

## Selected article on international humanitarian law

# Transitional justice and the International Criminal Court – in “the interests of justice”?

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### Abstract

*Transitional justice encompasses a number of mechanisms that seek to allow post-conflict societies to deal with past atrocities in circumstances of radical change. However, two of these mechanisms – truth commissions and criminal processes – might clash if the former are combined with amnesties. This article examines the possibility of employing the Rome Statute’s Article 53 so as to allow these two mechanisms to operate in a complementary manner. It considers three arguments – an interpretation of Article 53 in accordance with the relevant rules on treaty interpretation, states’ obligations to prosecute certain crimes and the Rome Statute’s approach to prosecutorial discretion – and concludes that Article 53 is ill-suited to accommodate truth commissions in conjunction with amnesties.*

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As is well known, the rebellion of the Lord’s Resistance Army (LRA), one of the longest running conflicts in Africa, continues to wreak havoc across the north of Uganda even today. Hundreds of thousands of people have been displaced, scores have been maimed, massacred or raped and thousands of children have been forcibly conscripted in a conflict rivalled by few in its cruelty. Following an

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unsuccessful military campaign, the Kampala government enacted an Amnesty Act in 2000 guaranteeing freedom from prosecution and punishment to any Ugandan “who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda” for “any crime committed in the cause of the war or armed rebellion”.<sup>1</sup>

However, following Uganda’s ratification of the Rome Statute on 14 June 2002, President Museveni referred the situation concerning the LRA to the International Criminal Court (ICC) in December 2003. He indicated his intention to amend the scope of the Amnesty Act “so as to exclude the leadership of the LRA, ensuring that those bearing the greatest responsibility for the crimes against humanity committed in Northern Uganda are brought to justice”.<sup>2</sup> In spite of attempts by a delegation of religious, cultural and district leaders from northern Uganda to persuade the ICC Prosecutor to spare the rebels,<sup>3</sup> arrest warrants against Joseph Kony, the LRA leader, and four of his closest henchmen were issued soon thereafter.<sup>4</sup>

Nevertheless, the rebellion raged on ferociously and the government, in an attempt to end the cycle of violence, engaged in peace talks with the rebels. These talks, marred by stalemate and frequent walk-outs, put the amnesty question back on the table again. As the rebels are demanding that the arrest warrants be revoked and the ICC Prosecutor seems determined to pursue the prosecution of LRA leaders,<sup>5</sup> justice and peace seem to have been set on a collision course once more.

## Transitional justice

The preceding example illustrates the challenge, faced by many societies emerging from a period of intense turmoil, of how to respond to a legacy of grave crimes. This conundrum forms part of the conceptual underpinnings of transitional justice.

In essence, the concept of transitional justice coalesces the notions of “transition” and “justice”. The former aspect is commonly seen as the transition societies make towards a more legitimate form of governance and/or peace in the wake of repressive rule and/or mayhem. However, the transitional context of a society may vary considerably as, for instance, crimes may have ceased long before

1 The Amnesty Act 2000, Article 3(1) and(2), available at [http://www.c-r.org/our-work/accord/northern-uganda/documents/2000\\_Jan\\_The\\_Amnesty\\_Act.doc](http://www.c-r.org/our-work/accord/northern-uganda/documents/2000_Jan_The_Amnesty_Act.doc) (last visited 4 September 2006).

2 “President of Uganda refers situation concerning the Lord’s Resistance Army (LRA) to the ICC”, ICC Press Release, ICC-20040129-44-En, 29 January 2004, available at [http://www.icc-cpi.int/pressrelease\\_details&id=16&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html) (last visited 4 September 2006).

3 “Ugandans ask ICC to spare rebels”, *BBC News*, 16 March 2005, available at <http://news.bbc.co.uk/2/hi/africa/4352901.stm> (last visited 4 September 2006).

4 “Warrant of arrest unsealed against five LRA commanders”, ICC Press Release, ICC-20051014-110-En, 14 October 2005, available at [http://www.icc-cpi.int/pressrelease\\_details&id=114&l=en.html](http://www.icc-cpi.int/pressrelease_details&id=114&l=en.html) (last visited 4 September 2006).

5 “Ugandan rebels in amnesty demand”, *BBC News*, 6 September 2006, available at <http://news.bbc.co.uk/2/hi/africa/5320254.stm> (last visited 6 September 2006).

the transition takes place (e.g. Spain), they may have been committed up until the transition (Timor Leste) or they may even continue to be committed during the transition (Uganda). As transitional justice remains cognizant of the potential hurdles in such circumstances, it seeks a holistic sense of justice instead of relying solely on a classical, retributive notion of justice.<sup>6</sup> Therefore, first and foremost, four instruments are employed: (i) trials – of a civil or criminal nature, conducted before national, foreign, international and/or hybrid courts; (ii) truth-seeking – by truth commissions or similar mechanisms; (iii) reparations – which may be of a monetary or a symbolic nature, for instance; and (iv) reforms – through, for example, vetting programs.<sup>7</sup>

Amnesties erase the legal consequences of certain crimes and have been employed in many post-conflict contexts in order to foster national reconciliation. Evidently, the nature of amnesties may vary, ranging from self-serving measures enacted by outgoing regimes (e.g. Chile) to ostensibly sincere attempts to deal with post-conflict legacies (South Africa). Although amnesties are not considered to be part and parcel of transitional justice, they may certainly intersect with its mechanisms, as will be explained in more detail below.

A transitional-justice approach to past atrocities is faced, quite inevitably, with a number of conflicting priorities. One of these, to which the remainder of this contribution is devoted, is the interrelationship between international criminal trials before the ICC and truth-seeking by truth commissions.

## The ICC and truth commissions

Having entered into force on 1 July 2002, the Rome Statute establishing the ICC aims at eradicating impunity for the most serious crimes of concern to the international community as a whole. The ICC may assert jurisdiction over genocide, crimes against humanity, war crimes and, once a definition has been adopted, aggression, as soon as a situation is referred to the Prosecutor either by a state party or by the UN Security Council, or, in case of a *proprio motu* investigation, initiated by the Prosecutor.<sup>8</sup>

Truth commissions have functions that are very different from those of a court. Although every truth commission seems to be of a *sui generis* character, reflective of a country's specific experiences, certain common traits have been identified by commentators.

First, a truth commission focuses on the past. Second, a truth commission is not focused on a specific event, but attempts to paint the overall picture of

6 The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary General, UN Doc. S/2004/616, 23 August 2004, p. 9.

7 Mark Freeman, *Truth Commissions and Procedural Fairness*, Cambridge University Press, New York, 2006, p. 5.

8 Rome Statute of the International Criminal Court, 21 UNTS 90, 17 July 1998, entry into force 1 July 2002 (hereinafter Rome Statute), Articles 5, 6, 7, 8, 13.

certain human rights abuses, or violations of international humanitarian law, over a period of time. Third, a truth commission usually exists temporarily and for a pre-defined period of time, ceasing to exist with the submission of a report of its findings. Finally, a truth commission is always vested with some sort of authority, by way of its sponsor, that allows it greater access to information, greater security or protection to dig into sensitive issues, and a greater impact with its report. Most truth commissions are created at a point of political transition within a country, used either to demonstrate or underscore a break with a past record of human rights abuses, to promote national reconciliation, and/or to obtain or sustain political legitimacy.<sup>9</sup>

At the outset, it must be noted that ICC trials and truth commissions are not intrinsically inimical, nor are they mutually exclusive. For instance, transitional justice strategies involving criminal trials based on the evidence amassed by a truth commission could be devised (e.g. Peru). Nevertheless, during or in the aftermath of deadly conflict, practical, logistical and political impediments to conducting criminal trials might exist, such as a devastated institutional framework and/or strongholds retained by ousted regimes. At the same time, amnesties may be the sole incentive for perpetrators to come forward and tell the truth before a truth commission. Amnesties may be conferred in different manners: by a truth commission itself (e.g. South Africa) or by a state following the termination of a truth commission’s activities (El Salvador), or they may have come into being through political negotiation prior to the establishment of the truth commission (Sierra Leone).

The Rome Statute does not incorporate a specific provision on amnesties, whether granted in combination with truth commissions or not, most likely due to the widely diverging opinions of negotiating delegations on this matter at the Rome Conference. Villa-Vicencio concludes that the establishment of the ICC is “a little frightening because it could be interpreted, albeit incorrectly, as foreclosing the use of truth commissions which could otherwise encourage political protagonists to turn away from ideologically fixed positions that make for genocide and instead to pursue peaceful coexistence and national reconciliation”.<sup>10</sup> Yet Scharf writes that in the opinion of Kirsch, the chairman of the Preparatory Commission for the ICC and current president of the ICC,

the issue was not definitely resolved during the Diplomatic Conference. Rather, the provisions that were adopted reflect “creative ambiguity” which could potentially allow the prosecutor and judges of the International Criminal Court to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the court.<sup>11</sup>

9 Priscilla Hayner, “Fifteen truth commissions – 1974 to 1994: a comparative study”, *Human Rights Quarterly*, Vol. 16 (1994), p. 604.

10 Charles Villa-Vicencio, “Why perpetrators should not always be prosecuted: where the International Criminal Court and truth commissions meet”, *Emory Law Journal*, Vol. 49 (2000), p. 205.

11 Michael Scharf, “The amnesty exception to the jurisdiction of the International Criminal Court”, *Cornell Law Journal*, Vol. 32 (1999), pp. 521–2 (footnotes omitted).

Bearing Kirsch's comments in mind, three principal provisions in the Rome Statute could arguably allow for criminal trials and truth commissions to coexist. At first sight, Articles 16 and 17 seem well situated to accommodate truth commissions combined with amnesties. The former stipulates that "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." It could thus be argued that the Security Council, provided it has determined the existence of a threat to peace, a breach of the peace or an act of aggression, could request the ICC to defer temporarily an investigation or prosecution when states employ truth commissions combined with amnesties. In addition, 17(1)(a) and (b) declare a case inadmissible where "The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution" or where "The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute." It appears plausible to contend that, under certain circumstances, the meting out of amnesties in combination with truth-telling could lead to the inadmissibility of a case before the ICC.

Yet it has been submitted that, should transitional justice mechanisms be taken into consideration by the ICC, Article 53, empowering the ICC Prosecutor to refrain from initiating an investigation or a prosecution "in the interests of justice", could be brought into play as well.<sup>12</sup> This contribution will therefore focus on Article 53 in order to attempt to shed light on the suitability of applying this article in a potential clash between the ICC and truth commissions.

## Interpreting "the interests of justice" clauses

In order to determine which situations allow the Prosecutor to invoke the discretionary right to forego an investigation or a prosecution, the first logical matter to consider is the actual wording of Article 53. In the relevant part, the article reads,

12 Ibid., p. 524; Richard 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 (2000), p. 663; Darryl Robinson, "Serving the interests of justice: amnesties, truth commissions and the International Criminal Court", *European Journal of International Law*, Vol. 14 (3) (2003), p. 486; Jessica Gavron, "Amnesties in light of developments in international law and the establishment of the International Criminal Court", *International and Comparative Law Quarterly*, Vol. 51 (2002), p.110; Carsten Stahn, "Complementarity, amnesties and alternative forms of justice: some interpretative guidelines for the International Criminal Court", *Journal of International Criminal Justice*, Vol. 3 (2005), pp. 697–8.

1. ... 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*. (emphasis added)

...

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, he shall inform the Pre-Trial Chamber and the State making a referral under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.” (emphasis added)

## The Vienna Convention on the Law of Treaties

As Article 53 does not specifically indicate the possibility of deferral to non-prosecutorial truth-seeking efforts, the prosecutor would appear to have the most leeway in this regard by applying the notion of “the interests of justice”. The phrase’s precise meaning is, at first sight, hardly evident and requires elucidation. The standard test for interpreting treaty rules is laid down in Article 31 of the Vienna Convention on the Law of Treaties (VCLT).<sup>13</sup> Article 31 of the VCLT calls for the interpretation of a treaty “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. As this formula shows, the emphasis is laid on the treaty terms’ ordinary meaning in their context, while the reference to the treaty’s object and purpose is relegated to a slightly less important role.<sup>14</sup> It is namely only “in the light of” a treaty’s object and purpose that “the initial and preliminary conclusion must be tested and either confirmed or modified”.<sup>15</sup>

The ordinary meaning of “the interests of justice” in its context seems to revolve around the question whether “the interests of justice” standard denotes a retributive notion of “justice” or whether additional, broader conceptions of

13 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, entry into force 27 January 1980, Article 31.

14 Ian Sinclair, *The Vienna Convention of the Law of Treaties*, 2nd edn, Manchester University Press, Manchester, 1984, p. 130.

15 *Ibid.*, p. 130.

“justice” may also be taken into account. In other words, when considering “the interests of justice”, should the prosecutor exclusively take into account matters bearing directly on the criminal trial itself, such as the gravity of the crime as indicated in Article 53, or are broader concerns, such as jeopardizing a fragile peace bargain by initiating an investigation or prosecution, also valid? In transitional societies, truth commissions followed by amnesties are often applied as the only feasible accountability mechanism, due to politically precarious circumstances. Therefore, if the scope of “the interests of justice” could reasonably be interpreted to incorporate such concerns, a strong indication of the suitability of Article 53 to allow the Rome Statute to accommodate truth commissions combined with amnesties would be provided.

Article 53 seems to reserve a different role for “the interests of justice” within the investigation phase and within the prosecution phase. In the decision whether to initiate an investigation, “the interests of justice” appears to constitute a criterion which may defeat the other criteria mentioned, that is, the gravity of the crime and the interests of victims. As suggested by its place at the end of the sentence, “the interests of justice” are contrasted with the aforementioned traditional considerations and may be used by the prosecutor to reject commencing an investigation even though the gravity of the crime and the interests of victims may so warrant. This could denote an intention to allow “the interests of justice” to encompass wide-ranging considerations not relating directly to a criminal trial.

In the prosecution phase, “the interests of justice” provides one of the bases, as in the investigation phase, for not initiating a prosecution upon the completion of an investigation. The phrase is placed at the beginning of the sentence and calls upon the Prosecutor to take into account “all the circumstances” in determining whether a prosecution would be in “the interests of justice”. Yet, here, the structure of the sentence does not seem to elevate “the interests of justice” criterion above the other considerations but rather subsumes more traditional issues that could be raised in this matter “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”.<sup>16</sup> The disparity in structure with Article 53(1)(c) and the examples of factors to be taken into account seem to indicate an exclusion of broader considerations. However, the door does not seem to be completely closed, since the article speaks of “all the circumstances, *including...*” (emphasis added), which renders the list of factors illustrative instead of exhaustive.

### Authors’ opinions

Authors have also voiced diverging interpretations on Article 53. Robinson believes that Article 53 is a relatively broad concept since, according to him,

<sup>16</sup> Rome Statute, above note 8, Article 53(2)(c).

<sup>17</sup> Robinson, above note 12, p. 488.

53(2)(c) contemplates broad considerations such as the age and infirmity of the accused and 53(1)(c) allows “the interests of justice” to trump the other criteria.<sup>17</sup> Stahn, while considering that the value of Article 53 has been overestimated in this context, holds that the express distinction between specific criteria and “the interests of justice” may suggest that the latter embodies a broader concept.<sup>18</sup> Gavron argues that Article 53 could accommodate wider considerations, although it could lead to speculation about future events and the deterrence argument would be turned on its head.<sup>19</sup> Amnesty International (AI) favours a restrictive interpretation of Article 53. Its basic presumption, bearing the Rome Statute’s preamble in mind, is that the interests of justice are always served by prosecuting the crimes within the ICC’s jurisdiction, absent a compelling justification.<sup>20</sup> It furthermore considers that “National amnesties, pardons and similar measures of impunity that prevent judicial determinations of guilt or innocence, the emergence of the truth and full reparations to victims are contrary to international law and it would not be in the interests of justice for the Prosecutor to decline to prosecute on the ground that the suspect had benefited from one of these measures.”<sup>21</sup> Human Rights Watch (HRW) is also a strong proponent of a narrow construction of Article 53, as that would be most consistent with, *inter alia*, the context and the object and purpose of the Rome Statute.<sup>22</sup>

As the first of three sub-arguments, HRW puts forward that the Rome Statute’s context, including preambular paragraphs, reflects the ICC’s *raison d’être*, that is, a safeguard against impunity for exceptionally grave crimes.<sup>23</sup> The preamble states, for instance, that “the most serious crimes of concern to the international community as a whole must not go unpunished” and that it is “determined to put an end to impunity for the perpetrators of these crimes”.<sup>24</sup> As a treaty’s preamble commonly also contains proof of the treaty’s object and purpose, HRW concludes that “if the phrase “in the interests of justice” is construed in light of the object and purpose of the Rome Statute, a construction that permits consideration of a domestic amnesty, domestic truth commission or peace process and results in permanently not initiating an investigation or proceeding from investigation to trial would be in principle at odds with the object and purpose of the Rome Statute, as set forth in its preamble”.<sup>25</sup> As a second contextual argument, although separately, HRW indicates that the Rome Statute

18 Stahn, above note 12, pp. 697–698.

19 Gavron, above note 12, p. 110.

20 Christopher Hall, “Suggestions concerning International Criminal Court prosecutorial policy and strategy and external relations”, *Contribution to an Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutor*, 28 March 2003, p. 28, available at <http://www.icc-cpi.int/library/organs/otp/hall.pdf> (last visited 5 October 2006).

21 *Ibid.*, pp. 28–9.

22 “Policy paper: the meaning of “the interests of justice” in Article 53 of the Rome Statute”, Human Rights Watch, June 2005, pp. 4–6 (hereinafter HRW Policy Paper), available at <http://hrw.org/campaigns/icc/docs/ij070505.pdf> (last visited 5 October 2006).

23 *Ibid.*, pp. 5–6.

24 Rome Statute, above note 8, Preamble, paras. 4, 5.

25 HRW Policy Paper, above note 22, p. 6.

preserves the prerogative to deal with issues on the intersection between international peace and security and international justice for the UN Security Council. Acting under Chapter VII, the Security Council is entitled to halt the commencement or continuation of an investigation or prosecution for a renewable period of twelve months.<sup>26</sup> This, then, would preclude the ICC Prosecutor from engaging in political determinations as no such power has been allocated to him, and, mindful of the irrefutable political impact of the Prosecutor's activities, the Rome Statute's architects sought to eliminate any possibly negative political consequences by inserting Article 16.<sup>27</sup>

Interestingly, HRW seems to qualify its previous comments on the Rome Statute's context and object and purpose somewhat with the second sub-argument. First, HRW denies the possibility of Article 53 covering wider notions of justice by a review of the Rome Statute's preamble, the main purpose of which, it is concluded, is to eradicate impunity for the crimes over which the ICC has jurisdiction. However, contradictorily to a certain extent, it is then held that wider notions of justice are also precluded by the fact that the framers of the Rome Statute had already envisaged a possible collision between peace and justice by inserting a role for the UN Security Council in Article 16. Proof that the Rome Statute is aware of this may, however, also be found in its preamble in the recognition that "such grave crimes threaten the peace, security and well-being of the world" and in the reaffirmation of "the Purposes and Principles of the Charter of the United Nations".<sup>28</sup> These expressions could therefore also signify that, when framing the Rome Statute, peace, security and well-being were seen as overarching aims to which the ICC is to contribute through repressing criminally odious crimes. Admittedly, as noted by HRW, the main aim is to set up a judicial machinery, but the Rome Statute certainly does not discount the wider context in which it is to function. According to Sinclair, conflicting interpretations of the object and purpose of a treaty are not rare, "given that most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes".<sup>29</sup>

HRW, finally, points out that other instances of the use of "the interests of justice" in the Rome Statute and in the Rules of Procedure and Evidence do not hint at a broad notion either.<sup>30</sup> For example, HRW refers to Article 55, setting out the rights of persons during investigation, requiring, for certain persons, the assigning of legal assistance if the person does not have such assistance or "in any case where the interests of justice so require".<sup>31</sup> Whereas this certainly is true, the direct context of Article 53 should not be overlooked. Although its exact contours

26 Rome Statute, above note 8, Article 16.

27 HRW Policy Paper, above note 22, p. 7.

28 Rome Statute, above note 8, Preamble, paras. 3, 7.

29 Sinclair, above note 14, p. 130.

30 HRW Policy Paper, above note 22, p. 6.

31 Rome Statute, above note 8, Article 55(2)(c). According to HRW, the use of the phrase in Articles 61, 65 and 67 of the Rome Statute and in Rules 69, 73(6), 82(5), 100(1), 136(1), 165(3) of the Rules of Procedure and Evidence suggests a similar interpretation.

remain ambiguous, it is clear that Article 53 intends to formulate some circumstances in which the initiation of an investigation or a prosecution would be ill-advised. Where references to “the interests of justice” are made in other articles in the Rome Statute, the intention seems to be to secure, as put by HRW, a “good administration of justice”.<sup>32</sup> As the decision whether to initiate an investigation or a prosecution, theoretically at least, opens the possibility of embracing wider considerations of justice, a similar use of the phrase in articles seeking to ensure a “good administration of justice” seems less likely. Except for far-fetched, imaginative scenarios, a nascent society’s future will not hinge upon the assigning of legal representation in an individual case.

The *travaux préparatoires* of the Rome Statute, which in any case is a supplementary method of treaty interpretation utilized to confirm the meaning resulting from the application of Article 31 VCLT or to determine the meaning when the first test leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable,<sup>33</sup> do not express an authoritative interpretation either. Syria expressed reservations about “allowing the Prosecutor to stop an investigation in the supposed interests of justice”.<sup>34</sup> Denmark, on the other hand, preferred that “the Court might itself consider that suspending a case would serve the interests of justice” instead of assigning the power to suspend proceedings in a particular case to the UN Security Council.<sup>35</sup> Whereas the latter comments do seem to allude to a broader dimension to be considered as, in the determination to whom to allot the authority to suspend proceedings, a choice is considered between the Security Council and the Court itself, the Syrian delegate’s remarks appear to be of a general nature. Yet only two delegates pronounced themselves on this issue and neither elaborated on the exact scope of “the interests of justice”.

## Conclusion

In conclusion, an interpretation of “the interests of justice” in conformity with the rules of the VCLT is unlikely to lead to a definite answer. Two principal interpretations, both with different nuances and emphases, have emerged and both contain a degree of validity. Therefore the question of whether Article 53 is apt to serve as a tool for reconciling the Rome Statute with truth commissions accompanied by amnesties will have to be assessed on the basis of additional criteria.

32 HRW Policy Paper, above note 22, p. 6.

33 Vienna Convention on the Law of Treaties, above note 13, Article 32.

34 “United Nations diplomatic conference of plenipotentiaries on the establishment of an International Criminal Court, official records”, *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, Vol. II, UN Doc. A/CONF.183/13 (Vol. II), Rome, 15 June–17 July 1998, p. 359, available at [http://www.un.org/law/icc/rome/proceedings/E/Rome%20Proceedings\\_v2\\_e.pdf](http://www.un.org/law/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf) (last visited 7 October 2006).

35 *Ibid.*, p. 302.

## The obligation to prosecute, the legality of amnesties and “the interests of justice”

In the debate on the question whether Article 53 may serve as a conduit between truth commissions and the ICC, the exigencies posed by international law form a second dimension. The VCLT indicates, namely, that the general rule on treaty interpretation requires that, together with the context, “any relevant rules of international law applicable in the relations between the parties” shall be taken into account.<sup>36</sup> Additionally, the applicable law of the ICC includes, as a secondary source, and only where appropriate, “applicable treaties and the principles and rules of international law”.<sup>37</sup> With regard to the principal focus of this article, the most relevant rules of international law are those governing the obligation to prosecute certain crimes and, closely connected thereto, the legality of amnesties.

On account of conciseness, a few comments on the scope of the obligation to prosecute the crimes overlapping with the ICC’s jurisdiction *ratione materiae* will follow.<sup>38</sup> Overall, neither international customary rules nor international general principles oblige states to exercise jurisdiction, on any ground, over all international crimes.<sup>39</sup> Nonetheless, Cassese believes that it is possible to argue that “in those areas where *treaties* provide for such an obligation, a corresponding customary rule may have emerged or be in the process of evolving”.<sup>40</sup>

### The obligation to prosecute genocide

As is well known, the 1948 Genocide Convention, crafted in the wake of the Second World War, defines genocide and sets out several provisions relating to the punishment of this offence. It stipulates, for instance, that all persons guilty of genocide – that is, constitutionally responsible rulers, public officials or private persons – shall be punished and, so as to give effect to the provisions of the Genocide Convention, states parties must enact the necessary legislation and, especially, provide for effective penalties.<sup>41</sup> An international penal tribunal and domestic courts of the territorial state are envisaged as enforcement mechanisms.<sup>42</sup> On a normative level, according to the International Court of Justice (ICJ), “the principles underlying the Convention are principles which are recognized by the

36 Vienna Convention on the Law of Treaties, above note 13, Article 31(3)(c).

37 Rome Statute, above note 8, Article 21(1)(b).

38 The crime of aggression will not be discussed as article 5(2) of the Rome Statute says that the ICC will only have jurisdiction over this crime of aggression once a provision defining the crime and setting out the conditions under which the court shall exercise jurisdiction with respect to this crime has been adopted.

39 Antonio Cassese, *International Criminal Law*, Oxford University Press, New York, 2003, pp. 301–2.

40 *Ibid.*, p. 302.

41 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, 9 December 1948, entry into force 12 January 1951, Articles 4–5.

42 *Ibid.*, Article 6.

civilized nations as binding on states, even without any conventional obligations”.<sup>43</sup> Orentlicher considers that “although the opinion does not specify which provisions reflect customary norms, those requiring punishment pursuant to the territorial principle, which are the heart of the Convention, surely are included”.<sup>44</sup> It appears, therefore, that an obligation to prosecute those guilty of genocide is endorsed by conventional and customary rules.

### The obligation to prosecute war crimes

Furthermore, the ICC purports to exercise jurisdiction over four types of war crimes: grave breaches of the Geneva Conventions; other serious violations of the laws and customs applicable in international armed conflict; serious violations of Article 3 common to the four Geneva Conventions; and other serious violations of the laws and customs applicable in armed conflicts not of an international character.<sup>45</sup> On the level of the obligation to prosecute war crimes, however, important distinctions may be discerned.

All four Geneva Conventions explicitly define the breaches that are deemed “grave”<sup>46</sup> and detail the consequences attached to their special status. High contracting parties are required to enact legislation necessary to provide for penal sanctions, to search for persons who have allegedly committed such breaches and to bring such persons before their own courts or to extradite them to another high contracting party concerned.<sup>47</sup> These provisions, supplemented by the relevant provisions of Additional Protocol I (API), also apply to the repression of breaches and grave breaches of API.<sup>48</sup> The aforementioned obligations form the basis of what the commentary to the Geneva Conventions deems “the cornerstone of the system used for the repression of breaches of the Convention”.<sup>49</sup>

For breaches of the Geneva Conventions other than grave breaches, the common articles on the repression of grave breaches stipulate that each high

43 ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, International Court of Justice, Advisory Opinion, 1951 ICJ 15, 28 May 1951, para. 24.

44 Diane Orentlicher, “Settling accounts: the duty to prosecute human rights violations of a prior regime”, *Yale Law Journal*, Vol. 100 (1990–1), p. 2565.

45 Rome Statute, above note 8, Article 8(a), 8(b), 8(c), 8(e).

46 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter GCI), 75 UNTS 31, 12 August 1949, entry into force 21 October 1950, Article 50; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter GCII), 75 UNTS 85, 12 August 1949, entry into force 21 October 1950, Article 51; Convention (III) relative to the Treatment of Prisoners of War (hereinafter GCIII), 75 UNTS 135, 12 August 1949, entry into force 21 October 1950, Article 130; and Convention (IV) relative to the Protection of Civilian Persons in Time of War (hereinafter GCIV), 75 UNTS 287, 12 August 1949, entry into force 21 October 1950, Article 147.

47 GCI, above note 46, Article 49; GCII, above note 46, Article 50; GCIII, above note 46, Article 129; GCIV, above note 46, Article 146.

48 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter API), 1125 UNTS 3, 8 June 1977, entry into force 7 December 1978, Articles 11, 85.

49 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. II, ICRC, Geneva, 1960, p. 590.

contracting party shall take measures necessary for the suppression thereof.<sup>50</sup> Although the wording is imprecise, according to the commentary “there is no doubt that what is primarily meant is the repression of breaches other than the grave breaches listed and only in the second place administrative measures to ensure respect for the provisions of the Convention”, and, therefore, “all breaches of the Convention should be repressed by national legislation”.<sup>51</sup> Meron concludes that “*mandatory* prosecution (or extradition) of perpetrators of grave breaches of the Geneva Conventions and *discretionary* prosecution for other (nongrave) breaches are left to the penal courts of the detaining power”.<sup>52</sup>

Common Article 3 of the Geneva Conventions, as well as Additional Protocol II (APII), which develops and supplements common Article 3 without modifying its existing conditions of application,<sup>53</sup> applies to conflicts of a non-international character. Unlike provisions relating to grave breaches and other breaches of the Geneva Conventions, common Article 3 and APII are devoid of explicit references to measures to be taken in response to breaches of their provisions. Common Article 3 arguably is covered by the third paragraph of the provision on grave breaches requiring measures for the suppression of “non-grave” breaches of the Conventions. In Meron’s opinion, criminal jurisdiction over these crimes could be of a non-compulsory nature, since violations of common Article 3 are not encompassed by the list of grave breaches of the Geneva Conventions.<sup>54</sup>

The question whether customary law requires the permissive or obligatory prosecution of war crimes is not obvious. The authors of the International Committee of the Red Cross (ICRC) customary law study assert that international customary law requires states to

investigate war crimes allegedly committed by their national or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.<sup>55</sup>

This would imply that, in international and non-international armed conflicts, “states must exercise the criminal jurisdiction which their national legislation confers upon their courts, be it limited to territorial and personal jurisdiction”.<sup>56</sup> Universal jurisdiction for war crimes, obligatory for grave breaches

50 GCI, above note 46, Article 49(3); GCII, above note 46, Article 50(3); GCIII, above note 46, Article 129(3); GCIV, above note 46, Article 146(3).

51 Pictet, above note 49, p. 594.

52 Theodor Meron, “International criminalization of internal atrocities”, *American Journal of International Law*, Vol. 89 (1995), p. 564 (emphasis added).

53 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter APII), 1125 UNTS 609, 8 June 1977, entry into force 7 December 1978, Article 1(1).

54 Meron, above note 52, p. 566.

55 Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I: Rules*, ICRC and Cambridge University Press, Geneva and Cambridge, 2005, p. 607.

56 *Ibid.*, p. 607.

only, may be claimed as a right.<sup>57</sup> Whereas “must” seems to imply an obligation, the insertion of “if appropriate” could be interpreted in at least two ways. First, “if appropriate” could relate to evidentiary issues requiring sufficient evidence to initiate criminal proceedings against an alleged offender. Second, keeping in mind that breaches of the Geneva Conventions falling short of grave breaches might not necessitate penal measures, it could be taken to mean that a criminal prosecution is merely one of the available alternatives. “Must” also seems to emphasize the investigation of war crimes rather than the prosecution of these acts. The obligation to prosecute alleged perpetrators of grave breaches does seem to have attained customary law status by virtue of “the almost universal ratification of the Geneva Conventions and the widespread occurrence of implementing legislation enacted by States around the world”.<sup>58</sup>

Therefore, while it is outside the scope of this article to examine this matter in depth, it is unclear whether the sources of the war crimes within the jurisdiction of the ICC require the permissive or obligatory prosecution of these acts. Suffice it to say, for the purposes of this contribution, that only grave breaches of the Geneva Conventions attract an unequivocal obligation, conventional and customary, of criminal prosecution.

### The obligation to prosecute crimes against humanity

Crimes against humanity have not been made the subject of a specialized convention. As the offences underlying crimes against humanity coincide, to a large extent, with human rights law, obligations to prosecute single acts might arise from other sources. Torture, for example, laid down in Article 7(1)(f) of the Rome Statute, is also a crime under the Convention against Torture (CAT). The CAT requires states parties, among other things, to “ensure that all acts of torture are offences under its criminal law”, and once a state party finds an alleged torturer on its territory it shall, if it does not extradite him, “submit the case to its competent authorities for the purpose of prosecution”.<sup>59</sup>

A clearly enunciated conventional obligation to prosecute crimes with the distinctive features of crimes against humanity is therefore non-existent. It could, on the other hand, be argued that if underlying offences of crimes against humanity attract a conventional or customary obligation to prosecute, perpetrators of the same crimes committed as part of a systematic or widespread attack should, *a fortiori*, be brought to trial. Should Cassese’s stipulation be accepted that customary rules on obligations to prosecute may only emerge in areas where treaties provide for such an obligation, it will be hard to defend that this has occurred with regard to crimes against humanity. Nonetheless, authors

57 Ibid., pp. 604–7.

58 Yasmin Naqvi, “Amnesty for war crimes: defining the limits of international recognition”, *International Review of the Red Cross*, Vol. 85 (851), 2003, pp. 596–7.

59 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984, entry into force 26 June 1987, Articles 4(1), 7(1).

such as Bassiouni have written that customary law obliges states to prosecute or to extradite perpetrators of crimes against humanity.<sup>60</sup> It seems, therefore, that the matter remains open for debate.

### The Rome Statute

Those convinced of the existence of a customary obligation to prosecute genocide, crimes against humanity and war crimes also contend that, regarding states parties, the Rome Statute itself recognizes such an obligation.<sup>61</sup> According to this line of reasoning, the Rome Statute's preambular paragraphs affirming that "the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" and recalling that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" correspond thereto.<sup>62</sup>

Although framed ambiguously, it has been suggested that the latter is sort of a "Martens Clause" referring not directly to the core crimes within the jurisdiction of the ICC but to a broad class of crimes which states must prosecute.<sup>63</sup> In addition, it is said, Article 17, setting out the ICC's pivotal complementarity mechanism, indicates that states not only possess the first right to prosecute perpetrators of the crimes within the ICC's jurisdictional reach but also a duty to do so.<sup>64</sup> Neither this article nor the remainder of the Rome Statute's operative part explicitly espouses an obligation to prosecute emanating from the Statute, but, mindful of concerns of state sovereignty, it effectively circumscribes the instances allowing the ICC to exercise its jurisdiction. A violation of an obligation to prosecute is not unambiguously foreseen as a jurisdictional trigger and a failure of an obligation to prosecute derived from other sources than the Rome Statute cannot alter the envisaged triggering mechanisms either.

Yet a logical reading of Article 17, and the Rome Statute as a whole, would certainly suggest that states parties are under an obligation to prosecute the crimes within the jurisdiction of the ICC. The nature of the ICC as a safety net, ensuring that the perpetrators of the most serious crimes of concern to the international community as a whole will not escape punishment, indicates that, one way or the other, perpetrators of these crimes must be held accountable.

An important qualifier in the admissibility requirements of ICC cases is Article 17(1)(d), excluding cases not of sufficient gravity, thus seemingly limiting states parties' obligation to prosecute crimes surpassing this, arguably hazy, threshold. Taking into account the characteristics of genocide and crimes against

60 Cherif M. Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd rev. edn, Kluwer Law International, The Hague, London, Boston, 1999, p. 219.

61 HRW Policy Paper, above note 22, p. 11.

62 Rome Statute, above note 8, Preamble, paras. 4 and 6.

63 Otto Triffterer and Morten Bergsmo, "Preamble", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, pp. 12–13.

64 HRW Policy Paper, above note 22, p. 11.

humanity and the fact that the Court intends to exercise its 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 war crimes, it will be hard to imagine that these acts, as such, will be deemed of insufficient gravity.

The ICC Office of the Prosecutor (OTP) considers, however, that, in determining whom to prosecute, the criterion of the gravity of the crime also entails an assessment of the degree of participation.<sup>65</sup> Consequently, it is concluded that “The global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation 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.”<sup>66</sup> In respect of possible impunity ensuing for other offenders it is said that “alternative means for resolving the situation may be necessary, whether by encouraging and facilitating national prosecutions by strengthening or rebuilding national justice systems, by providing international assistance to those systems or by some other means”.<sup>67</sup>

Whether the degree of responsibility of the offender, apart from the objective gravity of the crime, should also be taken into account in determining the extent of states parties’ obligation to prosecute is not certain. Yet it seems reasonable to translate the OTP’s comments into an understanding of the Rome Statute obliging states parties to prosecute those most responsible for the crimes whereas other means might suffice in dealing with other offenders. The OTP’s statement, namely, juxtaposes “some other means” against national prosecutions whereby the former could reasonably be interpreted to cover non-prosecutorial accountability mechanisms.

Additionally, it is submitted by Naqvi that “the attempt to reach a definite conclusion as to whether there is indeed a customary duty to prosecute international crimes on the basis of the complementarity principle infers too much from what is essentially a mechanism to establish which court is competent to try a case”.<sup>68</sup> Support for this argument is found in the facts that states are reluctant to assume additional obligations under customary law as a result of the ratification of a new legal instrument and, with regard to the war crimes enumerated in the Rome Statute, negotiators restricted themselves to identifying the war crimes recognized in customary law implying that they, hence, did not pronounce themselves on the customary obligation to prosecute these acts.<sup>69</sup>

65 ICC Office of the Prosecutor, “Paper on some policy issues before the Office of the Prosecutor”, September 2003, p. 7, available at [http://www.icc-cpi.int/library/organs/otp/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf) (last visited 12 October 2006).

66 *Ibid.*, p. 7.

67 *Ibid.*

68 Naqvi, above note 58, p. 599.

69 *Ibid.*, p. 600.

## The legality of amnesties

A close corollary of an obligation to prosecute certain crimes would be a ban on the granting of amnesties. Bases for amnesties certainly do exist in international law, such as Article 6(5) of APII. Although APII does not specify which acts shall be eligible for an amnesty, commentators have suggested that acts constituting war crimes are to be excluded, as the object and purpose of APII, in line with the VCLT rules on the interpretation of treaties, is greater protection for victims of non-international armed conflicts.<sup>70</sup> It is also held that the ICRC reads the article narrowly, as its main rationale is seen as the encouragement of immunity for the mere participation in hostilities but not for violations of international humanitarian law (IHL).<sup>71</sup> At the same time, the ICRC notes that amnesties are not excluded by IHL “as long as the principle that those having committed grave breaches have to be either prosecuted or extradited is not voided of its substance”.<sup>72</sup> The ICRC customary law study shares the assertion that war crimes may not be the object of an amnesty.<sup>73</sup>

Recent developments also confirm such a position and indicate, more generally, a changing attitude towards amnesties in international law. For instance, following the inclusion of an amnesty provision in a peace accord concluded between the Sierra Leone government and a rebellious faction,<sup>74</sup> the UN Special Representative appended a handwritten disclaimer to the agreement stating that the United Nations interprets the amnesty provision as not applying to international crimes of genocide, crimes against humanity, war crimes and other serious violations of IHL.<sup>75</sup> Accordingly, Article 10 of the Statute of the Special Court for Sierra Leone (SCSL) provides that an amnesty for crimes falling under the court’s jurisdiction “shall not be a bar to prosecution”, and the SCSL’s Appeals Chamber explicitly held that the Lomé agreement amnesty could not deprive it of its jurisdiction.<sup>76</sup>

Therefore, in recent times, a strong presumption in favour of the illegality of amnesties in international law seems to have appeared. However, the state of international law as it stands today does not yet support a “general obligation for States to refrain from enacting amnesty laws” with regard to international crimes.<sup>77</sup>

70 Ibid., p. 604.

71 Ibid., pp. 604–5. Douglass Cassel, “Lessons from the Americas: guidelines for international response to amnesties for atrocities”, *Law and Contemporary Problems*, Vol. 59 (4) (1996), p. 218.

72 Cassel, above note 71, p. 218.

73 Henckaerts and Doswald-Beck, above note 55, pp. 612–14.

74 Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Article ix, available at <http://www.sierra-leone.org/lomeaccord.html> (last visited 12 October 2006).

75 Human Rights Watch, “World Report 2001”, available at <http://www.hrw.org/wr2k1/africa/sierraleone.html> (last visited 12 October 2006).

76 Special Court for Sierra Leone, *Prosecutor against Morris Kalon, Brima Bazzy Kamara*, Case No. SCSL-04-15-PT-060, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Appeals Chamber), 13 March 2004, para. 88.

77 Cassese, above note 39, p. 315.

## Conclusion

The previous paragraphs attempted to point out that the law on the obligation to prosecute certain crimes is still unsettled. A general duty obliging states to prosecute international crimes, which, existing independently from the Rome Statute, would not trigger or alter the jurisdiction of the ICC at any rate, has not yet crystallized. Closely connected thereto, loopholes through which amnesties could pass remain, although there is an incontestable drift in international law towards the outlawing of amnesties.

Even in respect of the accepted or least contested customary obligations to prosecute specific crimes, difficult problems would arise for the ICC Prosecutor when applied in the context of “the interests of justice”. For example, in terms of overlapping crimes, the *actus reus* of genocide may coincide to a considerable extent with crimes underlying crimes against humanity, such as “killing members of the group” in comparison with “murder” and “extermination”.<sup>78</sup> Especially in the initial stages of an investigation, it might still not be entirely clear which legal qualification best fits the crimes under investigation. Consequently, from a practical perspective, a complex analysis as to the role of potentially differing obligations to prosecute appended to distinct crimes might not be suitable at this stage of the process.

States parties to the Rome Statute are arguably under an obligation to prosecute the crimes enumerated therein, although it seems too great a stretch to extrapolate from the Statute a customary duty to prosecute. HRW contends that this obligation is reflected in Article 17 relating to the Statute’s admissibility requirements. Yet, relying on this obligation, not a specific feature of Article 17 in any case, so as to determine whether the Prosecutor may invoke “the interests of justice” provision to halt an investigation or a prosecution seems to constitute a misconstruction of the Rome Statute’s structure. As said earlier, the Prosecutor must base his assessment as to the existence of a reasonable basis to proceed with an investigation or a prosecution under the Rome Statute on several factors. Besides having to consider whether “the interests of justice” do not warrant an investigation or a prosecution, the Prosecutor has to determine whether, in the case of an investigation, “the case is or would be admissible under Article 17”, and, in the case of a prosecution, whether “the case is inadmissible under Article 17”.<sup>79</sup> Although the formulations differ slightly, it is apparent that the admissibility requirements of Article 17, which, according to HRW, also contains states parties’ obligation to prosecute, must be appraised. A certain amount of overlap between these factors may be detected as “the gravity of the crime” is mentioned as an admissibility requirement in Article 17, but it also has to be considered within “the interests of justice” clauses. However, the obligation to prosecute, unlike the “gravity of the crime”, is not explicitly mentioned within “the interests of justice”, and a second determination of this aspect, or at least a *renvoi* thereto, seems

78 Rome Statute, above note 8, Articles 6(a), 7(1)(a), 7(1)(b).

79 Ibid., Articles 53(1)(b), 53(2)(b).

therefore illogical. Admissibility requirements, including the obligation of states parties to prosecute according to HRW, and the issue of whether “the interests of justice” would oppose an investigation or prosecution are thus separate determinations within the Prosecutor’s assessment as to the basis to proceed, leaving no room for a re-evaluation of Article 17 within the latter aspect, despite a certain overlap.

Therefore it is submitted here that the Prosecutor’s decision whether to decline to investigate or to prosecute based on “the interests of justice” should not be weighed against a general or a specific obligation to prosecute ICC crimes and the legality of amnesty bargains. Yet fully fledged international rules relating to the obligation to prosecute certain crimes and the legality of amnesties would seem to possess the potential to become a relevant factor within assessments as to “the interests of justice”. If, or when, this occurs, the issue whether a treaty rule is to be interpreted in the light of the rules of international law in force at the time of the conclusion of the treaty or whether a development of international law should also be taken into account will have to be resolved first.<sup>80</sup>

### Prosecutorial discretion and “the interests of justice”

*Black’s Law Dictionary* holds that “when applied to public functionaries, discretion means a power or right conferred upon them by law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others”.<sup>81</sup> The concept serves, among other things, to secure the Prosecutor’s independence by removing extraneous factors in the prosecutorial decision-making process.<sup>82</sup> This may become especially important in international criminal proceedings as the international Prosecutor exerts his or her discretionary powers in a politically charged judicial arena.

As has been indicated already, in situations of transitional justice, a truth commission combined with amnesties might be the only mechanism available to a fledgling society to deal with its past. What is more, demands for criminal trials might spark a renewed outbreak of hostilities or lead to the overthrow of a newly installed government.

The questions arises whether political considerations of this kind are to be taken into account by the ICC Prosecutor in deciding whether to defer to truth commissions combined with amnesties. The following paragraph will seek to provide an answer from the perspective of the Rome Statute’s approach to prosecutorial discretion, of which “the interests of justice” clauses of Article 53

80 Sinclair, above note 14, p. 139.

81 Henry Campbell Black, *Black’s Law Dictionary: Definition of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, 6th edn, West Publishing Co., St. Paul, Minn., 1990, p. 466.

82 Matthew Brubacher, “Prosecutorial discretion within the International Criminal Court”, *Journal of International Criminal Justice*, Vol. 2 (2004), pp. 75–7.

form part. Before turning to the Rome Statute’s position, elements of the discretion enjoyed by the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) will first be discussed, so as to illustrate the development of international prosecutorial discretion.

### The ICTY Prosecutor

The ICTY has, in general, moved from a strong adversarial paradigm towards a mixed system permeated by aspects of common law as well as of civil law.<sup>83</sup> The Tribunal’s Statute guarantees the Prosecutor a broad, though not unlimited, discretion in the discharge of his or her duties. Namely it entrusts the Prosecutor, “ex-officio or on the basis of information obtained from any source”, with the exclusive authority to initiate investigations as soon as he or she has decided that there is a sufficient basis to proceed upon an assessment of the information received or obtained.<sup>84</sup> Once satisfied that a *prima facie* case exists, the Prosecutor shall prepare an indictment which a Trial Chamber Judge must confirm before trial proceedings may be commenced.<sup>85</sup> Therefore, apart from a review of the *prima facie* threshold, the ICTY Statute leaves the Prosecutor’s discretion virtually unchecked, as preceding decisions as to the initiation of investigations, the persons being investigated and the conduct of investigations are not subject to judicial scrutiny. In the words of Judge Wald, “nowhere in the Statute is any Chamber of the ICTY given authority to dismiss an indictment or any count therein because it disagrees with the wisdom of the Prosecutor’s decision to bring a case”.<sup>86</sup>

The jurisprudence, however, indicates that the nature of the Prosecutor as an official vested with specific duties imposed by the Statute of the Tribunal circumscribes his or her discretion in a more general way, requiring the discharge of his or her functions with full respect for the law and recognized principles of human rights.<sup>87</sup> In this regard, the evolution of the Prosecutor’s role, compared with historic international criminal tribunals, is of relevance too. According to May, the ICTY Prosecutor is no longer limited to presenting the facts in a manner most favourable to his or her standpoints; a commitment to the establishment of the truth and the interests of justice has arisen too.<sup>88</sup> The jurisprudence indicates that “the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal

83 Darryl Mundis, “From common law towards civil law: the evolution of the ICTY Rules of Procedure and Evidence”, *Leiden Journal of International Law*, Vol. 14 (2001), p. 368.

84 Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), 25 May 1993, Article 18(1).

85 *Ibid.*, Articles 18(4), 19(1).

86 ICTY, *Prosecutor v. Goran Jelisić*, Case No. IT-95-10, Judgement (Appeals Chamber), Partial Dissenting Opinion of Judge Wald, 5 July 2001, para. 4.

87 ICTY, *Prosecutor v. Zejnil Delalić, Zdravko Mučić (aka “PAVO”), Hazim Delić and Esad Landžo (aka “ZENGA”) (“Čelibići Case”)*, Case No. IT-96-21-A, Judgement (Appeals Chamber), 20 February 2001, para. 604.

88 Richard May and Marieke Wierda, *International Criminal Evidence*, Transnational Publishers, Ardsley, NY, 2002, pp. 33–4.

justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting”.<sup>89</sup>

### The ICC Prosecutor

The Rome Statute, envisaging similarly to the ICTY an adversarial model infused with certain non-adversarial elements,<sup>90</sup> departs significantly from the ICTY’s approach to prosecutorial discretion. States in favour of broad prosecutorial discretion and those wary of an overzealous, politically inspired Prosecutor encroaching upon their sovereignty eventually compromised on additional checks on the Prosecutor’s discretion. Regarding the Prosecutor’s *proprio motu* powers, one of the major stumbling blocks during the negotiations, the Rome Statute provides a complicated construction. Article 15 of the Rome Statute sets this power out in more detail and reads in the relevant part:

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received ...
3. If 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 ...
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation ...<sup>91</sup>

After laying down the Prosecutor’s unconditional discretionary power in the first paragraph to initiate investigations, the second paragraph of Article 15 contains an obligation as to the analysis of the seriousness of the information on which a *proprio motu* investigation is based. Bergsmo and Pejić indicate that an evidentiary analysis pertaining to the information’s seriousness is required, which may concern the nature of the alleged crimes and the information’s incriminatory strength, as opposed to a test of appropriateness.<sup>92</sup> Although Article 15(1) speaks of the initiation of investigations, Article 15(6) refers to the steps to be taken in the first and second paragraphs as a “preliminary investigation”. This description seems more accurate, since a full-blown investigation requires judicial approval pursuant to the third and fourth paragraphs of Article 15.

89 ICTY, *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Santić, also known as “Vlado”*, Decision on Communication between the Parties and their Witnesses (Trial Chamber), IT-95-16, 21 September 1998.

90 Cassese, above note 39, p. 385.

91 Rome Statute, above note 8, Articles 15(1)–(4).

92 Morten Bergsmo and Jelena Pejić, “Article 15”, Triffterer, above note 63, p. 365.

As soon as the Prosecutor is convinced of the existence of a reasonable basis on which to proceed, on the basis of the criteria enumerated in Article 53(1)(A)–(C)<sup>93</sup>, article 15(3) imposes the obligation on the Prosecutor to submit a request for an investigation to the Pre-Trial Chamber. The Pre-Trial Chamber will review, together with a jurisdictional assessment, whether the information in the possession of the Prosecutor warrants the conclusion that there is a reasonable basis to proceed, upon which it may authorize the Prosecutor to start a full investigation in conformity with Articles 53 and 54. Article 53, applicable to all three jurisdictional triggers,<sup>94</sup> contains further judicial restraints in respect of prosecutorial discretion. Should the Prosecutor base his decision not to proceed with an investigation or prosecution solely on “the interests of justice” clause, a requirement arises to “inform the Pre-Trial Chamber” or to “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”.<sup>95</sup> In any event, the Pre-Trial Chamber may review “interests of justice” decisions on its own initiative and, should it decide to do so, the entry into force of the decision will be contingent upon the Chamber’s confirmation.<sup>96</sup> In addition, when requested by a state making a referral under Article 14 or by the UN Security Council under Article 13(b), the Pre-Trial Chamber may review decisions to forsake an investigation or a prosecution on any of the grounds enumerated in Articles 15(1) and 15(2) and request the Prosecutor to reconsider.<sup>97</sup>

With regard to the confirmation of charges, the Rome Statute, in contrast to the ICTY, foresees the holding of a hearing, in the presence of the person charged, his or her counsel and the Prosecutor, to confirm the charges on which the Prosecutor intends to seek trial.<sup>98</sup> In certain circumstances, upon request of the Prosecutor or on a motion of the Pre-Trial Chamber, the hearing may also be held in the absence of the person charged.<sup>99</sup> On the basis of this hearing, the Pre-Trial Chamber determines whether “there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”.<sup>100</sup>

Besides Pre-Trial Chamber control, the Rome Statute also puts forward several additional constraints on the Prosecutor. For instance, Article 18, pertaining to preliminary rulings regarding admissibility, is one of the manifestations of the Rome Statute’s complementary character and requires the Prosecutor to notify all states parties and those which normally would exercise jurisdiction over the crimes concerned when an investigation pursuant to state referral or *proprio motu* powers is commenced.<sup>101</sup> Unless the Pre-Trial Chamber

93 ICTY Rules of Procedure and Evidence, ICC-ASP/1/3, 3–10 September 2002, rule 48.

94 Morten Bergsmo and Pieter Kruger, “Article 53”, Triffterer, above note 63, p. 702.

95 Rome Statute, above note 8, Articles 15(1)(c), 15(2)(c).

96 Ibid., Article 15(3)(b).

97 Ibid., Article 15(3)(a).

98 Ibid., Article 61(1).

99 Ibid., Article 61(2).

100 Ibid., Article 61(7).

101 Ibid., Article 18(1).

authorizes an investigation on application of the Prosecutor, a national investigation will take precedence once a state has informed the Court that it is investigating or has investigated the acts in question.<sup>102</sup> Also, as stated earlier, Article 16 allows the UN Security Council, in case of intrusion into its domain, to halt the commencement or continuation of an investigation or prosecution under the Rome Statute.

In addition, the expansion of the international Prosecutor's role has continued with the adoption of the Rome Statute. Where the ICTY Prosecutor was merely obliged to disclose exculpatory evidence, all facts and evidence must be covered by an ICC investigation and incriminating and exonerating circumstances must be investigated equally in order to establish the truth.<sup>103</sup> The Prosecutor thus assumes "a role more akin to that of an investigating judge in the civil law system".<sup>104</sup>

The final example of an additional constraint to be mentioned here is the position of victims. Whereas the architects of the ad hoc Tribunals withheld from victims the right to partake individually in proceedings and to obtain compensation,<sup>105</sup> the Rome Statute considerably expands their role in the judicial process of the ICC.<sup>106</sup> With regard to prosecutorial discretion, both "interests of justice" clauses in Article 53 specifically oblige the Prosecutor to take account of the interests of victims in deciding whether there is a reasonable basis to proceed with an investigation or a prosecution. Furthermore, the Prosecutor is under a duty to respect the interests and personal circumstances of victims when taking appropriate measures for his investigations and prosecutions.<sup>107</sup>

### Prosecutorial discretion's side effects

Yet besides securing the Prosecutor's independence, prosecutorial discretion as to issues of investigation and prosecution may give rise to misgivings of various kinds. Two examples with regard to the ICTY may be helpful.

Virtually all sides involved in the Yugoslav disintegration have accused the ICTY Prosecutor of, among other things, employing a politically motivated prosecutorial policy. Côté holds that the criteria on which discretionary decisions are based are "numerous, ill-sorted and sometimes hazy" and that, despite Prosecutors' repudiation of the existence of a political dimension to the exercise of discretionary powers, it is hard to imagine that such considerations are always discarded in matters closely linked to vast political interests.<sup>108</sup> In addition, the

102 Ibid., Article 18(2).

103 Ibid., Article 54(1)(a).

104 May and Wierda, above note 88, p. 34.

105 Claude Jorda and Jérôme De Hemptinne, "The Status and Role of the Victim", in Antonio Cassese, Paola Gaeta and John Jones (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, Vol. II, Oxford University Press, New York, 2002, p. 1389.

106 Rome Statute, above note 8, Articles 15(3), 19(3), 68(3).

107 Ibid., Article 54(1)(b).

108 Luc Côté, "Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law", *Journal of International Criminal Justice*, Vol. 3 (2005), pp. 169–71.

same author rightly maintains that the exercise of discretionary power is inherently political and that the truly disturbing aspect is the secretive nature of discretionary decision-making, casting doubt on the legitimacy and impartiality of decisions.<sup>109</sup> Thus the ICTY Prosecutor’s decision to establish a committee to assess the allegations that NATO committed serious violations of IHL and to advise the ICTY whether there is a sufficient basis to proceed with an investigation into some or all the allegations<sup>110</sup> was initially hailed as an attempt to elucidate the process of discretionary decision-making. Interestingly, as explained above, the ICTY Prosecutor was not under an obligation to reveal the criteria guiding her decisions to investigate and, as has been pointed out, the report seems to resemble a preliminary examination as required for *proprio motu* investigations of the ICC Prosecutor.<sup>111</sup> Although a thorough discussion would be outside the scope of this research, the report’s conclusion not recommending the commencement of an investigation into the bombing campaign has met with considerable criticism. Côté writes that the reasoning behind this conclusion raises doubts as to double standards in respect of the Federal Republic of Yugoslavia (FRY) and NATO and that, consequently, the reaffirmation of the Prosecutor’s independence and impartiality, insofar as this was the Prosecutor’s principal aim, has not been achieved.<sup>112</sup>

Additionally and closely connected to the previous issue, the ICTY Prosecutor has had to face allegations of ethnic bias. One of the accused in the aforementioned *Čelebići* case maintained that he had been the victim of selective prosecution as, in order to appear more even-handed, the Prosecutor allegedly singled him out as a young Bosnian Muslim camp guard to represent the group to which he belonged, while indictments against all other defendants without military rank who were non-Muslims of Serbian ethnicity were withdrawn.<sup>113</sup> The Appeals Chamber, as indicated above, described the limitation to prosecutorial discretion posed by the recognized principles of human rights and said, with regard to the ICTY Statute’s right to equality before the law, that it “prohibits discrimination in the application of the law based on impermissible motives such as, *inter alia*, race, colour, religion, opinion, national or ethnic origin”.<sup>114</sup> The Appeals Chamber went on to say that a presumption exists that the prosecutorial functions under the Statute are exercised regularly, although evidence establishing that the discretion has in fact not been exercised in accordance with the ICTY Statute may rebut this presumption.<sup>115</sup> With regard to the right to equality before the law, a two-pronged

109 *Ibid.*, p. 171.

110 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000, para. 3, available at <http://www.un.org/icty/pressreal/nato061300.htm> (last visited 19 October 2006).

111 Côté, above note 108, p. 180.

112 *Ibid.*, p. 183.

113 ICTY, *Prosecutor v. Zejnil Delalić, Zdravko Mučić (aka “PAVO”), Hazim Delić and Esad Landžo (aka “ZENGA”) (“Čelebići Case”)*, Case No. IT-96-21-A, Judgement (Appeals Chamber), 20 February 2001, para. 596.

114 *Ibid.*, para. 605.

115 *Ibid.*, para. 611.

test must be satisfied: first, evidence must be brought “from which a clear inference can be drawn that the Prosecutor was motivated in that case by a factor inconsistent with that principle” and, second, “because the principle is one of *equality* of persons before the law, it involves a comparison with the legal treatment of other persons who must be similarly situated for such a comparison to be a meaningful one”.<sup>116</sup>

## Conclusion

The Rome Statute seems unpromising in terms of a prosecutorial appraisal of political factors in order to determine what is in “the interests of justice”. Certainly, the interplay between international politics and international criminal justice is not overlooked by the Rome Statute, as, in the words of Zappalà, “it appeared necessary to preserve the integrity of the proceedings without turning a blind eye to their political dimension”.<sup>117</sup> This has been achieved by allowing the UN Security Council to request that investigations or prosecutions not be commenced or proceeded with in the interests of international peace and security and by “entrusting the Pre-Trial Chamber with the duty to safeguard the interests of a correct administration of justice”.<sup>118</sup>

Thus the latter aspect, as attested to by various provisions in the Rome Statute, seems to exclude, or at least to limit significantly, the possibility of the Prosecutor resorting to political considerations within his discretionary powers. The Rome Statute in other words goes to great lengths to reduce the obscure nature of discretionary decision-making by imposing obligations on the Prosecutor to provide reasons for decisions not to proceed with investigations or prosecutions.

First, should the Prosecutor decide not to initiate a *proprio motu* investigation once a preliminary investigation has been conducted in accordance with Article 15(1) and (2), a duty arises to inform those who provided the information.<sup>119</sup> For instance, the Prosecutor’s decisions on communications regarding Venezuela and Iraq were made public and, in both cases, the Prosecutor indicated that the first threshold had not been met – that is, a reasonable basis for believing that a crime within the jurisdiction of the Court had been committed was absent.<sup>120</sup>

Second, as explained above, the Pre-Trial Chamber has to be informed of the Prosecutor’s decisions not to proceed with an investigation based solely on

116 Ibid.

117 Salvatore Zappalà, *Human Rights in International Criminal Proceedings*, Oxford University Press, Oxford, 2003, pp. 43–4.

118 Ibid., p. 44.

119 Rome Statute, above note 8, Article 15(6).

120 Venezuela Response, Letter of the Office of the Prosecutor, 9 February 2006, available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Venezuela\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf) (last visited 21 October 2006). Iraq Response, Letter of the Office of the Prosecutor, 9 February 2006, available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf) (last visited 21 October 2006).

“the interests of justice”, and, in addition, the Prosecutor is obliged to notify the Pre-Trial Chamber, the UN Security Council and the referring state, depending on who referred the situation, of a determination, on any ground, that there is no reasonable basis for a prosecution. Furthermore, the Pre-Trial Chamber’s powers to review “interests of justice” decisions on its own initiative are even greater than at first glance. Although Article 53(3)(b) apparently lays down a discretionary power, the final sentence makes the validity of these decisions contingent upon Pre-Trial Chamber approval. Whereas it may be questioned whether the approval is required only if the Pre-Trial Chamber decides to exercise its right to review “interests of justice” decisions on its own initiative, Bergsmo and Kruger write that

If the Prosecutor’s decision has no validity unless confirmed by the Pre-Trial Chamber, the Chamber is *necessarily* bound to review all such decisions of the Prosecutor. A different interpretation would result in the potential paralysis of the Court were the Pre-Trial Chamber to refrain from reviewing such a decision.<sup>121</sup>

Therefore, by obliging the Prosecutor to provide reasons for decisions based on discretionary powers and by allowing the Pre-Trial Chamber to review decisions based on delicate criteria on its own initiative, the Rome Statute seeks to avoid arbitrary decisions veiled by prosecutorial discretion. Logically, if the Prosecutor, in the exercise of his discretionary powers, was to take political factors into account in determining “the interests of justice”, his decision would have to be corroborated by reasoning and communicated to those providing the information, the Pre-Trial Chamber, the UN Security Council or a state referring the situation.

This situation might give rise to auxiliary negative effects. The Pre-Trial Chamber would, for instance, become mired in political judgement, having to express itself on the Prosecutor’s assessment of certain political circumstances on the basis of Article 53(3)(b) of the Rome Statute. The appearance of the Court as an independent and impartial institution would be gravely impaired the moment it explicitly affixes a political dimension to the discharge of its judicial functions. In addition, states referring situations to the Prosecutor and those providing information, especially victims’ organizations and non-governmental organizations (NGOs), might become disinclined to continue their co-operation with the Prosecutor were political parameters to be applied by the OTP. Cumulatively, these and other consequences of the Prosecutor playing an explicit political role might affect the Court as a whole and entail its marginalization on the international scene.

Other considerations also militate against interpreting prosecutorial discretion as leaving room for political contemplations. The Security Council entrusted the Prosecutors of the ad hoc tribunals with the task of safeguarding the interests of the international community, including those of the victims of the

121 Bergsmo and Kruger, above note 94, p. 713 (emphasis added).

conflicts, throughout the proceedings. However, after pointing out that the interests of the Prosecutor and the victims may diverge,<sup>122</sup> Jorda and de Hemptinne ask,

Would it not have constituted an additional guarantee of fairness, justice, and legal certainty to have granted the victim or his representatives a right to scrutinize the exercise of the Prosecutor's discretionary power, or even an actual right of appeal ...? Such measures would guarantee fairness and justice. First of all, because persons whose most fundamental rights have been flouted would thus have not only the certainty of being heard but also the formal assurance that, if it were decided to take no action on their case, the reasons for such decision would be based on overriding public-interests considerations and not on purely political grounds.<sup>123</sup>

The situation at the ICC is different. As mentioned previously, the ICC Prosecutor is obliged to weigh his decision not to investigate or to prosecute against the interests of victims, who, in addition, may make presentations to the Pre-Trial Chamber when the Prosecutor submits a request for an investigation, and, if they provided information, the Prosecutor must inform them of decisions not to pursue *proprio motu* investigations. While it is recognized that a political assessment may not necessarily be to the detriment of victims, the thrust of the victims' role seems to be to reduce the risk of murky political interference with discretionary decision-making. Nevertheless, the line between Jorda and de Hemptinne's "overriding public-interests considerations" and "purely political grounds" in matters on the juncture between politics and law is thin and, above all, a matter of perception. Therefore it appears that the expansion of the role of victims may plausibly be interpreted as another attempt by the Rome Statute to reduce as far as possible the political dimension of discretionary decision-making.

What is more, Article 54(1)(c) explicitly binds the Prosecutor to respect the rights of persons arising under the Rome Statute. As recognized by the ICTY in *Čelebići*, the improper exercise of prosecutorial discretion could impair an accused's right to equality before the law, recognized in the Rome Statute in the requirement that "the application and interpretation of law ... must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status".<sup>124</sup> The factoring in of political circumstances could bring about dissimilar treatment of perpetrators of similar crimes based on some of the aforementioned criteria, violating the requirement of equality before the law.

However, the standard applied by the ICTY, were the ICC judges to follow it, seems exacting and not easy to prove. Also, Côté notes that, in selecting

122 Jorda and De Hemptinne, above note 105, p. 1392.

123 *Ibid.*, pp. 1394–5.

124 Rome Statute, above note 8, Article 21(3).

potential indictees, taking account of their belonging or affiliation to a certain group may seem legitimate in light of international tribunals’ mandate to contribute to national reconciliation and the maintenance and restoration of peace, although, considered alone, these criteria may violate the right to equality.<sup>125</sup> If accepted, this element would additionally complicate proving an infringement of the right to equality.

Finally, the development of the role of the international Prosecutor has led Zappalà to describe the ICC Prosecutor as an “organ of justice” rather than a mere party to the proceedings.<sup>126</sup>

### Concluding remarks

The perception of a Prosecutor sensitive to political circumstances, and perhaps to political pressure, would irreparably harm the Prosecutor’s status as an independent party to international criminal proceedings.

On the other hand, due to the inescapable political reverberations of international criminal proceedings, it is suggested neither that the Prosecutor will escape political pressure nor that political assessments by the Prosecutor are unavoidable. Despite the Rome Statute’s safeguards, those hostile to the Court will relentlessly seek to politicize the Prosecutor’s acts. Moreover, as the Prosecutor ultimately retains the discretionary power to decide whether to initiate a *proprio motu* investigation despite the obligation to inform providers of information, political factors can not be discarded completely.

In any event, even a decision not to take account of political factors would, somehow contradictorily, have a certain political dimension to it. However, as the preceding paragraphs have endeavoured to demonstrate, allowing blatant political judgements through the back door of “interests of justice” assessments would be uncongenial to the Rome Statute’s strenuous attempts to curb prosecutorial discretion. Extensive obligations to motivate decisions taken pursuant to discretionary powers would produce additional negative effects impacting the Court as a whole.

125 Côté, above note 108, p. 176.

126 Zappalà, above note 117, p. 42.