the exercise of prosecutorial discretion, may be acceptable while the latter is highly objectionable as it challenges the independence not only of the Prosecutor but of the whole judicial institution.⁶²

Whilst it may seem problematic to allow the prosecutor to exercise discretion in such an open-ended manner – in particular all state parties to the Court have raised their concerns about the prosecutor being a political agent, pursuing her own political agenda – a structured approach to such a process would help to ease this problem. Chapter Three will provide a framework that discusses ways to reduce the fear of a politicised prosecutor. The thesis adds another contribution by its emphasis on the importance of a structured approach to the exercise of discretion. This will be applied in the context of considering Article 53’s ‘the interests of justice’, as Chapter Five discusses. Briefly, the framework suggests that in the context of the exercise of prosecutorial discretion, the prosecutor can utilise extra-legal considerations *as a tool to achieve a higher normative end of the process*. The purpose of this framework is to ensure that the process by which the prosecutor gives weight to extra-legal considerations, including certain political ones, is taken in order to achieve the aim of the Court (achieving justice). In the context of this thesis, justice (in its broad meaning) is a measure on which the validity of the exercise of discretion will be examined.⁶³ For this reason, international criminal

⁶¹ Carsten Stahn, Judicial Review of Prosecutorial Discretion: Five Years on, in Carsten Stahn and Goran Sluiter (ed.), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff, 2009), P. 253.

⁶² *Supra* n. 38, P. 171.

⁶³ The language of the Preamble of the ICC Statute refers to the necessity of delivering justice to victims in more than one paragraph. For example, ‘millions of children, women and men have been victims of

justice will be extended beyond retributive justice, as the Court undertakes and applies to include justice in its broad meaning.⁶⁴ It is meant to be broad justice,⁶⁵ as understood either by the Court or the relevant society in a certain situation, whichever is more achievable.⁶⁶

An understanding of these two senses of discretion would help to examine *the rules approach*⁶⁷ that the prosecutor is invoking to justify her strategy. As will be shown in Chapter Five, the ICC Prosecutor has justified her decisions to strictly show her commitment that she is only applying law and that no reference has been made to non-legal factors. For example, the OTP on several occasions, including my interviews with members of staff of the OTP, have been more inclined to consider peace negotiations as outside the bounds of their discretionary decision-making according to the limits imposed by the Statute.⁶⁸ The prosecutor does not seem

unimaginable atrocities that deeply shock the conscience of humanity,' 'that the most serious crimes of concern to the international community as a whole must not go unpunished,' and 'to put an end to impunity for the perpetrators'.

⁶⁴ The thesis will argue that justice cannot be achieved only through the ICC. It will suggest that the prosecutor may be advised to refer to other sorts of mechanisms to achieve justice. This sort of justice will be framed by the relevant society who is suffering mass violation of human rights. As justice may take different forms, therefore, the meaning of justice that this research adopts is the broad one that is capable of encompassing all sorts of it.

⁶⁵ Justice, basically, has two meanings: broad and narrow. For the purposes of this research, the broad meaning will be taken, as it includes all types of justice. This is to encompass the other types of justice that may be demanded by a certain society that is experiencing violence, whether during the ongoing atrocities, or during the transitional period. In 2011, the UN defined the broad meaning of justice in its report, and enumerated the possible mechanisms that basically involve 'both judicial and non-judicial mechanisms, including individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals. See *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, Secretary-General United Nations* (2004), at <<https://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/>>.

⁶⁶ For more information about the potential sort of justice mechanism, see Ruti G. Teitel, *Transitional Justice* (Oxford, Oxford University Press: 2000). Teitel referred to five main mechanisms that basically encompass all sorts of mechanisms: criminal justice, historical justice, reparatory justice, administrative justice, and constitutional justice. Also, Hayner did mention various ways by which countries can respond to past atrocities, such as: holding trials, truth commission, providing individuals access to security files, reparations, building memorials, lustration, making comprehensive reforms in all section of a state, Priscilla B. Hayner, *Unspeakable Truths: Facing Challenge of Truth Commissions* (New York, Routledge: 2002), P. 12.

⁶⁷ Gross, *supra* n. 26, 'All I can and will do is to apply the law in strict conformity with the Rome Statute', Fatou Bensouda answered the interviewer.

⁶⁸ Several interviews I conducted between 12th and 14th March, 2013. In addition see, 'What's clear for us is "interest of justice" is not the interest of peace or interest of security. That's a Security Council matter.' Mr. Moreno-Ocampo's discussion in an event held at the Council on Foreign Relations, see Stephen M. Schwebel, Pursuing International Justice: A Conversation with Luis Moreno-Ocampo, *Council on Foreign Relations* (4th February, 2010), available at <<http://www.cfr.org/human-rights/pursuing-international-justice-conversation-luis-moreno-ocampo/p34702>> (Last Access: 6th May, 2015). Also, several interviews with members' staff of the

interested in taking into account this factor as a basis on which to stop the proceedings. She is strictly committed to the rules as construed through a narrow reading of the Statute. Apart from the fact that international prosecutors use such a justification as a matter of mechanical approach to convince an audience that only the law is applied, it is important to elucidate that reference to extra-legal factors are normally accepted in the course of the exercise of prosecutorial discretion. Cote points out that international prosecutors often tend to commit strictly to the rules.⁶⁹ However, he suggests that the rhetorical denial ‘should not conceal the eminent political dimension of the exercise of prosecutorial discretion, particularly on the international scene, where conflicts are ongoing.’⁷⁰ Goldston also argues that ‘powerful the aspiration for neutral principles, experience and common sense suggest that law can never be entirely divorced from its surrounding environment.’⁷¹ Therefore, I will argue that the rhetorical denial of political should refer to the exercise of legal interpretive discretion, but not prosecutorial discretion.

Emphasising the importance of taking account of extra-legal factors within the decision-making process, the thesis will show the development of prosecutorial function of international criminal tribunals. It will show the multi-functional role that the international Prosecutors have started to play since the SC Tribunals. The circumstances in which these Tribunals work, in particular with the lack of several indispensable tools of conducting an effective justice all contributed to developing the role of the international prosecutor as a new international player within an international legal arena and international politics. This has pushed International Prosecutors to play various roles. I call this multiple functions of prosecution. When exercising prosecutorial discretion, the prosecutor would be encouraged,

OTP conducted on 12th and 14th of March, 2013. All staff stated to me that the peace-related issues has no regard when making a decision.

⁶⁹ See *supra* n. 38.

⁷⁰ *Supra* n. 38, P. 171.

⁷¹ Goldston, *supra* n. 18, Pp. 386-7

under the current formulation of the structure of the ICC, to consider values other than justice. The analysis of Article 53's 'the interests of justice' in Chapter Five and Six will show that the prosecutor may consider other values such as peace, security, stability, and the protection of victims. The Article 53 'interests of justice', for example, allows the prosecutor to think about other values in case the ICC's proceedings constitute an obstacle to a certain situation. The weakness of the enforcement mechanisms on which the Court was built, and the existence of such prosecutorial discretion would broaden the role of the contemporary international prosecutor to think differently than a domestic prosecutor. The political role of the ICC prosecutor and its effect on the administration of international criminal justice is vital on the international level.

The International Prosecutors of the Military Tribunals, which worked within more secure and normal circumstances that were similar to domestic courts, had not played such a role. They exercised a classical role that aimed only at achieving justice without looking at the other values. Indeed, the need for considering values other than justice, such as peace, security, and stability, and ending conflicts have started with the establishment of the ad hoc SC Tribunal. These Tribunals worked within unstable, exceptional circumstances, war zones, and sometimes with the will of NATO (cooperation). Depending on these various circumstances, in practice the Prosecutors had to consider those values to protect in practice. Indeed, knowledge of political and military framework of situations and cases under the jurisdiction of the Court as well as the legal framework is a vital part of articulating the individual peculiarities of these situations and cases for providing a meaningful justice.

The thesis has been influenced by the work of Martti Koskenniemi. His work is helpful in shedding light on the way in which international legal officials, and, for my purposes, the ICC Prosecutor, operate. Koskenniemi, in developing a theory of the structure of the legal discourses, places international legal officials at the centre of the legal discussion. In particular,

he suggests that there is a recurring pattern in which international legal decisions tend to be caught between utopian vision and apologist explanation. This binary approach helps to examine the controversies about the work of the ICC Prosecutor that has been posed to such binary positions. Therefore, the attempt to identify and explore the causes, and nature of the criticisms of the work the ICC Prosecutor will echo Koskeniemi's thoughts.⁷² In Koskeniemi's view, each principle or theory is surrounded by two opposite views; each of which is vulnerable to strong criticism, and *vice versa*. This approach can be manifested in the work of the ICC prosecutor, who is always exposed to recurring controversies and criticisms. Our focus will be on one recurring pattern: an *apologist* and *utopian* argument.⁷³ This approach provides that each position has a valid and plausible criticism that might, in one way or another, undermine the given legal discourse that the prosecutor has taken, and *vice versa*.⁷⁴ Koskeniemi claims that this sort of dyad is inevitable.⁷⁵ Koskeniemi's insight about the conceptual oppositions⁷⁶ helps us to assimilate why the prosecutor is always vulnerable to strong criticisms and accused of being politically-motivated. Although Koskeniemi's approach was directed only to international law, the scope of the discussion of this thesis will be narrower than his approach. It will employ Koskeniemi's approach in a broad and common sense to examine and analyse the questions of discretion throughout this thesis. His conceptual opposition's approach helps us to understand why the activities of the prosecutor are posed to persistent controversies. Also, it can push us to be able to identify, if any, the problems that

⁷² Martti Koskeniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005).

⁷³ This pattern will draw on Darryl Robinson's thought who used Koskeniemi's thoughts as a basis of his thesis, see Darryl Robinson, Inescapable Dyads: Why the ICC Cannot Win, *Leiden Journal of International Law*, Forthcoming, Queen's University Legal Research Paper No. 2015-016, Available at SSRN: <<http://ssrn.com/abstract=2491187>>.

⁷⁴ *Supra* n. 72, P. 16, 67, and 70.

⁷⁵ *Ibid*, P, 8, 9, 10, and 24.

⁷⁶ *Ibid*, Pp. 8- 9.

infect the given issue and find solutions to them. Accordingly, being familiar with the dyadic tensions, we will be able to discern and evaluate the problems.

In addition, the analysis of the ICC prosecutor's discretion will draw on the historical development of the exercise of discretion by the Prosecutors of the Military Tribunals and the Security Council Tribunals. This thesis will draw on the prosecutorial experience of these Tribunals and their lessons for the ICC. This will illuminate the discussion on the legal and policy criteria of the use of discretion and for providing the below framework. The historical analysis is a critical part of the analysis of discretion as it provides valuable lessons for the ICC prosecutor. In particular, the practice of those Tribunals has laid the foundations on which the ICC prosecutor can develop her prosecutorial functions in areas that have not been either well anchored (gravity) or even touched upon (the interests of justice). For example, the thesis follows a comparative approach between the ICC and the experience of the international tribunals due to the total absence of any case under the Court's review, in particular, in relation to the analysis of 'the interests of justice'. It is worth mentioning here that in addition to the limited scope of this thesis, the latter only focuses on these international tribunals due to the some similar circumstances and conditions that the ICC works in. in particular, the issues of the lack of enforcement mechanisms, police, and cooperation are common hurdles that shape the work of their prosecutors. There will be therefore no reference to the hybrid tribunals.

The thesis will discuss and examine the above issues through six chapters. Chapter One is an introduction to the creation of the Court, its structure, and the discretionary power of the prosecutor. The chapter aims at providing the legal, administrative, and political contexts in which the Court works. This will show why the exercise of discretion becomes crucial in such a situation. The focus will then shift to the legal process of making a decision for initiating investigations or prosecuting cases. The chapter then will discuss a general question as to whether or not the prosecutor has discretion to initiate investigations or prosecute cases,

focusing on prosecutorial discretion. Chapter Two traces the historical development of the concept of prosecutorial discretion, from the Military Tribunals up to the SC Tribunals. The significance of the chapter is that it establishes the ground on which the discussion of the power of the ICC prosecutors will be compared and developed. This chapter aims at showing the broader role that the Prosecutors of the SC Tribunals played when exercising prosecutorial discretion. Since that time, we have begun to see how crucial the exercise of discretion is in the context of delivering international criminal justice. Chapter Three stakes out the theoretical ground on which the entire thesis is examined and analysed. The chapter explains and critically discusses the nature and the two senses of discretion. The goal of this chapter is to explain the legal and theoretical basis of the concept of discretion in its two senses. Then, the chapter will draw on thoughts of Koskeniemi to explain why the prosecutor's decisions are subjected to recurrent criticisms.

Chapter Four moves on to concentrate on the concept of gravity, as laid down within the ICC Statute. The chapter examines this criterion as a consideration when the prosecutor exercises legal interpretive discretion (legal gravity) and prosecutorial discretion (relative gravity). The chapter concentrates on showing legal interpretive discretion that has been exercised by the ICC Prosecutor when applying 'sufficient gravity', as a legally admissible criterion. This chapter seeks to examine and analyse legal interpretive discretion in the sense that it can be distinguished from the conventional sense of discretion, namely prosecutorial discretion. However, the chapter will show how close each sense of these senses are where the dangers of the exercise of prosecutorial discretion can be also the case in the context of the exercise of legal interpretive discretion. Chapter Five entirely focuses on prosecutorial discretion and analyses the Article 53 'interests of justice' provisions that authorises the prosecutor to use this power. The chapter mainly aims at showing the broader role that the ICC prosecutor may and should play when exercising her prosecutorial discretion. Chapter Six of

the thesis takes as a case study the Darfur situation. The chapter examines the applicability of the Article 53 ‘interests of justice’ provisions to this situation, by focusing on the exercise of prosecutorial discretion. This chapter also aims at showing the multi-function roles that the current international Prosecutor can play in administering international criminal justice, and how this should be done. The conclusion will deal with two main issues. First, that the ICC Prosecutor needs to be consistent when interpreting the term ‘sufficient gravity’ in the context of the exercise of legal interpretive discretion. Second, that the ICC Prosecutor should play a more active role when delivering justice in a sense that she may consider different values, such as peace, security, stability, and ending conflicts when exercising prosecutorial discretion.

Methodology and Scope of the Research

In order to answer the first question of this thesis the scope of discretion that the ICC prosecutor may exercise, the thesis took a conceptual analysis of the concept of discretion, as laid down in the literature of the concept of discretion, which shows that there are two senses of discretion. I placed this analysis within the practice of the ICC Prosecutor to examine whether the latter has exercised these two senses of discretion. In addition to the exercise prosecutorial discretion, it was found that the Prosecutor also deployed a strong discretion when assessing ‘sufficient gravity’, to which I call legal interpretive discretion. For this purpose, Chapter Four examined almost all decisions where the admissible legal requirement for initiating investigations or prosecuting cases of ‘sufficient gravity’ were analysed. This was supplemented by an initial analysis of the practice of the Prosecutors of the SC Tribunals, which showed that such a sense of discretion was also undertaken. On the question of the role of the ICC Prosecutor, I followed a comparative approach to find what roles the ICC Prosecutor could/should play, and whether certain political considerations are desirable and taken within the decision-making process. Therefore, I depended on the analysis of the jurisprudence of the SC Tribunals to be compared with what and how should have the ICC Prosecutor done in

similar circumstances. For this purposes, Chapters Five and Six used two case studies (Uganda and Darfur) to analyse the concept of prosecutorial discretion. As has been noted, the thesis also draws broadly on Koskeniemi's thoughts about the way his binaries inflect international legal discourses. Koskeniemi suggests that that 'legal arguments within court... are constantly patterned into familiar relations of association and opposition.'⁷⁷ I will also engage with Darryl Robinson and his critique of the utopian and apologist binaries.⁷⁸ The purpose of the theoretical framework is to explain why the ICC Prosecutor may face criticisms for every single decision she makes, in particular the ones taken on the basis of the involvement of discretion.

I analyse the existing primary sources as legal texts, the ICC Prosecutor's decisions, other international Prosecutors' decisions, and policy documents of the OTP. Secondary sources will be largely involved to analyse the discretionary power of the ICC prosecutor. This analysis was used to examine the theory and practice of the exercise of discretion and its effects on the legitimacy of the prosecutor and effectiveness of her policy of prosecution. The thesis moves from the general to the particular by selecting several examples that resulted from the practice of the discretionary power in the selection of situations to investigate and cases to prosecute.

The research is primarily a library-based project, which was carried out in the British Library, UEL's library, British Library of Political and Economic Science, and the Institute of Advanced Legal Studies' library. The library-based approach is also supplemented by semi-structured interviews, conducted with three members of staff of the Office of the Prosecution of the ICC, during the middle stage of conducting this research in March 2013.⁷⁹ The communication office of the Court told me that I could formally meet up to two staff of the

⁷⁷ *Supra* n. 72, P. 69.

⁷⁸ *Supra* n. 73.

⁷⁹ See the appendix for some questions that were used with the staff.

OTP. However, I managed to meet four staff of the Court. The other two interviews were conducted informally, and without a signed approval letter, as interviewees told me that there was no need for this procedure. All of them asked me not to publish their names. The interviewees are: the Head of the International Relations Task Force of the OTP, a senior Appeal Counsel, a trial lawyer, and a prosecutor during the trial stage. Each interview took around one hour. The purpose of choosing this method was to support the qualitative approach of this project, as it is used indicatively and in a limited way to analyse the conformity with the aforementioned data.⁸⁰ These methods are relevant to this project, as the latter looks at the quality of decisions the prosecutor makes as well as the decision-making process within the Office.

In presenting and analysing the ICC Prosecutor's functions, the thesis uses an interdisciplinary approach, based on a descriptive and critical analysis.⁸¹ International law, international politics, international criminal law, and history are used to examine the theoretical basis and exercise of discretion. A descriptive approach is used to situate the discretionary power within its historical and legal background. A critical approach, in particular, is crucial in this thesis, as the analysis of the decisions, policy papers, statements of the ICC Prosecutor constitute the key basis of dealing with the issues this thesis raises. This approach helps to identify several problems that result from the exercise of discretion, depending on interdisciplinary perspectives. The broad discretion that is conferred on the Prosecutor led her to face several criticisms for using it in a way that justified preferred courses and strategies. Koskenniemi's thoughts were found suggestively helpful in this critical approach, as

⁸⁰ Zina O'Leary, *The essential guide to doing your research project* (London, Sage, 2010).

⁸¹ *Supra* n. 50, Pp. 295- 300. See also generally, Robert Cryer, Tamara Hervey, Bal Sokhi-Bulley, and Alexandra Bohm, *Research Methodologies in EU and International Law* (Oxford and Portland, Oregon, 2011).

Koskenniemi himself used a critical approach to analyse the views of realism, positivism, and liberalism in dealing with international legal discourses.

The project further uses individual and institutional approaches to examine discretion. Whilst the first one is used to examine the work of Prosecutors Moreno-Ocampo and Bensouda, the second is used to examine the work of the prosecutor of the ICC, as a body within a judicial institution.

The scope of this thesis is limited horizontally and vertically. Vertically, the thesis focuses mainly on the development of the concept of discretionary prosecution under the law and policy of the International Prosecutors of the two Military Tribunals: Nuremberg and Tokyo, the SC Tribunals, and the ICC. This particular focus is due to the development of the concept of the discretionary prosecution that resulted from the experience of these Tribunals. In addition, these Tribunals cover all types of international tribunals: a self-established institution, outcomes of SC's decisions, and a treaty-based institution. Horizontally, the thesis concentrates only on the discretionary discourse in its theoretical, historical, and legal contexts.

CHAPTER ONE: OVERVIEW OF THE INTERNATIONAL CRIMINAL COURT

This chapter sets out the background of the system of the ICC. It is divided into two main parts. The first part focuses on the Court as such. It considers aspects of the drafting history of the ICC Statute and the environment in which the Court works. The last section will outline the significance of the exercise of discretion and its role. The second part of this chapter concentrates on the ICC Prosecutor. It will outline the record of negotiations of the power of the ICC prosecutor, and then it will outline the stages through which the prosecutor makes an investigatory and prosecutorial decision. Finally, it will discuss prosecutorial discretion in terms of referrals and a *proprio motu* power during both investigation and prosecution stages.

1.1. The International Criminal Court's Overview

1.1.1. Drafting the Statute

The Statute was adopted by 120 votes in favour, 7 against, and 21 abstentions on 17th July, 1998. And after further minor amendments, it entered into force on 1 July 2002,⁸² when it obtained the 60 required ratifications for the Statute's entry into force.⁸³ Article 21 provides that The Rome Statute (128 Articles)⁸⁴, Elements of Crimes,⁸⁵ and the Rules of Procedures and Evidence (RPE)⁸⁶ are the main legal tools the Court shall apply in the first place. In addition, the Regulations of the Office of the Prosecutor,⁸⁷ and the regular policy documents⁸⁸ are the policy tools of the Office of the Prosecutor (OTP). It potentially has international jurisdiction.⁸⁹

⁸² Lee, Introduction: The Rome Conference and its Contribution to International Law, in Roy S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations and Results* (Boston, Kluwer Law International, 1999).

⁸³ Schabas, *supra* n. 4.

⁸⁴ The Rome Statute (Entered into Force on 1st July, 2002).

⁸⁵ Rules of the Elements of Crimes (Adopted during the Kampala Conference, 2010).

⁸⁶ Rules of Procedures and Evidence (Adopted by the ASP, 3- 10 September, 2002).

⁸⁷ Regulations of the Office of the Prosecutor (Entered into Force on 23rd April, 2009).

⁸⁸ See ICC, OTP, Policies and Strategies, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/policies%20and%20strategies/Pages/documents.aspx>.

⁸⁹ The ICC Statute allows the SC to refer situations in any state to the Court, including those that are not parties to the Statute in accordance with Article 13 (b). Also, the Statute provides states not parties to the Court an opportunity to refer their own situations to the Court, if they accept the jurisdiction of the Court in accordance

It is an independent entity and is not a part of the UN.⁹⁰ Currently, some 124 states have ratified the Rome Statute,⁹¹ where the African States make up the largest bloc of signatories to the Statute.⁹²

Article 5 of the Statute enumerates the *ratione materiae* jurisdiction and provides that the Court exercises jurisdiction over the specific crimes of genocide, crimes against humanity, war crimes, and aggression.⁹³ The Court only exercises its jurisdiction over nationals of states parties to the Court, nationals of states which are referred to the Court by a SC's resolution, or those of states which voluntarily accept the Court's jurisdiction. In relation to *ratione temporis* jurisdiction, the Court's jurisdiction 'is a prospective institution.'⁹⁴ Its jurisdiction extends back only to July, 2002, the date of the entry into force of the Rome Statute. In relation to the new parties to the Statute, this jurisdiction starts on the date of their ratification of the Statute, unless they accept the Court's jurisdiction since its entry into force, in 2002, as Article 11 of the Statute provides.

The creation of the ICC was the culmination of efforts to create an international criminal justice system that began at the end of the First World War. When World War I ended, the Versailles Peace Conference, led by the Allies, established the Commission on the

with Article 12 (2). Therefore, the jurisdiction of the Court may extend to cover any state in the world, whether party to the Statute or not.

⁹⁰ There is agreement between the two organisations that organises the relationship between them, see Negotiated Relationship Agreement between the International Criminal Court and the United Nations (Entered into Force, 4th October, 2004).

⁹¹ Of the 123, 34 are African States, 27 are from Latin American and Caribbean States, 25 from Western Europe and other states, 19 are from Asia-Pacific States, and 18 are from Eastern Europe.

⁹² 34 African States, 19 Asia-Pacific States, 18 Eastern European States, 27 Latin American and Caribbean States, and 25 Western European States. See, The States Parties to the Rome Statute, at the official website of the Court, at <http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx>.

⁹³ The Review Conference of Rome Statute held in Kampala on 11th June, 2010 provided that the Court shall exercise its jurisdiction over the crime of aggression after 1 January 2017, when States Parties makes a decision for activating this jurisdiction. See Coalition for the International Criminal Court's website at <<http://www.iccnw.org/?mod=aggression>>.

⁹⁴ Schabas, *supra* n. 4, P. 69.

Responsibility of the Authors of the War and on the Enforcement of Penalties.⁹⁵ The commission recommended⁹⁶ that an international court should be created to try ‘[a]ll persons belonging to enemy countries’ of the War.⁹⁷ However, this was not put into effect. In 1937, and as requested by the Council of League, the Secretary-General organised the International Conference on the Repression of Terrorism.⁹⁸ In this Conference, two conventions were adopted, namely a Convention for the Prevention and Punishment of Terrorism and a Convention for the Creation of an international criminal court. These conventions never entered into force due to the outbreak of World War II. After the end of the War, and as will be discussed in Chapter Two, the critical development of this attempt was the creation of the two International Military Tribunals. Further, a significant development took place in 1948 when The United Nations General Assembly (UNGA) issued Resolution 260, adopting the Convention on the Prevention and Punishment of the Crime of Genocide.⁹⁹ Article VI of the Resolution provided that people who are charged with genocide ‘shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction’. In this Resolution, the UNGA called the International Law Commission (ILC) ‘to study the desirability and possibility of establishing an international judicial organ for the trials of persons charged with genocide.’¹⁰⁰ When the ILC made its recommendation, the UNGA established a Committee to prepare a proposal for the court.¹⁰¹ In

⁹⁵ See Report Presented to the Preliminary Peace Conference, Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *The American Journal of International Law*, Vol. 14, No. 1 (1920), available at <http://www.jstor.org/stable/pdf/2187841.pdf?_=1459509279604>.

⁹⁶ *Ibid*, Para. 3, P. 124, providing ‘That each Allied and Associated Government adopt such legislation as may be necessary to support the jurisdiction of the international court, and to assure the carrying out of its sentences.’

⁹⁷ *Ibid*, P. 117. See footnote 270 in Chapter Two for more information about another attempt taken in relation to Kaiser.

⁹⁸ UN, Historical Survey of the Question of International Criminal Jurisdiction- Memorandum submitted by the Secretary-General, Question of international criminal jurisdiction, Doc: A/CN.4/7/Rev.1 (1949), Pp. 16-8.

⁹⁹ Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December, 1948, available at <<https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf>>.

¹⁰⁰ History of the ICC, *Coalition of the International Criminal Court*, available at <<http://www.iccnw.org/?mod=icchistory>> (Last Access: 13th February, 2016).

¹⁰¹ *Supra* n. 82.

1953, the Committee completed its task and presented its final draft statute. In 1954, the UNGA decided to stop proceeding with this project until a definition could be given about the crime of aggression.

The efforts of the ILC to create the court were dramatically impeded from 1954 to 1989 due to the Cold War.¹⁰² The tension between East and West, as Schabas points out, made it impossible to proceed with the process of the establishment of an international criminal court, as each side was concerned that the other would use the Court as a tool to target them.¹⁰³ However, with the end of the Cold War, and the emergence of the turmoil in Yugoslavia and later on in Rwanda, the creation of two UN ad hoc tribunals to deal with atrocities, underlined the advantages of a permanent international criminal court.

In 1989, the UNGA resumed its work and asked the ILC to complete the draft. In 1994, the ILC completed its task and submitted the Draft Statute to the UNGA.¹⁰⁴ The latter decided in 1995 to create an Ad Hoc Committee to review this draft. This Committee convened several times in 1995 and discussed mainly administrative and substantive matters, without engaging in the negotiation or drafting.¹⁰⁵ In December the same year, a Preparatory Committee was created to produce ‘a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries’.¹⁰⁶ After a comprehensive work done by the Preparatory Committee over three years, the UNGA then decided to organise the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of the ICC from June to July 1998, to be convened in Rome, Italy.¹⁰⁷ This

¹⁰² See in general, Michael C. Davis, Wolfgang Dietrich, and Dieter Sepp, *International Intervention in the Post-Cold War: Moral Responsibility and Power Politics* (New York, M.E. Sharpe, 2004).

¹⁰³ Schabas, *supra* n. 4, Pp. 9- 10.

¹⁰⁴ See generally, Fanny Bendetti, Karine Bonneau, and John. L. Washburn, *Negotiating the International Criminal Court: New York to Rome, 1994- 1998* (Leiden, Martinus Nijhoff Publisher, 2014).

¹⁰⁵ UNGA, Res. 50/46, U.N. GAOR, U.N. Doc. A/RES/50/46 (1995).

¹⁰⁶ UNGA Resolution, A/RES/50/46, 11 Dec 1995, Para. 2, P. 2. See also *supra* n. 82, P. 3.

¹⁰⁷ General Assembly Resolution 160/52, Establishment of an International Criminal Court, United Nations General Assembly Official Record, Fifty Second Session, Supplement No. 32, A/52/32 (1997).

Conference brought together 168 state delegates and others who represented different international organisations – international bodies, inter-governmental and non-governmental ones.

The Conference was preceded by six Preparatory Commission sessions to work on the Statute to be presented to the conference. Throughout these sessions, the ‘like-minded’ groups of states drawn from Europe, Latin American, and African countries promoted a strong independent court.¹⁰⁸ The members of these groups, whether European, Latin, or African countries, ‘shared and agreed on a set of principles, arrived at in Rome, which expressed a detailed vision of the nature and values of the Court.’¹⁰⁹ Some of these countries have experienced mass atrocities and crimes, and they strongly showed their commitment to creating such a court. They consisted of about 60 countries from around the world, except Asia. Countries such as Germany, Australia, Netherlands, Canada, and later on, United Kingdom and South Africa were the leaders of these groups.¹¹⁰ These groups played a strong role during the Preparatory Commission and Rome’s negotiations. In addition to these states, non-governmental organisations (NGOs) were also actively participating in these sessions.¹¹¹ Their role was to coordinate the work of all NGOs, and provide advice for states on the legal issues, and also play a lobby activity on the Statute with the like-minded group. However, The Court remained without being ratified by the most powerful states in the world such as the U.S., China, Russia, and India. As David Davenport states, ‘[a]s a consequence, the U.S. and other

¹⁰⁸ Canada, Australia, most of European States, and others were among this group.

¹⁰⁹ John Washburn, The Negotiation of the Rome Statute for the International Criminal Court and International Lawmaking in the 21st Century, *Pace International Law Review*, Vol. 11, Issue: 2 (1999), Pp. 367-8.

¹¹⁰ *Ibid.*

¹¹¹ Amnesty International was one of these NGOs. For more information, see *supra* n. 82, Pp. 13- 23.

major powers backed away from the Court and it became an institution with considerable power and independence on paper, but one that lacked sufficient support to be effective.’¹¹²

1.1.2. Meaningful Justice and the Need for Prosecutorial Discretion

International criminal law is still an emerging phenomenon. While it is much discussed in scholarly literature, its institutions, procedures and norms are, in fact, in an early stage of development. As a result, it often appears that the implementation of international criminal norms is applied in an irregular manner or never enforced. States are at the same time engaged in the creation of international criminal law and subject to it. This further complicates the picture as the only enforcement mechanisms are dependent on the will of states, either through unilateral or bilateral action or through the United Nations Security Council. As a consequence, the emergence of international criminal law takes place within a high political context. As Robert A. Friedlander notes, ‘[t]he difficulty with the theory of an international criminal law is that it represents a convergence of both public international legal norms and the international aspects of municipal criminal law.’¹¹³ Although international criminal law ‘is predicated upon analogies to domestic legal systems’,¹¹⁴ nonetheless, its viability is often compromised due to the lack of several essential features that make its domestic counter-parts effective and viable, such as the enforcement related-issues.

The sub-discipline of international criminal law, in particular, the ICC suffers most from this problem. The draft Statute includes aspirations, which create high expectations that may appear difficult to be achieved. The preamble of the Statute outlines several ambitious

¹¹² David Davenport, Happy Birthday International Criminal Court, *Forbes* (7th January, 2012), available at <<http://www.forbes.com/sites/daviddavenport/2012/07/01/happy-birthday-international-criminal-court/>> (Last Access: 11th April, 2015).

¹¹³ Robert A. Friedlander, The Foundations of International Criminal Law: A Present-Day Inquiry, *Case Western Reserve Journal of International Law*, Vol. 15, Issue: 1 (1983), P. 17, discussing the question of the existence of international criminal law.

¹¹⁴ *Ibid*, P. 17.

goals for the Court to achieve. Putting an end to the era of impunity, that most serious international criminals will be punished, calling for international peace and security, and that the role of the Court is complementary to national courts are some of these aims.¹¹⁵ These goals are global in nature. The potential global jurisdiction makes the function of the Court and the prosecutor highly complex. Whilst exercising its jurisdiction in ongoing conflicts, the Court has to be sensitive in balancing the different values contained in the Statute. Of course, peace, security, stability, and the protection of victims are some of these values that might be undermined with the intervention of the Court. As will be seen in Chapters Five and Six, the intervention of the ICC in Uganda and Sudan has raised several concerns about the peace process, security, stability, and the protection of victims.

Similarly applicable, in relation to post-conflicts, the Court may exercise its function over a situation where a local justice mechanism is invoked by a given state, especially, when the latter appear more achievable, desirable and needed. In these situations, the need to establish a stable and settled state requires sensitive and more attention to the overarching common good than due considerations to the rights of victims. This state of affairs may make several non-prosecutorial approaches, such as negotiation and reconciliation processes, to play a decisive role in achieving justice and restoring peace. The potential impacts of the decision of investigation or prosecution may distract these processes and even constitute a threat to the stability of those countries. As will be discussed in Chapter Five, this scenario was experienced by the ICTY where the Prosecutor had to face challenges related to the peace negotiation in the region, in particular when it came to make a decision to indict Slobodan Milosevic on the eve of the Dayton Peace Agreement.

¹¹⁵ See the Preamble, Paras, 4, 5, and 10.

These challenges necessarily require the Court and, in particular, the prosecutor to reflect on these issues when making an investigatory or prosecutorial decision. As Judge Hans-Peter Kaul argues, the Court will remain ‘small and weak’ in the sense that the achievement of its high hopes might not be simply possible.¹¹⁶ In order for the prosecutor to articulate these concerns, a wide range of discretion is needed. As will be analysed in Chapters Four and Five, the drafter of the ICC Statute inserted several legal terms in the Statute that would appear to help the prosecutor exercise a comprehensive function to address the above concerns. In fact, the negotiators of the ICC draft Statute anticipated the nature of the problems that the Court and the prosecutor would likely face when conducting their functions. The insertion of these terms were the result of series of compromises between the participants of the draft Statute’s negotiations and Conference who were concerned about the different values that may clash when the prosecutor decides to investigate or prosecute.¹¹⁷ In particular the most substantive issues of the draft (Part 2 of the Statute) ‘were left for last minute political compromises’.¹¹⁸ For these reasons, terms such as ‘the interests of justice’ and ‘the gravity of the crimes’ in Article 53 (1)(c) and (2)(c) are some ambiguous legal criteria that were inserted. These criteria would allow the prosecutor to deal with the questions of peace, security, reconciliation mechanisms, negotiations, stability, and the protection of victims. As Jan Wouters and Kenneth Chan note, ‘a philosophy of selective justice was adopted during the negotiations to weigh these competing interests and to develop a final product.’¹¹⁹ Article 53 (2)(c), Brubacher argues, requires the prosecutor to consider ‘the broader interests of the international

¹¹⁶ ICC, Key note by H.E. Judge Dr. jur. h. c. Hans-Peter Kaul, The International Criminal Court –Current Challenges and Perspectives, Salzburg, Austria (8th August, 2011), P. 8, available at <<http://www.icc-cpi.int/nr/rdonlyres/289b449a-347d-4360-a854-3b7d0a4b9f06/283740/010911salzburglawschool.pdf>>, P. 13.

¹¹⁷ These issues – compromises- will be dealt with in Chapter Five.

¹¹⁸ M. Cherif Bassiouni, Negotiating the Treaty of Rome on the Establishment of an International Criminal Court’, *Cornell International Law Journal*, Vol. 32, Issue: 3 (1999), P. 458.

¹¹⁹ *Supra* n. 48, P. 4.

community, including the potential political ramifications of an investigation on the political environment of the state over which he is exercising jurisdiction.’¹²⁰

Nonetheless, the basis on which the Court works makes the achievement of its institutional aims difficult. In fact, there are several constraints against which the Court functions. For example, in exercising its missions, the Court relies mainly on the limited financial resources it receives from its member states.¹²¹ This constraint forces the Prosecutor to make difficult decisions. ‘[F]or example, the Chief ICC Prosecutor Fatou Bensouda announced, regarding Darfur, that she was provisionally "shifting resources to other urgent cases"’.¹²² In addition, the ICC is accountable to the Assembly of States Parties (ASP) and relies on states’ cooperation to enforce its decisions. As the Court has no police or coercive authority to force its decisions, it is entirely dependent on its members.¹²³ As Mirjan A. Damaska argues, ‘[i]ts effectiveness will for the foreseeable future continue to depend on the fickle winds of the international political climate, and on the willingness of states and international organizations to provide it with assistance and support.’¹²⁴ Where the states fail to cooperate with the Court, the latter can *only* make a finding to the ASP, or to the SC if the situation was referred by the SC.¹²⁵ There is nothing else that can be done, if the relevant states do not cooperate. Quite apart from enforcement action, it is also dependent on the will of states when it comes to conducting its investigatory and prosecutorial functions. It has also no police

¹²⁰ Brubacher, *supra* n. 22, P. 81.

¹²¹ See, Financial Regulations and Rules, the ICC-ASP/7/5, adopted 21 November, 2008. The Court is funded by its member states, United Nations, and voluntary contributions. See the Rome Statute, Articles 115 and 115.

¹²² Mariana Rodriguez-Pareja and Salvador Herencia-Carrasco, At the ICC, there is no Deterrence without Resources, *Open Democracy* (10th June, 2015), available at <<https://www.opendemocracy.net/openglobalrights/mariana-rodr%C3%ADguezpareja-salvador-herenciaccarrasco/at-icc-there-is-no-deterrence-wit>> (Last Access: 12th May, 2016).

¹²³ Gabrielle Kirk McDonald, Problems, Obstacles and Achievements of the ICTY, *Journal of International Criminal Justice*, Vol. 2, Issue: 2 (2004), P. 564, stating that, ‘the cooperation of states and international organizations is essential to the effective functioning of an international criminal institution.’

¹²⁴ Mirjan R. Damaska, The International Criminal Court Between Aspiration and Achievement, *UCLA Journal of International Law and Foreign Affairs*, Vol. 14, No. 19 (2009), P. 32.

¹²⁵ Article 87 of the ICC Statute.

body that can force its decisions. As Antonio Cassese notes, it is a court ‘without arms and legs – it needs artificial limbs to walk and work.’¹²⁶

An example which illustrates the problem is the inaction of the South African Authorities when the President of Sudan visited the country to attend the 25th African Union Summit in June 2015. This was described as ‘shocking’ by Amnesty International.¹²⁷ South Africa, which is a state party to the Statute, refused to arrest Al-Bashir and allowed him to leave the country safely. The total dependence of the Court on effective cooperation of states is a key obstacle to the effective functioning of the Court, in particular in relation to the issue of arrests. The hopes that the Court would bring an end to era of impunity are impeded by such an institutional weakness. As Judge Kaul points out, ‘no arrests, [means] no trials.’¹²⁸ Whatever the position the ICC Prosecutor takes in relation to the Al-Bashir case, in fact, the system of cooperation that the Statute provides is not sufficient so the Prosecutor could manage to deliver justice.

However, this weakness makes the exercise of prosecutorial discretion important. As will be discussed more in Chapters Five and Six, the South Africa scenario makes the Article 53 (interests of justice) provisions crucial in terms of pushing the Prosecutor to think about other values and issues that pushed South Africa not to cooperate with the Court. The peace process, security, and achieving justice through other mechanisms in Uganda or Sudan may appear as incentive values that can be raised in relation to the consideration of ‘the interests of justice’ instead of a rigid commitment to the prosecutorial approach.

¹²⁶ Antonio Cassese, On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, *European Journal of International Law*, Vol. 9, Issue 1 (1998), P. 13.

¹²⁷ South Africa: Allowing Al-Bashir to Evade Justice Shows Total Disregard for the Law, *Amnesty International* (15th June, 2015).

¹²⁸ *Supra* n. 116, P. 8.

It is interesting to reflect that such problems were not faced by the first venture in institutional international criminal law with the creation of the two International Military Tribunals at the end of World War II. As the Tribunals worked in the context of the occupation regimes, they existed in an environment which was much more akin to domestic courts than the ICC. Chapter Two examines the way in which the Prosecutors of the Military Tribunals conducted their functions within a more secure and stable system. The perpetrators were arrested and detailed by allied forces and the prosecution had access to documents and witnesses.¹²⁹ As Jacob Katz Cogan points out, ‘cooperation was less of an issue because the Allies’ victory and political will secured access to the relevant evidence and witnesses.’¹³⁰ As the thesis will demonstrate the conditions in which the ICC prosecutor acts are quite different.¹³¹

A novel feature of the ICC is the principle of complementarity, for example, that was one of the fundamental questions that faced the drafters in relation to the role of the Court versus national judicial systems. The application of this principle has raised legal, procedural, and political challenges to the Court.¹³² During the draft debates and negotiations, there were two different views on this particular question. The majority was of the opinion of making the Court a court of last resort.¹³³ However,¹³⁴ some states shared different views and called for ‘a

¹²⁹ Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (Alfred A. Knopf, 1992), Chapter 5. See also the first section of Chapter Two of this thesis.

¹³⁰ Jacob Katz Cogan, International Criminal Courts and Fair Trials: Difficulties and Prospects, *the Yale Journal of International Law*, Vol. 27 (2002), P. 121.

¹³¹ The Military Tribunals were more like domestic courts in that the Allied Forces in Germany, the USA in Japan - provided a clear level of political control of the process. At the same time in the conditions surrender and occupation Germany and Japan were under military and security control of the countries. This meant that police inquiries, evidence taking by prosecutors took place in an environment that more resembles the conditions that domestic courts exist in. In particular, unlike the ICC, there was an important layer of officials and governments which took political responsibility for them. See Chapter Two of this thesis for more discussion about this issue.

¹³² *Supra* n. 124, P. 24. See also Sarah M. H. Nouwen, *Complementarity in the Line of Fire: the Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge, Cambridge University Press, 2013).

¹³³ See generally, Report of Ad Hoc Committee on the Establishment of an International Criminal Court, United Nations General Assembly Officials Records, Fiftieth Session, Supplement No. 22, A/50/22 (1995), Para. 47.

¹³⁴ *Ibid*, Paras. 29- 51.

greater role' to be played by the Court in this relation.¹³⁵ The result of these negotiations was a compromise 'between national sovereignty and the Court's jurisdiction',¹³⁶ where the Court could step in only when states are unable or unwilling to prosecute crimes under its jurisdiction. This final compromise was intended to respect *both* the principle of sovereignty¹³⁷ that the duty and the power to prosecute such crimes lies first of all with national courts when states are able and willing to prosecute, and the principle of the rule of the law, when states are not.¹³⁸

In practice, it can be noted that the Court legally and practically has authority to impose the principle of the rule of law and, therefore, its criminal justice over nationals of states. It is the Court that has the final word in deciding whether or not states are able and willing to prosecute through their own national legal systems; if not, the Court uses its authority to impose the rule of law – by instituting investigations and/or prosecutions in its own right. Yet, any conclusion as to whether there is or has been a 'genuine process of justice on a national level', is, Anthony Kariuki argues, 'both subjective and political.'¹³⁹ The wording 'genuinely to prosecute' in Article 17 (1)(b), for example, is obscure. Initially, it appears to mean a non-genuine prosecution, but not the quality of the procedures that led to that decision.¹⁴⁰ In other words, if a state conducted a genuine investigation, but decided for a certain reason –

¹³⁵ John T. Holmes, the Principle of Complementarity, in Roy S. K. Lee, *The International Criminal Court: the Making of the Rome Statute* (The Hague, Kluwer Law International), P. 42.

¹³⁶ Steven C. Roach, *Politicizing the International Criminal Court: the Convergence of Politics, Ethics, and Law*, (Rowman and Littlefield Publishers, 2006), P. 42.

¹³⁷ It should be noted here that when the SC triggers the jurisdiction of the Court, there is no need for the SC to obtain consent from this state whether party to the Statute or not, as the SC is acting under the authority of Chapter VII of the UN Charter.

¹³⁸ 'It should be noted, in line with the wording of Articles 18(1) and 19(2)(b), that the complementarity principle extends to any State which has jurisdictional competence over a case and applies irrespective of whether that State is a Party to the Statute.' At footnote 33 of ICC, Office of the Prosecutor, Policy Paper on Preliminary Examinations (November, 2013), P. 11, (hereinafter: Policy Paper on Preliminary Examinations 2013).

¹³⁹ Anthony Kariuki, War Crimes and Punishment: Why Is The ICC Targeting Africa? *Brown Political Review* (March, 2015), available at <<http://www.brownpoliticalreview.org/2015/03/war-crimes-and-punishment-why-is-the-icc-targeting-africa/>> (Last Access: 13th November, 2015).

¹⁴⁰ For more discussion on this point, see Dr. Joshua N Aston and Vinay N. Paranjape, Admissibility and the International Criminal Court (27th February, 2013), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226286>.

considering peace, security, or stability of its own state – not to prosecute, then according to the above wording, the outcome of the decision not to prosecute would still seem not genuine. A national prosecutor may conduct genuine procedures, but for different reasons, such as the lack of *prima facie* case, or for the interests of public, the prosecutor may decide not to prosecute. For example, Lenore F. Horton argues that ‘a truth commission arguably could constitute a "genuine investigation."’¹⁴¹ Although such a decision might be legitimate from the national judicial point of view, it might not be so by the ICC. The prosecutor may find such a case admissible, based on her interpretation of the national court’s decision that the latter masked its intention to make the case inadmissible.¹⁴² Whatever the real intention of the national procedures is, the Court in fact has the exclusive power to determine which institution will exercise its jurisdiction.¹⁴³

For example, in the situation of Libya, there were legal arguments about the admissibility of the cases of Saif Al-Islam Gaddafi and Abdullah Al-Senussi, based on the fairness of the procedures-related issues.¹⁴⁴ In these cases, the defence used two different grounds to challenge the admissibility’s procedures. As Stahn states,¹⁴⁵ whilst the defence of

¹⁴¹ Lenore F. Horton, Prosecutorial Discretion before International Criminal Court and Prosecution of Justice: How Expanded Prosecutorial Independence can Increase the Accountability of International Actors, *Eyes on the ICC*, Vol. 7, No. 5 (2010- 2011), P. 50.

¹⁴² Carsten Stahn, Libya, the International Criminal Court and Complementarity a Test for ‘Shared Responsibility’, *Journal of International Criminal Justice*, Vol. 10, Issue: 2 (2012), Pp. 325- 349. Stahn stats that the application of Article 17(2) (b) and (c) can either be interpreted narrowly, aimed at providing criminal justice, or broadly aimed at ensuring the quality of justice provided by the given state.

¹⁴³ Michael A Newton, Complementarity Conundrum: Are We Watching Evolution or Evisceration, *Santa Clara Journal of International Law*, Vol. 8, Issue: 1 (2010), 115- 164, arguing that the implementation of the principle of complementarity has been implemented on the model of competition rather than on the model of a healthy and cooperative synergy between national courts and the ICC. See also John M. Czarnetzky and Ronald J. Rychlak, An Empire of Law: Legalism and the International Criminal Court, *Notre Dame Law Review*, Vol. 79, Issue: 1 (2003), P. 95, arguing that the principle of complementarity might be abused, as ‘the decision as to whether a state is "unwilling or unable" to conduct a meaningful trial will ultimately not be made by that state, but rather by the ICC.’

¹⁴⁴ *The Prosecutor v. Saif Al-Islam Gaddafi*, ICC-01/11-01/11, and *The Prosecutor v. Abdullah Al-Senussi*, ICC-01/11-01/11.

¹⁴⁵ Carsten Stahn, Admissibility Challenges before the ICC: from Quasi-Primacy to Qualified Deference? in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford, Oxford University Press, 2015), P. 232.

the Libyan Government challenged the admissibility of the Court in order to exercise the jurisdiction themselves,¹⁴⁶ the defence of the accused argued in favour of the admissibility of the cases before the Court.¹⁴⁷ Whilst Pre-Trial Chamber I endorsed the Prosecutor's decision about the admissibility of the Gaddafi case in respect to complementarity and rejected Libya's challenge, the reverse happened in relation to the Al-Senussi case.¹⁴⁸ Although the two sides claimed different views to be applicable, it is only the Court which decided whether or not the legal judicial system of Libya satisfies the willingness and ability requirements.

In concluding this section, I have tried to show here that the circumstances in which the ICC functions make use of discretion by the prosecutor are quite important for providing *meaningful justice*, a justice that can be both accessible and attainable by the Court, or that is required by particularly affected communities when the Court does not seem able to deliver its own justice. The preamble of the ICC Statute emphasises the importance of the maintenance of several, but sometimes contradictory values such as peace, security, well-being of the world, putting an end to an era of impunity, and definitely justice that might be applied by national courts. In light of the above challenges, in seeking to achieve its criminal justice, the Court may not be able to achieve this end, and may, at the same time, undermine the other values that the Preamble declares. Further, one could notice that the achievement of justice is linked to the practical and political realities of the circumstances in which the Court works. This represents a challenge to the ICC prosecutor to achieve. Therefore, instead of undermining its own institutional goals, the Court through the discretionary power of the ICC prosecutor, may play

¹⁴⁶ Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-130, at <https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/related%20cases/icc01110111/court%20records/filing%20of%20the%20participants/states%20representatives/Pages/130.aspx>.

¹⁴⁷ *Supra* n. 145, P. 232.

¹⁴⁸ ICC, Appeals Chamber, Situation in Libya: in the Case of the Prosecutor v. Saif Al-Islam Ghaddafi and Abdullah Senussi: Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", No. ICC-01/11-01/11 OA 4 (21 May 2014).

an important role in promoting these goals, if the prosecutor considers how justice can be better delivered. Providing the prosecutor with prosecutorial discretion either through the Article 53 ‘interests of justice’ or the *proprio motu* power, she will have a chance to provide a more effective and meaningful justice, as will be explained in Chapter Five. Therefore, the achievement of justice does not have to be delivered through the Court itself when these values are at stake. If justice can be ideally and better achieved by different mechanisms (for example, local mechanisms), then the exercise of prosecutorial discretion will be the mechanism for the prosecutor to do it.

1.1.3. Court Structure

The Court consists of six bodies: the Presidency, the OTP, the Registry, a Pre-Trial Division, a Trial-Division, and an Appeal Division.¹⁴⁹ Within the judicial organs, there are 18 judges who perform judicial functions. The Registry provides judicial and administrative support for all organs of the Court, including issues of victims, witnesses, and defence.¹⁵⁰ It is headed by the Registrar.¹⁵¹ The Statute also provides another body, which is not an organ of the Court: the ASP.¹⁵² The latter is a separate body and has no judicial mandate, but it has legislative and administrative mandate.

Like the ICTY and ICTR, the ICC has its own Office of the Prosecutor.¹⁵³ The ICC Statute sets up the Office in more detail than the other tribunals. Under Article 42 (1), ‘[t]he Office of the Prosecutor shall act independently as a separate organ of the Court. ... A member

¹⁴⁹ Articles 34- 52 of the ICC Statute organise in detail the composition of administration of the Court.

¹⁵⁰ Article 43.

¹⁵¹ Article 43 (2).

¹⁵² See Article 112 of the ICC Statute for more details about the role of the ASP.

¹⁵³ The first Prosecutor was Luis Gabriel Moreno-Ocampo, an Argentine national, who took up the Office on 16 June 2003, before new Prosecutor: Fatou Bensouda (Gambia) took up the Office on 16 June 2012. The thesis will critically analyse and discuss the prosecutorial functions of the OTP during Moreno-Ocampo mandate and to lesser extent Bensouda’s mandate. For more information about the structure of the OTP, see Gregory Townsend, Structure and Management, in Luc Reydam, Jan Wouters, and Cedric Ryngaert (eds), *International Prosecutors* (Oxford, Oxford University Press, 2012), Pp. 285- 294.

of the Office shall not seek or act on instructions from any external source'. Article 42 (1) also provides that the OTP is responsible for receiving information, referrals, and conducting investigations and prosecutions. Sub-paragraph (4) provides that the Prosecutor is to 'be elected by secret ballot by an absolute majority of the Assembly of States Parties'. The same percentage of vote is needed to remove her according to Article 46 (2). The Prosecutor has more than one Deputy Prosecutor, who all must be drawn from different nationalities.¹⁵⁴ The OTP is linked directly to four reporting units,¹⁵⁵ and is comprised of three main divisions,¹⁵⁶ which are responsible for three major stages: pre-investigation stage, investigation stage, and prosecution stage.

¹⁵⁴ Opening seven situations, issuing 22 arrest warrants (of which 5 arrested), and 9 summonses, putting 5 in the custody, and doing preliminary examinations in 9 situations (of which 2 situations were reported to be dismissed) are the total work were done by first Prosecutor Luis Moreno-Ocampo.

¹⁵⁵ These are the Immediate Office of the Prosecutor, the Services Section, the Legal Advisory Section, and Executive Committee (ExCom).

¹⁵⁶ These are the Investigation Division, the Prosecution Division, and The Jurisdiction, Complementarity and Cooperation Division (JCCD).

1.2. The ICC Prosecutor

1.2.1. Decision-Making Process of the Prosecutor

Figure 1.¹⁵⁷

Status	Situations proceeded to investigations and Trigger	Preliminary Examination stage	Rejected Situations
Situations	1- Uganda (Jan, 2004), Self-Referral 2- Democratic Republic of the Congo (April, 2004), Self-Referral 3- Central African Republic (Jan, 2005), Self-Referral 4- Darfur (Sudan) (March, 2005), The SC Referral 5- Kenya (2010), Prosecutor <i>Proprio Motu</i> 6- Libya (Feb, 2011), The SC Referral 7- Côte d'Ivoire (Oct, 2011), Prosecutor <i>Proprio Motu</i> 8- Mali (2012), Self-Referral 9- Democratic Republic of the Congo II (Sep. 2014) 10 Central African Republic II (September, 2014), Self-Referral	Colombia (June, 2004) Afghanistan (2007) Georgia (Aug. 2008) Guinea (Oct. 2009) Nigeria (Nov. 2010) Iraq (May, 2014) Ukraine (April, 2014) Palestine (Jan, 2015)	Venezuela (Feb. 2006) Honduras (Nov. 2010) Republic of Korea (Dec. 2010) Comoros (July, 2013)
Cases	23		

¹⁵⁷ See the official site of the ICC for update at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx>.

The prosecutor of the ICC is the engine of the Court. She is a principal actor within the Court, the first point where complaints are received, the tongue of the Court to the public, and is the principal administrator and strategist of justice of the ICC.¹⁵⁸ The ICC prosecutor is endowed with investigative and prosecutorial functions.

The power of the prosecutor was one of the most sensitive debates during the negotiations and drafting of the Rome Statute. The first draft of the Statute submitted in 1994 by the UN's ILC gave the prosecutor limited prosecutorial power, as the only trigger mechanisms were the SC or State Party referrals.¹⁵⁹ Several members expressed their opinion that providing the prosecutor with a power to initiate proceedings on her own initiative (*proprio motu* power) was not desirable 'at the present stage of development of the international legal system'.¹⁶⁰ During the discussions of the Ad Hoc Committee in 1995, some delegates paid attention to the limited role that the prosecutor was given and suggested that the prosecutor should be given a power to initiate proceedings on her own motion.¹⁶¹ In 1996, the call for *proprio motu* power was increased during the discussion of the Preparatory Committee. However, in the same year, some governments claimed that the international community as a whole was not prepared to grant the prosecutor such a serious power.¹⁶² They claimed that if the Court were to obtain widespread acceptance, then it would be desirable not to empower her with such a power.¹⁶³ When the process was turned over to the Preparatory Committee, the

¹⁵⁸ Reydam, Wouters, and Ryngaert, *supra* n. 10.

¹⁵⁹ Silvia A. Fernandez de Gurmendi, The Role of the Prosecutor, in Roy S. Lee (ed.) *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations and Results* (Boston, Kluwer Law International, 1999), P. 175.

¹⁶⁰ See, Report of the International Law Commission on the work of its forty-sixth session, 2 May - 22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement No. 10, Draft Statute for an International Criminal Court, P. 46, available at <http://legal.un.org/ilc/documentation/english/reports/a_49_10.pdf>.

¹⁶¹ *Supra* n. 133, Paras. 25, 113, and 114.

¹⁶² Report of the Preparatory Committee on the Establishment of an International criminal Court, Volume 1 (1996), Paras. 149- 151

¹⁶³ For detailed information about the process of the Preparatory Committee and the Rome Conference, see *supra* n. 159.

question of prosecutorial power divided the drafters into two groups. Both proponents and opponents of a strong prosecutor shared a common fear, which revolved around the idea of politicising the Court,¹⁶⁴ which would undermine the impartiality and independence of the Court.¹⁶⁵ Therefore, providing the prosecutor with discretion may render her political and, at the same time, depriving her of such a power may render the whole Court political, as it will be directed and controlled by States Parties and the Security Council.

Opponents of the *proprio motu* power argued that the prosecutor could become a political actor, acting on the basis of their own assessment of the political circumstances and desiderata. This view was mainly supported by the US.¹⁶⁶ It was based on a fear that the initiation of an investigation *proprio motu* would ‘encourage overwhelming the court with complaints and risk diversion of its resources, as well as embroil the court in controversy, political decision-making, and confusion’.¹⁶⁷ It was further submitted that, as the Court cannot deal with all complaints, ‘he or she would have to decide on priorities, which would inevitably result in disappointment and challenges to his or her decisions.’¹⁶⁸ Therefore, it was argued, the ability to initiate an investigation should be in the hands of states and the UNSC. In parallel, there was a concern that the prosecutor would work on the basis of priorities and would choose among many worthy situations, as the Court was practically and financially unable to

¹⁶⁴ Danner, *supra* n. 14, P. 513.

¹⁶⁵ See Prosecutor Louise Arbour’s Statement to the Preparatory Committee on the Establishment of an International Criminal Court, Press Release, UNICTY, Prosecutor, The Hague (8th December, 1997), available at <<http://www.icty.org/sid/7434>>. See also Amnesty International, The International Criminal Court: Making the Right-Choices, Part II (June, 1997).

¹⁶⁶ Jimmy Gurule, United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court’s Jurisdiction Truly Complementary to National Criminal Jurisdictions? *Cornell International Law Journal*, Vol. 35, No. 1 (2008), 1- 45.

¹⁶⁷ Cited in Bartram Brown, U.S. Objections to the Statute of the International Criminal Court: a Brief Response, *International Law and Politics*, Vol. 31 (1999), P. 880, Footnote: 91. See, Statement of David J. Scheffer, Ambassador at Large for War Crimes Issues And Head of the U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court Before the Committee on Foreign Relations of the U.S. Senate (23rd July, 1998).

¹⁶⁸ *Supra* n. 159, P. 181.

investigate all of them.¹⁶⁹ Providing the prosecutor with such a power would *politicise* the Court.

The proponents argued, on the other hand, that restricting the power to initiate an investigation only to States Parties and the SC would politicise the Court in a different way, damaging the independence of the Court as well as the prosecutor.¹⁷⁰ This view was mostly led by NGOs, which strongly argued for a more independent prosecutor who could better promote justice.¹⁷¹ For example, Amnesty International stated that as the Court is a judicial body, then the prosecutor should be given the required independence to investigate and prosecute.¹⁷² Depriving the prosecutor of such a power and turning it over to political entities would *politicise* the Court. Their central justification was that the expansion of the power of the prosecutor to involve *ex officio* power to initiate investigations would uphold the independence and credibility of the prosecutor as well as the Court as a whole. They argued that the prosecutor ‘would be able to function on behalf of the international community rather than on behalf of a particular complainant State or the Security Council.’¹⁷³ States may be reluctant to refer their own situations for political reasons, as most governments are usually culprits.¹⁷⁴ It was difficult, at the time, to expect that states would be encouraged to refer their own atrocities to the Court, particularly if those states were themselves involved in the given atrocities. The UNSC, it was argued, was also guided by political interests and more problematically by the

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*, P. 178.

¹⁷¹ *Ibid.*, P. 177.

¹⁷² Amnesty International, The International Criminal Court: Making the Right-Choices, Part I (June, 1997), available at <<https://www.amnesty.org/en/library/info/IO40/010/1998>>.

¹⁷³ *Supra* n. 159, P. 178.

¹⁷⁴ The Palestine and Israel conflict could be one example, having accepted the jurisdiction of the Court by Palestine. See Ben Lynfield, Israel-Gaza conflict: Palestinians Consider Joining ICC to Prosecute Israelis for War Crimes, *Independent* (11th August, 2014), available at <<http://www.independent.co.uk/news/world/middle-east/israelgaza-conflict-palestinians-consider-joining-icc-to-prosecute-israelis-for-war-crimes-9662806.html>> (Last Access: 5th June, 2015).

veto system.¹⁷⁵ Imminent political considerations were inherent in the decisions of the SC. Therefore, it was unacceptable to endow the SC with such a conclusive power. Both trigger mechanisms, therefore, might deliver selective justice, which would undermine the legitimacy and independence of the Court, as well as weakening the possibility of obtaining widespread ratifications of the Statute by states.

At the conclusion of the Rome negotiations, it was finally agreed to provide the prosecutor with an independent power to initiate an investigation or prosecution.¹⁷⁶ However, despite the sharp differentiation between the two sides, all agreed that providing the prosecutor with unfettered discretion would involve some danger. Therefore, all came to an agreement that this power would be under judicial control by the Pre-Trial Chamber at an early stage of the investigation.¹⁷⁷ The Statute provides that the *proprio motu* decision of the prosecutor to initiate an investigation would be subject to the Pre-Trial Chamber's approval. It was a compromise between the two sides.

Under Article 42 (1) of the Statute, the OTP is 'responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.'¹⁷⁸ This means that the OTP is the body which first receives *notitia criminis*.¹⁷⁹ There are two avenues by which

¹⁷⁵ We have seen how Russia has shown its already objection for any potential referral of the Syrian situation to the Court, see Ian Black, Russia and China Veto UN Move to Refer Syria to International Criminal Court, *The Guardian* (22nd May, 2014), available at <<http://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court>> (Last Access: 2nd May, 2015).

¹⁷⁶ See Zoe Pearson, Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law, *Cornell International Law Journal*, Vol. 39, No. 2 (2006), 243- 284.

¹⁷⁷ Morten Bergsmo & Jelena Peji, Article 15: Prosecutor, in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd ed.), (Oxford, Hart Publishing and Verlag, 2008), Pp. 359- 363.

¹⁷⁸ Generally, see Hector Olasolo, *The Triggering Procedure of the International Criminal Court* (Leiden, Martinus Nijhoff Publishers, 2005).

¹⁷⁹ See Giuliano Turone: Powers and Duties of the Prosecutor, in Antonio Cassese, Professor Paola Gaeta, and Mr. John R.W.D. Jones (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), Pp. 1138- 1179.

the jurisdiction of the Court can be triggered¹⁸⁰: referrals and communications. These avenues provide three mechanisms that can trigger the jurisdiction of the Court. The first is state referral. This can be either from a State Party in accordance with Article 13 (a)¹⁸¹, or by non-state party according to Article 12 (3)¹⁸². The second is the UNSC referrals acting under Chapter VII of the UN Charter, as noted in Article 13 (b)¹⁸³. The third avenue is potentially triggered by communication sent to the prosecutor when the prosecutor may choose to act *proprio motu* in accordance with Article 15 (1).¹⁸⁴ However, this requires the prosecutor to seek authorisation from the Pre-Trial Chamber before opening an *investigation*.¹⁸⁵ The ICC Statute, unlike the ICTY and ICTR, provides a wide range of channels to trigger the jurisdiction of the Court, thereby avoiding any shortcoming of limiting such power to the prosecutor. The expansion of the triggering mechanisms allows all actors, including individuals and NGOs, a unique opportunity to bring any situation or case to the attention of the Court via the communication channel. When making these decisions, the investigative and prosecutorial proceedings go through three stages.¹⁸⁶ No time framework is set either by the Statute or the OTP for each of these stages. Before explaining these stages, it is important first to explain the main policy of prosecution the OTP has developed.

Some of these are general policies of conducting investigation and prosecution, and some were put for specific legal criteria (gravity in its relative and legal senses, and ‘the interests of justice’). In general, the OTP adopted an exemplary prosecution when exercising her prosecutorial strategy. In this regard, the OTP issued several policy papers, from 2003 to

¹⁸⁰ See generally, Schabas, *supra* n. 4, Chapter 3.

¹⁸¹ The ICC has opened four situations: DRC, Uganda, CAR, and Mali following referrals from those states.

¹⁸² The Prosecutor opened two situations *proprio motu* in Kenya and Côte d'Ivoire.

¹⁸³ The Court opened two situations: Darfur and Libya following Security Council referrals.

¹⁸⁴ The Prosecutor initiated a preliminary examination *proprio motu* in Kenya, Cote d'Ivoire, and Georgia.

¹⁸⁵ As was done with the situation with Kenya and Cote d'Ivoire; the Prosecutor signalled her intention to submit an authorisation request in relation to Georgia.

¹⁸⁶ Christoph Safferling, *International Criminal Procedures* (Oxford, Oxford University Press, 2012), Pp. 216-252.

2013, to deal with these limitations.¹⁸⁷ In a 2003 policy paper, it decided that ‘as a general rule, *the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.*’¹⁸⁸ It also emphasised that the focus of prosecution will be on the most serious international crimes, as laid down in Article 5.¹⁸⁹ These two policies have been reconfirmed in the 2010 and 2013 policy papers.¹⁹⁰ As will be shown in the next chapter, this trend was already adopted by the previous international tribunals, which mainly concentrated on the major war criminals for the most serious international crimes, in particular the Nuremberg and Tokyo Military Tribunals.¹⁹¹ This policy seems logical as those who bear the most responsibility represent ‘a high degree of culpability’, as Greenawalt points out.¹⁹² However, in certain necessary cases, the OTP ‘may go wider than high-ranking officers, if investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case.’¹⁹³ In relation to the other perpetrators, the OTP emphasised the importance of national justice systems to deal with them. The OTP adopted the policy of encouraging national judicial systems to undertake genuine investigations and prosecutions in relation to all international crimes, including the ones that come under its jurisdiction. In addition, as a general rule, the OTP developed general principles that will guide

¹⁸⁷ ICC, Office of the Prosecutor, Paper on some Policy Issues before the Office of the Prosecutor (September, 2003).

¹⁸⁸ *Ibid*, P. 7.

¹⁸⁹ *Ibid*, P. 6. See also, Policy Paper on Preliminary Examinations 2013, Para. 48.

¹⁹⁰ ICC, Office of the Prosecutor, Policy Paper on Preliminary Examinations (October, 2010), Para. 103, (hereinafter: Policy Paper on Preliminary Examinations 2010). See also, Policy Paper on Preliminary Examinations 2013, Para. 103.

¹⁹¹ See Chapter Two of this thesis for more information about the policy of the prosecution of the Military Tribunals and the SC Tribunals.

¹⁹² Greenawalt, *supra* n. 23, P. 628.

¹⁹³ *Supra* n. 187, P. 7.

the preliminary examination process and the selection of situations and cases.¹⁹⁴ These principles are independence, impartiality, and objectivity.

In relation to the concept of gravity, the OTP provided that it would use ‘both quantitative and qualitative considerations based on the prevailing facts and circumstances.’¹⁹⁵ In relation to the assessment of ‘the interests of justice’, the OTP asserted that stopping the Court’s proceedings on the basis of ‘the interests of justice’ would be rare and exceptional as the priority will be given for investigations and prosecution.¹⁹⁶ Also, it sets that the assessment of this criterion will be guided by the object and purpose of the Statute, in particular that the most serious crimes of international concern must not go unpunished.¹⁹⁷ Lastly, it provides that there is a difference between ‘interests of justice’ and interests of peace, as the latter would be under the mission of other institutions such as the SC.¹⁹⁸

¹⁹⁴ Policy Paper on Preliminary Examinations 2013, Paras. 25- 33, Policy Paper on Preliminary Examinations 2010, Paras. 33- 44, and Policy Paper on Preliminary Examinations 2016, Paras. 12- 19.

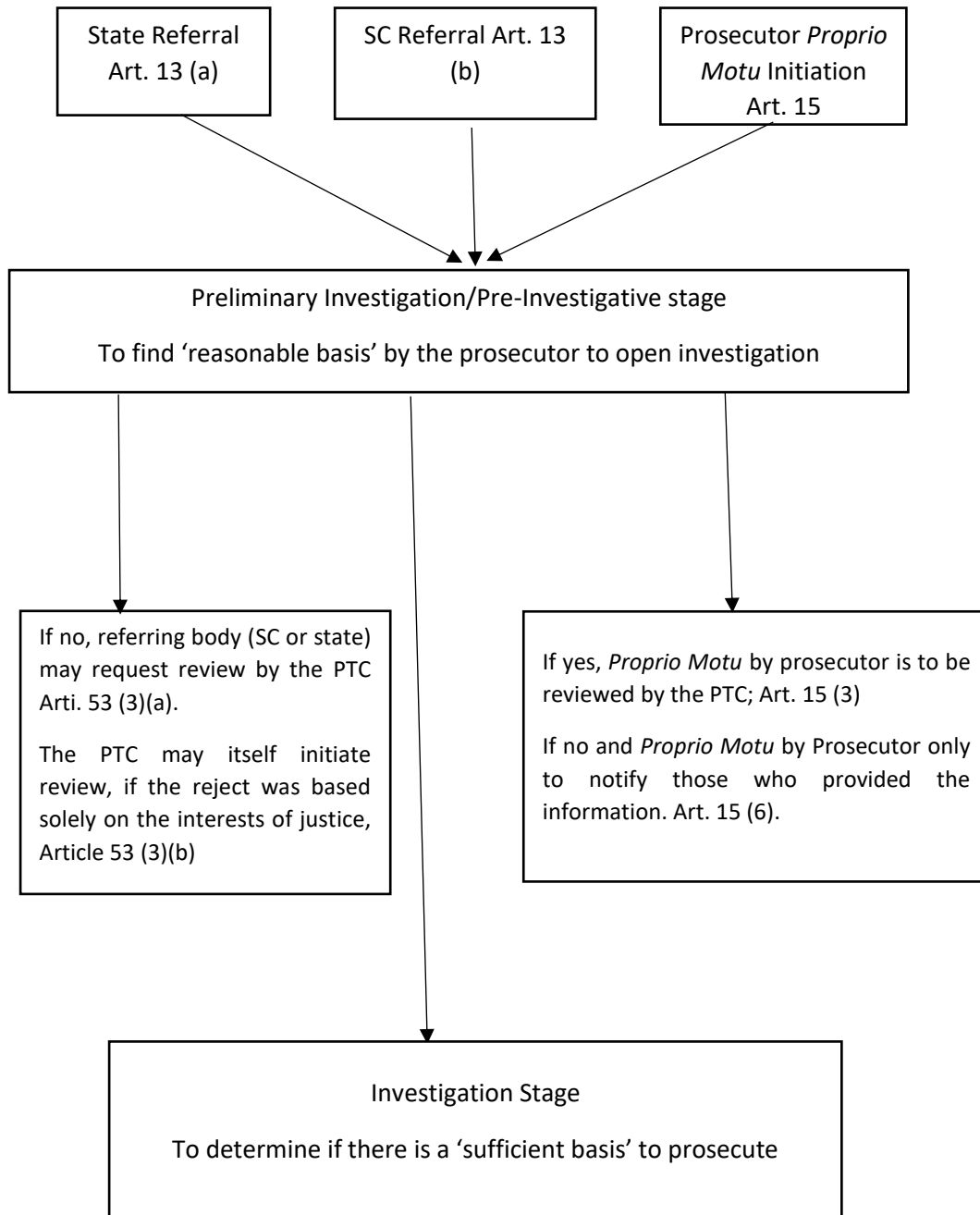
¹⁹⁵ Policy Paper on Preliminary Examinations 2010, Para. 70 and Policy Paper on Preliminary Examinations 2013, Para. 61.

¹⁹⁶ ICC, Office of the Prosecutor, Policy Paper on the Interests of Justice (September, 2007), P.1 (hereinafter Policy Paper on the Interests of Justice 2007).

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

Figure. 2



1.2.1.1. Preliminary Examination Stage

Articles 15, 17, and 53 of the Statute deal this stage. The preliminary examination may be initiated by the OTP for all situations, which are triggered through referrals and communication.¹⁹⁹ Not all situations will automatically enter the preliminary examination stage. If the source of the trigger is communication, here, and under Article 15 (2) the prosecutor analyses ‘the seriousness of the information received and may seek additional information from States, organs of the UN, intergovernmental and non-governmental organisations and other reliable sources that are deemed appropriate.’²⁰⁰ At this early stage, the prosecutor will ‘analyse and verify the seriousness of information received, filter out information on crimes that are outside the jurisdiction of the Court and identify those that appear to fall within the jurisdiction of the Court.’²⁰¹ Only the latter set of situations will proceed to the preliminary examination stage. If the source of the trigger is referrals (states and the SC), there will be no need for conducting an initial assessment of the information received; such situations will automatically enter the stage of preliminary examination. Once these situations enter the preliminary examination stage, Article 53 (1) provides three legal criteria to be examined by the prosecutor for the purpose of whether or not to open an investigation.²⁰² As Report on Preliminary Examination Activities 2014 provides,

Once a situation is thus identified, the factors set out in article 53(1) (a)-(c) of the Statute establishes the legal framework for a preliminary examination. It provides that, in order to determine whether there is a reasonable basis to proceed with an investigation into the situation the Prosecutor shall consider: jurisdiction (temporal, either territorial or

¹⁹⁹ Policy Paper on Preliminary Examinations 2010.

²⁰⁰ Report on Preliminary Examination Activities 2014, Para. 10.

²⁰¹ Policy Paper on Preliminary Examinations 2013, Para. 78.

²⁰² *Ibid*, Para. 12.

personal, and material); admissibility (complementarity and gravity); and the interests of justice.²⁰³

The first criterion is jurisdiction.²⁰⁴ This includes an assessment of whether the situation is within the temporal jurisdiction, *ratione temporis*, of the Court, meaning that the situation occurred after the entry into force of the Statute on 1st July 2002. The second element of jurisdiction is jurisdiction *ratione materiae*, also known as subject matter jurisdiction, *i.e.* whether the situation, more specifically potential cases within the situation, falls within the categories of crimes over which the Court has jurisdiction according to the Statute: crimes against humanity, war crimes, genocide, and aggression. In addition, the alleged crime must have been committed within a territory of a state party to the Statute or by a national of it. The next test is admissibility, as provided in Article 17.²⁰⁵ This test is divided into two elements: gravity and complementarity. The potential cases in a given situation should be of ‘sufficient gravity’ to justify the prosecutor (and the Court) to take further action. In respect to complementarity, the situation must also satisfy the admissibility criterion that a national court is not willing and able to carry out a genuine investigation and prosecution.

The last test is ‘the interests of justice’. This provision empowers the prosecutor to decide not to proceed with an investigation, when the latter would not serve ‘the interests of justice’. However, Article 53 (1)(c) requires the prosecutor at the same time to take into consideration two elements: the gravity of the crime and the interests of victims. When the OTP finishes the assessment of these criteria, an internal report will be forwarded to the prosecutor.

At the conclusion of this stage, having examined the satisfaction of these requirements under ‘the reasonable basis to proceed’ test, the prosecutor either decides to open the

²⁰³ Report on Preliminary Examination Activities 2014, Para. 3.

²⁰⁴ See Bergsmo, Cisse, and Staker, *supra* n. 3, P. 142.

²⁰⁵ *Ibid.*

investigation or reject it. The latter sort of decision may be judicially reviewable as follows: if the prosecutor decides to reject a situation initiated by the SC or a state, then at the request of the latter and according to Article 53 (3)(a), the Pre-Trial Chamber may request the prosecutor to review her decision. However, if such a decision is only based on ‘the interests of justice’, the Pre-Trial Chamber may review the decision on its own *initiative*.²⁰⁶ In the latter case, another constraint is imposed on the power of the prosecutor, as the insistence of the prosecutor not to proceed on the basis of ‘the interests of justice’ will be only accepted when the Pre-Trial Chamber confirms it.²⁰⁷

The situation is different when the prosecutor is operating under her *proprio motu* powers. It is solely her decision whether or not there is sufficient evidence to proceed, and this decision is not subject to judicial review. No party has *locus standi* to challenge the prosecutor. Stahn questions how a Chamber can ‘meaningfully exercise *proprio motu* powers of review over inaction under article 53, if the determination as to whether or not a decision not to prosecute has been taken is dependent on the initiative of the Prosecutor’.²⁰⁸ The prosecutor seems to have a broad discretion in this regard. The only duty that is imposed on the prosecutor in relation to those sort of decisions is to inform the providers of the information with her decision that there is not ‘a reasonable basis for an investigation’, under Article 15 (6). However, if the prosecutor decides to initiate an investigation on the basis of her *proprio motu* power, first she has to submit an application to the Pre-Trial Chamber for authorisation of an investigation according to Article 15 (3). It is noticeable that whilst the Court has a limited role in relation to situations that are referred by a state or the SC, it has a decisive role in determining whether to proceed with an investigation that is triggered by the prosecutor.

²⁰⁶ See Article 53 (3) of the Rome Statute.

²⁰⁷ *Ibid.*

²⁰⁸ *Supra* n. 61, P. 271.

1.2.1.2. Investigation Stage

This stage is provided for under Articles 53 (2) (a-c), 54, and 58. If the prosecutor is satisfied that the Article 53 (1) (a)-(c) requirements are met, investigative proceedings may commence.²⁰⁹ According to Article 54, the prosecutor is responsible for evaluating all material that was collected, and analysing the evidence and information to identify the potential suspects who will be prosecuted. She will also question suspects, witnesses, and victims, under Article 54 (1)(b). She may further seek cooperation of any state or organisation for the purposes of completing the investigation, under Article 54 (3) (c)(d). The role of the prosecutor *at this stage* is as a neutral and impartial body.²¹⁰ Article 54 (1) (a) provides that the prosecutor shall ‘investigate incriminating and exonerating circumstances equally.’ As Schabas points out, ‘[s]uch a Prosecutor is rather more like the investigating magistrate or *juge d’instruction* of the continental legal system rather than the adversarial prosecuting attorney of the common law.’²¹¹ ‘Therefore, and notwithstanding the more adversarial design of proceedings before the Court, the Prosecutor should not solely collect evidence with the aim of securing a conviction’,²¹² because she is not a partisan actor. Playing an objective role ‘to establish the truth’ is not only limited to the time prior to the confirmation of charges, as the Appeal Chamber confirmed in the Lubanga case.²¹³ There is nothing in Article 54 that prohibits the prosecutor to exercise post-confirmation investigations. However, the majority of Trial Chamber V submitted that the prosecutor is expected ‘to have largely completed its investigation prior to the confirmation hearing’,²¹⁴ and that such further investigations should pertain only ‘to evidence which the

²⁰⁹ See *supra* n. 179, P 1158.

²¹⁰ Schabas, *supra* n. 4, P. 261.

²¹¹ *Ibid.*

²¹² Karel De Meester, Article 54(1)(a): Commentary Rome Statute: Part 5, *Case Matrix Network*, available at <<http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-5/>> (Last Access: 17th July, 2016).

²¹³ Lubanga Dyilo, ICC, Appeal Chamber, ICC-01/04-01/06-568, 13th October, 2006, Para. 52.

²¹⁴ ICC, Trial Chamber, Situation in the Republic of Kenya: in the Case of The Prosecutor v. Uhuru Muigai Kenyatta: Decision on defence application pursuant to Article 64(4) and related requests, No.: ICC-01/09-02/11 (26th April, 2013), Para. 119.

Prosecution could not with reasonable diligence have discovered or obtained prior to confirmation.²¹⁵

At the end of this process, the prosecutor will decide which cases to prosecute. Before making such a decision, Article 53 (2) asks the prosecutor to satisfy three criteria: the existence of ‘a sufficient legal [and] factual basis to seek a warrant or summons’ under Article 58; meeting the admissibility requirements laid out in Article 17 (gravity and complementarity), and finally that the prosecution of the case is not contrary to ‘the interests of justice’. However, Article 53 (2) (c) adds two *further* factors for the evaluation of ‘the interests of justice’: the age or infirmity of the alleged perpetrator and his or her role in the alleged crime.

1.2.1.3. Prosecution Stage

Upon the satisfaction of the above factors, the prosecutor may seek a warrant or summons from the Pre-Trial Chamber. There is no specific time in which the prosecutor needs to make the decision of prosecution. Article 58 (1) provides that the prosecutor can apply for an arrest warrant or summons ‘at any time after the initiation of an investigation.’ The prosecutor needs approval from the Pre-Trial Chamber to get the arrest warrant or summons issued.²¹⁶ Article 61 (1) also obliges the prosecutor to send the charges to the Pre-Trial Chamber to be confirmed before proceeding to the trial stage (confirmation of charges hearing). In determining the arrest warrant, ‘the Pre-Trial Chamber must be satisfied that there are reasonable grounds to believe that the person has committed a crime within the Court’s jurisdiction, and that the arrest of the person is necessary.’²¹⁷ The Pre-Trial Chamber plays a vital role before a case enters the trial stage. The selection process is, therefore, contingent not only on the satisfaction of the prosecutor but also on the Pre-Trial Chamber. The creation of the latter requirements, as Stahn argues, was an ‘institutional response to the establishment of

²¹⁵ *Ibid*, Para. 120.

²¹⁶ Article 58 (1) of the Statute.

²¹⁷ Schabas, *supra* n. 4, P. 272.

an independent Prosecutor.²¹⁸ Therefore, any flaw in this process reflects on the whole legitimacy of the Court and not only the prosecutor. One issue that has been engaged is the fact that neither the Statute nor the RPE indicate that the arrest warrant should be issued sealed. The ICC Prosecutors' practice reflects this matter, as they issued the arrest warrant in two different ways, some were sealed, and others were unsealed.²¹⁹

1.2.2. The ICC Prosecutor's Discretion

The Rome Statute agreement on providing the ICC prosecutor with a *proprio motu* power occupied the centre of attention in debates about prosecutorial discretion. Around this power, major issues about the significance of prosecutorial discretion were brought into the foreground, both its benefits and its potential dangers. The installation of the prosecutor's *proprio motu* powers and the surrounding safeguards in the form of review provisions, thus symbolised a key commitment of the ICC – whilst at the same time highlighting the potential dangers. Unlike her/his predecessors, the ICC prosecutor was empowered for the first time to identify *situations* to be investigated. As will be explored in Chapter Two, the international Prosecutors of the IMT had the power of selecting only the charges, whilst the Prosecutors of the SC ad hoc Tribunals had the power to prosecute cases and decide charges. The creators of those Tribunals had already selected the situations that were the subject of their jurisdiction.²²⁰ With the establishment of the permanent international court, the prosecutor can initiate investigation into situations and prosecute cases. This is a new feature within international criminal justice. This unprecedented feature raises heated debates about whether the prosecutor has discretion to select these situations.

²¹⁸ *Supra* n. 61, 265.

²¹⁹ For example, all arrest warrant issued against the DLR's suspects were unsealed. However, the case against, for example Dominic Ongwen was issued sealed. For all information about this issue, see the official website of the Court, at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx>.

²²⁰ See William A. Schabas, Selecting Situations and Cases, in Stahn C (ed.), *The Law and Practice of the International Criminal Court*, (Oxford, Oxford University Press, 2015), Pp. 368-9.

Yet at the same time, this left many residual issues relatively unexamined concerning the discretionary powers that the prosecutor holds under the Rome Statute. The question that can be raised here is the scope of the prosecutor's discretionary power in respect to investigating situations (situational discretion), and prosecuting cases. Does the prosecutor enjoy the sort of discretion over decisions to prosecute that would be assumed or legislated in many domestic jurisdictions? The next section will discuss and analyse the scope of the conventional type of discretion known as prosecutorial discretion under the ICC Statute during the investigation and prosecution stages. In the context of the investigation stage, the discussion will start first with the Article 15 (1) and (3) *proprio motu* power,²²¹ and then will discuss this issue in the context of referrals. These all will be followed by the discussion of the scope of the discretionary power during the prosecution stage.

1.2.2.1. Investigation

1.2.2.1.1 *Proprio Motu* Decisions: Article 15 (1) and (3)

This is the article that gives the prosecutor an independent power to initiate an investigation *proprio motu*. Paragraph 1 says that '[t]he Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.' Paragraph 3 provides that '[i]f the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected.' In the first paragraph, the term '*may*' explicitly grants the prosecutor *prosecutorial discretion* to initiate a *proprio motu* investigation. However, Paragraph 3 raises a doubt about the extent of this discretion because the term '*shall*' appears to oblige the prosecutor – if she concludes that there

²²¹ Danner, *supra* n. 14, P. 518, stating that '[t]he debate over the role of the Prosecutor's *proprio motu* powers was essentially a fight over the proper scope of the Prosecutor's discretion—in particular, whether it should extend to the decision to initiate an investigation.'

is a reasonable basis to proceed with an investigation – to submit an authorisation request to the PTC. Thus, Margaret deGuzman says the Statute ‘contains contradictory provisions concerning the extent of the Prosecutor’s discretion’.²²² However, another interpretation can be offered, namely that Paragraph 3 contains one sentence that is divided into two parts. The first part is devoted to the process of making a *proprio motu* decision, whilst the second part tells the prosecutor what to do next upon making a decision of opening an investigation. The term ‘*shall*’ comes in the second part of the sentence, and on this interpretation, the mandatory language may mean to oblige the prosecutor to submit the application to the Chamber, but does not oblige her to proceed, as the structure of Paragraph 3 otherwise indicates. Unlike deGuzman’s argument that Article 15 is self-contradictory, this interpretation would make Article 15 seem consistent and, therefore, allow the prosecutor to exercise *prosecutorial discretion* to select among legally worthy equally *situations*. Schabas also notes that the Prosecutor has prosecutorial discretion when initiating a *proprio motu* investigation. He states that one of the major ‘changes to the draft of the ILC that appears in the final version of the Rome Statute is the recognition of discretion’²²³, including the power of the prosecutor to select which situation to be *proprio motu* initiated.

Bearing in mind that these *policy papers* and *practices* of the Prosecutor do not determine the existence of prosecutorial discretionary power,²²⁴ the OTP consistently implies in its policy papers that no discretion exists, on the ground that Article 53 provides guided and adequate criteria to make a *proprio motu* decision. In the draft policy paper of 2010 on preliminary examination, the OTP did not address the question of discretion and asserted that the prosecutor is bound by the legal criteria of Article 53 when deciding whether to open an

²²² DeGuzman, *supra* n. 13, P. 1410. See also *supra* n. 179, Pp. 1147-51.

²²³ *Supra* n. 220, P. 370.

²²⁴ Policy Paper on Preliminary Examinations 2013, Para. 20, ‘This is a document reflecting an internal policy of the OTP. As such, it does not give rise to legal rights, and is subject to revision based on experience and in light of legal determinations by the Chambers of the Court.’

investigation or not.²²⁵ For example, it states that ‘[i]f the State(s) concerned elects not to refer the situation, the Office remains prepared at all times to proceed *proprio motu*, as was done in the Kenya situation.’²²⁶ In its final version of the paper (2013), and in the context of initiating a *proprio motu* investigation, the OTP confirmed that ‘[i]f the Office is satisfied that all the criteria established by the Statute for this purpose are fulfilled, it has a legal duty to open an investigation into the situation.’²²⁷ Therefore, as Vaid argues, ‘[t]he Prosecutor thus does not claim [prosecutorial] discretion to decide whether or not to proceed once she determines a situation satisfies the requirements of article 53.’²²⁸

In practice, the Prosecutor has initiated two *proprio motu* investigations in Kenya and Cote d’Ivoire. In its two applications to the Court for authorisation to proceed to open an investigation, the Prosecutor did not raise the issue of discretion.²²⁹ She just confirmed that the legal criteria of Article 53 were met.²³⁰ Further, the Prosecutor has declined to proceed *proprio motu* in relation to three situations: Iraq, Venezuela, and Palestine.²³¹ The Prosecutor did not reach the question of discretion, as he rejected them on the basis of non-satisfaction of one of the legal criteria of Article 53, namely jurisdictional and admissible requirements.²³² For

²²⁵ Policy Paper on Preliminary Examinations 2010.

²²⁶ *Ibid*, Para. 76.

²²⁷ Policy Paper on Preliminary Examinations 2013, P. 2.

²²⁸ Vaid, *supra* no. 12, P. 370.

²²⁹ *Supra* n. 220.

²³⁰ ICC, Pre-Trial Chamber II, Situation in the Republic of Kenya: Request for Authorisation of an Investigation Pursuant to Article 15, No.: ICC-01/09 (26th November 2009), Paras. 45-61, available at <<https://www.icc-cpi.int/iccdocs/doc/doc785972.pdf>> (hereinafter: Situation in the Republic of Kenya 2009). See also ICC, Pre-Trial Chamber II, Situation in the Republic of Cote d’Ivoire: Request for authorisation of an investigation pursuant to Article 15, No ICC-02/11-3 (23rd June, 2011), Paras. 35- 60, at <<https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/11-3>> (hereinafter: Situation in the Republic of Cote d’Ivoire 2011).

²³¹ For all details of the decisions of the Prosecutor about these situations, see the ICC’s websites at

<http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx>.

²³² The Prosecutor rejected the Iraq situation on the ground of the non-satisfaction of admissibility’s requirement, namely gravity. See ICC, Office of the Prosecutor, OTP response to communications received concerning Iraq, the Hague (9th February, 2006), available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/iraq/Pages/otp%20letter%20to%20senders%20reply%20on%20iraq.aspx>.

example, it rejected the Venezuela situation on the ground that the alleged crimes committed did not come within the jurisdiction of the Court.²³³

The practice of judges in relation to the *proprio motu* selection of situations, namely Kenya²³⁴ and Cote d'Ivoire²³⁵, shows a considerable 'reluctance to intervene in the exercise of discretion by the prosecutor in the selection of situations [Article 15].'²³⁶ In the context of the Kenya situation and in the authorisation decision, PTC II invoked the fear of politicised use of a *proprio motu* investigation by the prosecutor.²³⁷ This does involve the potential use of discretion in this regard. However, the Court did not examine the politicised-related dangers and confined to the examination of the classical criteria of jurisdiction, admissibility, and 'reasonable basis to proceed' without mentioning the use of discretion, if any. This may indicate but does not definitely establish that the Court is implicitly inclined to accept prosecutorial discretion when it comes to the *proprio motu* investigations.

1.2.2.1.2. Referrals

In the context of a referral from the SC or a State Party to the Statute, commentators disagree as to whether or not the prosecutor has prosecutorial discretion at all. According to Hanna Kuczyńska, the commentators disagree about the question of discretion to initiate investigations. Whilst some of them rely on the principle of opportunism, claiming that the prosecutor has discretion, the others invoked the principle of legalism, arguing that the

²³³ *Ibid*, P. 4.

²³⁴ Situation in the Republic of Kenya 2009, *supra* n. 230.

²³⁵ Situation in the Republic of Cote d'Ivoire 2011, *supra* n. 230.

²³⁶ *Supra* n. 220, P. 370.

²³⁷ Situation in the Republic of Kenya 2009, *supra* n. 230, Para. 18, stating '[t]hus, it suffices to mention that, insofar as *proprio motu* investigations by the Prosecutor are concerned, both proponents and opponents of the idea feared the risk of politicizing the Court and thereby undermining its "credibility". In particular, they feared that providing the Prosecutor with such "excessive powers" to trigger the jurisdiction of the Court might result in its abuse.'

prosecutor has no discretion.²³⁸ Among those who depend on the principle of opportunism is Schabas, who argues that ‘the crucial decision with respect to the selection of situations lies with the prosecutor. Without her agreement it is almost impossible for a prosecution to proceed, even if this is formally requested by a State Party or the Security Council.’²³⁹ He argues that the prosecutor has discretion in relation to the referred situations. Schabas says that whilst the early draft Statue (ILC 1994) did not provide the prosecutor with discretion to select situations,²⁴⁰ the final version of the Rome Statute provides the prosecutor a power to reject *referred* situations.²⁴¹ To him, ‘the prosecutor is not at all bound to proceed on the basis of referrals’²⁴² though the Statute and other Court instruments do not give any guidance as how this discretion is to be exercised and are quite ambiguous.²⁴³ However, he states that the 2013 paper on preliminary examination does not emphasise the discretionary power in this regard.²⁴⁴ Similarly, OTP Regulation 29, does not mention any discretion to reject a referred situation.²⁴⁵

²³⁸ Hanna Kuczyńska, Selection of Defendants before the ICC: Between the Principle of Opportunism and Legalism, *Polish Yearbook of International Law*, Vol. 34 (2014), Pp. 207- 8, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2676204>.

²³⁹ *Supra* n. 220, P. 370.

²⁴⁰ UN, Report of the Commission to the General Assembly on the work of its forty-sixth session, Vol. II, Part: Two (1994), A/CN.4/SER.A/1994/Add.I, available at <http://legal.un.org/ilc/publications/yearbooks/english/ilc_1994_v2_p2.pdf>.

²⁴¹ *Supra* n. 220, P. 370.

²⁴² *Ibid*, P. 372.

²⁴³ This includes the Rome Statute, the Rules of Procedures and Evidence, and Regulations of the Office of the Prosecutor.

²⁴⁴ ICC, Office of the Prosecutor, Report on Preliminary Examination Activities 2013 (November, 2013) (hereinafter: Report on Preliminary Examination Activities 2013).

²⁴⁵ Regulation 29, Initiation of an investigation or prosecution: ‘1. In acting under article 15, paragraph 3, or article 53, paragraph 1, the Office shall produce an internal report analysing the seriousness of the information and considering the factors set out in article 53, paragraph 1 (a) to (c), namely issues of jurisdiction, admissibility (including gravity), as well as the interests of justice, pursuant to rules 48 and 104. The report shall be accompanied by a recommendation on whether there is a reasonable basis to initiate an investigation. 2. In order to assess the gravity of the crimes allegedly committed in the situation the Office shall consider various factors including their scale, nature, manner of commission, and impact. 3. Based on the report, the Prosecutor shall determine whether there is a reasonable basis to proceed with an investigation. 4. The evaluation shall continue for as long as the situation remains under investigation. 5. In acting under article 53, paragraph 2, the Office shall apply mutatis mutandis sub-regulations 1 to 4.’

Similarly to Schabas's view,²⁴⁶ Susana SaCouto and Kathrine A. Cleary also opine that the prosecutor does have prosecutorial discretion even in referrals.²⁴⁷ The authors refer to an important idea to justify such prosecutorial discretion, which lies in the principle of the independence of the prosecutor.²⁴⁸ This could be a most logical *basis* on which the use of discretion can be justified. Article 42 (1) affirms the principle of prosecutorial independence of the prosecutor as a separate body from other bodies of the Court and also from other international entities, including states and international organisations (the SC).²⁴⁹ The degree of this independence determines the scope of discretion that the prosecutor can enjoy. As Daniel D. Ntanda Nsereko states, the rationale of providing this independence to the prosecutor is to provide her a power 'to exercise independent professional judgment and freedom to enforce the law without fear, favour or ill-will.'²⁵⁰ SaCouto and Cleary further make an important reference to what factors the prosecutor may consider when exercising prosecutorial discretion. '[P]ractical considerations such as the likelihood of apprehending a suspect or the availability of evidence, or strategic considerations such as a desire to shed light on the "complete landscape" of events that occurred within a particular situation-in another context'²⁵¹ are some factors, which may be taken into account in assessing discretionary gravity. This clarification is important to sustain and show in this thesis, as these authors confirm that extra-legal considerations are to be considered in the context of the exercise of prosecutorial discretion. Ignaz Stegmiller also argues that the prosecutor has prosecutorial discretion, but

²⁴⁶ Matthew R. Brubacher also is of the view that the prosecutor has prosecutorial discretion whatever is the source of the trigger, see Brubacher, *supra* n. 22, P. 75. Also Murphy argues that 'he or she is under no obligation to initiate proceedings once a situation has been referred to the OTP.' See Ray Murphy, Gravity Issues and the International Criminal Court, *Criminal Law Forum*, Vol. 17, Issue: 3 (2006), P. 293. He argues this on the basis that 'The use of the word 'may' rather than shall [in Article 13] in regard to the Prosecutor's role in initiating an investigation points to its permissive rather than mandatory nature', Pp. 293-4.

²⁴⁷ SaCouto and Cleary, *supra* n. 13.

²⁴⁸ *Ibid*, P. 854.

²⁴⁹ Brubacher, *supra* n. 22, Pp. 84-5.

²⁵⁰ Nsereko, *supra* n. 13, P. 129.

²⁵¹ SaCouto and Cleary, *supra* n. 13, P. 854.

only in relation to the evaluation of ‘the interests of justice’ provision, as just confirmed by the Court in the Comoros situation.²⁵² In addition, Brubacher is also of the view that the prosecutor has prosecutorial discretion whatever the source of the trigger, arguing: ‘[i]n the ICC, prosecutorial discretion is implied by the fact that the Prosecutor is under no obligation to initiate proceedings once a situation has been referred to the OTP.’²⁵³

Adherents of the principle of legalism, such as deGuzman, argue that the prosecutor has no discretion in relation to the referred situations.²⁵⁴ She provides several arguments to conclude that the prosecutor has no prosecutorial discretion to select among admissible situations. In particular, she argues that it would be inappropriate to provide the prosecutor with such a power when the SC refers a situation which it deemed a threat to international peace and security.²⁵⁵ Jens David Ohlin also argues that the prosecutor has no discretion when a situation is referred by the SC as opposed to ‘cases initiated *proprio motu* or by referral from state parties.’²⁵⁶ To him, the prosecutor is obliged to proceed with any situation that the SC deems a threat to international peace and security, under Chapter VII of the UN Charter. Morten Bergsmo and Jelena Pejic also note that once the legal requirements of initiating a referred situation are satisfied, the prosecutor is obliged to proceed.²⁵⁷

1.2.2.2. Prosecution

1.2.2.2.1. Selecting Cases

There is a broad implicit and explicit agreement among commentators, and also the Court and the prosecutor that the prosecutor, has broad prosecutorial discretion to select among

²⁵² Stegmiller, *supra* n. 13, P. 564.

²⁵³ Brubacher, *supra* n. 22, P. 75.

²⁵⁴ DeGuzman, *supra* n. 13, Pp. 1414-15.

²⁵⁵ *Ibid*, P. 1413.

²⁵⁶ Jens David Ohlin, Peace, Security, and Prosecutorial Discretion, in Carsten Stahn and Goran Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff, 2009), P. 189.

²⁵⁷ *Supra* n. 177, P. 589.

legally admissible cases, without identifying any legal basis of such a power.²⁵⁸ For example, Schabas argues that ‘there is no pretence that all cases will be prosecuted.’²⁵⁹ In this regard, Moreno-Ocampo himself explicitly stated in 2006 that ‘it is not possible to prosecute all perpetrators or all crimes, which typically would number in the thousands. The investigation process must produce a limited number of particularly serious cases for presentation before the Court.’²⁶⁰ Once a situation meets the criteria of opening an investigation according to Article 53 (1)(a-c), the prosecutor thereafter has a broad power of selecting potential cases to be prosecuted. This discretion is mainly based on practical considerations, where the Court has only limited capacity to prosecute only a few handful cases.²⁶¹ The OTP has very recently published a new policy paper on case selection and prioritization, in which it clearly states that ‘the Office has broad discretion in selecting individual cases for investigation and prosecution’.²⁶²

²⁵⁸ DeGuzman, *supra* n. 13. See also *supra* n. 220, and see William A. Schabas, Prosecutorial Discretion v. Judicial Activism at the International Criminal Court, *Journal of International Criminal Justice*, Vol. 6, Issue: 4 (2008), 731- 761.

²⁵⁹ *Supra* n. 220, P. 377.

²⁶⁰ ICC, Office of the Prosecutor, Draft Criteria for Selection of Situations and Cases (June, 2006), P. 9 (hereinafter: Criteria for Selection of Situations and Cases 2006).

²⁶¹ D. J. Galligan, *Discretionary Powers: A legal Study of Official Discretion* (Oxford: Clarendon Press, 1990), Pp. 46- 55.

²⁶² ICC, Office of the Prosecutor, Draft Policy Paper on Case Selection and Prioritisation (29 February, 2016), available at <https://www.icc-cpi.int/iccdocs/otp/29.02.16_Draft_Policy-Paper-on-Case-Selection-and-Prioritisation_ENG.pdf> (hereinafter: Draft Policy Paper on Case Selection and Prioritisation 2016).

**CHAPTER TWO: THE HISTORICAL DEVELOPMENT OF INTERNATIONAL
CRIMINAL TRIBUNALS AND THE DISCRETIONARY POWER OF THE
PROSECUTOR**

2.1. Introduction

In order to understand the scope of the prosecutor's powers, including discretion, it will be helpful to place the discussion in the context of the history of the international criminal prosecutors from the Military Tribunals to the SC Tribunals. The current investigatory and prosecutorial discretion of the ICC prosecutor has not been developed in a vacuum. In fact, the previous international tribunals have played a major role in articulating the discretionary functions and roles within the governing statutory instruments of the ICC.²⁶³ From the early practice of such international tribunals, there was no doubt that the selection of cases and charges were inevitable, given a high volume of cases. As Kuczyńska holds, the principle of expediency has predominately shaped the work of the international prosecutors – a principle, which means that 'it is only for the prosecutor to decide which offences and offenders should be prosecuted and on which counts.'²⁶⁴

The question of discretion, however, was different from one tribunal to another. As will be seen below, Ohlin holds that 'the question of prosecutorial discretion was largely absent at Nuremberg'.²⁶⁵ Due to the occupation regime, the Allies were able to arrest and detain defendants in a similar manner to a national criminal justice system. This makes the situation clearly different to that which later pertains to the UN Tribunals and even more so the ICC. This state of affairs put the Allies in possession of masses of documents and other evidence. As a result of this situation, not much attention was raised about the use of discretion. The Prosecutors' exercise of discretion was not conducted as a *means* to develop a certain aspect of prosecution. Criminal justice was the only classical value that the Prosecutors sought to maintain and promote. As Matthew Lippman states, 'Lord Wright explained that the Allies,

²⁶³ See generally *supra* n. 141.

²⁶⁴ *Supra* n. 238, P. 189.

²⁶⁵ *Supra* n. 256, P. 185.

like the police, were merely enforcing the law; their motive was ‘justice, not revenge’.²⁶⁶ The idea that the major war criminals were under the occupation of the Allies, to whom the international Prosecutors were responsible made the issues that might be raised about the exercise of discretion less significant.

Discretion, however, was a central debate within the SC Tribunals. Although the Statutes of these Tribunals have not given much attention to discretion, in practice discretion proved to be the cornerstone of the development of the international prosecution at these Tribunals. With the absence of most of the above features that the Military Prosecutors enjoyed, the SC Prosecutors used their discretion in a more oriented way to achieve a meaningful justice. As will be discussed below, the Prosecutors were more concerned about several sensitive values, such as peace, and security where discretion was used as a *tool* to *develop* their prosecutorial strategy.²⁶⁷ The chapter will investigate to what extent discretion was employed by Prosecutors of the ad hoc Tribunals. It will show that *law was not enough to achieve justice* within the circumstances of these Tribunals where extra-legal considerations, including political effects/repercussions were essential in shaping the strategy of the prosecution. Andrew Ashworth refers to the essential link between law and social, political, and humanitarian reality, which appear on the international legal arena.²⁶⁸ This chapter aims to show how the role of the international prosecutors have been increasingly symbolised by the use of discretion. These new roles and powers of international actors have largely advanced and shaped international

²⁶⁶ Cited in Matthew Lippman, Nuremberg: Forty Five Years Later, in in Guenael Mettraux (ed.), *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press, 2008), P. 523.

²⁶⁷ The second section of this chapter will concentrate on the jurisprudence, developed by Prosecutor Goldstone in the context of the cases of Milosevic, Mladic, and Karadzic.

²⁶⁸ Andrew Ashworth, *Principles of Criminal Law* (4th ed.) (Oxford, Oxford University Press, 2003), Introduction.

criminal law in the sense that these judicial bodies constitute the heart of international criminal law.²⁶⁹

The chapter will examine two main points. First, it will examine the historical development of the scope of the office of the international prosecutors. A theme will be the significance of prosecutorial independence. This chapter will show that the different circumstances in which each of the different institutions operated has shaped the office of the prosecutor. It will suggest, for example, that the IMTs offered little scope of prosecutorial discretion whereas this became an issue with the UN Tribunals. It is with the creation of the SC Tribunals the Prosecutor begun to face issues, such as peace, security, stability, and protection of victims, in discharging its main functions. The useful analysis of discretion and the role of the prosecutor will indicate the relationship between the political environment and the scope of discretion. The chapter lays the basis for developing the detailed arguments on the ICC that follows. Second, the chapter also seeks to subject some decisions of the Prosecutors to critical scrutiny in terms of criticisms that the international Prosecutors have received. In particular, it will focus on the dyadic fault-lines of criticisms that will be explained more in the next chapter.

2.2. Post-World War II Tribunals

The issue of how to handle German war criminals,²⁷⁰ including the major leading Nazis, was one of the most contentious debates that faced the Allies when the Second World War

²⁶⁹ See generally, Luc Cote, International Criminal Justice: Tightening up the Rules of the Game, *International Review of the Red Cross*, Vol. 88, No. 861 (2006), 133- 144.

²⁷⁰ The modern history of international prosecution, in fact, started after the conclusion of World War I in 1918. The Allies decided to hold accountable Kaiser Wilhelm II of Germany, German war criminals, and also Turkish criminals who were responsible for crimes of genocide against Armenians. See Bassiouni, *supra* n. 2, P. 14. On 28 June, 1919, the Allies agreed to the Peace Treaty as a basis for the trial, after much heated negotiations. The treaty provided three main articles, 227, 228, and 229. Article 227 of the Treaty provided for a prosecution of the German Kaiser for initiating the war. The Kaiser remained at large, as he fled to the Netherlands, which refused to surrender the Kaiser to the Allies on the ground that the Kaiser's offenses were political ones. Also, article 228, which was about the prosecution of German war criminal, was not applied because of stability issues. For these reasons, the Allies asked Germany, instead, to prosecute them before the

concluded. Basically, the Allies contemplated three possible ways to deal with the defeated Germany.²⁷¹ These were summary execution, an amnesty policy to be given to them, and a criminal prosecution. The sharp disagreements among the Allies made it difficult to choose among available options. America's view was split into two main competing approaches: the criminal justice and denazification approaches.²⁷² In 1944, President Franklin Roosevelt explicitly supported Morgenthau's approach during the Quebec Conference and called for summary execution of the major criminals and a trial approach for the other war criminals.²⁷³

However, as a result of a great deal of discussion within the US Administration and between the Allies, eventually the idea of criminal trials for all levels of the Nazi regime took shape. The result was the creation of the International Military Tribunal at Nuremberg. The main trial focused on the top of the Nazi party. By 1945, the Nazi party which was defined by the Charter as a 'criminal organization', had 8.5 million members which explains why the Nuremberg process was, to some extent, demonstrative. However, the main trial also raised the

Supreme Court of Germany in Leipzig, in accordance with Article 228. Robert Cryer, Hakan Friman, Darryl Robinson, and Elizabeth Wilmschurst, *An Introduction to International Criminal Law and Procedures* (Cambridge: Cambridge University Press, 2007), P. 92. In 1921, the Supreme Court of Germany responded to the Allies' request and passed new legislation to prosecute all those accused. The Prosecutor General had, at that time, a notable prosecutorial power in selecting the accused, as he reduced the number of accused offenders from 895 to only 45. Further to this, he also decided to try only 12 military officers and, thereafter, the court convicted only six of them. Having shown this brief history, it is evident how important is the political will of states to pursue justice and try the perpetrators of atrocities. This blatant reluctance by the Allies to prosecute those perpetrators and complete their remarkable efforts was the main reason for not enforcing the Treaty of Versailles. Laura Barnett, *The International Criminal Court: History and Roles*, *Library of Parliament*, PRB 02-11E (2008), P. 3. Available in PDF's format on <http://www.parl.gc.ca/Content/LOP/researchpublications/prb0211-e.htm> (Last Access: 28th December, 2011). In fact, the belief of the Allies at the time, which prioritised the demand of peace over those of justice for the purposes of ensuring stability and peace in Europe, was an earlier important development that has been a heated debate within the ICC. See generally Bassiouni, *supra* n. 2.

²⁷¹ Elizabeth Borgwardt, *Re-Examining Nuremberg as a New Deal Institution: Politics, Culture, and the Limits of Law in Generating Human Rights Norms*, *Berkeley Journal of International Law*, Vol. 23, No. 2 (2005), P. 421.

²⁷² The first approach favoured a justice solution, provided by the War Department, which was under Henry L. Stimson, whilst the second proposal offered by the Treasury Department, led by Henry Morgenthau, called for a denazification approach. The cultural, political, ideological and also religious background of each team played an essential role behind this problem, see *supra* n. 271, P. 414.

²⁷³ *Ibid*, P 415. The same position was taken by Britain, which called for the summary solution for the major criminals and trials for lesser war criminals, see Gary Jonathan Bass, *Stay the Hand of Vengeance* (Oxford: Princeton University Press, 2002), P. 147.

question of how criminal responsibility in international situations was to be assessed. The scale of the Nazi party and its organization and the scale and depth of the atrocities committed across, Europe, North Africa, and the Middle East illustrated the problem of dealing with those who gave the orders, those who managed them, and those who carried them out. As we shall see, this issue has become a major concern for the UN Tribunals and the ICC itself.

In 1945 the Allies began to find it difficult holding the Nazis to account.²⁷⁴ Based on the Moscow Declaration, the Four Major Allies gathered in London, in the summer of 1945, and issued a Charter for the International Military Tribunal (IMT) at Nuremberg.²⁷⁵ The Tribunal's jurisdiction was to try the key leaders of Nazi Germany who were active in the government, the military and the economy for crimes against peace, war crimes, and crimes against humanity.²⁷⁶

2.2.1. Prosecutor's Powers under the Nuremberg Charter

Articles 14 and 15 of the Charter design the powers of the Prosecutors. Article 14 states that each of the Four Powers appoint one Chief Prosecutor. Those Prosecutors are to act as a Committee. The Committee indeed had had broad selective decisions.²⁷⁷ Article 14 (b) provides the Committee with discretion 'to settle the final designation of major war criminals

²⁷⁴ The first step towards the Nuremberg Tribunal was the establishment of the United Nations War Crimes Commission, which was mandated to investigate and collect evidence of war crimes. The Commission was totally under the auspices of the Allies. Despite the fact that the Commission achieved remarkable results in terms of investigations and collecting information, yet the Allies did not rely on the Commission to establish the Tribunal. Bassiouni, *supra* n. 2, P. 21. However, the Allies convened in Moscow, in 1943, and decided to try and punish war criminals and that by issuing the Moscow Declaration, which promised to punish war criminals and also major offenders once the War ended, see *supra* n. 3, P. 9. See also Cryer, Friman, Robinson, and Wilmschurst, *supra* n. 270.

²⁷⁵ William A. Schabas, *An Introduction to the International Criminal Court* (3rd ed.) (Cambridge: Cambridge University Press, 2007), P. 5. The agreement was reached and signed by Robert Jackson, Lord Jowitt, the Lord Chancellor of Briton, Robert Falco, the French Judge, Lona Nikitchenko, the Judge of the Supreme Court of the Soviet Union, at Church House in London, on 8th August. The London Agreement was later approved by a further 19 states. *Supra* n. 129, Chapter 4.

²⁷⁶ Thomas J. Dodd, The Nuremberg Trials, in in Guenael Mettraux (ed.), *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press: 2008), Pp. 190- 199.

²⁷⁷ Bergsmo, Cisse, and Staker, *supra* n. 3, P. 134, stating that '[a]s only 24 defendants were ever indicted, this in practice involved a selective decision on the part of the Chief Prosecutors.'

to be tried by the Tribunal'. Article 15 also provides the Chief Prosecutors with a discretionary power to individually prepare a list of indictments to be approved by the Committee. There was no need for obtaining approval from the Judges once the Chief Prosecutors filed indictments. Also, under Article 15 of the Charter, the Chief Prosecutors were in charge of 'investigation, collection and production before or at the Trial of all necessary evidence'. Although the Charter did not mention how the collection of evidence will be obtained, the Prosecutors relied on their Governments to locate and obtain evidence.

Under the Nuremberg Charter, there was no judicial oversight of the work of the Prosecutor.²⁷⁸ Therefore, there was, Horton holds, 'no right of appeal for abuse of prosecutorial discretion.'²⁷⁹ In fact, each of the Chief Prosecutors was under the control of his country. The Chief Prosecutor of the USA, Justice Robert Jackson, was responsible to Harry S. Truman, the President of the USA.²⁸⁰ Thus, it is true that whilst the Committee of the Prosecutors was an independent body within the Tribunal, the individual Chief Prosecutors were responsible to their governments. For example, the Soviet Union ordered its Prosecutor to claim that the Nazis were responsible for the Katyn Massacre.²⁸¹

The Charter of the Tribunal did not provide a *particular* list of criteria for the selection to either teams of Prosecutors. However, it was only the term 'the major war criminals' that was referred to in Articles 1 and 6 of the Charter that was provided as a criterion of the selection. In addition to this, Jo Stigen argues that having looked at 'the final list of the defendants and the judgments... the gravity of the crime, the perpetrator's role in the crime as well as his or her military rank or government position were important factors.'²⁸² Stigen

²⁷⁸ *Ibid.*

²⁷⁹ *Supra* n. 141, P. 14.

²⁸⁰ Bergsmo, Cisse, and Staker, *supra* n. 3, Pp. 121- 154.

²⁸¹ Robert E Conot, *Justice at Nuremberg* (Harper and Row, 1983), Pp. 452-4.

²⁸² Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Leiden, Martinus Nijhoff Publishers, 2008), P. 347.

concludes that these factors, to a large extent, correspond with the ones provided in Article 53 of the Rome Statute. This is a great development that contributed to the promotion of the rules of international criminal justice.

In practice, however, the process of the selection was conducted in a different way – the matter that makes use of discretion by the Prosecutors largely of little importance, if not even relevant.²⁸³ As Kuczyńska argues, ‘the decisions [of the selection] were taken by the governments of the victorious states.’²⁸⁴ The process of the selection of the defendants was considerably a political compromise, where the political decisions made by the governments simply selected who will be brought to the Tribunal. As Telford Taylor maintains, ‘the task of selecting the defendants was hastily and negligently discharged, mainly because no guiding principles of selection had been agreed on.’²⁸⁵ Justice Jackson also stated that ‘[t]he people at Potsdam... made this commitment to publish the list [of defendants] without consulting us.’²⁸⁶ The most serious flaw in this process is that it began even before the Charter was agreed on.²⁸⁷ As Bradley F. Smith holds, ‘the names were chosen before an indictment had been prepared and even before the Charter establishing the law on which some of them would be tried had been negotiated.’²⁸⁸ For example, the British team had already a list of defendants prepared in late June.²⁸⁹ The list consisted of the major representatives of the Nazi system, whereby ten people were selected. This list had been agreed upon fully later without any rejection by any delegate. On *June 23* 1945, the American team chose 16 defendants of those who best

²⁸³ *Supra* n. 129, Chapter 5.

²⁸⁴ *Supra* n. 238, P. 191.

²⁸⁵ *Supra* n. 129, P. 90.

²⁸⁶ Frederick de Vlaming, Selection of Defendants, in Luc Reydam, Jan Wouters, and Cedric Ryngaert (eds), *International Prosecutors* (Oxford, Oxford University Press, 2012), P. 545.

²⁸⁷ Bradley F. Smith, *Reaching Judgment at Nuremberg* (London: Andre Deutsch, 1977), P. 64.

²⁸⁸ *Ibid*, P. 64.

²⁸⁹ *Ibid*, P. 63.

represented the five organisations that were already chosen by the American team to be indicted.²⁹⁰

Richard Overy argues that, it ‘was the product of a great many different strands of political argument’.²⁹¹ The process of selection was not pure legal work, where several political strands were considered when the defendants were selected. For example, being known to the public was a major consideration on which the defendants were selected, as Prosecutor David Maxwell Fyfe reports.²⁹² Also, it was noted that the Chief Prosecutors were heavily depended on ‘the symbolic role’ of the Nazi regime as a basis of the selection.²⁹³ For instance, Julius Streicher, Wilhelm Keitel (also Alfred Jodle), and Walther Funk represented three symbolic roles of the Nazi regime, which were anti-Semitism, militarism, capitalism, respectively.²⁹⁴ The British team decided to include representatives of the dictatorship side of Germany such as Interior Minister Wilhelm Frick and the German Admiral and head of the German navy, Karl Doenitz.²⁹⁵ As Stigen points out, ‘[t]he selection of cases for prosecution before the IMT and IMTFE was far more politicised than before the subsequent international tribunals.’²⁹⁶ The process of the selection of the defendants seems to be ‘a series of compromises’.²⁹⁷ However, despite this political process, the policy of Jackson regarding the selection of offenders concentrated at the same time on the high-ranking leaders of Nazi Germany, including the organisations that represented the most powerful segment of Nazi society so the Tribunal could

²⁹⁰ *Ibid*, Pp. 63-4. However, the American list was partly rejected by the other teams, as it lacked consistency and names of any representative of industrialists.

²⁹¹ Richard Overy, *The Nuremberg Trials: International Law in the Making*, in Philippe Sands (ed.), *From Nuremberg to The Hague* (Cambridge: Cambridge University Press, 2003), P. 7.

²⁹² *Supra* n. 129, Pp. 85-6.

²⁹³ *Supra* n. 271, P. 422.

²⁹⁴ In order to include a representative of German industry, Jackson also called for the indictment of an ill and old man, Gustav Krupp. But because of his health conditions and therefore inability to stand the trial, Jackson, oddly, asked to put his son, Alfried, instead of the father, on trial, a suggestion that was rejected by the other prosecutor teams, see *supra* n. 291, P. 12.

²⁹⁵ For more discussions about the selection process of the defendants, see *supra* n. 129, Chapter 5.

²⁹⁶ *Supra* n. P. 282, P. 347.

²⁹⁷ *Supra* n. 291, P. 12.

put an end to any further atrocity.²⁹⁸ After the inclusion and exclusion of some names made to this list, a list of twenty-four defendants were ready to be presented to the Tribunal.

As can be seen now, the Chief Prosecutors were independent of the other organs of the Tribunal, however they were ultimately responsible to their governments. Given this status, there were regular political interventions of the Allies who in practice had the final word ‘in the selection of defendant’.²⁹⁹ In terms of the selection of the defendants, the Prosecutors were simply given a task of seeking evidence to convict the chosen defendants. For example, as Schabas and deGuzman point out, intelligence agents were among the staff of the U.S. Chief Prosecutor whose role was to ensure that ‘high-ranking Nazis who had collaborated with the United States in the final months of the war were spared prosecution.’³⁰⁰ The Prosecutors did not exercise prosecutorial discretion in the process of the selection. Therefore, the issue of the exercise of prosecutorial discretion in the context of the selection of defendants was sidelined.

In terms of charges, in fact the process of the selection by the Prosecutor were carried out on several occasions. For example, the charges of conspiracy of waging an aggressive war in Poland. Pursuing charges in respect to conspiracy to wage aggressive war was limited to specific instances of actions by the Axis powers because of a concern not to acknowledge or disclose evidence that ‘the Soviet Union was equally guilty in its attacks on Poland in September 1939’ – indeed, it was part of the same ‘conspiracy’ with German officials – and on Finland three months later’.³⁰¹ Hence Jackson ensured that the documentary evidence showing the terms of the German-Soviet agreement of 1939 on Poland ‘was kept in the file and never

²⁹⁸ *Supra* n. 129, P. 81.

²⁹⁹ *Supra* n. 238, P. 191.

³⁰⁰ Margaret M. deGuzman and William A. Schabas, Initiation of Investigations and Selection of Cases, in Goran Sluiter, Hakan Friman, Suzannah Linton, and Salvatore Vasiliev, *International Criminal Procedures: Rules and Principles* (Oxford, Oxford University Press, 2013), P. 134.

³⁰¹ *Supra* n. 291, P. 19.

presented at Nuremberg.³⁰² The independence of the Prosecutor was violated, due to the pressure imposed by the Soviet Union on the Prosecutors to avoid raising such a concern.

The case of American Admiral Chester Nimitz is another example.³⁰³ The latter was responsible for a *similar* incident in which German Admiral Donitz was indicted for waging unrestricted submarine warfare. However, as the American Admiral was also responsible for such an incident, he kindly confirmed the Donitz defense's claims that this incident does not constitute a war crime.³⁰⁴ Nimitz's admission of his conduct put the Court at a serious embarrassing point. The Allies had to accept the Donitz's defense in order not to embarrass Nimitz. The arbitrary response of the Court led to a change the law and transformed this particular incident from illegal to legal. As David Luban argues, 'it legalizes any crime committed by the vanquished provided the victor committed it as well.'³⁰⁵ It was not a rule of law, it was a rule of victory.³⁰⁶

Therefore, it is hard to legitimise the process of the selection of *charges* on the basis of prosecutorial discretion, which in essence would allow the Chief Prosecutor to exercise a wide range of discretion to select among legally worthy cases. It is not prosecutorial discretion by which one could justify the process of the selection. The issue was much connected to

³⁰² *Supra* n. 291, P. 19.

³⁰³ See generally, *supra* n. 281.

³⁰⁴ *Ibid*, Pp. 324-5.

³⁰⁵ David Luban, The Legacy of Nuremberg, in Guenael Mettraux (ed.), *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press: 2008), P 660.

³⁰⁶ It is true that Donitz's claims were found correct latter on, as the conventions of war were really changed, but the idea is the process of the trial in which the main priority was to shield the members of the Allies from putting under any trial. That was one of the flaws that pushed many people to raise the idea of victor's justice. Waging an aggressive war was obviously problematic in the sense of the legal basis of the charge and the failure of the prosecuting teams to apply this charge fairly. Jackson's team suggested putting the charge under a single heading of a conspiracy to wage such a war. This suggestion solved two problems. The first was to include all potential acts committed by the regime since they held the power. The second was to prevent the defendants to raise an obedience claim as a basis of avoiding the charge, because it was commanded by Hitler. Further to this, Jackson relied on the Kellogg-Briand Pact, as a legal basis of such a charge, see Sheldon Glueck, The Nuremberg Trial and Aggressive War (ed.), *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press: 2008), Pp. 72- 119. The Treaty entered into force on 24th July, 1929.

prosecutorial independence of the Prosecutors that was blatantly violated by the consistent intervention of the Allies. As was established in Introduction of this thesis, there is a difference between the prosecutorial discretion and prosecutorial independence. The only legitimate justification that can be made when making a selection is when it comes to prosecutorial discretion that the prosecutor exercises away from any external pressures. The external intervention or influence would just violate the independence of the prosecutor and this in turn cannot justify any decision a prosecutor makes under such pressure.

In short, the question of prosecutorial discretion in Nuremberg did not raise much attention. The Chief Prosecutors were not independent, but rather they were representatives of their governments. This picture revealed the importance of the independence of a prosecutor. The process of selecting defendants or charges should only be exercised on the basis of prosecutorial discretion. Therefore, any external influence or pressure that involves this process would undermine prosecutorial independence and cannot justify any decision that is made on such political or external influences. The most significant aspect of this Tribunal is that it sets forth several criteria of the selection that have been embedded in the law of the subsequent international tribunals. The degree of the responsibility of the perpetrators, the gravity of the crimes, and the rank of the perpetrators are some important criteria that were identified for the selection process.

2.2.2. The Power of the Prosecutor of the Tokyo Tribunal

When the Nuremberg Trial was in operation, the world again witnessed the emergence of another military tribunal set up in Tokyo, in January 1946, by the efforts of the Allies for crimes committed by Japan.³⁰⁷ The International Military Tribunal for the Far East (IMTFE)

³⁰⁷ For full discussion about this tribunal, see Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal - A Reappraisal* (Oxford, Oxford University Press, 2008).

was another historic achievement towards prosecuting international criminals.³⁰⁸ General Douglas MacArthur was in charge of setting up the Tribunal by a mandate given by the Allies to put the Potsdam Declaration into effect.³⁰⁹ Principle 10 of the Declaration laid down the basic approach to be adopted in dealing with criminals; it provided that ‘stern justice shall be meted out to all criminals’.³¹⁰ The designation of the Prosecutor’s body of the Tokyo Tribunal was almost the same as its counterpart the Nuremberg Tribunal. However, unlike the Nuremberg Tribunal, there was just one Chief Prosecutor, Josef Keenan,³¹¹ for this Tribunal. Under Article 8 (a) of the Charter, the Chief Prosecutor had the title of ‘Chief of Counsel’, and sub-paragraph (b) provided that each country of the Allies who were at war can appoint ‘an Associate Counsel’.³¹² There was no office of the staff to assist the Chief of Counsel.³¹³ The Charter did not provide how the Chief of Counsel was to be appointed or removed. However, Keenan was appointed by the USA.³¹⁴

The strategy for proving the guilt of the defendants, which was adopted by Keenan, was different than that of Jackson’s reliance on documentary evidence in the Nuremberg trials. This was due to the policy taken by the Japanese leaders, who destroyed nearly all their military and

³⁰⁸ Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge, Cambridge University Press, 2005), P. 44, Cryer stated that ‘[t]he main aspect of the trial was the focus on the crimes of against peace and conspiracy charges.’

³⁰⁹ See in general, *supra* n. 307.

³¹⁰ The Declaration was declared on 26, July 1945, and is available on < <http://afe.easia.columbia.edu/ps/japan/potsdam.pdf>>.

³¹¹ Joseph Keenan was a USA Assistant Attorney General, and Director of the Criminal Division of the USA Department of Justice.

³¹² Those countries were: Australia, China, France, India, the Netherland, New Zealand, the Philippines, the United Kingdom, the USA, and the USSR.

³¹³ Bergsmo, Cisse, and Staker, *supra* n. 3, Pp. 125-9.

³¹⁴ The other task of the Prosecutor such as the investigation, collecting and presenting evidence, the judicial oversight and other tasks were the same of the Nuremberg designation as was explained in the first section of this chapter. Ultimately, the Prosecutor indicted twenty-eight Japanese military and political offenders, charging them with conventional war crimes, crimes against peace and crimes against humanity. Two defendants died during the trial, one was found unable for the trial because of his health condition, 16 persons were sentenced for life, 7 defendants were hanged, and 2 persons were sentenced for a short term. For more information, see Bergsmo, Cisse, and Staker, *supra* n. 3.

political documents which forced Kennan to rely mainly on oral testimony.³¹⁵ The Charter itself was flexible enough to provide the Tribunal with the power of accepting any document it accepted to be of probative value, as Article 13 of the Charter provided.

By a way of comparison, one can note that the strategy of the prosecution conducted by the Prosecutors of the Nuremberg Tribunal was more fair and consistent than its sibling the Tokyo Tribunal. ‘The selection of defendants was many times criticized as “arbitrary” and evaluated as “a process plagued by poor organization and consultation, and little information, knowledge and time.”’³¹⁶ As was discussed above, the selection of the defendants focused on the top leaders of Nazi Germany, including heads of organisations that represented the most powerful segments of Nazi society.³¹⁷ In the IMTFE, several top leaders were shielded and remained unprosecuted.³¹⁸ The prosecutorial strategy of the IMTFE of choosing the alleged criminals, in fact, was not consistent and fair, a matter that pushed many people to raise the idea that the IMTFE is victor’s justice.³¹⁹ The Chief of Counsel of the IMTFE did not prosecute two of the most responsible persons for crimes during the war, Emperor Hirohito of Japan and his uncle Prince Yasuhiko. Professor Herbert P. Bix argues, based on historical research, that the Emperor was responsible for acts of aggression by Japan from 1937 to 1945, as the latter act was under the total management and command of the Emperor.³²⁰ As a consequence, Judge Pal said that, ‘the trial was victor’s justice, and selective.’³²¹ In addition, Judge Henry Bernard

³¹⁵ See generally Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (William Morrow and Company, 1987).

³¹⁶ *Supra* n. 238, P. 192.

³¹⁷ *Supra* n. 129, Chapter 5.

³¹⁸ The Tribunal released seventeen suspects of those who were classified into class A without any indictments. See Kentoaro Awaya, in the Shadow of the Tokyo Trial, in Chihiro Hosoya, Yasuaki Onuma, Nisuke Ando, and Richard Minear (eds.), *The Tokyo trial: an international symposium* (Tokyo, Kodanasha International, 1986), Pp. 79- 83.

³¹⁹ Danilo Zolo, *Victors’ Justice: From Nuremberg to Baghdad* (London, Verso, 2009), accusing the whole international criminal justice as a series of examples of victors’ justice. See also Neil Boister and Robert Cryer, *Documents on the Tokyo International Military Tribunal* (Oxford, Oxford University Press, 2008), Pp. 811- 930.

³²⁰ Professor Herbert P. Bix, *Hirohito and the Making of Modern Japan* (New York, Harper Collins Publishers, 2000), Pp. 581- 618.

³²¹ Cited in Cryer, *supra* n. 308, P. 45.

was also unhappy with the non-prosecution of the Emperor. He argued that the exercise of discretion in relation to the Emperor's situation was 'unacceptable'.³²² He further added that the exercise of discretion should be conducted in an equal and justified manner. This is an important idea that shows the distinction between prosecutorial discretion and prosecutorial independence. In this case, prosecutorial independence was violated, as the Allies pushed the Prosecutor to ignore the Emperor.³²³ Such a decision cannot then be justified on the basis of the exercise of discretion, due to the external influence.

In addition to this case, the case of Members of Unit 731³²⁴ is another example. Although they were responsible for one of the most shocking crimes, which was the use of biological and chemical weapons against prisoners, as an experiment, they were not prosecuted.³²⁵ Robert Cryer maintains that 'the evidence and suspects were available to the prosecuting States.'³²⁶ Even so, the Chief of Counsel decided not to prosecute them. Cryer harshly criticises the policy of the Chief of Counsel, stating that '[i]t is difficult to see this as anything other than an illegitimate use of discretion.'³²⁷ The idea that 'stern justice shall be meted out to *all* war criminals' did not include the biggest fish of those criminals.³²⁸ In other

³²² Dissenting Opinion of Judge Bernard, P. 19, cited in Robert Cryer, *supra* n. 308, P. 208.

³²³ President Webb opined that the Emperor was given immunity for the best interests of the Allies. Cited in Robert Cryer, *supra* n. 308, P. 208.

³²⁴ The Allies classified the defendants into three classes: A, B, and C. Class A was designed to try the top Japanese leader through the Military Tribunal of the Far East. The other two classes to be tried where the crimes committed. Unit 731 was among the two other classes: B and C.

³²⁵ *Supra* n. 308, P. 208.

³²⁶ *Ibid*, P. 208.

³²⁷ *Ibid*, P. 208.

³²⁸ In fact, the military and economic weight of the USA in East Asia, and the appointment of Douglas, who had great power in the region, played a major role that pushed the USA and also the British to omit the name of the Emperor from the list of the indictees, see *supra* n. 320, P. 593. Even more stunning was that Keenan himself tried to shield the Emperor totally from the processes of the trial, as he refused to interrogate him, take his testimony, or even ask for any personal documents belonging to him, see Mary Margaret Penrose, The Emperor's Clothes: Evaluating Head of States Immunity under International Law, *Santa Clara Journal of International Law*, Vol. 7, Issue, 2 (2010), P. 106. The acceptance of the Emperor to the conditions of the surrender was the first step by which he was given full immunity. MacArthur found that the Emperor was not criminally responsible for initiating an aggressive war, as there was nothing proved his responsibility under the theory of the command responsibility, see L.C. Green, *Superior Orders in National and International Law* (The Netherlands, Sijhoff International, 1976), Pp. 277- 282.

words, the use of discretion was not built on any specific criteria and arbitrarily exercised. Again, prosecutorial independence was violated.

However, if we look at these cases from a different point of view, we may come out with a different outcome. The following outcome can be undertaken *only* if the above decision of the Chief Prosecutor was adopted on the basis of prosecutorial discretion, and without any external pressures that undermine prosecutorial independence of the Prosecutor. Based on the latter imagination, the historical decision of the non-prosecution of the Emperor has laid down an early stone on which the idea of justice v. peace-building appeared. In fact, it would be a remarkable decision, if the Chief Prosecutor was trying to consider the impact of such a decision on restoring peace and achieving stability in the region.³²⁹ MacArthur, in particular, opposed the Australian suggestion of prosecuting the Emperor, when he opined explicitly that the administration of Japan would be smoother, in case they secured the cooperation of the Emperor instead of prosecuting him. That would secure at the same time the *interests of justice*, by securing stability in a defeated Japan. As will be more discussed in Chapter Five, this position, developed by Keenan, corresponds to the practice and legal texts, followed by the SC Tribunals (practice) and embedded arguably in the ICC Statute (the legal text), respectively. It is ‘the interests of justice’ and the debates over the impact of doing justice on peace and stability-related issues. Although this policy has paid attention to the idea of ‘the interests of justice’, nonetheless the problem remains in this case, as the Emperor and some other top leaders did not receive any sort of justice in its broad meaning.

Cryer seems right in his argument about the illegitimate decision in relation to the case of the scientists of unit 731, as the United States wanted their research in exchange for immunity. In fact, such a decision in the context of such a shocking offence they allegedly

³²⁹ See Cryer, Friman, Robinson, and Wilmshurst, *supra* n. 270, P. 99.

committed has nothing to do at all with moral, humanitarian, or legal excuses. It was pure political expediency. What I am trying to establish in this regard is that such a use of discretion cannot be justified on any legitimate basis, as no sort of justice was delivered. When we say that justice may be achieved without paying an account to political implications on the international legal arena, that does not mean that we give weight to such considerations to an extent that eliminates justice itself.

2.3. Post-Cold War Tribunals

In 1992, the SC returned to the spirit of Nuremberg in establishing the UN International Criminal Tribunal for Yugoslavia.³³⁰ In fact, there were two major factors that helped to reach that end. The first was the new political circumstances that emerged immediately after the end of the Cold War.³³¹ The Cold War halted any possible cooperation between the major powers, and it was not until it was over that serious discussion of the role of international criminal law could resume. The dissolution of the Soviet Union reshaped the policy of the SC allowing it to discharge its duties more effectively in response to international problems, as the successor states to the Soviet Union agreed to respect fundamental principles of international law.³³² Because of these facts, the SC responded effectively to the adverse consequences of the conclusion of the Cold War, which resulted in wars in Yugoslavia. The second was the insistent efforts of the international community to promote the rule of law through the emerging idea at the time, the promotion of a new world order.³³³ This all encouraged the international community and, in particular, the SC to emphasise the '*need to dispense international*

³³⁰ Virginia Morris and Michael P Scharf, *An insider's guide to the International Criminal Tribunal for the Former Yugoslavia: Documentary History and Analysis*, (Vol. II), (Brill Nijhoff, 1995), Chapter 1.

³³¹ Virginia Morris and Michael P Scharf, *An insider's guide to the International Criminal Tribunal for the Former Yugoslavia: Documentary History and Analysis*, (Vol. II), (Brill Nijhoff, 1995), Volume 1 Chapter 2.

³³² *Supra* n. 126, P. 7.

³³³ *Supra* n. 330, Chapter 2.

*justice*³³⁴ by establishing a permanent international criminal court. However, the media coverage of the atrocities that took place in Yugoslavia and Rwanda placed more pressures on the international community at stake to undertake their responsibility to end these atrocities, is also another factor.

In response to major atrocities in those countries, the Security Council, acting under Chapter VII, established the *ad hoc* International Criminal Tribunals for Former Yugoslavia (ICTY) and Rwanda (ICTR) in 1993 and 1994 respectively.³³⁵ The Statutes of these tribunals set out the prosecutorial powers in much greater detail than the Post-War II tribunals. These Statutes give a clearer picture of the functions and duties of the prosecutor, whilst exercising her discretionary power, as well as the oversight imposed on it by other bodies of the Court. In fact, the last decade of the twentieth century witnessed a real legal revolution in advancing the role of the prosecutor and prosecutorial power within international criminal justice. This was an obvious feature of that decade, which witnessed the creation of three great tribunals: the ICTY, ICTR, and later the ICC, each of which bestows on the prosecutor a broad prosecutorial power.

2.3.1. The Legal Framework of the Office of the Prosecutor under ICTY and ICTR Statutes

³³⁴ See United Nations, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), (S/1994/674), 24 May 1994.

³³⁵ It is beyond the purposes of this chapter to show the historical background of the conflicts in both Yugoslavia and Rwanda, others have done so quite well, see for example, Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman, *War, Conflicts, and Human Rights* (Oxon: Routledge, 2010), P. 69. See also Yusuf Aksar, *Implementing international humanitarian law: from the ad hoc tribunals to a permanent International Criminal Court* (London: Frank Cass, 2004). The SC issued Resolution 808 on 22nd February, 1993, in which they decided to establish the ad hoc tribunal for the Former Yugoslavia, and also asked the Secretary-General of the United Nations to prepare a proposal to be adopted as a Statute for the tribunal. In response to that report, the SC issued another resolution (827), by which it unanimously adopted the proposal to be a Statute for the tribunal. Surprisingly, the proposal that prepared by the Secretary-General was adopted without any change the matter that avoids any political compromise that shaped the Nuremberg Charter's negotiations. For more information see *supra* n. 330 Chapter, 1. The SC issued Resolution 955 on 8th November, 1994 whereby it established *ad hoc* Tribunal for Rwanda.

Article 16 (3) of the Statute states that ‘the Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required’.³³⁶ Rule 38 of the ICTY Rules of Procedures of Evidence (ICTY RPE) provides a Deputy Prosecutor to be also appointed.³³⁷ The latter is appointed by the UN Secretary General.³³⁸ The OTP of the ICTY and ICTR consists of the Prosecutor, the Deputy Prosecutor, and the investigators staff.

Under Article 16 (1) of the ICTY Statute,³³⁹ the Prosecutor is ‘responsible for the investigation and prosecution’. Unlike the Military Tribunals, Paragraph (2) holds that ‘the Prosecutor shall act independently... [and] shall not seek or receive instructions from any Government or from any other source.’³⁴⁰ However, that does not mean that the prosecutor is not able to seek advice or assistance. In the case of the alleged crimes of NATO’s bombing in Yugoslavia, the Prosecutor sought legal expert advice regarding NATO’s responsibility.³⁴¹ The idea of the independence of the Office of the Prosecution is a noticeable evolution achieved by the international community. As was explained above, the IMT and IMTFE’s prosecution teams were clearly composed of victorious Allies’ members who represented the final political compromises of the creation of those Tribunals.³⁴² However and according to Article 16 (4), the prosecutors of the ICTY and ICTR are not completely independent from any political shape,

³³⁶ Bergsmo, Cisse, and Staker, *supra* n. 3, Pp. 125-9.

³³⁷ Escovar Salom was the first Prosecutor appointed, although he never held the Office. From 15th August, 1994 to 1st October, 1996, Richard Goldstone was the first Prosecutor who took up the Office. Before Carla de Ponte took the Office on 15th September, 1999, Louise Arbour was appointed on 1st October, 1996 until 15th September, 1999. The current Prosecutor is Serge Brammertz from Belgium, who has taken up the Office since 1st January, 2008.

³³⁸ See Office of the Prosecutor - an Introduction, United Nations: International Criminal Tribunal for the Former Yugoslavia, available at <<http://www.icty.org/sid/287>> (Last Access: 31st March, 2012).

³³⁹ Similarly under Article 15 (1) of the ICTR Statute.

³⁴⁰ Similarly under Article 15 (2) of the ICTR Statute.

³⁴¹ On 14 May, 1999, when NATO’s bombing campaign was concluded, the Prosecutor established a Committee to examine the legality of the intervention and whether there was a reasonable ground to open an investigation against NATO, see the report, *supra* n.433.

³⁴² See the first section of Chapter Two.

as the Security Council, a political body, established the Tribunal and appointed the Prosecutors.³⁴³

Article 18 (1) of the ICTY Statute provides that the prosecutors ‘shall initiate investigations *ex-officio* or on the basis of information obtained from any source’. When receiving this information, ‘the Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed’ with a prosecution³⁴⁴ Similarly to Article 15 (3) of the ICC Statute (*proprio motu* power), in order to proceed with a prosecution, Article 18 (4) requires the prosecutor to satisfy that a *prima facie* case exists – a *prima facie* case means ‘that there is sufficient evidence to provide reasonable grounds for believing that a suspect has committed a crime within the jurisdiction of the Tribunal.’³⁴⁵ Once the prosecutor satisfies herself that a *prima facie* case exists, Article 18 (4) provides that the prosecutor ‘shall prepare an indictment’. The language of the latter paragraph seems arguably mandatory as it says that the prosecutor ‘*shall* prepare an indictment’ [emphasis added].³⁴⁶ Unlike the Nuremberg Tribunal where the Chief Prosecutors did not have to submit the indictment to the Court for approval – as only the approval of the Committee was needed -, and so by General MacArthur in relation to the Tokyo Military Tribunal, Article 18 (4) requires the prosecutor to submit the indictment to the trial Chamber. Article 19 of the ICTY Statute provides that if the Trial Chamber is not satisfied that the *prima facie* threshold is met, then they shall dismiss it. Where an indictment has been confirmed by the Trial Chamber, Rule 50 of the ICTY RPE provides that the prosecutor needs permission from a relevant judge for any amendment.³⁴⁷

³⁴³ Article 16 (4) of the Tribunal Statute provides that ‘the Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General.’

³⁴⁴ Article 18 (1) of the ICTY Statute.

³⁴⁵ United Nations, International Criminal Tribunal for Former Yugoslavia, Criminal Proceedings, available at <<http://www.icty.org/en/about/chambers/criminal-proceedings>>.

³⁴⁶ See Article 18 of the ICTY Statute. See Nsereko, *supra* n. 13, Pp. 135-6.

³⁴⁷ See, Daniel D. Ntanda Nsereko, Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, in Roger S. Clark and Madeleine Sann, *the Prosecution of International Crimes: a Critical Study of the International Tribunal for the Former Yugoslavia* (London: Transaction Publishers, 1996), Pp. 302-318.

This means that the prosecutor can amend, remove, or change any charge, and even withdraw the indictment, as long as no confirmation has been issued by the Trial Chamber.³⁴⁸

The absence of any judicial oversight or control is absolute in relation to the decision *not* to proceed with an investigation or proceed with a prosecution. The law here, in effect, allows the prosecutor to exercise an *absolute* power, which may have serious consequences. Making such decisions is limited to the prosecutor. The Statute makes them appear subjective, as the Statutes provide such a broad power, when it comes to the decision not to proceed with an investigation. In other words, the *pure* subjective dimensions of the decision not to open an investigation or proceed with a prosecution reveal the subjectivity of law-content in this regard.³⁴⁹ The next section will show how the lack of any sort of control by the Court on such decisions was problematic within the practice of the ICTR and, to a lesser extent, in the ICTY. In contrast, we have seen how the ICC Statute provides a stricter system, in which all decisions, including the positive and negative ones are reviewable and potentially controlled, except in that the negative *proprio motu* decisions are out of any control, unless decided solely on the basis of the ‘interests of justice’. As far as the Rwanda Tribunal is concerned, the legal frame is the same as that of the ICTY.³⁵⁰

In relation to the scope of discretion, we need to distinguish between the decision to initiate an investigation and the decision to prosecute. In respect to the initiation of an investigation, although Article 18 (1)³⁵¹ involves a mandatory language in relation to initiating

³⁴⁸ Rule 50 of Rules of Procedures and Evidence of the ICTY.

³⁴⁹ By analogy, see generally, Koskennimei’s discussion about the problems of the law-content and law-application, at *supra* n. 72, Pp. 25-9.

³⁵⁰ Since the adoption of the Statute of the ICTR on 8 November 1994, the OTP of the ICTY was decided to be the same Office for the ICTR as well. Resolution 1503, issued by the SC on 28 August 2003, amended the Statute of the ICTR, and decided to provide for a separate Office for the ICTR. On 4th September, the SC issued Resolution 1505 on which, it appointed Hassan Bubacar Jallow as a Prosecutor of the ICTR, see UNSC Resolution 1505 (2003). The OTP of the ICTR is situated in Arusha, Tanzania, see the Office of the Prosecution at the website of the Tribunal at < <http://www.unict.org/tabid/104/default.aspx> > (Last Access: 31st March, 2012).

³⁵¹ Same is also in Article 17 (1) of the ICTR Statute.

an investigation, indeed, the prosecutor has ‘full discretion’, as Stigen states.³⁵² As the prosecutor is the only source of the legal requirement to investigate, this means, in effect, that the prosecutor is the only one who will assess the information received and, therefore, decides whether this information constitutes a ‘sufficient basis’ to proceed. Schabas made a similar argument in a similar situation in relation to the ICC prosecutor’s *proprio motu* power, saying that the prosecutor ‘shall proceed, but only after he has decided to do so in the exercise of his discretion under Article 15.’³⁵³ In addition, there is no judicial oversight over the decision of opening *or* closing an investigation the matter which makes the discretionary power of the prosecutor quite broad. Cote also emphasises that although the language of the Article seems mandatory and obliges the prosecutor to investigate once a *prima facie* case exists, ‘the courts have, in the last ten years, recognized a clear prosecutorial discretion as to the decision to investigate and to indict individuals.’³⁵⁴ Jallow also confirms that Article 17 (1) of the ICTR Statute, which is similar to Article 18 (1) of the ICTY Statute, allows the prosecutor to act ‘at his discretion.’³⁵⁵

In relation to the decision to prosecute, prosecutorial discretion is more limited, compared to the investigatory decision. Article 18 (4) requires the prosecutor, upon finding a ‘sufficient basis’ to proceed, to obtain approval from the Trial Chamber.³⁵⁶ However, this prosecutorial discretion is still broad as such. In the *Čelebići* case, the ICTY Appeals Chamber stated that ‘[i]t is beyond question that the Prosecutor has a broad discretion in relation to the

³⁵² *Supra* n. P. 282, P. 348.

³⁵³ Schabas, *supra* n. 4, P. 253.

³⁵⁴ *Supra* n. 38, P. 165. See also *Prosecutor v. Zejnil DELALIC, Zdravko MUCIC (aka “PAVO”), Hazim DELIC and Esad LANDŽO (aka “ZENGA”) (Čelebići case)*, Case No.: IT-96-21-A (20th February, 2001), Para. 602 (hereinafter: *Čelebići case*), providing that ‘[i]n the present context, indeed in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments.’

³⁵⁵ *Supra* n. 59, P. 147.

³⁵⁶ Same is also to Article 17 (4) of the ICTR Statute.

initiation of investigations and in the preparation of indictments.³⁵⁷ In this case, and similarly to the situation in the ICC, the Judges made it clear that the Tribunal has limited resources and cannot prosecute all legally worthy cases.³⁵⁸ Schabas and deGuzman opine that the case law confirms that the prosecutor has ‘broad discretion’.³⁵⁹ In addition, Stigen holds that ‘the Prosecutor is, in reality, under no duty to proceed with a case whenever there is such a [sufficient] basis.’³⁶⁰ Judge Patricia M. Wald, with respect to the *Jelisić* Appeals Judgment also confirmed that it is the prosecutor who will decide which cases to be prosecuted and judges have no authority to intervene to examine the wisdom of such decisions.³⁶¹ In addition to these reasons, there is no judicial oversight of the decisions of the prosecutor to decline to proceed with a prosecution. However, it is only Nsereko who argues that Article 18 (4) involves a ‘peremptory language [and] suggests a duty and not discretion on the part of the Prosecutors to indict.’³⁶² To him, the ICTY is an ad hoc institution that was created ‘at great cost, specifically to try ‘serious violations’ or persons with ‘the greatest responsibility for serious violations’ of international humanitarian law.’³⁶³

As can be seen, it is widely accepted that the prosecutor has *prosecutorial discretion* when assessing ‘sufficient basis’ for the purpose of initiating an investigation, and ‘a *prima facie* case’ for prosecuting a case. As was mentioned, in *Celebići case*, the Appeal Chamber explicitly stated that the Prosecutor has prosecutorial discretion ‘in relation to the initiation of investigations and in the preparation of indictments.’³⁶⁴ The Court established this sense of discretion on the basis of the limited resources of the Tribunal that prevented it from

³⁵⁷ (*Čelebići case*), *supra* n. 354, Para. 602.

³⁵⁸ *Ibid*, Para. 602.

³⁵⁹ *Supra* n. 300, P. 136.

³⁶⁰ *Supra* n. P. 282, P. 349.

³⁶¹ *Prosecutor v. Goran Jelisić*, Case No. IT-95-10-A, Partial Dissenting Opinion of Judge Wald (2004) Para. 4.

³⁶² Nsereko, *supra* n. 13, P. 136.

³⁶³ *Ibid*, P. 136.

³⁶⁴ (*Čelebići case*), *supra* n. 354, Para. 602.

prosecuting all cases that came under its jurisdiction. Therefore, upon the satisfaction of these legal categories, the Court has made it clear that the Prosecutor does not have to open an investigation or proceed with a prosecution. She can choose among these legally but equally valid cases for investigations and prosecutions. However, what has not been discussed in this regard is the process in which the Prosecutor decides that these legal requirements are not satisfied. In such a situation and as will be established in the next two chapters, in analysing these legal requirements the prosecutor has a broad capacity to interpret them and decide whether these legal categories are met. In so doing, the prosecutor could exercise another sense of discretion which results from the broad meaning of these legal requirements. Stigen notes that ‘sufficient basis’ is not defined by the Statute and provides more space for discretion (the same can be raised in relation to a ‘*prima facie case*’).³⁶⁵ The broad meaning of such criteria allows the prosecutor in effect to deploy her discretion through her independent capacity to interpret these legal criteria that might involve several interpretations, and yet even opposite that may allow the prosecutor to select among opposite outcomes. This observation is important to be raised here and employed to analyse and discuss how the ICC Prosecutor has exercised a strong sense of such discretion.

The above analysis does not indicate that there is no limitation or control on the prosecutor’s discretion. In fact, there were several ways by which the Prosecutor’s discretion was limited and controlled. In 2002, the SC required the Tribunal to transfer intermediate and lower-level accused to national courts.³⁶⁶ Because of the existence of tens of thousands of perpetrators and the vast workload of the OTP of both Tribunals, the SC issued Resolution 1503 on 28 August 2003, by which it established a Completion Strategy.³⁶⁷ The SC asked the

³⁶⁵ *Supra* n. P. 282, P. 348.

³⁶⁶ Press Release, Security Council Endorses Proposed Strategy for Transfer to National Courts of Certain Cases Involving Humanitarian Crimes in Former Yugoslavia, UNSC, 23 July 2002.

³⁶⁷ UN Security Council Resolution 1503 (2003).

prosecutor to conclude all investigations by the end of 2004, and all trials by 2010.³⁶⁸ It also urged these Tribunals to concentrate only on the most serious crimes and send other crimes to be tried by national courts.³⁶⁹ As a consequence, Rule 11*bis* of the ICTY RPE was adopted by the judges and imposed two further limitations on the prosecutor's discretion, namely the gravity of the crimes and the level of the accused when making the transfer decisions. The prosecutor then had no discretion in relation to these cases and must transfer them to national courts. In this regard, it is important to mention here that such interference by the SC is not an infringement of the prosecutor's independence, as the SC did not intervene 'in the details of individual cases'.³⁷⁰ As a consequence, Jallow, the Chief Prosecutor of the ICTR, has adopted almost the same policy as in the Nuremberg Trial, in prosecuting high-profile perpetrators of crimes in Rwanda. Prosecutor Jallow decided to make the political, administrative, and military leaders the main targets of the prosecution.³⁷¹ The then Prime Minister of Rwanda, cabinet ministers, local administrative leaders, and other military leaders, who participated in committing the crime of genocide, have been all prosecuted.³⁷²

Further to this, on 26 March 2004, the SC issued Resolution 1534, which imposed a limitation on prosecutorial power of the prosecutor, when making a decision of whom to prosecute.³⁷³ The Resolution calls upon the prosecutor, when making indictments to 'concentrate on the most senior leaders suspected of being most responsible for crimes', which

³⁶⁸ See generally, Kevin Jon Heller, Completion Strategies and the Office of the Prosecutor, in Luc Reydam, Jan Wouters, and Cedric Ryngaert (eds.) *International Prosecutors* (Oxford, Oxford University Press, 2012).

³⁶⁹ See Paragraph 5 of the Resolution.

³⁷⁰ *Supra* n. 59, P. 151.

³⁷¹ See *supra* n. 59.

³⁷² This policy has been adopted, since a separate Prosecutor for the ICTR was first appointed.

³⁷³ See SC Resolution: 1534 (2004), Paragraph. 5. However, this policy has been already adopted by the Prosecutor of these Tribunals who committed their efforts to prosecute the big fishes. Former Prosecutor Carla Del Ponte addressed to the UNSC that "In addition to these 13 "top priority" investigations, my office has conducted 17 additional investigations that were suspended at the end of last year as a result of my decision to focus solely on the most senior perpetrators." See An address by Ms Carla Del Ponte, Chief Prosecutor of the ICTY, to the UN Security Council, Press Release, FH/P.I.S./791-e (10th October, 2003), Para. 6, available at <<http://www.icty.org/sid/8180>> (Last Access: 18th January, 2012).

are under the jurisdiction of the Tribunals.³⁷⁴ This step is a development of the Charter of the Nuremberg, which required its Prosecutors only to concentrate on such persons and crimes, as outlined above. Following this amendment, the ICTY Judges also decided to control these decisions, and check whether or not the prosecutor targeted only the most responsible perpetrators.³⁷⁵ Accordingly, in April 2004, Rule 28 (a) of the ICTY RPE was amended in a way that put the prosecutor under the Judges' oversight, when the prosecutor makes the decision to proceed with a prosecution.³⁷⁶ This rule empowers the President of the Tribunal to ask the Bureau to check whether or not the prosecutor indicted one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal. However, the ICTR judges did not take the same step taken by their counterpart, as they believed that such an amendment would violate the Statute that asserted the independence of the prosecutor.³⁷⁷

Another limitation is a general requirement. Article 21 (1) and 20 (1) of the ICTY and ICTR respectively provide a general principle that is well articulated within international legal justice. These Articles state that 'all persons shall be equal before the International Tribunal'. These Articles require that the prosecutor cannot exercise her prosecutorial power in an unequal way.³⁷⁸ Thus, according to this principle, the selection of indictees, on the basis of religious, political, racial, ethnic, or any other discriminatory basis is not acceptable, as all persons are equal before the law. In the *Prosecutor v. Delalic* case,³⁷⁹ the Appeal Chamber asserted that

³⁷⁴ UNSC Resolution 1534 (2004), Para. 5.

³⁷⁵ For more information about the fundamental amendments of the Statutes of the ICTY and ICTR see, Daryl A. Mundis, The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals, *the American Journal of International Law*, Vol. 99, No. 1 (2005), 142- 158.

³⁷⁶ The permanent Judges of the ICTY amended Rule 28 (A) without consulting the opinion of the Prosecutor, who seemed to have accepted the amendment because she already undertook that policy. The legal basis of this amendment is to be found in Rule 6 of the ICTY RPE, see *ibid*, P. 147.

³⁷⁷ *Supra* n. 375.

³⁷⁸ *Supra* n. 59, Pp. 154- 160.

³⁷⁹ *Prosecutor v. Z. Delalic et al.*, Appeals Chamber Judgment, AC, ICTY (20th February 2001), Case No. IT-96-21-A, Para. 605.

the Prosecutor is obliged to respect this principle, whilst exercising their prosecutorial power. ‘It thus appears that the discretion of the prosecutor under both the ICTY and ICTR systems is only limited to the extent that it does not violate article 21(1) of the ICTY Statute’.³⁸⁰ Therefore, any violation of this principle means the judges will intervene in the prosecutor’s discretion as far as the defence can show that a certain decision is taken on a discriminatory basis. In the *Ntakuritmana* case, the Trial Chamber holds ‘that the Accused . . . must show that the Prosecutor’s decision to prosecute them or to continue their prosecution was based on impermissible motives, such as ethnicity or political affiliation, and that she failed to prosecute similarly situated suspects of different ethnicity or political affiliation.’³⁸¹ In the *Akayesu* case, the Appeal Chamber of the ICTR holds that in order for the Tribunal to intervene in the prosecutor’s discretion, the evidence of discriminatory intent must be coupled with the evidence that the Prosecutor’s policy has a discriminatory effect, so that other similarly situated individuals of other ethnic or religious backgrounds were not prosecuted.’³⁸²

2.3.2. Prosecutorial Discretion in Practice under the ICTY and the ICTR

Unlike the Nuremberg Trial, the commencement of the prosecution’s processes at the ICTY was extremely slow. One of the staff of the OTP stated that ‘as we began to work, it was apparent that we could not start, as they did at Nuremberg and Tokyo, with cases against the military and political leaders.’³⁸³ This matter can be attributed to shortcomings in designation of the bodies of the Tribunal, whereby the prosecutor was appointed one year after the appointment of the judges of the Tribunal, as if they were trying ‘to build a house from the roof

³⁸⁰ Geert-Jan Alexander Knoop, *Theory and Practice of International and Internationalized Criminal Proceedings* (Hague: Kluwer Law International, 2005), P. 109.

³⁸¹ Decision on the Prosecutor’s Motion to Join the Indictments, *Ntakuritmana*, ICTR 96-10-I and ICTR 96-17-T, Trial Chamber (22nd February, 2001), Para. 870.

³⁸² *The Prosecutor v. Jean-Paul Akayesu* (Appeal Judgment), ICTR-96-4-A (2001), Para. 96.

³⁸³ Minna Schrag, *The Yugoslavia Crimes Tribunal: A Prosecutor’s View*, *Duke Journal of Comparative and International Law*, Vol. 6 (1995), P. 191.

down'.³⁸⁴ Both Tribunals started with the prosecution of lower-level perpetrators, as opposed to the supposed perpetrators that the international community would have preferred to see – major war criminals, as in the case of the Nuremberg Tribunal. Approximately, half a century after the first trials by an international tribunal, Dragan Nikolic, who was a low-level member of the Bosnian Serb forces, was the first person to be indicted by the ICTY.³⁸⁵ Former Chief Prosecutor Richard Goldstone made it clear that the reason for starting with such a person was not just the due application of law in accordance with the need for justice, but the credibility and survival of the Tribunal itself, to prove to the international community, in particular to victims, that the Tribunal was capable of delivering justice.³⁸⁶ Goldstone said,

I had also been informed ahead of time that at least one indictment had to be issued before the November meeting in order to demonstrate that the system was working and that the tribunal was worthy of financial support ... For that reason we issued our first indictment, against Dragan Nikolic, who despite the despicable nature of his alleged conduct, was a comparatively low-level member of the Bosnian Serb forces.³⁸⁷

As we will see, the Prosecutor of the ICTY has largely considered several extra-legal factors when making a decision. In relation to the *Nikolic* case, he was already in custody in Germany who transferred him on to the ICTY: in other words, he was available for prosecution. In addition, 'sufficient evidence' was available against him.³⁸⁸ Goldstone justified the decision that although 'he was a comparatively low-level member of the Bosnia Serb forces',³⁸⁹ cases against such 'small fish' would provide a basis for building the cases against the top leaders.³⁹⁰

³⁸⁴ *Ibid*, P. 189.

³⁸⁵ *Prosecutor v. Dragan Nikolic "Jenki"*, Case No. (IT-94-2-I).

³⁸⁶ Richard Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven: Yale University Press, 2000), P. 105.

³⁸⁷ *Ibid*, P. 105.

³⁸⁸ *Ibid*, Pp. 105-6.

³⁸⁹ *Ibid*, P. 105.

³⁹⁰ Antonio Cassese, The ICTY: A Living and Vital Reality, *Journal of International Criminal Justice*, Vol. 2, No. 2 (2004), P. 586.

However, this policy was criticised by the judges, who called upon Goldstone to focus on the high-ranking military and political leaders and commanders.³⁹¹

In the *Tadic* case, ultimately the first ever indictee to appear at trial,³⁹² was also considered to be a lower-level choice. The same above considerations were involved in respect to Tadic. As Cote argues, the decision taken against Tadic – the same can be argued in relation to Akayesu at the ICTR – was ‘the urgent need to prove to the international community that these first attempts at international justice after Nuremberg could work, rather than the relative importance of holding these specific men accountable for committing crimes in Rwanda and the former Yugoslavia.’³⁹³ The satisfaction of the *prima facie* case was not the key reason of prosecuting these perpetrators. In other cases, further extra-legal factors were considered by the Prosecutor. In the *Prosecutor v. Dusko Sikiric and Others* case, the prosecutor explicitly considered the resources available to him to conduct a fair trial, to withdraw the charges against them. In other cases, the Prosecutor also considered ‘the prospect for arresting the suspect, and the impact of the case on the resources of her Office.’³⁹⁴

Having looked at the factors presented by Goldstone for indicting those small fish, we would notice that he manifestly justified his decisions to indict such perpetrators on the basis of a *prima facie* case. However, the calculation of the extra-legal factors was the key reason of making such decisions. In other words, such a calculation was considerably employed and taken, on the basis of the apologist bases, to give credibility to the effectiveness of the Tribunal

³⁹¹ *Ibid*, P. 586. The Judges of the Tribunal met with the Prosecutor urging him to meet the expectations of the SC and the international community by concentrating on higher level perpetrators and those with greater responsibility, see United Nations, International Criminal Tribunal for the Former Yugoslavia, Press Release, The Judges of The Tribunal for The Former Yugoslavia Express their Concern Regarding the Substance of their Programme of Judicial Work For 1995, CC/PIO/003E (1st February, 1995), available at <<http://www.icty.org/en/press/judges-tribunal-former-yugoslavia-express-their-concern-regarding-substance-their-programme>> (Last Access: 10th February, 2016).

³⁹² *Supra* n. 66 *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-I.

³⁹³ *Supra* n. 38, P. 169.

³⁹⁴ Bergsmo, Cisse, and Staker, *supra* n. 3, P. 135.

to secure its operation in the near future. What is of concern here is to set out the dual nature of such criteria (the *prima facie* case), which can be used to achieve both justice aims and other aims. These criteria involve a degree of subjectivism that renders the prosecutor flexible to seek a certain goal, as Goldstone did when wanted to prove to the international community that the Tribunal was in operation. This initial observation is important to be emphasised, as it shows how the application of the legal requirements can involve the exercise of discretion. The broad and open-meaning of such criteria would allow decision-makers in effect to exercise broad discretion to choose from different interpretations that a legal criterion may offer. However, this thesis will argue that the consideration of these extra-legal factors that can be shaped or associated with political effects or repercussions can be legitimately taken only with the exercise of prosecutorial discretion. The application of the legal categories should be conducted on a consistent basis.

The last thing to show here is that the position that Prosecutor Goldstone took received two opposite *criticisms* that raised the common charge of politicalisation. Targeting a small fish by a tribunal that was supposed to try only big fish was considered politically-motivated. The Prosecutor was more concerned about the normative demand in that the Tribunal is able to deliver justice.³⁹⁵ The Prosecutor was then seeking to prove a point. It was a *utopian* critique. On the other hand, the prosecutor was deemed again political as he was trying to please the founders of the Court as well as the international community that the Tribunal is in operation.³⁹⁶ As Cote argues, the decision to target a small fish was not only based on the legal threshold, ‘but also on arguably legitimate political considerations about the mandate of international

³⁹⁵ Hitomi Takemura, Big Fish and Small Fish Debate—An Examination of the Prosecutorial Discretion, *International Criminal Law Review*, Vol. 7 (2007), P. 679. See also *supra* n. 386.

³⁹⁶ Takemura, *ibid*, P. 679.

criminal justice and the survival of the new judicial institutions.’³⁹⁷ It was an *apologist* critique.³⁹⁸

(RPF and NATO Cases)

The practice of the SC Tribunals is indeed a continuation of the previous regime of selective enforcement of the law. The selectivity process is not as such wrong.³⁹⁹ It is a process that the international prosecutors have to use, as they are choosing from among a hundred, if not a thousand cases. However, the ultimate outcomes of this selectivity process necessarily have a certain impact on the legitimacy of the given judicial institution. This potential and serious problem appears, in particular, when a decision-maker targets one group of the given conflict and ignores the other. This happens when the latter group has an active role in the criminal activities. As was explained above, this would also be contrary to the well-established principle in international criminal justice that Articles 21 (1) and 20 (1) of the ICTY and ICTR also assert, on: ‘equality before law’. The Trial Chamber holds that the Prosecutor’s discretion ‘is subject to the principle of equality before the law and to this requirement of non-discrimination.’⁴⁰⁰ In this context, the following paragraphs will analyse two case studies.

The failure of the ICTR Prosecutors to prosecute members of the Rwandan Patriotic Front (RPF) and its military wing, the Rwandan Patriotic Army (RPA) – the Government side – is one example where the Prosecutor gave as his reason not to prosecute those members on the basis that he is still reviewing the evidence. Victor Peskin criticises Goldstone that there was significant evidence that confirms the RPF atrocities, citing the United Nations

³⁹⁷ *Supra* n. 38, Pp. 169- 170.

³⁹⁸ In this regard, it can be said that the case of Jean-Paul Akayesu was also the first case to appear before the ICTR, and again he was considered as a small fish that the Tribunal began with. See, *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T.

³⁹⁹ *Supra* n. 308, P. 192, Cryer stated that ‘[s]elective enforcement of the law is not inherently wrong.’

⁴⁰⁰ Trial Chamber II, *The Prosecutor v. Augustin Ndindiliyimana*, Case No. ICTR-2000-56-I (26th March, 2004), Para. 23.

Commission of Experts' report.⁴⁰¹ The report called for these alleged crimes to be investigated, submitting that:

The Commission of Experts has concluded that there exist substantial grounds to conclude that mass murders, summary executions, breaches of international humanitarian law and crimes against humanity were also perpetrated by Tutsi elements against Hutu individuals and that allegations concerning these acts should be investigated further.⁴⁰²

Peskin then describes the political calculations that played the essential consideration in the position of Goldstone and next Prosecutor Arbour, who thought about the suspension of the Government's cooperation with the Tribunal⁴⁰³ and the serious intimidation that were to impose on the Tribunal's investigators, in case if the investigation was opened against them,⁴⁰⁴ respectively.

This state of affairs continues with the appointment of Jallow. In 2009, and during his speech to the SC, he asserted that his 'Office does not have an indictment that is ready in respect of these allegations [RPF] at this particular stage.'⁴⁰⁵ Such a response is already taken by then Prosecutor Goldstone when he justified his position not to prosecute the RPF on the basis of the lack of '*prima facie* evidence.'⁴⁰⁶ Former Chief Prosecutor Carla Del Ponte was the only

⁴⁰¹ Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge, Cambridge University Press, 2009), P. 189.

⁴⁰² Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935, GENERAL S/1994/1405 (9th December, 1994), Para. 95, available at <<http://www.phdn.org/archives/www.ess.uwe.ac.uk/documents/rwanda1.htm>>.

⁴⁰³ *Supra* n. 401, P. 190, supposing that Goldstone was likely aware about the threat of the Government to stop the cooperation with the Tribunal.

⁴⁰⁴ *Ibid*, P. 190, citing the response of Prosecutor Louise Arbour during an interview, 'How could we investigate and prosecute the RPF while we were based in that country? It was never to going happen. They would shout us down'.

⁴⁰⁵ United Nations, Security Council, 6134th meeting, S/PV.6134 (4th June, 2009), P.33, available at <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Tribunals%20SPV%206134.pdf>>.

⁴⁰⁶ The response of Goldstone to Filip Reyntjens; see Professor Filip Reyntjens, Prosecutorial Policies in the ICTR: Ensuring Impunity for the Victors, *World News Journal*, P. 1, available at <www.eurac-

Prosecutor who had a real intent to investigate the alleged crimes committed by the members of the RPF and RPA. It was argued at one point that she was removed from her position, when she decided to embark on the investigations against them.⁴⁰⁷ Cryer also argues that her removal ‘was because she refused to engage in selective enforcement, by insisting that investigations should go on into actions by the RPF’.⁴⁰⁸ Since the appointment of a separate Prosecutor for the Rwanda Tribunal in 2003, current Prosecutor Jallow has promised to proceed with the investigations against them, but nothing has been done so far. According to several sources, those members are accused of committing crimes against humanity and war crimes against Hutu, as a response to the genocide committed by them.⁴⁰⁹ Despite this, the ICTR has prosecuted only one side of the conflict and has totally ignored the alleged crimes committed by Tutsi led by the RPF.

Jallow made it clear on several occasions that those members are still under his consideration, but says there is no *prima facie* evidence to prosecute any.⁴¹⁰ However, in 2008, Jallow, for the first time, admitted that the RPF ‘had committed atrocities during the 1994 genocide’, whereby 15 civilians were killed by the RPF’s soldiers.⁴¹¹ Later on, Jallow changed his policy, earlier based on the postponement of the prosecution of those members, to adopting a new policy that would help in one way or another to provide them with impunity. His new policy was based on the acceptance of the request of the Rwandan authorities to refer these

network.org/web/uploads/documents/20090902_11747.doc>. See also *supra* n. 401, P. 189, quoting Goldstone’s response, ‘I certainly didn’t have evidence of massive crimes committed by the RPF’.

⁴⁰⁷ The argument was mentioned in, Schabas, *supra* n. 258, P. 750.

⁴⁰⁸ *Supra* n. 308, P. 221.

⁴⁰⁹ See the results of the special investigations team led by Reyntjens *supra* n. 406.

⁴¹⁰ *Supra* n. 405, P. 33.

⁴¹¹ See 06.06.08 - ICTR/UN – UN Prosecutor Admits of RPF Atrocities during 1994 Genocide, *Hirondelle News Agency*, available at <<http://www.hirondellenews.com/ictr-rwanda/404-ictr-institutional-news/21999-en-en-060608-ictr-un-prosecutor-admits-of-rpf-atrocities-during-1994-genocide1105011050>> (Last Access: 23rd January, 2012).

cases to the jurisdiction of the national court.⁴¹² He did so by describing the alleged crimes committed by the members of the RPF as simple murders, rather than war crimes. For this reason, the cases would be under the jurisdiction of Rwandan courts, although Jallow claimed that he would prosecute these cases if the Rwandan court did not prosecute them fairly. If the initial legal status of these acts is normal murders, then on what legal basis did Jallow make his promise to prosecute these crimes if the national courts failed to do so? In 2008, the Rwandan military court tried two senior officers (a major and brigadier general) and two other lower-level officers (captains) for those crimes. The senior officers were acquitted and the lower-level officers were sentenced to 8 years in jail, reduced on appeal to 5 years. Eventually, during his presentation to the SC in the summer of 2009, Jallow made it clear that he has no indictment prepared against those parties.⁴¹³

The *de facto* policy and the justification of Jallow in relation to the inaction of his Office to alleged crimes committed by the Government's side were highly contentious. The perception of bias was the main common debate about Jallow's policy. Akayesu himself was among those who criticised the Prosecutor for carrying out a one-sided policy, submitting in his Appeal:

that the Tribunal is prosecuting only the "losers" in the Rwandan conflict by failing to prosecute the perpetrators of "crimes of extermination of the Hutu" who enjoy "complete immunity" from prosecution. He submits that such failure exhibits partiality in the punishment of crimes committed in Rwanda during the relevant period. He compares this to the contrary situation before ICTY where persons from "both camps", including Croat leaders, have been prosecuted.⁴¹⁴

⁴¹² *Ibid.* See also UN Doc. S/PV.5904th Meeting, 4th June 2008, P. 11. Available at < <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/ICTR%20S%20PV%205904.pdf>> (Last Access: 23rd January, 2012).

⁴¹³ *Supra* n. 405, P. 33.

⁴¹⁴ *The Prosecutor v. Jean-Paul Akayesu*, Appeal Judgment, ICTR-96-4-A (2001), Para. 93. The Appeal Chamber dismissed these allegations of partiality on the grounds that the prosecutor had broad discretion (citing

Also, Amnesty International criticised Jallow for his failure to open investigations against the members of RPF and RPA, despite several investigations that indicate the responsibility of those members for committing crimes falling within the jurisdiction of the Tribunal.⁴¹⁵ These investigations, which were conducted by Amnesty International, showed that there was significant evidence that required the Prosecutor to make a case against the RPF, as they declared that '[e]vidence of crimes committed by the RPF in 1994 have been transmitted to the prosecutor's office either in private and confidential communications, in publications of non-governmental organizations and other sources, or through depositions of its own expert witnesses in Arusha.'⁴¹⁶ In the same report, Amnesty International stated that the national justice system was not efficient enough to deliver justice fairly and impartially.⁴¹⁷ As was shown above, the Prosecutor insisted that *prima facie* evidence is not available, and allowed the national courts to exercise its jurisdiction. More than that, the Prosecutor remained silent about his promise that he would bring these cases if the national court conducted the trials badly.

The above analysis indicates strongly that the legal requirements may allow decision-makers to find opposed outcomes/interpretations and, therefore, choose among these outcomes/interpretations. It also strongly suggests that the legal requirements have a dual

Celibici) and there were many calls on the prosecutor's resources to explain the non-prosecution; further that the accused had no evidence that this was due to partiality nor, even if the prosecutor pursued a discriminatory policy how it had specifically affected him and his case. See the same Judgment, Paras. 95-6.

⁴¹⁵ Katherine Iliopoulos, ICTR Accused of One-Sided Justice, *Crimes of War* (2011), available at <<http://www.crimesofwar.org/commentary/ictr-accused-of-one-sided-justice/>> (Last Access: 2nd December, 2014).

⁴¹⁶ *Ibid.* See also Letter to ICTR Chief Prosecutor Hassan Jallow in Response to His Letter on the Prosecution of RPF Crimes, *Human Rights Watch* (14th August, 2009), available at <<http://www.hrw.org/news/2009/08/14/letter-ictr-chief-prosecutor-hassan-jallow-response-his-letter-prosecution-rpf-crime>> (Last Access: 2nd December, 2014), urging the Prosecutor to open the investigation against the RPF, before the Tribunal concludes its mission in 2010 and that based on the credible evidence that HRW believe that the Office of the Prosecution holds.

⁴¹⁷ Rwanda: Suspects must not be Transferred to Rwandan Courts for Trial until it is Demonstrated that Trials will Comply with International Standards of Justice (with Amendment), *Amnesty International* (2nd November, 2007), P.2, available at <<http://www.amnesty.org/en/library/info/AFR47/013/2007/en>> (Last Access: 23rd January, 2012).

nature that in effect may allow officials to deploy their discretion through their independent capacity to find quite opposite interpretations and choose among them. As will be identified in the next chapter, this degree of discretion that can be exercised in such a case is significant. It may open a giant gate for politics and political bias to determine which decision should be selected. In other words, it seems as if the decision-makers have exercised prosecutorial discretion in the context of applying the legal thresholds, where discretion is not supposed to be involved. The above analysis shows two different arguments as to whether or not the investigation should be opened on the basis of the satisfaction of the legal requirements. This analysis strongly suggests that decision-makers should provide a detailed and public statement as to how the decision are made. Such a recommendation would minimise any doubt about the correctness of decisions. The reason for providing such statements is due to a point at which prosecutorial discretion and legal interpretive discretion (interpreting the legal thresholds) may converge. The exercise of the last sort of discretion has substantial consequences, as we have seen.

Here we find once again the same recurring pattern of opposite criticisms raising the common charge of politically-based decision-making. The Prosecutor was accused of pandering to the Rwandan Government in order to secure cooperation from them.⁴¹⁸ He feared the consequences of making a decision against them. The criticism here is that the Tribunal seeks too easy cases. This was an *apologist* critique. On the other hand, he was also accused of being political, as he was too *utopian* and took thereafter a position to prove a point to advance the profile of the Court and its ability to do justice by focusing on hard cases, cases that cannot be pursued or even may cause harm to other values.⁴¹⁹ As Jeremy Rabkin argues, generally

⁴¹⁸ See for example, *supra* n. 412, P. 12.

⁴¹⁹ See Jeremy Rabkin, The U.N. Criminal Tribunals For Yugoslavia And Rwanda: International Justice Or Show Of Justice? in William Driscoll, Joseph Zompetti, Suzette W. Zompetti (eds.), *The International Criminal Court: Global Politics and the Quest for Justice* (New York, International Debate Education Association, 2004), Pp. 73-80. See, also *supra* n. 73, Pp. 23-4.

international tribunals can only do ‘symbolic justice’ to some cases and that could be used to justify its inaction against the other cases that might be ‘too dangerous’⁴²⁰ to be pursued. This is a *utopian* critique. Obviously, one may notice how a single position the prosecutor may take might be encountered by opposite dyads, each has a plausible and credible argument against the other one.

The same problem was raised with regard to the ICTY, where the Tribunal was accused of being politically motivated with respect to the decision of the Prosecutor not to open an investigation against NATO for crimes allegedly committed during its campaign against the Former Yugoslavia in 1999.⁴²¹ The questions that will be discussed here are the assessment of the legality of this decision, and the discretionary power associated with making this decision. The then Chief Prosecutor, Del Ponte, after an extensive review of information she received about this matter, eventually decided not to open the investigation against NATO claiming:

that there is no basis for opening an investigation into any of the allegations or into other incidents related to the NATO air campaign. Although some mistakes were made by NATO, the Prosecutor is *satisfied* that there was no *deliberate* targeting of civilians or *unlawful* military targets by NATO during the campaign.⁴²² [emphasis added]

Alongside some other reports made by several organisations,⁴²³ Del Ponte based this decision on a report delivered by a committee within the Office of the Prosecution set up by the first Prosecutor of the ICTY, Louise Arbour, to advise the Prosecutor, whether or not there

⁴²⁰ Rabkin, *ibid*, P. 76.

⁴²¹ Anne-Sophie Massa, NATO's Intervention in Kosovo and the Decision of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia Not to Investigate: An Abusive Exercise of Prosecutorial Discretion? *Berkeley Journal of International Law*, Vol. 24, Issue: 2 (2006), P. 644.

⁴²² See Press Release of the office of the prosecutor, Prosecutor's Report on the NATO Bombing Campaign, PR/P.I.S./510-e (13th June, 2000), at <<http://www.icty.org/sid/7846>> (Last Access: 24th January, 2012).

⁴²³ See for example: Civilians Death in the NATO Air Campaign, *Human Rights Watch* (February, 2000), available at <<http://www.hrw.org/reports/2000/nato/>> (Last Access: 24th January, 2012).

was sufficient evidence to proceed with the investigation.⁴²⁴ The report *recommended* the Prosecutor not to take any steps against NATO because ‘either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences’.⁴²⁵ Before analysing the Prosecutor’s decision, it is worth mentioning the valuable and innovative policy taken by Arbour and Del Ponte, who agreed to set up such a committee and, later on, published a report stating the reasoning that led to the decision not to proceed.⁴²⁶ Under the Statute of the ICTY, the prosecutor does not have to take such steps. This kind of transparent approach helps to increase the credibility of the Tribunal and also to put a visible accountability on negative decisions – decision not to proceed with an investigation – which in the ad hoc tribunals vest in the prosecutor an absolute power of choice, as explained earlier in this chapter. Further to this, the division of the investigation phase into two parts, namely the collection of information and the investigation, was a unique step. This was later adopted by the ICC, which also imposed more judicial controls on the prosecutor, when acting *proprio motu*, who needs to get authorisation from the Pre-Trial Chamber before embarking on the second phase, opening an investigation. However, under the Statute of the ICTY, there is neither such a division nor any judicial control on the prosecutorial power of the prosecutor.

To begin, the alleged crimes committed by NATO are under the jurisdiction of the Tribunal by virtue of Articles 1 and 3 of the Statute, as they were committed within the territory of the Former Yugoslavia, and in violation of the laws or customs of war, respectively.⁴²⁷ Going back to the report of the Committee, it raises several questions under international law and

⁴²⁴ Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13, June (2000) (PR/.I.S/510-E).

⁴²⁵ *Ibid*, Para. 90.

⁴²⁶ *Supra* n. 38, P. 181.

⁴²⁷ See the opinion of Luc, in *supra* n. 38, P. 182.

doubts about the legality of NATO's intervention in Kosovo.⁴²⁸ Although the report was useful and correct on several issues it raised, such as the non-relevance of the jurisdiction of the Tribunal to crimes against peace, nevertheless, it contains considerable flaws.⁴²⁹ The report provided two main reasons for advising the Prosecutor not to proceed with the investigation. The first was that 'the law is not sufficiently clear.'⁴³⁰ In fact, within the international legal domain it is not uncommon to see often that the law is not clear in many aspects. As Natalino Ronzitti argues, '[d]ifficulties in interpretation are not a good excuse for not starting an investigation.'⁴³¹ Therefore, it is quite odd to recommend that a court, whose main function is to interpret the law, not proceed with the investigation. This is an unacceptable excuse. The second reason was the difficulty of obtaining sufficient evidence to substantiate an indictment. Later, Del Ponte also stated that 'it was impossible to investigate NATO, because NATO and its member states would not cooperate with us.'⁴³² Yet, obtaining evidence is by its very nature difficult, especially in the context of ongoing conflict situations. Again, Ronzitti states that 'this is no excuse for not commencing an investigation.'⁴³³ Providing such a reason should not have been adopted as a basis for making any decision because Article 18 (1) of the Statute requires the *existence* of sufficient evidence as a threshold and not the difficulty of obtaining it. These flaws are mainly linked, as Cryer⁴³⁴ and Anne-Sophie Massa⁴³⁵ argue, to the flaw in the methodology of the report to obtaining evidence: the reliance on NATO as the main source of information. Obviously, one cannot only take information about a certain incident from the

⁴²⁸ See more details about the jurisdiction-related issues in *supra* n. 421.

⁴²⁹ See the report, *supra* n. 424, Paras. 30-4.

⁴³⁰ See the report, *supra* n. 424, Para. 90.

⁴³¹ Natalino Ronzitti, Is the non *Liquet* of the Final Report by the Committee Established to Review the NATO Bombing Campaign against Federal Republic of Yugoslavia acceptable? *International Review of the Red Cross*, No. 840 (2000), available at <<https://www.icrc.org/eng/resources/documents/article/other/57jqtc.htm>>.

⁴³² Carla Del Ponte and Chuck Sudetic, *Madame Prosecutor: Confronting with Humanity's Worst Criminals and the Culture of Impunity* (New York: Other Press New York, 2008), P. 60.

⁴³³ *Supra* n. 431.

⁴³⁴ *Supra* n. 308, P. 216, Cryer argued that 'information provided by NATO was relied on heavily and assumed to be correct.'

⁴³⁵ *Supra* n. 421, P. 634, criticising the method of choosing the sources of the information.

accused himself. The Prosecutor indeed assumed the correctness of the source of the information as a basis for making the decision, as was concluded by the Committee.⁴³⁶ As Cote states, it is doubtful that such a Report contributed to enhancing the Prosecutor's credibility and to demonstrate her impartiality in the exercise of his prosecutorial discretion and her ability to take a clear and convincing decision in that case.⁴³⁷

In addition to the above concerns, doubts have been expressed about the assessment of the *seriousness* (gravity) of the alleged offences committed by NATO. By comparing this assessment with the other cases prosecuted by the OTP, the inconsistency is easily noticeable in the evaluation of the concept of seriousness (gravity). This argument was raised by Rachel Kerr, who makes a link between the refusal decision of prosecuting the NATO's offences and the lack of seriousness of those alleged crimes.⁴³⁸ In relation to the NATO's alleged crimes, in particular the assessment of the Djakovica Convoy's incident, in which nearly 75 people were killed and 100 people were injured, the report did not consider this incident serious enough to be prosecuted.⁴³⁹ The same argument was also applied to the attack of NATO against Korisa village where approximately 87 people were killed and 60 others were injured.⁴⁴⁰ Needless to mention, the other incidents, such as the Chinese Embassy, the Yugoslavia TV broadcast, and the Bridge were all abandoned.⁴⁴¹ These incidents imply that they are, to a large degree, serious. In contrast and in relation to the Macedonian National Liberation Army case, in which 5 people were killed and 5 other people were unlawfully detained for several hours, the Prosecutor opined that this incident was serious and, therefore, initiated the prosecution against them.⁴⁴² Clearly, this incident was less serious than the alleged offences in NATO case, by any

⁴³⁶ See the report, *supra* n. 424, 90.

⁴³⁷ *Supra* n. 38, P. 182.

⁴³⁸ Kerr, *supra* n. 29, P. 203.

⁴³⁹ See the report, *supra* n. 424, 63.

⁴⁴⁰ *Ibid*, Para. 86.

⁴⁴¹ *Ibid*, Paras: 80, 71-9, and 58-59 respectively.

⁴⁴² For more information about this issue, see *supra* n. 308, Chapter 4.

comparison. Thus, the question that can be raised is why did the Prosecutor not consider those incidents sufficiently grave?

However, the report mainly relied upon the ground of the absence of the element of intent (*mens rea*), stating that the NATO campaign did not ‘aim at causing substantial civilian casualties’.⁴⁴³ It was concluded that in most incidents, either the NATO campaign did not intend to cause the damage or the incidents occurred by mistake.⁴⁴⁴ Depending on this report and other elements, the Prosecutor decided not to open the investigation against NATO and NATO countries.

Before we evaluate the exercise of prosecutorial discretion, we notice again the same recurring pattern of arguments that surround the work of the prosecutor. Criticisms accused the Prosecutor of sacrificing the concerns to bring justice for the alleged perpetrators of NATO and also for about 500 civilian deaths and about 1000 wounded, as a result of the bombs⁴⁴⁵ to political considerations. The underlying reason for making the decision was to shield NATO from the Tribunal’s reach. The decision appears to be politically-motivated, as the Prosecutor was too concerned about the potential influences, in particular losing the funding and future cooperation from NATO and NATO states. This is an *apologist* critique. The Prosecutor ‘did take into account external factors in coming to its decision.’⁴⁴⁶ In particular, Del Ponte promised to open the investigation against NATO, ‘when it (the Tribunal) would no longer be so dependent upon NATO’s support’.⁴⁴⁷ Indeed, she failed to utilise her discretionary power in a way that enables her to exercise meaningful justice to them. It is true that she first considered the extra-legal demands that the Tribunal needed, at the time when the Tribunal was in such a

⁴⁴³ See the report, *supra* n. 424, Para. 54.

⁴⁴⁴ *Ibid*, Para. 23, 80, and 81.

⁴⁴⁵ See, *supra* n. 423, P. 3-4.

⁴⁴⁶ *Supra* n. 308, P. 220.

⁴⁴⁷ *Supra* n. 432, P. 62.

need, yet she could again open the investigation against them later on, when the Tribunal did not rely on the NATO's support. Nothing happened to bring justice to the alleged crimes committed by NATO.

On the other hand, the decision to prosecute NATO would again appear political, as the prosecutor was accused of pursuing too high cases that aimed only at proving a point. This was too *utopian*. The Prosecutor was too concerned with bringing justice only to the parties of the conflict. The enormous criticisms that were directed against this decision indicate that the political considerations were the real reason of making such a decision. It was only issued to shield the powerful states from prosecution. Massa argues that there were several serious incidents should have been investigated, including 'Operation Allies Force', citing the recommendation of Cassese.⁴⁴⁸ Based on the flaws of the Committee's report, and the merit of the NATO case to be investigated, she argues that the political considerations were aimed at protecting the NATO officials. She calls on the prosecutor to refrain 'from taking political considerations into account and departing from the principle of equality.'⁴⁴⁹ In addition, Paolo Benvenuti also states that 'the impression is given that the Prosecutor's intent has been, on the whole, to prevent investigations against NATO officials, and to hide herself behind the 'technical opinion' of the Review Committee.'⁴⁵⁰ This calculation that the Prosecutor took into consideration rendered the decision political.

If one thinks about the exercise of prosecutorial discretion in this decision, we would notice that the Prosecutor utilised 'external factors'⁴⁵¹ to achieve justice, however, *only* to the main parties to the conflict, whose crimes were unimaginable. Despite the above criticisms, the

⁴⁴⁸ *Supra* n. 421, P. 643.

⁴⁴⁹ *Ibid*, P. 644.

⁴⁵⁰ Paolo Benvenuti, The ICTY Prosecutor and the Review of the NATO Bombing Campaign against the Federal Republic of Yugoslavia, *European Journal of International Law*, Vol. 12 (2001), P. 505.

⁴⁵¹ *Supra* n. 308, P. 220.

decision not to prosecute NATO on the basis of extra-legal factors should not be underestimated.⁴⁵² As was shown in the case of the *Prosecutor v. Dusko Sikiric and Others*, it is well recognised (the Trial Chamber) that the prosecutor has broad prosecutorial discretion and, therefore, has a right to take extra-legal factors into her account, such as the resources available to her. The report of the Committee made an important conclusion about the difficulty of obtaining sufficient evidence by pursuing the NATO case. In such a scenario, conventionally, international prosecutors tend not to waste the resources of the tribunal in cases that they find difficult to pursue. Given the high potential volume of cases that may come under the jurisdiction of international tribunals, it is mandatory for the prosecutor to be selective. In this case, such a process would come under the power of the prosecutor to exercise prosecutorial discretion and, therefore, the decision can be justified on this basis. It is well known that the main aim of the NATO campaign was to stop the egregious violations of Serbs in Kosovo. The disastrous situation in the region, the unacceptable bloodshed, the urgent need to stop the violence at any cost, and the political environment in which the Tribunal was working all confer legitimacy on this decision. The efforts of the Prosecutor to obtain any evidence were all in vain, as it did not seem *at the time* that NATO would cooperate with the Office in terms of providing them any information about their bombs.⁴⁵³ Further to this, the fact that the Tribunal's operation effectively relied on NATO cooperation led the Prosecutor to face a serious dilemma. For these reasons, she had to choose either to prosecute the alleged crimes of NATO, thereby, rendering the Office 'incapable of continuing to investigate and prosecute'⁴⁵⁴ massive-scale crimes of the Serbs, or to accept the political environment, in which the Tribunal was working and, therefore, put an end to the vast atrocities that were taking place at the time. Thus, given the fact that the violence had to cease, the massive scale of atrocities

⁴⁵² *Ibid*, P. 219, Cryer stated that '[t]he difficulties the Tribunal would doubtlessly have encountered had NATO States withdrawn financing and co-operation should not be underestimated.'

⁴⁵³ *Supra* n. 432, P. 59.

⁴⁵⁴ *Ibid*, P. 60.

committed by the parties to the conflict in comparison to NATO's crimes, the limited resources of the Tribunal, and political considerations, it seems that the decision was wise. This policy pushed the Tribunal to succeed at bringing justice to some offenders who bore the greatest responsibility for the crimes, in particular Milosevic, the Head of the Former Yugoslavia. However, the decision as such was not taken on the basis of the exercise of prosecutorial discretion. The decision was taken on the basis of the lack of the legal threshold that there was no sufficient evidence for initiating the investigation and, therefore, the above justification cannot be applicable to this particular decision.

Two points can be concluded so far from the above arguments. The first point indicates that the Prosecutor considered several extra-legal factors, including the resources of the Tribunal in the context of applying the legal thresholds. Such a process can be imagined only in the context of the exercise of prosecutorial discretion. The second point refers to the dangerous convergence between prosecutorial discretion and legal interpretive discretion (applying the legal thresholds). The dual nature of the legal thresholds that often result due to the open-meaning of them allows officials to deploy a strong discretion that might reach to the level of the exercise of prosecutorial discretion, where extra-legal factors and political consideration may be taken. If there was any chance that the above political considerations could be legitimately taken into the decision-making process, that, initially, should be carried out in the context of the exercise of prosecutorial discretion, however, not applying the legal thresholds.⁴⁵⁵ The dual nature of the legal thresholds may allow officials to calculate political considerations to shape the final outcome of the decision. Del Ponte herself admits that the

⁴⁵⁵ See Chapter Three of this thesis for more information about such a process and how can be legitimately taken. The next chapter further adds another restriction for such a process where justice (in its broad meaning) should be also applied.

availability of the legal justification for the decision (the non-availability of sufficient evidence) can be masked by underlining political considerations.⁴⁵⁶

Even if we imagine that this decision was taken on the basis of prosecutorial discretion, the latter would appear abused. As was pointed out in the introduction, there should be a distinction between prosecutorial discretion and prosecutorial independence. Any external pressures, in particular, the political ones, on the discretionary power of the prosecutor would violate prosecutorial independence and would appear an abuse of prosecutorial discretion. The two above arguments about whether to initiate the investigation against NATO involve merit discussions. It was extremely difficult for the Prosecutor to obtain sufficient evidence from NATO. And it was doubtful whether the Prosecutor made the decision independently without any political pressures, imposed by NATO. As Cote argues, ‘[i]f a real investigation had been opened, it is very likely that the Prosecutor would have taken the same decision but without giving rise to an appearance of bias.’⁴⁵⁷ As finding a proper answer to this dilemma is sophisticated, Chapter Three will provide an approach in which the verification of such decisions can be measured. It is briefly to utilise extra-legal tools, including political ones to achieve justice. The approach suggests that the involvement of political consideration within the decision-making process can be justified only when any sort of justice is delivered. In our example, no sort of justice was brought to bear on NATO. The Prosecutor could, for example, have delayed the decision of prosecuting NATO until the circumstances become ready for making such a decision. As was argued above, although de Ponte promised to reopen the investigation against NATO once new factors were brought to her attention, she never did it, and NATO’s officials went unprosecuted. Such a position may describe the exercise of

⁴⁵⁶ *Supra* n. 432.

⁴⁵⁷ *Supra* n. 38, P. 183.

prosecutorial discretion as abused, as political considerations are taken into the account in the process.

2.3.3. Prosecutorial Independence in Practice

As was explained earlier in this chapter, in exercising her duties, the prosecutor is an independent body and should act independently. Article 16 (2) of the ICTY Statute⁴⁵⁸ requires the prosecutor, as a consequence, not to take instructions from any government or other source. Her decisions should be immune from any external pressures. Around two months after the cessation of the NATO bombing in Kosovo, Prosecutor of the ICTY Arbour exploited this situation and, accordingly, decided to indict Milosevic in summer 1999.⁴⁵⁹ Two months later, the successor Prosecutor, Del Ponte, put large pressures on the international community to secure the transfer of Milosevic to The Hague. Del Ponte kept urging the powerful countries to force Serbia to arrest Milosevic.⁴⁶⁰ Some would argue that powerful states influenced the decision and policy of the Prosecutor, in particular the timing of the indictment and the facilities provided for the Tribunal to issue the indictment against Milosevic (an *apology* critique). It was argued that ‘the United States and Britain were hurriedly handing over reams of satellite imagery, telephone intercepts, and other top-secret information to help the Prosecutor make the case against Milosevic’.⁴⁶¹ What led people to accuse the Prosecutor of being politically-motivated was the dramatic change of position of those states that previously pressed the Prosecutor not to indict him. However, this argument seems rather weak for two reasons.

First, and as was argued elsewhere, prosecutorial independence needs to be distinguished from prosecutorial discretion the prosecutor enjoys. The fact that the prosecutor

⁴⁵⁸ See also Article 15 (2) of the ICTR Statute.

⁴⁵⁹ *Prosecutor v. Slobodan Milosevic*, et, Case No. IT-99-37. He was indicted initially on 24 May, 1999

⁴⁶⁰ See generally, *supra* n. 273.

⁴⁶¹ Michael P. Scharf, The International Trial of Slobodan Milosevic: Real Justice or Realpolitik? *ILSA Journal of International and Comparative Law*, Vol. 8, Issue: 2 (2002), P. 396.

is seeking the indictment and arrest of a war criminal is part of the task of the prosecutor. In order for her to carry out this task, the prosecutor may seek help from other entities to enforce her decisions. Gaining such facilitation from those states does not mean that she was influenced politically by other international actors. In other words, she retained her independence. Rather, it means that the prosecutor was using her discretion that allows her to give weight for extra-legal factors, which is part of the discretionary power the prosecutor enjoys. This is not a matter of pleasing the interests of these countries (prosecutorial independence), but rather using the discretionary power that inherently allows her to calculate and benefit from extra-legal factors that allow her to please the interests of the Court (prosecutorial discretion).

The second reason why the critique is weak is that the process of utilising extra-legal factors, including political effects within the decision-making process was, in this instance, evidently to achieve a higher normative end, which is justice. The indictment and the transfer of Milosevic to the Tribunal promotes the needs of justice and achieves the normative considerations by bringing justice to him as well as to the victims. By such a process, the Prosecutor managed to arrest Milosevic, decrease the level of violence, and bring justice to the victims and Milosevic. It was the discretionary power that conferred the Prosecutor the opportunity of having more choices to exercise a more effective and flexible strategy of prosecution. It also eased, to a large degree, the sharp criticisms that the Prosecutor used to receive. In short, the strategy has helped to avoid, to a large degree, the extent of the recurring pattern of criticism, as it managed to achieve the most of the prosecution's strategy. This example significantly demonstrates how the prosecutor can use such a policy without herself being politically-motivated, and that the independence of the prosecutor remains inviolate. It simply shows that the process of the consideration of extra-legal accounts, including political effects within the decision-making process is a desirable process which the prosecutor can exercise to achieve a higher normative demand, which is justice. On the other hand, and as will

be argued in Chapter Three, the prosecutor is required to sustain a balance between being a body within the judicial institution (prosecutorial independence) and being flexible (prosecutorial discretion) when drawing the strategy of the prosecution of the Court. This balance reduces, and may even erase, the dilemma of being political, whichever position the prosecutor takes.

The *Čelebići* case is another example.⁴⁶² From the early start of the operation of the Tribunal, Goldstone revealed the priorities of his indictment policy when he was asked about the indictment of Milosevic in 1995. 'If we get evidence, we'll give priority to higher-ups'.⁴⁶³ The question here is did he fully commit to indict higher-up leaders? Did he indict all high-ranking people from all parties to the conflict? The *Čelebići* case was an ideal example that raised several important issues with respect to exercising prosecutorial discretion and to answering these questions.⁴⁶⁴ In this case, the Prosecutor indicted a Bosnian Croat and three Bosnian Muslims in 1996. Those perpetrators were accused of committing war crimes in the Čelebići camp against Serbs. Alija Izetbegovic, a Muslim high leader (the first president of Bosnia and Herzegovina), allegedly known to have given the orders to those perpetrators in the Čelebići camp, was not indicted by the Prosecutor though the latter acknowledged that he had investigated him but eventually closed the investigation because of his death.⁴⁶⁵ In this case, the Prosecutor was accused of being politically motivated when he, first, failed to indict Izetbegovic, and second when he discriminatorily selected Hazim Delic, Esad Landzo, and Zejnil Delalic as being Muslims.⁴⁶⁶ This case clarifies what is meant by the infringement of the

⁴⁶² See *The Prosecutor v. Zdravko Mucic, Hazim Delic, Esad Landzo, and Zejnil Delalic*, Case No. IT-96-21-A.

⁴⁶³ Cited in Bass, *supra* n. 273, P. 228.

⁴⁶⁴ *Supra* n. 462.

⁴⁶⁵ See an article written by Carl Savich, Celebici, available at:

<<http://www.serbianna.com/columns/savich/047.shtml>> (Last Access: 12th February, 2012).

⁴⁶⁶ See generally, Bass, *supra* n. 273, and see Robert M. Hayden, Biased 'Justice:' Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia, *Cleveland State Law Review*, Vol. 47 (1999), 549-573.

independence of the Prosecutor as a body within a judicial institution (prosecutorial independence) by a political pressure, which is unacceptable.

Initially, it is difficult to understand why the Prosecutor did not indict Izetbegovic on the basis of command responsibility, as the Prosecutor managed to indict the perpetrators themselves (implementers). This matter runs counter to the policy of giving priority to indict high leaders that Goldstone himself declared, as stated above. Some people argued that the Prosecutor did not indict him because of the pressures imposed on him by the US and NATO countries which were radically opposed to any indictment of the high-profile Bosnian Muslim political and military leaders.⁴⁶⁷ Therefore, that was allegedly why Delalic was acquitted by the Tribunal, as he also was one of those high leaders. In fact, this alleged 'real' policy posed, to some extent, the Tribunal to be accused of being a show trial, as the Prosecutor failed to be consistent in his official policy of prosecution, a matter that affects the legitimacy of the Tribunal. Now, if this argument was true, then, this can be considered a violation of the independence of the Court as the determination of not indicting Izetbegovic was shaped by political bodies but *not* the Prosecutor. The Prosecutor would then be deemed to be pleasing the political interests of states. In addition, the higher normative account was not achieved. The experience of the ICTY Prosecutor has shown that the prosecutor could play more roles and, therefore, exercise multi-functions. The prosecutor could utilise her discretionary power to promote or deliver other values, such as security, stability, peace, and so on.

2.4 Summary

The fact that international tribunals work within a political environment requires the prosecutor to be given broad power to discharge her duties. Before making decisions, the prosecutor needs to think how to give effect to those decisions. This is without prejudicing the

⁴⁶⁷ See *supra* n. 465.

independence of the prosecutor and also the rule of law that the prosecutor needs to respect in a way that was explained in introduction. Then, the meaningful prosecutorial strategy would consolidate the legitimacy of the international prosecution of these tribunals and, therefore, the legitimacy of the whole tribunals.

Three major developments can be found in the jurisprudence of the SC Tribunals. First, compared to the Military Tribunals, the selection powers of the SC ad hoc Tribunal Prosecutors have been increased, as they have had the power of selecting cases alongside the charges. However, and in a comparison with the Military Tribunals, the discretionary power has been reduced, as the Statutes of both Tribunals have imposed more restrictions on their discretionary powers. For example, the Prosecutors had to focus their prosecution on the high-ranking perpetrators. In so doing, the Trial Chamber has the right to review such decisions. This was a necessary development so the prosecutor can exercise the prosecutorial power more effectively on the one hand and without abusing her prosecutorial discretion on the other. Second, the SC's tribunals have witnessed a new generation of prosecution, where the international prosecutors have more roles to play to provide meaningful justice. With the establishment of the SC Tribunals, the international prosecutors through the use of discretion are to consider values other than justice (for example, peace and stability). We have seen how Goldstone considered the peace value when exercising his discretion before deciding the most responsible perpetrators for the international crimes. It was also a first time on the international level the parties of the trials were subjected to an independent court.⁴⁶⁸

The SC Tribunals, to a large extent, relied on the cooperation of states and organisations. However, the SC, itself the creator of the tribunals, did not play the role of the

⁴⁶⁸ See more helpful discussion about the involvement of a third independent party to conduct a trial and monitor compliance of the parties of the conflict to the legal rules in Joost Pauwelyn, *Conflict of Norms in International Law: How WTO Law Related to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003), Pp. 52- 69.

police whenever the Tribunals were in need of such help. Therefore, the Prosecutors sometimes had to use their discretion to get the most of their prosecution, as the case was with the policy of Goldstone. The role that, for example, Goldstone exercised whilst presenting the Karadzic, Mladic, Milosevic and other cases showed that the international prosecutor has a vital role to consider other international values than justice. As was discussed, Goldstone has considered several values, such as peace, security, stability, the interests of victims, and also justice whilst conducting his power. It is true that the legal texts of the Statute of both Tribunals do not provide the prosecutor with such a power. Nonetheless, the broad power of discretion has let the prosecutors exercise these new mandates that we have not seen before. Sometimes, the Prosecutors were conducting their functions in a more normal way, whenever the SC and NATO cooperated with them. As will be shown in the next chapters, The ICC Prosecutor's practice is a continuation of the SC ad hoc Tribunals Prosecutors' practices. The broad discretion given to the ICC prosecutor, and authorising the prosecutor to consider 'the interests of justice', as laid down in Article 53 (1)(c) and (2)(c) in effect allows her to play a prominent role in considering other values along justice. The new role the international prosecutor can play interprets, as will be seen throughout the next chapters, why and how the discretionary discourse is important for the success of the ICC.

Third, the analysis and investigation of the decisions of the prosecutor show that there are persistent criticisms that surround them. The arguments that were raised about the Prosecutor's decisions or policies of the prosecutor raise two opposite views, each of which is based on valid argumentation. As was explained earlier in this thesis, international criminal law is still an emerging project, and the norms, principles, and decisions that fall within this domain are subject to persistent criticisms. It is still full of contradictory mandates,⁴⁶⁹ which may open a gate for critical discussion about each. The next chapter will analyse and identify

⁴⁶⁹ See Chapter Three of this thesis.

dyadic sorts of arguments that surround the work of the prosecutor, based on the above analysis of the practice of the prosecutor. These arguments oppose one another and share one common charge for every position, which is the charge of politicisation.

CHAPTER THREE: THE LEGITIMACY OF DISCRETIONARY DECISION- MAKING PROCESS BETWEEN LAW AND POLITICS

3.1. The Prosecutor's Discretionary Power between Law and Politics

This chapter will provide an analysis of the concept of discretion and its relationship to the work of the prosecutor. This analysis will locate the issues concerning the prosecutor's discretion within theoretical and political contexts. Fundamentally, the chapter aims at identifying a possible wide range of discretion that the ICC prosecutor may exercise when applying *legal* criteria. Decision-makers have ability to interpret the legal categories in a way that could lead them to reach different outcomes, and yet justified in legal terms. This sort of practice amounts to the level of the exercise of discretion, in particular when there is no clear legal basis for the choice made to select a particular interpretation. The danger of this practice lies in the ability of decision-makers to consider extra-legal factors or even political calculations to choose among different, but legally worthy possibilities. I call this sort of discretion: legal interpretive discretion, where there might converge with prosecutorial discretion. It is only the latter sort of discretion, where prosecutors can normally choose between legally worthy possibilities, and hence conventionally consider extra-legal factors, or arguably political effects/repercussions.

The chapter will first identify the paradox within which the Court works and show why political effects or repercussions may be legitimately taken into account within the decision-making process. Specifically, it will argue that the process of the consideration of political elements is both inevitable and desirable. Of course, such a process will be distinguished from the power of politics that affect the decision of the prosecutor as an external pressure or imposition. Then, the chapter will suggest a structure in which political considerations or repercussions may legitimately be considered by the prosecutor. The chapter will move to analyse the theoretical context of the concept of discretion. It will identify two senses of discretion that can be exercised by the prosecutor, namely prosecutorial discretion and what I call legal interpretive discretion. This discussion aims at identifying and asserting the second

type of discretion in the context of the ICC prosecutor's work, as there is a quite superficial reference made to this sort of discretion in the current literature that extensively concentrated on analysing the first sort of discretion.

There is a clear paradox where the prosecutor needs to reconcile the legalist aspirations on which the Court was built, and the imperatives of realism without which the prosecutor would not be able to achieve a meaningful justice.⁴⁷⁰ From the early start of the operation of the Court, Moreno-Ocampo realises that 'there seems to be a paradox: the ICC is independent and interdependent at the same time. It cannot act alone. It will achieve efficiency only if it works closely with other members of the international community.'⁴⁷¹ It is within this context that the Court works and that the prosecutor needs to reconcile.⁴⁷²

Legalistic aspirations⁴⁷³ were meant to distance the ICC from the influence of politics.⁴⁷⁴ The extended debates of the influence of politics that surrounded the creation and work of the previous international tribunals, pushed the Rome Conference's participants to create a court that is conducting legal processes and remains immune from outside political influences.⁴⁷⁵ The ICC was seen then as 'a further step down the road from partiality to

⁴⁷⁰ Brubacher, *supra* n. 22, Pp. 71-2. See also Chapter One for more information about the meaning of 'meaningful justice'.

⁴⁷¹ Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC: Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, The Peace Palace, The Hague, The Netherlands (16th June, 2003), P. 2 available at <<http://www.iccnw.org/documents/MorenoOcampo16June03.pdf>>.

⁴⁷² Nerida Chazal, *The International Criminal Court and Global Social Control: International Criminal Justice in Late Modernity* (New York, Routledge, 2015), Introduction.

⁴⁷³ Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press, 1986), P. 1.

⁴⁷⁴ Sibylle Scheipers, *Negotiating sovereignty and human rights: International society and the International Criminal Court* (Manchester, Manchester University Press, 2009), Pp. 37- 60.

⁴⁷⁵ Danner, *supra* n. 14, P. 515, arguing that '[f]or an institution that promises a more muscular enforcement of the human rights of individuals, making the Court subject to direct political control would have constituted a betrayal of fundamental principles. The Prosecutor's ability to make individualized considerations based on law and justice, rather than the self-interest or sheer power of any particular state, transforms the Court from a political body festooned with the trappings of law to a legal institution with strong political undertones.'

impartiality.⁴⁷⁶ As was shown in Chapter One, providing the prosecutor with an independent power; the ability to initiate investigations or prosecute cases *ex officio*, was one of the main outcomes towards building a legal institution. The ICC prosecutor has a fundamental role – alongside the Court – to select which situations and cases will be the target of the Court. As Cassese earlier notes, ‘[t]he Prosecutor may thus bar any initiative of states or even any deferral by the Security Council which may prove politically motivated and contrary to the interests of justice.’⁴⁷⁷ This would strengthen due process and the rule of law. We have seen throughout the previous chapters that the Court aims to end the era of impunity. The idea was ‘that the most serious crimes of concern to the international community as a whole must not go unpunished.’⁴⁷⁸ Those who drafted the Statute aimed to make the Court apolitical.⁴⁷⁹ There is no place for political considerations to be taken during the Court’s proceedings.⁴⁸⁰ Only pure legal factors are to shape these proceedings.⁴⁸¹ No political compromises, considerations or influences should engage in the work of this Court.⁴⁸² For this reason, the current Prosecutor’s appeal to legitimacy is mainly linked to the Statute’s legal norms. The Prosecutor tries to obtain the perception of audiences by linking her decisions to pure legal rules and there is no place for any non-legal factor to be considered.⁴⁸³

⁴⁷⁶ Richard J. Goldstone and Gary Jonathan Bass, Lessons from the International Criminal Tribunals, in Sarah B. Sewall and Carl Kaysen, *The United States and the International Criminal Court: National Security and International Law* (New York, Rowman and Littlefield Publishers, 2000), Pp. 51-2.

⁴⁷⁷ Antonio Cassese, The Statute of the International Criminal Court: Some Preliminary Reflections, *European Journal of International Law*, Vol. 10 (1999), P. 162.

⁴⁷⁸ Czarnetzky and Rychlak, *supra* n. 143, P. 61, stating that ‘[t]he ICC as an institution is the result of absolute faith in a nonpolitical, *legalistic* model of justice: where human rights violations have occurred, prosecutions *must* take place either on the national level or in the ICC.’

⁴⁷⁹ Tor Krever, Unveiling (and veiling) Politics in International Criminal Trials, in Christine Schwöbel (ed.) *Critical Approaches to International Criminal Law: An Introduction* (New York, Routledge, 2014), Pp. 117-8.

⁴⁸⁰ See the position of Germany who were of the view that the Court only apply law, without considering the sensitiveness of politics, as discussed in Gerry Simpson, *Law, War and Crime* (Malden, Polity Press, 2007), Pp. 27-8.

⁴⁸¹ Greenawalt, *supra* n. 23, P. 612.

⁴⁸² See generally, Héctor Olásolo, The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-Judicial or a Political Body? *International Criminal Law Review*, Vol. 3, Issue: 2 (2003), 87- 150.

⁴⁸³ There are legal, sociological, and moral meanings of legitimacy. Legal legitimacy is linked to legal norms, and decisions that are taken in accordance with those norms. It means ‘what really is legally or morally legitimate’, see Richard H. Fallon, Jr. Legitimacy and the Constitution’, *Harvard Law Review*, Vol. 118, No. 6 (2005), P. 1851.

Technically, the ICC Prosecutor always asserts that her work is founded on pure legal bases. In her public statements, the Prosecutor seeks to confirm that her decisions were only taken on the basis of the legal requirements of the Statute. The public assertions that the role of the prosecutor is entirely governed by strict legal requirements have become common. These assertions imply that the prosecutor has no choice but is impelled to follow a legal imperative. The OTP regularly re-states in its policy documents that only a handful of situations and cases will be selected, and both Prosecutors have justified the decisions on strictly legal requirements of the Statute. This gives the impression that there was no choice to be made, and, therefore, that no extra-legal considerations, including political ones, have been taken into account within the decision-making process. Hence, all decisions were totally immune from any illicit factors. I call this a rhetorical denial of choice strategy. As one commentator has said it is as if they were ‘captives of some objective legal will.’⁴⁸⁴

This stance is not a new feature of international criminal justice but was also marked in the UN Tribunals. For example, on the question of indicting Karadzic and Mladic, Goldstone said, ‘[t]he real lesson I learned from the Karadzic indictment is that prosecutors should not take any account of political considerations in issuing their charges. Apart from being professionally inappropriate, neither the prosecutors nor their advisors have the political expertise on which to base such decisions.’⁴⁸⁵ Indeed, Koskeniemi points out that decision-makers are usually reluctant to announce to the public that legal rules or standards are simply indeterminate. Here, Koskeniemi states that ‘legal experts may themselves fail to take the

Sociological legitimacy refers to the perception of relevant audience to an institution, rules, or decisions. It means ‘what people think is legally or morally legitimate’, see Fallon, *ibid*, P. 1851. Moral legitimacy means the moral justification of an institution, rule, or decision, see Fallon, *ibid*, Pp. 1796- 7.

⁴⁸⁴ Special thanks to my Director of Studies John Strawson, who helped me to find out this expression.

⁴⁸⁵ Justice Richard, Comment: The Tribunal's Progress, *Institute for War and Peace Reporting*, No. 220 (12th May, 2001), available at <<https://iwpr.net/global-voices/comment-tribunals-progress>> (Last Access: 3rd November, 2015).

claims of determinacy and coherence all that seriously'.⁴⁸⁶ The ICC Prosecutors, in the course of justifying her decisions, portray them as if the legal requirements were determinate. In fact, this is a general policy decision-makers follow, as a technique to avoid being engaged in questions that usually arise from the indeterminate nature of international legal rules, which are highly contested.

The strategy of rhetorical denial of choice is often used by the ICC Prosecutor in the context of the criticisms that she receives. For example, Bensouda denied that the Court is adopting selective justice in the sense that her Office is not deliberately targeting Africa. She said, '[a]gain and again we hear criticisms about our so-called focus on Africa and about the court being an African court, having an African bias. Anti-ICC elements have been working hard to discredit the court and to lobby for non-support and they are doing this, unfortunately, *with complete disregard for legal arguments*'.⁴⁸⁷ [emphasis added]. She focused on the legal satisfaction that led her to make her current decisions. In her response to a question of the place of cases that have political indications, Bensouda answered, '[a]ll I can and will do is to apply the law in strict conformity with the Rome Statute'.⁴⁸⁸ Moreno-Ocampo also showed the strict rule approach that he followed when making his decisions in the sense that the legal rules are clear enough that no extra-legal factors were taken into account. In his famous and regular expression, Prosecutor Moreno-Ocampo already established this denial when he said, 'my duty is to apply the law without political considerations'.⁴⁸⁹ On the question of the application of Article 53, he said 'I cannot adjust the law to the political interests. Those who manage political agenda have to respect the law'.⁴⁹⁰

⁴⁸⁶ Martti Koskeniemi, The Politics of International Law – 20 Years Later, *The European Journal of International Law*, Vol. 20, No. 1 (2009), P. 8.

⁴⁸⁷ Smith, *supra* n. 44.

⁴⁸⁸ Gross, *supra* n. 26.

⁴⁸⁹ See Moreno-Ocampo's statement, *supra* n. 27.

⁴⁹⁰ See Ocampo's interview at International Bar Association *supra* n. 28. Also see Ocampo's interview at Global Observatory, *supra* n. 28. Also see Ocampo's interview at the Africa Report, *supra* n. 28.

However, when the Court has operated, this ideal does not seem as workable as the creators and joiners of the Court wished to see. The question that can be raised is, have the creators of the Court empowered the Court with all means necessary to maintain such a purely legally inspired institution? To what extent are the Court's aspirations achievable and reliable, without considering political necessities/effects? As long as the prosecutor is actively seeking to promote the legitimacy of the Court by showing her commitment to the legal rules, is it true that the prosecutor does not consider political considerations when making her decisions? In particular, that legitimacy in the sociological sense, as Richard H. Fallon states, is linked to the beliefs of relevant audiences in that an institution or decision can obtain legitimacy when those audiences 'regard[s] it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.'⁴⁹¹

The regular invocations for legalist principles on which the Court should conduct its missions using, for example, national legal systems as a standard against which the international criminal system is analysed is overestimated. An international legal institution lacks essential elements that their national counter-parts possess and that constitute the standard conditions of their success. This reality cannot be ignored when assessing international legal institutions. It was shown partly in Chapter One that several elements, such as enforcement mechanisms, cooperation, and the political compromises and environment in which the Court operates, shape the nature of the operation of this Court.⁴⁹² The Court, indeed, is not able independently to carry out its mission without political effects or repercussions. The independence of the Court on the political will of states to force its decisions does not only undermine the invocation for a purely legalistic institution, but also the legitimacy of the whole institution. In seeking to achieve the Court's goals, such as ending impunity and preventing

⁴⁹¹ *Supra* n. 483, P. 1795.

⁴⁹² See generally, *supra* n. 124.

crimes, the Court will not be systematically and accessibly able to achieve so, without the availability of these essential tools, which are often affected by political dimensions. In addition to the lack of the basic tools of initiating legal proceedings away from any political influences, some key legal rules of the ICC Statute itself, as will be shown in next chapters, are either broadly formulated or vague. Such rules either allow the prosecutor in effect to consider political imperatives and circumstances, as in the situation with the Article 53 ‘interests of justice’. The latter formulation was based on a compromise agreed on by the drafters, which gave due considerations to legalist and realist orientations, allowing the prosecutor to consider these accounts.⁴⁹³

The tension between legalism and realism was reflected earlier in the intense debates about the power of the prosecutor during the negotiation of the Rome Statute in 1998, as discussed in Chapter One. The two perceptions that reflect two opposed schools of political theory about the power of the prosecutor were particularly linked to the discretionary power and the exercise of this power. The main discussion of the prosecutor’s power during the Rome Conference revolved about preventing a politicised prosecutor. Now the Court has already begun its function, this ideal seems closer to fantasy.⁴⁹⁴ The extreme political environment in which the Court works, such as dealing with ongoing conflicts or countering the challenges around transitional justice, forces the prosecutor to consider these political contexts. The picture the Court is based on pushed the prosecutor to exercise additional functions. As

⁴⁹³ See the discussion of the compromises of providing the prosecutor with prosecutorial power in Chapter One of this thesis and also the discussion of ‘sufficient gravity’ in Chapter Four.

⁴⁹⁴ History has shown that criminal justice approaches have not fitted all situations, where gross violations of international human rights norms/international criminal legal norms were committed. Instead, it has shown that each situation involves complex circumstances where a certain mechanism was the right one to address the violations in question. For example, history has shown that four different approaches were used to deal with international atrocities: ‘physical revenge’ (the conflict in Rwanda), ‘the legalistic Model’, assigned by victors (the IMT), ‘the political Model’, where amnesty were imposed (Chile’s transition – Pinochet), and ‘mixed legalistic and political approach’ of TRC (South Africa’s transition). For more information about these four approaches, see Czarnetzky and Rychlak, *supra* n. 143, Pp. 63- 85.

Greenawalt argues, ‘the ICC reflects a more complex reallocation of authority which confers upon the ICC Prosecutor additional political functions alongside increased legal authority.’⁴⁹⁵

In addition to the indeterminate character of the legal standards embedded within the Statute, the prosecutor is pushed to deal with sensitive and political environments. In deciding on jurisdiction or admissibility, the prosecutor might be engaged in politics when making decisions. For example, on the question of jurisdiction, Moreno-Ocampo rejected the Palestine situation on the grounds that the Statute does not provide him with authority to determine ‘the term “State” within the meaning of article 12’.⁴⁹⁶ The OTP, therefore, said that the question of statehood was a matter that is either for the ASP of the Rome Statute or the UNGA to decide.⁴⁹⁷ Amnesty International argued that this ‘decision opens the ICC to accusations of political bias and is inconsistent with the independence of the ICC.’⁴⁹⁸ They claimed that the Prosecutor could have referred the situation to the judges of the Court, instead of to political bodies, such as the ASP or the UN bodies, as the Statute clearly requires the prosecutor to do so.⁴⁹⁹ Schabas also argues that ‘the prosecutor was wrong to say he did not have the authority to make such a determination.’⁵⁰⁰ He submits that this issue under ‘Article 12 (3) is a legal question... [and] is jurisdictional fact.’⁵⁰¹ The Prosecutor could have interpreted them in a way that allows him to

⁴⁹⁵ Greenawalt, *supra* n. 23, P. 613.

⁴⁹⁶ ICC, Office of the Prosecutor, Situation in Palestine (3rd April, 2012), Para. 5, available at <<http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9836106D2694A/284387/SituationinPalestine030412ENG.pdf>>.

⁴⁹⁷ *Ibid*, Para. 5.

⁴⁹⁸ Press Release, Fears over Denial of Justice to Gaza Victims after ‘Dangerous’ ICC Decision, *Amnesty International* (2nd April, 2012), available at <<http://www.amnesty.org.uk/press-releases/fears-over-denial-justice-gaza-victims-after-dangerous-icc-decision>>.

⁴⁹⁹ *Ibid*, arguing that ‘It also breaches the Rome Statute which clearly states that such matters should be considered by the institution’s judges.’ This argument was countered by Kevin Jon Heller who opines that the Statute does not require the prosecutor to refer this question to the judges or that this is a decision for the judges. As to the OTP’s own authority, he argued that Article 12 (3) is silent in this regard; the fact that ‘the OTP is responsible for deciding whether to investigate a particular situation, does not necessarily mean the OTP has the authority to decide whether an entity referring a situation qualifies as a state.’ See Kevin Jon Heller, Which Organ of the ICC Decides Whether Palestine Is a State? (Updated), *Opinio Juris* (4th April, 2012), available at <<http://opiniojuris.org/2012/04/04/which-organ-of-the-icc-decides-whether-palestine-is-a-state/>> (Last Access: 2nd May, 2016).

⁵⁰⁰ *Supra* n. 220, P. 374.

⁵⁰¹ *Ibid*, P. 374.

accept Palestine's lodge, in turn leaving *probably* the Appeal Chamber, under Article 82 (1)(a) according to Kevin Jon Heller, to decide the issue in case the decision was appealed.⁵⁰² The Prosecutor could let the judges have their final decision on the issue in question. However, even if the Prosecutor accepted this situation, such a decision again would be accused of being political. Davenport argues that the Court clearly has no jurisdiction and the context of this situation 'is precisely the kind of politicization and over-reaching that was feared from an independent prosecutor.'⁵⁰³ The charge of politicisation seems inevitable whichever decision the prosecutor could take.

Further, although the drafters of the Statute tried to avoid a politicised prosecutor, nonetheless, the current institutional design of the Court has staked the legitimacy of the Court on 'contingent political criteria.'⁵⁰⁴ The Court still lacks several capacities, which makes political effects necessary to the success of the Court and the prosecutor. For example, The Court has no system of coercive enforcement.⁵⁰⁵ It totally depends on the political wills of states throughout all stages of its functions. Conducting investigations, collecting information and evidence, securing arrests, and bringing witnesses require a great deal of cooperation from states.⁵⁰⁶ As officials of states may be involved in the crimes for which the Court seeks investigation or prosecution, those states will only cooperate with the Court to an extent that they keep their officials protected. Therefore, the success of the Court will be contingent on political circumstances of a conflict that comes under its jurisdiction. In addition, the Court has limited resources that require the prosecutor to choose among equally legally admissible situations and cases.⁵⁰⁷ The OTP acknowledged the limited resources of the Court through

⁵⁰² Heller, *supra* n. 499.

⁵⁰³ *Supra* n. 112.

⁵⁰⁴ Greenawalt, *supra* n. 23, P. 586.

⁵⁰⁵ See generally, *supra* n. 124.

⁵⁰⁶ *Supra* n. 61, P. 252.

⁵⁰⁷ M. Cherif Bassiouni, Where is the ICC Heading? The ICC- Que Vadis? *Journal of International Criminal Justice*, Vol. 4 (2006), P. 423.

several documents, and confirmed that the Court ‘is an institution with limited resources.’⁵⁰⁸ All these circumstances identify the political dimension that is inherently linked to the work of the prosecutor, as Cote points out.⁵⁰⁹

The rhetorical denial of choice does not correspond with the inevitability of extra-legal factors as well as political effects of the decision taken. Brubacher argues that decisions must be both ‘compliant with objective legal criteria but capable of being implemented in a manner that adapts to the prevailing political and social context.’⁵¹⁰ As was earlier analysed, these factors are an intrinsic part of the decision-making process. Norman Abrams argues that within the common law system, the prosecutor is envisaged with a broad discretion that enables her to deal ‘with individual cases to consider special facts and circumstances not taken into account by *the applicable rules*’⁵¹¹ [emphasis added]. Such an envisagement does not achieve its main aim, without the consideration of the individualised and detailed factors that surround a particular case. Therefore, why should not the prosecutor take into consideration political dimensions? Below, this chapter will explain how such a process should be taken into account and how it can be justified in the context of the multi-functional prosecutor, where due consideration should be given to political repercussions/effects such as peace, security, stability, and others alongside justice.

In this regard, we should make a distinction between the rhetorical discourse the ICC Prosecutor has announced and the practical application of the legal rules the ICC Prosecutor has followed. As will be seen in Chapter Four, although the ICC Prosecutor is always committed in her public statements to show that no choice is made when applying the legal rules, the Prosecutor has exercised considerable discretion to interpret the term ‘sufficient

⁵⁰⁸ See *supra* n. 187, and see the more recent one, Draft Policy Paper on Case Selection and Prioritisation 2016, Paras. 9 and 47.

⁵⁰⁹ *Supra* n. 38, P. 171. See also the general discussion in Introduction of this thesis.

⁵¹⁰ Brubacher, *supra* n. 22, P. 74.

⁵¹¹ Abrams, *supra* n. 60, P. 2.

gravity'. In so doing, the Prosecutor has found out several interpretations as to what is meant by the term 'sufficient gravity', and, therefore, she chose from these interpretations. In selecting one of the possible interpretations of the term 'sufficient gravity', she simply justified her decisions on the basis of satisfying the legal requirements. In Chapter Two, it was established that the legal criteria have a dual function that can be used to achieve a specific end other than what a criterion was essentially meant to obtain. On this basis, what is legally determined (*rhetoric*) is not similar to what is in *practice* legally justified. Whatever the public justifications given for making certain decisions, this should be distinguished to what has been in practice. The justification of making a certain decision on the basis of a specific legal criterion can be indeed masked by underlying political considerations, as such a criterion may have dual nature. Cote argues that Del Ponte would likely have reached a similar decision not to prosecute NATO's leaders, even if she had opened a real investigation against them. The indeterminate and open-ended meaning and the dual nature of these legal rules in effect can enable decision-makers to choose among the different available interpretations to reach a certain end.

Before we analyse the concept of discretion, and its types within the ICC Statute, it is important to identify what is meant by the term political, which sense of political may be legitimately justified when considered by the prosecutor within her decision-making process, and under which sort of discretion that can be taken.

3.3.1. The Prosecutor, Discretion, and the Political

The recourse to political considerations, or the fact that some decisions of the prosecutor will have political repercussions, are not usually avoidable, and might even appear desirable. Whether or not such considerations should be taken into account is a matter of debate. However, the problem lies in the precise use of the term political. In this regard, it is

important to distinguish between the charge of political bias/motivation and the separate issue of political effects/repercussions.⁵¹² Whilst political in the first sense is not acceptable, and undermines the rule of law, the second sense is either unavoidable, or may appear desirable to achieve political aims of the judicial institution. This thesis argues that only the second set of considerations, in particular when associated with extra-legal factors may be legitimately justified in the course of the exercise of *prosecutorial discretion*. The next section, in turn, will explain the *difference* between the exercise of prosecutorial discretion and legal interpretive discretion, where *only* in the former use of discretion, political in its second sense may be legitimately taken.

Political in the first sense, as Robinson points out, is a process in which decision-makers ‘are *not really doing law* but rather using legal argumentation as a mere mask or pretext as they pursue their political (apologist or utopian) aims.’⁵¹³ Liberal jurists deny the engagement of politics either in the administration or judicial process of international justice, as it constitutes a serious danger to the rule of law.⁵¹⁴ Commentators and legal practitioners tend to insist on the role of politics at the stage of the creation of judicial institutions, and that no more political intervention can be taken after this stage. In other words, this political process should be separated from the action of international criminal justice. In his famous remarks on the IMT at Nuremberg, Judge Jackson affirmed that although the establishment of this Tribunal was political, however what followed was a judicial process, where he was responsible ‘to run the legal end of the prosecution.’⁵¹⁵ Fred Mégret also points out that international criminal justice

⁵¹² Of course, there are more senses of political, but this thesis will confine only to these two senses, in order to draw the line between the second sense of political with others. See *supra* n. 480.

⁵¹³ *Supra* n. 73, P. 39.

⁵¹⁴ See generally Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton, Princeton University Press, 1961).

⁵¹⁵ Cited in Bass *supra* n. 273, P. 6.

is ‘a phenomenon anchored in power yet simultaneously capable of transcending it.’⁵¹⁶

Therefore, politics should ideally be limited to the creation of such a judicial institution.

Political, in this sense, might take different aspects and would constitute a violation of the rule of law and the independence of the prosecutor. For example, external pressures or influences on the prosecutors to take a specific decision is simply a mere political process and cannot be accepted under any circumstances, as it violates the independence of those prosecutors. The OTP also emphasises several times in its policy papers the irrelevance of this the political, providing that the ‘duty of independence goes beyond simply not seeking or acting on instructions. It also means that the selection process is not influenced by the presumed wishes of any external source’.⁵¹⁷ As was shown in Chapter Two, the International Prosecutors of the Military Tribunals were, on several occasions, accused of taking orders from their governments to make their decisions. For example, Herman Goren argued that the Russian and French judges already received instruction to make the final judgment against him.⁵¹⁸ This sort of political pressure is what is meant in this regard and cannot be justified. Regardless of the suitability of these allegations, it is within this context that any decision made on the basis of external pressures or influences is merely a political process and cannot be justified.

Another example is the instrumentalisation of a court for achieving political ends. This also would violate the independence of the prosecutor and would make any decision undertaken on this basis political. This scenario can be undertaken by decision-makers themselves or imposed by an external body. A best example that can be given here to explain the instrumentalisation of a court is the *Haymarket* and *Chicago* trials, where the defendants were

⁵¹⁶ Fred Mégret, The Politics of International Criminal Justice, *European Journal of International Law*, Vol. 13, No. 5 (2002), P. 1264.

⁵¹⁷ Criteria for Selection of Situations and Cases 2006, Pp. 1-2. See also Policy Paper on Preliminary Examinations 2013, P. 7, stating that independence ‘means that decisions shall not be influenced or altered by the presumed or known wishes of any party’.

⁵¹⁸ Cited in G. M. Gilbert, *Nuremberg Diary* (New York, Straus Farrar, 1947), Pp. 12-3.

prosecuted for their political oppositions to the military intervention of the U.S. in Vietnam.⁵¹⁹

The decision to prosecute those defendants aimed only at removing them from the political scene, based on partisan political aims. This sort of politics is not acceptable, as it deforms the law. As Gerry Simpson argues, officials in such cases are inappropriately distorting the legal rules.⁵²⁰ Therefore, this sort of politics is not acceptable and cannot be justified under any circumstances.

Bias is another dangerous aspect of this sense of political. Following the indictment of the President of Sudan, the Court was consistently accused of being neo-colonially biased against Africa. This allegation became more consolidated when the Court kept targeting African states and rejecting the non-African ones, in particular, the British situation in Iraq. Although there is no specific evidence, Wouters and Chan argue, ‘suggest[s] that any of the Court’s investigations were wrongly initiated’,⁵²¹ however, it seems not easy at all to remove this accusation from the work of the ICC Prosecutor. Macote Ambrozio argues that ‘it is reasonable to label the court as an institution of imperialists that is engaging in a campaign of disgracing African Leaders, and the continent on behalf of the West’s political and economic interests instead of in the name of justice for which it was meant to be.’⁵²² He continues that ‘[i]t would be hard to separate the ICC from the charge of neocolonialism behavior, especially at the time the court itself has engaged in the practices that are not different from colonialism in its selection of cases to prosecute.’⁵²³ This is political bias that has been seriously raised against the Prosecutor and seems now difficult to remove. As will be identified below, although

⁵¹⁹ For information about the instrumentalisation of a court for political aims in the context of the Chicago Trials, see Donald H. J. Hermann, *Contempt: Sacrilege in the Judicial Temple the Derivative Political Trial*, *Kentucky Law Journal*, Vol. 60 (1972), 565- 610.

⁵²⁰ *Supra* n. 480, Pp. 11- 29.

⁵²¹ *Supra* n. 48, P. 13.

⁵²² Macote Ambrozio, *The African Union’s Role in Obstructing Justice at the ICC*, *the University of UTAH* (31st October, 2014), available at <<http://law.utah.edu/the-african-unions-role-in-obstructing-justice-at-the-icc/>> (Last Access: 18th April, 2016).

⁵²³ *Ibid.*

the Prosecutor justifies her decisions on a regular basis, taken against these African states, on the application of the legal categories and no consideration given to any non-legal factor, indeed the process of the application of these legal requirements as such may involve an exercise of discretion (legal interpretive discretion). This may allow the prosecutor to come up with different outcomes when interpreting these legal categories, in particular when law does not provide a clear basis for choosing a specific interpretation or that decision-makers fail to provide a reasonable basis for making the given interpretation. Here, it is true that the prosecutor justified her decisions on the basis of legal requirements, however, the open-ended meaning of these legal categories may allow her to achieve a political end to be biased against certain states or individuals. Therefore, if the prosecutor selects a particular interpretation that immunises some situations or cases from investigation or prosecution, without giving any sort of justice to take place, then this position may amount to the level of political bias. The accusation of the Court of being an African court might strongly be linked to the application of these legal requirements that in effect may provide the prosecutor with a capacity to exercise a space of discretion. As opposed to Wouters' and Chan's argument, the problem may lie in the very application of these legal requirements. These authors argue that the problem may lie in the exercise of prosecutorial discretion, but not in the application of these legal rules when appropriately applied. This argument is not accurate enough. As will be shown in Chapter Four, the Prosecutor deployed her discretion when interpreting 'sufficient gravity', which is a legal threshold and adopted different interpretations for this term to make her decisions. The problem may be considerably linked then precisely with *the use of space of* discretion when applying these legal rules.

Political, in its second sense (repercussions/effects), often arises as a consequence of making a choice within the law. When decision-makers interpret or apply the legal rules, this usually involves making a choice. The existence of this choice will likely have political

repercussions, or raise political effects. From the early start of the Court's operation, McDonald and Haveman point out that, '[w]hile political considerations will be inescapable, the choices that are made in the early stages, and the reasons behind those choices, will set the tone for years to come and will strongly influence public perceptions of the Court and what it is for.'⁵²⁴ Sarah Nouwen and Wouter Werner also assert that politics in various ways is 'intertwined' with the law, as well as Danielle E. Goldstone who emphasises that 'political sensitivities are inevitable in the Prosecutor's own decision-making process.'⁵²⁵ As was shown in the example of the Palestine situation and consistent with the different views raised about the Prosecutor's decision, the latter had a political repercussion that deemed the Court not neutral. Such accusation is not avoidable, as the law of this given situation entails choices, depending on the interpretations that this law involves. Law inherently involves choices.

The political arrangements that accompany ongoing conflicts for the purpose of putting an end to the fight and reaching a peace deal could have a major *effect* on the decision of the prosecutor that cannot be ignored, let alone sorted out. As investigatory and prosecutorial decisions may have significant *effects* on peace negotiations, the prosecutor will have to consider those political effects. The ICC Statute itself through Article 53 (1)(c) and (2)(c) requires the prosecutor to consider the effect of her potential proceedings on 'the interests of justice'. In Chapter Five, it will be identified how Goldstone considered the peace process when he decided not to open the investigation against Milosevic on the eve of the Dayton Peace Agreement. He delayed this decision to the time when the political scene in the region was

⁵²⁴ McDonald and Haveman, *supra* n. 20, P. 3.

⁵²⁵ Sarah Nouwen and Wouter Werner, Doing Justice to the Political: the International Criminal Court in Uganda and Sudan, *European Journal of International Law*, Vol. 21, No. 4 (2010), P. 943, stating that '[d]epending on one's definition of politics, there are various ways in which the ICC is inextricably intertwined with politics. For instance, the Court was created by political decisions, it adjudicates crimes which are frequently related to politics, and it depends on a mysterious and seemingly magical 'political will' for the enforcement of its decisions.' Danielle E. Goldstone, Embracing Impasse: Admissibility, Prosecutorial Discretion, and the Lessons of Uganda for the International Criminal Court, *Emory International Law Review*, Vol. 22 (2009), P. 790.

ready for taking such a step. The consideration of such a political effect does not undermine the independence of the prosecutor. As Brubacher argues, ‘[t]he intervention by the OTP into ongoing disputes or post-conflict reconciliation processes requires the Prosecutor to consider the potential impact of an investigation or prosecution on the political process.’⁵²⁶ The prosecutor needs to be flexible when making a decision in such cases. The timing of indictments can have political implications that raise several concerns in relation to the meaningful justice approach that the ICC prosecutor follows. As Philipp Kastner suggests, ‘[t]he ICC's commitment to bringing perpetrators of international crimes to justice does not hold the OTP back from postponing the publication of indictments a few weeks or months in order to show itself politically sensitive and in line with the requirement of acting in accordance with the “interests of the victims,” as stipulated in article 53(1) (c) of the Rome Statute.’⁵²⁷ The timing of indictment is one important political consideration that raises several concerns in relation to the meaningful justice approach that the ICC prosecutor follows.

As will be discussed in detail in Chapter Five, the prosecutor might need to weigh these political arrangements against other interests that might likely favour a different mechanism to the ICC. These interests might even perceive the ICC as a threat to destroy the given conflict-resolution process. The ICC is not a typical response to all atrocities in this world. Other justice and non-justice mechanisms might be more relevant and applicable to situations, where the ICC may not be so. The institutional design on which the international community set the Court obliges the prosecutor to exercise several abnormal mandates that no normal prosecutor would deliver. For example, peace-related concerns should be typically outside the prosecutor’s function, as the latter is a body within a judicial institution. Such a consideration often involves political compromises the prosecutor should not take into account within her decision-making

⁵²⁶ Brubacher, *supra* n. 22, P. 81.

⁵²⁷ Philipp Kastner, The ICC in Darfur—Savior or Spoiler? *ILSA Journal of International and Comparative Law*, Vol. 14 (2007), P. 185.

process. Usually, it is abnormal that the prosecutor considers the value of peace when applying the law.

However, how could the prosecutor respond in situations where the Court's proceedings constitute a real obstacle to complete a certain peace negotiation and that such a process would put an end to atrocities and, therefore, save the lives of a large number of potential victims (Uganda situation)? How about if the given state opted for amnesty as a mechanism to deal with atrocities that this country faces (Uganda situation)?⁵²⁸ In addition, the prosecutor may also face moral questions in relation to international crimes that often result from a humanitarian intervention, as was the case with peace-keepers of the UN, or NATO. Such missions are often built on the humanitarian basis to stop serious international crimes that take place in a certain country. However, these interventions often result in further international crimes that could reach the attention of the ICC prosecutor (Sudan situation).⁵²⁹ The question here is how should the prosecutor deal with such a highly politically issue?

These political considerations are often necessary to achieve a more effective strategy of prosecution. They may even appear indispensable to that effect. All these concerns raise the question of the place of the political considerations within the decision-making process that the prosecutor makes when exercising prosecutorial discretion. As will be discussed in the following chapters, the prosecutor does need to involve these concerns. The current prosecutor is left to her own devices and pushed into a political role, where reference to political considerations seem inevitable. The creators of this Court did not empower her with a necessary and independent capacity to exercise her mandates as the case with national courts. It is true

⁵²⁸ Chapter Five answers this question and shows the new mandates that the international prosecutor of the permanent Court plays.

⁵²⁹ Sudan Accuses U.N. Peacekeepers of Killing Seven Civilians in Darfur, *Reuters* (27th April, 2015), available at <<http://www.reuters.com/article/2015/04/27/us-sudan-darfur-unamid-idUSKBN0N11SC20150427#P9EZdcMhvzoGJSkx.97>> (Last Access: 24th November, 2015).

that although political considerations and effect are not relevant in the context of national judicial systems, things may appear different at the international level as was argued earlier in this chapter. Indeed, the strategy of prosecution and the mandate of the ICC prosecutor takes place in a broader context than a normal (national) prosecutor would hold. Therefore, why should not the prosecutor take such considerations within the decision-making process? To put it in a higher level, the prosecutor often has no choice to avoid such considerations.

As Greenawalt argues, '[t]o the extent that such considerations form a part of the prosecutorial calculus, the evolution of the ICC assumes a different cast.'⁵³⁰ Seen in this context, consideration of political effects and consequences will remain a legitimate part of the decision-making of the prosecutor. This in turn also emphasises the multi-functional role the prosecutor is playing since the establishment of the ad hoc Tribunals, who needs to consider several values whilst delivering justice. However, the line between these two sorts of political is not bright and not easily distinguished. For this reason, and consistent with the view of this thesis that the consideration of political effects/repercussions, alongside extra-legal factors, a structured approach is needed to maintain the distinction between these sorts of political and identify which and when such considerations would be legitimately justified.

3.1.2. Structured Approach

The approach provides that the prosecutor *is to utilise extra-legal considerations, including the political ones of the given situation or case as a tool to achieve a higher normative end of the position*. The higher normative aim is meant to be justice, as there are no unified global aims for the Court yet. The language of the Preamble of the ICC Statute refers to the importance of justice as a main aim the Court seeks to deliver. For example, 'millions of children, women and men have been victims of unimaginable atrocities that deeply shock the

⁵³⁰ Greenawalt, *supra* n. 23, P. 613.

conscience of humanity,’ ‘that the most serious crimes of concern to the international community as a whole must not go unpunished,’ and ‘to put an end to impunity for the perpetrators’. We take this aim⁵³¹ as a measure on which the process will be verified, as it is the most common and prevalent aim that the Statute of the Court and the OTP has developed.⁵³² The achievement of justice here is meant to be whenever, wherever, and whatever is possible.⁵³³ It is meant to be a broad justice,⁵³⁴ as understood either by the Court or the relevant society of a certain situation, whichever is more achievable.⁵³⁵ This strategy is to be taken within the decision-making process by the prosecutor when exercising prosecutorial discretion. The approach would help to ease the tension or just end it depending on the given circumstances of the position in the question. This approach further means that the prosecutor may let other mechanisms (justice or non-justice) tackle the situation or case in question, as long as those mechanisms are better able to deliver justice.⁵³⁶ The decision-maker is considering the two

⁵³¹ Justice can be delivered through different way. It does not have to be delivered by the ICC, as there are several mechanisms can undertake this mission, such hybrid, ad hoc, and national tribunals. For more information about these forms, see, Milena Sterio, Rethinking Amnesty, *Denver Journal of International Law and Policy*, Vol. 34 (2006), Pp. 374-9. See also, Jane E. Stromseth, Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law? *Georgetown Journal of International Law*, Vol. 38 (2007), 251- 322.

⁵³² Maragret deGuzman, Choosing to Prosecute: Expressive Selection at the International Criminal Court’, *Michigan Journal of International Law*, Vol. 33, Issue: 2 (2012), 265- 320.

⁵³³ The thesis will argue that justice cannot be achieved only through the ICC. It will suggest that the prosecutor may be advised to refer to other sorts of mechanisms to achieve justice. This sort of justice will be framed by the relevant society who is suffering mass violation of human rights. As justice may take different forms, therefore, the meaning of justice that this research adopts is the broad one that is capable of encompassing all sorts of it.

⁵³⁴ Justice, basically, has two meanings: broad and narrow. For the purposes of this research, the broad meaning will be taken, as it includes all types of justice. This is to encompass the other types of justice that may be demanded by a certain society that is experiencing violence, whether during the ongoing atrocities, or during the transitional period. In 2011, the UN defined the broad meaning of justice in its report, and enumerated the possible mechanisms that basically involve ‘both judicial and non-judicial mechanisms, including individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals. See *supra* n. 65, P. 9.

⁵³⁵ For more information about the potential sort of justice mechanism, see Teitel, *supra* n. 66, Teitel referred to five main mechanisms that basically encompass all sorts of mechanisms: criminal justice, historical justice, reparatory justice, administrative justice, and constitutional justice. Also, Hayner did mention various ways by which countries can respond to past atrocities, such as: holding trials, truth commission, providing individuals access to security files, reparations, building memorials, Lustration, making comprehensive reforms in all section of a state, see Hayner, *supra* n. 66, P. 12.

⁵³⁶ Chapter five of the thesis provides several conditions that the prosecutor needs to verify before deciding on the jurisdiction of the Court. These conditions are necessity, legitimacy, and the demands of victims.

pillars by moving from one to another by taking into account the aim of each. By considering extra-legal considerations, including the political ones, the prosecutor would help to show that her decision is able to be responsive to the changing behaviours, wills, and policies of states.⁵³⁷ Therefore, the appearance of being *utopian* could be minimised, if not removed. And by seeking to achieve the higher normative aim, which is justice, the prosecutor could help show that her decision is not meant to serve political aims, as the aim of the process is built to reach justice. Therefore, the appearance of being *apologist* could be minimised, if not removed.

Indeed, the process of the reconciliation of these pillars in the context of international legal orders is invoked by several academic pioneers. Cassese, for instance, ascertains that the process of the reconciliation between history and politics on the one hand and law on the other is a continuous modern theme.⁵³⁸ He asserts that the combination of these components (law, history, and politics) can be completed by using an interdisciplinary method. Cherif Bassiouni also clearly refers to the importance of the consideration of extra-legal accounts within the decision-making process. He said that these considerations ‘reflect values which cannot be underestimated, let alone ignored’.⁵³⁹ International criminal justice, as a system, does not only function within its legal parameters, ‘without consideration for other broader concerns’.⁵⁴⁰ More than that, Bassiouni digs deeper into the issue when he says that

It should be noted that there is nothing inherently incompatible between politically oriented goals and the achievement of the higher value of justice for the purposes of

⁵³⁷ Richard A. Falk and Cyril E. Black, *The Future of the International Legal Order: Trends and Patterns* (Princeton: Princeton University Press), Vol. 32, Issue 3 (1969), Pp. 33-4.

⁵³⁸ Antonio Cassese, *International Law in a Divided World* (Oxford: Clarendon 1986), P. 2.

⁵³⁹ M. Cherif Bassiouni, Perspectives on International Criminal Justice, *Virginia Journal of International Law*, Vol. 50 (2010), P. 293.

⁵⁴⁰ *Ibid*, P. 293.

advancing the common good and, in particular cases, advancing goals pertaining to other positive outcomes, such as peace and reconciliation.⁵⁴¹

This is an interesting idea advanced by Bassiouni supporting the main idea of our approach that seeks to offer that the reconciliation of these two goals is under the power of the decision-maker (prosecutors) and, in so doing, the latter is not politically-motivated, as he or she uses such a balance to exercise a more efficient strategy to deliver his or her main mandates. By such a process, the decision-maker can demonstrate the content of the given legal discourse in a palpable manner. Brubacher also confirms that the strict rule-based approach the prosecutor follows does not help the success of the Court. He points out that the success of the Court:

hinges on the ability of the Prosecutor to adopt a policy where his discretion to initiate investigations is determined not only on the criteria contained within the ICC Statute, but also on those factors necessary for the exercise of his prosecutorial functions. This latter set of considerations necessitate that the Prosecutor take into account the political factors pertaining to the maintenance of international peace and security, as well as the ability of the Court to engender sufficient state support.⁵⁴²

This framework is also derived from analysing the jurisprudence of the Military and the SC Tribunals. As was critically discussed in the previous chapter, the Prosecutors of these Tribunals have used in practice this strategy to avoid the dual criticisms as much as possible, and they managed to put the higher normative aim, which is justice, in effect. We have also seen how Goldstone managed to achieve justice to Milosevic, decrease the level of violence,⁵⁴³

⁵⁴¹ *Ibid*, P. 293.

⁵⁴² Brubacher, *supra* n. 22, P. 94.

⁵⁴³ 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.

and keep the peace process in place,⁵⁴⁴ when he took the extra-legal considerations within the decision-making process.⁵⁴⁵ He used the postponement strategy as a way to complete the process successfully. There was a noticeable relationship between this strategy and the potential outcomes and results of the prosecutorial strategy. It was noticed that the above strategy helped the prosecutors to advance the efficiency of the prosecution and get the most of it. Thus, it was not only the above framework that helped to ease the tension between the *apologia* and *utopian* accusations, but it also led to a more effective strategy of the prosecution.

The approach shows that this process does not render the prosecutor politically-motivated, as my argument suggests that the process of *the consideration of extra-legal considerations is a sort of tool that the prosecutor can use to reach a normative aim*. Thus, the prosecutor does not consider those accounts to achieve political aims; instead it is only a strategy by which the prosecutor uses an instrument to reach normative ends, in particular given that a current international prosecutor has more roles to play when delivering justice.

3.2. The Concept of Discretion

Discretion, as George C. Christie states, is universally referred to as a choice.⁵⁴⁶ It is a power that allows decision-makers to choose between various courses of action. Where there is only one course of action to be taken, this is not an exercise of discretion. Rather, it is a legal duty that should be done. The exercise of discretion, De Smith and Evans argue, means that there is no one unique answer to the given problem.⁵⁴⁷ Legislators, when making rules, are usually impeded by a ‘relative ignorance of fact’ and a ‘relative indeterminacy of aim’, the matter that, Hart emphasises, makes the exercise of choice between the available alternatives

⁵⁴⁴ For more discussion about the strategy of prosecution conducted by Goldstone, *supra* n. 273, Pp. 227- 30.

⁵⁴⁵ See the last section of Chapter Two of this thesis.

⁵⁴⁶ George C. Christie, An Essay on Discretion, *Duke Law Journal*, Vol. 35, No. 5 (1986), P. 747.

⁵⁴⁷ *Supra* n. 54, P. 278.

desirable.⁵⁴⁸ Its existence is necessary, as law is either indeterminate or limited. Therefore, law-makers often tends to give a space for the decision-makers to exercise discretion to deal with complex issues. Choice is then the key aspect of the exercise of discretion. As long as there is a space for decision-makers to make a choice within the legal order, this means that officials have discretion whatever the *sort* and *scope* of this discretion is. However, discretion is of different senses depending on ‘features of the context.’⁵⁴⁹ The exercise of discretion could take a sense of creating, weighing, or interpreting standards. Accordingly, their roles, scopes, and sources are varied from one sort to another, and from one legal system to another, as will be explained fully in the next sections.

Discretion, Keith Hawkins points out, ‘is inevitable because the translation of rule into action, the process by which abstraction becomes actuality, involves people in *interpretation* and *choice*.’⁵⁵⁰ [emphasis added]. For the purpose of this thesis, this statement is important in that it refers to the dynamics of the operation of discretion. It either allows a decision-maker to choose among several available *interpretations*, where legal rules are interpreted, or to make choices, when these legal rules provide so. Each of these potentials is derived from a different sort of discretion that a legal order can involve. I call the first type legal interpretive discretion, whilst the second one is well known and is often administrative discretion: prosecutorial discretion. These two senses of discretion will be explored and analysed. In the context of the discretionary power of the ICC Prosecutor, the current literature has predominantly focused on the analysis and discussion of prosecutorial discretion. However, there is *scarce* reference made to the ability of the ICC prosecutor to exercise legal interpretive discretion when applying

⁵⁴⁸ *Supra* n. 31, Pp. 124-5.

⁵⁴⁹ Ronald M. Dworkin, The Model of Rules, *The University of Chicago Law Review*, Vol. 35 (1967- 1968), P. 32, Dworkin identifies for example two senses of discretion: weak and strong senses.

⁵⁵⁰ Keith Hawkins, The Use of Legal Discretion: Perspectives from Law and Social Science, in (ed) Keith Hawkins, *The Uses of Discretion* (Oxford, Clarendon Press, 1992), P. 11.

the legal categories.⁵⁵¹ This rare reference also has not examined this discretion as a sort that stands on its own. Therefore, this section will identify this discretion and reveal it as a sense that stands on its own. Also, the chapter will explore the conceptual aspects of these two senses of discretion and apply them to the discretionary power of the ICC prosecutor. This explanation will draw on the useful presentation and discussion of discretion by Ronald Dworkin.⁵⁵²

Dworkin distinguishes between strong discretion and weak discretion.⁵⁵³ This distinction between two types of discretion can be best applied to legal interpretive discretion and prosecutorial discretion. The strong discretion is exercised when there is no standard given by the law, and decision-makers are left to their own devices to create their own standards. This is a strong sense of discretion where decision-makers make decisions. The most cited example that Dworkin uses to explain this sort of discretion is ‘a sergeant has discretion who has been told to pick any five men for patrol he chooses’⁵⁵⁴. The sergeant is authorised to create his own standard on which those men will be selected. Weak discretion is exercised when the law already provides a standard and only asks decision-makers to apply it.⁵⁵⁵ For example, Dworkin explains, ‘the sergeant [is ordered] to take his five *most experienced* men on patrol’.⁵⁵⁶ [emphasis is added.] The term ‘most experienced’ is the standard that is imposed on the decision-maker to apply.

The strong sense of discretion represents the classical type of discretion, which is known as prosecutorial discretion, where decision-makers (prosecutors) use their own

⁵⁵¹ See Vaid, *supra* no. 12. See also Schabas, *supra* n. 4, P. 181, stating that the legal criteria of initiating an investigation *proprio motu* ‘provide enormous space for highly discretionary determinations.’

⁵⁵² *Supra* n. 549.

⁵⁵³ Ronald Dworkin, Judicial Discretion, *The Journal of Philosophy*, Vol. 60, No. 21, American Philosophical Association, Eastern Division, Sixtieth Annual Meeting. (10th Oct, 1963), Pp. 624-638.

⁵⁵⁴ *Supra* n. 549, P. 33.

⁵⁵⁵ Dworkin believes that in applying these standards, officials have no choice to make, as he supposes that there is always a correct answer to these standards. It is not the purpose of this thesis to respond to this particular debate, as others have done this well. The following authors have responded to the Dworkin’s allegation, at *supra* n. 31, also *supra* n. 32, and also see *supra* n. 33.

⁵⁵⁶ *Supra* n. 549, P. 32.

standards to choose among legal worthy choices when applying the legal rules. In exercising the strong sense of discretion, decision-makers (prosecutors) may, *as accepted normally*, consider extra-legal considerations, and *arguably* political effects, to make their decision. The decision-makers will create their own criteria to be considered when selecting a legal worthy choice. However, the application of these legal rules and the standards created to guide these rules may themselves involve an exercise of discretion, in particular when the legal rules are indeterminate. The weak and strong senses of discretion can be applied to legal interpretive discretion, as the legal rule and standard are so indeterminate. In this case, therefore, decision-makers are not supposed to consider extra-legal considerations, including strictly political ones, as the legal standard is given. These rules or standards could be interpreted in different ways or because, even the language is clear, there are underlying conflicts of doctrine or competing principles. Here, decision-makers are before several interpretations due to either the indeterminate character of legal rules or the conflicts between those principles or doctrines. This scenario allows decision-makers *in effect* to exercise legal interpretive discretion and choose among the different legal worthy interpretations.

However, prosecutorial discretion does not appear only in the case of the non-availability of standards. Prosecutorial discretion can also be imagined in the weak sense, in particular when the law authorises decision-makers to use prosecutorial discretion, and provides at the same time a specific standard to be considered, as the situation with the Article 53 ‘the interests of justice’. In the latter situation, the prosecutor is given prosecutorial discretion not to proceed with her investigation or prosecution, on the basis of that legal standard: ‘the interests of justice’. The prosecutor here is given a power to select among legally worthy situations or cases. At the same time, the weak versus strong senses of discretion does not mean that discretion in its weak sense is limited or of small degree. The degree of legal interpretive discretion could be wide as long as the given rule or standard is so indeterminate

or the competent legal principles or doctrines are strongly relevant for the given situation to be adopted. Normally, these rules or standards offer little guidance to their meaning or content the matter that provides the decision-makers substantial degree of discretion, when making a decision (same as to the indeterminate and competent principles and doctrines).⁵⁵⁷ In this case, discretion in its weak sense becomes wide so it allows decision-makers to exercise discretion ‘in a very real sense.’⁵⁵⁸

As can be seen now, both sorts of discretion involve choosing between legal worthy possibilities. However, consideration of extra-legal accounts or probably political effects should not be taken into account when exercising legal interpretive discretion. When decision-makers choose a specific interpretation for the indeterminate legal rule, or choose among the competing doctrines or principles, here decision-makers should look for a specific legal argumentation to find a solution within law. For example, different statutory interpretations or arguments by analogy with some other area of law could be one legitimate way to select a particular interpretation. The problem may arise when decision-makers do not provide a clear basis of selecting a particular interpretation. So, the predicament is what basis can they find to make a choice between the possibilities? If the judges/lawyers can find some basis within law for deciding between the choices, then this is only relative indeterminacy aka weak discretion. If no legal basis of making a decision can be found, then the danger is that judges/lawyers will implicitly rely on some extra-legal considerations to make their decision. Hence, the great fear here is that politics will be the basis of making the decision. At this particular point, the exercise of prosecutorial discretion and legal interpretive discretion may strongly converge and give rise to the accusation of political bias or motivation when making a decision. In other words, the exercise of legal interpretive discretion might be similar to the basis of exercising

⁵⁵⁷ *Supra* n. 261, P. 22.

⁵⁵⁸ *Ibid*, P. 9.

prosecutorial discretion that runs outside the law, where decision-makers consider extra-legal factors, or even arguably political effects. As can be seen now, the exercise of legal interpretive discretion involves a serious risk of being politically-taken or conducted in a biased form. This means that in such situations, decision-makers have the ability to interpret the legal categories in such a way to reach different outcomes, and yet justified in legal terms. As was noted above, the accusation of the Court of being politically directed against only Africa can be linked to this particular dilemma of the interpretation of the legal categories, in particular gravity as an admissible legal requirement, as the latter is quite open-ended.

3.2.1. Prosecutorial Discretion

Prosecutorial discretion means granting a power to a decision-holder to use her or his discretion in making certain decisions. D. J. Galligan calls this sort of discretion a ‘central sense’ where discretion is ‘an express grant of power conferred on officials where determination of the standards according to which powers to be exercised is left largely to them.’⁵⁵⁹ Hawkins refers to the same thing when he says ‘contemporary legal systems increasingly rely on express grants of authority to legal or administrative officials to attain broad legislative purposes.’⁵⁶⁰ Decision-holders here have a significant scope of power to settle the standards according to which the decision will be made. Once the legal categories have been satisfied, decision-makers will start exercising this discretion. This power, Galligan explains, is either granted or assumed.⁵⁶¹ In addition, discretion can, Galligan continues, also be assumed by officials when it is departed ‘from legal rules for reason of justice, or from practical necessity or expediency.’⁵⁶² As noted above, these standards are either provided by

⁵⁵⁹ *Ibid*, P. 1.

⁵⁶⁰ *Supra* n. 550, P. 11.

⁵⁶¹ *Ibid*, P. 11, and *supra* n. 261, Pp. 44-8.

⁵⁶² *Supra* n. 261, P. 46.

the law, or created by decision-makers, and thereupon, Dworkin states, this puts discretion in its strong sense.

In ICC terms, Article 53 (1)(c) and (2)(c) *explicitly* grants the prosecutor a power to exercise prosecutorial discretion arguably in Article 15 (1) and (3), as was analysed in Chapter One.⁵⁶³ This Article explicitly authorises the prosecutor to use her prosecutorial power to reject any situations or cases that met the legal requirements, however, opening investigations or proceeding with prosecutions with them respectively ‘would not serve the interests of justice.’⁵⁶⁴ The Statute in this example provides a standard that the prosecutor should consider when exercising her prosecutorial discretion. The prosecutor here is, therefore, exercising choice. She will pick up one or more of these legal worthy situations and cases. In deciding which cases to take to trial, the prosecutor selects which defendants to charge and what the charges shall be. As Kate Stith points out, ‘[i]n the context of the criminal law, to exercise discretion means, most simply, to decide not to investigate, prosecute, or punish to the full extent available under the law.’⁵⁶⁵

As noted above, in addition to the fact that law may create these standards, the latter also may be created by officials. In the ICC terms, the OTP has created several standards as a way of controlling or guiding the use of discretion. Such standards usually function as limitations on this discretion as well as a guidance. As was explained in Chapter One and later in Chapter Four, the Prosecutor sets qualitative and quantitative factors to guide the determination of the gravity criterion. This is applied for the assessment of ‘relative gravity’ in the context of the exercise of discretion. Also, the Prosecutor sets ‘as a general rule, *the Office*

⁵⁶³ *Ibid*, P. 48.

⁵⁶⁴ See generally, John H. Langbeint, Controlling Prosecutorial Discretion in Germany, *The University of Chicago Law Review*, Vol. 41, No. 3 (1974), 439- 467.

⁵⁶⁵ Kate Stith, The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion, *Yale Law Journal*, Vol. 117 (2008), P. 1420.

*of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.*⁵⁶⁶ Also, the OTP provides that the assessment of ‘the interests of justice’ is to be guided by the object and purpose of the Statute, in particular that the most serious crimes of international concern must not go unpunished.⁵⁶⁷ Most recently, the OTP has set up three standards to guide its exercise of prosecutorial discretion when selecting cases for investigation and prosecution, namely: ‘the gravity of the crimes, the degree of responsibility of the alleged perpetrators and the potential charges.’⁵⁶⁸

The very main rationale of providing decision-makers with a power to exercise prosecutorial discretion is to allow decisions to be made in a context-sensitive manner taking account of the specific circumstances (individualised decision-making). The legal rules are largely indeterminate, inflexible, and controversial. They are not always suitable to cope with uncertainty and change. Joseph Raz emphasises that rules alone cannot cover or weigh all reasons for the conformity to the required action.⁵⁶⁹ Similarly, Stephanos Bibas argues that ‘rules cannot capture every subtlety’.⁵⁷⁰ For such reasons, officials are empowered with discretion to take the reasonability of tackling some peculiarities of some individualised cases where only the prosecutor can identify. Abrams argues that within the common law system, the prosecutor is envisaged with a broad discretion that enables her to deal ‘with individual cases to consider special facts and circumstances not taken into account by *the applicable rules*.’⁵⁷¹ [emphasis added]. For this reason and as John Bell puts it, this power will help to

⁵⁶⁶ *Supra* n. 187, P. 7.

⁵⁶⁷ Policy Paper on the Interests of Justice 2007, P. 1.

⁵⁶⁸ Draft Policy Paper on Case Selection and Prioritisation 2016, Para. 33.

⁵⁶⁹ Joseph Raz, *The Authority of Law* (Oxford, Clarendon Press, 1979), Pp. 28- 33.

⁵⁷⁰ Stephanos Bibas, The Need for Prosecutorial Discretion, *Faculty Scholarship*, Paper 1427, Vol. 19, No. 2 (2010), P. 370.

⁵⁷¹ Abrams, *supra* n. 60, P. 3.

provide ‘individualized justice’.⁵⁷² In addition, Nsereko also argues that the rationale of giving prosecutorial discretion to prosecutors is because the latter is the only one who can ‘resolve the many issues that arise in the course of their work, as they cannot be resolved by hard and fast rules.’⁵⁷³ He says, for example, that in considering ‘the public interests’ of a certain case for prosecution, in fact it is only the prosecutor who can determine what these interests are. It is indeed a case-by-case basis that requires the prosecutor to exercise some discretion to identify the details of each case.

For the above reason, it is normally accepted that the prosecutor would consider extra-legal factors when evaluating situations for the purpose of opening an investigation or cases for a prosecution. In this regard, it is important to note that the standards created by the law or decision-makers should not be mixed with such extra-legal factors that may/should be taken into consideration by the prosecutor. The latter factors, Galligan points out, are ‘in nature of practical constraints... such as effectiveness and efficiency, the limitations on resources, organizational structures, and the moral attitudes of officials’.⁵⁷⁴ In the next chapters, we will see how these factors can play an important role in shaping the decision-making process of the prosecutor. Schabas, for example, points out that there was an allegation that the decision of choosing Thomas *Lubanga* to be prosecuted is an example of the exercise of prosecutorial discretion where the consideration of the likelihood of arresting *Lubanga* was taken into account by the Prosecutor, as he was already in custody and that there was an allegation that he might be released soon at the time.⁵⁷⁵ Schabas continues, ‘[t]he impression remains that in the *Lubanga* case, the exercise of prosecutorial discretion had more to do with the fact that this was an accused who was accessible to a Court starved for trial work rather than any compelling

⁵⁷² John Bell, *Policy Arguments in Judicial Decisions* (Oxford, Oxford University Press, 1985), P. 3.

⁵⁷³ Nsereko, *supra* n. 13, P. 125.

⁵⁷⁴ *Supra* n. 261, P. 30.

⁵⁷⁵ Schabas, *supra* n. 258, P. 744.

analysis based upon either gravity or complementarity.⁵⁷⁶ Wouters and Chan also confirm that the consideration of extra-legal factors are to be exercised at stage of exercising prosecutorial discretion. They argue that '[i]t is, for instance, hard to deny that the ready co-operation of a self-referred State would not be a persuasive consideration for the Court.'⁵⁷⁷

Prosecutorial discretion is an unlimited power, unless the law or other policy instruments impose limitations or/and controls. Outside the ICC, the extent of prosecutorial discretion is governed in accordance with the sort of legal system that is in operation. The civil law system and the common law govern the scope of, and level of control imposed over prosecutorial discretion in different ways. Whilst the number of cases that should be prosecuted reaches its maximum level within the civil law system, it is much lower within the common law system. The first is subsumed under the principle of legality (*Legalitätsprinzip*) where the prosecutor is required to initiate her proceedings against all worthy cases.⁵⁷⁸ The second is governed by the principle of expediency (*Opportunitätsprinzip*), where it is assumed the prosecutor will choose among legally worthy cases.⁵⁷⁹ The legality principle is derived from the classic German model, which requires a mandatory prosecution of all kinds of offences, although in practice the minor offences were excluded.⁵⁸⁰ The virtual absence of prosecutorial discretion here was to avoid any political or expedient influence on the decision-maker.⁵⁸¹ Therefore, the civil law system did not provide the prosecutor with wide discretion.⁵⁸² We can see here that the sheer magnitude of discretion is at its lowest level (maximum prosecution/minimum discretion). However, the common law system adopts the expediency

⁵⁷⁶ Schabas, *supra* n. 258, P. 744.

⁵⁷⁷ *Supra* n. 48, P. 9.

⁵⁷⁸ See generally, Mirjan Damaka, The Reality of Prosecutorial Discretion: Comments on a German Monograph, *The American Journal of Comparative Law*, Vol. 29, (1981), 119- 138.

⁵⁷⁹ *Ibid.*

⁵⁸⁰ *Supra* n. 564.

⁵⁸¹ *Supra* n. 308, P. 192.

⁵⁸² For more reasons for including this level of prosecutorial discretion in the civil law system as well as the common law system, see Jingbo Dong, Prosecutorial Discretion at the International Criminal Court: A Comparative Study, *Journal of Politics and Law*, Vol. 2, No. 2 (2009), Pp. 110-1.

principle that provides the prosecutor with more space of discretion to select among legally worthy cases – i. e. the proportion of cases prosecuted as compared to all those where prosecution is legally warranted – is higher (‘wider’) in common law than civil law jurisdictions – and far, far higher still in the ICC.

In addition, there may be a supplementary control on the exercise of discretion. These limitations may be imposed through institutional review mechanisms. Within the mandatory system, prosecutorial discretion is limited and subject to close scrutiny to judicial control through an investigating judge (the inquisitorial system).⁵⁸³ By the way of contrast, prosecutorial discretion is very broad in the common law system, as there is less judicial oversight that is imposed on it (the adversary system).⁵⁸⁴ In this system, courts have limited judicial control over prosecutorial discretion, in particular when a prosecutor abuses – exercising her prosecutorial discretion – for example the principle of the rule of law.⁵⁸⁵

The prosecutorial discretion system in the ICC is a hybrid of these two major legal models. For example, in terms of the degree of selectivity, the discretionary power of the ICC prosecutor is much closer to the common law system, as the prosecutor is not required to prosecute all legal worthy situations and cases, whilst it is much closer to the civil law system in terms of judicial control on discretion, as the ICC Statute empowers the Pre-Trial Chamber to exercise its control on several types of the prosecutor’s decisions, as was explained in Chapter One.

3.2.2. Legal Interpretive Discretion

Before the ICC prosecutor exercises prosecutorial discretion, as warranted in Article 53 (1)(c) and (2)(c), the same Article first requires the prosecutor to consider two legal categories,

⁵⁸³ *Supra* n. 582.

⁵⁸⁴ For more information, see *supra* n. 578.

⁵⁸⁵ See Nsereko, *supra* n. 13, P. 134.

namely jurisdiction and admissibility in accordance with Paragraph (1)(a); (1) (b), and (2)(a); (2)(b). These two categories are legal requirements and do not provide the prosecutor with a power of discretion, as they constitute legal thresholds, below which the prosecutor cannot open investigations, or proceed with prosecutions. Generally speaking, international legal rules are largely indeterminate, flexible, and open-ended. These characteristics could make these rules open to several interpretations that might also lead to *different* outcomes. Legal rules might be applied in different ways by the same officials from time to time or different officials. In order to avoid conflicting or opposite outcomes, legal systems usually provide a mechanical approach (for example, the analogy approach, or citing relevant and recognisable principle) for decision-makers to find an internal legal basis on which legal rules will be interpreted without having to go outside the law. Such a process helps to ensure that the decisions were not reached on the basis of discretion, but a judgment. The problem might arise however, when officials do not provide a sufficient reason to show how the open-ended legal rule was interpreted and why a particular interpretation was chosen over the others, in particular, when the given legal rule is so indeterminate and the law does not provide any standard or factor to give any useful meaning to such rules. In this case, and as Galligan argues, decision-makers will ‘exercise a certain degree of discretion’.⁵⁸⁶

I call this type of discretion legal interpretive discretion. Due to the indeterminate character of legal rules or standards, decision-makers will have a capacity to deploy their discretion to interpret the given legal rules. Such standards often, as Galligan points out, ‘leave room for variable interpretations.’⁵⁸⁷ This then should be distinguished from prosecutorial discretion. With legal interpretive discretion, the law does not provide decision-makers with a power of exercising discretion. This is only carried out in effect, where the indeterminacy of

⁵⁸⁶ *Supra* n. 261, P. 9.

⁵⁸⁷ *Ibid*, P. 9.

the legal rules, their vague meanings and contents, and the lack of guiding factors allow decision-makers to exercise a degree of discretion.⁵⁸⁸ As Galligan points out, discretion may also be found in the *application* of standards to facts: ‘the decision as to whether a given situation falls within an authoritative standard often involves elements of judgment, opinion, and appreciation, such that reasonable persons may sometimes come to different conclusions each of which is itself reasonable’.⁵⁸⁹

However, there is no agreement among scholars about legal interpretive discretion. Whilst some would argue that finding a particular interpretation to apply a rule of standard is ultimately determinable within the body of law, taking that in its widest sense, as Dworkin argues,⁵⁹⁰ others, such as Hart, would consider it to involve strong as well as weak discretion.⁵⁹¹ Several authors assert the extreme indeterminate nature of legal rules.⁵⁹² These wider debates are beyond the purpose of this thesis. However, this thesis will show that a space of discretionary leeway has been exercised by the ICC prosecutor when interpreting ‘sufficient gravity’. As Galligan argues, ‘[i]t is hard to imagine a decision which does not involve some discretion, and yet clearly some instances of discretion are much wider than others.’⁵⁹³ Koskenniemi, as will be discussed below, insists that there is a systematic indeterminacy running through the whole of international law and hence a high degree of discretion is involved.⁵⁹⁴

⁵⁸⁸ *Ibid*, P 35, arguing that ‘[t]he more open the standards, then of course the more the process of concretization shades into discretion in our central sense.’

⁵⁸⁹ *Ibid*, P 33.

⁵⁹⁰ Ronald Dworkin, *Taking Rights Seriously* (Harvard, Harvard University Press, 1977), Pp. 31- 71.

⁵⁹¹ *Supra* n. 31.

⁵⁹² Robert W. Gordon, *Critical Legal Histories*, *Stanford Law Review*, Vol. 36 (1984), P. 114. Also, Hart states that ‘[i]n every legal system a large and important field is left open for the exercise of discretion by Courts and other officials in rendering initially vague standards determinate.’ Hart, *supra* n. 31, P. 132, cited in *supra* n. 72, P. 36.

⁵⁹³ *Supra* n. 261, P. 11.

⁵⁹⁴ *Supra* n. 72, Pp. 17, 59, 503, and 504.

The exercise of legal interpretive discretion does not only result from the open-ended legal rules. Although some legal rules might appear somehow clearer, there might appear underlying conflicts of legal doctrine or competing principles that allow decision-makers to find different interpretations from which to choose. Koskenniemi's position about the indeterminacy of international legal arguments corresponds to the dyadic conceptual analysis.⁵⁹⁵ To him, each topic is open to competing interpretations that, in turn, have been argued. Because there is no way within law of prioritising one over the other (indeed he argues that each presupposes the other in a vicious circle). It is exposed to a dyadic conceptual pattern that characterises this indeterminacy. He states that this dyadic pattern reflects conflicts about the meaning and application of international legal rules and doctrines.⁵⁹⁶ In so determining, in fact decision-makers are exercising a space of discretion.

In ICC terms, Article 17 (1)(d) is a good example to illustrate legal interpretive discretion. The Statute here requires the prosecutor to examine 'sufficient gravity' of situations and cases to be admissible before the Court. Article 17 (1)(d) here provides a standard which is 'sufficient gravity' to be applied. The law does not provide any definition of 'sufficient gravity'. As Vaid argues, the term is left open and has given the prosecutor a degree of interpretive flexibility and choice.⁵⁹⁷ Legal interpretive discretion of the prosecutor in this case is quite strong. Chapter Four of this thesis will discuss and analyse the issues around gravity in detail. Suffice it here to mention, in interpreting this rule, the ICC Prosecutor has resorted to various meanings, contents, and weights for this rule. In deploying her discretion on this legal category, the prosecutor has a strong legal interpretive discretion to choose which situations

⁵⁹⁵ *Ibid*, Pp. 17, 59, 503, and 504 (concreteness v. normativity, descending v. ascending patterns).

⁵⁹⁶ *Ibid*, Pp. 38, 62.

⁵⁹⁷ Vaid, *supra* no. 12, P. 365.

and cases meet ‘sufficient gravity’. As was noted, Schabas also is of the view that the prosecutor exercises a degree of discretion when applying such legal thresholds.⁵⁹⁸

3.3. Theoretical Framework

3.3.1. The Dyadism of International Legal Discourses

International criminal law is still an emerging regime within the field of international law.⁵⁹⁹ It is still at the stage of evolution. As Schabas argued, ‘international criminal law... is not yet 20 years old.’⁶⁰⁰ As the old and well established system of international law is marked by indeterminacy, the emerging international criminal law is even at a pre-indeterminacy stage. Therefore, general values, aims, principles and doctrines, or legal argumentations about them might contradict each other. The latter problem makes it natural that decision-makers’ decisions in this system are posed to opposite criticisms. International criminal law, as Robinson states, does not often comply with its fundamental principles and doctrines a matter that causes contradictory arguments about them.⁶⁰¹ Peace versus justice, rules versus processes, sovereignty versus rule of law, idealism versus realism are some of these contradictory principles that judicial institutions need to settle and that often raise two plausible and valid arguments that run opposite to each other. These principles are usually embedded in the goals of some international institutions that set down its main priorities. However, these goals might contradict each other, as the situation with the preamble of the ICC Statute. The latter aims at promoting criminal justice and international peace and security at the same time. These two different aims might be used to criticise the prosecutor’s decision, when one of them falls in

⁵⁹⁸ Schabas, *supra* n. 4, P. 181.

⁵⁹⁹ Lyal S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (The Hague, Kluwer Law International, 1997).

⁶⁰⁰ William A. Schabas, Yvonne McDermott, and Niamh Hayes, *The Ashgate Research Companion to International Criminal Law: Critical Perspectives* (Surrey, Ashgate Publishing, 2013), P. 1.

⁶⁰¹ Darryl Robinson, The Two Liberalisms of International Criminal Law, in Carsten Stahn and Levan den Herik (eds.), *Future Perspectives on International Criminal Justice* (TMC Asser Press, 2010), P. 116.

conflict with the other one. The ICC prosecutor's decision to investigate a situation or prosecute a case might be characterised 'as both a positive tool that can end impunity and enforce human rights standards... and as a negative weapon that can amplify political struggles, reinforce geopolitical divides, and undermine national sovereignty.'⁶⁰²

The decision that the prosecutor makes and touches upon one of these issues can be easily criticised and, therefore, the prosecutor may face political accusations for the position she takes. The sorts of justice that should be delivered to a certain situation also might be in conflict. As Nerida Chazal points out, '[p]unitive and non-punitive approaches to criminal justice are also often contradictory and there is a clash between retributive and restorative paradigms'.⁶⁰³ Chapter Five of this thesis will fully discuss the contradictions that arise between the ICC as a potential mechanism to articulate conflicts under its jurisdiction, and other justice mechanisms that might also appear relevant to those conflicts.

Such dyadic criticisms and controversies can also be seen in the work of the ICC prosecutor. These criticisms are based on opposite arguments for each position that the Court takes. This study will be confined only to a specific controversy around the question of the exercise of discretion. The latter question has raised inescapable patterns of a contradictory duplication. This criticism or controversy occurs in a recurring pattern. Each position has a valid and plausible criticism that criticises decision-makers' decisions, and vice versa. Koskeniemi builds this dyadic thesis on the basis of the analysis of the structure of international legal arguments and refers to this pattern in his masterpiece of work and calls it 'conceptual oppositions'.⁶⁰⁴

⁶⁰² *Supra* n. 472, P. 35.

⁶⁰³ *Ibid.*

⁶⁰⁴ *Supra* n. 72, P. 8.

The fault-line of dyadic arguments that infects those decisions is based on Koskeniemi's thesis of *utopia* and *apology*'s criticisms.⁶⁰⁵ This thesis will concentrate on the discussion and analysis of the discretionary-based decisions in the context of the *utopia* and *apology*'s argumentations, as seen by Robinson.⁶⁰⁶ The *utopian* critique means that the given position is too close to principles, common interests, justice, or similar ideas, and that it is highly divorced from the states' interests, wills, and policies. The *apologist* critique is that the position is too connected to the interests and policies of states, and that it is too far from the common interests and principles. The first one argues that the given position lacks any connection to *groundedness*. In other words, the adherents of this argument claim that making a decision that is not backed by an effective support, that is not anchored, or that is not realistic in a sense that it cannot be just enforced and may cause further problems is a mere *utopian* one. The second one argues that the given position is not principled and appeals to the immediate policies and interests of states. It is an *apology*. Whilst the first is too political, as it is too dependent on states' policies (unprincipled), the second is also too political, as it simulates speculative *utopias* (unsupported or inefficient). In either case, the charge of political is the common point that both sides to the argument are raising.

⁶⁰⁵ The structure of international legal arguments is based on two requirements: normativity and concreteness. For Koskeniemi, in order for international law to maintain its independence and distinction from international politics, it must fulfil these two requirements, otherwise the given discourse will indulge in the political arena. Koskeniemi uses apologia and utopia dilemma, which corresponds with these two requirements of the structure of the international legal argument. To him, law is rooted in the will of states, known via identifiable sources. However, law is not only an expression of these wills, it is also normative in the sense that it can be applied even against those who accept it. For Koskeniemi, the failure of upholding these requirements, the given legal argument either will be criticised as uninspiring politics and ungrounded politics. Within each principle or theory, there are two opposite views that surround it. Each position has a valid and plausible criticism that might in a way or another undermine the given legal discourse that the prosecutor has taken, and vice versa. Each side approaches a different route to make a valid argument to criticise the other one. Every position that a decision-maker takes will be either criticised for being too apologist, as the given position is too connected and close to the policies and interests of states or too utopian, as it is too connected and close to higher principles and has nothing to do with the actuality. *Supra* n. 72, Pp. 16, 67, and 70. Yet, for Koskeniemi, the 'disagreement persists because it is impossible to prioritize one term over the other'. *Supra* n. 72, P. 9.

⁶⁰⁶ *Supra* n. 73.

In the ICC term, the prosecutor's decisions are open to the allegations that they are politically motivated. The prosecutor is either too close to the reality of the given situation and pleases the policies and interests of states, or is too far from such a *groundedness* in reality to the extent the decision seems unconnected to power and is merely based on ideals. As you have these choices, this means that people can easily advance plausible and convincing arguments, based on inherent values embedded within international criminal law to argue against the choice made, as was discussed earlier this chapter.

Consider, for example, a potential decision to open an investigation in the Syrian situation (supposing that the situation was referred by the SC referral). Such a decision, if made, would be criticised for being politically-motivated. The prosecutor would appear political, as the decision appeared as if it served a political agenda and ignored the normative yardsticks. As Richard Falk points out, the reaction of Russia – in using veto power to prevent the resolution of a referral of the Syrian situation to the Court – ‘reflects a view that the main motivations for such a resolution is ... a propaganda move rather than as a genuine attempt to promote criminal justice.’⁶⁰⁷ Equally applicable, the same potential decision can be accused of being politically-taken, as it would be argued that the prosecutor tries to prove a point that she is doing justice, in the sense that the decision would remain unsupported or enforced. Needless to say that such a decision might undermine any chance for advancing the political resolution for putting an end to the ongoing conflict.⁶⁰⁸ As can be seen, the prosecutor would in both cases be accused of being political.⁶⁰⁹ The accusation of politicisation was already made even though

⁶⁰⁷ Richard Falk, On Prosecuting Syrians for War Crimes, *Aljazeera* (3rd June, 2014), available at <<http://www.aljazeera.com/indepth/opinion/2014/06/syria-icc-war-crimes-20146364137245976.html>> (Last Access: 13th December, 2014), Falk talked about the two valid criticisms that can be raised from the referral or non-referral of the Syrian situation to the Court.

⁶⁰⁸ See generally, Anthony Dworkin, Dilemmas of justice, accountability and peace in Syria, *European Council on Foreign Relations* (November, 2013), available at <http://www.ecfr.eu/page/-/IJP_Syria.pdf> (Last Access: 10th January, 2015).

⁶⁰⁹ For more information see, *supra* n. 48.

the prosecutor had not taken any position against the Syrian situation.⁶¹⁰ The charge was already ready. Similarly applicable, most decisions that both Prosecutors have made before were countered by such a dyadic criticism, in particular the decision to indict the President of Sudan. In our example, whatever end the prosecutor aims to consider, she will be accused of being political.⁶¹¹ The recurrent pattern of this dyadicism is based mainly on the valid and strong *values*; or *aims*, *legal justifications*, or *principles* that might contradict each other, as will be explained below.

⁶¹⁰ US-backed UN resolution on Syria is 'odious', says Russian foreign minister, *The Guardian* (29th May, 2013) <<https://www.theguardian.com/world/2013/may/29/us-resolution-syria-russia-foreign-minister>> (Last Access: 18th March, 2015).

⁶¹¹ Alana Tiemessen, Defying Gravity: Seeking Political Balance in ICC Prosecutions, *Justice in Conflict* (22nd April, 2013), at <<https://justiceinconflict.org/2013/04/22/defying-gravity-seeking-political-balance-in-icc-prosecutions/>>. Tiemessen stated that '[t]he International Criminal Court is often accused of being 'political' or 'politicised' in its selection of situations and cases.'

CHAPTER FOUR: Gravity between Prosecutorial and Legal Interpretive Discretion

4.1. Introduction

Of all the controversies that have surrounded the ICC prosecutor's decisions, most have – overtly or implicitly – turned around the question of gravity. The main aim of the establishment of the ICC, as stated in the Preamble to the ICC Statute, is to investigate and prosecute 'the most serious crimes of concern to the international community as a whole'.⁶¹² This is echoed in Article 1, which provides that the Court 'shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern'. Article 5 in turn provides a list of those most serious crimes, which are crimes against humanity, war crimes, genocide, and aggression.⁶¹³ The definitional or chapeau requirements of these crimes already entail elements of gravity; a further requirement was added in the case of war crimes.⁶¹⁴ Thus, the Court's subject matter jurisdiction is limited to already grave crimes. However, the founders of the Court decided to further limit the reach of the Court, and required an additional degree of gravity⁶¹⁵ as a requirement of admissibility, to determine when the Court should exercise jurisdiction. Article 17 (1)(d) provides that the Court shall determine that 'a case' is inadmissible where it 'is not of sufficient gravity to justify further action by the Court'. (A case consists not only of the acts allegedly committed but also the alleged perpetrators of those acts.)

It is the prosecutor who will make this decision in the first instance. According to the report on the first three years of the OTP's activities, 'although any crime falling within the

⁶¹² Preamble to the ICC Statute, Para. 9. The Preamble of the Court Statute provides that 'most serious crimes...must not go unpunished', paragraph 4.

⁶¹³ See the Review Conference of Rome Statute held in Kampala, *supra* n. 7.

⁶¹⁴ Article 8(1) of the Statute specifies: 'The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.'

⁶¹⁵ ICC, Pre-trial Chamber II, Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (ICC-01/09) 31 March 2010, Para. 56 (hereinafter: Kenya, Pre-Trial Chamber II 2010). See also ILC, Summary record of the 2356th meeting of the International Law Commission, 24 June 1994, Doc. A/CN.4/SR.2356, the Yearbook of the International Law Commission, Vol. 1 (1994), Para. 60, referring to 'six of the major changes made to the version of the draft statute at the forty-fifth session in 1993': 'emphasis was now placed on the functions of the court, which was intended (a) to exercise jurisdiction only over the most serious crimes of concern to the international community...'

jurisdiction of the Court is a serious matter, the Rome Statute... clearly foresees and requires an additional consideration of “gravity” whereby the Office must determine that a case is of sufficient gravity to justify further action by the Court.’⁶¹⁶ Gravity is a basis of decision-making for the prosecutor at both investigation and prosecution stages. Article 53(1)(b) and (2)(b) require the prosecutor to determine admissibility of ‘the case’ at investigation and prosecution stages respectively, on the basis of Article 17.⁶¹⁷ Pre-Trial Chamber II has held that the use of the term ‘case’ in Article 53(1)(b) means that even in assessing situations, the prosecutor must identify ‘one or more potential cases within the context of a situation’⁶¹⁸ and that ‘potential case’ includes groups of persons or incidents ‘that are likely to be the focus of an investigation for the purpose of shaping the future case(s)’.⁶¹⁹

The term ‘sufficient gravity’ in Article 17(1)(d) arguably constitutes a notional threshold level below which the Court, as a matter of legal requirement, shall not deem ‘a case’ admissible. However, Article 17 does not provide a definition of the term ‘sufficient gravity’. Although, as will be explored below, the prosecutor and the judges, respectively, have refined and defined the criterion, nonetheless the term ‘sufficient gravity’ remains quite contested especially in relation to Article 53(1)(b).⁶²⁰ Key questions surround the assessment of situational gravity (remembering that ‘a case’ here means potential cases (see above)). Thus, it has been asked whether, in the context of Article 53(1)(b), the reference to Article 17(1)(d) is to be construed strictly legally or whether the overarching consideration by which the prosecutor is to determine whether there is a ‘reasonable basis’ to initiate an investigation,

⁶¹⁶ ICC, Office of the Prosecutor, Report on Prosecutorial Strategy (The Hague, 14th September, 2006), Para. 2(b), P. 6.

⁶¹⁷ The decision of the prosecutor not to proceed with a situation or case is subject to the Court’s review, as explained in Chapter One of this thesis, Pp. 61-2.

⁶¹⁸ Kenya, Pre-Trial Chamber II 2010, *supra* n. 615, Para. 48. The context (see paras 45-46) is whether the term ‘case’ was used inadvertently in Article 53(1)(b), concerning investigations.

⁶¹⁹ Kenya, Pre-Trial Chamber II 2010, *supra* n. 615, Para. 50.

⁶²⁰ The varying ruling of the Court Chambers and the opinions of legal academic commentators are discussed below.

conditions the assessment of gravity. If it is to be construed strictly legally, as deGuzman argues, it ‘follows that the gravity assessment under Article 53 (1) (b) is limited to the question whether the gravity threshold is met, according to clear and pre-set criteria’.⁶²¹ Taking this as a threshold below which potential cases cannot be admitted might seem too exacting considering, for example, that it might be difficult to assess the level of seriousness at the stage of a preliminary examination. However if it is to be so regarded, it matters very strongly whether this threshold is set high or low (as the Chambers determines). The further question is, especially bearing in mind that Article 53(1) requires the prosecutor to determine whether there is a ‘reasonable basis’ to initiate an investigation, as Vaid questions, whether she ‘must only analyze a particular situation *in isolation* to determine whether it is sufficiently grave, or whether instead the Prosecutor must [or may] compare the gravity of one situation in relation to others potentially admissible before the Court’ (emphasis added).⁶²² Following the argument that gravity in Article 53(1)(b) is a matter of strict legal requirement, commentators such as deGuzman have argued that it does not allow the Prosecutor to select between different situations.⁶²³ Vaid, contrary to deGuzman and Stegmiller, opines that it ‘remains uncertain is whether this additional threshold is absolute or relative’.⁶²⁴ However, considering the Comoros review decision, Vaid’s view in 2013 that ‘the Court has not yet clarified which standard should control’⁶²⁵ decisions, may have been superseded. Finally, it also needs to be remembered that ‘sufficient gravity’ in Article 17 (1)(d) considered by reference to a case (potential case) under

⁶²¹ As argued by deGuzman, see deGuzman, *supra* n. 13, P. 1403. See also Karel De Meester, Article 53: Commentary Rome Statute: Part 5, *Case Matrix Network*, available at <<http://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-5/>> (Last Access: 17th, July, 2016). See also ICC, Pre-Trial Chamber, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia: Decision on the Request of the Union of the Comoros to Review the Prosecutor’s Decision not to Initiate an Investigation, No.: ICC-01/13 (16th July, 2015), Para. 14 available at <<http://www.icc-cpi.int/iccdocs/doc/doc2015869.pdf>>, ‘exacting legal requirement’ (hereinafter: Comoros, Pre-Trial Chamber July, 2015).

⁶²² Vaid, *supra* n. 12, P 389.

⁶²³ Meester, *supra* n. 212. He is also citing deGuzman’s argument, deGuzman, *supra* n. 13, P. 1432.

⁶²⁴ Vaid, *supra* n. 12, P 389.

⁶²⁵ *Ibid.*

Article 53 (1)(b) pertains both to the criminal act of, and the role or rank of the perpetrator.’⁶²⁶

This is important because the Chambers have also made some interventions as to admissibility in this respect, concerning ‘those most responsible’.

In the sequence of issues that the prosecutor examines under Article 53(1)(b) in determining whether to open an investigation, she must consider whether legal requirements are met. This involves firstly being assured of jurisdiction taking into consideration complementarity, then moving to issues of admissibility including the test of gravity.⁶²⁷ In the short history of the Court, a number of potential situations have been excluded on the basis of jurisdiction and complementarity⁶²⁸ which narrows the number that have been assessed in terms of gravity. All situations where investigations have been opened must by definition have been construed as sufficiently grave; only Iraq and Comoros have been formally rejected by the prosecutor on this basis. Both decisions have been and remain highly controversial. The Prosecutor has been instructed to review its Comoros decision.⁶²⁹ How the Prosecutor interprets ‘sufficient gravity’ under Article 53(1)(b), therefore, is highly consequential.

Beyond this gravity threshold for admissibility, the ICC Prosecutor potentially has prosecutorial discretion to give priority to the situations and cases she considers most serious. Gravity has been identified by the Prosecutor as a crucial basis on which the OTP determines

⁶²⁶ Megumi Ochi, Gravity Threshold before the International Criminal Court: an Overview of the Court’s Practice, *International Crimes Database*, Brief 19 (2016), P. 13

⁶²⁷ Policy Paper on Preliminary Examinations 2013, Para. 42, ‘The Statute does not stipulate any mandatory sequence in the consideration of complementarity and gravity. The Prosecutor must be satisfied as to admissibility on both aspects before proceeding.’

⁶²⁸ The Venezuela situation has been rejected by the Prosecutor on the basis of the temporal jurisdiction, as a considerable number of incidents were committed prior to 1st July, 2002 (quantitative method), see a Letter of Prosecutor of the ICC, 16 July 2003, P. 1.

⁶²⁹ ICC, the Appeal Chamber, Situation on the Registered Vessels of the Union of the Comoros, Decision on the admissibility of the Prosecutor’s appeal against the “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation”, No. ICC-01/13 OA (6th November, 2015), available at <https://www.icc-cpi.int/CourtRecords/CR2015_20965.PDF> (hereinafter: Comoros, Appeal Chamber, November 2015).

which situations or cases will be selected for investigation or prosecution.⁶³⁰ ‘Gravity is one of the most important criteria for the selection of our situations and cases’, declared Moreno-Ocampo in 2005 and recently in 2016.⁶³¹

Many of the decisions that the prosecutor has justified on the basis of gravity have been criticised.⁶³² In 2004-06, a cluster of decisions – Uganda (2004), DRC (2004), and Darfur (2005) Situations, Iraq (2006) – came under attack, some individually but also because, taken together they seemed to show a selective enforcement of norms. The decision in 2006 not to open an investigation into crimes allegedly committed by British soldiers during the Iraq war on the basis that the number of victims (4 to 12) did not meet the standard of gravity has been subject to serious criticisms. The Prosecutor sought to justify this by comparison with Northern Uganda, the Democratic Republic of Congo and Darfur.⁶³³

Yet in turn, the focus of the prosecution on solely one continent has provoked serious concern about the fairness of the Court that continues to undermine its legitimacy.⁶³⁴ ‘We Africans and the African Union are not against the International Criminal Court. That should be clear, ... We are against Ocampo who is rendering justice with double standards. ... Why not Argentina, why not Myanmar ... why not Iraq?’⁶³⁵ Since then, the new Prosecutor has opened a new preliminary examination of the Iraq situation⁶³⁶ and also other non-African

⁶³⁰ See Draft Policy Paper on Case Selection and Prioritisation 2016.

⁶³¹ *Ibid.*

⁶³² See also Schabas’s criticism of not opening investigation against the British soldiers having rejected it on the basis of gravity, see Schabas, *supra* n. 258, P. 741.

⁶³³ Office of the Prosecutor, “Reply to Senders” included in Annex to Update on Communications Received by the Office of the Prosecutor: Iraq Response (10th February, 2006), Pp. 8-9, available at <http://iccnw.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf>, p 9.

⁶³⁴ See Schabas, *supra* n. 258. See also Julie Flint and Alex de Waal, Case Closed: A Prosecutor without Borders, *World Affairs* (Spring 2009), available at <<http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders>> (Last Access: 9th December, 2012).

⁶³⁵ Jean Ping, Chairman of the African Union Commission, ‘African Union accuses ICC prosecutor of bias’, *Reuters*, <<http://www.reuters.com/article/ozatp-africa-icc-idAFJOE70T01R20110130>> (Last Access: 15th February, 2015).

⁶³⁶ The OTP states: ‘On 10 January 2014, the Office of the Prosecutor received a new communication from the European Center for Constitutional and Human Rights ("ECCHR") together with the Public Interest Lawyers

situations, but such allegations of a disproportionate focus on Africa and corresponding pro-Western bias continue, the latest example being the Prosecutor's controversial decision not to open an investigation into the Comoros situation again partly on the basis of the small number of victims. This chapter will look at these and other instances of the Prosecutor's invocation of gravity, especially where they have led to criticism of the Prosecutor.⁶³⁷

The common charge is that they were politically based and politically biased.⁶³⁸ It is, indeed, the same dyadic pattern of criticism that surrounds the work of the prosecutor as has been identified and analysed in Chapter Three. These criticisms will be analysed through the lens of apology and utopia. The decision not to open an investigation of the crimes of the British soldiers in Iraq, and the decision to investigate only (or primarily) the rebels' side in Uganda, both justified by the prosecutor in terms of gravity, were attacked for reflecting the interests of the powerful. When the prosecutor defends their focus on situations in Africa on the basis of gravity, they face accusations of neo-colonialism, institutional bias, and being a tool of Western

("PIL"), alleging the responsibility of officials of the United Kingdom for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008. ... Based on an initial assessment of the information received, the 10 January 2014 communication provides further information that was not available to the Office in 2006. In particular, the communication alleges a higher number of cases of ill-treatment of detainees and provides further details on the factual circumstances and the geographical and temporal scope of the alleged crimes. The Prosecutor will therefore conduct a preliminary examination ...' <https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/iraq/pages/iraq.aspx>. For comments, see Jill Reilly and Ian Drury, British Soldiers to be Investigated by International Criminal Court over Claims they Committed War Crimes in Iraq, *DailyMail Online* (13th May, 2014), available at <<http://www.dailymail.co.uk/news/article-2627228/BREAKING-NEWS-British-soldiers-investigated-International-Criminal-Court-claims-committed-war-crimes-Iraq.html>> (Last Access: 14th May, 2014).

⁶³⁷ Also he was criticised for bringing lower scale of crimes to indict Lubanga, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06/// Uganda LRA.

⁶³⁸ See, ICC, A Tool to Recolonise Africa, *New African* (1st March, 2012), available at <<http://newafricanmagazine.com/icc-a-tool-to-recolonise-africa/>> (Last Access: 16th April, 2014), (reporting that the ICC is concentrating on Africa and ignoring the powerful states), see Otilia Anna Maunganidze, Prosecuting the Powerful: Will Justice ever be Done? *Institute for Security Studies* (28th January, 2014), available at <<http://www.issafrica.org/iss-today/prosecuting-the-powerful-will-justice-ever-be-done>> (Last Access: 16th April, 2014) (Talking about the concentration of the Court over African states), see also The USA and the International Criminal Court, *Amnesty International* (11th November, 2007), available at <<https://www.amnesty.org/en/international-justice/issues/international-criminal-court/usa-icc>> (Last Access: 16th April, 2014).

imperialism, again an accusation that the prosecutors' gravity-based justifications are mere apologetics.

These accusations all presuppose that, in making these decisions, the Prosecutor could have chosen otherwise, in other words that he had some discretion. Choice opens the possibility of politically-based decision-making. In this light, what is striking about the prosecutor's justifications of gravity-based decisions, whether in public statements or official documents, is the implication that these have in effect been driven entirely by substantive legal requirements, referring to the 'standard' of gravity or the 'threshold requirements' of the Statute (presumably referring to Article 17(1)(d) "sufficient gravity"). At the same time, the Prosecutor has identified gravity as a key factor in the selection of situations and cases, which seems to point towards prosecutorial discretion. Article 53 (1)(c) and (2)(c) explicitly grants the prosecutor a power to exercise prosecutorial discretion. In other words, even when the legal requirements of initiating an investigation or proceeding with a case are satisfied, the prosecutor can still decline to proceed to open an investigation or bring a case against an individual if this would not serve 'the interests of justice'. The 'interests of justice' provisions even specifically mention gravity. The Prosecutor, however, has not yet rejected any situation or case on the basis that the investigation or prosecution does not serve 'the interests of justice'. Indeed in the 2007 OTP policy document on the interests of justice, the Prosecutor emphasised that 'the exercise of the Prosecutor's discretion under Article 53(1)(c) and 53(2)(c) is exceptional in its nature and that there is a presumption in favour of investigation or prosecution wherever the criteria established in Article 53(1) (a) and (b) or Article 53(2)(a) and (b) have been met.'⁶³⁹

⁶³⁹ Introduction, P. 1.

Some legal academic commentators⁶⁴⁰ have argued that in a number of these early decisions the prosecutor ‘conflated’ the gravity as an admissibility criterion (so-called ‘legal gravity’ or ‘absolute gravity’) with gravity as it would be weighed in the exercise of prosecutorial discretion (so-called ‘relative gravity’).⁶⁴¹ This chapter will examine those debates below. However, these debates are limited. In making the contrast between ‘legal gravity’ and ‘relative gravity’, these authors do not raise the question whether the gravity threshold laid down in Article 17 (1)(d) as a legal standard is itself subject to discretionary interpretation. Here, it is a matter of legal interpretive discretion (see Chapter Three)⁶⁴² rather than prosecutorial discretion. This chapter seeks to argue that the broad and open-ended meaning of the term ‘sufficient gravity’ in Article 17 (1)(d) has in effect permitted the prosecutor to apply it in a discretionary fashion. In support of this claim, I shall draw on a number of authors who emphasise that there is much discretionary scope attached to this standard of legal gravity.

Running across all these debates is the issue of the Prosecutor’s lack of transparency. Especially in his early pronouncements, the Prosecutor offered very brief accounts of the reasoning leading to the decision. The form in which matters were put left it very unclear whether he was talking about applying the sufficient gravity criterion as such or was merely ‘guided’ by it in exercising prosecutorial discretion. As time has gone by, information from the OTP on decisions has become more detailed. Arguably one reason for this is that the Prosecutor has sought to open two investigations *proprio motu* (Kenya and Cote d’Ivoire), which necessitates the Prosecutor to put his reasoning when applying to the Chambers for

⁶⁴⁰ DeGuzman, *supra* n. 13, P. 1429. Stegmiller, *supra* no. 13, Pp. 558-9. Also see SaCouta and Cleary, *supra* n. 13, P. 851. Also see above discussion of conflicting interpretations.

⁶⁴¹ As the term ‘relative gravity’ is used by these commentators, at this point excluding the question whether sufficient gravity may itself be relative (see above and below for clarification).

⁶⁴² Special thanks to my supervisory team to help me to understand this sort of discretion, in particular my Director of Studies John Strawson.

authorisation to proceed to open an investigation. The extent to which these applications for authorisation are equally informative will be examined below. Indeed, I shall claim that the ‘breakthrough’ in openness can be identified in the Mali Article 53(1) report and, more widely, the decision of the OTP to issue reports when decisions are made under Articles 5.

In discussing the dyadic tensions structuring criticism of the ICC prosecutor and the Court more widely, Robinson suggests that one strategic way that the prosecutor could reduce criticism is to be quite transparent in offering explanations when making the final decision, in particular when the prosecutor is in front of a high-profile situation such as the Iraq decision concerning British troops.⁶⁴³ However, he argues, more transparency and explanation will not ultimately lead to an escape from these dyadic criticisms:

Transparency may offer many benefits, but escape from the dyads is not one of them.

Transparency may help increase predictability and reduce outright misunderstandings (and thus may reduce those criticisms based in misunderstanding or unfamiliarity).

But even if one’s approach is explained with perfect clarity, that approach will still be subject to legitimate apologia and utopia critiques.⁶⁴⁴

Over a period of years,⁶⁴⁵ no doubt partly in reaction to the controversies around the early decisions, the Prosecutor began to develop a ‘methodology’ for assessing the gravity of crimes by reference to a set of factors, which started to emerge in 2006 (see section 4.3 below). Seemingly, these factors were intended both as an aid to interpreting Article 17(1)(d) and to provide guidance on the exercise of prosecutorial discretion, although this was not specified. The approach to perpetrators was articulated quite early (2003)⁶⁴⁶ in terms of ‘those most

⁶⁴³ *Supra* n. 73, P 23, ‘A common reaction is that you could escape or blunt such concerns by publishing your legal reasoning.’

⁶⁴⁴ *Supra* n. 73, P. 35.

⁶⁴⁵ Schabas, *supra* n. 258, Pp. 736- 741.

⁶⁴⁶ Policy Paper 2003, *supra* n. 187, P. 3.

responsible'. The way that the Prosecutor has set out their overall stance on these factors, and the ways that they have been deployed in particular instances, has also attracted criticism: far from clarifying and stabilising the meaning of gravity, factorial analysis has merely enhanced the Prosecutor's discretion, especially in allowing the Prosecutor to pick and choose instances when qualitative factors will be deemed decisive. This chapter will pursue and develop this line of argument, that the prosecutor, when assessing these factors, should be more consistent when determining legal gravity, as understood under Article 17 (1)(d), and remain flexible when assessing relative gravity, as understood under Article 53 (1)(c) and (2)(c). A second (and related) line of criticism⁶⁴⁷ attributes the prosecutor's Africa focus to the OTP's commitment to one gravity factor: 'the scale of the crimes' has been used predominantly by the OTP. In developing this criticism, this chapter will explore how this focus raises doubts about the global character of the Court by limiting the reach of the exercise of jurisdiction by the Court to cover, for example, all victims of different communities or societies.

The Court Chambers have in turn adopted these factors (and at times, others) and criteria of responsibility, initially and most controversially in the *Lubanga & Ntaganda* cases, and subsequently, as will be examined below. Rulings by the Court Chambers on the meaning of 'sufficient gravity' (Article 17(1)(d) as invoked in Article 53(1)(b) limit the legal interpretive discretion of the Prosecutor insofar as the Prosecutor will follow the Chamber's interpretation. These decisions by the Court Chambers on gravity as an admissibility criterion can also raise higher or lower the legal threshold, which in turn has a significant impact on the entire conception of the role of the Court and the way that it is manifested in prosecutorial decisions. The *Lubanga & Ntaganda* PTC 1 (2006)⁶⁴⁸ decision – the first judicial interpretation

⁶⁴⁷ See Kevin Jon Heller, Situational Gravity under the Rome Statute, in Carsten Stahn and Larissa van den Herik (eds.), *Future Perspectives on International Criminal Justice* (Cambridge, Cambridge University Press, 2009), Pp. 1- 3.

⁶⁴⁸ ICC, Pre-Trial Chamber I, Situation in the Democratic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo: Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation

of gravity – interpreted ‘sufficient gravity’ not only as requiring certain gravity factors in respect to criminal acts, but also specific characteristics of the perpetrators. In deeming these integral to the meaning of Article 17(1)(d) PTC I thus imposed a high legal gravity threshold, whilst curtailing not only the broad discretionary leeway that the Prosecutor was otherwise able to deploy in interpreting ‘sufficient gravity’, but also considerably eroding prosecutorial discretion in selecting potential cases. This was an early example of intra-institutional conflict between the Chambers and the Prosecutor as to the prosecutor’s sphere of discretion. However, the decision of PTC I was to a large extent neutralised by the Appeal Court. The Comoros review decision, in returning to these issues has ruled on the meaning of ‘sufficient gravity’ in the context of Article 53, stating that Article 53 ‘paragraphs (a) and (b) require the application of exacting legal requirements’⁶⁴⁹ which would suggest that the prosecutor now has no leeway for interpretive discretion – except unlike previous analyses of ‘strict legal construal’ (see above). The PTC also seems to see this as compatible with comparative analysis in order to determine ‘sufficient gravity’.⁶⁵⁰ Unlike PTC in *Lubanga & Ntaganda*, however, PTC I in Comoros seeks to impose a low gravity threshold. At the same time, it has also specifically declared that the Prosecutor’s exercise of prosecutorial discretion in respect to investigating (referred) situations is limited to invoking the ‘interests of justice’ criteria in Article 53(1)(c). This will be explained below.

This chapter is structured in three parts. The first part examines the broad debates around discretion, notably whether comparative analysis between situations can legitimately be undertaken under Article 17(1)(d), whether ‘extra-legal’ factors such as the limited resources of the Courts, and other practical considerations, can be taken into account, as these

of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, No.: ICC-01/04-01/06, 24th February, 2006, Para. 42, (hereinafter: Congo, Pre-Trial Chamber, February, 2006). This case is discussed below.

⁶⁴⁹ Comoros, Pre-Trial Chamber July, 2015, *supra* n. 621, Para. 14.

⁶⁵⁰ *Ibid*, Para. 2.

have been raised by legal academic commentators in the name of the distinction between legal gravity and ‘relative gravity’. The Prosecutor’s development of a factor-based methodology and how this in turn potentially enhances prosecutorial discretion will also be examined.

The second part of the chapter looks at ‘Gravity in Practice’, and will analyse how the term ‘sufficient gravity’ has been interpreted and applied by the Prosecutor and the Court at the stage of initiating investigations and proceeding with prosecutions. It will show how the Prosecutor has interpreted ‘sufficient gravity’ relying on discretionary leeway afforded by the flexible and indeterminate character of this term, as laid down in Article 17 (1)(d) (legal interpretive discretion). More specifically, it will critically examine how the Prosecutor has utilised the ‘methodology’ of the factor-based analysis of gravity of crimes, focusing on the criticism that the ICC Prosecutor has selected different factors in different contexts to determine the legal gravity of situations and cases. The discussion of these situations and cases will concentrate also on the exercise of prosecutorial discretion and the criticism that the prosecutor has in effect been exercising prosecutorial discretion when considering gravity whilst presenting this as a purely legal exercise. The application of gravity factors by the prosecutor will also be examined from a critical perspective. It will be argued that the Prosecutor has been very committed to one factor when examining gravity, namely ‘the scale of the crimes’.

The third part of the chapter interrogates the predominately quantitative approach that the prosecutor has implicitly relied on in assessing gravity. It will examine the arguments that the prosecutor should give more weight to qualitative factors. It will consider these issues closely as they have been decided and disputed in the Comoros situation. The latter situation will be analysed as case law and will review the question of discretion and the factorial analysis that this chapter discusses.

4.2. Gravity and Discretion

Gravity has two different and distinct roles within the ICC regime. On the one hand, where gravity/seriousness is considered in the exercise of prosecutorial discretion, it would be an element – a very important element – as seen above, in selecting among legally worthy situations and cases (*i.e.* that satisfy jurisdictional and admissibility requirements). On the other hand, and, in fact, prior to that in the prosecutorial decision-making process, ‘sufficient gravity’ (Article 17(1)(d) functions as a legal threshold that imposes a standard of gravity higher than the already grave nature of the crimes that fall under the ICC’s jurisdiction. Whilst the first raises the question of when and how the prosecutor exercises prosecutorial discretion – and upon what basis of authority? – the second is frequently presented as involving no discretion at all. How does gravity figure in the exercise of prosecutorial discretion as a selection filter? This has been discussed by many writers using the term ‘relative gravity’. In fact, they are using the term in two different senses. First, ‘relative gravity’ can refer to making comparisons between the immediate situation or case and others, whether those that have already been decided upon in the past or among the range of possible options facing the prosecutor at any one time, considering whether the potential cases within a situation are relatively less grave or proceed on the basis that they are comparable or graver. For example, in his explanation of the decision, Moreno-Ocampo stated that he selected the Ugandan rebels but not government forces because the alleged crimes committed by the former ‘were much more numerous and of much higher gravity than’⁶⁵¹ the latter. Similarly, specific cases might be prioritised to take to trial on the basis of their relative gravity compared to other cases within the same situation. The OTP has said that ‘cases inside the situation are selected according to their gravity.’⁶⁵²

⁶⁵¹ Statement by Chief Prosecutor Luis Moreno-Ocampo 14 October 2005, P. 3, available at <https://www.icc-cpi.int/NR/rdonlyres/2919856F-03E0-403F-A1A8-D61D4F350A20/277305/Uganda_LMO_Speech_141020091.pdf>.

⁶⁵² Report on Prosecutorial Strategy, *supra* n. 616, P. 5.

As pointed out in section 4.1, in the absence of a clear judicial ruling, commentators have diverged as to whether this first sense of relative gravity may legitimately be considered under Article 53(1)(b), with the ‘conflation’ school of thought arguing that it definitely cannot. PTC I in Comoros seems to decree otherwise. However, all commentators are agreed that ‘relative gravity’ in the second sense (see next paragraph) could not fall within the realm of assessing gravity in relation to Article 17(1)(d) under Article 53(1)(b).

Second, ‘relative gravity’ is used to refer to weighing the gravity of potential cases within a situation, or cases to take to trial, against other factors, such as the limited resources of the ICC. As was shown in Chapter One, this particular limitation may be a sufficient reason for the prosecutor to allocate these resources elsewhere where if its gravity, relative to ‘other factors, such as practical considerations, including the likelihood of apprehending a suspect or the availability of evidence, or strategic considerations such as a desire to shed light on the "complete landscape" of events that occurred within a particular situation’⁶⁵³ does not warrant investigation or prosecution.

Commentators on the early cases and situations have accused the prosecutor of ‘conflating’ legal gravity and relative gravity (in both senses). They are insinuating that the Prosecutor assessed legal gravity through methods that they believe should have been used only for of relative gravity assessments. This raises a number of questions: 1) does the assessment of ‘sufficient gravity’ necessarily exclude making comparisons between potential cases in situations (relative gravity in the first sense)? Only the courts can give an answer to that (so far the Court ruled otherwise). 2) If these decisions are in fact an exercise in prosecutorial discretion, what discretion does the Prosecutor actually have in respect to investigating situations? This is especially important in respect to relative gravity in the second

⁶⁵³ SaCouto and Cleary, *supra* n. 13, p 814.

sense which includes reference to extra-legal factors. This will be examined in detail in the discussion below of the specific instances.

As explored in Chapter One of this thesis, there are some conundrums as to the extent of prosecutorial discretion authorised by the Statute in relation to both *proprio motu* powers and referrals. These general concerns naturally also apply where ‘relative gravity’ is involved as a basis of selection. Thus several commentators, as well as the ICC Prosecutor, argue that the prosecutor’s discretion in respect to *proprio motu* investigations under Article 15 ceases once the legal criteria of jurisdiction and admissibility have been satisfied.⁶⁵⁴ At that point the prosecutor has no choice but to proceed: ‘the Statute compels her to seek authorization to open an investigation.’⁶⁵⁵ With respect to referrals, that argument has been put even more forcefully.⁶⁵⁶

For those who believe that there is very little, if any, prosecutorial discretion to select situations once the legal criteria are satisfied, the ‘interests of justice’ provisions in Article 53 (1)(c) and (2)(c) become especially important as the only recourse for the exercise of prosecutorial discretion whether or not to open an investigation. Stegmiller, for example, argues that gravity can be considered in a relative sense only in the context of ‘the interests of justice’.⁶⁵⁷ Gravity is specifically mentioned as a consideration in both Article 53 (1)(c) and (2)(c), which grant the prosecutor discretion not to proceed in relation to investigations and prosecutions respectively. It is broadly accepted that ‘gravity’ here must mean something different from Article 17 (1)(d) itself. Certainly, what is referred to is the gravity of ‘the crime’ and not the case’, suggesting that only the severity of the offence is to be considered and not

⁶⁵⁴ See for example, Policy Paper on Preliminary Examinations 2010, .Para. 76. See also, Policy Paper on Preliminary Examinations 2013, Paras. 40 and 74.

⁶⁵⁵ Vaid, *supra* n. 12, P. 363.

⁶⁵⁶ DeGuzman, *supra* n. 13, P. 1410. Except that she argues that it would be covered by “reasonable basis”.

⁶⁵⁷ Stegmiller, *supra* n. 13, P. 563. This is also the stance taken in (Comoros, Pre-Trial Chamber July, 2015, *supra* n. 621, Para. 14).

the degree of responsibility of the perpetrator. Under these provisions, considerations of ‘relative gravity’ would be appropriate and authorised.⁶⁵⁸ However, gravity is positioned differently in respect to investigations and prosecutions. In Article 53 (1)(c), empowering the prosecutor not to open a formal investigation even though the legal criteria of jurisdiction and admissibility are met, the phrasing counter-poses gravity of the crime (and the interests of victims) to the interests of justice: ‘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’. This suggests that ‘the interests of justice’ is to be balanced against these factors as countervailing considerations, as further underlined by the term ‘nonetheless’.⁶⁵⁹ On this basis, deGuzman believes that, with respect to investigations, there is no room for considerations of ‘relative gravity’ under the Article 53(1)(c). She argues that ‘[r]eading the Prosecutor's discretion to consider relative gravity into the “interests of justice” provision strains the language of the Statute. The Statute’s use of the term “nonetheless” indicates gravity should not be considered an element of the interests of justice here, but rather a factor to be balanced against those interests, whatever they may be.’⁶⁶⁰ She advances this argument also on the basis that the drafters of the Statute – although the term ‘interests of justice’ was left ambiguous – would not accept that the determination of these interests to be made on the basis of ‘relative gravity judgments’.⁶⁶¹ Taking deGuzman’s arguments in this paper altogether, they had to claim that the Prosecutor has in effect no discretion with respect to situational gravity. Others, notably Stegmiller, do not find such a problem. However, he suggests that gravity can be considered in its relative sense under both Article 53 (1)(c) and (2)(c). When it comes to taking cases to trial, in Article 53(2)(c), gravity is clearly located as

⁶⁵⁸ DeGuzman, *supra* n. 13, P. 1413.

⁶⁵⁹ *Ibid*, P. 1413.

⁶⁶⁰ *Ibid*.

⁶⁶¹ *Ibid*.

one of the circumstances that may be ‘taken into account’ in determining a prosecution is not in the interests of justice.⁶⁶²

To summarise: for those early commentators who admonish the prosecutor for ‘conflating’ (or eliding or being careless) ‘legal gravity’ and ‘relative gravity’, Article 17 (1)(d) as considered under Article 53(1)(b) is ‘a purely legal admissibility test’⁶⁶³ and does not allow the prosecutor to exercise any sort of discretion not to proceed once the threshold of ‘sufficient gravity’ is met. Further, given that the interests of justice provisions have never been invoked as a basis not to proceed, the prosecutor in turn would have had a narrow compass of authority for the exercise of such prosecutorial discretion in *de facto* ‘relative gravity’ assessments. On the other hand, as deGuzman argues, this may be an issue more of form than substance⁶⁶⁴ and that the prosecutor may have discretion in the overall assessment of ‘reasonable basis’.⁶⁶⁵ Apart from anything else, it encompasses weighing the evidential value of the materials available on the alleged facts of what occurred.

In discussing ‘legal gravity’ as a threshold admissibility criterion, writers such as deGuzman and Stegmiller tend to present it as if it had an absolute sense, by contrast to the evidently discretionary nature of ‘relative gravity’. Indeed, whilst recognising the discretionary element of other statutory criteria, such authors do not raise the question whether the gravity threshold laid down in Article 17 (1)(d) is *itself* subject to somewhat discretionary interpretations and that the Prosecutor’s interpretation of ‘sufficient gravity’ should also be interrogated. The very term ‘sufficient’ suggests subjective judgement whilst Schabas has

⁶⁶² Article 53(2)(c) states: ‘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; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.’

⁶⁶³ Stegmiller, *supra* n. 13, P. 562.

⁶⁶⁴ DeGuzman, *supra* n. 13, p 1414.

⁶⁶⁵ *Ibid*, P. 1410.

remarked on the rather enigmatic notion of ‘gravity’ as a key example of the indeterminate nature of the statutory criteria: “‘gravity’ and ‘interests of justice’, provide enormous space for highly discretionary determinations.”⁶⁶⁶ These analyses imply that the prosecutor’s decisions are discretionary depending on the broad leeway given by the broad and undefined term ‘sufficient gravity’.

What became Article 17(1)(d) in the final version of the Statute, was originally included under Article 35 in the 1994 Draft of the Statute.⁶⁶⁷ During the ILC debates on the 1994 Draft Statute, in fact, much of the discussion about gravity concerned the crimes to be included under subject-matter jurisdiction (*ratione materiae*). The question then was whether, for the purposes of the *exercise* of jurisdiction, a further gravity requirement should to be imposed as a matter of admissibility. There were some members of the Commission who opined that there was no such need, as ‘the relevant factors could be taken into account at the level of jurisdiction’.⁶⁶⁸ In contrast, ‘[o]ther members argued that because the circumstances of particular cases could vary widely and [the statutory provision] could anyway be substantially clarified after the court assumed jurisdiction so that a power such as that contained in article 35 was necessary if the purposes indicated in the preamble were to be fulfilled.’⁶⁶⁹ At the conclusion of these discussions, the additional gravity threshold was retained within the Statute. However, there was little discussion offered to elaborate on the meaning of gravity. Indeed, two potentially conflicting rationales were offered.⁶⁷⁰ On the one hand, the rationale for the exclusion of

⁶⁶⁶ Schabas, *supra* n. 4, P. 181.

⁶⁶⁷ Article 35 of the 1994 Draft provided that a case will not be admissible when it ‘Is not of such gravity to justify further action by the Court.’

⁶⁶⁸ The 1994 draft was the final draft prepared by the International Law Commission and presented to the UNGA along with a report on the final ILC drafting debates. Report of the [International Law] Commission to the General Assembly on the work of its forty-sixth session, Yearbook of the International Law Commission, United Nations, A/CN.4 SER.A/1994/Add.I (Part 2), Para.91, Art. 35, P. 52 available at <http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1994_v2_p2.pdf&lang=EF5RAC>.

⁶⁶⁹ *Ibid.*

⁶⁷⁰ The conflict can be seen notably in Pikis’s dissenting judgment in *Lubanga /Ntaganda* Appeal, paras 38-40, especially para 40, where he adopts the perspective of a national court.

insufficiently grave cases was made (as above) by reference to fulfilling the purposes indicated in the Preamble of the Statute.⁶⁷¹ On the other hand, making reference to national jurisdictions, in one of the drafting meetings, it was argued that the international court should have ‘power to stay a prosecution on specified grounds, a power that existed in many national jurisdictions’ and should include the fact that the acts alleged were not of sufficient gravity to warrant trial at the international level’; otherwise, ‘the court might be swamped by peripheral complaints involving minor offenders, possibly in situations where the major offenders were going free’⁶⁷² away from the reach of the Court. Then, at the 1998 Rome Conference itself, the Chilean delegation asked for an explanation for the vague term ‘sufficient gravity’ in Article 15(d) as it then was, nonetheless, the draft negotiations proceeded without giving a sufficient attention to this particular debate.⁶⁷³ The legislative history then provided very limited clarification on the content of the term ‘sufficient gravity’. DeGuzman has noted the ‘constructive role’ played by the ‘failure to elaborate the meaning of gravity’ in enabling the Court's establishment and development by allowing “states to support the Court without having to share a vision of its role in the world”, bridging ‘human rights-promoting states and sovereignty-focused states’. The gravity threshold for admissibility in particular:

... enabled the human rights-focused states to expand the lists of war crimes and crimes against humanity included in the Rome Statute compared to prior statutes. When sovereignty-focused states expressed concern over the inclusion of less serious types of

⁶⁷¹ *Supra* n. 668, Para. 50.

⁶⁷² Report of the[International Law] Commission to the General Assembly on the work of its forty-sixth session, Yearbook of the International Law Commission, United Nations A/CN.4/SER.A/1994 1 [Part 1] , which includes SUMMARY RECORDS OF THE 2328th TO 2377th MEETINGS, 2330th meeting 4 May 1994, para 9, p 9. It is worth noting that the discussion continues (same paragraph): It was not sufficient for such considerations to be taken into account by the prosecutor since this would raise problems of accountability.

⁶⁷³ United Nations, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June -17 July 1998 Official Records Volume II, A/CONF.183/13 (Vol.II), P. 215, available at <http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf>.

crimes, they were reassured that the gravity threshold would ensure that the Court exercises jurisdiction only over sufficiently serious instances of those crimes.⁶⁷⁴

However, she notes elsewhere, ‘while gravity’s ambiguity played a constructive role in enabling the establishment of the ICC, it has become increasingly problematic as the ICC has become operational.’⁶⁷⁵

In taking up this issue of the ambiguity of the gravity threshold, Vaid emphasises that the open-endedness and substantive flexibility of ‘sufficient gravity’ provide the prosecutor with ‘some degree of discretion.’⁶⁷⁶ She says that gravity is of ‘an exceptionally flexible concept’ that is open for varied interpretations ‘in many different and plausible ways.’⁶⁷⁷ This type of discretion implicitly allows the prosecutor to choose among alternative interpretations. To her, indeterminacy of the concept gives the prosecutor a power to claim authority as to which correct interpretations will be taken when deciding whether to initiate an investigation or not.⁶⁷⁸ Therefore, ‘[s]uch interpretive autonomy, when coupled with the flexibility of the concept itself, strongly resembles discretion.’⁶⁷⁹ As will be explored and discussed below, the practice of the OTP in applying the term ‘sufficient gravity’ strongly suggests that the Prosecutor has been able to exercise a broad discretion, whilst remaining within the framework of the Statute. By contrast to *prosecutorial* discretion, which, explicitly permits and draws upon extra-legal factors, the prosecutor ‘has capitalized on the substantive flexibility of concepts

⁶⁷⁴ Margret M. deGuzman, How Serious are International Crimes? The Gravity Problem in International Criminal Law, *Columbia Journal of Transnational Law*, Vol. 51, Temple University Legal Studies Research Paper No. 2012-13. Available at <<http://ssrn.com/abstract=2014987>>, P. 34.

⁶⁷⁵ Margret M. deGuzman, Gravity Rhetoric: The Good, The Bad, and The "Political", *American Society of International Law Proceedings*, Vol. 107, p 423.

⁶⁷⁶ Vaid, *supra* n. 12, Pp. 377 and 385.

⁶⁷⁷ *Ibid*, P. 388.

⁶⁷⁸ *Ibid*.

⁶⁷⁹ *Ibid*, P. 365.

such as gravity to find the necessary [*legal interpretive*] discretion within rather than outside the criteria established by article [17(1)(d)]’(emphasis added).⁶⁸⁰ The benefit is that:

... adherence to pre-established standards and criteria has been often recognized as a factor relevant to the legitimacy of the resulting decisions, particularly with respect to prosecutors. ... [Hence] the Prosecutor seems to attempt to embrace these elements of —good process.⁶⁸¹

In order to see precisely how the ‘the Prosecutor has leveraged the flexibility of the text’ – specifically ‘sufficient gravity’ – ‘to assert discretion within those criteria’,⁶⁸² it is necessary to explore the factors developed by the Prosecutor in policy documents as a way of giving meaning to the concept of gravity. It is in the use and manipulation of those factors that the Prosecutor has been able to find and choose between alternative interpretations of the term ‘sufficient gravity’.

4.3. Gravity in OTP Documents and Statements

Although the OTP tried to elucidate the meaning of gravity through several policy documents and statements, nonetheless, the term is left highly unspecified. Indeed, it is not clear whether these documents or statements were intended as specifications of additional elements that would raise the commission of already grave crimes up to the Article 17 (1)(d) requirement of ‘sufficient gravity’ or whether they were merely intended as policy statements guiding prosecutorial discretion in making selections. In a policy paper 2003, the OTP examined the meaning of the ‘gravity of a case’ and stated that ‘[t]he concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of

⁶⁸⁰ *Ibid*, P. 383.

⁶⁸¹ *Ibid*, P. 383.

⁶⁸² *Ibid*, P. 385.

participation in its commission.’⁶⁸³ Outlining the OTP strategy of focusing ‘on those who bear the greatest responsibility, the paper emphasised that these would potentially be ‘leaders of the State or organisation’.⁶⁸⁴ This was reemphasised again in the paper issued in the same year. The strategy paper also notes, however, that ‘the Office of The Prosecutor may go wider than high-ranking officers, if investigation of certain types of crimes or those officers lower down the chain of command is necessary for the whole case.’⁶⁸⁵ Two years later, Prosecutor Moreno-Ocampo identified two factors to be taken into consideration in assessing gravity of the crimes: numbers of persons killed or who were victims of other crimes, and the impact of the crimes.⁶⁸⁶

In an unpublished draft policy paper on Criteria for selection of situations and cases 2006, the OTP identified four factors relevant for the assessment of gravity.⁶⁸⁷ These factors were then all laid down in Regulation 29 (2) of the Regulations of the Office of the Prosecutor (2009): 1- the scale of the crimes, 2- the nature of the crimes, 3- the manner of the commission of the crimes, and 4- the impact of the crimes.⁶⁸⁸ The OTP ‘left considerable space for flexibility, by leaving the balancing and weight of the individual criteria open to its independent assessment’.⁶⁸⁹ These factors are to be assessed independently, impartially, and objectively.⁶⁹⁰

⁶⁸³ *Supra* n. 187, P. 7.

⁶⁸⁴ ICC, Office of the Prosecutor, Annex to the “Paper on some policy issues before the Office of the Prosecutor”: Referrals and Communications (September, 2003), P. 7.

⁶⁸⁵ *Ibid*, P. 7.

⁶⁸⁶ The ICC, Office of the Prosecutor, Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court: Informal meeting of Legal Advisors of Ministries of Foreign Affairs (24th October, 2005), P. 6, <http://www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/LMO_20051024_English.pdf>.

⁶⁸⁷ Criteria for Selection of Situations and Cases 2006, the draft was not published but cited by many authors who have a copy of the draft, such as Margaret M. deGuzman, at *supra* n. 532.

⁶⁸⁸ Regulation 29 of Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, entered into Force on 23rd April 2009.

⁶⁸⁹ *Supra* n. 61, P. 268.

⁶⁹⁰ Cited in deGuzman, *supra* n. 13, P. 1459, in Criteria for Selection of Situations and Cases 2006.

These factors contain qualitative and quantitative measures.⁶⁹¹ A more recent policy paper issued in 2013 elucidates these factors.⁶⁹² ‘The scale of the crimes’ means the prosecutor will consider ‘the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, or their geographical or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period).’⁶⁹³ Fabricio Guariglia, a member of staff of the OTP, had earlier specified that the OTP considers ‘scale of the crimes’ in selecting which situations to investigate and crimes to prosecute.⁶⁹⁴ ‘The nature of the crimes’⁶⁹⁵ refers to the specific elements of each offence such as killings, rapes, and other crimes involving sexual or gender violence and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction.’⁶⁹⁶ The Prosecutor referred to some particular crimes such as killing, rape, and child conscription in the DRC situation.⁶⁹⁷ The third factor is the manner of commission of the crimes, includes crimes that are directed against vulnerable people who cannot defend themselves, or those crimes that are committed by virtue of positions of the authority of the perpetrators that facilitate the commission of such crimes.⁶⁹⁸ The fourth factor is the impact of crimes,⁶⁹⁹ which has also been the subject of the legal deliberation in the Pre-Trial Chamber.⁷⁰⁰ In the Darfur

⁶⁹¹ See further discussion of these factors in Stegmiller, *supra* n. 13, Pp. 560-1.

⁶⁹² Policy Paper on Preliminary Examinations 2013, P. 15.

⁶⁹³ *Ibid*, P. 15.

⁶⁹⁴ Fabricio Guariglia, The Selection of Cases by the Office of the Prosecutor of the International Criminal Court, in Carsten Stahn and Göran Sluiter (ed.), *The Emerging Practice of the International Criminal Court* (Leiden: Martinus Nijhoff, 2009), P. 214.

⁶⁹⁵ DeGuzman, *supra* n. 13, P. 1452.

⁶⁹⁶ Policy Paper on Preliminary Examinations 2013, Pp. 63.

⁶⁹⁷ *Supra* n. 694, P. 214.

⁶⁹⁸ Policy Paper on Preliminary Examinations 2013, P. 14.

⁶⁹⁹ *Ibid*, P. 14.

⁷⁰⁰ See in concurrence *Prosecutor v. Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243-Red, 8 February 2010, paras. 31; ICC-01/09-19-Corr, Para. 188; ICC-02/11-14, Paras. 203-204. See also, Sudan: Prosecutor: "The attack on African Union Peacekeepers in Haskanita was an Attack on Millions of Civilians They had Come to Protect; We will Prosecute those Allegedly Responsible", *Reliefweb* (17th May, 2009), at <<http://reliefweb.int/report/sudan/sudan-prosecutor-attack-african-union-peacekeepers-haskanita-was-attack-millions>> (Last Access: 20th May, 2016), stating that ‘parties are targeting those who came to help

situation, the Prosecutor referred to the gravity of the crimes committed against the members of the peace-keepers in Darfur and its serious impact on the large number of civilians who relied on the humanitarian aid and protection these forces provide.⁷⁰¹ Also, the Pre-Trial Chamber stated in its decision with regard to the *Lubanga case* that ‘the social alarm’ is a relevant factor for the assessment of the gravity threshold, as Lubanga was charged for enlisting children, which warrants such alarm.⁷⁰²

The OTP has made clear on several occasions that the consideration of these factors ‘should be considered jointly; no fixed weight should be assigned to the criteria, but rather a judgment will have to be reached on the facts and circumstances of each situation.’⁷⁰³ Several questions, however, remain unanswered about how these factors should be evaluated, whether there is any hierarchy or a co-equal approach to be taken, or whether or not the existence of one or more than one factor is enough to determine the satisfaction of gravity in a certain situation or case. In practice, the Prosecutors have not been consistent about what they are trying to develop. In the next sections of this chapter, there will be a detailed discussion of how the OTP has applied these factors. Before we turn to this discussion, it is worth noting that recently the OTP declared in its latest policy paper that ‘gravity of the crimes’ is one criterion for the selection of cases.⁷⁰⁴ This criterion means that the prosecutor when selecting which cases to be prosecuted will focus on those most serious ones ‘that are of concern to the international community as a whole’.

4.4. Gravity in Practice (2004- 2012)

civilians, the AU and UN Peacekeepers, the aid workers. Such attacks also have a direct impact on the delivery of vital services and thereby exacerbate the suffering of vulnerable groups.’

⁷⁰¹ *Ibid.*

⁷⁰² *Prosecutor v. Lubanga*, Decision on the Prosecutor’s Application for Warrant of Arrest, Article 58, No.: ICC-01/04-01/07, P. 47. See also Stegmiller, *supra* n. 13.

⁷⁰³ *Supra* n. 260, P. 5. Also see *supra* n. 694, P. 214.

⁷⁰⁴ Draft Policy Paper on Case Selection and Prioritisation 2016, Para. 34.

The following section will examine the earlier practice of the Court and the prosecutor of the application of gravity, before it moves to the most recent development. This section will trace this development chronologically. It will explore how the Prosecutors, in particular, and the Court, in general, applied gravity. The analysis of this practice will focus on Article 17 (1)(d), as the Prosecutor has not yet rejected any situation or case on the basis of ‘relative gravity’, as understood under Article 53 (1)(c) and (2)(c). The discussion also will refer to the importance of the consideration of extra-legal factors, and will emphasise that such a consideration is a part of the assessment of relative gravity when the prosecutor only exercises prosecutorial discretion and not to be mixed with the assessment of legal gravity. It will also argue that the prosecutor should be more consistent when assessing ‘sufficient gravity’, as the current practice, followed by the Prosecutor and the Court, indicates that the development of this concept is highly messy.⁷⁰⁵

4.4.1. Uganda (2004), DRC (2004), and Darfur (2005) Situations

In his first report about the first three years’ activities of the OTP Moreno-Ocampo stated:

After thorough analysis, the Office concluded that the situations in the Democratic Republic of the Congo (“DRC”) and Northern Uganda were the gravest admissible situations under the jurisdiction of the Court. The situation in Darfur, the Sudan, referred to the Prosecutor by the Security Council, also clearly met the gravity standard.⁷⁰⁶

⁷⁰⁵ Ignaz Stegmiller, *Interpretative Gravity under the Rome Statute*, in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge, Cambridge University Press, 2011), P. 617, stating that the Court and the Prosecutor confused the use of the concept of gravity in its legal and relative senses.

⁷⁰⁶ ICC, The Office of the Prosecutor, *Report on the Activities Performed during the First Years* (June 2003- June 2006), available at < http://www.iccnw.org/documents/3YearReport%20_06Sep14.pdf>.

In justifying his decision, Moreno-Ocampo based his decision to select the DRC, Uganda, and Darfur situations on the gravity criterion. The Prosecutor used the comparative method to determine ‘sufficient gravity’ of these situations (the first sense of relative gravity, as argued by the commentators). Here, the Prosecutor was accused of conflating situational ‘relative gravity’ with legal gravity.⁷⁰⁷ It was submitted that the comparative approach indicates that the Prosecutor was using his prosecutorial discretion to select among ‘the gravest admissible situations’,⁷⁰⁸ whilst in fact he meant legal gravity as understood under Article 53 (1)(b), where there is no room for prosecutorial discretion. In such assessment, deGuzman argues that the comparative method is not warranted by Article 17 (1)(d), as the latter requires instead a threshold.⁷⁰⁹ DeGuzman points out that Moreno-Ocampo justified his selection by virtue of ‘the Statute’s gravity threshold for admissibility.’⁷¹⁰

On another occasion as well, the OTP stated that ‘[t]he Office identified the situations in the DRC, Uganda and Colombia as containing the gravest occurrence of crimes within its treaty jurisdiction.’⁷¹¹ Once again, Moreno-Ocampo was using the comparative approach to determine ‘sufficient gravity’ of those situations.

In the Darfur situation, the Prosecutor used the comparative approach to conclude the gravity of this situation, as can be seen in the above report of the three first years of activities. In his second report to the SC, Moreno-Ocampo made a brief reference to gravity and stated that ‘the Office has collated as comprehensive a picture as possible of the crimes allegedly

⁷⁰⁷ DeGuzman, *supra* n. 13, P. 1429.

⁷⁰⁸ *Ibid*, P. 1432.

⁷⁰⁹ See for example another occasion in which the Prosecutor used the comparative method to conclude ‘sufficient gravity’ of the Uganda situation, Policy Paper on Preliminary Examinations 2010, Para. 57, stating that the Uganda situation was considered ‘as containing the gravest occurrence of crimes within its treaty jurisdiction.’

⁷¹⁰ DeGuzman, *supra* n. 13, P. 1432.

⁷¹¹ Policy Paper on Preliminary Examinations 2010, Para. 57.

committed in Darfur since 1 July 2002 From this over-all picture the Office has identified particularly grave events'.⁷¹²

Bearing in mind that the four factors of the June 2006 policy paper were not introduced yet by the OTP, what can be seen from these early uses of gravity is that the OTP considerably adopted the comparative approach to determine 'sufficient gravity' of those situations. As will be explained more in the Iraq situation, in using the comparative method, the Prosecutor primarily depended on the criterion of scale to determine the gravity of these situations, namely the relative number of victims was the measure of the assessment of 'sufficient gravity'.⁷¹³

4.4.2. LRA Case (2005)

Within the Uganda situation, the OTP investigated the alleged crimes committed by the Lord's Resistance Army (LRA) and Uganda People Defence Force (UPDF). Here, Moreno-Ocampo indicted five members from the rebels' groups (LRA) and zero members from the Government's side (UPDF). He stated:

In Uganda, the criterion for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by all groups -- the LRA, the UPDF and other forces. Our investigations indicated that the crimes committed by the LRA were of dramatically higher gravity. We therefore started with an investigation of the LRA.⁷¹⁴

⁷¹² ICC, Office of the Prosecutor, Second Report of the Prosecutor of the International Criminal Court Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSC 1593 (13th December, 2005), P. 2, available at <https://www.icc-cpi.int/NR/rdonlyres/2CFC1123-B4DF-4FEB-BEF4-52E0CAC8AA79/0/LMO_UNSC_ReportB_En.pdf>.

⁷¹³ *Supra* n. 626, Pp. 4-5.

⁷¹⁴ *Supra* n. 686, P. 8.

Similarly to the above early uses of gravity, Moreno-Ocampo used the comparative method to determine the gravity of these cases.⁷¹⁵ Critics such as Stegmiller and Sasana and Cleary accuse him of conflating ‘relative gravity’ with legal gravity.⁷¹⁶ They point out that such a statement suggests that ‘the Prosecutor's choice to investigate and prosecute the conduct of the LRA prior to looking into the alleged crimes of the government was based on an exercise of prosecutorial discretion, not as a result of the gravity requirement under Article 17(1)(d).’⁷¹⁷ In other words, as if both cases are legally admissible, but it is prosecutorial discretion that pushed the prosecutor to prosecute only rebels’ crimes, but not the Government’s side.

The decision was also criticised as being political on the two sides of the argument. Moreno-Ocampo was criticised for appearing political, as he decided only to prosecute the rebels but not the Government.⁷¹⁸ As one politician also said on the decision to concentrate investigations on the LRA, ‘the ICC has become Museveni’s political tool.’⁷¹⁹ The latter criticism is commonly linked to the idea that Moreno-Ocampo himself encouraged the Government in Uganda to refer its own situation without the OTP intervention.⁷²⁰ The referral from the Government asked the OTP to look only at the crimes committed by the rebels’ side, although the Prosecutor stated that he will investigate all sides to the conflict.⁷²¹ Uganda was

⁷¹⁵ These are five LRA commanders: Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen.

⁷¹⁶ Stegmiller, *supra* n. 13, P. 558. See also SaCouto and Cleary, *supra* n. 13, P.851.

⁷¹⁷ SaCouto and Cleary, *supra* n. 13, P. 851.

⁷¹⁸ Phil Clark, Law, Politics and Pragmatism: The ICC and Case Selection in Uganda and the Democratic Republic of Congo, in Nicholas Waddell and Phil Clark, *Courting Conflict? Justice, Peace and the ICC in Africa*, *The International Journal of Transitional Justice*, Vol. 2, Issue 3 (2008), P 42. Clark argued that the OTP failed to explain its strategy in Uganda in a way that help to defeat the massive criticisms that the OTP received of failing to initiate any case against the alleged crimes committed by the Government, and in particular by the UPDF.

⁷¹⁹ Cited in Clark, *ibid*, P.42.

⁷²⁰ See more on this issue, The Office of the Prosecutor of the ICC- 9 Years on: Analysis of the Prosecutorial Strategy and Policies of the Office of the Prosecutor (2003- 2011): Recommendations to the next Prosecutor, *FIDH Paper*, The International Federation for Human Rights (December 2011), P. 15, available at <<http://fidh.org/en/international-justice/international-criminal-court-icc/The-Office-of-the-Prosecutor-of>>.

⁷²¹ For more information about the tension in Uganda, see Adam Branch, Uganda's Civil War and the Politics of ICC Intervention, *Ethics & International Affairs*, Vol. 21, Issue, 02 (2007), Pp. 179- 198.

motivated by its own political interests, and they used the ICC approach to shield themselves from its justice. The Prosecutor then seems too political, as he was ‘too dependent on state policy’.⁷²² This was an *apologist* critique.

Equally applicable, the decision against only the rebels also (easy cases)⁷²³ looks politically taken, as the Prosecutor was seeking to prove a point that justice is in operation, though it was only partial justice.⁷²⁴ He did not give any attention to the other values that might be undermined, as the Prosecutor seeks to achieve only justice. Adrian Traylor criticises him for being ‘too insulated from the political considerations that are bound to be part of a State’s referral of a situation.’⁷²⁵ This referral has been criticised by many commentators, as it does not ‘serve the interests of justice but also attempts to prolong the conflict and to keep the Acholi people of the north... weak.’⁷²⁶ The decision is unhelpful and unwise. It was a *utopian* critique.

As can be seen now, the consideration of some extra-legal factors, such as securing the cooperation of the Government ‘for its [the OTP] continued presence in Uganda and its generally good relationship with key Ugandan officials’,⁷²⁷ and the political bias’ allegation indicate that the Prosecutor conducted a strong sense of discretion. This process has been completed by applying the legal criterion ‘sufficient gravity’, where the Prosecutor deployed his discretion over it. In so doing, the Prosecutor used the comparative method, relying primarily on the number of victims in this situation (scale).

⁷²² *Supra* n. 72, P. 23.

⁷²³ Easy cases means those cases that appear more likely to be prosecuted than others, and appear politically more manageable and expedient. In the Uganda situation, the Prosecutor has a good relationship with the Ugandan Government, who showed a complete readiness to cooperate with the Court only to pursue the rebels. See, Nicholas Waddell and Phil Clark, *Courting Conflict? Justice, Peace and the ICC in Africa*, *The International Journal of Transitional Justice*, Vol. 2, Issue 3 (2008), P. 43.

⁷²⁴ See generally these arguments in, Waddell and Clark, *ibid*, Pp. 430- 431.

⁷²⁵ Adrian Traylor, *Uganda and the ICC: Difficulties in Bringing the Lords’ Resistance Army Leadership before the ICC*, *Eyes on the ICC*, Vol. 6, No. 1 (2009- 2010) P. 36.

⁷²⁶ *Ibid*, P. 36.

⁷²⁷ *Supra* n. 718, P. 43.

4.4.3. Iraq Situation (February 2006)

In this situation, Moreno-Ocampo was highly criticised for fallacious *reasoning* in the justification he provided for deciding not to open an investigation into the alleged crimes committed by the British soldiers in Iraq. He first examined the jurisdictional requirements, on the basis of the information available, and concluded that there was a reasonable basis to believe that British soldiers had committed crimes that fell within the jurisdiction of the Court. He declared that

There was a reasonable basis to believe that crimes within [personal and territorial] the jurisdiction of the Court had been committed, namely willful killing and inhuman treatment. The information available at this time supports a reasonable basis for an estimated 4 to 12 victims of willful killing and a limited number of victims of inhuman treatment, totaling in all less than 20 persons.

However, the Prosecutor then went on to state that, not only were the ICC specific gravity criteria for war crimes (Article 8(1)) not met but also:

... the general gravity requirement under Article 53(1)(b). The Office considers various factors in assessing gravity. A key consideration is the number of victims of particularly serious crimes, such as wilful killing or rape. The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. It is worth bearing in mind that the OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, the Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as intentional and large-scale sexual violence and

abductions. Collectively, they have resulted in the displacement of more than 5 million people. Other situations under analysis also feature hundreds or thousands of such crimes.

Taking into account all the considerations, the situation did not appear to meet the required threshold of the Statute.⁷²⁸

Moreno-Ocampo explicitly said that ‘the situation did not appear to meet the required threshold of the Statute.’, yet almost in the same breath offers a justification based on comparisons with other situations and the relatively small number of victims in the Iraq situation compared to a large numbers of victims in Northern Uganda, the Democratic Republic of Congo and Darfur situations. Whilst considerations of scale are relevant both to the assessment of ‘sufficient gravity’ as a legal threshold under Article 17(1)(d) and to prosecutorial discretion in selection situations, only the latter includes cross-situational comparison *i.e.* considerations of relative gravity (according to the above commentators).

This ‘conflation’ has attracted criticisms from many commentators. Stegmiller points out that the Prosecutor faced criticisms in relation to this decision because he was not careful enough to distinguish between ‘gravity as an admissibility criterion or as a matter of prosecutorial (discretionary) selection.’⁷²⁹ DeGuzman again asserts in a more recent article that Moreno-Ocampo again conflated ‘relative gravity’ and legal gravity.⁷³⁰ She says that the Prosecutor assessed legal gravity as an admissibility criterion on the basis of the relatively small number of victims compared to the large number of victims in other situations.⁷³¹ ‘Thus, the “threshold” was treated as a relative analysis based primarily on the number of victims in

⁷²⁸ *Supra* n. 633, Pp. 8-9.

⁷²⁹ Stegmiller, *supra* n. 13, P. 595.

⁷³⁰ *Supra* n. 532, P. 286.

⁷³¹ DeGuzman, *supra* n. 13, P. 1432.

[this] situation.’⁷³² She emphasises that the term ‘sufficient gravity’, as laid down in Article 17 (1)(d) requires a legal threshold, but not ‘a comparison’.⁷³³ However, deGuzman makes an important reference that the Prosecutor may deliberate this conflation as he may seek to hide his discretionary selection into the legal requirements of the Statute. This is the only indirect acknowledgement given by deGuzman that the assessment of ‘sufficient gravity’ may broadly involve discretionary-taken decision. Schabas also harshly criticises Moreno-Ocampo for taking such a decision, but for different reasons. He points out that the comparison of a large-scale situation with one case within the Iraq situation was misused by the Prosecutor, as he ‘was comparing apples with oranges’.⁷³⁴ Such a poor comparison might cause a considerable damage to the legitimacy of the Court.⁷³⁵ In particular it suggests that the prosecutor is politically-motivated when it comes to pursue alleged crimes committed by powerful states (The British soldiers’ situation).

Another point that can be raised in relation to the Iraq situation is that the decision of the Prosecutor not to proceed to open an investigation in this situation was harshly criticised for the same pattern of the dyadic arguments. The decision was criticised for being too deferential in that the Prosecutor was sacrificing his mandate to factors other than criminal justice. This was an *apology* critique. In a related context, ICC Watch states ‘that there is one so-called ‘international law’ for European and western countries, and their leaders, and another quite different legal standard for Third World nations.’⁷³⁶ The Prosecutor ‘refuses to even publicly account for why he will not investigate British politicians and military personnel.’⁷³⁷

⁷³² *Ibid*, P. 1432.

⁷³³ *Ibid*, P. 1432.

⁷³⁴ Schabas, *supra* n. 258, P. 741.

⁷³⁵ SaCouto and Cleary, *supra* n. 13, Pp. 813-4, arguing that ‘if the Prosecutor is not careful to distinguish between considerations of gravity for purposes of determining whether a situation or a case is admissible under Article 17 and considerations of gravity for purposes of determining which situations and cases will be investigated or prosecuted as a matter of prosecutorial discretion, the public perception of the Court may suffer.’

⁷³⁶ Press Release, Why Won’t the ICC Move Against Tony Blair on War Crimes? *ICC Watch* (4th February, 2010)

⁷³⁷ *Ibid*.

He was seen as too deferential to the powerful states, including the USA.⁷³⁸ Schabas discusses the political-motivation of the decision, in his recent article, citing a cable sent by Wikileaks, ‘Ocampo has said that he was looking at the actions of British forces in Iraq- which... led a British ICTY prosecutor nearly to fall off his chair’, said a dispatch to Washington from one of the missions. ‘Privately, Ocampo has said that he wishes to dispose of Iraq issues (i.e. Not to investigate them.)’.⁷³⁹ The legal argument of this view is that the Prosecutor failed to maintain the criminal justice mandate of the Court that is supposed to be applied to all states however powerful these are. That did not happen at the time.

On the other hand, the decision was also criticised for being too imperious, as the Prosecutor is pursuing too high profiles and is trying only to prove a point that he is capable of achieving justice.⁷⁴⁰ He is then still political. It is just too far disconnected from the interests and policies of states that may easily render the decision incapable of being enforceable. In this regard, Davenport suggests that ‘[t]he new prosecutor should spend less time on highly visible and politicized cases and bring some cases of war crimes and crimes against humanity she can actually try and win.’⁷⁴¹ The concentration on too high cases might only disturb other values on the ground. It is true that the dyadic arguments are manifested in this particular case, concerning its first and second moments respectively. However, the tension of this situation does not appear to be unresolvable, in particular since the British-Iraq war came to an end several years ago. The above concerns that might play a role in Moreno-Ocampo’s position

⁷³⁸ See generally, David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford, Oxford University Press, 2014).

⁷³⁹ William A. Schabas, The Banality of International Justice, *Journal of International Criminal Justice* (2013) P. 5.

⁷⁴⁰ Tim Murithi, The African Union and the International Criminal Court: An Embattled Relationship? *Institute for Justice and Reconciliation Policy Brief*, (8th March 2013), P. 6. Murithi stated that ‘the ICC has to acknowledge... that it is operating in an international political milieu- and that on occasion it would have to sequence its prosecutions to enable political reconciliation processes to run their course. This would require the ICC to step down from the artificial pedestal on which Ocampo placed it, asserting that it does not play politics- When in fact it has appeared that everything that it has done has been politically tainted.’

⁷⁴¹ *Supra* n. 112.

seem now unfounded. As was discussed in Chapter Two, Goldstone exercised a strategic plan before he indicted Karadzic, Mladic, and Milosevic. He considered several extra-legal factors within his decision-making process before he finally prosecuted them at different times.

Indeed, several years later from Moreno-Ocampo's decision, Prosecutor Bensouda responded to our suggestion – made in Chapter Two that the prosecutor should consider the circumstances that accompany in particular the political cases – and completed what Moreno-Ocampo started. She reopened a preliminary examination on Iraq, following a new communication sent by the European Center for Constitutional and Human Rights (ECCHR) and Public Interest Lawyers (PIL).⁷⁴² The OTP states that 'the communication alleges a higher number of cases of ill-treatment of detainees and provides further details on the factual circumstances and the geographical and temporal scope of the alleged crimes.'⁷⁴³ As Mark Kersten questions, 'will Western officials responsible for crimes against humanity and war crimes in Iraq finally be brought to justice?'⁷⁴⁴ This a decisive moment that all observers are waiting for to see how the prosecutor will respond to the 250-page dossier detailed allegations of beatings, electric shocks, mock executions, and sexual assault.⁷⁴⁵

As can be seen (bearing in mind the four factors were not yet identified), the Prosecutor so far, is still consistent in his approach to conclude 'sufficient gravity', as he again used a quantitative approach (based on the comparative method) to assess the gravity of this situation. He did not use or even mention any qualitative measures. The Prosecutor linked the satisfaction

⁷⁴² ICC, Office of the Prosecutor, Statement: Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq (13th May, 2014), available at <<https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014>>.

⁷⁴³ *Ibid.*

⁷⁴⁴ Mark Kersten, The ICC and Iraq: "A Pinochet Moment?", *Muftah* (27th May, 2014), available at <http://muftah.org/icc-iraq-pinochet-moment/#.Vfv2i_IViko> (Last Access: 18th September, 2015).

⁷⁴⁵ See Communication to the Office of the Prosecutor of the International Criminal Court: The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008, *The European Center for Constitutional and Human Rights* (submitted on 10th January, 2014), available at <file:///C:/Users/user/Desktop/UKICC-Communication-2014-01-10_public.pdf>.

of gravity here only to the relative number of victims committed by the British soldiers. That was the measure for the Prosecutor to conclude that the situation was not sufficiently grave. This method of interpreting gravity suggests, but definitely does not establish, that scale, based on the comparative approach is a sufficient factor to determine the gravity of a situation. However, under the above charges of politicisation, it can be noticed that the Prosecutor deployed his discretion through his independent capacity to interpret the legal criterion ‘sufficient gravity’ to come up with the decision not to investigate. That was a strong fashion of discretion exercised by applying this legal requirement.

4.4.4. *Lubanga and Ntaganda* Cases (February 2006)

In the DRC situation, the *Lubanga* and *Ntaganda* PTC I’s decision was the first judicial cases where the Chambers ruled on the meaning of ‘sufficient gravity’ (Article 17 (1)(d)). For the purpose of assessing this gravity, the Chamber followed the literal, contextual, and teleological criteria as laid down in Articles 31 and 32 of the Vienna Conventions on the Law of Treaties.⁷⁴⁶ As Ray Murphy points out, Article 21 of the Statute also is relevant in this regard.⁷⁴⁷ Based on the literal interpretation, the Chamber first made clear that the assessment of the admissibility of a case is mandatory and that there is no room for discretion.⁷⁴⁸ Moving to the contextual interpretation, the Chamber concluded that the application of the gravity threshold must be assessed at the investigation and prosecution stages, and that its decision only concerns the prosecution stage *i.e.*, when the gravity threshold ‘applied to a case arising from the investigation of a situation.’⁷⁴⁹ Further to this, the Chamber created two features that

⁷⁴⁶ Congo, Pre-Trial Chamber, February, 2006, *supra* n. 648, Para. 42. See also ICC, Pre-Trial Chamber I, Situation in the Democratic of the Congo: Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, Annex II, No.: ICC-01/04-01/07, Para. 43.

⁷⁴⁷ Article 21 provides ‘In the first place its Statute, Elements of the Crimes and its Rules of Procedure and Evidence; (b) in the second place where appropriate, applicable treaties and the principles and rules of international law’. Murphy, *supra* n. 246, P. 288.

⁷⁴⁸ Congo, Pre-Trial Chamber, February, 2006, *supra* n. 648, Para. 43.

⁷⁴⁹ *Ibid*, Para. 44.

render a particular conduct grave: 1- the conduct must be systematic or large scale, 2- and due consideration should be given to the social alarm that the conduct caused in the international community.⁷⁵⁰ Proceeding to the teleological interpretation, the Chamber found further that the additional gravity threshold of Article 17 (1)(d) is meant to maximise the deterrent effect of the Court, given the aims of the Court. Therefore, the Chamber decided that a further factor must be also considered, alongside the gravity of the relevant conducts, which is the case initiated ‘against the most senior leaders suspected of being the most responsible for the crimes within the jurisdiction of the Court’.⁷⁵¹ PTC I considered that this additional factor contains three elements: 1- ‘the position of the persons’, 2- ‘The roles such persons play, through acts or omissions, when the State entities, organisations or armed groups to which they belong commit systematic or large-scale crimes within the jurisdiction of the Court., and 3- the role played by such State entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court.’⁷⁵² On these bases and unlike the case against *Lubanga*, the Chamber found that *Ntaganda* was not among these senior leaders and, therefore, his case was inadmissible.⁷⁵³

As can be seen, the Chamber had set a very high threshold for determining that the case was of ‘sufficient gravity’ to justify further action by the Court under Article 17 (1)(d). Although some of these factors were developed as a policy consideration by the OTP, such as the focus of the prosecution on the most responsible people for the most serious crimes,⁷⁵⁴ yet in this judgment, the Chamber rendered them legal requirements, with no place for discretion. Under such a decision, the Prosecutor would not then be able to exercise legal interpretive

⁷⁵⁰ *Ibid*, Para. 46.

⁷⁵¹ *Ibid*, Para. 50.

⁷⁵² *Ibid*, Paras. 51-2.

⁷⁵³ *Ibid*, Para. 89.

⁷⁵⁴ Policy Paper on Preliminary Examinations 2013, Para. 42, ‘the Office will assess complementarity and gravity in relation to the most serious crimes alleged to have been committed and those most responsible for those crimes’.

discretion having received these legal specifications, (however the decision was reversed, as will be explained below). This decision however was harshly criticised by commentators. For example, Schabas argues that in creating the factor of ‘the social alarm’, PTC I ‘assessed gravity in vacuum.’⁷⁵⁵ He says that the Chamber did not consider the mass atrocities that resulted from the American and British invasion of Iraq to assess the gravity of the *Lubanga* case. He ‘was comparing Apples with nothing.’⁷⁵⁶ Schabas then clearly opposes deGuzman’s opinion in that the comparative approach could be a relevant method to determine legal gravity.⁷⁵⁷

The decision, however, was reversed in 2006 by the Appeal Chamber, following a Prosecutor’s application.⁷⁵⁸ The Appeal Chamber found PTC I erred in law, and that its decision was unfounded, and subjective; and that the application of an extremely high threshold would reduce the deterrence effect of the Court.⁷⁵⁹ In his application to appeal the PTC I’s decision, the Prosecutor argued that the three prongs PTC I developed for the interpretation of the threshold gravity would go against the ordinary meaning of Article 17 (1)(d) and also the intent of the drafters.⁷⁶⁰ For further explanation, he argued that ‘the social alarm’ test cannot even be found within the Statute.⁷⁶¹ Also, the teleological interpretation would not further the deterrent effect of the Court, as the future criminals would not fear the Court. More importantly,

⁷⁵⁵ Schabas, *supra* n. 258, P. 743.

⁷⁵⁶ Schabas, *supra* n. 258, P. 743.

⁷⁵⁷ DeGuzman, *supra* n. 13, P. 1429, stated in footnote 142 ‘criticizing the Lubanga Pre-trial Chamber for “assess[ing] gravity in a vacuum” rather than employing a relative gravity analysis of the gravity threshold for admissibility’.

⁷⁵⁸ ICC, Appeal Chamber, Situation in the Democratic of the Congo: Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest,” Art. 58, No.: ICC-01/04-169 (13th July 2006) (hereinafter: Congo, Appeal Chamber, July 2006).

⁷⁵⁹ Specifically, the Appeal Chamber found that the systematic and large scale conditions are not applicable to the crimes against humanity, and that ‘social alarm’ test is too subjective and based on nothing, and also confining the admissibility of the Court only to those most responsible for crimes in question would affect the deterrence of the Court, since other perpetrators would avoid the jurisdiction of the Court. See Congo, Appeal Chamber, July 2006, *supra* n. 758, Paras. 68- 82.

⁷⁶⁰ Congo, Appeal Chamber, July 2006, *ibid*, Para. 66.

⁷⁶¹ *Ibid*, Para. 66.

the Prosecutor argued that such a decision would limit ‘prosecutorial discretion’⁷⁶², as it enforces the Prosecutor to focus his prosecution only on top leaders. The Appeal Chamber agreed with the Prosecutor and concluded that the Chamber’s test was incorrect.⁷⁶³ It rejected the three prongs. For example, and in relation to the test of the most senior suspects being most responsible, the Appeal Chamber held ‘the deterrent effect of the Court is highest if no category of perpetrators is *per se* excluded from potentially being brought before the Court.’⁷⁶⁴ The Appeal Chamber then rejected every aspect that PTC I came up with.

Although the Appeal Chamber did not offer an explanation for the preferred meaning of ‘sufficient gravity’, in rejecting these criteria as elements of the threshold test, the Court adopted a lower threshold for gravity, thus expanding the reach of the Court. However, Judge Giorgos Pikis provided a separate dissenting opinion, arguing for a very low threshold, in which ‘sufficient gravity’ should be construed very narrowly, such that only trivial crimes become excluded.⁷⁶⁵

As can be seen now, the Appeal Chamber’s decision has opened the door again for the prosecutor to exercise a discretionary leeway when interpreting gravity to choose among the different interpretations that the term may involve. The Court endorsed, in this case, the low level of the required threshold for determining the term ‘sufficient gravity’. Moreno-Ocampo and, later on, Bensouda have continued to interpret ‘sufficient gravity’ in a discretionary fashion.

4.4.5. Kenya (2010) and Cote d’Ivoire Situations (2011)

⁷⁶² *Ibid*, Para. 66.

⁷⁶³ *Ibid*, Paras. 68- 82.

⁷⁶⁴ *Ibid*, Para. 73.

⁷⁶⁵ See G. Pikis, *The Rome Statute for the International Criminal Court* (Leiden: Martinus Nijhoff, 2010).

Having published already in June 2006 the four factors of the assessment of gravity, the OTP has, for the first time, given details about how the assessment of legal gravity were applied, and that was in the context of the Kenya and, more recently, the Mali situations.⁷⁶⁶ The Kenya situation was the first *proprio motu* investigation where the prosecutor sought to proceed from preliminary examination to open an investigation (by contrast to the Iraq situation, also via the communications channel/*proprio motu* (under Article 15), where the prosecutor declined to proceed to an investigation). The Statute requires the prosecutor to gain authorisation from the Court to open *proprio motu* investigations. Hence, this was also the first time that Pre-Trial Chamber II (PTC II) was required to consider the Prosecutor's application of Article 17 (1)(d) in relation to situational gravity as a part of the assessment of admissibility.

PTC II has made great progress towards identifying the meaning of gravity. The Chamber confirmed that 'sufficient gravity' must be read as an additional gravity that aims at preventing the Court from exercising its jurisdiction over 'peripheral cases.'⁷⁶⁷ PTC II then set a low level of threshold for assessing 'sufficient gravity', and considered the proposition of the Prosecutor of determining gravity in accordance with 'a concrete case' as irrelevant. Instead, it asked the Prosecutor to examine gravity 'against the backdrop of the likely set of cases.'⁷⁶⁸

⁷⁶⁶ See ICC, Presidency, Decision Assigning the Situation in the Republic of Mali to Pre-Trial Chamber II, ICC-01/12-1 (19th July, 2012), available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0112/court%20records/presidency/Pages/1.aspx>. Oddly, between these two situations, the OTP opened investigation into two situations in two countries without providing any detail about these factors. See the Libya and Cote d'Ivoire situations' decisions: No.: ICC-01/11 (26, February 2011), and No.: ICC-02/11 (22nd February 2012), respectively. The OTP seems again inconsistent in relation to clarification of those factors. However, one possible interpretation to the inconsistent strategy of prosecution the OTP exercises can be attributed to the prevalence of the common law system over the civil law system in shaping the prosecutorial discretion. Whilst '[t]he common law system is characterised by the almost unlimited discretion', the civil system is stricter and requires the prosecutor to be consistent when exercising a prosecutorial discretion. Kai Ambos, Comparative Summary of the National Reports, in Louise Arbour, Albin Eser, Kai Ambos, Andrew Sanders (eds.), *the Prosecutor of Permanent International Criminal Court* (Freiburg im Breisgau: 2000), p. 505. In the two situations in question, the OTP is inclined more to adopt the civil law system, and the opposite in relation to the other situations. The current result of this strategy is that the legitimacy of the Court is at risk.

⁷⁶⁷ Kenya, Pre-Trial Chamber II 2010, *supra* n. 615, Para. 56.

⁷⁶⁸ *Ibid*, Para. 58.

In defining these cases, PTC II provided two requirements that the Prosecutor needs to examine. The first one relates to potential crimes that might be prosecuted. Here, the quantitative and qualitative approach are required to examine ‘sufficient gravity’.⁷⁶⁹ The second one is concerned with potential perpetrators. Here, the assessment of ‘sufficient gravity’ must concentrate on ‘those who may bear the greatest responsibility for the alleged crimes committed.’⁷⁷⁰ Although these legal requirements may slightly reduce the discretion of the prosecutor in interpreting ‘sufficient gravity’, nonetheless deGuzman states that this is only a limitation on ‘the prosecution’s freedom to shape investigation’.⁷⁷¹ The prosecutor then still has broad discretionary leeway to interpret ‘sufficient gravity’, as this assessment is ‘general in nature.’⁷⁷²

In applying for authorisation, the Prosecutor did not discuss the issue of discretion. This time, he did not use the comparative method, as he moved to treat ‘sufficient gravity’ as a threshold, where he employed the four factors to conclude the gravity of the situation. In interpreting gravity, the Prosecutor used the four factors jointly to make the decision, without establishing any hierarchy among these factors. For example, in relation to scale, the Prosecutor stated that the acts of nearly 1133 killings of civilians, 900 rapes, the displacement of 350000 people, 3561 reported acts of serious injury and other acts are enough to satisfy this factor.⁷⁷³ In contrast to the previous situations, the Prosecutor now used the full range of factors for assessing gravity so he could make the decision to open an investigation. She used the four factors together (quantitative and qualitative measures) to reach the decision.

⁷⁶⁹ *Ibid*, Para. 62.

⁷⁷⁰ *Ibid*, Para. 60.

⁷⁷¹ Margret M. deGuzman, The International Criminal Court’s Gravity Jurisprudence at Ten, *Washington University Global Studies Law Review*, Vol. 12 (2013), P. 483

⁷⁷² Kenya, Pre-Trial Chamber II 2010, *supra* n. 615, Para. 60.

⁷⁷³ In relation to the impact of the crimes, the Prosecutor concluded these crimes have devastating nature on victims, in particular sexual-related crimes. In terms of the manner of the commission of the crimes, he described the acts as brutally committed, such as cutting off body parts. See Situation in the Republic of Kenya 2009, *supra* n. 230, Paras. 56-9.

The other *proprio motu* investigation launched offers a significant contrast that the Prosecutor instead used only two factors to make a decision concerning the gravity of the Cote d'Ivoire situation, the quantitative factor of scale and the qualitative factor manner of commission of the crimes to reach her decision.⁷⁷⁴ In interpreting 'sufficient gravity' of this situation, the Prosecutor considered the satisfaction of *only* two factors of both quantitative and qualitative characters. This is rather a discretionary leeway in finding as what 'sufficient gravity' was meant for. In the Kenya situation, the Prosecutor picked an interpretation that involved four factors to assess legal gravity. The different assessment of the term 'sufficient gravity' implicitly allowed the Prosecutor to exercise a broad legal interpretive discretion to make a decision.

4.4.6. Mohammed Hussein Ali Case (2011)

In this case, a confirmation of charges, Ali disputed the charges issued against him, arguing that the conduct with which he was charged (police inaction) was not sufficiently grave to be admissible, and that he was not one of the senior or principal perpetrators and thus fell below the requirement of the gravity threshold.⁷⁷⁵ Upon ruling on these arguments, PTC II held that the Statute does not exclude conviction for inactions; and it further held that such interpretation of the gravity threshold that limit the subject matter jurisdiction of the Court is contrary to the aims and purposes of the Rome Statute, the claim that only senior perpetrators justify further action by the Court is 'legally unfounded'.⁷⁷⁶ Then, The Chamber used the four factors to confirm 'sufficient gravity' of this case and found all of them satisfied.⁷⁷⁷ Logically

⁷⁷⁴ ICC, Pre-Trial Chamber III, situation in the Republic of Cote d'Ivoire, Request for Authorisation of an Investigation Pursuant to Article, No.: ICC-02/11, 23 June 2011, 15 Paras. 63 (scale) and 58 (scale and manner), available at <<https://www.icc-cpi.int/iccdocs/doc/doc1097345.pdf>>.

⁷⁷⁵ *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (23rd January, 2012), Para. 41 available at <<http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf>>.

⁷⁷⁶ *Ibid*, Paras. 46-7.

⁷⁷⁷ *Ibid*, Paras. 49- 50.

speaking, when the Court tends to set a low threshold for gravity to be considered by the prosecutor, this opens the door for more cases to be admissible before the Court. This means that the exercise of the discretionary fashion, whether prosecutorial or legal interpretive would be wider.

4.4.7. Mali Situation (2012)

In the Mali situation, the Prosecutor's report on the decision to open an investigation was more detailed than any other decision.⁷⁷⁸ Bensouda stated that six types of alleged war crimes have been committed by the conflicted parties.⁷⁷⁹ She explained the application of all gravity factors in a sequenced way for each type of crime and related incident, identifying five main incidents.⁷⁸⁰ With regard to the scale of the crimes, Bensouda's quantitative methodology was used to identify the number of incidents and victims in each, as well as particular buildings that were destroyed. Regarding the nature of the crimes, this reflected the recognition that crimes against humans can include actions directed against the cultural and spiritual heritage of the given country. As far as the manner of commission of these crimes is concerned, she identified the fact that those crimes were committed in an unusually cruel way, such as stoning, amputation, flogging, disemboweling, and other methods, makes a particular incident

⁷⁷⁸ Upon receiving 'credible information' via communications and referral source, Bensouda decided that there was 'a reasonable basis' to believe that the alleged crimes committed in Mali are under the jurisdiction of the Court. Further to this, she also decided that the situation is admissible, as the Government of Mali explicitly accepted the jurisdiction of the Court following its referral, see Report on Preliminary Examination Activities 2013, Para. 231. The OTP, then, moved on to decide that the situation in Mali 'appears to be of sufficient gravity to justify further action by the Court, based on an assessment of their scale, nature, manner of commission and impact.' See, ICC, Office of the Prosecutor, *Situation in Mali: Article 53 (1) Report* 16 (January 2013), Para. 11. Indeed, the OTP already in some earlier documents declared that the situation meets 'the threshold of gravity set out in article 17 (1) (d)' that renders a situation admissible before the Court. The Prosecutor found out the gravity of the situation according to the aforementioned factors: 'the scale, nature, manner and impact of the alleged crimes committed'. As a consequence, Bensouda decided, formally, to open the investigation in Mali based on 'the gravity threshold' assessment, see Report on Preliminary Examination Activities 2013, P. 232.

⁷⁷⁹ Situation in Mali, *ibid*, Para. 7.

⁷⁸⁰ Situation in Mali, *ibid*, Paras. 144- 170.

sufficiently grave. The evaluation of the impact of the alleged crimes was mainly based on the terrible situation of victims and other members of civil society in this situation.

With the Mali situation, the current Prosecutor has made a great advance in terms of being more transparent, concrete, and detailed about what makes a situation sufficiently grave (legal gravity). This clarification can enable all actors and observers to predict how the OTP might behave in a future situation. If the prosecutor fails to open investigation against a certain situation that looks as grave, or graver than the Mali situation, based on the above clarification of the concept of gravity, the perception and legitimacy of the Court may be undermined. Again, the Prosecutor treated gravity as a legal threshold. However, she required four factors jointly to assess the satisfaction of legal gravity. This also indicates that the prosecutor has a broad legal interceptive discretion to determine legal gravity.

Before we analyse the last development of the assessment of gravity in the Comoros situation, we can see so far that the Prosecutor has significantly deployed strong discretion to interpret ‘sufficient gravity’ in an open-way. As opposed to the arguments of the commentators, ‘sufficient gravity’ did not have an absolute legal sense. The term itself is indeterminate and the Court has already set a low level for its threshold. The different use of the factorial analysis of the term ‘sufficient gravity’ has allowed the Prosecutor to come up with different interpretations of the term ‘sufficient gravity’. These all contributed to the broad discretionary determination of the term. The Prosecutor has used two different methods to interpret ‘sufficient gravity’. 1- The comparative method, 2- the judgment method (threshold). In using these two methods, the Prosecutor was considering different factors to determine the issue of ‘sufficient gravity’. For example, in using the comparative approach, the Prosecutor heavily depended on the quantitative measure, namely the number of victims. In using the threshold judgment, the Prosecutor sometimes used one factor to reject a situation, two factors to satisfy ‘sufficient gravity’, and on another occasion she recalled four of them jointly to conclude the

gravity threshold. In using these methods and factors, it was shown that the Prosecutor has given weight to several extra-legal considerations, such as the limited capacity of the Court, and also to political considerations.

4.5. Remarks on Relative Gravity

In the Uganda situation, the Prosecutor was heavily criticised for following a one-sided approach to achieve justice. This criticism gives rise to how gravity should be applied. In this situation, Moreno-Ocampo selected the rebels and rejected the Government's members on the ground of 'relative gravity'. One immediate dilemma that can be raised here is how can the Prosecutor justify her reluctance to deliver justice to those victims who have been considered less victimized (the victims of the Government, as their crimes were not investigated)? In particular, that in such a situation, those victims will not receive any sort of justice, as the Court is only concerned to deliver justice to the other side to the conflict. As Alana Tiemessen argues, is this not a sort of an affront to victims?⁷⁸¹ Worse than this are the reports that some commentators, NGOs, human rights advocates deliver confirming the high seriousness of the offences that were allegedly committed against those victims by the Government.⁷⁸² These reports, at least, indicate that there are a considerable numbers of victims who did not receive any justice. It was submitted that the 'continuing internment of over a million people without military necessity and without adequate protection and aid constitutes a grave violation of the laws of war and certainly falls within the ICC's temporal jurisdiction.'⁷⁸³

This picture *strongly* suggests that the Court (judges) or even the ASP is to reconsider as to how 'relative gravity' should be applied, when selecting among legally worthy cases. The implication requires the prosecutor to consider 'relative gravity' in accordance with crimes that

⁷⁸¹ *Supra* n. 611.

⁷⁸² See more discussion about this issue in Chapter Five.

⁷⁸³ *Supra* n. 721, Pp. 181- 2.

are committed by each side in a conflict and then to choose among the legally admissible cases from both sides. Therefore, instead of selecting the most serious crimes from within the whole situation, she is advised to select gravest crimes from within *each* side to the conflict in question. It is often normal to see a conflict in which one side commits more crimes, which are more serious than the other side. Therefore, if the Court decides to proceed the prosecution with only one side whose crimes are more serious, then the other side will totally go free of any charge. Needless to say that the victims of this group are not respected and totally ignored.

This gap appears more anchored, in particular if the given state is not willing or able to pursue the alleged crimes committed by all sides. In the Uganda situation, the Prosecutor could choose the gravest crimes from the rebel side and also the gravest of those from the Government's side. This does not just secure the fairness of the strategy of prosecution, it also promotes the legitimacy of the Court, as it could stop all criticisms directed against the Prosecutor. In one of its reports, HRW argued that the strategy of balance is desirable.⁷⁸⁴ They invoked that what is at stake here is to deliver justice to all sides to the conflict, rather than only considering the political ramifications of such balance. This corresponds with what has been argued throughout this thesis. As long as any position the prosecutor takes will be criticised of being political anyway, it seems more desirable for the prosecutor to acknowledge the *importance* of having choice. The Prosecutor emphasised several times that not all admissible cases will be selected. Therefore, as the prosecutor has the choice, the application of this choice should consider the balance approach.

The balance strategy may instead play a role in the alleviation of this tension. This suggestion corresponds with the principle of impartiality that the OTP developed in selecting decisions. It is quite impartial to bring to the Court potential perpetrators from all sides of the

⁷⁸⁴ Unfinished Business: Closing Gaps in the Selection of ICC Cases, *Human Rights Watch* (2011), available at <<http://www.hrw.org/sites/default/files/reports/icc0911webwcover.pdf>>, P. 5.

conflict, whenever a domestic judicial system is not able or willing to proceed with any case. This is how this principle can be promoted. In fact, adopting a high degree of gravity at the admissibility level would make it difficult for the prosecutor to avoid such severe criticisms. Therefore, the prosecutor could consider ‘relative gravity’, based on her prosecutorial discretion to make such balance, as the latter consideration is not a requirement of legal gravity under Article 17 (1)(d). That is meant to show that the current Prosecutor, based on her prosecutorial discretion, can play multi-roles to deliver. The satisfaction of the need of the neglected community, and avoiding the persistent criticisms as much as possible are some gaps that the prosecutor could cover by utilising her prosecutorial discretion. Indeed, this what we call a multi-functional role that can be played by the ICC prosecutor.

4.6. Quantitative ‘versus’ Qualitative Factors

As was seen above, in interpreting gravity, the Prosecutor used different methods to reach a conclusion regarding the seriousness of situations and cases. The Prosecutor was not consistent in the use of these methods. Sometimes, she only used the comparative approach associated usually with the relative number of victims (the early uses), and sometimes she mixed it with the qualitative measures. In so doing, she does not make clear as ‘relative gravity’ or legal gravity was considered. Yet, and as was partly shown in the above analysis of the situations and cases, and will be shown below, in assessing relative or legal gravity, the Prosecutor was heavily relying on one fundamental factor, which is ‘the scale of the crimes’. As Stahn states, ‘[t]he criteria outlined in the Statute contain the various loopholes and open, in fact, a wide scope of interpretation to the Prosecutor, since they do not provide much guidance on the substantive content of the criteria governing the decision whether or not to initiate an investigation or to proceed with a prosecution.’⁷⁸⁵ As gravity is one of these uncertain

⁷⁸⁵ *Supra* n. 61, P. 267.

criteria, then this may interpret why the Prosecutor has chosen predominantly one factor to determine the content of gravity. This strategy somehow leads to the perception of the prosecutor of prosecuting only manageable situations and cases.⁷⁸⁶

This section will conclude that the strict commitment to this particular factor might be one of the major causes of the current doubt about the legitimacy of the Court, and the accusation that the Prosecutor is following a politically driven strategy. Heller has made a major contribution on this question, arguing that ‘in practice, the number of victims is the only factor that has played a significant role in the OTP’s situational gravity determinations’.⁷⁸⁷ In fact, the OTP has made clear several times that its main orientation is to concentrate on situations where large numbers of victims are involved.⁷⁸⁸

On the situational level, almost all situations where the Court is currently exercising jurisdiction involve a significant number of crimes, victims, and perpetrators. In particular, Uganda, Sudan, DRC, CRA, and Mali involve a massive number of crimes. In the DRC, the early statement by the OTP about the referral of this situation to the Court was about the large numbers of people, who were killed: it says ‘millions of civilians have died as a result of conflict in the DRC.’⁷⁸⁹ Also, in the Darfur situation, Moreno-Ocampo characterised the gravity of this situation by reference to the large number of crimes, victims, and perpetrators.⁷⁹⁰

⁷⁸⁶ *Supra* n. 739, P. 5, Schabas criticised this particular strategy and stated that ‘[t]his confirmed the consensual nature of the prosecutions, although there were some concerns that these might be one-sided investigations directed at insurgents rather than government officials.’

⁷⁸⁷ *Supra* n. 647, Chapter 9, P. 3.

⁷⁸⁸ See *supra* n. 686. ‘Experience shows that the situations faced by the Court tend to involve large-scale commission of crimes.’

⁷⁸⁹ Press Release, ICC - The Office of the Prosecutor of the International Criminal Court opens its first investigation, ICC-OTP-20040623-59, available at <<https://www.icc-cpi.int/Pages/item.aspx?name=the+office+of+the+prosecutor+of+the+international+criminal+court+opens+its+first+investigation>>.

⁷⁹⁰ ICC, Office of the Prosecutor, First Report of the Prosecutor of the ICC to the Security Council pursuant to UNSC 1593 (2005), 29.06.2005, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/report%20of%20the%20prosecutor%20of%20the%20icc_%20mr_%20luis%20moreno%20ocampo%20to%20the%20security%20coun.aspx>.

The Uganda situation also involved a significant number of victims. Moreno-Ocampo stated that ‘between July 2002 and July 2004, the period that was the focus of our investigation, the killings and abductions numbered in the thousands, often reaching into the hundreds within single months.’⁷⁹¹ ‘The scale of the crimes’ committed in each situation is a factor that the OTP evidently relied on, as the main basis for the selection of situations. Heller argues that the quantitative approach has not only dominated, but also has been taken as ‘a principled approach to determining the gravity of different situations.’⁷⁹² This has been defended by the OTP on the ground of the limited capacity of the Court that requires it to focus on situations of mass atrocities, that such a focus will be seen as more legitimate by the international community, and that the number of victims is a more objective factor to be assessed.⁷⁹³

In terms of prosecuting cases, the OTP has been primarily oriented towards prosecuting those who are responsible for the commission of the vast violations of international criminal law. Almost all of the Court’s indictees are responsible for committing crimes that involved a considerable number of victims. For example, the Prosecutor stated that Jean-Pierre Bemba Gombo is responsible for the attack against civilians that ‘was carried out on a large scale and targeted a significant number of civilian victims.’⁷⁹⁴ However, in another case and in the confirmation of charges process in the 2008 case against Bahar Idriss Abu Garda in the Darfur situation, the Court noted that the Prosecutor had specifically identified crimes committed against the UN peace-keepers as ‘sufficiently grave’,⁷⁹⁵ on the basis of *the impact of the crime*.

⁷⁹¹ ICC, Office of the Prosecutor, Press Release, *Press Conference on the Uganda Arrest Warrants*, ICC-OTP-20051014-109, available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/press%20releases/Pages/press%20conference%20on%20the%20uganda%20arrest%20warrants.aspx>.

⁷⁹² *Supra* n. 647, P. 3.

⁷⁹³ *Ibid*, P. 3.

⁷⁹⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08 (14th November, 2014)

⁷⁹⁵ ICC-02/05-02/09-21, Para. 7, quoted in *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09. at para 33: ‘The Chamber notes the Prosecution’s contention that, as a result of the alleged attack, killings and pillaging in the MGS Haskanita, “AMIS operations were severely disrupted, thus affecting its mandated protective roles with respect to millions of Darfuri civilians in need of humanitarian aid and security” The

Earlier at the stage of initiating the investigation, he had said that ‘the gravity of such attacks is heightened by their over-all impact on the delivery of vital humanitarian aid to over two million individuals living in an already extremely vulnerable situation.’⁷⁹⁶ The expansion of the determining factors to assess gravity would also maximise the deterrent effect⁷⁹⁷ that the Court seeks to achieve.⁷⁹⁸ However, the prosecutor is still using scale as a fundamental factor for all other cases.

By analysing the situations and cases, indeed there is a clear link between these situations and cases and ‘the scale of the crimes’. The Prosecutor has mainly prioritised this particular factor over the other factors.

What can be understood from this implicit strategy of prosecution are two main points. First, the OTP has developed its methodology of prosecution mainly on the factor of scale, consequently prioritising only those situations and cases that comprise a vast number of crimes and victims. This gives the impression that the fundamental orientation of the OTP is to investigate situations that involve basically mass atrocities. In effect, the factor of ‘the scale of the crimes’ functions as a *fundamental* factor within the decision-making process, whilst the other factors are *complementary* to that process and not even necessary. Second, the OTP’s policy of investigation and prosecution is based on the fact that the Court is a big court that exercises a criminal jurisdiction only over giant situations and cases. Is the Court mandated for this trend the OTP is developing? Was the Court established to prosecute only the vast

Prosecution further states that AMIS initially suspended and then reduced its activities in the area, and that this left a large number of civilians without AMIS protection, on which they had allegedly relied before the attack..’

⁷⁹⁶ *Supra* n. 790, P. 3.

⁷⁹⁷ *Supra* n. 647, P. 17.

⁷⁹⁸ See The Preamble of the Rome Statute, ‘Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’. Also the OTP confirmed the importance of deterrence to maximise the impact of its proceedings. See, ICC, OTP, Prosecutorial Strategy 2009- 2012 (1st February, 2010), Para. 23. ‘The fourth principle guiding the Prosecutorial Strategy is to maximize the impact of the activities of the Office.’

situations and cases? The international character that the drafters of the Statute of the Court sought to emphasise is meant to show the global nature of the Court. It is the grave character of each situation and case, considered from a rounded perspective and not just the volume of victims in each that should determine the exercise of the jurisdiction of the Court. Although ‘the scale of the crimes’ is a key factor; when selecting situations and cases that does not at all mean that the OTP should link this particular factor to all its decisions, and thereafter dealing with it as a rule in its approach. Accordingly, the current policy of investigation and prosecution indicates that the Court is a Big Criminal Court (BCC), but not ICC, as it was warranted. By following this implicit strategy, the OTP loses sight of the main mandate on which the Court is based, which is to prosecute the most serious crimes and not only the biggest situations and cases (situations with a large number of victims). The last section of this chapter will suggest a solution to this persistent problem.

4.7. Case Law: The Gaza (Comoros) Situation- Recent Development (2013)

The Court and the Prosecutor’s decisions about the Gaza (Comoros) situation represent the latest development in relation to the question of discretion in the context of applying, and the way by which they assess ‘sufficient gravity’. The next paragraphs will examine the two main issues that this chapter has examined. First, it will concentrate on the most recent development the Court and the Prosecutor has made in relation to the question of discretion. Second, the discussion will extend to address the factors that the Prosecutor used to determine the ‘sufficient gravity’ test of this situation. Before we embark on these two issues, reference will be made to the factual and legal background of this situation.

In relation to the background of this situation, on 31st May 2013, eight vessels shipped to the Gaza Strip to deliver humanitarian aid, in a response to the blockade imposed on the

Strip by Israeli Authorities.⁷⁹⁹ Upon a request by the Secretary General of the United Nations to conduct an investigation on the incident, the Turkish Commission provided several grounds on which they found that the Israeli blockade was illegal under international law. For example, the blockade was illegal under international humanitarian law and therefore does not constitute ‘a legal basis for them to board the vessels.’⁸⁰⁰ Six of these vessels were attacked by the Israel Defense Forces (IDF).⁸⁰¹ The referral, in particular, emphasised MV Mavi Marmara, a vessel owned by a Turkish charity organisation and registered in the Union of the Comoros, as most of the crimes were committed onboard this vessel.⁸⁰² In their responses, Israel claimed that they issued four warnings, before they boarded the vessels.⁸⁰³ The Israeli National Investigation, as requested by the Secretary General, however, reported that their naval blockade was lawful under international law, citing several legal resources,⁸⁰⁴ to confront the prevailing security threat due to thousands of rockets and mortars fired from the Strip.⁸⁰⁵ The interception resulted in nine Turkish people killed, a dozen seriously wounded civilians, and a hundred allegedly detained.⁸⁰⁶

In May 2013, the OTP received referral from the authorities of the Union of the Comoros about this specific situation, *i.e.* the Israeli raid on the humanitarian aid flotilla.⁸⁰⁷

⁷⁹⁹ See the text of the referral at <<http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>>.

⁸⁰⁰ UN, Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident (September, 2011), Para. 37 (c). Also, they claimed that ‘[t]he force used to take over the vessels was unnecessary, disproportionate and failed to take account of the fact that those on board the vessels were civilians.’ See Para. 37 (e).

⁸⁰¹ See ICC, the Office of the Prosecutor, ICC Prosecutor receives referral by the authorities of the Union of the Comoros in relation to the events of May 2010 on the vessel ‘MAVI MARMARA’, 14/05/2013, available at <http://www.icccpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-14-05-2013.aspx>. See also, Q&A: Israeli deadly raid on aid flotilla, *BBC* (22nd March, 2013), available at <<http://www.bbc.co.uk/news/10203726>> (Last Access: 13th September, 2013).

⁸⁰² See *supra* n. 799.

⁸⁰³ UN Report, *supra* n. 799, Paras. 45-5.

⁸⁰⁴ UN Report, *ibid*, Para. 47 (a), ‘the Commission relies upon decisions of the Supreme Court of Israel and statements by various United Nations organizations and humanitarian and human rights organizations.’

⁸⁰⁵ UN Report, *ibid*, Para. 46.

⁸⁰⁶ Referral, *supra* n. 801.

⁸⁰⁷ Referral, *supra* n. 801.

The OTP opened a preliminary examination to examine whether the criteria for opening an investigation were met.⁸⁰⁸ In the UN Human Rights Council report, the UN had concluded that there was clear evidence that crimes within Article 147 of the Fourth Geneva Convention had been committed, including willful killing, torture, and wilfully causing great suffering or serious injury to body or health.⁸⁰⁹ The OTP then decided that the jurisdictional criteria of the Court was met and concluded that ‘[t]he information available indicates that there is a reasonable basis to believe that war crimes have been committed’.⁸¹⁰ Bensouda then examined whether the gravity threshold was met and decided ‘that the potential case(s) that would likely arise from an investigation into the situation would not be of sufficient gravity to justify further action by the Court and would, therefore, be inadmissible pursuant to articles 17(1)(d) and 53(1)(b) of the Statute.’⁸¹¹ In so deciding, the Prosecutor considered ‘(i) whether the individuals or groups of persons that are likely to be the object of an investigation, include those who may bear the greatest responsibility for the alleged crimes committed; and (ii) the gravity of the crimes committed within the incidents which are likely to be the focus of an investigation.’⁸¹²

In respect to the question of discretion, Bensouda decided the inadmissibility of the ‘Flotilla Incident’ on the ground of insufficient gravity, under Article 17 (1)(d).⁸¹³ In so

⁸⁰⁸ ICC, Office of the Prosecutor, Statement: Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on concluding the preliminary examination of the situation referred by the Union of Comoros: “Rome Statute legal requirements have not been met” (6th November, 2014), available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-06-11-2014.aspx>.

⁸⁰⁹ United Nations, General Assembly, Human Rights Council, Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, A/HRC/15/21 (27th September, 2012), Para. 265.

⁸¹⁰ ICC, Office of the Prosecutor, Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53 (1) Report (6th November, 2014), Para. 132 (hereinafter: Comoros, OTP, November 2014), available at <[http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov2014Eng.pdf](http://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf)>. Based on Article 12 (2) (a) of the Statute, as the alleged crimes committed on board a vessel, which is registered in a state that is a party to the ICC, then the personal jurisdiction is met. With regard to the subject jurisdiction, the referral indicates that the alleged interception by the IDF amounts to level of war crimes and crimes against humanity.

⁸¹¹ Comoros, OTP, November 2014, *supra* n. 810, Para. 150.

⁸¹² *Ibid*, Para. 135.

⁸¹³ *Ibid*, Para. 148.

deciding, she looked at ‘the scale of the crimes, the nature of the crimes, the manner of the commission of the crimes, and the impacts of the crimes.’⁸¹⁴ Following the Comoros’ appeal,⁸¹⁵ the PTC has decided that the Prosecutor is to review her decision.⁸¹⁶ The PTC disagreed with every aspect of the application of gravity, namely the four factors.⁸¹⁷ What is relevant to show in this situation is that the Court for the first time has made clear that apart from the discretionary power not to proceed under the ‘interests of justice’ provisions, the prosecutor has no discretion in relation to the selection of situations, as far as the interpretation of Article 17 (1)(d) is concerned. Further to this, the Chamber consistently adopted a lower level for the satisfaction of ‘sufficient gravity’. This is the first judicial pronouncement of the Court on matters connected to gravity in relation to investigating situations. The Chamber has, for the first time, ruled on the Prosecutor’s interpretation of ‘sufficient gravity’; Article 17(1)(d). The PTC held that

The Chamber recognises that the Prosecutor has discretion to open an investigation but, as mandated by article 53(1) of the Statute, that discretion expresses itself *only* in paragraph (c), *i.e.* in the Prosecutor’s evaluation of whether the opening of an investigation would not serve the interests of justice. Conversely, paragraphs (a) and (b) require the application of exacting legal requirements. [emphasis added]⁸¹⁸

As deGuzman points out, this judicial decision constrains the prosecutor’s discretion.⁸¹⁹ The Chamber’s decision now states that the jurisdictional and admissible criteria laid down in Article 53 (1)(a) and (b) ‘require an application of exacting legal requirements.’⁸²⁰ Notably, it

⁸¹⁴ *Ibid*, Paras. 138- 141.

⁸¹⁵ For full information about the decisions of the Prosecutor and the Court, see <<https://www.icc-cpi.int/comoros>>.

⁸¹⁶ Comoros, Pre-Trial Chamber July, 2015, *supra* n. 621.

⁸¹⁷ *Ibid*, Paras. 23- 48.

⁸¹⁸ Comoros, Pre-Trial Chamber July, 2015, *supra* n. 621, Para. 14.

⁸¹⁹ Margret M. deGuzman, What is the Gravity Threshold for an ICC Investigation? Lessons from the Pre-Trial Chamber Decision in the Comoros Situation, *American Society of International Law*, Vo. 19, Issue: 19 (2015).

⁸²⁰ Comoros, Pre-Trial Chamber July, 2015, *supra* n. 621, Para. 14.

held that the Prosecutor, in considering the persons likely to be the objects of the investigation, concentrated on their leadership roles rather than those most responsible for the crimes.⁸²¹ The Chamber reversed the Prosecutor's evaluation of 'sufficient gravity'; and set a low-level threshold for the meaning of 'sufficient gravity', as it did not stipulate a high-ranking level of potential perpetrators, but instead those who are most responsible for the crimes.

The Chamber's decision then is similar to Stegmiller's analysis of the distinction between 'relative gravity' and legal gravity, as was presented earlier this chapter. In addition, the Court seems now to decree that the comparative method is relevant when assessing 'sufficient gravity'. The Chamber held

In the view of the Chamber, ten killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity, or torture or inhuman treatment, which would be the scale of the crimes prosecuted in the potential case(s) arising from the referred situation, in addition to exceeding the number of casualties in actual cases that were previously not only investigated but even prosecuted by the Prosecutor (*e.g.* the cases against Bahar Idriss Abu Garda and Abdallah Banda), are a compelling indicator of sufficient, and not of insufficient gravity.⁸²²

On the merit of the PTC's decision, Heller was surprised by this decision. He argues that the Prosecutor's approach to interpret the 'potential perpetrators' gravity is better than the PTC's one. In so claiming, he presents several defending points. He first describes the PTC's decision as 'a frontal assault on the OTP's prosecutorial discretion'.⁸²³ He argues that the Chamber was clearly comparing a situation with a case without noting that there is a difference

⁸²¹ *Ibid*, Para. 23.

⁸²² *Ibid*, Para. 26.

⁸²³ Keven Jon Heller, The Pre-Trial Chamber's Dangerous Comoros Review Decision, *Opinio Juris*, (17th July, 2015), available at <<http://opiniojuris.org/2015/07/17/the-pre-trial-chambers-problematic-comoros-review-decision/>> (Last Access: 15th January, 2016).

between them. He says that ‘the issue is whether the Comoros situation is sufficiently grave *relative to other situations* to justify a formal investigation.’⁸²⁴ Now, apart from the Chamber’s authorisation in making a comparison, the question here is how fair is this comparison as it compares a situation whose crimes were committed on a ship, with other situations that occur throughout a massive space of a state? How can the Chamber compare this ship (situation) with, for example, the DRC situation that involves thousands and thousands of crimes? The argument of Heller about ‘the scale of the crimes’ indicates as if a large number of victims ‘scale’ should be first satisfied (the quantitative approach).

Lastly, he fears that the decision of the PTC would lower the required threshold for ‘sufficient gravity’ the matter that would result in making the Court overwhelmed with investigations. DeGuzman replies to *such* a fear by arguing that ‘[s]uch an outcome could be averted if the ICC follows the suggestion of the majority and allows the Prosecutor significant discretion to decide when investigations are in the interests of justice.’⁸²⁵ The prosecutor would still have prosecutorial discretion to choose among admissible situations, by weighting ‘relative gravity’ under Article 53 (1)(c) against other extra-factors, such as the resources of the Court.

However, the OTP appealed the PTC’s decision before the Appeal Chamber.⁸²⁶ The potential response of the Appeal Chamber will be decisive in this regard if they endorse the PTC’s decision. With such a potential, the prosecutor would have very limited legal interpretive discretion to decide which situation meets ‘sufficient gravity’, at least, when this is referred. However, it is not clear how such a decision would reduce the discretionary leeway when assessing ‘sufficient gravity’. As Alex Whiting argues, ‘the application of exacting legal

⁸²⁴ *Ibid.*

⁸²⁵ *Supra* n. 819.

⁸²⁶ ICC, Appeal Chamber, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia: Notice of Appeal of “ Decision on the Request of the Union of the Comoros to Review the Prosecutor’s Decision not to Initiate an Investigation” (ICC-01/13-34), No.: ICC-01/13 (27th July, 2015).

requirements' would *still* involve substantial evaluation to be made by the prosecutor.⁸²⁷ He opines that the approach of the majority is 'mechanical' and does not consider the reasons for which the prosecutor was granted some margin of discretion, in particular that the prosecutor is the best one to assess gravity given 'her perspective on all of these cases before the Court'.⁸²⁸ In this regard, Judge Peter Kovacs disagreed with the majority, asserting that Article 53 (1) still 'provides the Prosecutor with some margin of discretion in deciding not to initiate an investigation into a particular situation.'⁸²⁹ Thus, according to this view, the prosecutor is still able to exercise legal interpretive discretion to determine which situation is sufficiently grave. This argument seems to have, to a large extent, merit, in particular if the Prosecutor keeps using her wide range of methods and the factors for interpreting 'sufficient gravity', in the same way as was explained above. In particular, that we can notice with this situation, the Prosecutor examined jointly four factors to dismiss this situation, compared with only one factor to dismiss the British situation in Iraq. The Prosecutor is still not consistent in her method and factorial analysis of interpreting 'sufficient gravity'.

Currently, the Appeal Chamber, by three votes to two, dismissed the admissibility of the Prosecutor's appeal against the PTC's decision on the ground that the PTC's decision was not a decision on admissibility.⁸³⁰ Although this decision does not rule on the assessment of gravity itself in the context of the exercise of discretion, yet the endorsement of the inapplicability of the Prosecutor's decision makes it clear now that the Pre-Trial Chamber cannot force the Prosecutor to re-open an investigation of referred situations (when the

⁸²⁷ Alex Whiting, The ICC Prosecutor should Reject Judges' Decision in Mavi Marmara, *Just Security* (20th July, 2015), available at <<https://www.justsecurity.org/24778/icc-prosecutor-reject-judges-decision-mavi-marmara/?print/>> (Last Access: 29th March, 2016).

⁸²⁸ *Ibid.*

⁸²⁹ Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia, Case No. ICC-01/13, Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision not to Initiate an Investigation, Partly Dissenting Opinion of Judge Peter Kovacs, Para. 8.

⁸³⁰ Comoros, Appeal Chamber, November 2015, *supra* n. 629, Para. 66.

dismissal decision is based on Article 53 (1)(b)). The Appeal Chamber holds that ‘under article 53 (3)(a) of the Statute, the Prosecutor is obliged to reconsider her decision not to investigate, but retains ultimate discretion over how to proceed.’⁸³¹ As Giulia Pecorella argues, ‘the Prosecutor obtained the express recognition that, under article 53(3)(a), the Prosecutor retains the ultimate discretionary power to decide whether or not to proceed with an investigation of a situation referred to the Court by either a state party or the UN Security Council’.⁸³² It is then up to the prosecutor again to see whether or not to re-open the investigation, without any enforcement imposed by the Pre-Trial Chamber. The Prosecutor could reply to the PTC’s request, saying ‘thanks, but no.’⁸³³ Therefore, Bensouda may still come out with the same conclusion and decide not to open the investigation, but this time it should be on a different basis. Otherwise, she must either open the decision, or dismiss it on the basis of ‘the interests of justice’.

With regard to the question of the factors that the Prosecutor used to assess ‘sufficient gravity’, the PTC I found that the Prosecutor rightly considered appropriate factors for determining gravity, however, it ‘committed a material error.’⁸³⁴ PTC I then turned to consider the Prosecutor’s assessment of gravity in terms of scale.⁸³⁵ It concluded that the numbers of victims identified by the Prosecutor are a convincing signal of sufficiency, and hence the Prosecutor should have used scale ‘as militating in favour of sufficient gravity,’ rather than the term ‘sufficient’.⁸³⁶ PTC I opined that ‘the scale of the crimes’ met the gravity threshold, as

⁸³¹ *Ibid*, Para. 59.

⁸³² Giulia Pecorella, The Comoros situation, the Pre-Trial Chamber and the Prosecutor: the Rome Statute’s system of checks and balances is in good health, *International Law Blog* (30th November, 2015), available at <<https://aninternationallawblog.wordpress.com/2015/11/30/the-comoros-situation-the-pre-trial-chamber-and-the-prosecutor-the-rome-statutes-system-of-checks-and-balances-is-in-good-health/>> (Last Access: 30th March, 2016).

⁸³³ Kevin Jon Heller, What Happens if Comoros Appeals? (Answer: Not Much.), *Opinio Juris* (9th May, 2016), available at <<http://opiniojuris.org/2014/11/07/happens-comoros-appeals/>> (Last Access: 09th May, 2016).

⁸³⁴ Comoros, Pre-Trial Chamber July, 2015, *supra* n. 621, Para. 26.

⁸³⁵ *Ibid*, Paras. 25-6.

⁸³⁶ *Ibid*, Para. 26.

‘ten killings, 50-55 injuries, and possibly hundreds of instances of outrages upon personal dignity, or torture or inhumane treatment’ is in favor of ‘sufficient gravity’.⁸³⁷ In relation to the nature of the crimes, the PTC noted that the Prosecutor did not dispute the information that asserted the existence of mistreatment on board the vessels, including several conducts (war crime of torture or inhuman treatment) such as ‘seawater spray and wind gusts from helicopters, various physical and verbal harassment’⁸³⁸ and others.

In relation to the manner of commission, the PTC presented several points to conclude that the Prosecutor erred in her conclusions. For example, the PTC held that the Prosecutor decided, ‘based on the *totality* of the evidence’ [emphasis added], that there was no sufficient evidence confirmed that the alleged crimes were systematic or the result of a deliberate plan or policy to attack civilians.⁸³⁹ In contrast to the Prosecutor’s approach, the PTC, based on *some* evidence, held that the Prosecutor did not dispute this part of the evidence that indicated that there was already an intent by the IDF to launch the attack prior to the boarding of the vessels. This conclusion was criticised by Whiting, arguing that ‘the PTC should have given deference to this considered judgment over its own speculative analysis of *selective pieces* of information.’⁸⁴⁰ [emphasis added]. Making a decision on the basis of selective sources of evidence, Whiting argues, is out of context and does not establish that a deliberate plan or policy was existed.⁸⁴¹ He adds, ‘[w]hile the Prosecutor assessed all of the available evidence to determine what it reasonably shows, and whether gravity would then be satisfied, the majority of the PTC cherry picks pieces of evidence here and there to insist that, because the evidence is disputed, an investigation is required.’⁸⁴² In relation to the impact of the crimes, the

⁸³⁷ *Ibid*, Para. 26.

⁸³⁸ *Ibid*, Para. 29.

⁸³⁹ *Ibid*, Para. 33.

⁸⁴⁰ *Supra* n. 827.

⁸⁴¹ *Ibid*.

⁸⁴² *Ibid*.

PTC held that the Prosecutor underestimates the impact of the alleged crimes on the direct victims of the vessels as well as the overall impacts on Gaza, depending on the Comoros' argument.⁸⁴³ According to the International Committee of the Red Cross, the blockade was 'devastating'⁸⁴⁴ and might affect the humanitarian conditions in Gaza. However, in making her refusal decision, the Prosecutor relied on the report of the Israeli National Investigation that stated that '[i]srael is complying with its humanitarian obligations, including the prohibition on starving the civilian population or preventing the supply of objects essential for the survival of the civilian population and medical supplies, and the requirement that the damage to the civilian population is not excessive in relation to the concrete and direct military advantage anticipated from the blockade.'⁸⁴⁵

In deciding on the gravity of this situation, the Prosecutor declined to open the investigation on the basis that 'the potential case(s) that would likely arise from an investigation of the flotilla incident would not be of sufficient gravity to justify further action by the Court (*i.e.* Article 17 (1)(d)).'⁸⁴⁶ She added, 'the potential case(s) that could be pursued is inherently limited to an event encompassing a small number of victims of the alleged ICC crimes, with limited countervailing qualitative considerations.'⁸⁴⁷ In her decision, Bensouda followed the established pattern of privileging 'the scale of the crimes' over any other factors. Overall, she concluded on the question of scale, that 'while the Office regrets and deplores the loss of life and injury, it has to be acknowledged that the total number of victims of the flotilla incident reached relatively limited proportions as compared, generally, to other cases investigated by

⁸⁴³ Comoros, Pre-Trial Chamber July, 2015, *supra* n. 621, Paras. 46-7.

⁸⁴⁴ *Supra* n. 809, Para. 38, '[i]n a public statement issued on 14 June 2010, the International Committee of the Red Cross (ICRC) described the impact of the closure on the situation in Gaza as "devastating" for the 1.5 million people living there, emphasizing that "the closure constitutes a collective punishment imposed in clear violation of Israel's obligations under international humanitarian law", saying the only sustainable solution was a lifting of the closure.'

⁸⁴⁵ *Supra* n. 800, Para. 47 (d).

⁸⁴⁶ Comoros, OTP, November 2014, *supra* n. 810.

⁸⁴⁷ *Ibid*, Para. 25.

the Office.⁸⁴⁸ What is striking in her report is that whilst Bensouda was satisfied to a certain extent with the other factors, the nature, manner of commission, and impact, of the crimes, she clearly had a problem with ‘the scale of the crimes’. The OTP is not oriented to prosecute a small situation or case, the big cases are its target. It seems as if it is the BCC but not ICC. It can be seen now that the criterion of scale to assess the satisfaction of ‘sufficient gravity’ is playing a fundamental role in making a decision.

However, Judge Kovacs disagreed with the majority stating that the Prosecutor was right in his decision. In his several defending points, he said that the assessment of scale was not carried out, as was previously acknowledged by the Chambers, and as understood by the Statute.⁸⁴⁹ Having cited several decisions taken by the Chambers, he said that gravity should be assessed ‘in such a manner as to achieve the ultimate goal for its inclusion, namely to focus on those situations/cases which are indisputably grave and deserve the attention of the international community.’⁸⁵⁰ The Chamber’s assessment of scale fell short of this purpose. He used a comparative method between this situation and Kenya to support his opinion.⁸⁵¹

4.7.1 Implications

Based on the above analysis, several implications can be drawn from this chapter. First, there is a need that the OTP should acknowledge the importance of not limiting the evaluation of gravity to one factor. For example, the nature of the crime might appear so grievous that its importance outweighs its scale. In talking about the definition of genocide, Micol Sirkin states ‘a single isolated act could qualify as genocide’.⁸⁵² As the genocide crime constitutes ‘the crime

⁸⁴⁸ *Ibid*, Para. 138.

⁸⁴⁹ Dissenting Opinion *supra* n. 829.

⁸⁵⁰ *Ibid*, Para. 18.

⁸⁵¹ *Ibid*, Para. 19.

⁸⁵² Micol Sirkin, Expanding the Crime of Genocide to Include Ethnic Cleansing: a Return to Established Principles in Light of Contemporary Interpretations, *Seattle University Law Review*, Vol. 33, No. 2 (2010), P. 489.

of crimes’, then the quantitative approach of the evaluation of the seriousness of the offence might look less significant.⁸⁵³ The strict commitment to, and consistent link between, the gravity and ‘the scale of the crimes’ that the OTP has developed might render some acts of genocide involving small number of victims inadmissible. It would seem odd if the prosecutor decides that the crime of genocide that does not involve a large scale of victims in a certain situation is not sufficiently grave.

In addition, the consistent quantitative orientation of the OTP may fall short of protecting minorities, as it keeps them away from the reach of the Court. For example, according to several reports, it was submitted that a few crimes, which involved a small number of victims were committed (displacement) against Armenians when the Syrian regime and the Free Syrian Army started to fight in Kessab, an area that is mainly inhabited by nearly 2000 Armenians.⁸⁵⁴ Arguably, if these accusations are true, then the question is how will the OTP be able to open the Armenian case and protect their victims as long as the numbers of victims is very low, compared to the vast crimes committed in other potential cases within the Syrian situation? Of course, crimes committed against minorities are often conducted in the context of less widespread violence. Therefore, perpetrators are usually less fearful of the ICC prosecution.⁸⁵⁵ There is then a need for the OTP to operationalise the other factors to assess gravity and not to make his policy as ‘rules’, because the discretionary power should be dealt with as a process, as Rosalyn Higgins demonstrates in her widely cited book.⁸⁵⁶

⁸⁵³ See William A. Schabas, *Genocide in International Law: The Crime of Crimes* (2nd ed.) (Cambridge, Cambridge University Press, 2009).

⁸⁵⁴ See Christians Flee Syria’s Kessab, Twitter Cries Atrocities, Armenia Accuses Turkey, *Russia Today* (31st March, 2014), available at <<http://rt.com/news/armenians-kessab-syria-attack-381/>> (Last Access: 28th April, 2014).

⁸⁵⁵ See the opinion of Heller about the small situations, *supra* n. 647, P 22.

⁸⁵⁶ Rosalyn Higgins, *Problems and Process: International Law and how We Use it* (Oxford: Clarendon Press, 1994), Chapter 1.

Dealing with the law as rules does not often lead to the achievement of justice for all affected societies or victims.⁸⁵⁷ This particular discussion also suggests an important point for the OTP to consider when using ‘the scale of the crime’ to assess gravity. It acknowledges the ‘relative quantitative approach’. In order for the Court to keep protecting minorities, the OTP should calculate ‘the scale of the crimes’ according to the number of minority victims as a proportion (or even percentage) of the total number of the given minority itself and not the other cases that might involve thousands of victims. This argument can be used as a reply to Heller’s argument in the context of the Comoros situation when he argues that the PTC should have compared the Comoros situation with equivalent standards, which are situations.

Second, consistent with the Court’s trend,⁸⁵⁸ it is desirable for the OTP not to set a high threshold for gravity and not to connect it to the mandatory satisfaction of ‘the scale of crimes’. A lower threshold may seem more desirable. However, the determination that the Kenya situation was sufficiently grave to justify further action by the Court is a great development made by the OTP.⁸⁵⁹ In this decision, the Prosecutor has opposed to her main orientation that focuses only on big situations and cases. In this situation, the number of victims is far less than any other situations, currently under the investigation of the Court.⁸⁶⁰ It is true that several people have criticised the prosecutor for making this decision – and indeed in the Court authorisation hearing – as one of the ICC judges dissented from the Court’s decision.⁸⁶¹

⁸⁵⁷ *Ibid*, Pp. 5-10.

⁸⁵⁸ As was explored in this chapter, the Court tends to adopt a low threshold for gravity to determine the admissibility of situations and cases. The decision of the Appeal Chamber in relation to the *Ntganda* case, the PTC’s decision to relation to the Prosecutor’s determination of insufficient gravity of the Palestine-Israel situation are two examples.

⁸⁵⁹ Situation in the Republic of Kenya 2009, *supra* n. 230.

⁸⁶⁰ Situation in the Republic of Kenya 2009, *supra* n. 230, Para. 56 that states that ‘the post-election violence resulted in a reported 1,133 to 1,220 killings of civilians, more than nine hundred documented acts of rape and other forms of sexual violence, with many more unreported, the internal displacement of 350,000 persons, and 3,561 reported acts causing serious injury’.

⁸⁶¹ See for example, Michelle Nichols, AU’s Zuma asks U.N. Security Council about Kenya ICC deferral, *Reuters* (8th October, 2013), available at <<http://www.reuters.com/article/2013/10/08/us-kenya-icc-un-idUSBRE9970Z120131008>> (Last Access: 15th January, 2015), and see ICC, Pre-Trial Chamber II, Situation in the Republic of Kenya, in the Case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua

Nonetheless, the picture is still bright from the perspective of those who wish to see the threshold kept as low as possible and to maximise potential investigations and prosecutions. This decision, indeed, keeps pace with the current fundamental trend that international criminal law is expanding more and more, deGuzman argues.⁸⁶² It does not have to concentrate only on crimes such as the Holocaust and the Srebrenica's massacre or the Rwandan genocide to claim an international criminal adjudication. Today, a single incident could be grave enough to invoke an international legal action, such as the Al-Hariri Tribunal.⁸⁶³

Third, the practice of the Court and the Prosecutor in applying gravity has shown a tension between the Prosecutor and the Pre-Trial Chamber. The intra-institutional conflict between them is a healthy phenomenon, as it makes the Statute clearer. The conflict occurred in the *Lubanga* and *Ntaganda* case and the Comoros situation. In these two instances, the Appeal Chamber had to intervene 'to interpret the Statute so as to fill a legislative lacuna.'⁸⁶⁴

Fourth, it was noticed that the Prosecutor was highly inconsistent in interpreting the term 'sufficient gravity', the matter that allows her to use a strong sense of legal interpretive discretion. The Prosecutor, therefore, is required to be more consistent as to how and which methods and factors should be considered when interpreting 'sufficient gravity', bearing in mind the above observations. This wide scope of legal interpretive discretion may explain the causes of the criticisms that the Prosecutor is facing, in particular the anti-African Court's criticism. The causes of these criticisms are not associated with the exercise of prosecutorial

Arap Sang, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", No.: ICC-01/09-01/11 (15th March, 2011).

⁸⁶² *Supra* n. 819.

⁸⁶³ UN Security Council, Press Release, Security Council Authorizes Establishment of Special Tribunal to Try Suspects in Assassination of Rafiq Hariri, SC Resolution 1757 (2007), 5685th Meeting (PM), available at <<http://www.un.org/press/en/2007/sc9029.doc.htm>>. '[I]f the court finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties, and with the consent of the Council, are connected in [...] and are of a nature and gravity similar to the attack on Mr. Hariri, the Tribunal "shall also have jurisdiction over persons responsible for such attacks".'

⁸⁶⁴ *Supra* n. 832.

discretion, as most of the literature tries to show. Instead, it is the very application of the legal categories, where a strong sense of discretion was exercised.

CHAPTER FIVE: IN THE INTERESTS OF JUSTICE

5.1. Introduction

The ‘interests of justice’ provisions of Article 53 of the ICC Statute have been the subject of intense debate. Subparagraphs (1)(c) and (2)(c) provide the prosecutor with prosecutorial discretion to decline to launch an investigation or to proceed to prosecution if doing so would conflict with ‘the interests of justice’.⁸⁶⁵ This means that, even though investigation or prosecution satisfy the admissibility criteria: gravity and complementarity,⁸⁶⁶ nonetheless the prosecutor is empowered to cease proceedings on the basis of ‘the interests of justice’.⁸⁶⁷ If the prosecutor makes such a decision, *i.e. solely* on the basis of ‘the interests of justice’, this will come under a strict judicial oversight.⁸⁶⁸ The Pre-Trial Chamber can exercise a *proprio motu* power of review.⁸⁶⁹ If the Chamber dismisses the prosecutor’s decision, the latter then must proceed with the investigation or prosecution.⁸⁷⁰ Yet, what is the exact meaning and scope of the term ‘the interests of justice’?

It is a striking fact that the Prosecutor has never invoked the Article 53 ‘interests of justice’ provisions as a basis not to initiate an investigation or proceed with a prosecution. Since the operation of the ICC began in 2002, the Prosecutor has not once used her discretion to decline any investigation or prosecution in ‘the interests of justice’.⁸⁷¹ Accordingly, there has been much speculation within the literature about the scope and interpretation of ‘the interests of justice’. In particular whether, in considering ‘the interests of justice’ the prosecutor may and should take into account the non-prosecutorial justice mechanisms, and also the potential

⁸⁶⁵ Meester, *supra* n. 212.

⁸⁶⁶ Article 17 (1) (a)-(c) and (2) of the ICC Statute.

⁸⁶⁷ Darryl Robinson, *Serving the Interests of Justice: Amnesty, Truth Commissions and the International Criminal Court*, *European Journal of International Law*, Vol. 14. No. 3 (2003), P. 486.

⁸⁶⁸ Article 53 (3).

⁸⁶⁹ Article 53 (3) (b) provides that ‘the Pre-Trial Chamber may, on its own initiative, review a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c). In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.’

⁸⁷⁰ *Supra* n. 61.

⁸⁷¹ *Supra* n. 694, P. 216.

impact of the ICC's proceedings on peace-related issues.⁸⁷² This issue has made Article 53 open to different interpretations and readings. 'The interests of justice' provisions of Article 53 are the focus of the most heated debates surrounding the Rome Statute; the breadth of the discretionary power of the prosecutor, and how it should be exercised. Current scholarship by academics and NGOs offer strongly differing legal interpretations of the potential scope of these provisions as well as conflicting views from a policy perspective on what stance the prosecutor should take. Such controversy is a result of the lack of definitive clarification from the Prosecutor, despite a policy paper devoted to the meaning and potential application of 'the interests of justice' provisions⁸⁷³ in Article 53.⁸⁷⁴ In fact, the term is still not definitely defined.

The issue of which mechanisms could be acceptable, as an alternative is, in particular, the central point of the discussion of the Article. National truth commissions, national amnesties, and peace process are the most common mechanisms, which may replace the ICC, as the latter's proceedings may not serve 'the interests of justice'. Here, it is quite important to clarify that there are two types of amnesties. One is usually associated with truth commissions and is called a conditional amnesty. It is already associated with a non-prosecutorial justice mechanism. Another is called blanket amnesty, which does not accompany any sort of justice mechanisms. Amnesty allows all perpetrators go free of any charge or any sort of accountability. A peace process as a sole possible alternative, which is supposed to pave the way for a transition, is also another way of providing a blanket amnesty. The chapter will concentrate on non-prosecutorial justice mechanisms such as truth commissions – whether or

⁸⁷² The peace-related process is one of the most debated issues when it comes to determine the scope of 'the interests of justice'. See Rodman, *supra* n. 21.

⁸⁷³ See *supra* n. 179, Pp. 1151- 1158.

⁸⁷⁴ Goldston, *supra* n. 18, P. 292, stating that 'there has been much debate about its meaning [Article 53]'.

not associated with amnesty. It also focuses on peace processes whether or not associated with blanket amnesty,⁸⁷⁵ as these two approaches do not accompany any sort of justice mechanisms.

The current discussions of Article 53 ‘the interests of justice’ provisions in the literature tend to focus on a fundamental question, which is how these provisions should be read. There are two different views. The first view, which constitutes the majority, reads the Article in a narrow way.⁸⁷⁶ The proponents of this view tend to give priority to the criminal justice avenue.⁸⁷⁷ This particular concern is raised in the context of the potential effect of the ICC’s proceedings on national developments, such as truth commission processes, and ongoing peace-related talks.⁸⁷⁸ HRW’s argument, for example, suggests that justice ‘is a precondition for meaningful peace.’⁸⁷⁹ Therefore, this view suggests that the potential of ceasing the ICC’s proceedings should be limited to a criminal justice response.

The second view, which constitutes the minority, reads ‘the interests of justice’ in a broad way so it allows the prosecutor to defer to non-prosecutorial justice mechanisms.⁸⁸⁰ The

⁸⁷⁵ Several peace processes that were signed to put an end to armed conflicts provided amnesty, as the situations were in France-Algeria (1962), Haiti (1994), and Algeria (1999). See Douglas Cassel, *Lessons from Americas: Guidelines for International Response to Amnesties for Atrocities, Law and Contemporary Problems*, Vol. 59, No. 4 (1996), P. 197- 230.

⁸⁷⁶ *Supra* n. 30, arguing in favor 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/IO40/023/2005>>. 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, see Robinson, *supra* n. 867, the author gave a priority for the criminal prosecution, when interpreting the Article, see also Kate Allan, Prosecution and Peace: a Role for Amnesty before the ICC? *Denver Journal of International Law and Policy*, Vol. 39 (2011), 239- 301, arguing for a restrictive approach, when interpreting Article 53, see *supra* n. 720, Pp. 17- 18, arguing in favour of criminal proceedings.

⁸⁷⁷ *Supra* n. 30, P. 2, It stated that ‘HRW believes the OTP should adopt a strict construction of the term “interests of justice” in order to adhere to the context of the Rome Statute, its object and purpose, and to the requirements of international law.’ See also, M. Cherif Bassiouni, Searching for Peace and Achieving Justice: The Need for Accountability, *Law and Contemporary Problems*, Vol. 59, No. 4 (1996), 9-28.

⁸⁷⁸ Allan, *supra* n. 876.

⁸⁷⁹ *Supra* n. 30, P. 2.

⁸⁸⁰ See, Henry M. Lovat, Delineating the Interests of Justice: Prosecutorial Discretion and the Rome Statute of the International Criminal Court, *beppress Legal Series*, Paper, 1435 (2006). See also Brubacher, *supra* n. 22. And see Elizabeth B. Ludwin King, Does Justice Always Requires Prosecution? The International Criminal Court and Transitional Justice Measures, *George Washington International Law Review*, Vol. 45 (2013), arguing for a

extent to which national developments, such as alternative justice mechanisms are relevant to the consideration of the prosecutor when assessing ‘the interests of justice’ is a main concern of this debate. Specifically, the ICC Statute, and the OTP’s policy document about the interpretation of ‘the interests of justice’ do not provide a specific position about such developments, although it was the main discussion during the Rome Diplomatic Conference.⁸⁸¹ This was intentionally left vague to provide the prosecutor with a broad power to decide on situations and cases. The latter concern also opens another discussion about whether or not ‘peace processes’ come within the scope of Article 53.⁸⁸² The dilemma between justice and peace raised heated debates in the context of the Uganda situation, where several local people argued that the provisions of ‘the interests of justice’ could have been applied to cease the ICC’s proceedings in favour of the ongoing peace talks.⁸⁸³

This chapter will analyse prosecutorial discretion under the Article 53 ‘interests of justice’. It aims at showing the importance of undertaking extra-legal factors, including the political circumstances, associated with making a decision in ‘the interests of justice’. In the first part of this chapter, my discussion will seek to discuss, and reply to those who raised the narrow reading. I shall offer my own opinion to that debate, as well. Before this discussion takes place, this section will explore the Article 53 ‘interests of justice’ provisions. It will explore the general scene of the power of the prosecutor under this Article and the preparatory discussion of the meaning of the term ‘the interests of justice’ during the Rome Conference. Then, my discussion will massively concentrate on the relevance of non-prosecutorial justice mechanisms, such as truth commissions and its conformity to the classical theories of justice.

deferral at the accomplishment of certain conditions. See Also Rodman, *supra* n. 21, arguing for a broader interpretation of the Article, including peace process, as an alternative.

⁸⁸¹ Michael Scharf, The Amnesty Exception to the Jurisdiction of the International Criminal Court, *Cornell International Law Journal*, vol. 32 (1999), Pp. 507 and 521-22.

⁸⁸² Rodman, *supra* n. 21.

⁸⁸³ Cited in *Courting History: the Landmark International Criminal Court’s Five Years*, *Human Rights Watch* (2008), Pp. 34, also available at <<http://www.hrw.org/reports/2008/07/10/courting-history>>.

As set out earlier in Chapters One and Two, the ICC prosecutor is exercising her power within unusual circumstances, where the Court totally relies on the voluntary cooperation of states and international organisations to enforce its decisions.⁸⁸⁴ The international community has pushed the prosecutor into a political role, where unfamiliar values, such as security, peace, and stability become indispensable to be considered when the prosecutor delivers justice.⁸⁸⁵ Although the prosecutor as a body within a judicial institution is only responsible to deliver justice, it is the lack of several crucial means⁸⁸⁶ that the Court does not possess that urges the prosecutor to pay attention to those values. International criminal justice, as Bassiouni points out, ‘cannot be viewed as a system that functions entirely without consideration for other broader concerns such as peace and reconciliation. ICJ must, therefore, be viewed within the broader goals of justice in response to the needs of certain societies at a given time and place’.⁸⁸⁷ The term ‘the interests of justice’ is not just ‘a creative ambiguity’ that provides the prosecutor with a broad power, as Philippe Kirsch states.⁸⁸⁸ Indeed, it does also provide her with a creative mandate to exercise her prosecutorial function in a way that may help to make the achievement of justice, which is the main aim of the Court, more effective and meaningful.⁸⁸⁹ With the establishment of such a permanent court, which lacks the most critical means for its success, the role of the prosecutor with such a generation of prosecution is more functional.

⁸⁸⁴ See more discussion about this in Chapter One.

⁸⁸⁵ Rodman, *supra* n. 21, Pp. 120- 123, identifying that the prosecutor has a new role to play as being diplomat or a lawyer who needs to consider the impact of investigations and prosecution on ongoing conflict and political transitions.

⁸⁸⁶ The Court has no enforcing agents and no police to work under its commands. Also, all states whether parties to the Court or not, and also international organisations are not obliged to cooperate with the Court. That was opposed to those crucial means that were available under the services of the Military Tribunals Prosecutors.

⁸⁸⁷ *Supra* n. 539, P. 239.

⁸⁸⁸ Quoted in Michael P. Scharf, The Amnesty Exception to the Jurisdiction of the International Criminal Court, *Cornell International Law Journal*, Vol. 32 (1999), P. 521-2.

⁸⁸⁹ See Chapter One about the idea of meaningful justice.

The second part of this chapter will concentrate on the position of peace processes within the scope of ‘the interests of justice’. In so doing, I shall argue that due to the above circumstances, the exercise of prosecutorial discretion is *multi-functional* where the prosecutor now is more responsible to consider other values that accompany ongoing and post conflicts. The Prosecutor does not seem to acknowledge this new role. The Prosecutor on several occasions made it clear that there is no place for any political considerations or peace-related issues within her decision-making process, as her prosecution’s strategy is only based on law.⁸⁹⁰ She is strictly committed to the rules. Greenawalt also observed this status.⁸⁹¹ He submits that the insistence of the prosecutor on legalism is to ensure to the international community that the ICC is not a political court.⁸⁹² It is unlike the early predecessor international tribunals in that it tries to represent itself as a normal international court.⁸⁹³ However, this chapter will argue that the ICC is far from being normal. The rhetorical denial strategy both Prosecutors are following and the strict commitment to the rule approach do not actually help avoid the classical accusation of the prosecutor being political⁸⁹⁴ or following a one-sided policy.⁸⁹⁵ The prosecutor is required to address several concerns that a prosecutor of a normal court would not.

In order to answer these questions, the analysis of Article 53 (1)(c) and (2)(c) will *mainly* draw on the current literature, policy papers of the OTP, some lessons from the ICTY, ICTR, and where relevant, from the Nuremberg Tribunal as well, in the context of the theoretical and historical chapters developed earlier in this thesis. The current literature will be more engaged throughout the following discussion, as Article 53 has not been applied. In

⁸⁹⁰ See the full discussion of this issue in the introduction of this thesis.

⁸⁹¹ *Supra* n. 23.

⁸⁹² *Ibid.*

⁸⁹³ *Ibid.*

⁸⁹⁴ See the allegation of being political in introduction of this thesis

⁸⁹⁵ *Supra* n. 718, P 42. Clark argued that the OTP failed to explain its strategy in Uganda in a way that help to remove the common perception that the Court is a ‘one-sided and heavily politicised’.

addition, I undertook qualitative research at The Hague, the city where the OTP is situated. I conducted semi-structured interviews with both Prosecutors and several staff members of the OTP. The latter is used as an inductive source, to which reference will be made, when appropriate.

5.2. Exploring the Article 53 Provisions on ‘the Interests of Justice’

The ICC Statute was built on the basis of putting ‘an end to impunity’, to ensure that those who are *most* responsible for committing serious international crimes face justice, and to complement national judicial proceedings.⁸⁹⁶ In its first policy document, the OTP ‘encourage[s] national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means.’⁸⁹⁷ This policy was meant to avoid an ‘impunity gap’ that may result from the non-involvement of national judicial authorities in pursuing other perpetrators that the Court does not follow. This is called a complementarity regime, based on Article 17 of the Statute.⁸⁹⁸ This is one avenue provided by the Statute, by which national judicial authorities may take the initiative. It may completely replace the ICC, if the national judicial system is genuinely willing and able to pursue potential perpetrators. Or, it could only complement the work of the Court by concentrating on other cases that the Court did not investigate.⁸⁹⁹ This avenue opened a massive debate about the *non-prosecutorial* justice mechanisms as possible alternatives to the ICC.⁹⁰⁰ It is not the focus of this chapter to address this problem. It is to emphasise that the discussion of the position of these alternatives will be in the light of the

⁸⁹⁶ Paragraph 4, 5, and 10 of the ICC Statute. See also Mahnouch H. Arsanjani, The Rome Conference on an International Criminal Court: The Negotiating Process, *The American Journal of International Law*, Vol. 93, No. 1 (1999), P. 24.

⁸⁹⁷ *Supra* n. 187, P. 3.

⁸⁹⁸ See generally, Jann K. Kleffner, *Complementarity in the Rome Statute and national criminal jurisdictions* (Oxford, Oxford University Press, 2008).

⁸⁹⁹ See generally, *ibid.*

⁹⁰⁰ *Supra* n. 135, P. 77, arguing that truth commission or other non-prosecutorial alternative may not replace the ICC, as they may not meet the criminal investigative requirement.

potential of the assessment of ‘the interests of justice’ stage. In addition, it is worth bearing in mind that the stage of the assessment of ‘the interests of justice’ is preceded by a positive decision on the admissibility of a situation or a case. This means that the given situation or case is already determined admissible. Therefore, the decision not to open an investigation or not to proceed with the prosecution, according to the FIDH, ‘would contradict the Statute’s most fundamental aim’.⁹⁰¹

There is also another avenue where those alternatives may replace the ICC. Under Article 16, the SC may ask the prosecutor not to commence or stop an investigation or prosecution for 12 months. This avenue may allow those alternatives to take the initiative until values such as stability or peace are settled. This chapter’s focus is intensively on the potential of ceasing an investigation or prosecution on the basis of ‘the interests of justice’ provisions of Article 53.

During the preparatory discussion of the Rome Statute, the question of how to deal with non-prosecutorial justice mechanisms was highly debated, but largely avoided within the Statute itself. This potential of the consideration of non-prosecutorial justice mechanisms was a matter of debate during the designation of Article 17, but more extensively in the context of Article 53. Articles 17 and 53 are two possible avenues, which are left open for discretion of the prosecutor to decide on this particular question. These provisions provide a leeway that may enable the prosecutor to give national authorities a chance to tackle the given atrocities through different types of accountability. Several participants in the Rome negotiations opined that states should be given an opportunity to determine what sort of *justice* should be delivered to violators of mass international atrocities. Imposing the ICC’s approach on all situations and

⁹⁰¹ Comments on the Office of the Prosecutor's draft policy paper on « The interest of Justice », FIDH (November, 2005), P. 2.

cases may not suit the cultures of punishment of some states,⁹⁰² it may also have adverse effects on transitions from violent status to stable one.⁹⁰³ Therefore, alternatives such as truth commissions could be an ideal solution for some situations and should be given the priority to tackle the given conflict. Others were quite opposed and insisted on prosecution as an appropriate response to atrocities.⁹⁰⁴

At the conclusion of these discussions, the drafters did not reach any agreement on those difficult questions and preferred to be diplomatic and left the door open for the prosecutor (and the Court) to deal with the question of the relevance of other alternatives. It was left to the discretionary power of the prosecutor to assess potential impacts of the Court's proceedings on national developments such as truth commissions, amnesty, and peace process. What is meant to show in this discussion is that the background negotiations of 'the interests of justice' provisions of Article 53 was mainly about the potential adverse impact of the ICC's proceedings on national initiatives to tackle atrocities. Therefore, the term 'justice' was intentionally left open for different interpretations, guided by several factors the prosecutor may consider when using her discretion.

In relation to 'the interests of justice', Article 53 (1) and (2) deal with the investigation and prosecution stages respectively.⁹⁰⁵ Subparagraph (1)(c) deals with the investigation stage and provides the prosecutor with a power not to open an investigation on the basis of 'the interests of justice', if the following conditions are met: 'Taking into account the gravity of the

⁹⁰² Alex Boraine, *A Country Unmasked: South Africa's Truth and Reconciliation Commission* (Oxford: Oxford University Press, 2000).

⁹⁰³ Charles Villa-Vicencio, why Perpetrators should not always be Prosecuted: Where the International Criminal Court and Truth Commission Meet, *Emory Law Journal*, Vol. 49 (2000), P. 222, a speech given by Kofi Annan arguing that truth commissions should not be completely set aside.

⁹⁰⁴ Madeline H. Morris, Foreword, *Law and Contemporary Problems*, Vol. 59 (1996), 1-3, see also Michael P. Scharf, From the Exile Files: An Essay on Trading Justice for Peace, *Washington and Lee Law Review*, Vol. 63, Issue: 1 (2006), P. 367.

⁹⁰⁵ See generally, William Schabas, *The International Criminal Court: a Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), Pp. 655- 671. See Also, *supra* n. 179, Pp. 1153- 1158.

crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice'. Obviously, the prosecutor is not required to prove that the investigation would serve 'the interests of justice'. It is only when it comes to deciding not to initiate an investigation that the prosecutor is required to prove the incompatibility of the investigation with 'the interests of justice'. The subparagraph provides two criteria that the prosecutor should consider when making a negative decision: 'the gravity of the crime and the interests of victims'. The interpretation of the term justice is balanced against these factors, as the Paragraph uses the term '*nonetheless*' having placed those factors in first instance.⁹⁰⁶

If the prosecutor decides to initiate an investigation, she, then, will move on to the prosecution stage and decide whether or not to prosecute. At this stage, the prosecutor is entitled to select cases within the given situation which is being investigated. Subparagraph (2) (c) of Article 53 provides the prosecutor with a power not to prosecute if the following conditions are met:

(c) 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; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

Like the investigation provision, here too 'the gravity of the crime' and 'the interests of victims' are to be considered, and in addition there are two more criteria that the prosecutor is required to consider: 'the age or infirmity of the alleged perpetrator', and 'his or her role in the

⁹⁰⁶ DeGuzman, *supra* n. 13, P. 1413.

alleged crime.’ As Dražan Djukić points out, the factors explicitly listed are not exclusive as ‘the article speaks of “all the circumstances, *including...*” (emphasis added) which renders the list of factors illustrative instead of exhaustive.’⁹⁰⁷ This is critical, as it empowers the prosecutor to consider factors other than those explicitly named. The wording of the text implies that the prosecutor can utilise a broad meaning of justice, when making a decision not to proceed, as the Statute adds two more factors to be considered. The Statute is quite specific at this stage, as it deals with the cases stage and, therefore, the identity of the perpetrators is often known at this advanced stage. Therefore, it suggests that age-related problems or health-related problems of perpetrators can constitute an excuse for not proceeding with the prosecution.⁹⁰⁸

5.3. Interpreting ‘the Interests of Justice’

As articulated earlier, the debates about ‘the interests of justice’ in Article 53 focus on the question of whether or not the prosecutor can and should use her discretionary power to respect other alternative justice mechanisms (non-prosecutorial ones such as truth commissions), associated/not associated with amnesty or peace-related approach. One view interprets ‘the interests of justice’ in a narrow way so it gives criminal justice proceedings the priority to address international mass atrocities. Most of them⁹⁰⁹ conclude that the prosecutor should strictly commit to a criminal prosecution and ignore any possible alternative justice mechanisms, which is based on non-prosecutorial processes such as truth commissions, amnesty, or peace processes.⁹¹⁰ Only a few people read ‘the interests of justice’ in a broad way so it allows the prosecutor to take these processes into account as part of considering ‘the

⁹⁰⁷ Djukić, *supra* n. 876, P. 26.

⁹⁰⁸ For more information about the judicial review of discretionary prosecution, see *supra* n. 61, P. 247.

⁹⁰⁹ See for example, Martin Macpherson, *supra* n. 876.

⁹¹⁰ This is a widely view due to the fact that the prosecutor is a body within a judicial institution, whose main mandate is only to deliver a criminal justice.

interests of justice'.⁹¹¹ They mainly justified this view by depending on different bases, according to which justice has different meanings to different communities and in different situations.⁹¹² In principle, the view is based on the idea that the international criminal law regime can be reconciled with other alternative justice mechanisms and peace processes, as the two latter can achieve justice, stability, peace, and smooth transitions.⁹¹³

I will first present, and analyse their arguments, before I offer my reply. I will argue that as the Court is working within unusual circumstances,⁹¹⁴ where the prosecutor is left with no effective means to promote 'the interests of justice' and pushed into a political role, it could be desirable for the prosecutor to waive her proceedings and allow other sorts of non-prosecutorial justice alternatives, associated/not associated with amnesty or a peace process. Whilst this section will evaluate the conformity of those alternatives with the term justice, the second part of this chapter will concentrate on the relevance of peace processes within the scope of 'the interests of justice' and in light of the justice theories. The assessment of the relevance of peace processes is also applicable to amnesty.

HRW is among those who rigorously asks the prosecutor to interpret the phrase of 'the interests of justice' in a narrow way; in the sense that only a criminal justice mechanism is to be considered.⁹¹⁵ The proponents of the narrow interpretation build their arguments on the fact that the phrase 'the interests of justice' in Article 53 is not determinate, in the sense that it does

⁹¹¹ Rodman, *supra* n. 21. See also Brubacher, *supra* n. 22, P. 94, he opined that when the prosecutor exercises her prosecutorial discretion, she can consider 'the political factors pertaining to the maintenance of international peace and security'. See also Carsten Stahn, Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court, *Journal of International Criminal Justice*, Vol. 3, Issue: 3 (2005), Pp. 697-8, arguing that the interpretation of term justice may embody a broader meaning.

⁹¹² Goldstone and Fritz, *supra* n. 876, P. 662.

⁹¹³ Josefine Volqvartz, ICC under Fire over Uganda Probe, *Global Policy Forum* (23rd February, 2005), available at <<https://www.globalpolicy.org/component/content/article/164/28501.html>> (Last Access: 21st August, 2015) argues that the OTP's indictments against the LRA's members could have adverse effects on the ongoing peace efforts that were taking place at the time.

⁹¹⁴ See Chapter One of this thesis.

⁹¹⁵ *Supra* n. 30.

not contain an exact meaning⁹¹⁶ and, therefore, requires interpretation by reference to the methods of interpretation Article 31 of the Vienna Convention on the Law of Treaties provides.⁹¹⁷ On that basis, they provide several legal justifications for their argument. Article 31 provides that a term should be first interpreted according to its ordinary meaning. But HRW argues, since this is not clear ‘in isolation’, one must consider the term in the context of the Statute more widely and in light of the treaty’s objects and purposes. HRW then notes that no definitional agreement was reached at Rome.⁹¹⁸ There is no indication of ‘any agreement that the phrase “the interests of justice” permits the prosecutor to consider the existence of a national amnesty or truth commission process, or ongoing peace negotiations as factors to be evaluated.’⁹¹⁹ Therefore, it seems that, in considering ‘the interests of justice’ within the context of the treaty itself, the ‘object and purpose’ of the treaty, as a second focus of interpretation is relevant in this regard. Accordingly, they turn to the Preamble as a relevant source.⁹²⁰ According to the Preamble of the ICC Statute, the preeminent object of the Statute as summarised by HRW, ‘is to prosecute the most serious crimes of concern to the international community.’⁹²¹ On this basis they reach their narrow construction of ‘the interests of justice’ as excluding consideration of on-ground developments ‘such as truth commissions, national amnesties, or the implementation of traditional reconciliation methods, or concerns regarding an ongoing peace process.’⁹²² As a consequence, the prosecutor should ignore any mechanism that does not ensure a criminal justice. This conforms to the ICC’s *raison d’être*, which is as read from the Preamble, according to HRW ‘the goal of putting an end to impunity of the perpetrators of [genocide, aggression, crimes against humanity, and systematic or large-scale

⁹¹⁶ *Ibid.* See also *supra* n. 909. See also, Robinson, *supra* n. 867, P. 488. See also Lovat, *supra* n. 880. See also Richard J. Goldstone and Nicole Fritz, *supra* n. 876.

⁹¹⁷ The Vienna Convention on the Law of Treaties (1969) (entered into force on 27th January, 1980).

⁹¹⁸ *Supra* n. 30.

⁹¹⁹ *Ibid.*, P. 4.

⁹²⁰ *Ibid.*, Pp. 3- 4.

⁹²¹ *Ibid.*, P.6.

⁹²² *Ibid.*, P.21 .

war crimes] is the main reason for the creation of the ICC.⁹²³ As Martin Macpherson expresses on behalf of Amnesty International, '[a] suspension by the Prosecutor of an investigation on the political ground that it might facilitate negotiations to end an armed conflict would be inconsistent with the purpose of the Court'.⁹²⁴

The next interpretation presented by the adherents of the narrow construction concerns Article 16.⁹²⁵ HRW submits that Article 16 allows the UNSC to postpone an investigation or prosecution for a 12 month period, 'because it may interfere with international peace and security'.⁹²⁶ Therefore, they argue that this clearly indicates that it is for the UNSC, not the OTP prosecutor, to take such political decisions.⁹²⁷ They present several citations to support this view, such as that 'Article 16 is "the vehicle for resolving conflicts between the requirements of peace and justice where the Council assesses that the peace efforts need to be given priority over international criminal justice"⁹²⁸. HRW concludes then that the only means that the Statute allows for non-prosecutorial mechanisms, in particular a peace process to 'trump' the Court's proceedings, is through Article 16.⁹²⁹ Providing such a broad power for the ICC prosecutor would undermine the fair and non-discriminatory character the prosecutor should enjoy. It would further undermine the legal legitimacy of the court, if it was exercised wrongly.⁹³⁰ For these reasons, the drafters of the Statute were aware that the OTP as a body

⁹²³ *Ibid*, P.6.

⁹²⁴ *Supra* n. 909, P. 4.

⁹²⁵ See mainly the discussion of HRW about article 16 at *supra* n. 30. Article 16: Deferral of 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.

⁹²⁶ *Supra* n. 30, P.7.

⁹²⁷ *Supra* n. 30. See also, *supra* n. 909. See also Webb, *supra* n. 17, see also, Linda M. Keller, Achieving Peace with Justice: the International Criminal Court and Uganda Alternative Justice Mechanisms, *Connecticut Journal of International Law*, Vol. 23 (2008), P. 239.

⁹²⁸ *Supra* n. 177, P. 378, cited in *supra* n. 30.

⁹²⁹ *Supra* n. 30, P.8.

⁹³⁰ Danner, *supra* n. 14, P. 536.

within a judicial institution has no any political legitimacy to examine the issue of the stability and security of a certain situation.⁹³¹

Indeed, the strict legal justifications of HRW seem problematic. Although the reading of the language of the Statute and its Preamble emphasises the prosecutorial approach as a rule to address conflict situations, however that does not mean at all that the criminal justice response is the sole approach to which those means refer. For example, they concentrate on the idea ‘that the most serious crimes of concern to the international community as a whole must not go unpunished.’⁹³² The next section will show that punishment is wide and may involve some forms that may be inflicted from non-prosecutorial mechanisms. In addition, it is not true that the aims and purposes of the Statute only emphasis the criminal justice value as the only target for the Court. Paragraph 3 of the Preamble, which even precedes the punishment aim, provides that the peace and security values are also to be taken into account. In addition, Paragraph 7 also reaffirms ‘the Purposes and Principles of the Charter of the United Nations.’ The latter’s main principle and mandate is to secure peace and stability in the world. Therefore, the strict interpretation of the HRW does not seem coherent, as the aims of the Statute do not provide one certain goal.⁹³³

The key concern of HRW is that the involvement of the prosecutor in the question of peace, security, and stability, which have political repercussions, may raise serious legal concerns about the legal legitimacy of the prosecutor as a body within a judicial institution. Therefore, it is the SC, the principal body, whose mandate is to concentrate on national political developments, such as peace processes, transitions, and stability, who is to take responsibility

⁹³¹ See *supra* n. 179, P. 1142.

⁹³² See the Preamble of the Statute, Para. 4.

⁹³³ Ian Sinclair, *The Vienna Convention of the Law of Treaties* (2nd ed.) (Manchester, Manchester University Press, 1984), P. 130. He points out ‘most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes.’

for those values. However, to what extent are these allegations are workable? Does the prosecutor have any role or even choice to read ‘the interests of justice’ in a broad way that may cover the non-prosecutorial justice mechanisms as well as peace-process related issues?

As was discussed in Chapter One, the effectiveness of enforcement mechanisms at the international level is still weak.⁹³⁴ The ICC, in particular, has no police who work under its command. The Court was created with no normal means of making the operation of the Court effective. The prosecutor of a permanent court has to face questions of the adverse impacts of her proceedings on any potential conflicts, although, in principal, she is not responsible to address such questions. The Court totally relies on the political decision of states for cooperation and enforcement and can only report to The ASP in case those states failed to comply with the Court’s requests.⁹³⁵ The ASP has no effective power by which to force states to enforce any decision the prosecutor makes.⁹³⁶ The insistence on the ICC’s approach requires effective enforcement mechanisms, which the Court and the prosecutor lack. The same argument can be applied to the SC, as the latter has failed on several occasions to intervene, as an enforcement tool to administrate justice, as in the situation Syria.⁹³⁷ The exclusive allocation of the articulation of the assessment of the scope of justice by the SC does not seem logical.

⁹³⁴ See the arguments advanced by, Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books: 1977). See also the argument addressed by Cherif Bassiouni about the importance of having effective enforcement mechanisms at the international level, M Cherif Bassiouni, Justice and Peace: the Importance of Choosing Accountability over *Realpolitik*, *Case Western Reserve Law Journal*, Vol. 35 (2003), Pp. 202-4.

⁹³⁵ See Articles 87 and 112 of the ICC Statute.

⁹³⁶ Most recently, Chad has refused to arrest Defense Minister of Sudan Abdel-Rahim Hussein who travelled to Chad, although the latter is a party to the ICC and under an obligation to arrest him, see Chad Welcomes Hussein and Violates its International Legal Obligations Yet Again, *International Justice Project* (April, 2013), available at <<http://www.internationaljusticeproject.com/chad-welcomes-hussein-and-violates-its-international-legal-obligations-yet-again-2/>> (Last Access: 15th May, 2013).

⁹³⁷ The failure of the SC in putting an end to the violence in Syria and therefore to bring justice to both victims and perpetrators is another example of the lack of a stable and effective mechanism of enforcing justice, see a report by: Jane Cown, UN Slams Security Council’s Syria Failure, *ABC News* (August 2012), available at <<http://www.abc.net.au/news/2012-08-04/un-chief-warns-battle-for-aleppo-imminent/4176616>> (Last Access: 7th November, 2012).

There is no guarantee that the SC will always intervene to prevent or terminate an investigation or prosecution.⁹³⁸

Accordingly, so long as ‘justice’ could be achieved in different ways, as will be discussed below, that the current enforcement mechanisms are not always effective, and that some conflicts cannot be solved by criminal justice (whether international or international), then it seems that other mechanisms would be desirable. This, at least, should be the case until the international community resolves the enforcement problem.⁹³⁹ The idea then is not which body should possess the interpretation of ‘the interests of justice’. It is, indeed, how to ensure the protection of these interests. This interpretation indicates that the prosecutor of the permanent international criminal court has multifunctional roles to play. The prosecutor is left in a position that forces her to consider values, which are not normal within a body that is supposed to deliver a sole judicial mandate that is to say justice. This discussion further implies that the broad reading of ‘the interests of justice’ accordingly seems necessary let alone desirable.

5.3.1. The General Orientation of the OTP and the Prosecutors on ‘the Interests of Justice’

Before we proceed in discussing the relevance of the non-prosecutorial mechanisms, it is important firstly to explore the policy of the OTP in relation to the meaning of ‘the interests of justice’, and also the view of both Prosecutors about its potential scope. In 2007, the OTP issued a policy document regarding ‘the interests of justice’ clauses of Article 53.⁹⁴⁰ In this paper, the OTP tried to interpret the meaning of the concept and also, in small part, referred to other justice mechanisms. Generally, the paper does not offer a specific meaning of justice and

⁹³⁸ Lovat, *supra* n. 880, Pp. 5-6.

⁹³⁹ See generally, M. Cherif Bassiouni, *International Criminal Law: Enforcement* (Transitional Publishers, 1987), Vol. 3.

⁹⁴⁰ Policy Paper on the Interests of Justice 2007.

the relevance of any other alternatives that could replace the Court.⁹⁴¹ The paper made it clear that the OTP is ‘bound to offer only limited clarification in the abstract’, ‘as the Statute itself does not try to elaborate on the specific factors or circumstances that should be taken into account in consideration of the interests of justice issue.’⁹⁴² The paper rather provides three general principles for dealing with a decision not to proceed in ‘the interests of justice’.

First, the paper insists on the investigation and prosecution, and that the decision not to proceed with the proceedings in ‘the interests of justice’ would be exceptional in nature.⁹⁴³ Secondly, the paper, further, emphasises that the interpretation of ‘the interests of justice’ will be undertaken in light of the objects, aims and purposes of the Statute, ‘namely the prevention of serious crimes of concern to the international community through ending impunity.’⁹⁴⁴ This reiterates the Prosecutor’s position that the use of his discretionary power will be guided in particular by the aim, which points to the criminal justice approach. Thirdly, it states that the concept of ‘the interests of justice’ is not the same as ‘the interests of peace’, and that the latter falls within the mandates of other bodies.⁹⁴⁵

The policy document thus strongly emphasises that the prosecutor will place first priority on a criminal justice approach to any situation or case that is under the jurisdiction of the Court. However, the paper also refers to ‘some justice mechanisms’ such as ‘domestic prosecutions, truth seeking, reparation programmes, institutional reform and traditional justice mechanisms’ as another approach ‘in the pursuit of a broader justice.’⁹⁴⁶ The latter are mentioned as complementary mechanisms that can go alongside with the ICC approach. In other words, the Prosecutor intends that whilst the Court focuses on the gravest crimes and

⁹⁴¹ See Linda M. Keller, Comparing the ‘Interests of Justice’: What the International Criminal Court can Learn from New York Law, Washington University Global Studies, *Law Review*, Vol. 12, No. 1 (2012), Pp. 9- 10.

⁹⁴² Policy Paper on the Interests of Justice 2007, P. 1.

⁹⁴³ *Ibid*, P. 1.

⁹⁴⁴ *Ibid*, P. 1.

⁹⁴⁵ *Ibid*.

⁹⁴⁶ *Ibid*, P. 8.

those who bear the most responsibility for crimes under the jurisdiction of the Court, the other alternatives can complement the work of the Court on the national level.⁹⁴⁷ The wider meaning of ‘the interests of justice’ seems to be taken only when those prosecutorial and non-prosecutorial justice mechanisms are complementing the main task of the Court, whose focus is on the most responsible people.

In relation to the question of peace processes, the paper first intends to limit the scope of justice in the sense that it does not encompass ‘all issues related to peace and security’.⁹⁴⁸ It says that ‘[a]ny political or security initiative must be compatible with the new legal framework’, which has anyway influences on ‘conflict management efforts’.⁹⁴⁹ Nonetheless, the paper explicitly suggests that the OTP may consider the protection of victims when assessing ‘the interests of justice’. It cites Article 68 (1) of the Statute which provides that ‘[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.’ Rodman opines that this suggestion could be a touchstone in ‘factoring peace processes into prosecutorial discretion since their destabilization would almost inevitably lead to further victimization.’⁹⁵⁰ Indeed, it is not clear how and why peace processes *as such* have been a possible alternative to Rodman. The paper does not make any reference to peace-related issues in the context of analysing the interests of victims. It repeatedly emphasises the importance of taking into account the opinions of victims and says nothing about the potential of peace-related processes. The latter *as such* does not conform to the objects and aims of the Statute that seeks to end impunity. This approach does not involve any sort of justice, if it is presented *alone* without any other justice mechanisms with which to associate. In addition, the paper asserts that the legal missions of the Court have

⁹⁴⁷ *Ibid.*

⁹⁴⁸ *Ibid.*, P. 8.

⁹⁴⁹ *Ibid.*, P. 4.

⁹⁵⁰ Rodman, *supra* n. 21, P. 122.

inevitable impacts on ‘conflict management efforts’. So far, there is no strong indication within this paper nor in the statements of the Prosecutors (as will be explored now) that implies that peace processes *as such* could purely replace the ICC.

In relation to the view of both ICC Prosecutors about the scope ‘the interests of justice’, they are generally not clear enough though they mainly follow one main orientation, which focuses on prosecution. It becomes controversial when it comes to set their opinion about the non-prosecutorial justice mechanisms and peace processes. Generally, the Prosecutors tend to concentrate on the criminal prosecution as a basis for articulating justice. For example, Prosecutor Moreno-Ocampo has made clear on several occasions that the criminal justice response is his top priority.⁹⁵¹ He stated that other non-prosecutorial and prosecutorial justice alternatives can work together with the criminal justice’s response in handling particular atrocities.⁹⁵² On the question of peace processes, he again insisted on his role and rejected peace processes to replace the Court, as such. For example, in a webcast interview I asked Moreno-Ocampo: you said in 2005 that you followed the various national and international efforts to achieve peace and security when considering ‘interests of justice’. What part do “peace and security” concerns play when deciding what cases to investigate? He answered: ‘I cannot adjust the law to the political interests. Those who manage political agenda have to respect the law.’⁹⁵³ I also conducted several interviews with the staff of the OTP at The Hague, in March 2012, where they confirmed that the criminal justice approach of the ICC is the basic option when considering ‘the interest of justice’ provisions of Article 53, and that other justice mechanisms

⁹⁵¹ See Policy Paper on the Interests of Justice 2007.

⁹⁵² *Ibid*, P. 8, ‘[a]s such, it fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice’. In the context of the Uganda conflict, he urges that ‘this case in Uganda is to show how traditional mechanisms to reconcile people can work together with investigation and prosecution.’ See, Felix Osike, ICC Prosecutor Louis Ocampo in his Office at The Hague [interview] (July, 2007), *HighBeam Business*, available at <<http://business.highbeam.com/3548/article-1G1-166422590/icc-prosecutor-louis-ocampo-his-office-hague-interview>> (Last Access: 14th April, 2013).

⁹⁵³ See an Ocampo’s interview at International Bar Association *supra* n. 28. Also see an Ocampo’s interview at Global Observatory, *supra* n. 28. Also see an Ocampo’s interview at the Africa Report, *supra* n. 28.

would play a complementary role in this regard. Bensouda also made clear that '[t]he prospect of peace negotiations is therefore not a factor that forms part of the Office's determination on the interests of justice.'⁹⁵⁴ However, in one of his reports to the SC about the Darfur situation, Moreno-Ocampo showed his readiness to 'follow the various national and international efforts to achieve peace and security, as well as the views of witnesses and victims of the crimes.'⁹⁵⁵ Current Prosecutor Bensouda also confirmed to me in one public lecture that she would consider national efforts when she was assessing 'the interests of justice', however, without specifying which exact national activities would be relevant.⁹⁵⁶

However, it appears that the Prosecutor's base-line policy is criminal prosecution as the sole response by the ICC to any atrocity.⁹⁵⁷ 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. This indicates that the OTP is far from accepting broader meanings of justice that might involve approaches other than the ICC. Whilst it seems that such a policy has merit, many commentators have queried there is a doubt regarding its success, since in practice, these tribunals and the ICC itself work within a political environment, and exercise their jurisdiction over crimes that also have, to a large extent, political dimensions. The next two sections will analyse the relevance of those alternatives as well as a peace process and concludes as to whether or not the zero-tolerance policy is desirable and effective.

5.3.2. General Guidelines for the Deferral Decision under 'the Interests of Justice'

⁹⁵⁴ ICC, OTP, Seminar Institute for Security Studies (ISS): Setting the record straight: the ICC's new Prosecutor responds to African concerns (10th October, 2010), P. 5.

⁹⁵⁵ *Supra* n. 712, P. 6.

⁹⁵⁶ This was Prosecutor Fatou Bensouda's answer to my question about the prospects of the application of Article 53, where 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.

⁹⁵⁷ See Policy Paper on the Interests of Justice 2007, Pp. 7- 8. Moreno-Ocampo confirmed that the broad justice through the other types of justice mechanisms can be completed by the domestic authorities alongside with the ICC that only provides justice in its narrow scope, which is criminal justice.

Thus far, this chapter explored the provisions of ‘the interests of justice’ of Article 53, and discussed the different views of the reading of the term ‘the interests of justice’. It shows that the broad reading of the term may be relevant based on several weakness of the Court’s system, and the new role of the prosecutor, which has to play in international law’s arena. It then explored the opinion of the prosecutor as well as her office’s policy towards the scope of the term justice. The following sections will proceed to examine the potential of non-prosecutorial justice mechanisms as well as peace process associated/not associated with amnesty to replace the ICC under ‘the interests of justice’ provisions of Article 53. The discussion will not cover a prosecutorial-mechanism such as national trials, as this situation comes under the discussion of the complementarity regime, given by Article 17 of the Statute, and will only concentrate on truth commissions, as a most common alternative. The classical theories of justice will be used to examine the suitability of such a replacement. It then will investigate the Uganda situation as a brief case study to verify these theoretical examinations and explore the new role that the ICC prosecutor could play.

The first section of this chapter concludes that there is a possibility that the term ‘the interests of justice’ may be read in a broad way as encompasses non-prosecutorial justice mechanisms associated/not associated with peace processes or amnesty. The latter are both suggested to be linked to one of alternative justice mechanisms. This section will, therefore, examine the conformity of these mechanisms to the most common goals that the ICC seeks to achieve, which are retribution, deterrence, restoration, and expressivism.⁹⁵⁸ It is highly likely that the invocation of the provisions of ‘the interests of justice’ of Article 53 will be raised whenever there is clash between the *Court* and *other* sorts of justice mechanisms and/or peace

⁹⁵⁸ See generally, Antonio Cassese, The Rationale for International Criminal Justice, in Antonio Cassese, *The Oxford Companion to International Criminal Justice* (Oxford, Oxford University Press, 2009). See also Jean Galbraith, The Pace of International Criminal Law, *Michigan Journal of International Law*, Vol. 31, (2009), 79-143.

processes that could also serve ‘the interests of justice’ (*the ICC vs. other alternatives*).⁹⁵⁹ The ICC cannot always be the sole option to serve justice. There are always other mechanisms that may better fit the given situations and replace the ICC. Rodman points to this possibility when he says the prosecutor can utilise Article 53 as ‘a means of holding back from criminal proceedings or considering alternative justice mechanisms when demanding prosecution might prolong an armed conflict or dissuade a tyrant from stepping down.’⁹⁶⁰ This is simply because one size never fits all.⁹⁶¹ Article 53 genuinely covers this gap and provides the prosecutor with an opportunity to examine the suitability and appropriateness of the ICC as a solution to most complicated situations and cases.⁹⁶²

5.4. Theories of Justice

The retribution theory is mainly based on the idea of desert.⁹⁶³ A criminal should receive a sort of punishment because he or she deserves it. It is a sort of a justification of the punishment. This theory aims to secure that a sort of punishment inflicted on a criminal is proportional. As this rationale could be noticeably achievable on the national level, however, it seems quite difficult to achieve on the international level. The aim of the ICC Statute is to ‘put an end to impunity’. The Preamble specifies that only ‘those most serious crimes of concern to the international community as a whole must not go unpunished’. According to the aim of retribution and the ICC Statute, it seems that this particular aim is far from its aspiration.

⁹⁵⁹ Teitel, *supra* n. 66. See also 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), 19- 47, Hazan identified seven categories of transitional justice mechanisms: criminal justice, public apologies, reparatory justice, National Remembrance Day, administrative justice, constitutional justice, and historical justice. Also, Hayner did mention various ways by which countries can respond to past atrocities, such as: holding trials, truth commission, providing individuals access to security files, reparations, building memorials, lustration, making comprehensive reforms in all section of a state, see Hayner, *supra* n. 66, P. 12.

⁹⁶⁰ Rodman, *supra* n. 21, P. 104.

⁹⁶¹ Ludwin *supra* n. 880, P. 92.

⁹⁶² *Supra* n. 867.

⁹⁶³ See, Janet Dine and James J Gobert, *Cases and Materials on Criminal Law* (4th ed.) (Oxford: Oxford University Press, 2003), about the forms of justice theories. See also, Paragraph 4 of the ICC preamble asserts ‘that the most serious crimes of concern to the international community as a whole must not go unpunished’. See also *supra* n. 532, P. 301.

The ICC Prosecutors' practice shows that the Court is not able to provide punishment for all international perpetrators due to its selection-based system of prosecution. Nor did it show a comprehensive strategy of prosecution in which all those who committed the most serious international crimes and supposed to be prosecuted are punished. As Mark A. Drumbl points out, the achievement of the ambition of retribution by international criminal justice is challengeable due to the selectivity-based system of international tribunals as well as 'political reasons'.⁹⁶⁴ Therefore, one notices here that international criminal justice, through the international criminal tribunals, can limitedly achieve this ambition, and at best further it.

With regard to non-prosecutorial alternatives, such as a truth commission, one can say that the retribution's aim could be highly placed. As was explored, retribution is based on two basic pillars, namely the establishment of individual culpability and punishment. Obviously, the main concern of truth commissions is to disclose all offences committed. This in turn results in identifying nearly all offenders as well a matter that the ICC itself cannot do it. If such alternatives are, therefore, mandated to undertake a full investigative process that discloses the responsibility of the accused, and the crimes that were committed, then we can say that such alternatives, to a large extent, meet the first pillar.⁹⁶⁵ In relation to the second pillar, the idea of punishment is not exclusively linked to the idea of incarceration. Most truth commissions provide sorts of punishments that may take different forms. Reparations, compensation, removal from office, and public services may all satisfy this requirement. Therefore, such an alternative may satisfy the aims of retribution.

⁹⁶⁴ Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007), P. 151.

⁹⁶⁵ The South Africa situation is an example to this argument, as the truth and reconciliation model in that country conducted and covered these requirements, see Andreas O Shea, *Amnesty for Crime in International Law and Practice* (Kluwer Law International, 2002), Pp. 333-4.

The deterrence theory is a consequentialist-based idea.⁹⁶⁶ It aims to deter or to prevent future crimes.⁹⁶⁷ Punishment is inflicted here to have a deterrent effect, aimed at preventing further criminals. This seems to be the ultimate goal that the Court seeks to achieve through its criminal prosecutorial method, at least, on the theoretical level.⁹⁶⁸ Putting an end to the era of impunity as a main goal of the Statute, is meant to put the deterrent effect in place. It is not clear to what extent the ICC can achieve this rationale, in particular the Court imposes its punishments on only a few perpetrators.⁹⁶⁹ The prosecutor has to exercise selective justice that is difficult to justify by this theory, as the latter supposes that all perpetrators should be punished.⁹⁷⁰ In addition, because of the lack of police or enforcement agent and the weak cooperation system, the future criminals may not fear the ICC prosecution and punishment. The Darfur-like situations for example may not prevent the others from fearing the reach of the Court, as the situation in Syria. The achievement of this aim is more difficult by other alternatives, as it is based on the existence of a certain punishment. Nonetheless, they may still reach this aim through different threats they provide. For example, other non-prosecutorial alternatives, such as truth telling, might also reach that level, as they disclose a large number of offences, perpetrators, and crimes.⁹⁷¹ The stigma of the disclosure of those factors may in a way help to achieve the deterrent aim.⁹⁷² The outcomes of this disclosure should be published as copiously as possible in order to maximise the potential deterrent effect. However, as deGuzman states, this particular aim seems extremely difficult to achieve, as we still find the

⁹⁶⁶ See generally, Stephen L. Quackenbush, *Understanding General Deterrence Theory and Application* (New York Palgrave Macmillan, 2011).

⁹⁶⁷ *Supra* n. 964, P. 169.

⁹⁶⁸ Paragraph 5 of the Preamble of the ICC Statute, 'Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.'

⁹⁶⁹ *Supra* n. 539, P. 294, asserting that the achievement of retribution and deterrence's goals are 'impossible to assess', and 'untested'.

⁹⁷⁰ Michael T. Cahill, Retributive Justice in the Real World, *Washington University Law Review*, Vol. 85. Issue: 4 (2007), P. 826.

⁹⁷¹ Miriam Aukerman, Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice, *Harvard Human Rights Journal*, Vol. 15 (2002), 39- 96, arguing that some types of alternatives, such as a truth telling can achieve a deterrent aim.

⁹⁷² *Ibid*, P. 69.

resurgence of new crimes, not just in new areas of the world, but even within situations that are already under *criminal prosecution*.⁹⁷³ In short, as the situation with the retributive theory, the deterrent goal cannot be achieved by those alternatives, they could only further it.

Restorative justice is based on the idea of restoring offenders, victims, and the societies in which all parties to the given situation live.⁹⁷⁴ This particular form of justice does not concentrate on the penalisation process of the perpetrators, but it mainly emphasises the reparation of the damage caused by perpetrators.⁹⁷⁵ Although the ICC is not built on a restorative basis, however, several goals have been asserted by the Court that aims at contributing to the restorations. The participation of the victims within all the criminal proceedings, and the compensation system⁹⁷⁶ within the ICC system are broadly emphasised by the Statute and the OTP.⁹⁷⁷ The role that the ICC plays in conflicts has a prominent effect on reconciliation and peace, as the latter are both usually furthered by imposing a criminal accountability.⁹⁷⁸ Other alternative mechanisms, in particular a truth commission, can best further this particular aim.⁹⁷⁹ The prosecutor will not face a difficulty, as to whether or not other alternatives have the capability to achieve this particular aim. It is even supposed that the potential to achieve this aim can be best achieved through other alternatives that do not involve a prosecutorial approach. The reconciliation process via truth telling between the offenders and

⁹⁷³ *Supra* n. 532, P.306.

⁹⁷⁴ *Supra* n. 964, P. 53- 124.

⁹⁷⁵ Linda M. Keller, Seeking Justice at the International Criminal Court: Victims' Reparations, *Thomas Jefferson Law Review*, Vol. 29, No. 2 (2006), 189- 217.

⁹⁷⁶ Article 75 of the ICC Statute.

⁹⁷⁷ See, Articles, 53, 68, and 82 of the Statute. See also, ICC, Office of Prosecution, *Policy Paper on Victims' Participation*, April, 2010, available at <http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-ST-V-M.1-ENG.pdf>.

⁹⁷⁸ *Prosecutor v. Dusko Tadic a/k/a 'Dule'*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2nd October, 1995), Para. 39, asserting that the establishment of the ICTY was an appropriate measure to achieve its objectives: 'the restoration of peace.'

⁹⁷⁹ See, generally, Luna, Erik, Punishment Theory, Holism, and the Procedural Conception of Restorative Justice, *Utah Law Review*, Vol. 1 (2003), 205-302.

victims is more likely to restore them within the given situation, once an agreement is reached among them.

Expressivism theory, to some extent, overlaps with retribution and deterrence theories.⁹⁸⁰ It means that a certain institution, which exercises a certain policy, has several messages that the relevant audience should receive. These messages are part of the societal values that each community seeks to sustain and develop.⁹⁸¹ The expressive aim of the ICC is to teach the audience how to understand fully that the crimes under the jurisdiction of the Court are not allowed and should be punished.⁹⁸² This is a message that the audience should receive and learn. Whilst other prosecutorial alternatives have the same aim, the non-prosecutorial ones might also involve the same messages to be delivered to the audience. The effect of the reconciliation process on a certain society can send a clear message to the next generation that no atrocities can go without disclosure and condemnation. This might play a role in asserting for those generations that wrong deeds will be no longer tolerated. These sorts of mechanisms have long experience in creating history records about the past atrocities and acquiring the full stories about these atrocities. Thereafter, these mechanisms are highly likely to further this particular aim of justice.⁹⁸³

Having presented, briefly, the potential mechanisms, such as truth commissions for delivering justice, the question now is how will the prosecutor employ her prosecutorial discretion, when considering the question of peace-related issues and alike (amnesty)? Obviously, the goals of justice, in light of the above analysis, cannot be achieved or furthered by means of peace or pure amnesties, as it is out of the question. Under the current characterisation of the ICC, as an institution working within unusual circumstances, would

⁹⁸⁰ *Supra* n. 964, P. 52. See also Diane Marie Amann, Group Mentality, Expressivism, and Genocide, *International Criminal Law Review*, Vol. 2, No. 2 (2002), P. 117. See also *supra* n. 532.

⁹⁸¹ Keller, *supra* n. 927, Pp. 273-5.

⁹⁸² Amann, *supra* n. 980, Pp. 117- 224.

⁹⁸³ *Supra* n. 903.

peace processes be a relevant approach that may come within the scope of ‘the interests of justice’?

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

The critical question at this point is whether or not a peace process (national political arrangements) can be a relevant mechanism that the prosecutor may take into account in considering whether to stop criminal proceedings, whether at the investigation stage or the decision to prosecute.⁹⁸⁴ In other words, can a peace process figure in relation to the factors considered as covered by Article 53 ‘the interests of justice’? This part of the chapter will try to understand the relevance of the peace process within the decision-making process, and whether this sole process as such can be a reason to cease the Court’s criminal proceedings. Most commentators, authors and, generally, the OTP answered with no.⁹⁸⁵ This is part of the classical theory of legalism that is based on the idea of the independence of international law from international politics.⁹⁸⁶ It is a strict view that puts peace considerations outside the scope of judicial mandates. However, history has shown that this is not always the case, as the peace considerations have been adopted, as an approach to handling several atrocities, and to deliver justice.⁹⁸⁷ During the last three decades, the international community has experienced several occasions, where peace processes were used to handle several atrocities, and different kinds of impunities were granted to the leaders of the abusive regimes.⁹⁸⁸

⁹⁸⁴ Rodman, *supra* n. 21, P. 100. Rodman raised a similar question, questioning ‘[s]hould the Prosecutor hold back from criminal proceedings if he is persuaded that prosecution could interfere with negotiated transitions?’

⁹⁸⁵ See Moreno-Ocampo’s Statement, *supra* n. 27.

⁹⁸⁶ See generally, *supra* n. 473, part two: Law and politics: P. 111- 222.

⁹⁸⁷ See generally, Jonathan Tonge, *Comparative Peace Processes* (Malden, Polity Press, 2014), discussing the most successful peace processes and those which failed during history. And also see Priscilla B. Hayner, *supra* n. 66.

⁹⁸⁸ Mozambique, El Salvador, and Haiti are examples of those countries, see Cynthia L. Arnson, *Comparative Peace Processes in Latin American* (Stanford, Stanford University Press, 1999).

To find whether peace considerations come within the confines of justice, we need to look at Article 53, the policy paper on the interests of justice, and several responses I collected interviewing members of the staff of the OTP. Obviously, the wording of the text of Article 53 does not make any explicit reference to peace processes. However, the balancing test that Article 53 provides might merit an examination of the position of peace within the scope of the Article. Among the factors that the Article suggests are ‘the role of the alleged perpetrators’ and ‘the interests of victims’. These factors may play a role in illustrating the place of the peace negotiations within the parameters of Article 53. Having looked at history, one might see that these factors were taken into consideration when dealing with certain situations.⁹⁸⁹ It can be noticed that the peace negotiations within those situations drew on the policy of prosecution followed by international prosecutors. The failure of the ICC Prosecutor to indict former Kenyan President Mwai Kibaki could be a result of the peace-related concern, as Kenya was at an unstable status due to the then conflict. It was really surprising that former Prosecutor Moreno-Ocampo ignored and omitted the then sitting head of state in the list of charges he made against three persons who were under the command of the President,⁹⁹⁰ although the Court’s confirmation of charge decision referred repeatedly to the involvement of State House (and the presence of Kibaki) in the alleged preparing and planning meeting that prefaced the Mungiki attacks on members of the Luo ethnic group, which took place in the Rift Valley.⁹⁹¹ If these allegations are true, then the Prosecutor started to play an extra-role, where the value of peace was taken into account. This then constitutes a clear development of the policy of prosecution that the OTP has started to acknowledge.

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

⁹⁸⁹ *Ibid.*

⁹⁹⁰ See *supra* n. 775.

⁹⁹¹ *Ibid.*

situations, a criminal prosecution may be a desirable option. This happens, essentially, in situations where the alleged perpetrators no longer hold power and can be apprehended without fear of the renewed explosion of violence, and have no further role in the society concerned. The prosecutor might not then consider the ‘the role of the alleged perpetrators’, and, therefore, proceed with the investigation or prosecution. ‘The interests of justice’ during the Nuremberg and Tokyo tribunals were best promoted by simply delivering criminal justice to the perpetrators, who were no longer in power.⁹⁹² The same can be applied to the Rwanda situation, where the defeat of the *genocidaires* made the criminal justice response an ideal mechanism to deal with the post-conflict transition without fear about ‘the interests of justice’.⁹⁹³

Matters look different in unstable situations, however. Having looked at history, one could notice that different justice mechanisms (criminal or non-criminal mechanisms) have been applied to these sorts of situations.⁹⁹⁴ However, one common shared feature shaped such situations. It was a political and military strategy articulated to end the violence or to boost the fragile peace processes, which played an essential role in the eventuality of prosecution on peaceful transitions. In other words, the articulation of ‘the interests of justice’ was, to a large extent, affected by the accompanying *political* and military circumstances, in particular in ongoing conflict. For example, one of the worst atrocities committed in Bosnia and Herzegovina, the Srebrenica massacre by Mladic, happened only two years after the establishment of the ICTY.⁹⁹⁵ When the perpetrators of this massacre and those of other crimes,

⁹⁹² *Supra* n. 273.

⁹⁹³ Rodman, *supra* n. 21, P. 109.

⁹⁹⁴ El Salvador and Haiti adopted non-criminal mechanisms, while Uganda, Sierra Leone and Rwanda and Former Yugoslavia adopted a criminal approach.

⁹⁹⁵ *Supra* n. 273. 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 ‘[t]he 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 Hazan, *supra* n. 959, P. 35.

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.⁹⁹⁶ It is a process in which Goldstone took account of the *political* circumstances to bring justice to those perpetrators. This happened on the eve of the Dayton Peace Agreement, when Goldstone indicted only Karadzic and Mladic, and totally ignored Milosevic,⁹⁹⁷ who was still needed for the Dayton talks.⁹⁹⁸ Here, Goldstone took those concrete factors to bring justice later on when the situation would have become ready to complete the process of making the decision. The mere indictment of those perpetrators helped to restore peace, as the fight stopped in 1995.⁹⁹⁹ This was done by getting those defendants out of the political life, in particular from the government in Bosnia.¹⁰⁰⁰ Thus, the indictment decisions of Goldstone did involve *political* considerations, as it contributed to identify perpetrators, under the Agreement, whose text was opaque in terms of sorting out the war criminals. The interests of justice that Goldstone sought to secure, in fact, did serve the interests of peace and went side by side with the Dayton Peace Agreement. It was a remarkable policy that showed that indicting Karadzic and Mladic were part of the peace process rather than part of an obstacle to it.

It was only after the NATO intervention in Kosovo that Milosevic was rendered no longer capable of any violent backlash (interests of victims).¹⁰⁰¹ The latter environment, which obviously had *political* overtones, provided an ideal opportunity for ‘the hunter to hunt his

⁹⁹⁶ Bass, *supra* n. 273, Pp. 227-30.

⁹⁹⁷ M. Cherif Bassiouni, Combating Impunity for International Crimes, *University of Colorado Law Review*, Vol. 71 (2000), P. 419, arguing that ‘[w]orse yet, Milosevic was given de facto immunity in exchange for his signature on the Dayton Accord in 1994.’

⁹⁹⁸ *Supra* n. 273, P.237.

⁹⁹⁹ *Supra* n. 432, P. 47.

¹⁰⁰⁰ *Supra* n. 273, P. 246.

¹⁰⁰¹ 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.

prey'.¹⁰⁰² In these cases, the peace process was taken into account without fully replacing the prosecution's fate. It just delayed it. These critical cases demonstrate that the consideration of *political* circumstances were needed for a meaningful strategy and effective prosecutorial strategy, based on prosecutorial discretion. Further, considering these factors was apparently a part of the decision-making process that provided the Prosecutor with more meaningful choices without prejudice to the independence of the Prosecutor, as a body within a judicial institution.

The same argument can be applied to the Darfur situation, where prosecution might result in increasing the level of suffering (interests of victims), and those who had been indicted by the ICC and were still in power, were still committing war crimes.¹⁰⁰³ However, there is a significant difference between Darfur and Yugoslavia, in relation to the enforcement problem.¹⁰⁰⁴ 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.¹⁰⁰⁵ Further, *all* indictees of the Sudanese Government are still at large. Nonetheless, the first Prosecutor decided not to take any national political arrangements into his consideration, and indicted those most responsible for

¹⁰⁰² *Supra* n. 38, P. 178, stating that the political factors are also taken by Goldstone although the latter denied it, saying: 'the 'timing' of some important indictments seems to indicate otherwise.'

¹⁰⁰³ When the President of Sudan was indicted by the Prosecutor, who ignored calls by the Arab League, the AU, 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 services, see Allan, *supra* n. 876, Pp. 275-6.

¹⁰⁰⁴ In the ICTY situation, despite the fact that the Prosecutor 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. This, first, pushed the decision-makers to insist on the 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. See generally, *supra* n. 939. See also Goldston, *supra* n. 18, P. 395, stating that 'the prospect for arresting the suspect' is a proper factor to be weighed.' 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 Bass *supra* n. 273.

¹⁰⁰⁵ 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).

committing crimes under the jurisdiction of the ICC, including the President of Sudan; although an effective enforcement mechanism is not available.¹⁰⁰⁶ The SC's resolution referring the Darfur situation to the ICC did not provide any effective mechanisms for forcing the decision.¹⁰⁰⁷ In addition, the ICC depends on the political will of states in enforcing its decisions.¹⁰⁰⁸ 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.¹⁰⁰⁹

This does not mean at all that the Prosecutor should not have indicted the President; instead he could have exercised a more meaningful strategy, if he had considered these extra-legal factors, associated with further political repercussions/effects. It is true that the consideration of these accounts does not necessarily guarantee the capture of the alleged perpetrators. However, such a strategy, at least, gives a better chance for arresting the fugitives. For example, Moreno-Ocampo 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. Thus, the reference to political repercussions/effects 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 more meaningful prosecutorial strategy, based on the available

¹⁰⁰⁶ There are huge concerns about the public nature, benefit, seriousness, and time of the indictment of President 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* (27th May, 2009), available at <<http://www.guardian.co.uk/commentisfree/2009/may/27/hay-festival-icc-darfur-sudan>> (Last Access: 24th November, 2012). See also, Goldston, *supra* n. 18, P. 385. Regarding these political arrangements, see the next chapter of this thesis.

¹⁰⁰⁷ UNSC Resolution 1593 (2005).

¹⁰⁰⁸ Haydar Karman, The Paradox and the ICC, *Strategic Outlook* (November, 2012).

¹⁰⁰⁹ Hazan, *supra* n. 959, 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> (Last Access: 25th July, 2015).

options. This is how Rodman states the importance of the political repercussions/effects by saying ‘those episodes 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.’¹⁰¹⁰

As can be seen, during stable situations, the deference to the peace process, as an alternative to criminal prosecution, or even a tool for delaying the prosecutorial approach, seems irrelevant and out of the question. The peace process, as an alternative, does not replace the criminal justice procedures, nor is it considered for any particular strategy. It has simply been ignored. During unstable situations, the peace process was sometimes considered, but does not as such replace criminal prosecution, as an alternative, either. However, the effect of the peace process on the Yugoslavia situation was apparently significant, as it was considered by the Prosecutor, when the latter decided not to indict the perpetrator in question, who was needed for the advancement of the peace process. The policy of delay is one strategy, which was used for this operation. The peace process, then, does not *purely* seem to replace criminal prosecution, and, therefore, it might not purely come within the confines of ‘the interests of justice’, either. It only delays the criminal prosecution, at best. Does this mean, then, that the peace process cannot replace criminal prosecution at all? The following case study suggests that there are basic conditions that the prosecutor may need to consider, before replacing criminal prosecutorial procedures with the peace process.

5.5.1. The Ugandan Application

The Uganda situation was among the first to raise the issue of whether or not the peace process should be taken into account in the exercise of prosecutorial discretion, in particular

¹⁰¹⁰ Rodman, *supra* n. 21, P. 101.

under the Article 53 ‘interests of justice’.¹⁰¹¹ The following discussion will examine the past massive violation of international criminal law that took place over the last few decades in Uganda. Following the acceptance of the Ugandan Government’s referral in 2005,¹⁰¹² some people, including Betty Bigombe,¹⁰¹³ a former Uganda minister, some NGOs, and the Acholi community, criticised this referral, as they believed that it would disturb the peace talks.¹⁰¹⁴ The Court decided to indict five alleged perpetrators from *only* the rebels’ side (LRA), including Joseph Kony who was mainly responsible for serious crimes committed against the Acholi community.¹⁰¹⁵ Since that time, the Court has to deal with rigorous claims as to its blatant failure to bring these alleged perpetrators to the Court, letting Tim Allen describes the Court as ‘just one more example of end-of-millennium wishful thinking’.¹⁰¹⁶ Indeed, it took ten years for the Court to make its first arrest against one of the LRA’s indictees.¹⁰¹⁷ The Government of Uganda has led several procedures to end the conflict by entering into peace

¹⁰¹¹ The Situation of Uganda was referred to the Court in 2004 by the state of Uganda. See ICC, Press Release, ICC - Prosecutor of the International Criminal Court opens an investigation into Northern Uganda, ICC-OTP-20040729-65, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/prosecutor%20of%20the%20international%20criminal%20court%20opens%20an%20investigation%20into%20northern%20uganda.aspx>.

¹⁰¹² ICC, Press, Release, ICC - President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, ICC-20040129-44, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/2004/Pages/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord_s%20resistance%20army%20_lra_%20to%20the%20icc.aspx>.

¹⁰¹³ Will Ross, Attacks Mark End of Uganda Truce, *BBC* (23rd February, 2005), available at <<http://news.bbc.co.uk/1/hi/world/africa/4292363.stm>> (Last Access: 31st May, 2015), Betty Bigombe warranted that the potential of issuing an arrest warrant against the LRA would ‘call the whole peace process off.’

¹⁰¹⁴ See generally, Kathrine Southwick, Investigating War in Northern Uganda: Dilemmas for the International Criminal Court, *Yale Journal of International Affairs*, Vol. 1 (2005), 105- 119.

¹⁰¹⁵ See *Prosecutor v. Joseph Kony and Vincent Otti*, Case No. ICC-02/04-01/05, the rest of the alleged perpetrators are Vincent Otti, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen, available at <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/Pages/situation%20index.aspx>.

¹⁰¹⁶ *Supra* n. 46, P. 2.

¹⁰¹⁷ ICC, Press Release, Dominic Ongwen makes first appearance before the ICC, ICC-CPI-20150126-PR1085 (26th January, 2015), available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1085.aspx> (Last Access: 4th April, 2015).

negotiations with Kony.¹⁰¹⁸ It has provided a variety of alternatives to all perpetrators, ranging from blanket amnesty¹⁰¹⁹ to punishment procedures against only those who committed the most serious crimes, without clarifying what kinds of punishments are envisaged.¹⁰²⁰ Kony has refused several times to sign any peace talks until the ICC withdraws the arrest warrant issued against him, however.¹⁰²¹

These efforts have resulted in the cease-fire in Uganda, and the situation has become more stable and peaceful.¹⁰²² Currently, ‘the LRA is largely decimated and does not have the ability to wage major offensives anymore. It has few troops left and has hardly any access to the territory of Uganda.’¹⁰²³ However, the *few* attacks of the LRA still continue outside Uganda, as currently they have spread into three more countries, namely into the DRC, the CAR, and Southern Sudan.¹⁰²⁴ Further, the dilemma of justice and peace in the context of the Uganda situation is still unclear, as the Kony group is still fighting on the one hand whilst claiming to seek a peaceful resolution on the other.¹⁰²⁵ A UN report released in 2013 submitted that there

¹⁰¹⁸ Situation in Uganda, *The Hague Justice Portal*, available at <<http://www.haguejusticeportal.net/index.php?id=6175>> (Last Access: 2nd April, 2013).

¹⁰¹⁹ For more recent information about the amnesty given in Uganda, see Jeremy Sarkin, The Interrelationship and Interconnectedness of Transitional Justice and the Rule of Law in Uganda: Pursuing Justice, Truth, Guarantees of Non-Repetition, Reconciliation and Reparations for Past Crimes and Human Rights Violations, *Hague Journal on the Rule of Law*, Vol. 7, No. 1 (2015), 111- 139.

¹⁰²⁰ 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* (24th Feb, 2008), available at <http://www.nytimes.com/2008/02/24/world/africa/24uganda.html?_r=0> (Last Access: 26th March 2013).

¹⁰²¹ Mark Kersten, Between Skepticism and Reality: LRA Leader Joseph Kony in “Surrender Talks”, *Justice in Conflict* (21st November, 2013), available at <<http://justiceinconflict.org/2013/11/21/between-skepticism-and-reality-lra-leader-joseph-kony-in-surrender-talks/>>.

¹⁰²² Uganda Country Profile, *BBC* (21st May, 2015), available at <<http://www.bbc.co.uk/news/world-africa-14107906>> (Last Access: 30th August, 2015).

¹⁰²³ *Supra* n. 1019, P. 122.

¹⁰²⁴ See Martin Plaut, On the Trial of Joseph Kony and the Lord's Resistance Army, *Martinplaut* (20th February, 2015), available at <<https://martinplaut.wordpress.com/2015/02/20/on-the-trail-of-joseph-kony-and-the-lords-resistance-army/>> (Last Access: 4th April, 2015).

¹⁰²⁵ 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-IHclHmwkfQylbPQ/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.

was still a significant number of attacks launched by the LRA.¹⁰²⁶ Indeed, the violent activities of the LRA are increasing in the region, as they are fighting now in the aforementioned countries.¹⁰²⁷ It was widely believed that the ICC indictments are a major obstacle towards a comprehensive peace in not just Uganda, but also in the whole region.¹⁰²⁸ The question how the Prosecutor should respond to this situation is highly controversial. Should she respect the national political efforts that seek the demands of peace ahead of justice and, therefore, stop the prosecution, and defer to the peace process?¹⁰²⁹

As was discussed elsewhere, if the prosecutor decides to stop the proceedings on the basis of ‘the interests of justice’ and defers to the current peace process in lieu of the ICC’s criminal proceedings, she would be criticised for being political, because of her political calculation.¹⁰³⁰ Therefore, a potential of taking political considerations into account ahead of normative ones would be criticised (considerations such as putting an end to the conflict, retaining stability, and providing peace). This would be an *apology* critique.¹⁰³¹ If the prosecutor insists on the ICC’s proceedings, she would be again criticised of being political, as she is seeking to prove a point that the Court is able to do justice. She is omitting the fact that the ICC has done nothing for the victims, and appears to do nothing in the near future. This is a *utopian* critique. Joseph Hoover summarises the dyadic problem in the Uganda situation,

¹⁰²⁶ See UN: Security Council, Report of the Secretary-General on the activities of the United Nations Regional Office for Central Africa and on the Lord’s Resistance Army-affected areas, S/2013/671 (14th November, 2013), Pp. 35- 42.

¹⁰²⁷ See *supra* n. 1024.

¹⁰²⁸ See Nick Grono and Adam O’Brien, Justice in Conflict? The ICC and Peace Processes, in Nicholas Waddell and Phil Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa*, *The International Journal of Transitional Justice*, Vol. 2, Issue 3 (2008), P. 19, (as the peace talks progress, it is clear that the ICC remains a very real obstacle to achieving an end to the conflict). See also Michael Drexler, Whither Justice? Uganda and Five Years of the International Criminal Court, *Interdisciplinary Journal of Human Rights Law*, Vol. 5 (2011), P. 98.

¹⁰²⁹ Keller, *supra* n. 927, Keller is arguing that both justice and peace could be achieved together.

¹⁰³⁰ *Supra* n. 30, P. 14. HRW argued that any decision whether to initiate an investigation, based on political calculation is not acceptable and may undermine the legitimacy of the Court.

¹⁰³¹ *Supra* n. 30, P. 14. HRW refused those considerations to be taken by the prosecutor when evaluating the meaning of ‘the interests of justice’, as it would appear political and urged the prosecutor ‘to steer clear of such politicization of his role.’

when he says that the ICC's involvement in Uganda 'has been shown to be too deferential to the interests of states and too inattentive to the victims of violence'.¹⁰³² It is a persistent dyad of arguments that the prosecutor faces. The question is then, is there any chance to escape this dyad?

If we deeply examine the problem of this dyad, we would notice that the non-achievement of the higher normative demand of the situation is a reason on which the both sides of the arguments raise their criticisms. The demand is meant here to be the achievement of justice. Therefore, if justice was delivered in this situation, we would ease, if not escape, these criticisms. Based on her discretion, the prosecutor is then required either to achieve justice through her institution, or seek to do it through other alternatives when she cannot do it on her own.

Obviously, the Court is not isolated from the world, in which it operates. The ICC has specific mandates and goals it seeks to deliver.¹⁰³³ In so doing, the Court needs to maintain its legitimacy and consider how best to achieve its mandates without any prejudice to its legitimacy. The aforementioned criticisms are linked with internal and external standards respectively. Avoiding these sorts of criticisms would promote the legitimacy of the Court. The prosecutor seems then to consider these two standards when exercising her power. The internal ones are manifested in the legal tools of the Court (*utopian*), whilst the external are extra-legal ones (*apologist*), but also are derived initially from the Statute of the Court.¹⁰³⁴ It is the responsibility of the prosecutor, via the exercise of the prosecutorial discretion, to decide how best to reintegrate these two concerns. Higgins states that the decision-making process cannot

¹⁰³² Joseph Hoover, Moral Practices: Assigning Responsibility in the International Criminal Court, *Law and Contemporary Problems*, Vol. 76 (2013,), P. 285.

¹⁰³³ See, the Preamble of the ICC Statute.

¹⁰³⁴ The utopian critique means that the given position is too close to principles, common interests, justice, or similar ideas, and that it is highly divorced from the states' interests, wills, and policies. The apology critique is that the position is too connected to the interests and policies of states, and that it is too far from the common interests and principles. See Chapter Three of this thesis and *supra* n. 72, Pp. 16, 66, 67, and 70.

be separated from extra-legal factors that are essential when making a choice.¹⁰³⁵ The social, humanitarian, moral, and political factors are interlaced with the legal rules that the decision-making process involves, as ‘law cannot alone achieve justice’.¹⁰³⁶ She argues that such a process makes the supposed decision more preferable (effective).

The following section will briefly explain these issues in the context of Ugandan peace talks, and show that the peace process may come within the scope of ‘the interests of justice’, subject to certain requirements. Here, the peace process is suggested to be accompanied by another sort of alternative justice mechanism, in order to come within the scope of ‘the interests of justice’, *based on the utopian and apologist justifications*.

The internal standards are, generally, the legal tools of the Court, such as the Statute; and the policy papers. Both Prosecutors of the ICC have shown a rigid commitment to the legal tools of the Court, as a fundamental orientation of their tasks.¹⁰³⁷ ‘We have to respect our legal limits’,¹⁰³⁸ Bensouda confirmed. Following pre-set rules plays an important role in the enhancement of the legitimacy of the Court, as they help the Court to be more predictable, certain, and accurate in terms of the exercise of a certain discretionary strategy of prosecution. However, are the rigid commitment to these standards workable enough to address the Uganda situation, in the sense that the prosecutor is able to achieve justice, and, therefore, apply the best mechanism to the given situation? Does it help to avoid or at least reduce the current criticisms the OTP faces?¹⁰³⁹

Both the Statute and the policy paper do not provide concrete standard as to what, if anything, might justify the deferral of the situation to the domestic peace efforts, which might

¹⁰³⁵ *Supra* n. 856, P. 9.

¹⁰³⁶ *Ibid*, P. 9.

¹⁰³⁷ See ‘The General Orientation of the OTP and the Prosecutor on ‘the Interests of Justice’ in this chapter to follow the full statements of the Prosecutors and the associated arguments.

¹⁰³⁸ *Supra* n. 954, P. 5.

¹⁰³⁹ See the above arguments about being apologist or utopian.

grant amnesty to the perpetrators in the Uganda situation. Although ‘the alleged role of the perpetrators’ can be a relevant criterion for deferring the situation to an alternative, as Kony is still playing a significant role in the direction of the conflict in Uganda, nonetheless, it seems that the prosecutor will not use this criterion to stop criminal procedures. The Prosecutor has made it clear on several occasions that the national alternatives could be relevant except for the four individuals currently accused before the Court, who should face criminal justice.¹⁰⁴⁰ Further to this, the Prosecutor also recognised in the policy paper that ‘the best guidance on the Office's approach to these issues can be gathered from the way it has dealt with real situations. The Office will not speculate on abstract scenarios.’¹⁰⁴¹ Accordingly, in the current formulation of the Statute,¹⁰⁴² the policy paper,¹⁰⁴³ the views of some members of staff of the OTP,¹⁰⁴⁴ and the Prosecutor¹⁰⁴⁵, there would be no scope for factoring in the peace process. The inability of the OTP to arrest the perpetrators, bring justice to them as well as the victims, and the fact that the OTP’s proceedings are highly likely to disturb the ongoing negotiations might raise a question regarding the legal legitimacy of the Court.

In the context of the Uganda situation, it seems difficult to apply these standards (the Statute and policy papers), as they do not make explicit reference to national political efforts in placing peace in the country that the OTP should respect. Even from a theoretical perspective, it seems quite difficult to apply the same standards to all situations and cases, which often have different circumstances that render any such standards inapplicable to them. For example, both the Uganda¹⁰⁴⁶ and Darfur¹⁰⁴⁷ situations have raised the issue of the transfer

¹⁰⁴⁰ Moreno-Ocampo confirms that the national efforts can complement his criminal efforts together, see Osike, *supra* n. 952.

¹⁰⁴¹ See Policy paper on the Interests of Justice 2007, P. 9.

¹⁰⁴² See Article 53 of the ICC Statute.

¹⁰⁴³ Policy Paper on the Interests of Justice 2007.

¹⁰⁴⁴ Several interviews I conducted at The Hague between 12th and 14th March, 2013.

¹⁰⁴⁵ My question to the Prosecutor during her lecture at LSE, London.

¹⁰⁴⁶ Drexler, *supra* n. 1028.

¹⁰⁴⁷ Dapo Akande, The African Union’s Response to the ICC’s Decisions on Bashir’s Immunity: Will the ICJ Get another Immunity Case? *Blog of the European Journal of International Law* (8th February, 2012), available at

of these situations to other mechanisms, and the necessity for withdrawal of the arrest warrants. However, these situations are totally different from each other in terms of the balance of power between the fighting groups, the available alternative justice mechanisms and the political atmosphere. The Prosecutor does not seem able to apply the same legal standards to two different situations and obtain similar outcomes. As Greenawalt argues, dealing with countries experiencing transitional justice processes should be ‘contingent upon case-by-case assessments.’¹⁰⁴⁸ Further to this, the OTP on several occasions, including my interviews with members of staff of the OTP,¹⁰⁴⁹ have been more inclined to consider peace negotiations as an irrelevant strategy to the Office.¹⁰⁵⁰

Based on the formulation of Article 53, the policy paper on ‘the interests of justice’,¹⁰⁵¹ and the nature of the peaceful resolution in each situation, the prosecutor might not be able to make a wise decision that is consistent with the given example. Additionally, the consistent denial policy that the Prosecutor keeps following also may render her unable to address the situation in question. The insistence of the OTP to achieve the Court’s aim through rigid rules, and the total denial of political considerations might undermine the legal and legitimacy authority of the Court.¹⁰⁵² The Prosecutor needs to be aware that she does make political decisions. The political dimensions are strongly linked to her decisions.¹⁰⁵³ What is required at this stage is that the Prosecutor is advised to utilise these factors to achieve the Court’s ends. The ICC is like a fish which swims within a political sea. The pure normative way (legal standards) to deal with a certain situation without considering the prevailing environment often

<<http://www.ejiltalk.org/the-african-unions-response-to-the-iccs-decisions-on-bashirs-immunity-will-the-icj-get-another-immunity-case/>>.

¹⁰⁴⁸ Alexander K. A. Greenawalt, Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court, *Virginia Journal of International Law*, Vol. 50, No. 1 (2010), P. 137.

¹⁰⁴⁹ Several interviews I conducted at The Hague between 12th and 14th March, 2013.

¹⁰⁵⁰ *Ibid.*

¹⁰⁵¹ Policy Paper on the Interests of justice 2007.

¹⁰⁵² See generally *supra* n. 856.

¹⁰⁵³ See generally, M. Cherif Bassiouni, *The Statute of the International Criminal Court, A Documentary History* (Ardsey, N.Y.: Transnational Publishers, 1998), P. 408.

does not help to address the problem or promote the legitimacy of the Court. Therefore, it seems that the prosecutor is advised to acknowledge the importance of several external factors, which are associated with political effects to make the Court more effective. The enumeration of these factors cannot be confined to one single list, as they are too connected to the specific circumstances of each situation. Therefore, the next discussion will try to identify those which are more connected to the Uganda situation and similar. These factors are in nature *apologist* and represent ‘the political, instrumental or “process” aspect of the law.’¹⁰⁵⁴

One of these external factors is the demands of people, in particular the needs of victims. It may require the prosecutor to stop the prosecutorial approach of the Court and defer to what best suits the demands of people. It is not only the voice of victims, but those of all segments of the whole affected society should be heard.¹⁰⁵⁵ However, the demands of victims should be given priority, as, naturally, this segment is the most affected side of the given society, because the achievement of the demands of victims is the achievement of justice.¹⁰⁵⁶

This consideration is also inherently driven from the Statute, which seeks to bring justice to the victims.¹⁰⁵⁷ Our justice is determined in accordance to what victims ask for. The ICC Statute,¹⁰⁵⁸ the RPE,¹⁰⁵⁹ and the policy paper on victims’ participation in 2010 have all emphasised the importance of the role of victims before and during the criminal proceedings.¹⁰⁶⁰ The UN document about the rights of victims emphasised the rights of victims

¹⁰⁵⁴ *Supra* n. 72, P. 19.

¹⁰⁵⁵ This should include victims, representatives of all communities, religious and tribal leaders.

¹⁰⁵⁶ This is the main aim that also all transitional justice mechanisms should involve when addressing certain atrocities of a conflict. A report, submitted by the United Nations, asserted the latter idea by providing ‘that transitional justice mechanisms reflect the needs of conflict-affected communities, including victims.’, see, 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. 18.

¹⁰⁵⁷ Article 53 (1) (c) and (2) (c) of the ICC Statute provides that ‘the interests of victims’ to be considered when evaluating ‘the interests of justice’.

¹⁰⁵⁸ See, the ICC Statute, Articles 15, 19, 53, and 68.

¹⁰⁵⁹ See, the ICC Rules of Procedure and Evidence, rules: 89- 93.

¹⁰⁶⁰ See, Policy Paper on Victims’ Participation 2010, *supra* n. 977.

not only to an effective judicial remedy, but also to have access to other domestic criminal and administrative mechanisms, which meet their needs.¹⁰⁶¹ The latter emphasis refers clearly to the idea that victims' rights and needs may be met via myriad mechanisms. If the international justice response (ICC prosecution) is a real obstacle to achieve justice in some situations, then, the deferral to another alternative can be justified on that basis.¹⁰⁶² Criminal justice is not the sole mechanism to meet the demands of victims. What, for example, if the victims seek and favour the demands of peace ahead of the demands of justice? Further, if the international community is unable to stop the violence in question, and the ICC's approach is not effective, either to stop the violence or to apprehend the alleged perpetrators, shall we keep insisting on the ICC justice at the cost of seeing more victims? Or, should we listen to the victims who are more interested in a peace settlement? These are obviously critical questions that the OTP is facing in the context of several situations under its jurisdiction. These problems can be attributed to the lack of effective enforcement mechanisms on the international level and the dependence of the Court on the political will of states, which are usually driven by their own interests.¹⁰⁶³

Indeed, the OTP has organised many missions to discern the demands of victims in the countries that are under its investigation. It has conducted more than 25 missions in Uganda for the purpose of listening to the demands of victims and other representatives of local

¹⁰⁶¹ See Article 14 of Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, C.H.R. res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (19th April 2005).

¹⁰⁶² See 'the scope of the interests of justice' in this chapter. However, there is a difference between the demands of victims and 'the interests of victims', as laid down in Article 53. Whilst the first is evaluated according to the opinions of the victims themselves, the latter is evaluated by the prosecutor. See also Carsten Stahn, *Justice civilisatrice? The ICC, post-colonial theory, and faces of 'the local'*, in Christian de Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge, Cambridge University Press, 2015), P. 64, he sheds light on the importance of 'the local' and in particular the interests and voices of victims in the articulation of a given conflict. He says that the OTP, in its 2007 policy paper, failed to acknowledge the interests of victims as 'a bar to the ICC proceedings'.

¹⁰⁶³ See generally, *supra* n. 939.

communities.¹⁰⁶⁴ However, it is not known to what extent the Prosecutor effectively considered these voices within her decision-making process, as we cannot see any of these demands have been met, as we will see now. Then, what are the demands of Ugandans? How could justice have been achieved according to Ugandans?

In fact, over the last eight years, several surveys conducted by different groups have provided no definitive answer, as to what the victims in Uganda prefer. However, there is a tendency to think that a need for peace is placed ahead of justice. For example, two surveys conducted in 2005 and 2007 showed that the responses of the affected societies are far from uniform. Whilst the earlier one demonstrated that most of the respondents supported criminal prosecution rather than peace talks, the second survey showed the reverse.¹⁰⁶⁵ The majority of the respondents of the second survey preferred ‘soft options’, such as forgiveness, reconciliation, and reintegration.¹⁰⁶⁶ In particular, the majority of the respondents preferred peace requirements to any other priorities. Only three percent favoured justice, as the main priority. Moreover, the figures showed that the majority of the respondents preferred peace with amnesty, as long as it achieved peace. The significant feature of this change comes from the fact that those respondents ‘changed their minds upon learning that the Court could not conduct its own arrests.’¹⁰⁶⁷ It is within this background Jeremy Sarkin ‘argues that while prosecutions are not favoured in Uganda, in any case, they will be difficult to carry out because of the extensive amnesties already granted, and because of the political resistance and lack of political will to carry out prosecutions, especially against those employed by the state or in the

¹⁰⁶⁴ Policy Paper on the Interests of Justice 2007, P. 6.

¹⁰⁶⁵ 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>>.

¹⁰⁶⁶ Otim and Wierda, *supra* n. 1025, P. 6.

¹⁰⁶⁷ *Ibid*, P. 5.

Ugandan political arena.’¹⁰⁶⁸ These figures demonstrate that the ICC is not still well placed to be an ideal response to any conflict. Hence, other alternative justice mechanisms are still needed, given that the ICC has no effective enforcement mechanisms, as it totally depends on the political will of states.¹⁰⁶⁹ Further, it means also that the legitimacy of the Court might be undermined, if the Court is only interested in building its strategy and existence at the cost of victims’ suffering.

Thus, what is the preferred alternative the victims seek?¹⁰⁷⁰ The 2007 survey showed that the majority of the respondents preferred traditional justice mechanisms. Later in the same year, both sides to the conflict signed an Agreement on Accountability and Reconciliation, as consequence to that effect.¹⁰⁷¹ Although, the formulation of the provisions of the Agreement was loose, nonetheless, it referred to a truth telling body, a reparation system, and a traditional justice ceremony, called *mato oput*.¹⁰⁷² It was agreed that these alternatives should be applied to all perpetrators, including those responsible for committing the most heinous crimes. As was discussed elsewhere, no alternative can replace the ICC approach without putting this alternative under a careful examination. If the prosecutor is to take these considerations into account, she needs to examine the basic conformity of the given alternatives with ‘the interests of justice’, as understood by the theories of justice.¹⁰⁷³ As was explained, it seems that those alternatives can, to a large extent, achieve the aims of international criminal justice (retributive,

¹⁰⁶⁸ *Supra* n. 1019, P. 113.

¹⁰⁶⁹ Stephen Krug, ICC Effectiveness Depends on Member State Cooperation, *Jurist* (3rd January, 2012), available at <<http://jurist.org/hotline/2012/01/eric-leonard-icc-effectiveness.php>> (Last Access: 1st June, 2015).

¹⁰⁷⁰ For more information about this issue, see Janet McKnight, Accountability in northern Uganda: Understanding the Conflict, the Parties and the False Dichotomies in International Criminal Law and Transitional Justice, *Journal of African Law*, Vol. 59, No. 2 (2015), Pp.204-5.

¹⁰⁷¹ See, Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement (Juba, Sudan), 2007, Pp. 4, 7-8, available at <www.fides.org/eng/documents/uganda_agreement_290607.doc> (Last Access: 19th November, 2013).

¹⁰⁷² ‘Mato Oput refers to the traditional ritual performed by the Acholi after full accountability and reconciliation has been attained between parties formerly in conflict, after full accountability’, see *ibid*, P.2.

¹⁰⁷³ These conditions are the conformity of the alternatives to the justice’s theories, necessity, and legitimacy of the alternatives.

deterrent, restorative, and expressive justice). However, there might be a doubt about as how these alternatives; in particular the peace process achieves retributive justice. Elizabeth Ludwin King suggests that retributive justice can be delivered by means other than through criminal punishments.¹⁰⁷⁴ She states that retributive justice can take several forms, such as lustration.¹⁰⁷⁵ Also, naming and shaming the offenders is another form of this sort of justice.¹⁰⁷⁶ Community service, as a sort of punishment can be a form of retributive justice.¹⁰⁷⁷ Therefore, if the conclusion of the peace agreement were to involve one of these forms, one could say that the conformity of alternatives to the international criminal justice theories would be met.

Another external factor is necessity.¹⁰⁷⁸ This appears to be the most critical verification that the prosecutor needs to evaluate.¹⁰⁷⁹ The prosecutor should make a deferral decision when there is an urgent need for the deferral. For example, if there is a need in a certain situation for a non-prosecutorial alternative other than the ICC approach to be applied to the given situation, then the prosecutor may defer to that method. The justification of this argument lies in the fact that the ICC is not always an ideal solution to all conflicts, as an international criminal response.¹⁰⁸⁰ The achievement of those basic aims can be reached through other alternatives that can also or better serve ‘the interests of justice’. In addition, the call for non-prosecutorial justice mechanisms is often invoked when the criminal prosecution constitutes a major obstacle to peace and, therefore, to putting an end to conflicts. In particular, when the proposed alternative is able to suffice justice, as understood by the above justice theories. This can be

¹⁰⁷⁴ Ludwin *supra* n. 880.

¹⁰⁷⁵ *Ibid*, P. 32.

¹⁰⁷⁶ *Ibid*, P. 32.

¹⁰⁷⁷ *Ibid*, P. 32.

¹⁰⁷⁸ *Supra* n. 867, P. 497. Robinson argued that necessity could be a measure on which to give a way for other alternatives to take a role.

¹⁰⁷⁹ *Ibid*.

¹⁰⁸⁰ Otim and Wierda, *supra* n. 1025, 1- 8, the author is emphasizing the importance of the other mechanisms to address atrocities, using Uganda as a case study.

verified, for example, if the Court and other international institutions, such as the SC are unable or unwilling to apprehend the supposed perpetrators who are still committing further crimes.¹⁰⁸¹

In the Uganda situation, all circumstances indicate the existence of this particular condition. Kony, on several occasions, has made it clear that he will not sign any peace deal, until the ICC withdraws the arrest warrant against him and his friends. In her important book, Sarah M. H. Nouwen also shows how the complementarity concerns has not appeared an issue before the ICC was viewed as hampering peace in Uganda.¹⁰⁸² Based on the political dynamics of the situation in Uganda, in particular the political arrangements of the peace process, it is not only ‘the interests of justice’ becomes a concern to this situation, it is even the complementarity principle that has been also invoked, as stated by Sarah. In other words, the political arrangements often have a particular effect on the way how the legal principles can be applied. Following the political scene in Uganda, the Ugandan government showed its readiness to call the Court to withdraw them upon signing the peace agreement.¹⁰⁸³ As the ICC is not able to arrest those fugitives, the LRA is still committing crimes, and the end of this tragedy is contingent on the withdrawal of the arrest warrants, it appears that the necessity condition is highly required to be taken into account. As Janet McKnight wonders, ‘[t]he increase in atrocities seemed to confirm that putting justice first would only lead to the impossibility of peace, as Kony then felt he had to fight not only Museveni's government, but

¹⁰⁸¹ In the Uganda situation, Kony's group has shown a consistent and continuous threat to the ongoing peace talks, and a continuous capability to commit further abuses of human rights, as long as the Court sustains its warrants. The Ugandan authorities, accordingly, have asked the OTP to withdraw warrants, as they believe that there is an urgent need to move on to its alternatives. For more information about the LRA, see *supra* n. 46.

¹⁰⁸² Nouwen, *supra* n. 132

¹⁰⁸³ Uganda to Ask ICC to Retract War Crimes Indictments for LRA Rebels, *Jurist* (31st August, 2006), available at <<http://jurist.org/paperchase/2006/08/uganda-to-ask-icc-to-retract-war.php>> (Last Access: 2nd September, 2015).

also the entire international community.’¹⁰⁸⁴ Therefore, if the above argument is valid, the prosecutor can defer to the given alternatives.

The third factor, as Rodman and Greenawalt have identified, is the role of the civil society groups.¹⁰⁸⁵ This is called a local support. In the context of the Uganda situation, those units have favoured the amnesty approach in exchange for ending the conflict and having peace talks. This was the response of several civil societies within the Acholi community and also of former Ugandan minister Betty Bigombe to several missions sent by Moreno-Ocampo to Uganda.¹⁰⁸⁶ The International Crisis Group has also joined this voice and asked for a better strategy from the OTP.¹⁰⁸⁷ It says that if the withdrawal of the arrest warrants were to lead to peaceful settlement, then the OTP should forego them as a strategy. ‘The international community should continue to provide strong support for prosecution and only consider asking the court to suspend its activity when and if the LRA leaders begin to implement a fair settlement.’¹⁰⁸⁸

In response to these views, the OTP depended on several NGOs and international actors to maintain its current attitude to the Uganda situation. It maintained that the arrest warrant had had a positive effect in forcing the LRA leaders to come to the negotiation table. The current warrants have forced them to sit at the negotiation table, and also left them with no safe place to stay, as all neighbouring states have joined the AU’s mission to arrest Kony and his friends.¹⁰⁸⁹ Yet, whilst such pressure may lead the rebels into peace talks, by the same token,

¹⁰⁸⁴ *Supra* n. 1070, P. 207. See also *supra* n. 1018.

¹⁰⁸⁵ Rodman, *supra* n. 21.

¹⁰⁸⁶ For more information about this, see Rodman, *supra* n. 21, P.104.

¹⁰⁸⁷ See Northern Uganda: Seizing the Opportunity for Peace, African Report No. 124, *International Crisis Group* (26th April 2007), at <<https://www.ciaonet.org/attachments/3975/uploads>> (Last Access: 14th September, 2015).

¹⁰⁸⁸ *Ibid*, P. 15.

¹⁰⁸⁹ Rodney Muhumuza, Joseph Kony Hunt: African Union will Send 5,000 Soldiers to Find Ugandan Rebel Leader, *Huff Post: World* (March, 2012), available at <http://www.huffingtonpost.com/2012/03/23/joseph-kony-hunt_n_1375284.html> (Last Access: 2nd April, 2013).

it is quite unclear how the maintenance of the warrants will eventually lead to the surrender of these indictees. 'To the extent the warrants have incentivised the LRA to negotiate, that must be because the LRA expects the negotiations will lead precisely to that sort of alternative to international prosecution.'¹⁰⁹⁰ This means that the main justification that the OTP is using to retain its position does not seem strong.

The fourth factor is stability. This is an essential factor that the prosecutor needs to examine. It suggests that the continuous relevance of the ICC, as a solution to a country that has experienced mass violation of human rights supposes the stability of the situation in that country¹⁰⁹¹. If the situation is not stable, in the sense that the ICC looks like a real obstacle to maintaining stability, then this is a strong indication towards favouring a peace concern. Therefore, the prosecutor may be required to step away to give a chance for other mechanisms, which have the ability to retain that stability and achieve justice. In Uganda, the situation is not stable, as Kony has made clear that he will not sign any cease-fire agreement until the Prosecutor withdraws her warrants. In such a circumstance, such a political repercussion indicates that the peace process needs to be taken into account, when deciding which mechanism can best serve justice and retains stability. This factor, alongside the above pragmatic factors, supposes that a peace process accompanied by a local justice mechanism may be a relevant basis on which the prosecutor can apply the Article 53 'interests of justice'.

In short, this chapter showed that the rigid application of the rules often does not help the prosecutor achieve the ends of the Statute of the Court. What makes this problem worse is the denial rhetoric strategy the prosecutor declares now and then as if she were a 'captive of some objective legal will.' It is only the law that makes her direct the Court to a certain end. The surrounding circumstances of a situation are part of the decision-making process.

¹⁰⁹⁰ *Supra* n. 1048, Pp. 146-7.

¹⁰⁹¹ See generally, Ludwin *supra* n. 880.

Otherwise, the decision that keeps distance between itself and those circumstances may fail to achieve the aim for which it is issued. This is a process, in which consideration of the internal and external standards together can help give the prosecutor more understanding about a certain situation or case when considering alternative justice mechanisms, associated with peace negotiations. Article 53 allows the prosecutor to play more effective roles that can best enhance the legitimacy and the aims of the Court. The other values that are not covered by the legal rules can be promoted by the new role that is given to an international prosecutor. The success of the ICC in Uganda is not contingent on the regular argument of the Court that justice and peace can be achieved through its criminal justice avenue. A broader consideration of all the internal standards and external factors should be weighed together in order to achieve peace and justice. Also, the chapter argues that peace talks cannot come within the scope of 'the interests of justice' as such. The latter cannot be served without activating some form of justice mechanisms. It was argued that the peace process can only be a reason for ceasing the ICC's approach, when it is accompanied by another form of justice mechanism, regardless of the type of this alternative.

CHAPTER SIX: THE DARFUR SITUATION (CASE STUDY)

6.1. Darfur Conflict

The indictment of the President is the central debate within the Darfur situation. It is also linked to the dilemma of justice versus peace. It also raises the same dyadic criticisms the Prosecutor faces. The classical tension between justice and peace has divided the current arguments about the indictment's decision into two main views. Adherents of the decision relied on the classical tone that granting impunity for hideous crimes would encourage perpetrators of the given situation and other situations to commit further atrocities.¹⁰⁹² Therefore, it is only the criminal justice approach that must be undertaken regardless of other extra-legal considerations, such as peace and stability-related issues. This argument seems, however, too *utopian*. However, the opponents of this view believed that the criminal prosecution taken against the sitting head of state is likely to miss all chances of fostering peace talks to end the conflict.¹⁰⁹³ The Prosecutor is focusing on a too high profile, who cannot be arrested. As Davenport criticises, '[i]n Sudan, the prosecutor indicted President Omar al-Bashir, but he has been sufficiently protected by his allies and friends that the Court can't even reach him; whereas some lesser figures could have been targeted, captured and prosecuted.'¹⁰⁹⁴ He argues that the Prosecutor should concentrate on manageable cases and avoid 'highly visible and politicized cases'.¹⁰⁹⁵ However, this argument seems too *apologist*. Moreno-Ocampo

¹⁰⁹² Selling Justice Short: Why Accountability Matters for Peace, *HRW* (July, 2009), at <<https://www.hrw.org/report/2009/07/07/selling-justice-short/why-accountability-matters-peace>> (Last Access: 12th July, 2013), providing that the criminal justice approach for handling atrocities and that such an approach would uphold peace at the same time. Goran Sluiter, Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case, *Journal of International Criminal Justice*, Vol. 8 (2010), P. 365-382. Also, see Christopher Gosnell, The Request for an Arrest Warrant in Al- Bashir: Idealistic Posturing or Calculated Plan? *Journal of International Criminal Justice*, Vol. 6 (2008), P. 841- 851, Mary T. Reynolds, Legitimizing the ICC: Supporting the Court's Prosecution of those Responsible in Darfur, *Boston College Third World Law Journal*, Vol. 30 (2010), P. 197- 206.

¹⁰⁹³ The International Criminal Court: Sudan's Leader is Accused, but others can Expect to Follow, *The Economist* (July, 2008), available at <<http://www.economist.com/node/11751353>> (Last Access: 31st July, 2013), also the AU in some of its declaration, asked the SC to defer President Al-Bashir's case.

¹⁰⁹⁴ *Supra* n. 112.

¹⁰⁹⁵ *Ibid.*

already decided to take the first choice by, first, endorsing the Security Council's referral,¹⁰⁹⁶ and second by indicting several people from all sides to the conflict, including the President.¹⁰⁹⁷ According to the above arguments, the Prosecutor seems too utopian.

This Chapter will discuss the potential of the local mechanism – considering political impacts/factors – to cease cases before the Court on the basis of a broader understanding of the term 'the interests of justice'. In particular, the discussion will focus on the analysis of the case of the President of Sudan. As was already emphasised, the concept of justice does not exclusively a criminal accountability delivered by trial. This could encompass different measures and aims. As Michael A. Newton states, '[c]ommunity-based dispute mechanisms can thus have a central role alongside formalised trials, to the extent that localised processes embody a culturally meaningful blend of restorative and retributive elements.'¹⁰⁹⁸ He further emphasises that the term 'justice' becomes more meaningful when it responds 'to the demand of the local population.'¹⁰⁹⁹ Therefore, the chapter will conclude that the term justice should be read in a broad way so it includes any sort of local mechanism that is supported by the locals.

The Darfur conflict started in 2003.¹¹⁰⁰ The conflict first originates from late 2002 when the two main rebels groups: the Sudanese Liberation Army/Movement (SLA/M) and the Justice and Equality Movement (JEM) attacked several government bases, such as police stations.¹¹⁰¹ They justified their attacks by accusing the Government of discriminatorily neglecting them,

¹⁰⁹⁶ See the referral's decision: UNSC Resolution 1593 (2005).

¹⁰⁹⁷ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09.

¹⁰⁹⁸ Michael A. Newton, A Synthesis of Community-Based Justice and Complementarity, in Christian de Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge, Cambridge University Press, 2015), P. 123.

¹⁰⁹⁹ *Ibid*, P. 128.

¹¹⁰⁰ See the United Nations and Darfur, at <http://www.un.org/News/dh/infocus/sudan/fact_sheet.pdf> (Last Access: 6th June, 2016).

¹¹⁰¹ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General: Pursuant to Security Council Resolution 1564 of 18 September 2004, 25th January, 2005, Pp. 61- 72.

in terms of economic marginalization and a power-sharing deal.¹¹⁰² When these groups started to organise and consolidate their power, the Government in Sudan declared the existence of the status of uprising in the region.¹¹⁰³ They decided, first, to arm the Arab Militia, known as Janjaweed to fight those groups, and, second, to launch an armed attack against them.¹¹⁰⁴ Six years later, after an intense fight between these groups, massive destruction and violence resulted from the Government and Janjaweed's attacks.

By 2013, more than 300,000 people were killed, more than 3 million people were internally displaced, and more than 200,000 others sought refuge in the neighbouring states, in Chad in particular.¹¹⁰⁵ The conflict resulted in further humanitarian crisis, leaving more than 3 million people with no basic necessities of life as well as security.¹¹⁰⁶ The situation has been more mutated and developed for worse status.¹¹⁰⁷ As a consequence, the level of violence has increased and become unpredictable and spread over other parts of the country and the region. This led to new conflicts in other areas of Sudan, which are Kordofan and Blue Nile.¹¹⁰⁸ The same rebel groups in Darfur are also engaged with the rebels groups in these two areas in

¹¹⁰² See more details about the background of the conflict in, Chandara Lekha Sriram, Olga Martin-Ortega, and Johanna Herman, *War, Conflict, and Human Rights: Theory and Practice* (2nd ed.) (New York, Routledge, 2014), Pp. 142-5.

¹¹⁰³ Darfur: Background to The Conflict, *Darfur Australia Network*, available at <<http://www.darfuraustralia.org/darfur/background>> (Last Access: 1st June, 2015).

¹¹⁰⁴ *Ibid.*

¹¹⁰⁵ Glenys Kinnock and Michael E Capuano, A Decade on, Sudan Threatens to Repeat the Tragedy of Darfur, *The Guardian* (10th March 2013), available at <<http://www.theguardian.com/commentisfree/2013/mar/10/decade-on-sudan-tragedy-darfur>> (Last Access: 30th July, 2013). See also Darfur Situation Marked by Insecurity, Limited Progress on Peace Front, Security Council told, *UN News Centre* (23rd October, 2013), available at <http://www.un.org/apps/news/story.asp/h%3Cspan%20class='pullme'%3EIn%20short,%20when%20you%20empower%20a%20woman,%20you%20change%20the%20world%3C/span%3Ehttp://www.unfpa.org/story.asp?NewsID=46315&Cr=darfur&Cr1=#.UvICdWJ_vZE> (Last Access: 28th January, 2014).

¹¹⁰⁶ Kinnock and Capuano, *supra* n. 1105.

¹¹⁰⁷ See Eric Reeves, Humanitarian Conditions in Darfur: A Climate of Violence and Extreme Insecurity, *Sudan Tribune: Plural News and Views on Sudan* (4th August, 2013), available at <<http://www.sudantribune.com/spip.php?article47542>> (Last Access: 6th August, 2013).

¹¹⁰⁸ Kinnock and Capuano, *supra* n. 1105.

fighting the Government.¹¹⁰⁹ Since the beginning of 2015, a quarter of a million of people were displaced, thousands of people fled the country, and dozens of people were killed, as the fight intensified between the fighting groups, mostly by the Rapid Support Forces, a government-backed force.¹¹¹⁰

Although all sides to the conflict have been involved in several peace talks beginning from 2004, none of these talks have ever succeeded. In early 2004, the Sudanese army entered into a ceasefire that lasted only for one month, before an attack was launched over a village.¹¹¹¹ Two more peace talks failed in 2005, when both sides met in Abuja, Nigeria, as the representatives to these talks were not comprehensive.¹¹¹² In 2006, a faction of SLA and the Government signed the Darfur Peace Agreement, although the agreement, in large part, was not implemented.¹¹¹³ More than a decade after the outbreak of the conflict in Darfur and despite these peace efforts taken, one can say that the international community has achieved a blatant failure (as we will see later) in not only preventing the violation of human rights in the region, but also in mitigating the hideous subhuman conditions. In short, the situation in Darfur today is ‘a man-made humanitarian catastrophe’.¹¹¹⁴

6.2. The UNSC and ICC’s Response

¹¹⁰⁹ Najeeb Bin Mohammed al-Nauimi, Darfur and Sudan: Visionary Approach Needed – and Qatar can Help, *The Guardian* (5th April, 2013), available at <<http://www.theguardian.com/global-development/poverty-matters/2013/apr/05/darfur-sudan-visionary-approach-qatar>> (Last Access: 30th July, 2013).

¹¹¹⁰ See, World Report 2016: Sudan Events of 2015, *Human Rights Watch*, P. 535, available at <https://www.hrw.org/sites/default/files/world_report_download/wr2016_web.pdf>. See also A Joint Statement by the Deputy Head of the UNA-African Union Peacekeeping Mission in Darfur and the UN Resident Coordinator in Sudan, Reported at Alarm Raised over Violence in Sudan's Darfur, *Aljazeera*, (28th March, 2014), at <<http://www.aljazeera.com/news/africa/2014/03/un-raises-alarm-over-growing-darfur-violence-201432723314421433.html>>, (Last Access: 18th June, 2014).

¹¹¹¹ High Commissioner for Human Rights, Situation of Human Rights in the Darfur Region of the Sudan, delivered to the Chairperson of the Commission of Human Rights, U.N. Doc. E/CN.4/2005/3, May 7, 2004.

¹¹¹² In Depth: Sudan The Crisis in Darfur, a Timeline, *CBC News* (July, 2008), available at <<http://www.cbc.ca/news/background/sudan/darfur.html>> (Last Access: 30th July, 2013).

¹¹¹³ The Janjaweed militia was not disarmed as was supposed to be, for example, the agreement is available at <<http://www.un.org/zh/focus/southernsudan/pdf/dpa.pdf>>.

¹¹¹⁴ Kinnock and Capuano, *supra* n. 1105.

In response to a report submitted by an international commission of inquiry¹¹¹⁵, the SC issued Resolution 1593 in 2005 referring the Darfur situation to the ICC Prosecutor according to Article 13 (b) of the Statute.¹¹¹⁶ The Resolution provides that all parties to the conflict are under an international obligation to ‘cooperate fully with, and provide any necessary assistance to the Court and the Prosecutor.’¹¹¹⁷ In his first response, Prosecutor Moreno-Ocampo issued a report in late 2005 urging several countries and NGOs to provide all necessary assistance to the Court.¹¹¹⁸ The OTP conducted a rather inductive and slow investigation into the alleged crimes committed in Darfur and, accordingly, asked the Pre-Trial Chamber to issue two arrest warrants against: Ahmad Muhammad Harun, senior government official, and Ali Muhammad Ali Abd-Al-Rahman, known as Ali Kushayb, a militia leader.¹¹¹⁹

Consequently, it took more than two years, since the Darfur referral¹¹²⁰ to the Court, for the Pre-Trial Chamber to issue the first two arrest warrants against the two Sudanese leaders for alleged crimes of crimes against humanity and war crimes.¹¹²¹ Over the next year, as the OTP failed to get assistance from the international community, including the SC and Sudan, to arrest the alleged perpetrators, Moreno-Ocampo submitted a request for arrest warrant this time against President Omar Al-Bashir in July 2008.¹¹²² In so doing, Prosecutor Moreno-Ocampo decided that there was evidence to add the crime of genocide against him. That was a first ever decision taken by an international tribunal against a sitting head of state. In March 2009, the Pre-Trial Chamber approved the Prosecutor’s request and issued the first arrest warrant against

¹¹¹⁵ UN Report, *supra* n. 1101, the commission was established according to UNSC Resolution 1564 (2004), for information about this resolution. See also Schabas, *supra* n. 4, P. 50.

¹¹¹⁶ UNSC Resolution 1593 (2005).

¹¹¹⁷ UNSC Resolution 1593 (2005), P. 2.

¹¹¹⁸ This report is issued regularly pursuant to the Security Council Resolution referring the situation to the Court, see *supra* n. 790.

¹¹¹⁹ *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Case No. ICC-02/05-01/07.

¹¹²⁰ Resolution 1593 (2005): Adopted by the Security Council at its 5158th meeting, on 31 March 2005, United Nations Security Council, S/RES/1593 (2005).

¹¹²¹ *Supra* n. 1119.

¹¹²² *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09.

the President for counts of crimes against humanity and two counts of war crimes.¹¹²³ However, the Chamber did not agree with Moreno-Ocampo that there were grounds for indicting him for acts of genocide, based on insufficient evidence that held the president liable for such a crime. The Chamber said ‘if the existence of a GoS's genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution application in relation to genocide must be rejected as the evidentiary standard provided for in article 58 of the Statute would not have been met.’¹¹²⁴

However, the Prosecutor appealed the decision before the Appeal Chamber. The latter, in turn, ordered the Pre-trial Chamber to reconsider its decision with regard to the genocide charges based on an erroneous standard of proof for determining genocidal intent.¹¹²⁵ Prosecutor Moreno-Ocampo, successfully, managed to obtain approval from the Pre-Trial Chamber for the issuance of an arrest warrant for the President for three counts of genocide.¹¹²⁶ However, none of these arrests have been executed at the time of writing this work. To expand his policy of prosecution, Moreno-Ocampo, further, indicted three rebel leaders, who are all at the custody of the Court.¹¹²⁷

6.3 The AU's Response

The ICC Prosecutor's decision of indicting the Sudanese President has provoked a sharp response by the AU against the Court. The AU has sharply assailed the Prosecutor's

¹¹²³ Pre-Trial Chamber, ICC, In the Case of *the Prosecutor v. Omar Hassan Al Bashir*: Situation in Darfur, No.: ICC-02/05-01/09 (4th March, 2009), available at <https://www.icc-cpi.int/CourtRecords/CR2009_01517.PDF>

¹¹²⁴ *Ibid*, Para. 159.

¹¹²⁵ Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09, Pp. 33-9, the counts are: Killing, causing serious bodily or mental harm, and inflicting on each target group conditions of calculated to bring about the group's physical destruction.

¹¹²⁶ See, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09.

¹¹²⁷ *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, *The Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09.

strategy of indicting, in particular, a sitting head of state.¹¹²⁸ In its 13th summit held in Sirte, Libya 2009, the AU completely rejected the indictment of President Al- Bashir and refused to cooperate with the Court to arrest the President.¹¹²⁹ The AU continues requesting that the SC defer the proceedings initiated against the President in all its meetings. The request was totally ignored by the Security Council. This position of the AU is mainly based on two main legal reasons, which render it uncooperative with the Court.

First, two weeks before the Prosecutor issued the arrest warrant, the AU, in its ordinary session 2008, declared its objection to any extraterritorial prosecution of the leaders of Africa' states.¹¹³⁰ The Assembly of the Union justified the declaration by adopting a decision on the 'abuse of the principle of universal jurisdiction'.¹¹³¹ The Assembly provided that abusing the latter principle is a violation of the principle of sovereignty and territorial integrity of African countries.¹¹³² It constitutes a clear violation of international law, and endangers security and peace in the region. According to this development, the AU decided not to cooperate with the Court to execute the arrest warrant of the President of Sudan.

Another legal basis is the new reform the AU made, in which the Peace and Security Council (PSC) was created.¹¹³³ The latter has a right to intervene into any African country pursuant to a decision of the Assembly in regard to any grave international crimes, in pursuance to Article 14 (h) of the Constitutive Act. The PSC also criticised the indictment's decision, and

¹¹²⁸ Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (Cambridge, Cambridge University Press, 2014), Chapter five.

¹¹²⁹ The AU's Decision on the Report of the Commission on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC)– Doc. Assembly/AU/13 (XIII), Assembly/AU/Dec.245(XIII) Rev.1, Assembly of the African Union, 13th Ordinary Session, 1- 3 July, 2009, Sirte, Great Socialist People's Libyan Arab Jamahiriya.

¹¹³⁰ The AU's Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/aU/14 (XI), Assembly of the African Union, 11th Ordinary Session, 30 June – 1 July, 2008, Sharm El Sheikh, Egypt.

¹¹³¹ *Ibid*, Pp. 1 -2.

¹¹³² *Ibid*.

¹¹³³ Protocol relating to the Establishment of the Peace and Security Council of the AU (2003), at <<http://www.peaceau.org/uploads/psc-protocol-en.pdf>>.

asserted that the pursuit of justice should not derail efforts sought to promote lasting peace.¹¹³⁴ It further requested the SC to operate Article 16 of the ICC Statute and defer the situation for one year taking into consideration the necessity not to impede the ongoing peace talks. This reform was not meant to grant the President immunity, but rather reiterated the right of the AU to resolve its grave problems.

As a consequence, the AU established the High-Level Panel on Darfur to examine the situation and suggest recommendations on best approaches to address accountability and peace.¹¹³⁵ In 2009, the Panel submitted ambitious recommendations, in which it tried to balance peace and justice.¹¹³⁶ It recommended the creation of a hybrid tribunal, new legislation that removes all immunities of potential suspects in Darfur, and the creation of a truth and reconciliation commission.¹¹³⁷ The ICC Prosecutor ignored these efforts and made no communication about such steps, taken by an important body in the region. Hence, Moreno-Ocampo insisted on his request, and as a consequence, and two weeks before the Panel started its mission, the Pre-Trial Chamber issued the warrant of arrest against the President.¹¹³⁸ Accordingly, the AU decided not to cooperate with the Court having ignored its efforts in sorting the problem out.¹¹³⁹ It further refused the ICC's request to open an office for communication in Ethiopia.¹¹⁴⁰ In addition, in its recent response to the Prosecutor's decision, the AU invited President Al-Bashir to attend a special session of the AU on HIV/AIDS, held

¹¹³⁴ Peace and Security Council, Press Statement, PSC/PR/BR(CXLI), 11 July, 2008, Addis Ababa, Ethiopia.

¹¹³⁵ Comfort Ero, Understanding Africa's Position on the International Criminal Court, March 2010, in *Debating International Justice in Africa, Oxford Transitional Justice Research* (2008- 2010), Pp. 11-4

¹¹³⁶ Peace and Security Council, Report of the African Union: High-Level Panel on Darfur (AUPD), PSC/AHG/2(CCVII), October, 2009, Abuja, Nigeria, available at <file:///C:/Users/user/Desktop/Report_of_the_African_Union_High_Level_Panel_on_Darfur_The_Quest_for_Peace_Justice_and_Reconciliation_October_2009.pdf>.

¹¹³⁷ *Ibid*, Pp. 25-6.

¹¹³⁸ *The Prosecutor v. Omar Hassan Al Bashir: Situation in Darfur*, No.: ICC-02/05-01/09 (4th March, 2009).

¹¹³⁹ *Supra* n. 1129, P. 10.

¹¹⁴⁰ See African Union, 15th AU Summit- Press Release N. 104 (29, July, 2010).

in Nigeria, in July 2013, despite the arrest warrant issued against him.¹¹⁴¹ The AU's responses reflect how resistant the AU is to the arrest warrant. This was a first sign of the start of tension between the AU and the ICC, in general, and the Prosecutor, in particular.

The total disregard of these AU steps by the Court and the Prosecutor 'add fuel to the flame', as the Court is already challenged by being a new colonial intervention into Africa.¹¹⁴² The AU tried to take a part in resolving its own disputes, and decided to create their own legal tools to avoid such an intervention. However, the AU failed to impose its own criminal jurisdiction over the African conflicts. In addition to the hybrid tribunal, the AU also requested the AU Commission, in all its regular meetings since its 12th Ordinary session, to ensure the ability of empowering the African Court on Human and People's Rights with a criminal jurisdictional mandate.¹¹⁴³ However, it is worth noted here that the failure of the AU to take the initiative to tackle its own problems is not only due to the intervention of the ICC in Africa, but also the weak and ineffective mechanisms offered by the AU to provide its own alternatives.¹¹⁴⁴ The response of the ICC prosecutor to these African efforts, by using discretionary power, is highly vital in reshaping the form of the relationship between the Court and Africa, as was seen in Chapter Four. It is true that the problem appears to be between the AU and the Security Council, however, it is time now for the prosecutor to intervene and play a role in mitigating the AU's criticisms that are ultimately directed against the Court.

¹¹⁴¹ Although Nigeria first did not accept the attendance of President Al Bashir, however, the latter did participate under the auspices of the AU, and Nigeria complied with the AU Assembly decision, adopted in at the 13th Ordinary Session, in Libya. See Ogbole Amedu Ode, African Union Special Summit Reviews Successes on HIV/AIDS, Tuberculosis and Malaria, *Modern Ghana* (16th July, 2013), available at <<http://www.modernghana.com/news/475480/1/african-union-special-summit-reviews-successes-on-.html>> (Last Access: 9th April, 2015).

¹¹⁴² See the following debate about this issue in, The Africa Issue: is the International Criminal Court (ICC) Targeting Africa Inappropriately? *Office of the Prosecutor: ICC Forum* (March, 2013), at <<http://iccforum.com/africa>>.

¹¹⁴³ The AU has kept requesting such a mandate in all its ordinary sessions, since 2009.

¹¹⁴⁴ See generally, B. S. Chimni, Third World Approaches to International Law: A Manifesto, *International Community Law Review*, Vol. 8 (2006), 3- 27.

6.4. African States and Sudan's Response

The responses of the individual African countries are varied. Nigeria, for example, refused to take action regarding the attendance of Al-Bashir, during the AIDs/HIV session, claiming 'its commitment to African Union position on the issue.'¹¹⁴⁵ The same action was taken by the majority of African states, when several of them, such as Mali, and Chad, refused to arrest the President during his visit to those countries.¹¹⁴⁶ Other countries, such as Malawi, Zambia, and Botswana have declared their readiness to arrest the President of Sudan.¹¹⁴⁷ Malawi, in particular, was against the ICC's decision against the President, before the newly arrived President changed the political attitude of the policy of the country and decided to arrest President Al-Bashir.¹¹⁴⁸

With regard to the Sudanese response to the President's indictment, The Sudanese government declared a complete opposition to steps taken by the Court.¹¹⁴⁹ They initially pre-empted the potential decision of the arrest warrant and declared threats of violence. The Sudanese army attacked civilians in a village using air and ground weapons.¹¹⁵⁰ Also, when the Court issued the decision, the Sudanese government retaliated, expelling nearly all aid

¹¹⁴⁵ Agency Reporter, Al-Bashir: AU Position Superior to ICC Warrant – Ashiru, *The Nation* (18th July, 2013), available at <<http://thenationonlineng.net/new/al-bashir-au-position-superior-to-icc-warrant-ashiru/>> (Last Access: 2nd August, 2013).

¹¹⁴⁶ Stephen A. Lamony, Nigeria was Wrong to Host Omar Al-Bashir at AU Summit, *African Arguments* (2nd August, 2013), available at <<http://africanarguments.org/2013/08/02/nigeria-was-wrong-to-host-omar-al-bashir-at-au-summit-by-stephen-a-lamony/>>, (Last Access: 2nd August, 2013).

¹¹⁴⁷ *Ibid.*

¹¹⁴⁸ They changed their position due to the conditions imposed on them, before they receive any aid, see Malawi Cancels AU Summit over Sudan's Bashir, *Aljazeera* (9th June, 2012), available at <<http://www.aljazeera.com/news/africa/2012/06/20126974132905285.html>>, (Last Access: 2nd August, 2013).

¹¹⁴⁹ Sudanese President Tells International Criminal Court to 'Eat' Arrest Warrant, *The Guardian* (4th March, 2009), available at <<http://www.theguardian.com/world/2009/mar/04/sudan-al-bashir-war-crimes>> (Last Access: 1st June, 2015).

¹¹⁵⁰ UN Says Sudan Targeted Civilians in Darfur, *Reuters* (20th March, 2008), available at <http://uk.reuters.com/article/2008/03/20/idUKL20508924._CH_.242020080320> (Last Access: 28th July, 2013).

organisations.¹¹⁵¹ The alleged action immediately affected the lives of more than one million people, who already live at risk.¹¹⁵² It was only a few hours between the latter action and the time of the issuance of the arrest warrant. ‘It happened right after the announcement. The connection was clear,’ said one aid official.¹¹⁵³ The connection was clear, since the Sudanese government has accused the ‘aid organisations of collaborating with the court by providing data and testimony used to build cases against Sudanese officials.’¹¹⁵⁴ They further alerted that the arrest warrant would undermine the peace talks within not only Darfur, but also throughout the country, including the Comprehensive Peace Agreement (CPA). This is exactly what the Sudanese government has continued doing over the last ten years since the Darfur crisis.

In February 2013, the Sudanese government and JEM signed a ceasefire deal in Doha, Qatar.¹¹⁵⁵ This deal appeared to end a decade-old conflict in Darfur, and represented one of the most important steps taken to end the conflict. However, the Sudanese government did not show any real political will to implement the deal in good faith.¹¹⁵⁶ For example, no real progress was taken to articulate the issues of immunity, accountability, compensations, and security. It was apparent that the ICC’s decisions are influencing the developments in the region. The results of security and stability have remained elusive, and worse than that the violence persisted, as the aforementioned two areas (Kordofan and Blue Nile) are also involved in the crisis. The continuous violence and the ignorance of the peace talks by both sides,

¹¹⁵¹ Sudan: Expelling Aid Agencies Harms Victims: Government Action Endangers 1 Million Civilians, *Human Rights Watch* (5th March, 2009), available at <<http://www.hrw.org/news/2009/03/05/sudan-expelling-aid-agencies-harms-victims>> (Last Access: 3rd July, 2013).

¹¹⁵² *Ibid.*

¹¹⁵³ Marlise Simons and Neil MacFarquhar, Court Issues Arrest Warrant for Sudan’s Leader, *The New York Times* (4th March, 2009), available at <http://www.nytimes.com/2009/03/05/world/africa/05court.html?_r=0> (Last Access: 3rd August, 2013).

¹¹⁵⁴ *Ibid.*

¹¹⁵⁵ The government of Sudan has signed a ceasefire deal in Qatar with a Darfur rebel group in a fresh bid to end a decade-old conflict in western Sudan, Qatar’s state news agency QNA reported late on Sunday, *Reuters* (11th February, 2013), available at <<http://www.reuters.com/article/2013/02/11/us-sudan-darfur-ceasfire-idUSBRE91A04120130211>> (Last Access: 3rd August, 2013).

¹¹⁵⁶ *Supra* n. 1109.

particularly by the Sudanese government, stimulated the classical debate, within international criminal justice, between justice and peace. The following section will concentrate on this particular dilemma and discuss how best Prosecutor Moreno-Ocampo could have exercised his strategy of prosecution and what options the new Prosecutor has.

6.5. Justice v. Peace

The above positions of the AU, most of the African States and other international actors¹¹⁵⁷ are mainly based on political exigencies by using legal instruments. Although several legal tools were used for justifying the irrelevant steps taken by the Prosecutor against the President, as discussed above, nonetheless, it appears that several political considerations were also associated with the above legal justifications the AU presented.

For example, the sole and consistent target of the Court on Africa is one account (nine situations under the Court jurisdiction are from the African continent). As was discussed throughout the thesis, the problem does not mainly lie in the legal assessment of the African situations that are under the jurisdiction of the Court. The problem appears in the discretionary fashion of *determining the legal requirements* of initiating an investigation, as was discussed in Chapter Four. It is indeed the broad discretion that allows the prosecutor either to stay in, or to go beyond Africa.¹¹⁵⁸ It is the discretionary use that has undermined the institutional ties, and its relationship with Africa, in a way that the ability of the Court to continue its mission is under serious threats.

The key justification that the Prosecutor uses to validate its focus on Africa is her serious concern about the vast number of African victims in each situation that urged her to

¹¹⁵⁷ For example, the Islamic Conference, China, and most Arab countries are against the ICC's decision, see China must Arrest Sudanese President, *Amnesty International* (16th June, 2011), available at <<http://www.amnesty.org/en/news-and-updates/china-must-arrest-sudanese-president-2011-06-16>>, (Last Access: 2nd August, 2013).

¹¹⁵⁸ *Supra* n. 261. See also Chapter Three for more details about the nature of the concept of discretion.

open all these situations.¹¹⁵⁹ However, if the victims' arguments is the sensitive chord the Prosecutor is using, then what about the other victims who are long waiting for the Court's justice? There are vast numbers of victims in countries for whom the Court has done nothing so far. Colombia, in particular, is one of those countries that is still under the preliminary examination stage.¹¹⁶⁰ Obviously, there is no doubt about the gravity of the Colombian situation that is sufficient enough to be under the investigation of the Court.¹¹⁶¹ The OTP declared that it is still assessing the complementarity test and does not reach the stage of the assessment of gravity.¹¹⁶² In its regular Reports on Preliminary Examination Activities, the OTP asserted that the Colombian authorities have conducted vast proceedings against those who are allegedly accused of committing war crimes and crimes against humanity.¹¹⁶³ It is only that the OTP needs some further information about the genuine nature of the national proceedings that are taken so far before it can conclude its formal decision.¹¹⁶⁴

These reports give a clear impression that the Colombian authority is conducting fair and effective investigations against all sides to the conflict. However, one may easily raise several concerns about these reports and the prosecutor's discretion. If the national proceedings are fair and successful as these reports indicate, then why has the OTP not yet gathered the required information to make its decision? This situation has been under the preliminary

¹¹⁵⁹ 'We say that the ICC is targeting Africans, but all of the victims in our cases in Africa are African victims', Prosecutor Fatou Bensouda said, in a joint interview with Reuters and France's TV5, see Tim Cocks, Interview- ICC Says Protecting Africans, not Targeting them, *Reuters* (29th June, 2011), available at <<http://www.reuters.com/article/2011/06/29/icc-africa-idAFLDE75S1S220110629>> (Last Access: 9th April, 2015).

¹¹⁶⁰ See, ICC, OTP, Report: Situation in Colombia - Interim Report, 14/11/2012, available at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/Situation-in-Colombia-Interim-Report.aspx> (Last Access: 2nd June, 2015).

¹¹⁶¹ See the OTP's regular reports of its preliminary examination activities, since 2011, at <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/reports/Pages/default.aspx>.

¹¹⁶² See for example, Report on Preliminary Examination Activities 2014, Paras. 112- 131.

¹¹⁶³ See the official website of the Court at, <http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx>.

¹¹⁶⁴ See Report on Preliminary Examination Activities 2014, Para. 128.

examination stage for more than nine years, and the good progress that the national apparatus has taken has started for nearly five years, as indicated in the above reports. Apparently, if the OTP concluded the admissibility of this situation, the gravity test would be endorsed, in particular that 'the scale of the crimes' appears to be met in this situation.¹¹⁶⁵ These arguments raise doubt about the independence of the Prosecutor. She is not interested in pursuing this situation independently enough, so she does not reach the gravity test, with which she would determine the admissibility of the situation. If the contradictory statements the OTP declared in these reports are true in the sense that the prosecutor is not dealing with the situation in a good faith, this means the independence of the prosecutor is broken. This strategy, accordingly, gives the impression that the prosecutor is happy to stay in Africa and endorses the current accusation that the Court is an African test of the new international criminal regime.

Another pragmatic argument is the timing of the issuance of the arrest warrant. In fact, the time at which the prosecutor decided to issue an unsealed arrest warrant against the President synchronised with two critical events that were taking place in Africa. The first event was the indictment of a former head of state of Liberia: Charles Taylor.¹¹⁶⁶ The ICC's decision against the Sudanese President came as a second historic decision that targeted again the head of an African state. These international decisions witnessed the emergence of signs of worsening the relationship between the African states alongside the AU and the ICC. As a consequence, most African leaders have become cautious when dealing with the Court, especially with respect to the importance of cooperation with the Court.

The second event was the peace talks that were taking place in Darfur and the protection of further potential victims, having issued the decision. The AU puts the peace agenda as its

¹¹⁶⁵ The AU is concerned about this sole approach that the prosecutor uses to evaluate the existence of the threshold gravity when appraising situations and cases. See, Simon M. Weldehaimanot, Arresting Al-Bashir: the African Union's opposition and the legalities, *African Journal of International and Comparative Law*, Vol. 19, No. 2 (2011), P. 208- 235.

¹¹⁶⁶ *The Prosecutor vs. Charles Ghankay Taylor*, SCSL-7-3-2003.

top agenda as a common strategy, when dealing with any conflict in the continent.¹¹⁶⁷ In one of its meetings, the AU submitted that the step taken by the ICC Prosecutor might cause further instability in the region.¹¹⁶⁸ Thus, reference should be given first to the peace needs before reaching justice. This is a critical scenario that the Prosecutor seemed not to calculate, when deciding to indict the President even before managing to secure the arrest of the two other suspects (*Harun and Kushayb*).¹¹⁶⁹ The Prosecutor was well aware that the Court is toothless in terms of the enforcement of any decision it makes. He was also aware that Sudan will not cooperate with the Court, as the Government made it clear that they are against the Court's intervention into the internal affairs of the state at the time of the indictments of the above two other suspects.¹¹⁷⁰ Therefore, the question that can be raised now is, did the disregard of those political considerations help the Prosecutor bring justice to those perpetrators and the victims? The answer is no.

The Sudanese government has escalated the level of violence since the Court's intervention in the country. For example, it has persisted, first, not to cooperate with the Court, second, to abort every peace negotiation that has been initiated between both sides of the conflict. Worse than that, the Sudanese government has increased the level of violence since the indictment of the President, not just against the locals, but also against the UN and the African Union- United Nations Hybrid Operation in Darfur (UNAMID). For example, on 13th July 2013, seven UN peacekeepers were killed, and seventeen military and personnel from the UNAMID were injured.¹¹⁷¹ Although there is no confirmation on who committed this attack,

¹¹⁶⁷ See, the Communique of the Peace and Security Council (International Criminal Court (ICC)), 142nd PSC Meeting PSC/MIN/Comm (CXLI) (21st July, 2008).

¹¹⁶⁸ *Ibid.*

¹¹⁶⁹ *Supra* n. 1119.

¹¹⁷⁰ Claudia Parsons, ICC Prosecutor to Open Two New Darfur, *Cases Global Policy Forum* (4th December, 2007), available at <<https://www.globalpolicy.org/component/content/article/164/28587.html>> (Last Access: 2nd June, 2015), stating that 'Sudan denies the court has jurisdiction over the cases.'

¹¹⁷¹ Press Release, ICC Prosecutor: Attacks against peacekeepers may constitute war crimes, 19/07/2013, available at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-19-07-2013.aspx> (Last Access: 4th August, 2013).

‘suggestions from local sources [confirmed] that the attack appeared to have been planned and carried out by government-linked forces.’¹¹⁷² Obviously, the reactions of both sides indicate that the Court will not be able to enforce a single arrest warrant, having known also that some powerful states support the Khartoum regime, such as China. It is not an easy hypothesis to connect the level of violence and the failure of the peace process in Darfur with the decision of the Prosecutor to arrest the President. However, it is undeniable that the strategy of Khartoum in light of the aforementioned discussion of Sudan, African states, and the AU’s response to this decision is, to a large extent, linked. The President of Senegal, in particular, described the Court’s decision as a ‘poor judgment’, which lacks any political sensitivity.¹¹⁷³ The AU has made it clear over time that they are against this particular decision against the Sudanese President. They accused former Prosecutor Moreno-Ocampo of selective justice having targeted only African states. ‘Frankly speaking, we are not against the ICC. What we are against is Ocampo's justice," AU commission chairman Jean Ping said in 2011.¹¹⁷⁴

Another pragmatic factor that was ignored by the Prosecutor is the fact that international justice is sometimes ineffective and powerless.¹¹⁷⁵ The Prosecutor did not take any of these concrete considerations within his decision-making process and was rigid in terms of applying the rules of the Court. As a consequence of this policy, the Prosecutor now is left with no choice but to deal with the crisis in Sudan, the ongoing violence, and alleged perpetrators. The strict commitment to the rules of the Court does not seem helpful in building a more effective strategy of prosecution in Sudan. As was discussed and established throughout this thesis, the achievement of justice cannot be completed without dealing with the making of legal decisions

¹¹⁷² Agencies in Khartoum, Seven Tanzanian Peacekeepers with United Nations Die in Darfur Ambush, *South China Morning Post*, (15th July, 2013), available at <<http://www.scmp.com/news/world/article/1282365/seven-un-peacekeepers-killed-darfur-ambush>> (Last Access: 4th August, 2013).

¹¹⁷³ *Supra* n. 1135, P. 12.

¹¹⁷⁴ *Supra* n. 43.

¹¹⁷⁵ *Supra* n. 939.

as a process in which reference should be made to the social and political context of the situation. The Prosecutor can do nothing towards the crisis in Sudan, based on the current view of the rules of the Court and the OTP. The Prosecutor should be encouraged then to use other strategies that can make, at least, the prospects of obtaining more effective policy of prosecution higher than what she has obtained so far. It appears that the prosecutor is advised to take account of these considerations before making a certain decision, in particular, the ones that target high-profile officials. The endeavour for achieving justice by bringing cases to a court at the cost of the emergence of new violence, victims, and other kinds of atrocities seems amoral. It is true that this could be politically problematic, as some culpable regimes might use this to avoid justice. However, the absence of effective enforcement mechanisms and genuine will of states to obey international criminal justice norms require decision-makers (the prosecutor) to balance between the normative and pragmatic exigencies before delivering justice.¹¹⁷⁶ Within such an environment, a calculated strategy of prosecution is needed based on both considerations.¹¹⁷⁷ This might require the prosecutor, for example, to postpone issuing certain decisions, sealing decisions, or deferring situations or cases to local alternatives. The following section seeks to provide a framework in which the tension between peace and justice, or between the above dyadic arguments are reduced.

6.6. Discretionary Policy: Flexibility and Calculation

What should the Prosecutor have done in the situation at question? And what should the new Prosecutor do? Of the nineteen arrest warrants that have been issued so far, ten were issued sealed and nine were made public immediately. Of the ten sealed arrest warrants, six have been arrested (60% was successful), whilst of those that were issued unsealed; only two

¹¹⁷⁶ *Ibid.*

¹¹⁷⁷ Stephen Oola, Bashir and the ICC: The Aura or Audition of International Justice in Africa? 15th October, 2008, in *Debating International Justice in Africa, Oxford Transitional Justice Research* (2008- 2010), P. 64.

have been arrested (20% was successful).¹¹⁷⁸ These figures show that the prospects of arresting the perpetrators under sealed warrants are higher than the unsealed ones. The prosecutor is apparently advised to follow this strategy before making any decision public. Although the unsealed policy is well anchored within domestic and international prosecutorial norms, which aim at providing a more open and just system of the judicial body, nonetheless, the sealed strategy is also popular.¹¹⁷⁹ In the Darfur situation, the Prosecutor made four unsealed arrest warrants, and none have been executed so far. It was really an odd strategy that Prosecutor Moreno-Ocampo did not seal, at least, the one against the President. He should have waited for a period of time, first, to secure executing his arrest at a certain point, and more importantly, to build a concrete and strong case against him. The Prosecutor, instead, decided to indict the President only one year after the first two warrants, without giving any chance for advancing the cases before the Court. Cassese criticised Prosecutor Moreno-Ocampo for such a strategy stating that if he ‘intended to pursue the goal of having Al-Bashir arrested, he might have issued a sealed request and asked the ICC’s judges to issue a sealed arrest warrant, to be made public only once Al-Bashir travelled abroad.’¹¹⁸⁰ Moreno-Ocampo thought that making such a public decision would increase pressures and political responsibilities over Sudan and other states that might be required to arrest him to cooperate with the Court.¹¹⁸¹ Cassese’s suggestion asks the prosecutor to consider the political dimension of the case to be utilised later to achieve the higher normative end of the process.

¹¹⁷⁸ These figures are up to 2015. It was only on last 17th January 2015, when the Court managed to arrest one more accused: Dominic Ongwen who is under the custody of the Court, see the ICC website at <http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1084.aspx>.

¹¹⁷⁹ The Federal Prosecution Service Deskbook, *Public Prosecution Service of Canada*, (2000), chapter 3, at <<http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/index.html>> (Last Access: 24th February, 2008).

¹¹⁸⁰ Antonio Cassese, Flawed International Justice for Sudan, *Project Syndicate: the World’s Opinion Page* (15th July, 2008), available at <<http://www.project-syndicate.org/commentary/flawed-international-justice-for-sudan>> (Last Access: 7th April, 2015).

¹¹⁸¹ Gosnell, *supra* n. 1092.

Although it is too late, Cassese's suggestion would have provided a solution for the two sides of the criticisms that the Prosecutor faces because of the indictment's decision. The decision against the Sudanese President is often criticised of being *utopian* in the sense that the prosecutor is unable to enforce it.¹¹⁸² The Prosecutor was only trying to prove a point that the Court is in operation and its mission is to put an end to the era of impunity whoever the accused is. The Prosecutor is approaching too high cases (indictees who are too high profile). It is an unsupported or anchored case.¹¹⁸³ It is too *utopian*.

The decision is also harshly criticised of being *apologist* in the sense that the Prosecutor is focusing too much on a highly politicised case. Davenport criticises the Prosecutor of doing so when he argued that '[t]he new prosecutor should spend less time on highly visible and politicized cases.'¹¹⁸⁴ The decision is also accused of being politically transferred to the Court, as it was referred by the Security Council.¹¹⁸⁵ Such a referral appears 'to be used to advance the political objectives of powerful states.'¹¹⁸⁶ The Prosecutor was pleasing those states and made her progress with the head of the state. The decision against a sitting head of an African state represents an array of the classical tension between the North-South debates.¹¹⁸⁷ It is only directed against African cases, which are already highly politicised cases. The decision appears unprincipled and uninspiring. In either case, the prosecutor is doing a political calculation and,

¹¹⁸² The decision is too utopian, as it is too disconnected to the policies and interests of states. See *supra* n. 72.

¹¹⁸³ Most of the African states, Arab states, the AU, and the Arab League are against the policy of the Prosecutor in Darfur, particularly to the decision of the indictment against the Sudanese President. It is not just that those actors have opposed the indictment's decision issued against the President; it is also their full refusal to the decision of opening the investigation against the Darfur situation, whereby a regular call is raised by them to defer the given situation.

¹¹⁸⁴ *Supra* n. 112.

¹¹⁸⁵ Richard Dicker, A Flawed Court in Need of Credibility, *The New York Times* (21st May, 2012), available at <<http://www.nytimes.com/2012/05/22/opinion/a-flawed-court-in-need-of-credibility.html>> (Last Access: 11th April, 2015), arguing that 'the court's problems are compounded by the dominance of the council's five permanent members'.

¹¹⁸⁶ *Ibid.*

¹¹⁸⁷ See in general the arguments of Schabas about the main concerns of the SC in its relationship to the ICC, 'The International Criminal Court has failed to live up to its own expectations.' *Supra* n. 739, Pp. 1- 7.

therefore, she appears to be political, seeking to achieve aims, which are not warranted by the law.

Cassese's solution would help, to a large extent, to *ease* the above tension. The success of the Court of arresting the President would end the utopian criticisms and provide a chance to ease the severity of the argument of the apology criticisms. As has been explained before,¹¹⁸⁸ the success of Goldstone of transferring Milosevic to the Tribunal helped decrease the level of violence, protect civilians and victims, and foster the peace process. This scenario may be reaped again in the context of the Sudan situation, if the Prosecutor could successfully have arrested the President.¹¹⁸⁹ As Kai Sheffield argues, 'Moreno Ocampo would have better served the ICC's legitimacy by following prosecutorial standards more in line with those practiced in earlier ICC cases involving State Parties and in the domestic context of State Parties like Canada, including the use of sealed warrants.'¹¹⁹⁰ Therefore, the *apologist* criticisms could be eased, if not disappear.

Having already made the decision, what is the Prosecutor required to do at this stage, if she (the new Prosecutor) *insists on prosecution*? All the Prosecutor can do is concentrate on two main issues. First, she is required to indict new alleged perpetrators, as there are several reports indicated to the involvement of those alleged perpetrators.¹¹⁹¹ Second, the prosecutor should apply for sealed warrants, so she avoids the failed strategy that the previous prosecutor obtained.¹¹⁹² Drawing on this policy and the OTP's regular statement, the Prosecutor should change the current policy that only targets those who bear the most responsibility of heinous

¹¹⁸⁸ See generally, Chapter Two of this thesis.

¹¹⁸⁹ Kai Sheffield, *Speak Softly and Carry a Sealed Warrant: Building the International Criminal Court's Legitimacy in the Wake of Sudan*, *Appeal Review of Current Law and Law Reform*, Vol. 18, No. 1 (2013) P. 171.

¹¹⁹⁰ *Ibid*, P. 171.

¹¹⁹¹ See, *supra* n. 784, P. 35. The report indicates that Second Vice-President Ali Othman Taha, and other senior officials, such as Maj. Gen. Abduraheem M. Hussein, Maj. Gen. Bakri Hassan Salih, Gen. Salah Abdallah Ghosh and Abbas Arabi should be all investigated.

¹¹⁹² *Supra* n. 1189.

crimes. These suggestions require the Prosecutor, further, to prosecute perpetrators lower down the chain of command to ‘build cases against senior officials.’¹¹⁹³ Although this policy appears complex, nonetheless, it could increase the likelihood of the successful strategy of the prosecution. The fact that President Al-Bashir is charged for massive crimes, committed under his full control and knowledge by using thousands of subordinates makes the issue of targeting those lower perpetrators necessary. Thus, if the Prosecutor manages to bring them to the trial and prove their criminal responsibilities, this would enhance the strategy of her prosecution in the eyes of the relevant actors. It would help also to build the factual basis, on which the Prosecutor can make a strong case against the President. However, both Prosecutors seem to ignore this suggestion that the OTP itself mentions, when it issued a policy paper asserting that the OTP might go down to investigate and prosecute those below high-ranking officers.¹¹⁹⁴

As it appears, the above option, the insistence on the prosecution’s approach delivered particularly by the ICC, does not seem to succeed, at least in the near future.¹¹⁹⁵ The criminal justice approach through the ICC may not be an option. Therefore, the Prosecutor may be required to consider the peace-related issue. The unlikelihood of the arrest of the President, the Court’s lack of coercive capacity, and the unstable strategy that the prosecutor has pursued raise the questions of the place of peace talks under such circumstances. The arguments to stop justice in exchange for peace talks to end violence have been a heated debate in the Sudan situation. As has been argued throughout the thesis, the criminal justice that is delivered by the ICC appears to constitute a serious impediment to end violence and place peace in the region,

¹¹⁹³ Human Rights Watch, *supra* n. 883, Pp. 45.

¹¹⁹⁴ *Supra* n. 187, P. 3.

¹¹⁹⁵ The proponents of the view of the criminal prosecution that should be approached to end the violence opined that such an approach does not derail the peace process. They cited the experience of the ICTY and ICTR. Therefore, they insisted that the prosecutor should go ahead and indict all responsible people in the Darfur conflict, including the head of the state. For example, Philipp Kastner, in particular, expressed the benefits of the criminal prosecution on the attitude of the Sudanese government in changing its policy in Darfur. See, *supra* n. 527, the author provided several benefits of putting the Darfur situation under a criminal jurisdiction of the Court, such as weakening the Sudanese government, bringing all sides to the peace talks, pressuring the international community to act, and pressuring the government to stop supporting Janjaweed.

as the situation in Sudan shows. The indictment's decision, in particular, against the Sudanese president has made the situation worse and put the life of civilians in Darfur at even greater risk. This is what happened when the level of violence increased on the eve of the indictment decisions. It was estimated that nearly 75% of the total humanitarian assistance delivered to the people in Darfur by some organisations were cut off by the Sudanese government.¹¹⁹⁶ Over time, the effectiveness of the work and the reach of the Court has been indeed more limited. It is not only about the extremely slow work that has been presented in terms of all aspects of the work of the Court, but also about the limited justice that has been delivered by the Court to victims and perpetrators. 'One size does not fit all' still seems applicable to the Court's option. The findings of 20 years of research conducted by HRW endorsed the latter trend, as there are still several examples that showed that the ICC's approach is not the case all the time.¹¹⁹⁷

Therefore, does the criminal approach through the ICC seem workable? One spokesperson of peace groups argued that 'obviously, nobody can convince the leaders of a rebel movement to come to the negotiating table and at the same time tell them that they will appear in courts to be prosecuted.'¹¹⁹⁸ Six years later, the suggestion of the proponents of the criminal justice approach does not seem to be fruitful, as the humanitarian conditions and the human rights have deteriorated. However, there was no evidence that considering the political realities of the situation in Darfur would end the conflict either. The Sudanese government and some factions of other sides to the conflict have broken all peace efforts undertaken by the international community, and have not implemented the basic rules of these efforts aimed at ending the conflict. The conflict in Darfur seems to be extremely difficult for any potential

¹¹⁹⁶ See *supra* n. 1107.

¹¹⁹⁷ In the Mozambique situation, the peace agreement that signed in 1992 totally replaced any form of a criminal justice approach and also stopped the civil war that was taking place in the country, and also the South Africa situation is another example, see HRW, *supra* n. 1092.

¹¹⁹⁸ Cited in *supra* n. 527, P. 71. See also, Adam Branch, International Justice, Local Injustice, *Dissent Magazine* (Summer, 2004).

solution either on the political level or prosecutorial one. In particular, the SC, as usual, does not seem willing or effective enough to support the Court, in apprehending the perpetrators, as China and Russia are in support of the Sudanese Government.¹¹⁹⁹

The concept of peace and the concept of justice in the Darfur situation seem to be contradictory to each other. Although there is a need to apply criminal justice to all perpetrators to the conflict, however, the *adverse effects* of the Prosecutor's decision should not be only ignored but also addressed. It seems, then, that the recommendation of the African Union High-Level Panel on Darfur is workable under the above reasons. The Panel suggested a hybrid tribunal that will be under the auspices of the AU as one solution to the conflict in the region.¹²⁰⁰ Although such a solution could aim at salvaging the President, however, the AU provided several calls for the implementation of the Panel recommendation fairly.¹²⁰¹ It fully associated itself with, and confirmed the necessity of, the application of all recommendations of the Panel, which mainly address the issue of peace, justice, healing, and reconciliation.¹²⁰² It further proposed the establishment of truth, justice, and reconciliation commission that can work alongside the hybrid tribunal.¹²⁰³ The panel envisaged that such a commission would deal with the root causes of the conflict and 'would make an important contribution to healing the wounds of Darfur and the divisions in Sudan over Darfur.'¹²⁰⁴ In fact, the decision of deferring the situation of Darfur to this alternative (national and regional solution) has merit. If the regional organisation, the AU, most African states, and more importantly the Sudanese people prefer this mechanism for handling the conflict (pragmatic demand), then, the hybrid tribunal should

¹¹⁹⁹ Sudan Arms Continuing to Fuel Serious Human Rights Violations in Darfur, *Amnesty International* (8th May, 2007), available at <<https://www.amnesty.org/en/documents/afr54/019/2007/en/>> (Last Access: 13th December, 2014).

¹²⁰⁰ See *supra* n. 1136, Para. 25.

¹²⁰¹ *Ibid.*

¹²⁰² *Ibid.*, Chapter 3.

¹²⁰³ *Ibid.*, Paras. 246- 51.

¹²⁰⁴ *Ibid.*, Para. 269.

be the case (normative demand). The long-term results policy of addressing the atrocities that the ICC Prosecutor has kept mentioning over time does not appear to solve problems. It is extremely difficult to outweigh the commitment to one single mechanism of handling a certain conflict over other mechanisms that potentially could address the conflict, given the fact that the first mechanism only causes more victims. This also would boost any potential peace agreement between all sides to the conflict.

In addition to the problem of enforcement that the Court lacks, the problem of timing is another.¹²⁰⁵ The question of time in this situation identified two main problems. The first is the necessity of issuing a certain decision at the right time something Prosecutor Moreno-Ocampo failed to achieve, in the case of the President. Kastner emphasises the importance of the right timing when making a choice, when he said that ‘[t]he question of the right timing in order to exercise a genuine threat while minimizing potential political risks will always be crucial.’¹²⁰⁶ The second is the long-term results policy that the ICC Prosecutor is following. This looks problematic in terms of how long one should wait until the Court can manage to arrest all perpetrators, who are committing more crimes. There is a need for a wise and flexible strategy that the Prosecutor needs to apply, even if such a strategy will consider the political circumstances. As Kastner argues, ‘[t]he ICC’s commitment to bringing perpetrators of international crimes to justice does not hold the OTP back from postponing the publication of indictments a few weeks or months in order to show itself politically sensitive and in line with the requirements of article 53’.¹²⁰⁷ Such a wise and flexible strategy that considers the given circumstances would also further the perception of the Court in the eyes of the given audience and, therefore, promote the sociological legitimacy of the Court. The calculation of accompanied circumstances of the given situation might increase the chance of a successful

¹²⁰⁵ *Supra* n. 527.

¹²⁰⁶ *Supra* n. 527. Pp. 80-1.

¹²⁰⁷ *Ibid*, P. 81.

strategy of prosecution. This is how Christopher Gosnell opines when he said that ‘these kinds of political considerations are intrinsic to international justice.’¹²⁰⁸ In another words, such discourse has, at least, political dimensions that requires the decision-maker to consider when using legal instruments. The use of prosecutorial discretion through applying the Article 53 ‘interests of justice’ is the discourse by which the above suggestion can be implemented.

6.7. Applicability of Article 53 to the Darfur Situation

Three main concerns can be invoked about the applicability of Article 53 to the situation in question. First, whether or not the Prosecutor is able to apply the Article. Second, to which potential and acceptable justice mechanism the Prosecutor would defer. Third, which factor the Prosecutor can consider to defer the situation or the case of the Darfur situation in light of Article 53. As it is known now, Article 53 is the most plausible avenue to defer to other alternative justice mechanisms, in the light of ongoing or future peace efforts. Alternative mechanisms include local criminal approaches, hybrid tribunal, truth commission accompanied with conditional or unconditional amnesty, or ongoing peace negotiations. Under the Article 53 ‘interests of justice’, the prosecutor has prosecutorial discretion to decline an investigation or a prosecution on the basis of ‘the interests of justice’. Obviously, the Darfur situation has passed this progression, as Moreno-Ocampo already refused to use his power to decline either the investigation or prosecution.

Given the decision of the initiation of the investigation in Darfur was made, this means that the Prosecutor decided that such an investigation is in ‘the interests of justice’. The prosecutor is not obliged to prove the compatibility of the investigation with ‘the interests of justice’. It is only when it comes to prove the reverse decision that the prosecutor is obliged to prove the incompatibility of the investigation with ‘the interests of justice’. With regard to the

¹²⁰⁸ Gosnell, *supra* n. 1092, P. 845.

prosecution stage, Article 53 (2) empowers the prosecutor with a right to decline a prosecution at certain conditions, as discussed fully in Chapter Five.¹²⁰⁹ In the Darfur situation, Moreno-Ocampo did not make a decision not to prosecute any person on the basis of ‘the interests of justice’. Instead, he sought four arrest warrants and three summonses against all parties to the conflict. This means that the prosecution is compatible with ‘the interests of justice’, and, therefore, there is no need to prove such a finding. As Moreno-Ocampo already made the prosecution decisions, is the new Prosecutor still able to decline the prosecution decisions made so far? In other words, is Bensouda still able to decide that the prosecution decisions do not serve ‘the interests of justice’ now? As the situation of Darfur passed the stage of seeking the arrest warrants, and progressed to the stage of the Pre-Trial Chamber, it seems that Article 53 is no longer applicable. However, Article 53 (4) provides an opportunity to reopen consideration of the prosecution’s decisions based on ‘the interests of justice’ test. The subparagraph provides that ‘[t]he Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.’¹²¹⁰ The text seems to allow the prosecutor to reopen the application of Article 53 for new consideration. The provision, first, refers to both the stages of investigation and prosecution, on which the prosecutor can reconsider her decision. The provision, further, does not specify what sort of decision the prosecutor might make. It appears that the provision covers both sorts of decision: the declination and affirmation of the prosecution. This means that upon finding new facts or information, the prosecutor may again decide to decline to prosecute those which the

¹²⁰⁹ These condition are (a) there is not a sufficient legal or factual basis to seek a warrant or summons under article 58; (b) The case is inadmissible under article 17; or (c) 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; the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.

¹²¹⁰ Article 53 (4) of the Rome Statute.

prosecutor already prosecuted. The prosecutor, for instance, might find that a local justice mechanism is more effective than the Court's approach to serve 'the interests of justice'.

In her report to the UN Security Council, dated on 5th June, 2013, Bensouda urged the SC and members of the states to the UN and the ICC to execute the outstanding arrest warrants issued against Sudanese alleged perpetrators.¹²¹¹ Therefore, it appears that she will not likely invoke the application of the Article 53 'interests of justice' to cease on-going proceedings. The new Prosecutor has kept urging states and other actors to cooperate with the Court to execute the arrest warrants issued against Sudanese perpetrators, including President Omar Al-Bashir. During an event on the start of genocide awareness in April, 2013, Bensouda emphasised the importance of bringing the fugitives to the custody of the Court.¹²¹² She stated that '[u]nfortunately for the victims in Darfur, their suffering continues because of lack of implementation of the arrest warrant'.¹²¹³ Thus, it is not likely that Prosecutor Bensouda will ever cease the prosecution against the fugitives and defer to any proposed justice alternative or peace talks, although she still has such a power, as concluded above.

6.8. Applicability of Factors of Article 53 to the Darfur Cases

The following discussion will examine the prospects of the applicability of the factors enumerated in Article 53 for the declination of the prosecution against the Sudanese President according to the recent development of the conflict in Darfur. As the arguments of those who are against the ICC Prosecutor's policy are related to the decision of prosecuting the President, and that sub-paragraph 2 (c) enumerates all possible factors that the prosecutor can consider for ceasing a case, the focus will be only on the prosecution stage and not the investigation

¹²¹¹ ICC, Office of the Prosecution, ICC Prosecutor Statement to the United Nations Security Council on the situation in Darfur, the Sudan, pursuant to UNSCR 1593 (2005), 05/06/2013.

¹²¹² ICC/Sudan- Bensouda Calls for Bashir's Arrest (2nd April, 2013), *Hirondelle News Agency*, available at <<http://www.hirondellenews.com/icc/571-sudan/34148-20413-iccsudan--bensouda-calls-for-bashirs-arrest>> (Last Access: 13th August, 2013).

¹²¹³ *Ibid.*

stage. This is because the prosecutor can *choose* which cases will be dismissed, among worthy cases.

The first factor is ‘the gravity of the crime’. Of course, the crimes that were allegedly committed by the perpetrators are grave in nature, especially in the case of genocide. Given the severity of the crimes that have been committed in Darfur, and that the conflict in Darfur has spread to other areas resulting in the explosion of a new conflict in Blue Nile and Kordofan, it seems that the Prosecutor might not decline any case under this particular factor.¹²¹⁴ This is what the experience of other international tribunals have told us,¹²¹⁵ when all Prosecutors of those tribunals have fought all crimes that have severe gravity, in particular, genocide.¹²¹⁶ According to several reports, there is an indication that the alleged perpetrators are also responsible for emerging these new crimes.¹²¹⁷ In particular, the Sudanese government seems mainly responsible for these crimes, as much of the violence is under Sudanese control. Therefore, this particular factor is not qualified for ceasing any case, in particular the one directed against the President, as he was charged for the crime of genocide.

Before moving to the next two factors, which are worthy of a deeper analysis, I will move on to the third factor, as it seems also irrelevant to the consideration of the prosecutor. ‘The age or infirmity of the alleged perpetrator’ does not appear to be applicable to any case under the jurisdiction of the Court. There is no report or indication that the accused are so aged or infirm as to invoke the possibility of declining the prosecution. However, the next two factors might be taken into consideration by the prosecutor for the purposes of declining the prosecution of one or more cases in the Darfur situation.

¹²¹⁴ See *supra* 1107.

¹²¹⁵ Webb, *supra* n. 17, P. 328, stating that the Prosecutors of the ICTY and ICTR emphasized the importance of prosecuting serious crimes, where rape was considered as a war crimes, crimes against humanity, and even genocide.

¹²¹⁶ See generally, Chapter Two and Four of the thesis.

¹²¹⁷ *Supra* n. 1151.

‘The interest of victims’ is the most probable factor that can be evaluated, as a basis for declining the prosecution of one or more cases.¹²¹⁸ The use of a certain strategy of prosecution based on the interests of victims is well established under the jurisprudence of the ICTY. We explored in the last chapter, how Goldstone used the tactic of postponement of the indictment against *Milosevic*.¹²¹⁹ This criterion has a dual nature that enables the prosecutor either to insist on the prosecution or decline it. However, the absence of conditions, in which an effective criminal trial can be held, such as the lack or the unavailability of effective enforcement mechanisms, is a critical consideration to the situation of Darfur. This can be drawn from the position of most African states, Arab states, China, Russia, the AU, and the Arab League, who all have opposed the ICC Prosecutor’s strategy against the Sudanese president.¹²²⁰ This opposition has led those actors not to cooperate with the Court, in terms of arresting the fugitives. Even the SC, the body, which referred the Darfur situation to the Court, has not taken any effective step towards arresting or putting an end to the horrific violence in the region.¹²²¹ The Sudanese response to the Court activities has also resulted in causing more suffering to the victims when Khartoum’s government expelled nearly all the aid organisations.¹²²² Under all these circumstances, and the fact that the Court is toothless without any effective support from those actors, the interest of victims is at serious risk. As Giulio M. Gallarotti and Arik Y. Preis argue ‘ideals cannot alone impose justice in an anarchic world. History has taught us that while ideals may move the heart, it is only when ideals are backed by power that they become truly compelling.’¹²²³ Therefore, the question here is shall the Prosecutor decline any case under its

¹²¹⁸ Webb, *supra* n. 17, P. 329.

¹²¹⁹ See also Chapter Two of this thesis for more discussion about the strategy of Goldstone in this regard.

¹²²⁰ See the first section of this chapter.

¹²²¹ Amid Growing Brutality in Darfur, International Criminal Court Prosecutor Urges Security Council to Rethink Tactics for Arresting War Crime Suspects, *United Nations*, SC/11696, 7337th Meeting (AM) (12th December, 2012).

¹²²² See the first section of this chapter.

¹²²³ Giulio M. Gallarotti and Arik Y. Preis, Politics, International Justice, and the United States: Toward a Permanent International Criminal Court, *UCLA Journal of International Law and Foreign Affairs*, Vol. 4 (1999), P. 35.

jurisdiction based on these circumstances? Before we can answer this question, we need to explore the applicability of the fourth factor that is *closely* linked to the above factor.

The fourth factor is ‘the role of the alleged perpetrator’.¹²²⁴ This criterion also has a dual nature that can be either reasoned for proceeding with the prosecution or ceasing it. By a way of comparison, it seems that the three main cases under the ICTY jurisdiction have much in common with their counterparts in the Darfur situation. In both situations, there are one President and two main and senior leaders who all were charged by the tribunals (*Milosovic, Mladic, Karadzic vs Al-Bashir, Harun, Hussein*). Goldstone delivered great lessons that Moreno-Ocampo should have learned with respect to what extent Goldstone evaluated the importance of the role of those perpetrators to the stability and peace at the time of the given region. Whilst Goldstone played a significant strategy of prosecution by indicting some and delaying the prosecution of others depending on the role of those perpetrators and the time of issuing the indictments, Moreno-Ocampo was more concerned about the record of his Office.¹²²⁵ Obviously, the role of the Sudanese President in the current conflict is extremely significant, as the whole situation is under his total control. In contrast, it seems also that the other perpetrators do not hold such a role, as they are under the control of the President. This political consideration suggests that the Prosecutor should be careful in seeking any arrest warrant against him, in particular that most of the aforementioned actors are against the indictment. The Prosecutor should have at least followed the same strategy that Goldstone used with regard to those major perpetrators. He should have, for example, delayed the pursuance for the arrest warrant or, at least, sealed the arrest warrant. However, as the Prosecutor

¹²²⁴ See Webb, *supra* n. 17, P. 330. Also see *supra* n. 30, P. 16.

¹²²⁵ Some Sudanese analysts criticised Moreno-Ocampo’s zealous pursuit of indicting the biggest fish in Sudan, focusing on the arrogant way the Prosecutor dealt with in relation to the President of Sudan case, see Flint and Waal, *supra* n. 634.

proceeded with the prosecution, thus the important question is what should the new Prosecutor do?

As explained above, the interests of victims are still dramatically at risk. Two different trends are shaping the situation in Darfur. The first is some political factors that conclude the necessity of declining the prosecution against the President. The second opposes and renders the first trend inutile. On the first side of the picture, the President of Sudan is still playing a significant role in all atrocities that are still taking place in the region. The level of violence is not only increasing, but also spreading to engage new areas in the conflict. There is a common trend that calls for the deferral of the situation of Darfur for one year, as many international and regional organisations oppose the particular decision issued against the President. All these political considerations refer to the necessity of withdrawing the arrest warrant issued against the President, as a first good will for the start of effective peace talks. However, on the other side of the conflict, no serious peace agreement has taken place. Instead, Khartoum's government is still playing a significant role in breaking any peace deal. The Sudanese government does not provide genuine willingness and ability to conduct a fair trial against the alleged perpetrators either. The conflict is getting extremely complex, as too many groups are engaged in the war and that makes reaching a certain peace deal impossible.¹²²⁶ How should the Prosecutor, then, respond?

Three possible scenarios are available for the Darfur situation: insisting on the prosecution, declining a certain case under Article 53 (2) (c), and the Security Council's deferral under Article 16. Only the two first scenarios are relevant to this discussion. Based on the idea that the Prosecutor, by virtue of Article 53, can play several roles and deliver several

¹²²⁶ To understand the complex war of Darfur, see Ahmad Sikainga, *The World's Worst Humanitarian Crisis': Understanding the Darfur Conflict*, *Origins*, Vol. 2, Issue: 5 (February, 2009), available at <<http://origins.osu.edu/article/worlds-worst-humanitarian-crisis-understanding-darfur-conflict>> (Last Access: 12th September, 2015).

values, it would be desirable that the Prosecutor should give due considerations to the fact that the conflict is still ongoing. As Gosnell argues, the Prosecutor should be aware that ‘[d]eciding which strategy to follow -- and when to switch from one to the other -- is an intensely political decision.’¹²²⁷ He, further, adds that ‘once the decision is made to go public, the Prosecutor necessarily becomes engaged in a political strategy ... He becomes a political actor.’¹²²⁸ This opinion supports the idea that the Prosecutor is advised to consider political considerations, which accompany any situation. And the Prosecutor should not isolate herself from those factors. Therefore, the Prosecutor, based on her legal power situated in Article 53, may simply suspend the prosecution initiated only against the President. The Prosecutor, then, once the situation becomes conducive for the prosecution; can again reopen the prosecution against him. This is exactly what the American Non-Governmental Organisation suggested by stating that the prosecutor can suspend a prosecution, and, then reopen it ‘once certain stability in a peace agreement is reached or other political problems are eliminated.’¹²²⁹

However, as there is no indication on the ground that a genuine peace deal is in place, or will be in place in the foreseeable future, the Prosecutor is still able to decline the prosecution. The hybrid tribunal that was recommended by the AU Panel is another possible alternative to which the Prosecutor can defer. If this alternative is what victims need, then the Prosecutor should defer to such an alternative, even if the tribunal adds or removes some new names to the trial. However, given the fact that the Prosecutor has not used her discretion to decline an investigation or prosecution based on ‘the interests of justice’, it is highly likely that she will not reverse the decision of prosecution.

¹²²⁷ Gosnell, *supra* n. 1092, P. 845.

¹²²⁸ *Ibid.*

¹²²⁹ John Washburn and Wasana Punyasena, *Interests of Justice Proposals, Coalition for the International Criminal Court* (1st May, 2005), available at <http://www.iccnw.org/documents/InterestsofJustice_WashburnandPunyasena_May05.pdf>.

In short, the flexible strategy of prosecution, which considers the political repercussions/effects, aimed at *achieving justice*, through factoring them within the decision-making process, can help to promote the perception of the Court in the eyes of those who perceive the Court being illegitimate. The above discussion of what the Prosecutor should have done and how the new Prosecutor should respond in the context of both considering either peace process or operating Article 53 of 'interests of justice' have shown the above short conclusion. By considering the accompanying circumstances (political accounts) of the Darfur situation via following a certain strategy of prosecution (sealing arrest warrants or the deferral to the local mechanism) would not lead those who are against the Prosecutor to perceive the Court as an illegitimate Court. Further, if the Prosecutor considered the regional demands that seek a hybrid tribunal and a truth and reconciliation commission (normative and concrete demands), the Court would again obtain more credit from the relevant audience. The calculation strategy also plays a vital role in easing or removing the amount of criticism that the prosecutor faces when using her discretion.

CONCLUSION

This thesis examined and analysed the exercise of discretion by the ICC Prosecutor. In particular, it focused on the places where the ICC Prosecutor exercised discretion in its two senses. This analysis was preceded by considering the historical and then theoretical framework of the concept of discretion. It aimed to discover the potential scope of discretion that the ICC Prosecutor may exercise. For this purpose, the thesis focused on the analysis of one legal requirement, namely ‘sufficient gravity’ – an admissible criterion – and the term ‘the interests of justice’, which provides the prosecutor with prosecutorial discretion. Having applied these historical and theoretical frameworks to the work of the Prosecutor, it was found that the Prosecutor has exercised a strong sense of discretion when interpreting the legal requirements of initiating an investigation or proceeding with a case. In addition to the conventional sense of discretion: prosecutorial discretion that can be exercised by the virtue of the Article 53 ‘interests of justice’, it was explored that the Prosecutor has also used a wide range of legal interpretive discretion to interpret ‘sufficient gravity’. Whilst the first sense of discretion is a power the Prosecutor can claim, the second sense of discretion is not a power and has been, in effect, exercised by the Prosecutor due to the strong indeterminate character of the term ‘sufficient gravity’, the lack of a definition of the term, and the lack of a consistent method and factors for the assessment of the term.

The exercise of discretion is analysed and discussed in the context of the common charge of politicisation of the work of the Prosecutor. It has been increasingly common for commentators, authors, officials, and other representatives of international bodies to discuss or, at least, make reference to the problem of politicisation, addressing several issues, such as the accusation of the Court as biased against African states. In so doing, the common focus was extensively about the idea of selective justice that was exercised by the Prosecutor. Selectivity here is seen in the exercise of prosecutorial discretion. The exercise of selectivity let those commentators and authors criticise the Prosecutor as politically-driven when making her

decision, or biased against Africa. On her part, the ICC Prosecutor also has pushed the Court to the arena of international politics, however, they also strongly left her Office with an impression of being really biased or politically-driven. In particular, the current situations that are under the jurisdiction of the Court are all from African continent.

Although these criticisms have merits, however, in practice, the Prosecutor so far has made no decision on the basis of prosecutorial discretion to select the current *situations*. The African situations have been selected on the basis of the satisfaction of the legal requirements, but not prosecutorial discretion. Similarly, the situations that were rejected were dismissed on the basis of the non-satisfaction of the legal requirements. Accordingly, the focus of the current literature on the examination of the charges of politicisation, derived from the exercise of selective justice, in fact, informs us little, as technically the Prosecutor has not made any situational decision so far on the basis of prosecutorial discretion. For this reason, this study sought a different approach to analyse why the Prosecutor receives the charges of politisation, derived from the exercise of discretion. The thesis established that the problem may lie with the hidden sense of discretion that has been *effectively* and *widely* exercised by the Prosecutor when interpreting the legal requirements for initiating investigations or prosecuting cases. The thesis focused, in particular, on the term ‘sufficient gravity’ that constitutes the key legal admissible criterion for initiating investigations or prosecuting cases. The anti-African court and bias charges may result from this wide and strong sense of discretion that has been exercised in places where legal judgments are required instead of discretion. ‘Sufficient gravity’ is a legal admissible criterion and is supposed to be applied through a clear and consistent manner.

The thesis examined the concept of gravity in its legal and relative senses, and also ‘the interests of justice’ test. Chapter Four of this thesis examined the term ‘sufficient gravity’ – the legal criterion under Article 17. It also examined relative gravity as a consideration that the

prosecutor may take into account, when examining ‘the interests of justice’. The chapter established that the Prosecutor, in effect, exercised a broad degree of discretion when interpreting the term ‘sufficient gravity’, as an admissible requirement. This requirement is legal and is supposed to be applied in a more determined way. Contrary to the majority of the literature, it was found that the term ‘sufficient gravity’ has no absolute sense, at least, when looking at the way by which the Prosecutor applied it. The Prosecutor exercised a broad discretion to find out different interpretations for the meaning of ‘sufficient gravity’ that all led the Court to target only the African countries. The open-ended way of the interpretation of this crucial term may construe why the Court has been harshly criticised of bias.

However, the Court seems to cut off the broad leeway in its recent decision in the Comoros situation in the context of a referred situation.¹²³⁰ The Court also endorsed a low level for the assessment of ‘sufficient gravity’, as the Appeal Chamber and the Pre-Trial Chamber decided in the *Lubanga* and *Ntaganda* cases and the Comoros situations respectively.¹²³¹ Therefore, in examining the application of gravity by the Prosecutor, several findings and recommendations are found.

First, this study found that the strategy of the prosecutor in relation to the evaluation of legal gravity is not consistent. The Prosecutor has used two different methods to interpret ‘sufficient gravity’, 1- the comparative method, and 2- the judgment method (threshold). In using these two methods, the Prosecutor took account of a wide range of factorial analysis to determine the issue of ‘sufficient gravity’. The Prosecutor was picking from scale, impact, manner of commission, and nature of crimes. For example, in using the comparative approach, the Prosecutor heavily depended on the quantitative measure, namely the number of victims. In using the threshold judgment, the Prosecutor sometimes used one factor to reject a situation,

¹²³⁰ Comoros, Pre-Trial Chamber July, 2015, *supra* n. 621, Para. 14.

¹²³¹ See Chapter Four of this thesis for more information.

two factors to satisfy ‘sufficient gravity’, and, on another occasion, she recalled four of them jointly to conclude the threshold gravity. In using these methods and factors, it was shown that the Prosecutor has given weight to several extra-legal considerations, such as the limited capacity of the Court, and also political considerations.

This state of affairs may explain why the ICC Prosecutor faces the accusation of politicisation and bias. It also may elucidate how the ICC Prosecutor focused the direction of the Court to only African states. On this basis, the thesis strongly recommends that the ICC Prosecutor follows a more consistent application of the term ‘sufficient gravity’. The wide range of arbitrariness in using different methods and factors to interpret any legal requirement, including ‘sufficient gravity’ has changed the legal status of how this legal requirement should be interpreted. It makes it as if the Prosecutor was exercising selective justice to choose among legal, but equally valid and admissible situations. Therefore, this thesis recommends further research to be done for addressing the question of the consistent application of ‘sufficient gravity’. This in turn may raise the same issues with the legal requirements for initiating investigations or prosecuting cases (the jurisdictional requirements).

Second, and according to the above finding, it was established that the insistent use of the quantity measure to evaluate gravity does not only undermine the legitimacy of the Court, but also the global character of the Court. It also restricted the reach of the Court to only big situations and cases instead the gravest ones. Thereafter, the thesis recommends the OTP adopt a relative meaning of the term scale instead of using an absolute one. The relative meaning of scale provides that the OTP should conclude the percentage of ‘the scale of the crime’ according to the total number of the given society itself, compared to the total population of the country, and not to the other cases that might involve thousands of incidents and crimes.

This suggestion is important, as it provides an opportunity for minorities to be protected by the Court, as the situation with the Kessab case.¹²³²

Third, the OTP, followed by the Court's adoption, developed four factors for the assessment of gravity in its relative and legal senses: the scale, manner, commission, and nature of the crimes. These also were considered at the stage of investigation and also prosecution.

Four, in relation to the question of the scope of discretion, this thesis provides the following findings.

1- In terms of referrals, the prosecutor has no discretion – whether prosecutorial discretion or legal interpretive discretion – to initiate admissible referred situations, according to the Comoros's judgement.¹²³³ According to the Comoros's judgment, the prosecutor can exercise prosecutorial discretion only at the stage of the assessment of 'the interests of justice'.¹²³⁴ In particular, gravity in its relative sense under the Article 53 'interests of justice' provisions can be considered by the prosecutor when exercising prosecutorial discretion. Before the PTC's decision in the Comoros situation, it was established and emphasised that the prosecutor in effect exercised a broad discretion, which I called legal interpretive discretion. 2- In relation to the prosecutor's *proprio motu* power, the extent of prosecutorial discretion the prosecutor can exercise is not clear. Article 15 (1) clearly authorises the prosecutor to exercise prosecutorial discretion. However, paragraph (3) of the same Article contains an obligatory language enforcing the prosecutor to proceed with the investigation. The Court has not made any clear judgment on this question, and the matter is still debated. 3- With respect to the selection of admissible cases, the Statute and the Court are silent. However, there is an

¹²³² See *supra* n. 854. And see, the discussion of this case in Chapter Four.

¹²³³ Comoros, Pre-Trial Chamber July, 2015, *supra* n. 621, Para. 14.

¹²³⁴ *Ibid*, Para. 14.

explicit and common consensus among commentators and authors that the prosecutor has an implicit power to reject any case on the basis of ‘the interests of justice’, in particular ‘relative gravity’, whatever the trigger mechanism is. The OTP has just published a new policy document on the selection of cases and confirmed that it has broad prosecutorial discretion when selecting among legally worthy admissible cases.¹²³⁵ The paper particularly sets three criteria for this selection, namely ‘the gravity of the crimes’, ‘the degree of the responsibility of the alleged perpetrators’, and ‘the potential charges’.¹²³⁶

Five, it has been established throughout the thesis that the prosecutor sits at the critical juncture of the efficiency and sufficiency of the Court at furthering its *institutional goals*. Whilst the prosecutor is required to maintain the sufficiency of the Court as a legal body, which works independently without concrete prescriptions, she is required as well to make the work of the Court efficient and capable of achieving its institutional aims. Whilst the first stands for the value of independence, the latter refers to the value of discretion. It is two sides of the same coin, as was emphasized throughout the thesis. The strict commitment to the legal rules does not necessarily render the work of the Court efficient. It was established throughout this thesis that the ICC is not yet an ideal resort to address all sorts of atrocities, and that its ability to deliver justice is considerably limited. There are often legitimate political questions that are necessary for making the work of the Court efficient at furthering its institutional goals. We have seen how several extra-legal factors and political circumstances may require the prosecutor to take into account within her decision-making process to render the work of the Court more efficient. In discussing this scenario, the thesis emphasises that these set of

¹²³⁵ Draft Policy Paper on Case Selection and Prioritisation 2016, Para. 4.

¹²³⁶ *Ibid*, Paras. 33- 45.

considerations to be taken into account only at the stage of exercising prosecutorial discretion, but not at the stage of assessing the legal thresholds, including ‘sufficient gravity’.

The thesis strongly recommends that these set of considerations are vital to the success of the Court in furthering its institutional aims, including justice, peace and security, and it recommends the OTP to follow them, given the current circumstances in which the Court works. The decision to initiate investigations or proceed with prosecutions are not only contingent on the legal criteria of the Statute. There are always extra-legal factors and political circumstances necessary for the exercise of meaningful prosecutorial missions.¹²³⁷ The engagement of the prosecutor in the particularities of situations and cases is very important for enforcing meaningful justice that the Court itself may not be able to do. As Goldston asserts, the consideration of extra-legal factors is essential for the ‘viability’, ‘efficacy’, ‘efficiency’, and ‘independence’ of the Court.¹²³⁸ Gosnell also states that the consideration of these political circumstances within the decision making-process is because ‘these kinds of political considerations are intrinsic to international justice.’¹²³⁹

The policy of denial rhetoric has mainly prevented the Prosecutor from delivering justice on several occasions. Applying the law in its rigid formula has not helped the Prosecutor to do meaningful justice in Sudan or Uganda. Several pragmatic considerations in these situations required the prosecutor to use her discretion to stop the Court’s proceedings as an option and allow for other alternatives to replace the Court’s approach. The existence of these two poles established that the ICC is not yet an ideal approach to deal with all atrocities.¹²⁴⁰ After one decade, most situations under the ICC jurisdiction are still experiencing mass

¹²³⁷ See generally, Brubacher, *supra* n. 22.

¹²³⁸ Goldston, *supra* n. 18, P. 402.

¹²³⁹ Gosnell, *supra* n. 1092, P. 845.

¹²⁴⁰ *Supra* n. 48, arguing that the ICC is not ideal institution to deliver justice all the time and to all potential situations.

violation of human rights. Some conflicts are still in progress.¹²⁴¹ The most wanted ones are still at large.¹²⁴² The peace-related problems in Sudan, Uganda, and Kenya are, to a large extent, impeded by the policy of the Prosecutor.

Based on above recommendations, it was also found that contemporary international prosecutors have more roles to deliver. The development of the international criminal law and the jurisprudence of international prosecutors all contributed to developing the role of an international prosecutor, as a new international player within the international legal arena and international politics. For instance, when the prosecutor stops the criminal proceedings, using her discretionary power, based on ‘the interests of justice’, the prosecutor, in fact, may be addressing other values, such as stability or peace-related considerations. This process confesses the prosecutor’s new roles to play alongside with her main mandate in delivering justice. Accordingly, this thesis also establishes that the current international Prosecutor can/should exercise a multifunction of roles in order to promote those values. With the establishment of the ICC, we have begun to see a dramatic development in the idea of the prosecution in terms of both the legal level and practical level. It is a multi-functional prosecution. The creation of the ICC witnessed a formal emergence of a new sense of prosecution, where the role of the prosecutor has been formally widened, accordingly. Article 53 was a product of the historical development of the exercise of the discretionary power by the previous prosecutors. Although this form of power was not clear enough either theoretically or practically in the work of the Military Tribunals,¹²⁴³ it was clear enough in the practice of the SC Tribunals.¹²⁴⁴ The thesis showed several times how Goldstone used his discretionary

¹²⁴¹ The CAR, DRC, Darfur, Libya, and Côte d'Ivoire are for example still facing conflicts.

¹²⁴² See the official website of the ICC about the current arrested perpetrators, at <<https://www.icc-cpi.int/>>.

¹²⁴³ I analysed several positions taken by the international Prosecutors of the Nuremberg and Tokyo International Military Tribunals, and found that the consideration of ‘the interests of justice’ was considered by those Prosecutors, before taking a certain decision. See generally the second part of Chapter Two, and Chapter Five.

¹²⁴⁴ See Chapter Two of this thesis.

power to consider the interests of justice before making his decisions.¹²⁴⁵ With the arrival of the ICC, we have begun to see that these developments have been embedded in the law.

However, in considering the political considerations, the prosecutor must aim at achieving justice. Chapter Five established, for example, that the consideration of peace processes (a political influence) on the basis of ‘the interests of justice’ can be accounted for only when such processes are associated with some sort of justice mechanisms. This is often the case when international justice of the ICC is not attainable due to some obstacles, then other justice mechanisms might be more meaningful and needed. Chapter Three offered a structured approach, which aimed at providing a framework in which the reference to political influences/repercussion may be justified. The use of the *apologist* considerations as a tool to achieve the *utopian* end, which is justice, in its broad sense, is the approach that may legitimately help justify the consideration of political factors. As the prosecutor is expected to be independent, respecting the rule of law when exercising her discretion, she is also expected to be flexible, as discretion is in nature a power that stands outside the law. The prosecutor may need to give weight to considerations that are not warranted in law. The ignorance of one of these premises posed the prosecutor in the dyadic criticisms.

The long strife between the advocate of bringing criminal justice to perpetrators at any cost and those who call for the abandonment of criminal justice in favor of peace may just end with neither justice nor peace delivered to both victims and perpetrators. The tension between these two values is still yet to be sorted out. As Arbour raises, ‘[w]e all repeat the mantra that there can be no lasting peace without justice; and that’s true enough. But I don’t think that we have yet resolved the inevitable tensions between the two in a workable fashion.’¹²⁴⁶ This

¹²⁴⁵ See generally, *supra* n. 273.

¹²⁴⁶ Louise Arbour, *Doctrines Derailed?: Internationalism's Uncertain Future*, *International Crisis Group* (28th October, 2013), the Speech is available at you tube: <<https://www.youtube.com/watch?v=EYW6sWp6hCM>> (Last Access: 15th May, 2016).

requires researchers to examine the potential impacts of the Court in conflicts where there is tension between the achievement of justice and maintaining peace. Kersten emphasises that '[w]hat we need are more analytically nuanced and empirically rich accounts of how the ICC affects the conflicts in which it intervenes—as well as how it doesn't.'¹²⁴⁷ However, the lack of several essential tools for the successful achievement of justice by the Court should not be ignored. The impotent enforcement mechanisms that the Court currently holds make the ability of the Court as a main international protector of victims highly questionable, in particular that the Court has achieved little since its operation in 2002. Of 23 cases, only 6 indictees were brought to the Court, where most of them voluntarily appeared.¹²⁴⁸ Additionally, the strong political effects that surround the work of the ICC Prosecutor also makes the ICC justice difficult to attain. For these considerations, the above suggested approach offers a moderate solution where both values may be attained. Giving a pass for the peace process, associated with another mechanism of justice, including the local one through the use of prosecutorial discretion can be one way to end this dilemma. Chapter Five suggests, having presented the Uganda situation, that any sort of justice as long as the civil society and victims accept it, should be respected by the Prosecutor, when the ICC is not able to achieve justice and constitutes an obstacle for achieving peace.

This is not to say that the ICC should abandon its proceedings whenever its ability to deliver its own justice is not possible. In fact, based on the practice of the Prosecutors of the ad hoc Tribunals, examined in Chapter Two, the ICC prosecutor is required to analytically and carefully examine potential effects and ability of the Court, before intervening in a certain situation. Although this is not an easy task, as the ICC prosecutor cannot predict every single

¹²⁴⁷ Mark Kersten, The ICC and its Impact: more Known Unknowns, *Open Democracy* (5th November, 2014), available at <<https://www.opendemocracy.net/openglobalrights/mark-kersten/icc-and-its-impact-more-known-unknowns>> (Last Access: 15th May, 2016).

¹²⁴⁸ See the main page of the ICC website for more information and update.

circumstance of the future, however, there are still different strategies that the prosecutor can follow in case it appears that the Court's approach is not workable. The strategy of delaying an investigatory or prosecutorial decision is one of the most effective, as we have seen with regard to the practice of the ICTY. We made a distinction between the strategy of the ICTY Prosecutor and the ICC Prosecutor in relation to the decision of indicting Milosevic and Al-Bashir, respectively, where the first was successfully brought to the Tribunal, whilst Al-Bashir remains at large. In the Darfur situation, Moreno-Ocampo was completely utopian when he made a decision of prosecuting head of Sudan: Omer Al-Bashir, because he did not give any attention to his role and power. Al-Bashir is still controlling the whole war that is taking place in the region. The results of the exercise of this strategy of prosecution were the blatant failure of the OTP to bring any alleged perpetrator to the Court, including the President, the refusal of many of African states, including those who are parties to the ICC, to cooperate with the Court to arrest Al-Bashir or to promote the fragile peace negotiations, and to put an end to humanitarian tragedy in Darfur. On the other hand, the Prosecutor of the ICTY did not initially make a decision against Milosevic, although he was responsible for many atrocities. The Prosecutor instead took several pragmatic considerations such as the fact that Milosevic was needed for the peace process at the time, and more importantly his power and role. However, four years later, when new pragmatic considerations emerged, such as the fact that the NATO countries were ready to arrest Milosevic and that was for political reasons, also the fact that he was not needed for any peace process, and the indictment decision would not destabilise the region, the prosecutor made a decision to indict him. The outcomes of that strategy were arresting Milosevic, relatively decreasing the level of violence, and bringing justice to victims. Through the exercise of prosecutorial discretion, allowing enough time to build a strong case against a high ranking leader, by indicting lower indictees such as Karadzic and Mladic, and the others facilitated and paved the way for the Prosecutor to make the biggest decision. The ICC

Prosecutor did not follow such a strategy and did not give any attention to the peculiarities of the situation of Darfur and the potential impacts that may result from indicting the most high-ranking official in Sudan – President Al-Bashir – in a rushed way. This simply ended with a zero achievement in Sudan.

Therefore, the exercise of prosecutorial discretion offers the Prosecutor different options to get the most of her prosecution. The thesis has suggested that the consideration of the political peculiarities of situations and cases alongside the ability of the Court to deliver its justice would allow the ICC prosecutor to exploit more effectively the available resources of the Court in a way that allows a certain sort of justice to take place and also not to waste the Court's resources for nothing. It was established several times throughout the thesis that the main rationale of the exercise of discretion is to be aware of peculiarities of situations and cases.¹²⁴⁹ Peter Cane and Joanne Conaghan also hold that prosecutorial discretion 'can individualize the implementation of the law, softening the harshness or injustices that sometimes arise from rules dispassionately applied.'¹²⁵⁰ The careful consideration of the ability of the Court to bring justice to all sides to a certain conflict is important, as the Court has only thought about justice to one side of several conflicts, such as Uganda. In fact, such intervention, even if successfully completed, would jeopardise the perception of the Court and make the Prosecutor biased. Justice cannot only be delivered to one side of the conflict. We have seen that there were several alternatives suggested by victims in Uganda that were acceptable to all sides to the conflict. The ICC Statute and Rules of Procedure and Evidence emphasised the importance of the participation of victims in proceedings. Explicitly, Article 53 requires the prosecutor to consider the voices of victims before proceeding with her investigation or prosecution. This particular factor is highly crucial to changing the type of the decision the

¹²⁴⁹ Nsereko, *supra* n. 13, P. 125.

¹²⁵⁰ Peter Cane and Joanne Conaghan, *The New Oxford Companion to Law* (Oxford, Oxford University Press, 2008), P. 330.

prosecutor may make. If the local voices of a certain conflict favor a certain form of alternative other than the ICC, then the prosecutor is highly likely required to respect this particular demand. The Uganda situation has shown a typical example, where the majority of voices favored the peace demands ahead of justice. Even more to the point, the majority of Ugandans sought the local justice mechanism to replace the ICC. In such a scenario, the Prosecutor should have stepped back and allowed for the local alternatives to take place.

Additionally, the prosecutor is required to be transparent and explain to the public that the aim of making such decisions is to achieve justice and not to make any political outcomes. Although the OTP is publishing more policy documents explaining how its decisions are formulated, it is indeed the decision itself that should be transparent.

The thesis also broadly draws from Koskeniemi and Robinson's thought to identify why the Prosecutor faces criticisms when making any decision. Based on the analysis of the Prosecutor's exercise of her powers in the shadow of Koskeniemi's thinking, it was found that the Prosecutor is in a persistent criticism whatever position she takes. Each position is vulnerable to two opposite criticisms and both raise one common charge.¹²⁵¹ It is a charge of politicisation. The prosecutor is either too *utopian* in the sense that her decision is too far from the interests and policies of states. It is just not supported by any political force and, therefore, is not capable of being enforceable. Or, she is too *apologist* in the sense that her decision is too connected to the latter's policies and interests. It is just ignoring the higher normative demand that the decision is supposed to deliver. It is an unprincipled decision and appears to lack legitimacy. The fact that the prosecutor appears to be in such a persistent criticism does not reduce at all the importance, or the vital role of the ICC. International criminal law and particularly the Statute of the ICC are usually based on contradictory assignments that enable

¹²⁵¹ *Supra* n. 72, Pp. 16, 67, and 70.

observers easily to find a gap from which they attack any single position the prosecutor takes, based on their own legal or political orientations.¹²⁵² Any potential failure of the prosecutor, therefore, to respond to every side of the argument does not mean that the prosecutor is in a crisis. The persistent criticism is a healthy phenomenon and does not nullify the good mission that the Court, and, in particular, the prosecutor has conducted so far. On the contrary, the dyadic criticisms helped us to find why the prosecutor faces criticisms, and also pushed us to look for solutions for some dyadic arguments. It is true that some dyadicisms cannot be resolved due to the strong legal arguments that each side uses, however, there has often been means to reduce others.

The ICC is the most important achievement in international criminal justice, where bringing perpetrators to justice and ending the era of impunity are the two critical purposes this Court seeks to deliver. However, it is yet an emerging institution, the creators of the Court could not build the Court on a solid ground. There are still several essential tools, without which the success of the Court in achieving the above institutional goals remains in doubt. Until the international community resolves these basic problems, the relevance of the political peculiarities of situations and cases, the achievement of justice through different mechanisms, and exercising a meaningful prosecution will remain decisive for achieving these goals. The tension between justice and peace would be better solved by a means of calculation not subtraction. The ICC prosecutor is the one who has a critical role to play in order to cover these deficiencies.

¹²⁵² For example and in the context of this thesis, Chapter Six showed that the value of peace could be under the confine of the values that are protected by Article 53. In addition, the Preamble of the Statute asserts that peace is one goal the Court seeks to achieve. Justice, however, is the fundamental aim of the Court. In practice, these two values may often contradict each other the matter that allows the observers open opposite criticisms and legal arguments to defend about one of these values, in case if the prosecutor fails to achieve both aims together when making a certain decision, as the situation was in Sudan and Uganda. See more discussion about this issue in Chapters Five and Six. See generally, Cassese, *supra* 958.

APPENDIX

Here are some examples of the questions that were used to interview staff.

- Do not you think that the Prosecutor considers concrete demands, including those that have political dimensions when evaluating the discretionary criteria (relative gravity and ‘interests of justice’)?
- Under the current accusation of the Court of being an African Court, do you think that the geographical criterion should be a relevant factor for the assessment of the gravity threshold? If so, would not such criterion maximize the effectiveness of the Court as well as the reach of it?
- Given the lack of effective enforcements mechanisms at the international level, would the OTP reconsider the indictments of Sudan’s President, as this indictment increased the level of the violence and caused more human rights violations? Would Article 53 be applicable to such a case?
- In other words, does the Prosecutor make any link between the political environment, where the Court works and her strategy of prosecution to deliver justice?

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UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17th May 2002), 25th May 1993.

Vienna Convention on the Law of Treaties, opened for signature on 23rd May 1969, art 34, 35 and 38 (entered into force on 27th January 1980).