

## THE INTERESTS OF JUSTICE

### 1. Introduction

This policy paper sets out the Office of the Prosecutor's understanding of the concept of the interests of justice as mentioned in Article 53 of the Rome Statute. This a policy document of the Office of the Prosecutor and, as such, it does not give rise to rights in litigation and is subject to revision based on experience and in the light of legal determinations by the Chambers of the Court.

The paper discusses the exceptional circumstances in which a situation or case, which would otherwise qualify for selection by the OTP is not pursued *and* that decision not to proceed is based solely on a determination by the OTP that the investigation or case would not serve the "interests of justice", as that term is used in the Rome Statute.<sup>1</sup> The paper deliberately does not enter into detailed discussions about all of the possible factors that may arise in any given situation. Experience demonstrates very clearly that each situation is different. It is also noted that the Statute itself does not try to elaborate on the specific factors or circumstances that should be taken into account in consideration of the interests of justice issue. The approach taken by the Office of the Prosecutor is therefore bound to offer only limited clarification in the abstract: as is the case with many legal problems in jurisdictions throughout the world, the particular approach taken will necessarily have to depend on the facts and circumstances of the case or situation.

Therefore, this paper emphasises three things. Firstly, that the exercise of the Prosecutor's discretion under Article 53(1)(c) and 53 (2)(c) is exceptional in its nature and that there is a presumption in favour of investigation or prosecution wherever the criteria established in Article 53(1) (a) and (b) or Article 53(2)(a) and (b) have been met. Secondly, the criteria for its exercise will naturally be guided by the objects and purposes of the Statute – namely the prevention of serious crimes of concern to the international community through ending impunity. Thirdly, that there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor. Finally, it should be noted that the Prosecutor is obliged to inform the Pre-Trial Chamber of any decision not to investigate or not to prosecute based solely on Articles 53(1)(c) or 53(2)(c).<sup>2</sup> The Pre-Trial Chamber may choose to review such a decision which will then only be effective if confirmed by the Chamber.

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<sup>1</sup> It should be noted that at this stage no decision has yet been made by the Prosecutor not to proceed because an investigation or prosecution would not serve the interests of justice.

<sup>2</sup> Article 53(1)(c) requires that a decision not to open an investigation solely on the basis of the interests of justice must be informed to the Pre-Trial Chamber, but this is not required in relation to a decision not to

## 2. The Statutory framework

The issue of the interests of justice, as it appears in Article 53 of the Rome Statute, represents one of the most complex aspects of the Treaty. It is the point where many of the philosophical and operational challenges in the pursuit of international criminal justice coincide (albeit implicitly), but there is no clear guidance on what the content of the idea is. The phrase “in the interests of justice” appears in several places in the ICC Statute and Rules of Procedure and Evidence<sup>3</sup> but it is never defined. Thorough reviews of the preparatory works on the treaty also offer no significant elucidation. However, as is discussed below, the text and purpose of the Rome Statute clearly favour the pursuit of investigations and cases when those investigations and cases are admissible and the relevant standard of proof can be satisfied.

Article 53(1) of the Statute addresses the initiation of an investigation. If the Prosecutor is satisfied that there is a reasonable basis to believe that the case is within the jurisdiction of the Court and is or would be admissible under Article 17 of the Statute, he must determine whether, *taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.*

Article 53(2) addresses the initiation of a prosecution. It indicates that, upon investigation, the Prosecutor may conclude that there is not sufficient basis to proceed because it *“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 perpetrators, and his or her role in the alleged crime”.*

## 3. The balancing test

Article 53(1)(c) and 53 (2)(c) create an obligation to consider various factors. The interests of justice tests need only be considered where positive determinations have been made on both jurisdiction and admissibility.

While the other two tests (jurisdiction and admissibility) are positive requirements that must be satisfied, the “interests of justice” is not. The *interests of justice* test is a potential *countervailing* consideration that might produce a reason *not* to proceed even where the

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open an investigation on the basis of matters under Article 53(1)(a) or (b). On the other hand, any decision not to proceed to an investigation under Art 53(2)(a), (b) or(c) must be notified to the Pre-Trial Chamber. However the Chamber only has the power to review *proprio motu* in matters where a decision not to investigate or proceed is solely in relation to the interests of justice as provided under Article 53(3)(b).

<sup>3</sup> See for example Articles 55(2)(c), 65(4) and 67(1)(d), as well as rules 69, 73, 82, 100, 136 and 185. These provisions tend to deal with matters closely related to the rights of the accused or of victims in the course of investigations or trial. They may provide some guidance for the way in which the phrase should be understood in the context of Article 53.

first two are satisfied. This difference is important: the Prosecutor is not required to establish that an investigation or prosecution is in the interests of justice. Rather, he shall proceed with investigation unless there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time.

The interpretation and application of the interests of justice test may lie in the first instance with the Prosecutor, but is subject to review and judicial determination by the Pre Trial Chamber.<sup>4</sup>

#### 4. *Understanding the meaning of the Interests of Justice within the Statute*

##### *a. Exceptionality*

The role of the Office of the Prosecutor is to investigate and prosecute those responsible for crimes under the jurisdiction of the Court, subject to Article 17 of the Rome Statute. Taking into consideration the ordinary meaning of the terms in their context, as well as the object and purpose of the Rome Statute, it is clear that only in exceptional circumstances will the Prosecutor of the ICC conclude that an investigation or a prosecution may not serve the interests of justice.

##### *b. The presumption in favour of investigation or prosecution*

Many developments in the last ten or fifteen years point to a consistent trend imposing a duty on States to prosecute crimes of international concern committed within their jurisdiction.<sup>5</sup> In the Preamble to the Rome Statute, paragraph six, the States Parties recognize that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. This recognition by States Parties appears to be supported by the United Nations Commission on Human Rights, with its adoption of the Updated Set of principles for the protection and promotion of human rights.<sup>6</sup>

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<sup>4</sup> See footnote 2 above

<sup>5</sup> See the report of the statement of the United Nations Under Secretary General for Legal Affairs, Nicolas Michel (UN Security Council Press Release, June 22, 2006 on 5474<sup>th</sup> meeting): “Touching on another issue highlighted in today’s debate, Nicolas Michel, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, said that ending impunity for perpetrators of crimes against humanity was one of the principal evolutions in the culture of the world community and international law over the past 15 years. “Justice should never be sacrificed by granting amnesty in ending conflicts,” he said, adding that justice and peace should be considered as complementary demands and that the international community should “consider ways of dovetailing one with the other”. The trend was confirmed in the statement of the President of the Security Council where he stated that, “The Council intends to continue forcefully to fight impunity with appropriate means and draws attention to the full range of justice and reconciliation mechanisms to be considered, including national, international and ‘mixed’ criminal courts and tribunals, and as truth and reconciliation commissions,” Statement of the President of the Security Council, June 22, 2006)

<sup>6</sup> Updated Set of principles for the protection and promotion of human rights. Report by Diane Orentlicher updating the Joinet Principles. UN COMMISSION ON HUMAN RIGHTS E/CN.4/2005/102/Add.1 Sixty-first session, 8 February 2005. See in particular Principle 19: duties of states with regard to the

*c. The Objects and Purposes of the Statute with regard to the interests of justice*

The interpretation of the concept of “interests of justice” should be guided by the ordinary meaning of the words in the light of their context and the objects and purpose of the Statute.<sup>7</sup> The Preamble of the Rome Statute provides a useful point of reference in this regard. Paragraph four of the Preamble underlines that the States Parties are determined to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community and thus to contribute to their prevention. The last paragraph indicates their resolve “to guarantee lasting respect for and the enforcement of international justice”. Thus, considerations of prevention of serious crimes and guaranteeing lasting respect for international justice may be significant touchstones in assessing the interests of justice.<sup>8</sup>

The Prosecutor has not yet made a decision not to investigate or not to proceed with a prosecution because it would not serve the interests of justice. Therefore it is instructive to consider the manner in which the “interests of justice” have been assessed in the context of the situations currently under investigation. The investigations conducted in the situations of the DRC, Uganda and Darfur all required consideration of the question of the interests of justice prior to proceeding for an application for arrest warrants or summonses. The situation of Uganda has perhaps attracted the most attention, given the attempts by various parties to resolve the conflict between the Government of Uganda and the LRA. This situation demonstrates well the exceptional nature of the provision on the interests of justice as well as the differences between this concept and the interests of peace.

With the entry into force of the Rome Statute, a new legal framework has emerged and this framework necessarily impacts on conflict management efforts. The issue is no longer about whether we agree or disagree with the pursuit of justice in moral or practical terms: it is the law. Any political or security initiative must be compatible with the new legal framework insofar as it involves parties bound by the Rome Statute.

*5. Explicit Factors to be considered*

*a. The Gravity of the crime.*

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administration of justice: States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.

<sup>7</sup> See Article 31 of the Vienna Convention on the Law of Treaties.

<sup>8</sup> Thus, conceivable instances where action would not be in the interests of justice could be where the action was clearly detrimental to prevention or respect for international justice. One possible example of the latter could be where a suspect’s rights had been seriously violated in a manner that could bring the administration of justice into disrepute.

The Rome Statute was created to address the most serious crimes of concern to the international community. In order for a case to be admissible, not only do the crimes have to be within the jurisdiction of the Court, but they must also meet the higher threshold of being of “sufficient gravity to justify further action” of the Court in terms of Article 17(1)(d).

In determining whether the situation is of sufficient gravity, the Office considers the scale of the crimes, the nature of the crimes, the manner of their commission and their impact.

Before considering whether there are substantial reasons to believe that it is not in the interests of justice to initiate an investigation, the Prosecutor will necessarily have already come to a positive view on admissibility, including that the case is of sufficient gravity to justify further action. These reflections demonstrate both the central importance of the element of gravity of the crime, as well as the strong presumption in favour of initiating an investigation where the threshold of sufficient gravity is met.

*b. Interests of Victims*

One of the great innovations of the Rome Statute and the Rules of Evidence and Procedure is the important role accorded to victims. For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and concerns to the Court.

Article 53 imposes a specific obligation on the Prosecutor to take into account the interests of victims before starting an investigation or prosecution. The experience of the Court to date proves that understanding the interests of victims in relation to the decision to initiate an investigation is a very complex matter. While the wording of Article 53(1)(c) implies that the interests of victims will generally weigh in favour of prosecution, the Office will listen to the views of all parties concerned. The Office considers that the central goal of respecting victims through the possibilities of participation in the proceedings also implies a duty to be respectful of possibly divergent views. The Office will give due consideration to the different views of victims, their communities and the broader societies in which it may be required to act.

The Office considers that the “interests of victims” includes the victims’ interest in seeing justice done, but also includes other essential interests such as their protection, as indicated by the Rome Statute. Article 68(1) places an obligation on the whole Court, including the Office of the Prosecutor, to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. Article 54(1)(b) requires the Prosecutor to respect the interests and personal circumstances of victims and witnesses in carrying out effective investigations.

Investigations are likely to often take place in unsafe or unstable circumstances. The Office of the Prosecutor, working with the Victims and Witnesses Unit of the Registry, has established internal guidelines that provide for an ongoing risk assessment for victims and witnesses.

In attempting to ascertain the interests of victims, the Prosecutor will conduct a dialogue with the victims themselves as well as representatives of local communities. The Office of the Prosecutor considers that seeking the views of other actors involved in the situation will also be crucial in order to assess the impact for the interests of victims of investigations and prosecutions. Understanding the interests of victims may require other forms of dialogue besides direct discussions with victims themselves. It may be important to seek the views of respected intermediaries and representatives, or those who may be able to provide a comprehensive overview of a complex situation. This may include local leaders (religious, political, tribal), other states, local and international intergovernmental and nongovernmental organizations. Victims, their representatives and other intermediaries are encouraged to be proactive in providing the Office with their views.

The OTP's activities in relation to Uganda exemplify this approach. The OTP has conducted more than 25 missions to Uganda for the purpose of listening to the concerns of victims and representatives of local communities. Two meetings with leaders from several local communities have also been held in The Hague. In addition, and working in conjunction with the Victims and Witness Unit of the Registry, The OTP has been preparing and implementing protective measures for victims and potential witnesses.

Similarly, in the DRC situation, multiple missions to Kinshasa and Ituri have been conducted for the purpose of consulting with civil society groups and victim representatives with a view to understanding the concerns of local populations. Since 2003, several seminars have also been organised in The Hague, gathering various organizations and victim representatives. Finally, three missions were conducted in Kinshasa, Bunia and Ituri by multidisciplinary teams to analyse the probable consequences of OTP action for local populations, including victims and witnesses. Some surveys conducted by external actors, showing the diverse views of victims, have also been of considerable use.

*c. The particular circumstances of the accused*

Under Article 53(2)(c), the Prosecutor is required to consider whether a prosecution is not in the interests of justice, taking into account all of the circumstances, including the gravity of the crime, the interests of the victims and the age or infirmity of the accused, and his or her role in the accused crime.

The OTP has clearly stated its policy of focusing its investigations on those bearing the greatest degree of responsibility. Factors to be taken into account include the alleged status or hierarchical level of the accused or implication in particularly serious or notorious crimes. That is, the significance of the role of the accused in the overall commission of crimes and the degree of the accused's involvement (actual commission, ordering, indirect participation).

It is possible however, that even an individual deemed by the OTP to be among the "most responsible" would not be prosecuted in the "interests of justice." If the Court is to achieve the lasting respect for the enforcement of international justice, it is essential that it considers also the interests of the accused. It is common in many legal systems to require consideration of the circumstances of the accused before determining whether to proceed to a prosecution. For example, international justice may not be served by the prosecution of a terminally ill defendant or a suspect who has been the subject of abuse amounting to serious human rights violations. This matter has been dealt with both by national jurisdictions and by Ad Hoc international criminal tribunals. Significant guidance will be derived from such experience.

6. *Other potential considerations under Article 53(1)(c) and 53(2)(c)*<sup>9</sup>

a. *Other justice mechanisms*

In relation to other forms of justice decided at the local level, the Office of the Prosecutor reiterates the need to integrate different approaches. All approaches can be complementary. The Office notes the development of theory and practice in designing comprehensive strategies to combat impunity.<sup>10</sup> The pursuit of criminal justice provides one part of the necessary response to serious crimes of international concern which, by itself, may prove to be insufficient as the Office is conducting focused investigations and

<sup>9</sup> These considerations are the ones that the Office has found frequently arise in discussions about the concept of the interests of justice in its consultations on the matter. Their inclusion in this paper should not be taken to imply that they are viewed as being always necessarily relevant. It will depend on the facts and circumstances of each case or situation.

<sup>10</sup> See for example Orentlicher's Commentary on the Updated Principles (supra, note 2, at paragraph 7). Another category of revisions broadly reflects developments in State practice that, beyond their potential relevance in disclosing emerging principles of customary law or confirming established norms, have provided valuable insights concerning effective strategies for combating impunity. Perhaps most important in this regard, recent experience has affirmed the central importance of promoting "the broad participation of victims and other citizens" in "designing policies for combating impunity". Their participation helps ensure that policies for combating impunity effectively respond to victims' actual needs and, in itself, "can help reconstitute the full civic membership of those who were denied the protection of the law in the past". Broad consultations also help ensure that policies for combating impunity are themselves rooted in processes that ensure public accountability. Finally, programmes that emerge from national consultations are, in the words of a recent report by the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, more likely than those imposed from outside "to secure sustainable justice for the future, in accordance with international standards, domestic legal traditions and national aspirations".

prosecutions. As such, it fully endorses the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice.

The Office notes the valuable role such measures may play in dealing with large numbers of offenders and in addressing the impunity gap. The Office will seek to work with those engaged in the variety of justice mechanisms in any given situation, ensuring that all efforts are as complementary as possible in developing a comprehensive approach.<sup>11</sup>

*b. Peace processes*

The ICC was created on the premise that justice is an essential component of a stable peace. The Preamble to the Statute recognizes that the crimes under the Court's jurisdiction threaten the peace, security and well-being of the world. The Secretary General of the United Nations has stated that "Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives."<sup>12</sup>

The concept of the interests of justice established in the Statute, while necessarily broader than criminal justice in a narrow sense,<sup>13</sup> must be interpreted in accordance with the objects and purposes of the Statute. Hence, it should not be conceived of so broadly as to embrace all issues related to peace and security.

In situations where the ICC is involved, comprehensive solutions addressing humanitarian, security, political, development and justice elements will be necessary. The Office will seek to work constructively with and respect the mandates of those engaged in other areas but will pursue its own judicial mandate independently.

The Statute recognizes a role for the UN Security Council to defer ICC action where it considers it necessary for the maintenance of international peace and security. Article 16 provides 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 under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

This provision does not displace the obligation of the Prosecutor to consider the interests of justice under article 53 and, in doing so, he will consider all relevant factors. The

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<sup>11</sup> OTP Policy Paper 2003, p 3: [http://www.icc-cpi.int/library/organs/otp/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf)

<sup>12</sup> The Secretary General goes on to say in the same report that, "the most significant recent development in the international community's long struggle to advance the cause of justice and rule of law was the establishment of the International Criminal Court." (See Report of the Secretary general on the Rule of Law and Transitional Justice, 23<sup>rd</sup> August, 2004, S/2004/616, introduction and para 49 respectively).

<sup>13</sup> Since Article 53(1)(c) foresees a possibility of pursuit of criminal justice not being "in the interests of justice", it follows that the concept must be broader than criminal justice.

Office will consider issues of crime prevention and security under the interests of justice, and there may be some overlap in these considerations and in considering matters in accordance with the duty to protect victims and witnesses under Article 68. As indicated above, however, the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions.

Bearing in mind the objectives of the Court to put an end to impunity and to ensure that the most serious crimes do not go unpunished, a decision not to proceed on the basis of the interests of justice should be understood as a course of last resort. Various other options, besides deciding not to open an investigation or to stop proceedings, may be available. For example, considerations about potential adverse impact on security and crime prevention may be addressed by managing the profile of investigative activities and working with partners to ensure all possible security measures are in place, as was the case in Uganda. In any event, it should be recalled that any decision not to proceed based on the interests of justice can be revisited in the light of new facts or information (see Article 53(4)).

#### *7. Conclusion*

The Office of the Prosecutor understands the interest raised by Article 53(1)(c) and 53(2)(c). A clear understanding of how the Office sees its role in relation to these provisions of the Statute in this area is of benefit to many parties, including victims, organizations working with victims and others affected by conflict, States, and those involved in trying to end conflicts.

The best guidance on the Office's approach to these issues can be gathered from the way it has dealt with real situations. The Office will not speculate on abstract scenarios. This paper clarifies the exceptional nature of the provisions on the interests of justice and indicates how the Office conceives of the relationship of those provisions with other matters, including the interests of international peace and security, conflict management efforts and other justice mechanisms. As indicated above, in any event, a decision by the Prosecutor not to investigate or to prosecute solely on the basis that it is not in the interests of justice to proceed must be presented to the Pre-Trial Chamber, who may or may not choose to review the decision.