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Introducing a Fairness-Based Theory of Prosecutorial Legitimacy before the International Criminal Court

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Abstract

The International Criminal Court became operative in 2002. The first prosecutor of the Court faced the enormous challenge of setting up a series of policies addressing at the same time the backlog of overriding expectations. His task was daunting, and his prosecutorial choices triggered a series of controversies among a variety of relevant audiences, while the concept of legitimacy appeared to become the panacea to the debate. The current contribution purports to achieve a twofold goal using a doctrinal, descriptive and normative angle: (i) to provide an alternative normative theory of the thorny principle of prosecutorial discretion and particularly of the interests of justice reference, based on the fairness aspect of legitimacy and (ii) to recommend an alternative to today's adopted prosecutorial policy with regard to the interests of justice reference in Article 53, emphasizing its long-term effect on the overall perception of the Court.

1 Introduction

Following the adoption in 1998 of the Rome Statute,[1] the International Criminal Court (ICC) was characterized in rather high prose by the then UN Secretary-General as 'a gift of hope for future generations'.[2] Twelve years later, the current Secretary-General of the United Nations reiterated this same belief, stating that the '[t]he Rome

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1 Rome Statute of the International Criminal Court (Rome Statute) 1998, 2187 UNTS 90.

2 K. Annan, Former Secretary General of the United Nations, Address at the Rome Conference, 18 July 1998.

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Statute represents the best that is in us, our most noble instinct ... the instinct for peace and justice'.[3] Notwithstanding this initial triumphant acceptance, the Court has completed its first decade of operation and been subjected to scathing critique by academics and experts.[4] Among others, the policy of self-referrals, the selection of first situations and cases, the slow and controversial judicial progress,[5] the accusation of being solely an 'African Court'[6] and the tension between judicial intervention and so-called 'peace' has triggered serious concerns even from the side of the most persistent proponents of the Court.[7]

Over the last 10 years, the Office of the Prosecutor (OTP) and the fundamental concept of prosecutorial discretion, as it is developed in Article 53, has lain at the heart of the controversy about the a-political nature of the ICC and, ultimately, its role, limits and goals.[8] On the one hand, the very first prosecutor of the Court adopted a single and persistent response to every critique about his choices, focusing on his role as a judicial actor who simply applies the law, irrespective of the exogenous factors. On the other hand, the predominant academic response, with some rare exemptions, has been focused on the need for establishing *ex ante* selection criteria for situations and cases and the controversial notions of gravity and the interests of justice. In particular, these last two concepts are considered by many to be a loophole, which carries the risk of defying the conventional wisdom that the ICC is an independent and autonomous institution, purported to combat impunity, promote accountability and contribute to the prevention of criminality, independently of the political context. Within this context, the quest for legitimacy has become a major challenge that has raised an interesting, but narrowly defined, discourse especially among legal audiences.

The current article purports to examine precisely a particular component of the exercise of prosecutorial discretion during the term of the very first prosecutor of the

[3] Secretary-General, 'An Age of Accountability', Address at the Review Conference on the International Criminal Court Kampala, 31 May2010, available at www.un.org/sg/STATEMENTS/index.asp?nid=4585 (last visited 15 June 2016).

[4] See D. Bosco, *Rough Justice: the International Criminal Court in a World of Power Politics* (2014).

[5] Judgment pursuant to Article 74 of the Statute, *Prosecutor v. Ntaganda Dyilo* (ICC-01/04-01/06), Appeals Chamber, 14 March 2012.

[6] Jallow, 'Regionalising International Criminal Law', 9 *International Criminal Law Review* (*ICLR*) (2009) 445.

[7] Arsanjani and Reisman, 'The Law in Action of the International Criminal Court', 99 *American Journal of International Law* (*AJIL*) (2005) 385; Kress, 'Self-Referrals and Waivers of Complementarity', 2 *Journal of International Criminal Justice* (*JICJ*) (2004) 944, at 946; Schabas, 'First Prosecutions at the International Criminal Court', 27 *Human Rights Law Journal* (2006) 25; Bassiouni, 'The ICC-Quo Vadis?', 4 *JICJ* (2006) 421, but for the opposite position see Akhavan, 'Self Referrals before the International Criminal Court: Are States the Villains or the Victims of Atrocities?' 21 *Criminal Law Forum* (*CLF*) (2010 103; Robinson, 'The Mysterious Mysteriousness of Complementarity', 21 *CLF* (2010) 67; Rastan, 'Comment on Victor's Justice and the viability of ex ante standards', 43 *John Marshall Law Review* (*JMLR*) (2010) 569.

[8] See the contributions analysing the Office of the Prosecutor (OTP) in M. Minow, C. True-Frost and A. Whiting (eds), *The First Global Prosecutor: Promise and Constraints* (2015).

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ICC (the adopted policy by the OTP on the interests of justice referenced in Article 53) and link it to the broader question of legitimacy of the OTP. The concept of justice within the Rome Statute represents the classic format of a retributive version, combined with the other goals of criminal law such as deterrence, rehabilitation, reconciliation and expressivism.[9] However, the reference to 'interests of justice' in Article 53 appears to be an exception to the basic rule – a state of exception.[10] As it is widely acknowledged, it represents a broader concept of justice that transcends the strict width of prosecutorial criminal justice. Moreover, it is considered to be so novel that it '[d]oes not correspond to any provision in positive law'.[11] If the interests-of-justice clause is an exception to the rule, this proposition definitely seems to be paradoxical. Can a non-strictly legalistic form of justice be included in the Rome Statute, which is the 'apotheosis of the international insistence on prosecutions', to use Justice Richard Goldstone's reference to the Statute.[12]

The targeted aim of this article is not an examination of the overall performance of the ICC. The predominant goal of this research challenges the adopted policy by the OTP on the interests of justice referenced in Article 53. The main research question does not purport to provide a specific definition on the content of the word justice within the interests of the justice reference. Instead, it focuses on the legitimacy challenges and legal and policy dilemmas arising from this specific term for the exercise of prosecutorial discretion as a long-term project.

2 The Concept of Prosecutorial Discretion in International Criminal Justice

Ronald Dworkin has stated that '[d]iscretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction. It is therefore a relative concept. It always makes sense to ask, "Discretion under which standards?" or "Discretion as to which authority?"'.[13] Particularly in the field of international criminal justice, the notion of prosecutorial discretion carries an interesting, but controversial, dynamic. The overall question of prosecutorial discretion has been addressed extensively by a series of scholars, who have covered many aspects of the challenges that the prosecutor of an international criminal tribunal, in general, and of the ICC, in

[9] For the purposes of criminal law see C. Beccaria, *On Crimes and Punishments*, translated by David Young (1986); H.L.A. Hart, *Punishment and Responsibility* (1970); more recently, G.P. Fletcher, *Basic Concepts of Criminal Law* (1998), at 50–76; specifically for international criminal law, see M.A. Drumbl, *Atrocity, Punishment and International Law* (2007), at 149–180.

[10] G. Agamben, *State of Exception* (2005).

[11] Delmas-Marty, 'Interaction between National and International Criminal Law in the Preliminary Phase of Trial at the ICC', 4 *JICJ* (2006) 10.

[12] Goldstone and Kritz, 'International Criminal Court: In the Interests of Justice and Independent Referral: The ICC Prosecutor's Unprecedented Powers', 13 *Leiden Journal of International Law* (*LJIL*) (2000) 655.

[13] R. Dworkin, *Taking Rights Seriously* (1998), at 31.

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particular, has to face.[14] The former prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY), Justice Louise Arbour, in a statement before the Preparatory Committee during its December 1997 session describing the difference between domestic and international prosecutions, stressed that in the latter case:

> [t]he discretion to prosecute is considerably larger and the criteria upon which such prosecutorial discretion is to be exercised are ill defined and complex. In my experience based on the work of the two Tribunals to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention rather than to weed out weak or frivolous ones.[15]

The principle of prosecutorial discretion has been a predominant feature of international criminal justice since Nuremberg.[16] The chief prosecutors at the International Military Tribunals of Nuremberg and Tokyo had to follow the guiding principles agreed by the Allies.[17] Yet both the Charters of the Nuremberg and Tokyo Tribunals assigned the prosecutors with the responsibility 'for the final designation of major war criminals to be tried at the tribunal'.[18] In the Statutes of the International

[14] See Ntanda Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals', 3 *JICJ* (2005) 124; Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', 97 *AJIL* (2003) 510; Brubacher, 'Prosecutorial Discretion within the International Criminal Court', 2 *JICJ* (2004) 71; Knoops, 'Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective', 15 *CLF* (2004) 365; Hall, 'The Powers and Role of the Prosecutor of the International Criminal Court in the Global Fight against Impunity', 17 *LJIL* (2004) 121; Jallow, 'Prosecutorial Discretion and International Criminal Justice', 3 *JICJ* (2005) 145; Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', 6 *JICJ* (2008) 731; Côté, 'International Justice: Tightening up the Rules of the Game', 81 *International Review of the Red Cross* (*IRRC*) (2006) 133; Côté, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' 3 *JICJ* (2005) 162; Olásolo, 'The Prosecutor of the ICC before the Initiation of Investigations: A Quasi Judicial or a Political Body?', 3 *ICLR* (2003) 87; Greenawalt, 'Justice without Politics? Political Discretion and the International Criminal Court', 39 *New York University Journal of International Law and Politics* (*NYUJILP*) (2007) 583; Stahn, 'Judicial Review of Prosecutorial Discretion, Five Years On', in C. Stahn and Sluiter (eds), *The Emerging Practice of the International Criminal Court* (2009) 247; Ohlin, 'Peace, Security and Prosecutorial Discretion', in Stahn and Sluiter, *ibid.*, 185; Guariglia, 'The Selection of Cases by the Office of the Prosecutor of the International Criminal Court', in Stahn and Sluiter, *ibid.*, 209; Schabas, 'Prosecutorial Discretion and Gravity', in Stahn and Sluiter, *ibid.*, 229; Wouters, Verhoeven and Demeyere, 'The International Criminal Court's Office of the Prosecutor: Navigating between Independence and Accountability', in J. Doria, H.-P. Gasser and M. Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court* (2009) 345; Sarooshi, 'Prosecutorial Policy and the ICC, Prosecutor's Proprio Motu Action of Self-Denial?', 2 *JICJ* (2004) 940; Gallavin, 'Prosecutorial Discretion within the ICC: Under the Pressure of Justice', 17 *CLF* (2006) 43; Goldston, 'More Candour about Criteria, The Exercise of Discretion by the Prosecutor of the International Criminal Court', 8 *JICJ* (2010) 383; Struett, 'The Politics of Discursive Legitimacy: Understanding the Dynamics and Implications of Prosecutorial Discretion at the International Criminal Court', in S.C. Roach (ed.), *Governance, Order and the International Criminal Court* (2009) 107; Mégret, 'International Prosecutors: Accountability and Ethics', in L. Reydams, J. Wouters and C. Ryngaert (eds), *International Prosecutors* (2012) 416.

[15] Justice Louise Arbour, Statement at the Preparatory Committee on the Establishment of a International Criminal Court, 8 December 1997, at 7–8.

[16] Schabas, 'Prosecutorial Discretion v. Judicial Activism', *supra* note 14.

[17] T. Taylor, *The Anatomy of the Nuremberg Trials* (1992), at 40.

[18] Charter of International Military Tribunal 1945, 82 UNTS 279, Art. 14(b); Charter of the International Military Tribunal for the Far East 1946, 4 Bevans 20, Art. 8(a).

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Criminal Tribunal for the Former Yugoslavia and for Rwanda, the feature of prosecutorial discretion is further reiterated since the prosecutors can select cases for prosecution *ex officio*,[19] 'albeit within the tight jurisdictional framework of the *ad hoc* institutions'.[20]

In the case of the ICC with its global jurisdictional terrain, the notion of prosecutorial discretion is particularly critical since the prosecutor is empowered by the Statute to initiate independently not only prosecutions but also investigations.[21] This is a unique feature that differentiates the ICC from the ad hoc and hybrid tribunals, highlighting the statutory principle of prosecutorial independence as prescribed in Article 42 of the Rome Statute.[22] Under this exceptional framework, the quest for a balanced, independent and objective selection of situations and cases has been made the main priority for most of those involved in the international criminal justice project, due to the concern that 'discretion entails both risks and benefits', as it may trigger 'unjustified discrimination' and affect the perception of the criminal justice system as a whole.[23]

3 Exercise of Prosecutorial Discretion: Prosecutorial Guidelines

Dworkin differentiates three forms of discretion. There is an initial weak version, which covers situations where the standards to be applied require a form of judgment and, thus, cannot be applied mechanically.[24] A second weak version of discretion empowers a final judgment that cannot be reviewed due to the position of the incumbent person at the top of the hierarchy.[25] Whereas the strong version of discretion governs cases that have an absolute lack of standards, where the judgment is not subjected to any authoritative review, it is not totally immune to criticism.[26] Applying the first form of weak discretion in the context of international criminal justice, Hassan Jallow has argued that:

[19] Statute of the International Criminal Tribunal for the Former Yugoslavia 1993, 32 ILM 1159 (1993), Art. 18(1); Statute of the International Criminal Tribunal for Rwanda 1994, 33 ILM 1598 (1994), Art. 17(1) prescribe that '[t]he Prosecutor shall initiate investigations ex-officio on the basis of information obtained from any source, particularly from Governments, United Nations Organs, intergovernmental and non-governmental organizations. The Prosecutor shall access the information received or obtained and decide whether there is sufficient basis to proceed.' For a comparative presentation of all tribunals since Nuremberg, see Bergsmo, Cissé and Staker, 'The Prosecutors of the International Tribunals: The cases of the Nuremberg and Tokyo Tribunals, the ICTY and ICTR and the ICC Compared', in L. Arbour *et al.* (eds), *The Prosecutor of a Permanent International Criminal Court* (2000) 121.

[20] Schabas, 'Prosecutorial Discretion v. Judicial Activism', *supra* note 14.

[21] Bergsmo and Kruger, 'Article 53', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, 2008) 1066.

[22] *Ibid.*

[23] Danner, *supra* note 14.

[24] Dworkin, *supra* note 13, at 31.

[25] *Ibid.*, at 32.

[26] *Ibid.*, at 32–33.

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> [t]he exercise of prosecutorial discretion with regard to the investigation of criminal conduct and the institution of judicial proceedings is a necessary and fundamental concept in the administration of criminal justice. Its necessity springs from the practical need for a selective rather than automatic approach to the institution of criminal proceedings, thus avoiding the overburdening and perhaps clogging of the machinery of justice. Somebody somewhere thus has to decide whether to initiate proceedings and for what offence or offences.[27]

This 'somebody somewhere' is the prosecutor of every international criminal tribunal, whose powers have been described elsewhere as 'one man's warranty is another man's wild card'.[28] If the prosecutor of an international criminal tribunal is regarded as such a predominant figure and her choices can carry a legitimized function for the overall project of international criminal justice, then how is this prosecutorial discretion exercised?

The concept of prosecutorial discretion is based largely on policy criteria, which are usually not defined in the statutes of the tribunals, leaving a huge gap of indeterminacy. This indeterminacy is what is called prosecutorial policy or strategy, and it should be founded on public prosecutorial guidelines that strengthen the legitimacy of the court and establish transparency, according to the predominant view.[29] The prosecutor of the ICC has arguably enjoyed the benefit of the vast experience obtained by the ad hoc tribunals during the last 15 years. Yet the ICC has an unique character due to its jurisdictional structure, and its differences with the ad hoc or hybrid tribunals should not be overlooked in the sense that any analogous construction and application should take into consideration its *suis generis* nature.[30]

The above introduction to the general concept of prosecutorial discretion elucidates the relativity that characterizes this principle and explains the anxiety that it has triggered among lawyers and legal scholars, who have adopted a positivist conception of the law. The notion of discretion depends substantially on the context that surrounds it, and it is shaped by policies and principles that identify the nature and function of the institution where it operates.[31] The mainstream legal scholarship in the field of international criminal justice reluctantly applies the first weak form of prosecutorial discretion as developed by Dworkin. This non-mechanical application of the law thereby requires a form of guidance. The belief in the existence of objective criteria has become the principal attribute of the 'good' international criminal lawyer, who disassociates herself from the 'dirty' world of politics. Within this context, the concept of legitimacy also has been transformed into a central subject of concern among legal

27 Jallow, *supra* note 14.

28 Côté, 'International Justice', *supra* note 14.

29 See characteristically Danner, *supra* note 14.

30 Jallow, *supra* note 14. It should be clarified that the ad hoc tribunals were created by the UN Security Council (UNSC) under Chapter VII resolutions, creating a different legal obligation regarding cooperation. *A contrario*, the International Criminal Court (ICC) is a treaty-based organization with broader temporal and geographical jurisdictional terrain since it is an *ex ante* judicial institution that depends predominantly on state cooperation. However, the practice of the last 15 years has indicated that the lack of state cooperation is endemic even for ad hoc tribunals, despite their UNSC 'birth'.

31 See Dworkin, *supra* note 13, at 31–45, where he analyses the different normativity between law and principles as conceived by positivist lawyers.

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scholars, who have attempted predominantly to objectify the exercise of prosecutorial discretion with clear selection criteria.

4 Prosecutorial Discretion and the ICC

Article 53 of the Rome Statute prescribes the breadth and limits of prosecutorial discretion. The four paragraphs of the article regulate the power of the prosecutor to initiate an investigation and a prosecution, the review power of the Pre-Trial Chamber regarding a prosecutorial decision not to proceed and the power of the prosecutor to reconsider her decision, sitting thus 'at the junction between prosecutorial discretion and judicial review'.[32]

Article 53 comes into play after the activation of one of the three triggering mechanisms (*notitia criminis*) provided for in Article 13.[33] A state party can trigger the exercise of the jurisdiction of the Court by referring a situation to the prosecutor.[34] Additionally, the United Nations Security Council (UNSC), acting under Chapter VII of the Charter of the United Nations can refer a situation to the prosecutor.[35] Finally, the prosecutor herself may initiate an investigation *proprio motu*, following an authorization by the Pre-Trial Chamber.[36] Immediately after the activation of the triggering procedure, the stage of preliminary examination of a situation is initiated, as it is set out in Article 53(1)(a)–(c).

In order to decide whether she should proceed or not with an investigation, the prosecutor has to consider three accumulative criteria in subparagraphs a, b and c of Article 53. Specifically, the prosecutor has to, first, pass the test of jurisdiction; second, the test of admissibility, as prescribed in Article 17 of the Statute and, finally, the prosecutor has to decide, despite the gravity of the crimes and the interests of the victims, that the investigation would not serve the interests of justice. If the prosecutor decides not to investigate, then she is obliged to inform the Pre-Trial Chamber if her decision is solely based on the interests of justice criterion.

Paragraph 3 of Article 53 governs the judicial review of prosecutorial discretion, which is twofold. When triggered at a request of the UNSC or the referral state, then the Pre-Trial Chamber may review the decision not to proceed and may request the prosecutor to reconsider her decision.[37] On the other hand, when the prosecutorial decision not to proceed is based solely on the interests of justice requirement, then the Pre-Trial Chamber may exercise its review powers *proprio motu*.[38] In this case, the decision of the prosecutor is not valid unless confirmed by the Pre-Trial Chamber.[39] If the

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[32] W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute, Article 53, Initiation of an Investigation* (2010), at 657.

[33] See generally H. Olásolo, *The Triggering Procedure of the International Criminal Court* (2005).

[34] Rome Statute, *supra* note 1, Arts 13(a), 14.

[35] *Ibid.* Art. 13(b).

[36] *Ibid.* Arts 13(c), 15

[37] *Ibid.*, Art. 53(3)(a) and Rules of Procedure and Evidence, Rule 107.

[38] *Ibid.*, Art. 53(3)(b).

[39] *Ibid.*

Pre-Trial Chamber does not confirm his decision, then the prosecutor must proceed with the investigation or prosecution.[40]

Mireille Delmas-Marty has described Article 53 as a compromise between strict legality and prosecutorial discretion.[41] On the one hand, the indeterminacy, especially of the terms 'gravity' and 'interests of justice', appear to allow substantial interpretative loopholes in the exercise of prosecutorial consideration for the selection of situations and cases.[42] On the other hand, the actual scope of judicial review in Article 53(3) raises a series of sub-questions regarding the range of a prosecutorial decision not to investigate or prosecute and the actual judicial power to overturn a relevant decision by the prosecutor.

However, as a general conclusion, it can be observed that the notion of prosecutorial discretion, as finally delineated in the Rome Statute, is not an unfettered one. On the contrary, it is subject to checks and balances, which are the product of harsh compromises and trade offs. These limitations in the application of prosecutorial discretion are institutional and pragmatic.[43] In this sense, the words of Louise Arbour that '[t]here is more to fear from an impotent than from an overreaching Prosecutor' sound prophetic.[44]

5 The Interests of Justice and Its Discontents

As mentioned above, Article 53(1)(c) of the Rome Statute dictates that the prosecutor, in deciding whether to initiate an investigation or not, shall consider that even '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 the justice'.[45] The consideration of the interests of justice is countervailing.[46] Contrary to jurisdiction and admissibility, which '[a]re relatively clear and judicially cognizable notions',[47] the interests, or, better, non-interests, of the justice provision '[m]oves along a principle of largely discretionary criminal action'.[48]

Article 53(2)(c) has a different wording. Subparagraph 53(2)(c) provides that the prosecutor may conclude that a prosecution is not in the interests of justice by taking under consideration all circumstances, including the gravity of the crimes, the interests of the victims and the age or infirmity of the alleged perpetrator and his or her role in the alleged crime. Here, the word 'nonetheless' is missing and replaced by the term 'all the circumstances'. Whereas in Article 53(1)(c) the gravity of the crimes and the

40 *Ibid.*, Rules of Procedure and Evidence, Rule 110(2).
41 Delmas-Marty, *supra* note 11.
42 Stahn, 'Judicial Review of Prosecutorial Discretion: Five Years On', in Stahn and Sluiter, *supra* note 14, 267.
43 Allison Danner differentiates between formal and pragmatic accountability in Danner, *supra* note 14, whereas Carsten Stahn speaks of four models of accountability: political accountability, process-based checks and balances, (self-regulation) and judicial review. Stahn, *supra* note 42, 259.
44 Arbour, *supra* note 15.
45 See Rome Statute, *supra* note 1, Art. 53.
46 ICC and the Office of the Prosecutor (OTP), Policy Paper on the Interests of Justice, September 2007, at 3.
47 Schabas, *supra* note 32, at 660.
48 Turone, 'Powers and Duties of the Prosecutor', in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court* (2002), vol. 1, at 1153.

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interests of justice are counterweights to the interests of justice, in Article 53(2)(c) they appear to be indicators of the interests of justice consideration.[49] The additional two elements of age and infirmity carry humanitarian and practical concerns,[50] suggesting that 'each case has to be determined on its own merits'.[51]

6 Problem of 'Content' and 'Application'

The issue of the interests of justice, as it appears in Article 53 of the Rome Statue, represents one of the most contentious and 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.[52] The 'interests of justice' provision in Article 53 is a tool that may never be applied by the prosecutor and subsequently reviewed by the Pre-Trial Chamber. This provision lies at the heart of the prosecutorial discretion, whereas, at the same time, it challenges the rationale underpinning the creation of the ICC.

The ICC was created to end impunity for the most serious crimes of concern to the international community as a whole.[53] At the same time, Article 53(1)(c) and (2)(c) empowers the prosecutor not to proceed with an investigation or prosecution when the interests of justice criterion is not served. The reference to the interests of justice has been linked to propositions that it could be used as a loophole to allow the prosecutor to consider the option of truth and reconciliation commissions, national amnesties and the prospect of peace process agreements, which are all considered to be of a non-legal, but mostly political, nature.[54] These questions were not ultimately addressed by the Rome Statute, which was a product of compromises, despite the exchange of opinions during the negotiation period.[55]

Yet, the 'interests of justice' reference is not only a problem of content (meaning *in abstracto*). It is also a problem of application (meaning *in concreto*).[56] This latter

[49] Schabas, *supra* note 32, at 667.

[50] *Ibid.*

[51] Bergsmo and Kruger, 'Article 53', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, 2008) 1073, whereas Gallavin, 'Article 53 of the Rome Statute of the International Criminal Court: In the Interests of Justice?', 14 *King's College Law Journal* (*KCLJ*) (2003) 186, talks of an 'internal or intrinsic' interpretation of the interest of justice.

[52] ICC and OTP, *supra* note 46.

[53] See Rome Statute, *supra* note 1, perambular para. 5.

[54] See, e.g., M. Freeman, *Necessary Evils, Amnesties and the Search for Justice* (2010), at 83, where he claims that 'the interests of justice test has been at the heart of the Article 53 debate, and of the global debate on amnesty as such'. Yet, it is beyond the scope of this article for an extensive analysis on amnesties.

[55] Hafner *et al.*, 'A Response to the American View as Presented by Ruth Wedgwood', 10 *European Journal of International Law* (*EJIL*) (1999) 108, at 109.

[56] According to the understanding of the current author the interest of justice references is a hard case of 'relative indeterminacy'. This term has been used by H.L.A. Hart to describe situations where vague expressions due to their 'open texture' leave a margin of discretion, but they remain relative since they need to be assessed within the limits of law. This doctrine also aims to preserve the objectivity of law and to differentiate it from politics and other considerations. Under this normative rubric, the interests of justice term in Article 53 includes a problem of content and a problem of application. See H.L.A. Hart, *The Concept of Law* (2nd edn, 1994), at 128; M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2nd edn, 2005), at 26, 40.

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dimension, pertains to the width and scope of the policy priorities and extra legal considerations that the prosecutor may take into account while exercising his or her discretion. The ongoing academic dialogue triggered by the 'creative ambiguity'[57] of the Article 53 language illustrates the dynamic nature of this reference.[58] Thus, it has been supported that '[t]he exercise of prosecutorial discretion in accordance with Article 53 bears the potential of gradually crystallizing a coherent approach to the room left for alternative responses and for the exercise of prosecutorial discretion on the domestic level'.[59] Others have called the reference 'a safety valve', 'an expression that was intended to leave the exercise of prosecutorial discretion unfettered'[60] or 'an escape clause'[61] that allows the prosecutor 'to arbitrate between the imperatives of justice and the imperatives of peace'.[62]

In general, there are three different sets of argumentation regarding the prosecutorial discretion, its scope and application as prescribed in the reference to the interests of justice in Article 53 of the Rome Statute and, subsequently, its role in regard to amnesties, alternative justice mechanisms and peace negotiations. There were some who hailed the existence of this provision in the Statute and advocated for the inclusion of broader considerations of security and stability when applied[63] and others who acknowledged the option of prosecutorial discretion, within its limits though, provided both by a mandatory judicial review and the current legal trends.[64] However, the latter group considered it to be controversial and risky for the legitimacy of the

[57] The term 'creative ambiguity' is attributed to Philip Kirsch, former president of the ICC and chairman of the Rome Diplomatic Conference. Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court', 32 *Cornell International Law Journal* (*CIJL*) (1999) 521.

[58] Indicative enough are the following articles: Scharf, *supra* note 57; Majzub, 'Peace or Justice? Amnesties and the International Criminal Court', 3 *Melbourne Journal of International Law* (2002) 247; M. Arsanjani, *The International Criminal Court and National Amnesty Law*, ASIL Proceedings (1999); Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court', 51 *International and Comparative Law Quarterly* (2002) 91; Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court', 3 *JICJ* (2005) 695; Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court', 14 *EJIL* (2003) 481; Clark, 'The Prosecutor of the International Criminal Court, Amnesties, and the "Interests of Justice" Striking a Delicate Balance', 4 *Washington University Global Studies Law Review* (2005); Rodman, 'Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court', 22 *LJIL* (2009) 99; Goldstone and Kritz, *supra* note 12; Gallavin, *supra* note 51; Lovat, 'Delineating the Interests of Justice', 35 *Denver Journal of International Law and Policy* (2007) 275; Dukic, 'Transitional Justice and the International Criminal Court: In "the interests of justice"?', 89 *IRRC* (2007) 691; Villa-Vicencio, 'Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet', 49 *Emory Law Journal* (2000) 205; Freeman, *supra* note 54, at 82–84; L. Mallinder, *Amnesty, Human Rights and Political Transitions, Bridging the Peace and Justice Divide* (2008), at 286–291.

[59] J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008), at 291.

[60] Schabas, 'Prosecutorial Discretion v. Judicial Activism', *supra* note 14.

[61] Freeman, *supra* note 54, at 83.

[62] Côté, 'Reflections', *supra* note 14 (citing further William Bourdon, *La Cour pénale internationale* [2000]).

[63] See, e.g., Le Fraper du Hellen, 'Round Table: Prospects for the Functioning of the International Criminal Court', in M. Politi and G. Nesi (eds), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001) 300; Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court', 14 *EJIL* (2003) 488.

[64] Stahn, *supra* note 58.

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overall project of international criminal justice, proposing instead a restrictive interpretation.[65] This latter position has been adopted by the three leading non-governmental organizations (NGOs) (Human Rights Watch, Amnesty International and the International Federation for Human Rights), which fiercely oppose any potential application by the prosecutor, building up their argumentation on a series of legal and policy points.[66] The restrictive view regarding the interests of justice reference rejects any policy considerations, claiming that the object and purpose of the Rome Statute does not allow for a deferral by the prosecutor under this clause.

In September 2007, the OTP issued a policy paper, addressing the issues arising from the interests of justice clause. This policy paper was the product of consultations between the OTP and the NGOs, which dated back to November–December 2004.[67] First, the paper emphasizes that the exercise of prosecutorial discretion under Articles 53(1)(c) and 53(2)(c) is exceptional.[68] Second, it adopts a teleological interpretative approach focusing on the dimension of prevention of the core crimes as one of the objects and purposes of the Statute.[69] Finally, the drafters of the policy paper highlight its most controversial argument – that there is a difference between the notion of the interests of justice and the interests of peace – and, in the latter case, they support that there are other responsible institutions assigned to deal with concerns of security and stability.[70]

Regarding the interests of the victims, the policy paper reiterates its strict flexibility since it initially acknowledges that despite the wording of Article 53(1)(c), which implies the preference of the victims for prosecutorial justice, there is still the possibility of divergent views, which the OTP assures will be respected.[71] However, it reiterates that the interests of the victims of any merit for the process before the OTP are confined to issues of criminal justice.[72]

Finally, the policy paper acknowledges that criminal justice is only a limited component of the overall project of combating impunity for the most serious crimes of concern to the international community as a whole, and, '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

[65] See, e.g., Human Rights Watch, Policy Paper: The Meaning of 'the Interests of Justice' in Article 53 of the Rome Statute, 4 June 2005, available at www.hrw.org/campaigns/icc/docs/ij070505.pdf (last visited 15 June 2016); Amnesty International, Open Letter to the Chief Prosecutor of the International Criminal Court: The Concept of Interests of Justice, 2 June 2005; Olásolo, 'The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-Judicial or a Political Body?', 3 *ICLR* (2003) 87.

[66] See Human Rights Watch, *supra* note 65, Amnesty International, *supra* note 65; Féderation Internationale des Ligues des Droits de l'Homme, Comments on the Office of the Prosecutor's Draft Policy Paper on "The Interest of Justice", 14 September 2006, available at www.fidh.org/IMG/pdf/FIDH_comments_-_interests_of_justice_-_final.pdf (last visited 15 June 2016).

[67] ICC and OTP, *supra* note 46, at 1, 3.

[68] *Ibid.*

[69] *Ibid.*

[70] *Ibid.*

[71] *Ibid.*

[72] *Ibid.*

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in the pursuit of a broader justice'.[73] However, it fails to address the scenario, in which these other justice tools could contribute if such 'exceptional circumstances' did exist, that would make the prosecutor abstain from an investigation or prosecution under the interests of justice criterion. Thus, it can be safely concluded that the policy paper does not accept those 'other' mechanisms as feasible alternatives to criminal justice.

7 Doing Justice to the Interest of Justice

In particular, among the three above-mentioned potential scenarios for the application of the specific reference, the peace–justice approach of the OTP has triggered a polarizing dialogue predominantly between political scientists and lawyers in the context of northern Uganda and Darfur.[74] The OTP has never used (at least they have never admitted to having considered) the interests of justice provision and proceeded with indictments in the situation of Northern Uganda, Democratic Republic of the Congo (DRC), Darfur, Kenya and Lybia.

The peace–justice debate, despite the clear objective of the OTP to address the interests of the victims in Articles 15 and 53, has highlighted the *problematique* regarding the goals and vision of the ICC as a whole. The response to this critique has emphasized the need for an independent, impartial and objective application of the adopted selection criteria for situations.[75] The persistence in objectifying the selection process has revealed a dynamic dichotomy between those who consider the project of international criminal justice a clear case of pre-determined goals and those who appear to be more sceptical towards the specific proposition.[76] The same position (pro-objective criteria) purports to differentiate law from politics and reflects the 'liberal theory of politics'.[77] Yet, the need for prosecutorial guidelines in a generic manner, which '[g]uide but not prescribe in advance decision making', can be definitely acknowledged.[78] Although a series of scholars link the concept of legitimacy of the Court with the exercise of prosecutorial discretion[79] and the need for specific and clear criteria,

[73] *Ibid.*, at 7, referring further to the Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616, 23 August 2004.

[74] See, e.g., the contributions in N. Wadell and P. Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (2008) and the collected essays of Oxford Transitional Justice Research. Centre for Socio-Legal Studies, *Debating Justice in Africa* (2008–10).

[75] ICC and OTP, Policy Paper on Preliminary Examinations, November 2013.

[76] Billas and Whitney Burke-White, 'International Idealism Meets Domestic-Criminal Procedure Realism', 59 *Duke Law Journal* (*DLJ*) (2010) 637, at 681–682, but see deGuzman, 'Gravity and the Legitimacy of the International Criminal Court', 32 *Fordham International Law Journal* (*FILJ*) (2009) 1435.

[77] Koskenniemi, *supra* note 56, at 24.

[78] Goldston, *supra* note 14.

[79] See, e.g., Danner, *supra* note 14; Goldston, *supra* note 14; Webb, 'The ICC Prosecutor's Discretion Not to Proceed in the "Interests of Justice"', 50 *Criminal Law Quarterly* (2005) 305; Côté, 'Reflections', *supra* note 14; Ntanda Nsereko, 'Prosecutorial Discretion before National Courts and International Tribunals', 3 *JICJ* (2005) 127; Brubacher, 'Prosecutorial Discretion within the International Criminal Court', 2 *JICJ* (2004) 76; Schabas, 'Prosecutorial Discretion v. Judicial Activism', *supra* note 14.

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ex ante standards, their analysis appears to develop in hypothetical scenarios, which actually touch upon another fundamental contention – namely that until the telos of the ICC is defined in clarity and its unique nature fully understood, the conversation on prosecutorial criteria misses its point of reference.[80] This article will attempt to introduce the question of legitimacy via the threefold framework of legal, moral and sociological legitimacy.

8 The Fault Lines of Legitimacy[81] and the ICC

Since Nuremberg, there has been a growing movement on combating impunity for gross violations of human dignity, which has developed under the premises of the rule of law concept.[82] The Nuremberg principles summarize the normative core upon which the field of modern international criminal law was built.[83] It is founded on the perception of a global community that purports to retain and strengthen shared moral values with the aim of fostering peace and coexistence.[84] Cherif Bassiouni, while developing his theory on punishment for *jus cogens* international crimes, refers to *a civitas maxima*, which 'transcends the interests of the singular' on a common interest in 'repressing certain international crimes',[85] while the late Antonio Cassese speaks about 'universal values'.[86]

This position, though, is far from uncontested. Thus, this 'oceanic feeling' that advocates for the universality of humanity,[87] which shares the same goals and purposes, has been severely criticized as a 'cosmopolitan dream' or even as a hegemonic

[80] See, e.g., deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court', 33 *Michigan Journal of International Law* (2012) 265, at 268–269; Greenawalt, *supra* note 14.

[81] Charlesworth, 'Conclusion: The Legitimacies of International Law', in H. Charlesworth and J.M. Coicaud (eds), *Fault Lines of International Legitimacy* (2010) 396.

[82] See, e.g., Cassese, 'Reflections on International Criminal Justice', 61 *Modern Law Review* (1998) 1; Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', 9 *EJIL* (1998) 2; Akhavan, 'Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda', 7 *Duke Journal of Comparative and International Law* (*DJCIL*) (1997) 325; Akhavan, 'Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order', 15 *Human Rights Quarterly* (1993) 262; Reisman, 'Institutions and Practices for Restoring and Maintaining Public Order', 6 *DJCIL* (1995) 175.

[83] See GA Res. 95(I), 11 December 1946; GA Res. 177(II), 21 November 1947; B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003), at 19.

[84] Tomuschat, 'The Legacy of Nuremberg', 4 *JICJ* (2006) 830; Luban, 'A Theory of Crimes against Humanity', 29 *Yale Journal of International Law* (2004) 85; L. May, *Crimes against Humanity: A Normative Account* (2005); Cassese, 'The Rationale for International Criminal Justice', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009) 123, at 127; Roach, 'Value Pluralism, Liberalism and the Cosmopolitan Intent of the International Criminal Court', 4 *Journal of Human Rights* (2005) 475, 485–486.

[85] M.C. Bassiouni, *Introduction to International Criminal Law* (2003), at 33.

[86] Cassese, 'The Rationale', *supra* note 84, at 127.

[87] Koskenniemi, 'The Subjective Dangers of World Community', in A. Cassese (ed.), *Realizing Utopia, The Future of International Law* (2012) 3, at 5–11, emphasizing the aspect of power and the danger of authority in the argumentation for universality.

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project of the West to 'civilize' the rest of the world.[88] However, even if it is accepted that there is this humanity that shares common moral aspirations, then, as Mark Drumbl observes, '[i]t is one thing to agree to the universal repudiation of the great evils and to agree that victims are entitled to accountability. It is another matter to accept the universality of categorizing the great evils as crimes.'[89] Within this context, the ICC:

> [a]spires to institutionalize the ideal of universal justice. In its inclusive notion of human suffering in which 'all peoples are united by common bonds' the ICC embodies the cosmopolitan world view in which all victims are citizens deserving the protection afforded by the rule of law. The Court's intent to treat all people equally and to privilege no one over another is a cornerstone of cosmopolitanism's regard both for '*the moral worth of persons*' [and] the *equal* moral of *all* persons.[90]

Trying to find a balance between this quest for cosmopolitan values and a global institutional framework, the majority of legal scholars, despite the 'faith of the international criminal lawyer',[91] resort to legitimacy in order to 'ensure a warm feeling in the audience', as Martti Koskenniemi suggests.[92]

The concept of legitimacy in general has obtained a variety of contents, and for this reason a proliferation of theories and modalities may be observed.[93] It has even been supported that it is exactly this indeterminacy of the concept that makes it such an attractive concept at least in the international arena.[94] At the same time, the elusive content of legitimacy has been severely criticized as another instrumentalized power exercise at the expense of 'formality'.[95] It can be broadly supported, however, that the

[88] See, e.g., D Kennedy, 'One, Two, Three, Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream', speech delivered at the International Law Association, British Branch, University College London and School of Oriental and African Studies, March 2006; M. Koskenniemi, *The Gentle Civilizer of Nations* (2001); see also C. Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (2007).

[89] Drumbl, *supra* note 9.

[90] Peskin, 'An Ideal Becoming Real? The International Criminal Court and Limits of Cosmopolitan Vision of Justice', in R. Pierik and W. Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (2010) 196 (emphasis in the original).

[91] See, e.g., Koller, 'The Faith of the International Criminal Lawyer', 40 *NYUJILP* (2008) 1019; Talgren, 'The Sensibility and Sense of International Criminal Law', 13 *EJIL* (2002) 561.

[92] Koskenniemi, 'Legitimacy, Rights, Ideology: Notes towards a Critique of the New Moral Internationalism', 7 *Associations* (2003) 349; Koskenniemi, 'Formalism, Fragmentation, Freedom: Kantian's Themes in Today's International Law', 4 *No Foundations: Journal of Extreme Legal Positivism* (*NFJELP*) (2007), available at www.helsinki.fi/nofo/ (last visited 15 June 2016); Klabbers, 'Setting the Scene', in J. Klabbers, A. Peters and G. Ulfstein (eds), *The Constitutionalization of International Law* (2009) 37–34; Klabbers, 'Normative Pluralism: An Exploration', in J. Klabbers and T. Piiparinen (eds), *Normative Pluralism and International Law: Exploring Global Governance* (2013) 29.

[93] See, e.g., J.M. Coicaud and V. Heiskanen (eds), *The Legitimacy of International Organisations* (2001); A. Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (2004); T.M. Franck, *The Power of Legitimacy among Nations* (1990); R. Wolfrum and D. Roben (eds), *Legitimacy in International Law* (2008); Caron, 'The Legitimacy of the Collective Authority of the Security Council', 87 *AJIL* (1993) 552.

[94] Tasioulas, 'Parochialism and the Legitimacy of International Law', in M. Sellers (ed.), *Parochialism, Cosmopolitanism, and the Foundation of International Law* (2012) 17.

[95] See, in particular, Koskenniemi, 'Legitimacy, Rights, Ideology', *supra* note 92.

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notion of legitimacy implies the justification of authority[96] either to render binding rules or binding decisions with an element of deference.[97]

The notion of legitimacy carries both a normative and sociological meaning.[98] The former implies the right to rule irrespective of the existence of coercion, whereas the latter entails the belief of the right to rule.[99] Or as Daniel Bodansky explains, the sociological or popular dimension of legitimacy presupposes the acceptance of authority by the public as being justified,[100] whereas normative legitimacy prerequisites the justification of authority in an 'objective' sense.[101] Additionally, while the normative form of legitimacy requires a process of evaluation, the sociological version is predominantly empirical in nature.[102] In this sense, despite their proximity and sporadical interrelations, the two dimensions of legitimacy remain distinct.

Alternatively, there are three main angles with which the notion of legitimacy is perceived. The first one is the procedural view of legitimacy, which is predominantly legal. Legal legitimacy reiterates the initial validation of authority via state consent and provides the conditions under which the authority is considered to be legitimate – the condition of being in accordance with law or principles.[103] The second view of legitimacy is the moral one, developed as an idea of justice, like the one developed by Allen Buchanan who emphasizes the importance of the moral justification for an entity to act.[104] According to this theory, the entity secures its moral justification when it protects human rights and advocates for justice.[105] Finally, the third perspective of legitimacy is the subjective one, as evolved by Ian Hurd, who focuses on the perception of a norm irrespective of its moral value.[106]

The tripartite dichotomy is also reflected in the diversification between source-, procedural- and substantive-based legitimacy.[107] The first one implies consent, the second one entails fairness, whereas the last one requires desirable outcomes depending on the relevant audience.[108] Each of these perspectives defines legitimacy in a very different way, while the complexity of the relevant audience has at least to be acknowledged.

[96] For the concept of authority, see H. Arendt, *Between Past and Future: Eight Exercises in Political Thought* (1968), at 93, who supports that '[i]f authority is to be defined at all, then it must be in contradistinction to both coercion by force and persuasion through arguments'.

[97] Wolfrum, 'Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations', in Wolfrum and Roben, *supra* note 93, 6; Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' 93 *AJIL* (1999) 601.

[98] Buchanan and Keohane, 'The Legitimacy of Global Governance Institutions', 20 *Ethics and International Legal Affairs* (2006) 405.

[99] *Ibid.*

[100] Bodansky, *supra* note 97.

[101] *Ibid.*

[102] Tasioulas, 'Parochialism and the Legitimacy of International Law', in Sellers, *supra* note 94, 16.

[103] See Fallon, Jr., 'Legitimacy and the Constitution', 118 *Harvard Law Review* (2005) 1787, at 1794; Bodansky, *supra* note 97.

[104] Buchanan, *supra* note 93, at 187.

[105] *Ibid.*

[106] I. Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (2007), at 7.

[107] Bodansky, *supra* note 97.

[108] Wolfrum, *supra* note 97.

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Returning to the particular angle of this article, the exercise of prosecutorial discretion has been linked to the overall function and legitimacy of the ICC. In this context, as mentioned above, several scholars have suggested that the adoption of *ex ante* guidelines, which would objectify the selection process, add transparency and clarification in the work of the main figure, the prosecutor, and thus enhance the legitimacy of the Court.[109] Mainly, they suggest the pursuit of legitimacy via the right process.[110]

Under this rubric, it has been supported that the legitimacy of the international criminal tribunals derives '[f]rom the manifested fairness of their procedures and punishments'.[111] Bassiouni similarly has claimed that '[t]he legitimacy of the ICC will not be sustained on the basis of occasional referrals based upon political expediency but will depend on the consistency of its work',[112] adding that '[t]he success of the ICC will not be predicated on the simple arithmetic of case numbers but on the regular flow of cases and more particularly on the fairness, objectivity and effective management and costs of the institution'.[113] Margaret deGuzman, on the other hand, has argued that the jurisdictional threshold of gravity serves the moral or legal legitimacy of the Court, whereas the notion of 'relative gravity' enhances the sociological legitimacy of the ICC.[114]

However, one could observe a confusion about the various aspects of legitimacy, where procedural requirements are mixed with sociological dimensions and moral expectations with legal or subjective validation.[115] Still, the demanding quest of legitimacy might provide a more nuanced and humble understanding of the overall function and capability of the Court, contextualizing the demand for a more coherent and effective attribution of justice.[116]

9 From Legitimacy to Legitimization?[117]

The first decade of prosecutorial action and inaction triggered an interesting debate between academics and practitioners. Legal and policy questions were raised in an unprecedented exchange of opinions among public international and criminal lawyers, among

[109] See, e.g., Danner, *supra* note 14; Goldston, *supra* note 14; Lepard, 'How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles', 43 *JMLR* (2010) 553.

[110] Danner, e.g., acknowledges the perceived angle of legitimacy, although she still insists on the procedural legal one, while applying the model developed by Chayes.

[111] Luban, 'Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of the International Criminal Law', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 579.

[112] Bassiouni, *supra* note 7.

[113] *Ibid.*

[114] See deGuzman, *supra* note 76.

[115] Charlesworth, *supra* note 81. In particular, see Alvarez, 'The Quest for Legitimacy: An Examination of the Power of Legitimacy among Nations by Thomas M. Franck', 24 *NYUJILP* (1991) 199, at 207; Koskenniemi, 'Book Review', 86 *AJIL* (1992) 175, at 178 (reviewing Franck, *supra* note 93, proposing that legitimacy must also take account of 'available notions of authentic human justice').

[116] See Human Rights Watch, Unfinished Business, Closing the Gaps in the Selection of the ICC Cases, September 2011, supporting that delivering meaningful justice requires coherent and effective strategies designed to ensure that investigations and prosecutions resonate with the concerns of victims and affected communities.

[117] See Rask Madsen, 'Sociological Approaches to International Courts', in K. Alter, C. Romano and Y. Shany (eds), *OUP Handbook of International Adjudication* (2013) 390.

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realists and idealists and between apologists and utopians.[118] The justice–peace debate in northern Uganda, the DRC and Darfur, with the arrest warrant against a current head of state and, more recently, with the situation in Libya, has carried both a strong legal and sociological dimension of legitimacy, where the strict application of the Rome Statute has contravened with diverse social perceptions both on the affected societies and among the legal community. This latter controversy put the OTP in an unprecedented turmoil, which was elevated to the level of a Schmitian dichotomy between enemy and friends.[119]

Yet the subsequent question to be asked is: legitimacy to the eyes of whom? The ICC functions among an array of relevant constituencies such as state parties, civil society and the directly affected communities – the 'victims'. Additionally, the diverse angles of legitimacy – legal, moral and subjective – add a second level of normative uneasiness. At the same time, the Rome Statute has raised different expectations about the various constituencies that exacerbate the legitimacy gap. This 'global' community consists of states, individual experts, NGOs, victims and affected communities. Each of these actors defines the goals of the Court in a different way, according with their own priorities.

The Rome Statute is the product of very good intentions. It is beyond the purpose of this article to doubt the values of its drafters. Yet it can be argued that due to its special character, the credibility or legitimacy of the ICC is enhanced when the affected communities that it is purported to serve share at least a minimum standard of acceptance.[120] Otherwise, the Court becomes the subject of discourse among a small elite, who share thorough knowledge and access to its functions, while excluding those who are immediately affected by its decision.[121]

Within this context, the idea of legitimization, as it is pronounced by a series of sociologists,[122] appears to provide another way to deal with the problems arising from a narrow application of a normative concept of legitimacy, focusing strictly on procedural fairness,[123] representation and transparency.[124] Under this normative rubric

[118] Koskenniemi, *supra* note 56.

[119] See Nouwen and Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', 21 *EJIL* (2011) 4, at 941–965.

[120] This is founded on the recognition that sociological legitimacy enhances the normative one, or as Yuval Shany refers to the interrelation between internal and external legitimization in the context of judicial effectiveness. Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach', 106 *AJIL* (2012) 2.

[121] See Koskenniemi, 'The Politics of International Law: 20 Years Later', 20 *EJIL* (2009) 1, and his reference to the doctrinal swift from indeterminacy to structural bias within specified regimes. See also Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field', 38 *Hastings Law Journal* (1987) 805.

[122] See Rask Madsen, *supra* note 117, and his sources.

[123] See characteristically N. Grossman, 'Legitimacy and International Adjudicative Bodies', 41 *George Washington International Law Review* (2010) 107.

[124] Even new studies on international criminal tribunals (ICTs) focus entirely on the court's public authority, the issue of democratic legitimacy and the new roles of ICTs without exploring further the sociological aspects of legitimacy. See, e.g., Von Bogdandy and Venzke, 'In Whose Name? An Investigation of International Court's Public Authority and Its Democratic Justification', 23 *EJIL* (2012) 7; Von Bogdandy and Venzke, 'On the Functions of International Courts: An Appraisal in Light of the Burgeoning Public Authority', 26 *LJIL* (2013) 49; Alter, 'The Multiple Roles of International Courts and Tribunals, Enforcement, Dispute Settlement, Constitutional and Administrative Review', in J. Dunoff and M. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of Art* (2013) 345; Kingsbury, 'International Courts: Uneven Judicialization in Global Order', in J. Crawford and M. Koskenniemi (eds), *The Cambridge Companion to International Law* (2012) 203.

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and applying the sociological model of Max Weber, the ICC and, in our case, the prosecutor has to be reflexive and representative of the society. In this sense, she should interact not only with the legal elites and the states but also with the society in an open dialogue, where the OTP will acknowledge the various expectations and subsequently adjust its policies in order to legitimize its practice.[125]

This suggestion appears to be in contract with the adopted position of the OTP to focus on legal or procedural legitimacy, which contributes to a predominantly external legitimization. It is not enough for the OTP to address solely either the source (input) legitimacy or the procedural one. In order to achieve a holistic form of legitimization, the OTP should also be concerned with a so-called result-based legitimacy, one that can be identified with outcomes that influence state conduct. This legitimization process will allow the OTP to engage in a sincere dialogue, which will be especially beneficial at least when considering the interests of justice reference. As mentioned above, the interests of justice reference is a question of content and application, which is central among a diversity of perceptions and the existence of a normative schism between those who characteristically have been described as 'judicial romantics' and 'political realists'.

10 From Legitimization to Fair Balance (*μέτρον*) Using the Tool of the Interests of Justice

The ICC consists of a hard form of legalization, containing all three characteristics.[126] However, the institutionalization of justice,[127] as it has been evolved within the context of juridification[128] and judicialization,[129] has started to encounter suspicions and critique.[130] According to the prevailing opinion among legal scholars and experts, the ICC is a judicial institution. However, could it also be a political body? And if it is not

[125] See Rask Madsen, 'Explaining the Power of International Courts in Their Contexts: From Legitimacy to Legitimization', in European University Institute, *Courts, Social Change and Judicial Independence*, RSCAS Policy Paper (2012) 23.

[126] See Abbott *et al.*, 'The Concept of Legalization', in Goldstein *et al.* (eds), *Legalization and World Politics* (2001) 17.

[127] See, e.g., Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003) 3; Martinez, 'Towards an International Judicial System', 56 *Stanford Law Review* (2003) 429; Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', 31 *NYUJILP* (1999) 709; Romano, 'The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent', 39 *NYUJILP* (2007) 791, at 797–798, n. 18; Born, 'A New Generation of International Adjudication', 61 *DLJ* (2012) 775.

[128] R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004).

[129] Kingsbury, *supra* note 124.

[130] See Skouteris, 'The New Tribunalism: Strategies of De(Legitimization in the Era of Adjudication', 17 *Finnish Yearbook of International Law* (2006) 307; Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary', 20 *EJIL* (2009) 73; Koskenniemi and Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *LJIL* (2002) 553, but see Kingsbury, *supra* note 124, who concludes that the project of judicialization has not been subjected to severe critique, and the current status of attitude is more reformist than rejectionist.

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a purely judicial body, how can this twofold dimension (being both a criminal and a security court) be substantiated? In other words, what are the goals of the ICC? Are its purposes confined in rendering individual accountability, or should the Court promote reconciliation, peace and security on the ground? If this is the case, then when should the Court intervene? Moreover, in the case of intervention, should the prosecutor consider political and exogenous factors contrary to his persistence that those parameters are outside his spectrum?

The present article supports the idea that the ICC is a *sui generis* creation functioning under the premises of the first scenario, that of the Court being a hermaphrodite institution. If we accept that there is a legal consensus of universal condemnation of the core crimes, then the interests of justice reference with its open-ended character is a fundamental legal and policy tool to render the prosecutor invulnerable to political expediency, guiding him in the quest for harmony and fine balance (*μέτρον*).

The normative dimension of metron (*μέτρον*) in the specific context means fine balance, balance between the various goals of the ICC. In this sense, until the scope of the Court is delineated, the prosecutor may confront the tension arising from the demands for accountability and the realities on the ground, using the tool of the interests of justice reference, as a '[g]uarantee of prosecutorial diplomacy'.[131] Furthermore, the interests of justice clause empowers the prosecutor with a sense of fairness. Fairness here means rightness, an intrinsic quality of balance.[132] In Greek, the word *Δικαιοσύνη* entails both concepts of justice and fairness. *Δίκαιο* means both just and fair. To ignore the realities on the ground entails the risk of rendering criminal justice a project without merit. To be apprehensive of the particularities of the societies that are at stake, on the other hand, is a quality not only of justice but also of fairness.

In this exercise, the prosecutor of the ICC must demonstrate the virtue of right balance, or *phronisis*, as it was developed in the Aristotelian philosophy of ethics.[133] The virtue of *phronisis* liberates the prosecutor from legalistic constraints and guides her towards fair and contextualized decisions.[134] Yes, the prosecutor must also apply the law, but the application of her prosecutorial discretion should be exercised under the auspices of fair balance and wisdom. In a different context, Thomas Franck wrote that '[l]aw … does not thrive when its implementation produces *reductio as absurdum*: when it grossly offends most persons common moral sense of what is *right*'.[135] In the framework of the ICC, it can be argued that the fairness of a prosecutorial decision does not

[131] Freeman, *supra* note 54, at 83.

[132] The present thesis does not adopt the retributive dimension of fairness as developed by Thomas Franck in his seminal work. T. Franck, *Fairness in International Law and Institutions* (1995).

[133] I am indebted to Jan Klabbers for pointing towards this direction. See the very enlightened work of Korhonen, 'New International Law: Silence, Defence or Deliverance?', 7 *EJIL* (1996) 1; Gaskarth, 'The Virtues of International Society', 18 *European Journal of International Relations* (2012) 431.

[134] See Klabbers, 'Towards a Culture of Formalism? Martti Koskenniemi and the Virtues', 27 *Temple International and Comparative Law Journal* (2013) 417, claiming that the 'culture formalism' and 'constitutional mindset' of Koskenniemi's scholarship reflect a virtue ethics approach.

[135] T.M. Franck, *Recourse to Force* (2002), at 178.

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solely affect the due process rights of the accused. A second dimension of fairness is reflected in the broader implications of the prosecutorial exercise. Since the prosecutor is empowered by this kind of discretion, it would be truly tragic if she overlooked and/or misused this power.

11 Conclusion

The current article purports to highlight the importance and complexity of the concept of legitimacy within the context of the ICC under the particular angle of prosecutorial discretion. The demand for further independence and transparency, which is advocated by a series of scholars and activists, reveals the perplexed function of legal, moral and sociological legitimacy, based on the importance of procedural fairness for the foundation of the belief that a decision is legitimate.

This is an open-ended dialectic process that requires a more nuanced and flexible attitude towards the multi-layered concept of legitimacy. A purely legalistic process-oriented approach can provide only a limited insight, missing the actual impact of the ICC. On the other hand, sociological perceptions have to be assessed via the eyes and expectations of the various audiences. However, all of this theoretical framework presupposes an understanding and realization of the goals of the Court. Decades ago, Hannah Arendt, writing for the *Eichmann* trial, explained, among other things, the following: '[I] held and hold the opinion that this trial had to take place in the interests of justice and nothing else.'[136]

Under the Rome Statute, the interests of justice usage is unique, allowing the prosecutor to forego the investigation of core crimes and the prosecution of the 'worst' criminals even when all of the jurisdiction and admissibility parameters have been fulfilled. Despite its extraordinary function, this reference serves as a safety net for the prosecutor and the Court because it simply recognizes the limits of international criminal justice. In this regard, the prosecutor should explore its potentials in a way that would liberate her from accusations of being either utopian or apologetic, too political or not political at all and a guarantor of justice or a spoiler of peace.

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[136] H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1977), at 286.