

# INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

## ‘Interests of justice’: Defining the scope of Prosecutorial discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court

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### Abstract

The International Criminal Court (ICC) was established with the aim of prosecuting individuals for the gravest crimes of concern to the international community. Yet some provisions of its Statute (the Rome Statute) recognize the need for temporarily setting aside criminal investigations or prosecutions in favour of different considerations. Two of these provisions are Article 53(1)(c) and (2)(c) of the Statute. They allow the Prosecutor of the Court to use his or her discretion in deciding not to initiate an investigation or a prosecution in the ‘interests of justice’. Nonetheless, the ambiguity of this phrase, coupled with an absent definition, have given rise to a polarized debate about its meaning and the Prosecutor’s ensuing margin of discretion: some consider matters of peace and security and alternative justice mechanisms as possible ‘interests of justice’, while others exclude them. Among those adopting the latter view is the ICC’s Office of the Prosecutor (OTP), as can be inferred from a 2007 Policy Paper on the Interests of Justice and a 2013 Policy Paper on Preliminary Examinations, which continue to be upheld by the Office. Against this backdrop and amid new developments at the ICC which call into question the OTP’s position, the purpose of this article is to develop a comprehensive interpretation of Article 53(1)(c) and (2)(c) of the Rome Statute, using all the interpretative tools provided by Articles 31 to 33 of the Vienna Convention on the Law of Treaties.

### Keywords

interests of justice; International Criminal Court; peace and justice; prosecutorial discretion

## I. INTRODUCTION

The ICC was established with the aim of prosecuting individuals for the gravest crimes of concern to the international community.<sup>1</sup> Yet some provisions of the Rome Statute recognize the need for temporarily setting aside criminal investigations or prosecutions in favour of different considerations. Two of these provisions are Article 53(1)(c) and (2)(c) of the Statute. They allow the Prosecutor of the Court to use his

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<sup>1</sup> See paras. 4 and 5 of the Rome Statute (ICCSt.) Preamble.

or her discretion in deciding not to initiate an investigation or a prosecution in the ‘interests of justice’. Nonetheless, the ambiguity of this phrase, coupled with an absent definition,<sup>2</sup> have given rise to an important debate about its meaning and the ensuing scope of Prosecutorial discretion.

On the one hand, some commentators argue that the phrase ‘interests of justice’ has a broad meaning, which allows the Prosecutor to decide not to pursue a criminal investigation or prosecution based on considerations *other than* those strictly related to the criminal proceedings themselves (such as fair trial rights or inherent budgetary limitations) and the factors explicitly listed in Article 53(1)(c) and (2)(c).<sup>3</sup> Those considerations could potentially include alternative forms of justice (such as truth and reconciliation commissions, reparations, etc.), amnesties or pardons, and matters of peace and security. This view assumes that criminal justice might sometimes jeopardize peace.<sup>4</sup>

Conversely, other authors claim that the phrase ‘interests of justice’ ought to have a narrow meaning.<sup>5</sup> As such, it could only comprise procedural considerations and the criteria which are explicitly listed in Article 53(1)(c) (the gravity of the crime and the interests of victims) and (2)(c) (the gravity of the crime, the interests of victims, the age or infirmity of the accused, and his or her role in the alleged crime). Thus, under this view, investigations or prosecutions could only be deferred for very limited purposes, which would *not* include alternative forms of justice, amnesties or peace and security considerations. The main assumption underlying this approach is that there can be no lasting peace without justice and, more precisely, without criminal justice in the traditional sense of retribution.<sup>6</sup> This view is shared by the ICC’s Office of the Prosecutor (OTP), as can be inferred from a Policy Paper on the

<sup>2</sup> M. Brubacher, ‘The development of prosecutorial discretion in international criminal courts’, in E. Hughes, W.A. Schabas and R. Thakur (eds.), *Atrocities and International Accountability* (2007), 142 at 149, 150; W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), at 660, 661–3; A. O’Shea, *Amnesty for Crime in International Law and Practice* (2002), at 317.

<sup>3</sup> See, *inter alia*, D. Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’, (2003) 14 *EJIL* 481, at 493–8; K.A. Rodman, ‘Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court’, (2009) 22 *LJIL* 99; M.R. Brubacher, ‘Prosecutorial Discretion within the International Criminal Court’, (2004) 2 *JICJ* 71, at 81, 82; Schabas, *supra* note 2, at 655–71; P. Webb, ‘The ICC Prosecutor’s Discretion Not to Proceed in the “Interests of Justice”’, (2005) 50 *CLQ* 305, at 335, 336–8; L.M. Keller, ‘Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms’, (2008) 23 *Connecticut Journal of International Law* 209, at 239, 246–51; Y.A. M’Boge, ‘In the interests of peace and the interests of justice’, in N. Quéniévet and S. Shah-Davis (eds.), *International Law and Armed Conflict: Challenges in the 21st Century* (2010), at 368, 378, 379; M.P. Scharf, ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’, (1999) 32 *Cornell International Law Journal* 507, at 524.

<sup>4</sup> T.H. Clark, ‘The Prosecutor of the International Criminal Court, Amnesties, and the “Interests of Justice”: Striking a Delicate Balance’, (2005) 4 *Washington University Global Studies Law Review* 389, at 390; J.N. Clark, ‘Peace, Justice and the International Criminal Court Limitations and Possibilities’, (2011) 9 *JICJ* 521, at 541–3.

<sup>5</sup> See, *inter alia*, J.D. Ohlin, ‘Peace, Security and Prosecutorial Discretion’, in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (2009), at 187–208; Human Rights Watch, Policy Paper: The Meaning of ‘the Interests of Justice’ in Article 53 of the Rome Statute (2005); M. Macpherson, Open Letter to the Chief Prosecutor of the International Criminal Court: Comments on the concept of the interests of justice, Amnesty International, 17 June 2005, IOR 40/023/2005; C. Gallavin, ‘Article 53 of The Rome Statute of The International Criminal Court: In the Interests of Justice?’, (2003) 14 *King’s College Law Journal* 179, at 193–7; D. Đukic, ‘Transitional justice and the International Criminal Court – in “the interests of justice”?’, (2007) 89 *International Review of the Red Cross* 691, at 716.

<sup>6</sup> J.N. Clark, *supra* note 4, at 539–40; M’Boge, *supra* note 3, at 376.

Interests of Justice issued in September 2007<sup>7</sup> and confirmed by a 2013 Policy Paper on Preliminary Examinations.<sup>8</sup>

Although it has been a while since these documents were issued, the view of the OTP does not seem to have changed amid new developments at the ICC.<sup>9</sup> In particular, the recent decision of the Prosecutor to suspend active investigations in the Kenya II situation, due to the absence of state co-operation,<sup>10</sup> appeared, to many, as a typical example of an 'interests of justice' assessment.<sup>11</sup> Nonetheless, the OTP strongly denied having made such an assessment and reiterated the position stated in the Papers.<sup>12</sup> Very recently, the OTP has adopted a Policy Paper on Case Selection and Prioritisation, in which it explicitly reaffirms the views of the 2007 and 2013 Policy Papers as regards the interpretation of the 'interests of justice'.<sup>13</sup> Thus, these documents, and particularly the 2007 Policy Paper, remain the reference point for the OTP's position on the interpretation of Article 53(1)(c) and (2)(c) of the Statute.

Against this backdrop, the purpose of this article is to reignite the debate on the meaning of the 'interests of justice' in Article 53(1)(c) and (2)(c) of the Rome Statute, the scope of prosecutorial discretion that it yields, and the relationship between peace and justice that it envisions. In doing so, it will try to fill an important gap in the literature: to propose a complete interpretation of Article 53(1)(c) and (2)(c) of the Rome Statute, considering all the interpretative tools that international law prescribes and suggests.

## 2. METHODOLOGY

In order to achieve its purpose, this article will resort to the interpretative tools prescribed by Articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT), as a reflection of the general rule of treaty interpretation under customary international law.<sup>14</sup> Pursuant to Article 31 of the VCLT, this article will

<sup>7</sup> ICC-OTP, Policy Paper on the Interests of Justice, September 2007, available at [www.legal-tools.org/doc/bbo2e5/](http://www.legal-tools.org/doc/bbo2e5/) ('Policy Paper on the Interests of Justice').

<sup>8</sup> ICC-OTP, Policy Paper on Preliminary Examinations, November 2013, available at [www.legal-tools.org/doc/acb906/](http://www.legal-tools.org/doc/acb906/), paras. 67–71 ('Policy Paper on Preliminary Examinations').

<sup>9</sup> ICC-OTP, Report on Preliminary Examination Activities 2016, 14 November 2016, paras. 8, 225, 228, available at [www.legal-tools.org/doc/f30a53/](http://www.legal-tools.org/doc/f30a53/).

<sup>10</sup> *Situation in the Republic of Kenya*, Letter from the OTP to the LRV of 2 April 2015, ICC-01/09-154-Conf-Anx2, para. 20.

<sup>11</sup> See, e.g., *Situation in the Republic of Kenya*, Victims' response to Prosecution's application to dismiss *in limine* the Victims' request for review, ICC-01/09-157, Legal Representative of Victims, 15 September 2015, paras. 2, 41–54.

<sup>12</sup> *Situation in the Republic of Kenya*, Prosecution's application to dismiss *in limine* the Victims' request for review of Prosecution's decision to cease active investigation, ICC-01/09-156, OTP, 25 August 2015, paras. 2, 17, 28–44.

<sup>13</sup> ICC-OTP, Policy Paper on Case Selection and Prioritisation, 15 September 2016, available at [www.legal-tools.org/doc/182205/](http://www.legal-tools.org/doc/182205/), para. 33 ('Draft Policy Paper on Case Selection').

<sup>14</sup> *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment of 17 March 2016, at 18, para. 35. On the applicability of the VCLT to the ICCSt., see L. Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (2014), 28, 29, 40, 44 and 45; *Prosecutor v. Jean-Pierre Bemba Gombo* ('Bemba case'), Judgment pursuant to Article 74, ICC-01/05-01/08-3343, T. Ch. III, 21 March 2016, para. 70.

consider the text and context of Article 53(1)(c) and (2)(c), together with the object and purpose of the Rome Statute respectively, bearing in mind the principle of good faith.<sup>15</sup> Pursuant to the crucible approach to treaty interpretation, this order is merely instructive and does not imply a hierarchy between the interpretative tools.<sup>16</sup> Within the textual analysis of Article 53(1)(c), reference will be made to the text of this provision in the other authentic versions of the Statute, namely, French, Spanish, Chinese, Arabic, and Russian, in accordance with Article 33(1) of the VCLT and Article 128 of the Rome Statute. The same exercise will not be undertaken for Article 53(2)(c), given the substantial equivalence between its authentic versions.

We will then resort to the two applicable rules of interpretation contained in the Rome Statute, namely, *in dubio pro reo* (Art. 22(2))<sup>17</sup> and consistency with internationally recognized human rights (Art. 21(3)),<sup>18</sup> to the extent that they are relevant for interpreting Article 53(1)(c) and (2)(c). As those provisions are not definitions of crimes or penalties, strict legality, as provided for in Article 22(2) of the Statute, does not apply to affect the operation of the VCLT.<sup>19</sup>

In order to confirm and/or clarify the interpretation derived from Article 31 of the VCLT and the Statute's own rules, recourse will be made to supplementary tools of interpretation, such as the Statute's preparatory works, ICC case law,<sup>20</sup> and the practice of the OTP, pursuant to Article 32 of the VCLT. In the end of this process, any remaining discrepancy between the authentic versions of Article 53(1)(c) will be reconciled in accordance with Article 33(3) and (4) of the VCLT. Given the importance of the OTP's position in the interests of justice debate, the Policy Papers on the Interests of Justice and on Preliminary Examinations, together with any other relevant OTP document, will be key comparative tools throughout this entire interpretative process.

Following these directions, the body of this article will be divided into two parts. Part I will apply Articles 31 and 33(1) of the VCLT and Articles 21(3) and 22(2) of the Rome Statute to Article 53(1)(c) and (2)(c) of the Statute. Part II will resort to the relevant supplementary means of interpretation (Art. 32 of the VCLT) and seek to reconcile any remaining difference that may have arisen from a comparison between the authentic versions of Article 53(1)(c) of the Statute.

<sup>15</sup> See Art. 31(1) VCLT; See also R.K. Gardiner, *Treaty Interpretation* (2015), 6; M.E. Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission', in E. Cannizzaro (ed.), *The law of treaties beyond the Vienna Convention* (2011), 105 at 167–81.

<sup>16</sup> Gardiner, *supra* note 15, at 10; Villiger, *supra* note 15, at 113, 114; Grover, *supra* note 14, at 42; See generally, O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties* (2012); O. Corten and E. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011).

<sup>17</sup> See *Bemba* case, Judgment pursuant to Article 74, *supra* note 14, para. 218.

<sup>18</sup> Art. 21(3) ICCSt; See also Grover, *supra* note 14, at 114–19.

<sup>19</sup> Grover, *supra* note 14, at 3, 28, 29, 31, 46, 102, 106–8, 110–12; B. Broomhall, 'Nullum crimen sine lege', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008), 713 at 719 and 724.

<sup>20</sup> See Art. 21(2) ICCSt. and Art. 38 of the Statute of the ICJ.

### 3. PART I: ARTICLES 31 AND 33(1) OF THE VCLT AND ARTICLES 21(3) AND 22(2) OF THE ROME STATUTE

#### 3.1. The text of Article 53(1)(c) and 2(c) of the Rome Statute

As indicated earlier, the first logical step to interpret Articles 53(1)(c) and (2)(c) of the Statute is to look at the ordinary meaning of their texts. This analysis will start by looking at the wording of Article 53(1)(c) as a whole, i.e., its ‘overall structure’. It will then move to the overall structure of Article 53(2)(c). Lastly, we will interpret the words ‘interests of justice’, which are identical in both provisions.

##### 3.1.1. The overall structure of Article 53(1)(c) of the Rome Statute

Article 53(1)(c) reads as follows:

- i. The Prosecutor shall, having evaluated the information made available to him or her, *initiate an investigation unless* he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
  - ...
  - c) *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*.<sup>21</sup>

Article 53(1)(c) concerns a decision whether or not to initiate an *investigation* after preliminary examinations have been conducted by the Prosecutor. At this moment, there is not yet an accused person, only suspects.<sup>22</sup>

As the text of subparagraph (c) indicates, a decision on the basis of the ‘interests of justice’ is a negative one, i.e., a decision that an investigation *is not* in the interests of justice. This means that the Prosecutor does not need to make a positive assessment as to whether an investigation *is* in interests of justice, or at least not an explicit one. Rather, it is only if the interests of justice weigh *against* an investigation that the Prosecutor must make a formal decision pursuant to Article 53(1)(c).<sup>23</sup> This means that there is a strong presumption in favour of an investigation.<sup>24</sup> It also means that a decision ‘in the interests of justice’ is an exceptional one.<sup>25</sup> The same conclusions have been reached by the OTP.<sup>26</sup>

<sup>21</sup> Emphasis added.

<sup>22</sup> C.C. Aravena, ‘Revisión Crítica del Criterio “Interés de la Justicia” como razón para no abrir una investigación o no iniciar un enjuiciamiento ante la Corte Penal Internacional’, (2011) 1 *Revista de Derecho Universidad Católica del Norte* 21, at 28 and Schabas, *supra* note 2, at 659; Policy Paper on Preliminary Examinations, *supra* note 8, para. 43.

<sup>23</sup> Policy Paper on the Interests of Justice, *supra* note 7, at 2, 3; Aravena, *supra* note 22, at 24, 28, 29; Schabas, *supra* note 2, at 660.

<sup>24</sup> Policy Paper on the Interests of Justice, *supra* note 7, at 1, 5; Policy Paper on Preliminary Examinations, *supra* note 8, para. 71; Aravena, *supra* note 22, at 24, 26; Brubacher, *supra* note 2, at 149, 150; See Section 3.4, *infra*.

<sup>25</sup> Aravena, *supra* note 22, at 24, 26; Brubacher, *supra* note 2, at 149, 150; Keller, *supra* note 3, at 213, 238, 249, 262; Schabas, *supra* note 2, at 661; J. Dugard, ‘Possible Conflicts of Jurisdiction with Truth Commissions’, in A. Casesse et al. (eds.) *The Rome Statute of the International Criminal Court: A Commentary* (2002), at 70.

<sup>26</sup> Policy Paper on the Interests of Justice, *supra* note 7, at 2, 3.

In addition, note that Article 53(1)(c) uses the words ‘nonetheless’ and ‘taking into account’. ‘Nonetheless’ is an adverb that indicates an opposition between two clauses. It is a synonym of ‘in spite of’, ‘despite’, ‘nevertheless’, and ‘however’.<sup>27</sup> Conversely, ‘taking into account’ has a value-neutral meaning. The ordinary meaning of this expression is ‘to consider’, ‘to evaluate’ or ‘to assess’ a certain factor or circumstance.<sup>28</sup>

With these remarks in mind, one can reasonably reach at least three textual interpretations of Article 53(1)(c)’s overall structure.

First, one can conceive ‘nonetheless’ as linking the clauses ‘taking into account the gravity of the crime and the interests of victims’ and ‘substantial reasons to believe that an investigation would not serve the interests of justice’. In this position, ‘nonetheless’ would express an opposition between, on the one hand, ‘the gravity of the crime and the interests of victims’, and, on the other, the ‘interests of justice’. Thus, under this interpretation of Article 53(1)(c), the consideration of the gravity of the crime and the interests of victims would invariably weigh in favour of the initiation of an investigation, while the ‘interests of justice’ would go against the latter and justify its deferral. Moreover, the factors that could be considered ‘interests of justice’ would necessarily be different from the gravity of the crime and the interests of victims and were not explicitly listed.<sup>29</sup>

Conversely, in second and third readings of Article 53(1)(c)’s overall structure, ‘nonetheless’ would connect paragraph 1(c) as a whole to paragraphs 1(a) and (b) of Article 53. In this position, ‘nonetheless’ would denote an opposition that naturally exists between the jurisdictional and admissibility tests performed under Article 53(1)(a) and (b), on the one hand, and an ‘interests of justice’ decision pursuant to Article 53(1)(c), on the other. In other words, despite having concluded that a crime within the jurisdiction of the Court appears to have been committed (Art. 53(1)(a)) and that such crime is of sufficient gravity to be admissible before the Court (Art. 53(1)(b)), both of which are assessments that weigh in *favour* of the opening of an investigation, ‘there are, nonetheless, substantial reasons to believe that an investigation would *not* serve the interests of justice’.

Since ‘nonetheless’ would connect paragraphs 1(a) and (b) to paragraph (c) of Article 53, the relationship between ‘the gravity of the crime and the interests of victims’, on the one hand, and the ‘interests of justice’, on the other, is not necessarily one of opposition, as in the first interpretation. Rather, in one possible interpretation of Article 53(1)(c)’s text, ‘the gravity of the crime and the interests of victims’ are themselves the only factors that could be considered as ‘interests of justice’. This reading would be justified by the absence of any textual indication of the other possible factors that could be ‘taken into account’ when a decision pursuant to Article 53(1)(c) is made. This is the second interpretation of Article

<sup>27</sup> Oxford Dictionaries, [www.oxforddictionaries.com/definition/english/nonetheless](http://www.oxforddictionaries.com/definition/english/nonetheless) and Thesaurus.com, [www.thesaurus.com/browse/nonetheless](http://www.thesaurus.com/browse/nonetheless).

<sup>28</sup> Cambridge dictionary, [www.dictionary.cambridge.org/dictionary/english/take-sth-into-account?q=take+into+account](http://www.dictionary.cambridge.org/dictionary/english/take-sth-into-account?q=take+into+account).

<sup>29</sup> See Robinson *supra* note 3, at 488; H. Hafner et al., ‘A Response to the American View as Presented by Ruth Wedgwood’, (1999) 10 EJIL 108, at 112; Gallavin, *supra* note 5, at 185.

53(1)(c)'s overall structure and the one which has been adopted by the OTP<sup>30</sup> and by some commentators who follow a stricter approach to the text of Article 53(1)(c).<sup>31</sup>

With 'nonetheless' still connecting paragraphs 1(a) and (b) to paragraph (c) of Article 53, the third possible interpretation of Article 53(1)(c)'s overall structure is one in which 'the gravity of the crime and the interests of victims' are *not* the only factors that can be considered as 'interests of justice'. Rather, they are mere examples of factors that can be weighed in a decision to defer an investigation pursuant to Article 53(1)(c).<sup>32</sup> Importantly, due to the use of the neutral expression 'taking into account', the factors that can be considered under Article 53(1)(c) could *either* weigh in favour of an investigation or go against it. If the factors going against an investigation outweigh those that favour it, then an investigation would 'not serve the interests of justice'. Thus, under the third interpretation, Article 53(1)(c) would have a balancing function: all the relevant circumstances of each concrete case are weighed by the Prosecutor, including the gravity of the crime and the interests of victims.<sup>33</sup> On one side of the balance would be the factors favouring the initiation of an investigation ('the positive factors') and on the other, those that go against it ('the negative factors'). The 'interests of justice' would ultimately correspond to those negative factors prevailing over the positive ones and rebutting the presumption in favour of the initiation of an investigation.

Given the plurality of textual interpretations of Article 53(1)(c)'s overall structure, it is useful, at this point, to verify whether the text of this provision in the other authentic languages of Rome Statute yields the same ambiguity as the English version.

First, in the French version of Article 53(1)(c), there is no word equivalent to 'nonetheless' or any other adverb of opposition. At the same time, an equivalent to 'taking into account' ('*compte tenu*') was employed:

In order to make his or her decision, the Prosecutor examines if ... there are serious reasons to believe that, taking into account the gravity of the crime and the interests of victims, an investigation would not serve the interests of justice.<sup>34</sup>

As in the second and third interpretations of Article 53(1)(c)'s English version, the absence of an adverb of opposition, together with the value-neutral character of 'taking into account', possibly indicate that 'the gravity of the crime and the interests of victims' are not necessarily opposed to the 'interests of justice'. Rather, 'the gravity of the crime and the interests of victims' could either be interpreted as exclusive 'interests of justice' factors (as in the second interpretation of Art. 53(1)(c)'s English version) or as examples of these factors (as in the third interpretation of Art. 53(1)(c)'s English version).

<sup>30</sup> Policy Paper on the Interests of Justice, *supra* note 7, at 2, 3.

<sup>31</sup> Aravena, *supra* note 22, at 26.

<sup>32</sup> See Webb, *supra* note 3, at 326; Brubacher, *supra* note 3, at 80; Brubacher, *supra* note 2, at 149; Keller, *supra* note 3, at 246; M'Boge, *supra* note 3, at 368.

<sup>33</sup> Similarly, Brubacher, *supra* note 3, at 82, 84; Brubacher, *supra* note 2, at 149–51; Gallavin, *supra* note 5, at 185; Aravena, *supra* note 22, at 26.

<sup>34</sup> Author's translation.



A similar result is yielded by the Spanish and Chinese versions of Article 53(1)(c). In Spanish, ‘nonetheless’ was replaced by an adverb that does not necessarily indicate opposition, but is rather used to emphasize something unexpected (*‘aun’*).<sup>35</sup> Moreover, this adverb appears right next to the neutral expression, ‘taking into account’ (*‘teniendo en cuenta’*). These are indications that there is not a necessary opposition between ‘the gravity of the crime and the interests of victims’, on the one hand, and ‘the interests of justice’, on the other. The Chinese text of Article 53(1)(c) also employs an adverb that has an emphasis function (*‘仍’* or ‘réng’) and is equivalent to ‘still’.<sup>36</sup> Thus, it appears that the Spanish and Chinese versions of Article 53(1)(c) correspond to the second or third interpretation of this provision’s English version.

As to the Arabic and Russian versions of Article 53(1)(c), their examination leads to an interpretation similar to the one yielded by the English text of this provision, i.e., that the three above interpretations remain possible. This is because both Russian and Arabic versions of Article 53(1)(c) use adverbs of opposition which are equivalent to ‘however’, ‘nonetheless’ or ‘nevertheless’ (respectively, ‘тем не менее’ and ‘مع ذلك’).<sup>37</sup>

In accordance with Article 33(4) of the VCLT, we will seek to remove the ambiguities in the authentic versions of Article 53(1)(c) by resorting to the remaining interpretative tools. If those ambiguities remain, we shall adopt the interpretation which best reconciles the competing versions with the Statute’s object and purpose.

### 3.1.2. *The overall structure of Article 53(2)(c) of the Rome Statute*

Article 53(2)(c) of the Rome Statute reads as follows:

2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a *prosecution* because:
  - ...
  - 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;
    - ...

As the *chapeau* of paragraph 2 indicates, Article 53(2)(c) refers to a prosecution or case, which is initiated after investigations have been conducted and is brought against one or more accused individuals.

As with Article 53(1)(c), Article 53(2)(c) need only be formally invoked by the Prosecutor if there is any reason to believe that a prosecution is *not* in the interests of justice. Thus, when the Prosecutor considers Article 53(2)(c), a rebuttable

<sup>35</sup> [www.oxforddictionaries.com/es/definicion/espanol/aun](http://www.oxforddictionaries.com/es/definicion/espanol/aun); [www.spanishdict.com/translate/aun](http://www.spanishdict.com/translate/aun); and [dictionary.cambridge.org/dictionary/english/even](http://dictionary.cambridge.org/dictionary/english/even).

<sup>36</sup> Based on the analysis of an English translation of Art. 53(1)(c)’s Chinese version, which was provided by an official ICC interpreter.

<sup>37</sup> Based on the analysis of the English translations of Art. 53(1)(c)’s Arabic and Russian versions, which were provided by ICC legal officers who are native speakers of these languages.

<sup>38</sup> Emphasis added.



presumption in favour of the initiation of a prosecution is already in place. This also means that recourse to Article 53(2)(c) is exceptional.

In addition, Article 53(2)(c) does not employ any adverb of opposition or emphasis, similar to the French version of Article 53(1)(c). At the same time, Article 53(2)(c) contains the neutral expression 'taking into account', followed by the criteria to be evaluated by the Prosecutor. Significantly, these criteria now consist of 'all the circumstances', followed by the word 'including' and a list of factors. Moreover, while the reference to the 'gravity of the crime and the interests of victims' was kept, the list was enlarged to include 'the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime'.

The reference to 'all the circumstances' and its juxtaposition to 'including' appear to indicate that the list of factors that can be weighed by the Prosecutor under Article 53(2)(c) is merely exemplificative. Nevertheless, the fact that neither 'all the circumstances' nor the additional criteria were employed in Article 53(1)(c) does not mean that the latter's list of possible 'interests of justice' is closed. Instead, explicit reference to more factors in Article 53(2)(c) is better explained by the fact that, when this provision comes into play, there is possibly more information available to the Prosecutor, as an investigation has already been conducted.<sup>39</sup>

With these remarks in mind, we can reasonably conclude that the overall structure of Article 53(2)(c) yields an interpretation where: a) there is no *a priori* opposition between 'the gravity of the crime', 'the interests of victims' or any other criteria, on the one hand, and the 'interests of justice' on the other; b) all the relevant and available circumstances must be considered by the Prosecutor when deciding not to initiate a prosecution based on the 'interests of justice'; c) these circumstances can correspond to factors other than the gravity of the crime, the interests of victims, the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime; d) the circumstances or factors that are 'taken into account' by the Prosecutor could potentially weigh either in favour or against prosecution; and e) if the circumstances countering prosecution outweigh those that favour it, the Prosecutor could conclude that bringing a case against the accused is not in the 'interests of justice'.

Accordingly, Article 53(2)(c) has a balancing function, which grants the Prosecutor some discretion in considering the pros and cons of prosecution.<sup>40</sup> Notably, this interpretation is similar to the third interpretation of Article 53(1)(c)'s overall structure and, as such, it provisionally supports the choice of this interpretation for the latter provision.

### 3.1.3. *The phrase 'interests of justice'*

The interpretation of the term 'interests of justice' should logically begin with its ordinary meaning, in accordance with Article 31(1) of the VCLT. For this purpose, it is useful to first look at each word in that phrase ('interests', 'of', and 'justice').

<sup>39</sup> Webb, *supra* note 3, at 330.

<sup>40</sup> Similarly, Aravena, *supra* note 22, at 28; Brubacher, *supra* note 3, at 82, 84; Brubacher, *supra* note 2, at 149–51; Gallavin, *supra* note 5, at 185.

Despite the plurality of its dictionary meanings, ‘interest’ is most adequately defined as a ‘legal interest’, given the legal nature of our context.<sup>41</sup>

In turn, ‘of’ is a preposition that indicates a certain relationship between the terms that it connects.<sup>42</sup> In the present context, this relationship appears to be one of part and whole: the part, ‘interests’, belongs to the whole, ‘justice’. Thus, the use of the preposition ‘of’ to link ‘interests’ and ‘justice’ indicates that it is not ‘justice’ itself that is the object of consideration. Rather, it is something that ‘belongs to’ justice or that justice ‘has an interest in’ which is expressed by the phrase ‘interests of justice’.

Similarly, the ordinary meaning of ‘justice’ could first be sought in the dictionary. In all dictionaries consulted, this meaning ranges from a very general and subjective definition, corresponding to the attainment of what is just, fair or reasonable, to various more specific meanings, including criminal justice or the process of applying criminal law.<sup>43</sup>

Most commentators have situated the meaning of ‘justice’ along one of the following lines: 1) a general reference to reasonableness or social justice, including the need to maintain peace; 2) the stricter concept of ‘the criminal proceedings themselves’; or 3) the intermediate concepts of ‘criminal justice’ or ‘international criminal justice’ as a whole (i.e., in a broader sense than ‘criminal proceedings’).<sup>44</sup>

The problem with equating ‘justice’ to strict concepts such as ‘investigations or prosecutions’ or the ‘proceedings themselves’ is that these are precisely what a decision in the ‘interests of justice’ countervails. A similar conclusion was reached by the OTP in the following terms: ‘Since Article 53(1)(c) foresees a possibility of the pursuit of criminal justice not being “in the interests of justice”, it follows that the concept *must be broader* than criminal justice.’<sup>45</sup>

As far as the other two possible meanings are concerned, it is fair to say that both could be reasonably put forward as definitions of ‘justice’ in Article 53(1)(c) and (2)(c). This is particularly due to the plurality of objectives that the Rome Statute pursues, as will be further demonstrated.<sup>46</sup> Nonetheless, even if we opt for the concept of ‘international criminal justice’ as a whole, factors other than those explicitly listed in Article 53(1)(c) and (2)(c) could still be equated to ‘the interests of justice’. There are two main reasons for this conclusion.

Firstly, domestic and international criminal justice, including the ICC, convey not only one, but at least four different functions or justifications.<sup>47</sup> Aside from

<sup>41</sup> Oxford Dictionaries, [www.oxforddictionaries.com/definition/english/interest](http://www.oxforddictionaries.com/definition/english/interest) and Cambridge Dictionary, [dictionary.cambridge.org/dictionary/english/interest](http://dictionary.cambridge.org/dictionary/english/interest); Merriam-Webster, [www.merriam-webster.com/dictionary/interest](http://www.merriam-webster.com/dictionary/interest).

<sup>42</sup> Merriam-Webster, [www.merriam-webster.com/dictionary/of](http://www.merriam-webster.com/dictionary/of); Oxford Dictionaries, [www.oxforddictionaries.com/definition/english/of](http://www.oxforddictionaries.com/definition/english/of).

<sup>43</sup> Oxford Dictionaries, [www.oxforddictionaries.com/definition/english/justice](http://www.oxforddictionaries.com/definition/english/justice); Dictionary.com, [www.dictionary.com/browse/justice](http://www.dictionary.com/browse/justice); Cambridge Dictionaries, [dictionary.cambridge.org/dictionary/english/justice](http://dictionary.cambridge.org/dictionary/english/justice); Merriam-Webster, [www.merriam-webster.com/dictionary/justice](http://www.merriam-webster.com/dictionary/justice); See also A. O’Shea, *supra* note 2, at 317.

<sup>44</sup> See *supra* notes 4 and 5.

<sup>45</sup> Policy Paper on the Interests of Justice, *supra* note 7, at 8 and footnote 13 (emphasis added).

<sup>46</sup> See Section 3.3, *infra*.

<sup>47</sup> See Ohlin, *supra* note 5, at 202–3; C. McCarthy, ‘Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?’, (2012) 10 JICJ 351, at 365; B. Wringer, ‘Why Punish War Crimes?’

*retribution* in the form of punishment, criminal justice also has a *symbolic* or expressive function, according to which it should convey a message to the victims and the social group concerned that the criminal conduct in question is unacceptable.<sup>48</sup> More importantly, criminal justice is often said to serve as a *deterrent* for those who intend to commit new crimes and, as such, to *prevent* their future occurrence.<sup>49</sup> In the context of the ICC, what is sought to be prevented are crimes that 'threaten the peace and security of mankind'.<sup>50</sup> As will be demonstrated further on, these functions are part and parcel of the Rome Statute's object and purpose.

Secondly, the word 'justice' does not appear alone in Article 53(1)(c) or (2)(c). In fact, its juxtaposition to the words 'interests of' signifies that it is not 'justice' itself or any of its specific forms which is favoured by a deferral. Instead, it is 'an interest' that 'belongs' to 'justice', either in the form of criminal justice or another relevant form, which is conveyed by the phrase 'interests of justice'. This means that, for instance, when one considers 'peace' as an 'interest of justice', 'justice' is not simply being equated to 'peace', as some have argued.<sup>51</sup> Rather, peace is being contemplated because it could be an 'interest' or a legal concern of 'justice', especially of international criminal justice's preventive function.<sup>52</sup>

Thus, pursuant to both possible meanings of 'justice', the fulfilment of any of international criminal justice's functions could be 'in its interests'. This in turn means that non-prosecutorial measures and peace considerations which can further any of criminal justice's functions could potentially justify a deferral under Article 53(1)(c) and (2)(c).

Other factors that could be weighed in an 'interests of justice' decision include: fair trial rights and other procedural considerations,<sup>53</sup> the legality and the international legitimation of the non-prosecutorial solution in question,<sup>54</sup> the limited availability of human and financial resources,<sup>55</sup> the criteria used for assessing complementarity and admissibility,<sup>56</sup> state co-operation,<sup>57</sup> and the existence of a state duty to prosecute

Victor's Justice and Expressive Justifications of Punishment', (2006) 25 *Springer's Law and Philosophy* 159, at 159–60; See Keller, *supra* note 3, at 211.

<sup>48</sup> McCarthy *supra* note 47, at 365–7; Wringer *supra* note 47, at 185.

<sup>49</sup> Ibid.; and Keller, *supra* note 3, at 260.

<sup>50</sup> ICCSt. Preamble, paras. 3, 5.

<sup>51</sup> See Policy Paper on the Interests of Justice, *supra* note 7.

<sup>52</sup> Similarly, Schabas, *supra* note 2, at 661; Keller, *supra* note 3, at 259.

<sup>53</sup> *Prosecutor v. Nikolic*, Trial Judgement, Case No. IT-94-2-S, T.Ch. II., 18 December 2003, paras. 31–2; Aravena, *supra* note 22, at 31; Policy Paper on the Interests of Justice, *supra* note 7, at 2, footnote 3; Webb, *supra* note 3, at 344.

<sup>54</sup> Keller, *supra* note 3, at 259–78; Informal expert paper: The principle of complementarity in practice (2003) ('Informal expert paper on complementarity'), Annex 2: Rules of Interpretation, at 26; and at 23, 24, available at [www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf](http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf).

<sup>55</sup> Webb, *supra* note 3, at 340–2; Aravena, *supra* note 22, at 31, 35; Draft Policy Paper on Case Selection, *supra* note 13, para. 47, letter (a); ICC-OTP, Paper on Some Policy Issues before the Office of the Prosecutor (2003), available at [www.legal-tools.org/doc/f53870/](http://www.legal-tools.org/doc/f53870/), at 2 ('Paper on some Policy Issues').

<sup>56</sup> Webb, *supra* note 3, at 340, 346; See also Section 3.2.1, *infra*.

<sup>57</sup> Brubacher, *supra* note 2, at 151, 152; Webb, *supra* note 3, at 316; Policy Paper on Preliminary Investigations, *supra* note 8, para. 70; ICC-OTP, Annex to the 'Paper on some policy issues before the Office of the Prosecutor': Referrals and Communications, available at [www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy\\_annex\\_final\\_210404.pdf](http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf), at 1.

the crime in question.<sup>58</sup> As with non-prosecutorial mechanisms and peace and security matters, any of these factors could be considered under Article 53(1)(c) and (2)(c), as long as they can further one or more of international criminal justice's goals.

There are a few legal and practical objections to the proposed interpretation of 'interests of justice', particularly regarding the inclusion of peace and security.

Some, including the OTP, argue that the ICC and its Prosecutor are not the appropriate *fora* to consider matters related to international peace and security.<sup>59</sup> Instead, those factors would be the responsibility of the United Nations Security Council (UNSC).<sup>60</sup> In addition, it is thought that factors that bear upon peace and security are far too political to be considered by the Prosecutor.<sup>61</sup>

Certain observations on the nature of international criminal law and the powers of the UNSC could respond to these objections.

First, virtually any issue of international criminal law is linked, in one way or another, to questions of peace and security.<sup>62</sup> Thus, the fact that a certain assessment bears on political matters does not mean that it entirely escapes the law. Rather, any subject matter contains aspects that can be considered from a legal perspective and are thus justiciable.<sup>63</sup>

Second, and in this connection, it is possible to derive from Article 53(1)(c) or (2)(c) certain substantive legal standards that the Prosecutor should abide by when using those provisions, including when considering issues of peace and security. The most important of those standards is the necessity of deferring an investigation or prosecution to safeguard peace and security (or another objective of international criminal justice). This standard can be derived from the presumption in favour of investigations and prosecutions, and from the exceptional nature of a decision based on the 'interests of justice'. It requires that a deferral be a measure of last resort, i.e., a measure that is only justifiable if the damage to the protected interest is greater than the departure from the general rule.<sup>64</sup> Necessity also implies that there is a causal link between the investigation or prosecution and the harm or threat to peace and security (as in the case of an accused who in a position to effectively commit

<sup>58</sup> Scharf, *supra* note 3, at 524; D. Jacobs, 'A Samson at the International Criminal Court: The Powers of the Prosecutor at the Pre-Trial Phase', (2007) 6 *Law and Practice of International Courts and Tribunals* 317, at 328; and T.H. Clark, *supra* note 4, at 408–9.

<sup>59</sup> Đukic, *supra* note 5, at 279–80.

<sup>60</sup> See Policy Paper on the Interests of Justice, *supra* note 7, at 8.

<sup>61</sup> Jacobs, *supra* note 58, at 329; Gallavín, *supra* note 5, at 193–5.

<sup>62</sup> See Policy Paper on the Interests of Justice, *supra* note 7, at 4, 9; Paper on some Policy Issues, *supra* note 55, at 2, 6; Webb, *supra* note 3, at 316; R. Goldstone, 'Justice as a Tools for Peace-Making: Truth Commissions and International Criminal Tribunals', (1996) 28 *New York University Journal of International Law & Politics* 485, at 486, 488; Schabas, *supra* note 2, at 667.

<sup>63</sup> See *Public Committee v. Government of Israel*, Judgment, Supreme Court of Israel, 13 December 2006, HCJ 769/02, para. 48.

<sup>64</sup> For similar views, see Policy Paper on the Interests of Justice, *supra* note 7, at 9; Draft Policy Paper on Case Selection, *supra* note 13, at 11, para. 32; Keller, *supra* note 3, at 213, 261–5; Robinson, *supra* note 3, at 484, 496, 497; T.H. Clark, *supra* note 4, at 409; J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), 297–300; M. Valiña, 'Interpreting complementarity and interests of justice in the presence of restorative-based alternative forms of justice', in C. Stahn and L. Van den Herik (eds.), *Future Perspectives of International Criminal Justice* (2010), 267 at 277.

violence or to conduct peace negotiations).<sup>65</sup> It also requires that such threat or harm is present or imminent (for instance, in the case of an on-going armed conflict), as opposed to future and more speculative scenarios.<sup>66</sup> In addition, a set of procedural safeguards applies to any decision under Article 53(1)(c) and 2(c).<sup>67</sup>

Lastly, the responsibility of the UNSC to consider matters of peace and security is not exclusive, but *primary*, in accordance with Article 24 of the UN Charter.<sup>68</sup> Thus, other institutions, including the ICC, can assess those matters within the context and limits of their respective mandates.

In a nutshell, even if we do not opt for a fluid definition of 'justice', the phrase 'interests of justice' would still function as an umbrella term for any factor which contributes to the achievement of one of international criminal justice's functions.

### 3.2. The context of Article 53(1)(c) and 2(c)

#### 3.2.1. Immediate context

The immediate context of Article 53(1)(c) and (2)(c) comprises the other provisions of Article 53 of the Rome Statute, namely, paragraphs 1(a), (b) and *in fine*, 2(a) and (b), 3(a) and (b), and 4.

The relevance of Article 53(1)(a)–(b) and (2)(a)–(b) lies in the way in which those provisions operate in relation to Article 53(1)(c) and (2)(c). In fact, the assessments or tests contained in subparagraphs (a), (b) and (c) in both paragraphs 1 and 2 appear to be listed as a logical sequence of steps. In this sense, if the Prosecutor has reached the 'interests of justice' test in Article 53(1)(c) or (2)(c), he or she must have already concluded that the tests contained in paragraphs 1(a)–(b) and 2(a)–(b) would authorize the initiation of an investigation or prosecution, respectively.<sup>69</sup> At the same time, all of these tests are performed on the basis of the same factual elements, often coinciding in time.<sup>70</sup>

In practical terms, this means that when the Prosecutor concludes that there is sufficient information on the commission of a crime under Article 53(1)(a) or (2)(a), the 'evidentiary test', he or she must take this same conclusion into account when evaluating the 'interests of justice' under Article 53(1)(c) or (2)(c). Since the jurisdiction of the Court is limited to 'the most serious crimes of international concern',<sup>71</sup> the Prosecutor must conclude, in the context of Article 53(1)(c) and (2)(c), that the crime, at least in the abstract, is of a grave nature, which would favour an investigation or prosecution.

<sup>65</sup> See ICC-OTP, Draft Regulations of the Office of the Prosecutor (annotated) (2003), available at [www.jura.uni-muenchen.de/fakultaet/lehrstuehle/satzger/materialien/istghdrr.pdf](http://www.jura.uni-muenchen.de/fakultaet/lehrstuehle/satzger/materialien/istghdrr.pdf), at 47, footnote 79; Robinson, *supra* note 3, at 497.

<sup>66</sup> See J. Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court', (2002) 51 ICLQ 91, at 110; Keller, *supra* note 3.

<sup>67</sup> See Art. 53(1), *in fine* and 3(a)(b) ICCSt.

<sup>68</sup> *Certain Expenses of the United Nations (Article 17, paragraph 2 of the Charter)*, Advisory Opinion of 20 July 1962, [1962] ICJ Rep. 151, at 163.

<sup>69</sup> Policy Paper on Interests of Justice, *supra* note 7, at 5.

<sup>70</sup> See Annex to the Paper on some Policy Issues, *supra* note 55, at 3.

<sup>71</sup> Art. 1 ICCSt.

In turn, Article 53(1)(b) and (2)(b) deal with the so-called ‘admissibility test’: under both provisions, the Prosecutor must assess, *inter alia*, whether the crime is of sufficient gravity ‘to justify further action’ by the Court.<sup>72</sup> This includes a concrete assessment of the role of the accused, the number of victims or the territorial scope of the crime.<sup>73</sup> Therefore, when it comes to assessing the interests of justice under Article 53(1)(c) and (2)(c), the Prosecutor must logically consider that the ‘gravity of the crime’ is a factor that favours the initiation of an investigation or prosecution.<sup>74</sup>

Significantly, given the results of the evidentiary, jurisdictional and admissibility tests (that the gravity of the crime favour an investigation or prosecution), it makes sense that the ‘interests of justice’ include factors other than the gravity of the crime. Otherwise, Article 53(1)(c) and (2)(c) would have very little utility.

Paragraph 1, *in fine*, and paragraphs 3(a) and (b) of Article 53 also provide important elements for the interpretation of the Article 53(1)(c) and (2)(c). In fact, in addition to allowing any type of decision not to investigate or prosecute to be reviewed upon request of those who made the referral, the former provisions require, *only* for a decision based on the ‘interests of justice’, that a) the Prosecutor inform such decision to the Pre-Trial Chamber and b) that the same Chamber confirms this decision. This reinforced review process is an indication that a decision under Article 53(1)(c) and (2)(c) has a higher degree of discretion and subjectivity than the evidentiary, jurisdictional, or admissibility tests performed under Article 53(1)(a)–(b) and 2(a)–(b).<sup>75</sup>

Lastly, Article 53(4) allows the Prosecutor to reconsider any of his or her decisions under paragraphs 1 and 2 based on new facts or information. This supports the view that, despite the discretionary and circumstantial nature of an ‘interests of justice’ decision, it is not irreversible.<sup>76</sup> Thus, Article 53(4) is an important safeguard against the higher degree of discretion and subjectivity that are contemplated in a decision pursuant to Article 53(1)(c) and (2)(c).

In sum, all provisions from the immediate context of Article 53(1)(c) and (2)(c) reasonably support the third interpretation of Article 53(1)(c)’s overall structure, where the gravity of the crime and the interests of victims are not the only factors that can be considered by the Prosecutor. They also endorse the interpretation reached earlier for Article 53(2)(c)’s overall structure and for the phrase ‘interests of justice’.

### 3.2.2. *The broader context*

The broader context of Article 53(1)(c) and (2)(c) comprises those provisions of the Rome Statute, which, apart from Article 53 itself, are relevant for the interpretation of Article 53(1)(c) and (2)(c). Pursuant to Article 33(3)(c) of the VCLT, the broader

<sup>72</sup> See Art. 17 ICCSt.

<sup>73</sup> Policy Paper on Interests of Justice, *supra* note 7, at 5; Policy Paper on Preliminary Examinations, *supra* note 8, paras. 59–66; Draft Policy Paper on Case Selection, *supra* note 13, paras. 34–40.

<sup>74</sup> See Policy Paper on the Interests of Justice, *supra* note 7, at 5; Draft Policy Paper on Case Selection, *supra* note 13, para. 36; Aravena, *supra* note 22, at 25, 26; Webb, *supra* note 3, at 327; see also Gallavin, *supra* note 5, at 185; for a contrary view, see Brubacher, *supra* note 3, at 80, 82.

<sup>75</sup> Webb, *supra* note 3, at 320, 322.

<sup>76</sup> Webb, *supra* note 3, at 347; M’Boge, *supra* note 3, at 377–9, Aravena, *supra* note 22, at 39.

context of Article 53(1)(c) and (2)(c) also includes rules of international law found outside of the Statute, such as treaty or customary rules, which are applicable to the relations between the Statute's parties and relevant for the interpretation of Article 53(1)(c) and (2)(c). Although there are various statutory provisions and external rules of treaty and customary international law which may have a bearing on the interpretation of Article 53(1)(c) and (2)(c), in the interests of space, this article will focus on those statutory provisions which are most relevant for our interpretative task. Those provisions are Articles 13 and 16.

Article 13(b) of the Rome Statute deals with one of the ICC's jurisdictional triggers, namely, the *referral* of a situation to the Court by the UNSC. For our purposes, it suffices to note that, in order to make a referral, the UNSC has to be 'acting under Chapter VII of the UN Charter'.<sup>77</sup> At the same time, Article 39 of the Charter provides that any measure adopted by the Council under Chapter VII must aim to maintain or restore international peace and security, where those have been a) threatened, b) breached or c) affected by an act of aggression. Significantly, this means that, in any UNSC referral, there is an acknowledgement that international criminal justice, in the form of ICC investigations or prosecutions, is the most appropriate tool for maintaining or restoring international peace and security.<sup>78</sup>

Conversely, Article 16 of the Rome Statute allows the UNSC to *defer* criminal investigations or prosecutions also based on a Chapter VII resolution.<sup>79</sup> This means that the investigation or prosecution is being suspended to maintain or restore international peace and security, as the pursuance of the former would have breached or affected the latter.<sup>80</sup>

As the foregoing analysis indicates, both Articles 13 and 16 support the view that peace and security can be factored as 'interests of justice' by the Prosecutor. This is despite the fact that both provisions assign a role to the UNSC rather than the Prosecutor. As noted earlier, the UNSC's primary responsibility on issues of peace and security does not exclude the consideration of these questions by the Prosecutor in the context of his or her own functions. Significantly, neither Article 13 nor Article 16 assert or imply that the UNSC's peace and security functions in the context of the ICC are exclusive.

### 3.3. The object and purpose of the Rome Statute

The object and purpose of the Rome Statute can be sought in its Preamble,<sup>81</sup> in the text of relevant provisions and by analyzing the Statute as a whole.<sup>82</sup>

<sup>77</sup> See Art. 13(b) ICCSt.

<sup>78</sup> Notice that the ICTY and the ICTR were also created by a UNSC Chapter VII resolution under the explicit recognition that they were tools for the maintenance of international peace. See Resolution 827, UN Doc. S/RES/827 (1993), para 6; Resolution 955, UN Doc. S/RES/955 (1994), para. 6.

<sup>79</sup> See Art. 16 ICCSt.

<sup>80</sup> See M'Boge, *supra* note 3, at 367; Y. Naqvi, 'Amnesty for War Crimes: Defining the Limits of International Recognition', (2003) 85 IRRC 583, at 592; J. Llewellyn, 'A Comment on the Complementarity Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Contexts?', (2001) 24 *Dalhousie Law Journal* 192, at 216.

<sup>81</sup> Kleffner, *supra* note 64, at 237; Villiger, *supra* note 15, at 110.

<sup>82</sup> Villiger, *supra* note 15, at 110.



Firstly, several parts of the Preamble seem to allude to the retributive function of international criminal justice, which is principally expressed in the form of criminal investigations and prosecutions.<sup>83</sup> By the same token, an analysis of the Rome Statute as a whole indicates that the bulk of its provisions are dedicated to the regulation of criminal investigations and prosecutions.<sup>84</sup> These are indications that retribution and prosecution are an important part of the Statute's object and purpose.

At the same time, Paragraphs 3 and 5 of the Preamble appear to refer to the preventive function of the ICC, namely its goal of 'contributing to the prevention' of crimes which 'threaten the peace, security and well-being of the world'.<sup>85</sup> Likewise, we have seen that the operation of Articles 13 and 16 of the Statute seems to be justified on the basis of the ICC's preventive function.

Taken together, these provisions support the conclusion that investigations and prosecutions are indeed the 'general rule' or the 'immediate objective' of the Rome Statute, although not necessarily its 'overarching' or 'prevailing' goal.<sup>86</sup> This is also true of other international criminal tribunals and domestic systems, where prosecution is the common face of criminal justice. At the same time, the above provisions also appear to indicate that, in certain circumstances, investigations or prosecutions could be set aside for jeopardizing the other statutory objectives, such as peace and security.

However, this proposition still begs two important questions. First, which function of criminal justice prevails at the ICC? Second, if there is such a prevailing function, how does one explain that it could be overridden by another interest or function?

Admittedly, considering the Statute's various objectives and the other interpretative tools used so far, either peace,<sup>87</sup> retribution<sup>88</sup> or both<sup>89</sup> could be reasonably put forward as the prevailing goal of the Statute. This is perhaps why there is so much controversy in the literature on Article 53(1)(c) and (2)(c) and no sign of a compromise. However, one does not need to take any side in this debate to conclude that a deferral of investigations or prosecutions would still be legally permissible. This is because, as mentioned earlier, the function of Article 53(1)(c) and (2)(c) is to serve as a measure of exception.<sup>90</sup>

In more detail, an exception operates in the concrete level of a specific situation, leaving untouched the abstract and general values protected by the rule which is temporarily set aside. Accordingly, an exceptional measure, if adopted as such and

<sup>83</sup> See, e.g., paras. 4, 5 and 11 of the Preamble; see also Robinson, *supra* note 3, at 485, 486, 504; Keller, *supra* note 3, at 266.

<sup>84</sup> *Ibid.*

<sup>85</sup> See Keller, *supra* note 3, at 270; Kleffner, *supra* note 64, at 298; Aravena, *supra* note 22, at 36; Policy Paper on the Interests of Justice, *supra* note 7, at 8; Policy Paper on Preliminary Investigations, *supra* note 8, para. 16.

<sup>86</sup> See Robinson, *supra* note 3, at 504; Gallavin, *supra* note 5, at 180; Keller, *supra* note 3, at 213, 260, 266.

<sup>87</sup> See, e.g., Goldstone, *supra* note 62, at 486, 492, 501; Kleffner, *supra* note 64, at 298; D. Tutu, *No Future without Forgiveness* (1999), 27; M. Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (1999), 184.

<sup>88</sup> See *supra* note 5.

<sup>89</sup> See, for instance, Schabas, *supra* note 2, at 667.

<sup>90</sup> Similarly, Informal expert paper on complementarity, *supra* note 54, at 22, 23.

contained in the rule itself, would not, at the very least, undermine the overarching objective or the immediate function of the ICC, whatever those are.<sup>91</sup>

In sum, the analysis of the object and purpose of the Rome Statute appears to ratify the view that alternative justice mechanisms, peace and security considerations, and other objectives of international criminal justice, could be in the 'interests of justice'. Finally, this interpretation of 'interests of justice' matches the first and third interpretations of Article 53(1)(c)'s overall structure and the proposed interpretation of Article 53(2)(c)'s overall structure.<sup>92</sup>

### 3.4. Articles 21(3) and 22(2) of the Rome Statute: *In dubio pro reo* and consistency with internationally recognized human rights

Interpreting Article 53(1)(c) in a manner that favours the accused would mean including as possible 'interests of justice' factors that directly relate to the situation, rights and interests of the potential accused, if those aspects can be identified. In addition, an open list of factors would certainly be more beneficial to the accused, as this would increase the chances of an investigation being deferred. Similarly, although Article 53(2)(c) already requires consideration of the particular circumstances of the accused, having an open list of factors as possible 'interests of justice' would also benefit the accused.

The requirement of consistency with internationally recognized human rights also seems to support a broader interpretation of both Article 53(1)(c) and (2)(c). This is because the group of subjects that is entitled to internationally recognized human rights is recognizably broad;<sup>93</sup> it arguably includes not only the direct victims and the accused, but also the indirect victims of the crime (such as the whole societal group affected) and the international community as a whole.<sup>94</sup> Furthermore, the rights that are internationally recognized are by no means restricted to the rights of victims to retribution, but include the rights to a fair trial, reparations, safety, physical and moral well-being.<sup>95</sup> The consideration of these rights would certainly favour a broader list of possible 'interests of justice'.

## 4. PART II: ARTICLES 32 AND 33(3)–(4) OF THE VCLT

### 4.1. Article 32 of the VCLT: Supplementary means of interpretation

For the purpose of this article, resort to supplementary means of interpretation may be useful to i) confirm the conclusions resulting from the application of the

<sup>91</sup> See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Rep. 14, para. 186.

<sup>92</sup> All of which allow the consideration of factors other than those explicitly listed.

<sup>93</sup> On the general scope of this expression see S. Bailey, 'Article 21(3) of the Rome Statute: A Plea for Clarity', (2014) 9 ICLR 513, at 523–30; Grover, *supra* note 14, at 118.

<sup>94</sup> See Keller, *supra* note 3, at 250.

<sup>95</sup> See, for instance, UN General Assembly, 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 and Annex, Res. 60/147, 16 December 2005, UN Doc. A/RES/60/147; 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, particularly Arts. 6(1), 7, 9, 10, 14 and 15.

mandatory interpretative tools, and ii) dismiss any ambiguities that remain after applying such tools.<sup>96</sup>

#### 4.1.1. *Preparatory works of the Rome Statute and circumstances of its conclusion*

Despite the little attention received by other commentators,<sup>97</sup> the preparatory works of the Rome Statute provide a great deal of materials that may assist with the interpretation of Article 53(1)(c) and (2)(c).

Firstly, two key aspects of Article 53(1)(c)'s drafting history may illuminate the choice between the plurality of interpretations derived from Article 53(1)(c)'s overall structure.

In fact, the reference to 'interests of justice' in the context of prosecutorial discretion was born from a British proposal of amendment in 1996.<sup>98</sup> The phrase was *not* originally accompanied by any adverb of opposition. Significantly, the proposal explained that 'interests of justice' reflected a wide scope of discretion and included factors such as the counter-productive nature of the proceedings.<sup>99</sup>

At the same time, the reference to an adverb of opposition originally came in the form of the following proposal:<sup>100</sup>

Article 54. Initiation of an investigation. The Prosecutor shall, having evaluated the information made available to him, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: ... (c) ~~Notwithstanding~~ the gravity of the crime and the interests of victims, there are ~~other~~ substantial reasons to believe that an investigation would not serve the interests of justice.<sup>101</sup>

The initial reference to a synonym of 'nonetheless' (i.e., notwithstanding), coupled with a handwritten strikethrough that was subsequently added, are reasonable indications that drafters were hesitant about the usefulness of that adverb, and that its function was perhaps merely stylistic. Furthermore, the use of the word 'other' appears to indicate that the factors to be considered as 'interests of justice' were thought to be different from the gravity of the crime and the interests of victims. At the same time, 'other' was also struck through by hand, which possibly indicates that drafters may have had reservations about restricting the list of possible 'interests of justice'.

Thus, the drafting history of Article 53(1)(c) supports the third interpretation of this provision's overall structure and a broader interpretation of the 'interests of justice'.

<sup>96</sup> Art. 32 VCLT.

<sup>97</sup> See, e.g., Policy Paper on the Interests of Justice, *supra* note 7, at 2; Schabas, *supra* note 2, at 663; Robinson, *supra* note 3, at 483; Scharf, *supra* note 3, at 508, 521–7; Webb, *supra* note 3, at 306, 325; R. Wedgwood, 'The International Criminal Court: a American view', (1999) 10 EJIL 93, at 97.

<sup>98</sup> Complementarity: Suggested Amendments to ILC Draft, United Kingdom, 26 March 1996, Arts. 26(4), 27(1); Discussion paper: International Criminal Court, Complementarity, United Kingdom, 29 March 1996, paras. 29, 32.

<sup>99</sup> Discussion paper: International Criminal Court, Complementarity, United Kingdom, *supra* note 98, para. 30.

<sup>100</sup> Proposal submitted by the informal working group of Argentina, Israel, et al. on Article 54.1(c) and Article 54.3(c), 16 June 1998, Art. 54(1)(c), available at [www.legal-tools.org/en/doc/fcdo4/](http://www.legal-tools.org/en/doc/fcdo4/).

<sup>101</sup> Emphasis added.

In turn, Article 53(2)(c)’s drafting history seems to confirm our proposed interpretation of this provision. This is because Article 53(2)(c) kept its current structure during most of its drafting process. In particular, a negative decision (that a prosecution was *not* in the interests of justice’) was preferred over a positive one and reference was never made an adverb of opposition.<sup>102</sup>

The preparatory works of the Statute may also confirm the conclusions reached so far on the meaning of the phrase ‘interests of justice’, in particular that it includes any factor that fulfils one of international criminal justice’s functions. In fact, although it is fair to say that the participants of the Rome Conference disagreed on the content of ‘interests of justice’<sup>103</sup> and on the ensuing scope of prosecutorial discretion,<sup>104</sup> three aspects of the drafting history of Article 53(1)(c) and (2)(c) seem to shed some light on the meaning of that phrase.

Firstly, the provision on the initiation of an investigation was, until the Rome Conference, accompanied by a requirement of consistency with any relevant UNSC decision.<sup>105</sup> This linkage between investigations, on the one hand, and the relevant decisions and discussions of the UNSC, on the other (which is now materialized by Arts. 13 and 16), appears to indicate that peace and security matters and issues of similar nature should inform an ‘interests of justice’ decision. Secondly, it was noted that the reference to ‘interests of justice’ was originally made with a wide scope of discretion in mind. This, and the fact that the expression remained unchanged throughout the entire preparatory works of the Statute, seem to indicate that the drafters wanted to preserve at least the thrust of the original proposal, namely, that the factors which the Prosecutor may consider should not be too restrictive.

Lastly, the records of the meetings held during the Rome Conference can confirm our previous conclusions on the Statute’s object and purpose and on the broad interpretation of the ‘interests of justice’. This is because there are multiple references, either implicit or explicit, to all of the functions or objectives of international criminal justice identified earlier: retribution,<sup>106</sup> deterrence,<sup>107</sup> prevention,<sup>108</sup> reparation,<sup>109</sup> rehabilitation,<sup>110</sup> and symbolic justice.<sup>111</sup>

<sup>102</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records, Volume III, Reports and other documents (‘Rome Conference – Vol. III’), at 110, 159, 272, 279, 294.

<sup>103</sup> United Nations Diplomatic Conference of Plenipotentiaries on The Establishment of an International Criminal Court, Rome, 15 June–17 July 1998. Official Records. Vol. II, Summary records and of the Meetings of the Committee of Whole, A/CONF-183/13 (VOL-II) (‘Rome Conference – Vol. II’), at 77, para. 63, and 359, para. 45; Rome Conference – Vol. III, *supra* note 102, at 279, footnote 119.

<sup>104</sup> Rome Conference – Vol. II, *supra* note 103, at 202, para. 129, and 211, para. 3.

<sup>105</sup> See, e.g., Annex: Complementarity: A compilation of concrete proposals made in the course of discussion for amendment of the ICL Draft Statute – Addendum, 08 April 1996, a/ac-249/crp-9/add-I Art. 26(1)(d), and letter ‘B’; Abbreviated Compilation of Proposals on Procedure Matters, Working group on Procedural Matters, PrepCom, 04 August 1997, UD/A/AC-249/1997/WG-4/IP (‘Abbreviated Compilation’), Art. 26(i bis)(b)(iii); Report of the Inter-Sessional Meeting from 19 To 30 January 1998 in Zutphen, The Netherlands, PrepCom, 4 February 1998, A/AC-249/1998/L-13 (‘Zutphen Draft’), Art. 47[26](i)bis(b)(iii); Report of the PrepCom, 14 April 1998, A/CONF.183/2, Art. 54(2)(b)(iii).

<sup>106</sup> Rome Conference – Vol. II, *supra* note 103, at 62, para. 24; 64, para. 40; 82, paras. 7, 13.

<sup>107</sup> *Ibid.*, at 82, para. 13; 87, para. 59; 117, para. 45.

<sup>108</sup> *Ibid.*, at 82, para. 7; 82, para. 13; 110, para. 64.

<sup>109</sup> *Ibid.*, at 82, para. 13; 99, para. 48.

<sup>110</sup> *Ibid.*, at 82, para. 13.

<sup>111</sup> *Ibid.*, at 75, para. 39; 110, para. 64.

Additionally, in the said meetings, several references were made to the connection between the goals of peace and justice. In particular, some delegates a) acknowledged that justice could sometimes hinder the achievement of peace;<sup>112</sup> b) stated that each of these goals was essential to the achievement of the other;<sup>113</sup> and c) argued that national reconciliation and measures such as amnesties should sometimes be respected by the ICC, as they could contribute to the achievement of peace.<sup>114</sup> This demonstrates that the particular objective of achieving international peace and security is at the heart of the Statute's object and purpose and that it could be taken into account under Article 53(1)(c) and (2)(c).

#### 4.1.2. ICC jurisprudence

The jurisprudence the ICC, although scarce on the subject at hand, can also serve to confirm some of the propositions made so far on the meaning of Article 53(1)(c) and (2)(c). There are perhaps four ICC decisions that may be of some assistance.

First, in the situation of Darfur, Sudan, Pre-Trial Chamber I observed that the list of criteria which the Prosecutor may consider when deciding whether to initiate a prosecution under Article 53(2)(c) is not closed.<sup>115</sup>

In the Article 70 proceedings against Jean-Pierre Bemba Gombo and others (situation of the Central African Republic), Trial Chambers II and VII held that the 'interests of justice' test may include the evaluation of whether certain conduct (*in casu*, an Art. 70 crime) undermines the efficacy or efficiency of the rule of law.<sup>116</sup>

Lastly, in the Kenya II situation, Pre-Trial Chamber II ruled that the Prosecutor's decision 'not to conduct further investigations at present' did not amount to a determination that a prosecution is not in the 'interests of justice'. Instead, it was due to 'an objective circumstance of temporary nature', i.e., lack of state co-operation.<sup>117</sup> Although this article posits that state co-operation may be factored in the 'interests of justice' test, we agree with the Chamber that this test includes subjective criteria.

Thus, all existing ICC decisions on the interests of justice support our proposition that the list of factors in both Article 53(1)(c) and (2)(c) is flexible and could include subjective factors, such as peace and security considerations.

#### 4.2. Article 33(3) and (4) VCLT: Reconciling the authentic versions of Article 53(1)(c) and 2(c)

As seen earlier, despite the presumption that all versions of a treaty text have the same meaning,<sup>118</sup> the interpretation of the English, Russian and Arabic texts of

<sup>112</sup> Ibid., at 62, para. 11; 87, para. 62.

<sup>113</sup> Ibid., at 63, para. 29; 83, para 17.

<sup>114</sup> Ibid., at 87, para. 62.

<sup>115</sup> *Situation in Darfur, Sudan*, Decision on Application under Rule 103, Pre-Trial Chamber II, 4 February 2009, ICC-02/05-185, paras. 17, 18.

<sup>116</sup> *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* ('Bemba et al. Case'), Decision on Arido Defence request to withdraw the charges, Trial Chamber VII, 27 March 2015, ICC-01/05-01/13-876, para. 9; *Bemba et al. Case*, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749, Pre-Trial Chamber II, 11 November 2014, para. 23.

<sup>117</sup> *Situation in the Republic of Kenya*, Decision on the 'Victims' request for review of Prosecution's decision to cease active investigation', ICC-01/09-159, Pre-Trial Chamber II, 5 November 2015, paras. 22, 25, 27.

<sup>118</sup> Art. 33(3) VCLT.

Article 53(1)(c) diverged from that of the French, Spanish and Chinese versions of that provision. Nevertheless, we have also seen that the Statute's object and purpose, together with the other interpretative tools used, support the third interpretation of Article 53(1)(c)'s overall structure, the same interpretation which is yielded by the French, Spanish and Chinese versions. Thus, in accordance with Article 33(4) of the VCLT, this is the interpretation which best reconciles the different authentic versions of Article 53(1)(c).

## 5. CONCLUSION

As we have seen throughout this article, step by step, virtually all the interpretative tools that we have resorted to give support to the third interpretation of Article 53(1)(c)'s overall structure, i.e., one where 'interests of justice' includes, but is not limited to, the gravity of the crime and the interests of victims. The same interpretative tools have also allowed us to conclude that even a narrower interpretation of 'justice' as 'international criminal justice' would authorize the consideration of any of the latter's functions, including crime prevention. Thus, it is reasonable to conclude that Article 53(1)(c) can be interpreted as allowing, *inter alia*, the interests of victims, peace and security matters, and non-prosecutorial measures to be considered as 'interests of justice' in a balancing operation against the gravity of the crime and other possible circumstances weighing in favour of the initiation of an investigation.

By the same token, the one interpretation derived from the Article 53(2)(c)'s overall structure was ratified by the totality of interpretative tools used. Accordingly, it is possible to advance that Article 53(2)(c) allows the ICC Prosecutor to balance, against the gravity of the crime and other factors weighing in favour of prosecution, all the circumstances related to any of international criminal justice's functions, including the interests of victims, the situation of the accused, peace and security considerations, and non-prosecutorial measures.

Most importantly, this article has concluded that the foregoing interpretations can be arrived at regardless of the prevailing objective one assigns to the ICC. This is because, as seen earlier, Article 53(1)(c) and (2)(c) operate as *exceptions* to the general rule of initiating criminal proceedings, without undermining this rule or the overarching purpose of the Statute. The exceptional nature of Article 53(1)(c) and (2)(c) is indeed the lowest common denominator of the various opinions on the subject, including the one expressed by the OTP. Thus, even if this article is unable to end the debates on the ICC's objectives, it has brought closer together the polarized views on this subject. Furthermore, by simultaneously acknowledging the value of these debates and providing a workable interpretation of Article 53(1)(c) and (2)(c), this article has perhaps found a way to preserve the effectiveness of those provisions without undermining academic diversity.