

Alternative Perspectives on Lawyers and Legal Ethics

Reimagining the Profession

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8 Gender, ethics and the discretion not to prosecute in the ‘interests of justice’ under the Rome Statute for the International Criminal Court

Tina Dolgopol

8.1 Introduction

The International Criminal Court (ICC) was created by the international community to try the most serious cases of war crimes and crimes against humanity.¹ It is a reflection of the international community’s belief that such crimes violate the ‘rights and conscience . . . of particular victims and humanity as a whole’.² Within the structure of the ICC, it is the Office of the Prosecutor (OTP) that selects the situations to be investigated and the individuals to be prosecuted,³ as well as determining the charges to be brought against those individuals. The confluence of the Rome Statute’s admonition that only the most serious cases are to be brought before the ICC, the Statute’s emphasis on complementarity⁴ and the practicalities of holding international criminal trials⁵ places substantial restrictions on the number of trials that can be held. These limitations make clear that a broad power of discretion must be exercised by the OTP in carrying out its work.

While such discretion is necessary and, as will be discussed later in this chapter, is an accepted part of prosecutorial practice in many parts of the world, discretion is not without its limits,⁶ and should be exercised in a manner that allows scrutiny of the decision-making process.⁷ Although the push to have published guidelines on the exercise of prosecutorial discretion is often discussed in terms of transparency,⁸ it could also be understood as a method of publicly articulating the ethical dimensions of the work undertaken by prosecutors. Prosecutors, both domestic and international, play a role in the fulfilment of the public’s expectations about justice⁹ and crime prevention.¹⁰ Their work is carried out with the knowledge that they are in some sense answerable to the community for their decisions.

Scholars in the field of ethics, such as Deborah Rhode, have suggested that ethical decision-making goes beyond the formal rules of conduct that typically govern the legal profession and that are used in disciplinary matters. Rhode argues that ethical decision-making takes account of the impact one’s decisions

will have on the broader community,¹¹ as well as the functioning of the institutions of the law:¹² 'lawyers, as officers of the justice system, have a special obligation to pursue justice. That obligation runs first and foremost not to particular clients, but to the rule of law and to the core values of honesty, fairness and social responsibility that sustain it'.¹³ Further, the 'morally reflective' practice she espouses encompasses an obligation to understand the 'social context' in which decisions are made, in particular the uneven distribution of 'wealth, power and information'.¹⁴

This view of ethics is one that is particularly apt for those engaged in the commencement and conduct of trials involving war crimes and crimes against humanity. Such trials affect hundreds, if not thousands, of victims as well as the international community as a whole. Our knowledge of the past failures of international humanitarian law¹⁵ with respect to the protection and promotion of the rights of women and other vulnerable minority groups,¹⁶ as well as the ongoing discrimination that often exists in societies recovering from armed conflict,¹⁷ makes it apparent that thought must be given to the implications of an international prosecutor's work on those living within these countries.

Pursuant to Article 53 of the Rome Statute, the OTP has the power to determine that it would not be in the 'interests of justice' either to continue an investigation or, once an investigation is complete, to prosecute a particular defendant. This power has been the subject of debate by a range of international actors.¹⁸ The OTP issued a policy paper on Article 53 in September 2007.¹⁹ In that paper, the OTP expresses its view that it will operate from the premise that investigations and prosecutions are generally in the interests of justice and that only extraordinary circumstances would warrant a determination that it would not be in the interests of justice to proceed.²⁰

While that strong statement is to be applauded, the discussion about the factors that would militate against prosecution leaves many unanswered questions. Of concern is the failure of the OTP to articulate the specific issues it would consider if such a step were being considered. The Statute requires a balance to be achieved among factors such as the interests of justice, the interests of victims and the gravity of the crimes committed by the individual. Given the extent of crimes of sexual violence that have and are taking place in conflicts that would come within the jurisdiction of the court, it is surprising that the policy paper does not include a gender analysis, both with respect to the general issue of prosecutorial discretion and the specific issue of how the interests of victims will be handled in determining whether or not the interests of justice would support a decision either not to investigate or not to prosecute.

It is the thesis of this chapter that the OTP has an ethical obligation to give greater consideration to the gender dimensions of victims' concerns, and to articulate more fully its understanding of the discretion it has been given under Article 53. Before demonstrating the manner in which gender can influence our perceptions of justice, as well as the interests of victims, the chapter will commence with a brief overview of prosecutorial discretion and Article 53.

8.2 The Rome Statute and prosecutorial discretion

Many of the world's legal systems recognize the importance of prosecutorial discretion.²¹ 'Its necessity springs from the practical need for a selective, rather than automatic, approach to the institution of criminal proceedings, thus avoiding the over-burdening and perhaps clogging of the machinery of justice.'²² Although in specific instances the manner in which prosecutors exercise their discretion at the domestic level may be the subject of challenge or criticism, it is accepted in these systems that discretion is an inherent and necessary part of the functions of a prosecutor's office.²³ However, even in systems that accept the importance of prosecutorial discretion, there remains a general presumption that serious crimes will be brought to trial.²⁴ In recent years, prosecutors have commenced articulating and publicizing the guidelines that will influence the manner in which they exercise their discretion.²⁵

In contrast to domestic systems, the ICC operates on the presumption that only the minority of potential cases will be investigated and prosecuted. This presumption arises from the principle of complementarity (Articles 1, 12 and 17) and the restriction of the ICC's jurisdiction to the most serious cases (Article 5). These limitations on the work of the ICC in conjunction with its yet unproven place in the international arena, its potential for assisting in the diminution of horrific crimes, the vast number of state and non-state actors that worked to bring the court into existence, the opposition to the court by the United States and the emerging nature of international criminal justice (in contrast to the more established rules of international humanitarian law) have all contributed to the burgeoning literature on the nature of and the limits to the exercise of discretion by the OTP.²⁶

Article 53 has two prongs. Paragraph 1 deals with the investigatory stage, and would allow the prosecutor to determine that, even if there was 'a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed', it would not 'serve the interests of justice' to continue with an investigation despite 'the gravity of the crime and the interests of victims'.²⁷ A pre-trial chamber of the court²⁸ is to be advised of the prosecutor's decision not to proceed with the investigation. Paragraph 2 focuses on the bringing of a prosecution and calls on the prosecutor to inform the pre-trial chamber if a decision is reached not to prosecute, *inter alia*, because it would not be in the interests of justice, 'taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime'.²⁹ The pre-trial chamber may review a decision of the prosecutor made in accordance with either paragraph on its own initiative.³⁰ A review of the decision may also take place if requested either by the Security Council for matters it has referred to the prosecutor or by a state that has referred a situation to the prosecutor.³¹

8.2.1 Discretion and the interpretation of paragraphs 1 and 2

One of the difficulties facing those wishing to interpret Article 53 of the Rome Statute is the paucity of information in the drafting history with respect to the meaning of the phrase ‘interests of justice’ and the intent of the drafters in inserting the language into the Article. The draft submitted to the Diplomatic Conference of Plenipotentiaries put a positive obligation on the prosecutor to make a determination that an investigation was in the ‘interests of justice’ prior to initiating an investigation; however, the phrase ‘interests of justice’ was in square brackets, as were the phrases ‘taking into account the gravity of the offences’ and ‘the interests of victims’.³² In contrast, the prosecutor, in determining not to file an indictment, was to conclude that ‘a prosecution would not be in the interests of justice’.³³ This paragraph also referred to the ‘interests of victims’ in square brackets, but the placement of the phrase seems to suggest that it would be a factor in favour of prosecution; however, without more information it is not possible to draw a definitive conclusion. With respect to the phrase ‘interests of justice’, Human Rights Watch has observed that no consensus was reached by the drafters with respect to its meaning.³⁴ The OTP, having considered the drafting history and the language as adopted, has observed in its policy paper that the ‘Interests of Justice test is a potential countervailing consideration’ rather than a positive requirement, and that this is a crucial distinction. It means that the OTP has no obligation to ‘establish that an investigation or prosecution *is* in the interests of justice’ (emphasis added).³⁵

Given the volume of information that comes before the OTP, as well as the limits on its resources – both human and material – it is obvious that a broad power of discretion must reside in its officers if the work of the office is to progress efficiently and expeditiously. There are a range of issues that one could envisage the office having to consider with regard to the myriad situations that have and will come to its attention.

For example, in the case of a state party referral where an initial assessment would have been made as to whether or not the situation is one in which crimes within the jurisdiction of the court are occurring and whether or not there is sufficient evidence to go forward with the matter, one could imagine that in a given set of circumstances an ‘opt out’ clause such as that in paragraph 1 might be useful. Although there might be evidence of crimes within the jurisdiction of the court, the conflict might be an interstate conflict, and the prosecutor might come to the conclusion that a state party is attempting to manipulate the jurisdiction of the court in order to win a tactical advantage in peace negotiations or in respect of its diplomacy in connection with the war.³⁶ Alternatively, in the context of an intrastate conflict, the state might wish to secure support for its bargaining position vis-à-vis armed resistance groups.³⁷ Another possibility is that the OTP’s investigations in an ongoing conflict situation lead to a conclusion that the physical safety of victims and witnesses could not be guaranteed. In none of these circumstance would it be in the ‘interests of justice’ to proceed. At a later stage, when hostilities have ceased or peace negotiations have concluded, the

OTP might rely on Article 53 to reconsider its decision. This article allows the Prosecutor to reconsider a decision not to initiate an investigation or prosecution in light of new facts or information that has come to the OTP's attention.

At the prosecution stage, a situation might arise where the OTP, having reviewed the evidence, might come to the conclusion that the available evidence would only allow lesser charges to be brought and that, given the resources needed to go forward, it would not serve the larger interests of international criminal justice to bring this particular prosecution. Other considerations that might come into play are that a prosecution would not create a useful precedent or that this is the type of crime that is routinely prosecuted at the domestic level.

8.2.2 Constraints on the OTP's exercise of discretion

Aware of the breadth of the discretion being given to the OTP, the drafters of both the Statute and the Rules of Procedure included provisions for the oversight of this discretion. Although the Statute creates a difference in the obligations of the OTP to give reasons for its decision, depending on whether it is being made at the investigation stage (OTP to inform the Pre-Trial Chamber (PTC)) or the prosecution stage (OTP to inform either the Security Council or referring state as well as the PTC of their conclusions and is to give reasons for the conclusion), the Rules of Procedure³⁸ require reasons to be given in both circumstances. With respect to a decision not to proceed with an investigation, Rule 105(3) requires the notification to the state party or the Security Council to contain the conclusion of the OTP as well as its 'reasons for the conclusion', taking account of the need to protect victims and witnesses under Article 68. Rule 105(4) requires the notice to the PTC to include the conclusion and the reasons for the conclusion. Rule 106 mirrors the language in Article 53(2) with respect to the provision of conclusions and reasons at the prosecution stage.³⁹

With respect to a Pre-Trial Chambers review of the OTP decisions, the outcomes will differ depending on who requested the review. If the Security Council or a referring state requests a review, the PTC may only ask the OTP to reconsider its decision. However, if the PTC undertakes a review on its own initiative, then the OTP's decision not to proceed is 'effective only if confirmed by' the Chamber.⁴⁰ Pursuant to Rule 110, if the PTC does not confirm the OTP's decision not to proceed with either investigation or prosecution, then the OTP is obligated to proceed.

8.2.3 Are the constraints on the OTP's exercise of discretion sufficient to meet the expectation of ethical decision-making?

There is a suggestion in the OTP policy paper with respect to the 'interests of justice' that the existence of judicial review of its decision-making functions should lessen the concern of organizations following the work of the court that a decision outside the bounds of reasonable discretion would or could be made by the OTP.⁴¹ This view is put forward in order to support the OTP perspective that

this type of decision-making is case or situation specific, and that it is not useful to enter into a more abstract discussion of what would or would not be a sufficient 'interests of justice' criteria warranting a decision not to investigate or prosecute.⁴² However, this perspective ignores the fact that both paragraphs call on the OTP to give consideration to the interests of victims. Even though the Rome Statute gives greater status to victims than previous international tribunals, there are still profound limitations on their ability to access the court and to have their voices heard by the Pre-Trial Chamber. At the investigation stage, many victims will either not have been identified or will not be aware of their ability to apply to the ICC to have their status recognized. At the prosecution stage, there may be a narrowing of the class of persons able to participate as victims.⁴³ As women in many communities have limited access to information about their rights, these barriers may particularly affect them.

Further complicating this matter are the various interpretations that could be given to the phrase 'interests of victims'. Is Article 53 referring to victims of the situation being investigated by the prosecutor, victims associated with the crimes committed by a particular individual who may have an arrest warrant outstanding or, if either an arrest warrant has been issued or charges have been brought, those individuals who have been recognized by the court as being victims of the case? Despite the recognition that a broad interpretation should be given to the definition of victim in Article 68 of the Statute, which allows the 'views and concerns' of victims to be 'presented and considered' by the court in cases where their 'personal interests are affected', the number of persons who will receive recognition will always be far lower than the number of persons who have been victimized by a given conflict or even a given defendant.

If Article 53 is meant to encompass all possible victims, this has challenges for women in many societies as their concerns may not be on the public record or they may not have access to the public spaces in which the OTP consults affected communities.⁴⁴ There has been some criticism of the OTP's outreach efforts, including criticisms that it has not been gender sensitive.⁴⁵ As particular chambers can only rule on applications before them⁴⁶ the Statute presupposes that potential victims are aware that the ICC is investigating or considering matters relevant to them. If the ICC's outreach programmes are not ensuring the right to equality of access to justice, this is of particular concern, as this right has been considered a core obligation in the protection and promotion of human rights since the drafting of the Universal Declaration on Human Rights.⁴⁷

In addition, a failure to provide mechanisms that ensure equality of access to victims can lead to what is often termed secondary victimization. Bassiouni, in his comprehensive overview of the development of a theory of victims' rights in international law, includes in his description of secondary victimization the process by which people are left feeling ostracized by their communities when the systems that are created to deal with violations of their rights are perceived to act unfairly.⁴⁸ It would be a failure of the OTP's ethical leadership in the field of international criminal justice if its approach to decision-making undermined

victims' faith in the ICC and created a situation whereby those already traumatized by armed conflict were further victimized by the court's processes.

If, at the prosecution stage, the notion of victims' interest is limited to the interests of those who have been recognized by the court as victims of the case, then some consideration has to be given to the ratio of male and female victims recognized by the court and whether or not the interests of female victims are being put forward in a comprehensive manner. Further, some oversight of the nature of the cases brought by the OTP is necessary to ensure that a decision not to prosecute in the 'interests of justice' does not result in fewer resources being devoted to cases with gender implications. None of these matters is noted or addressed in the OTP policy paper.

As discussed above, if the matter of an interest of justice concern arises at the prosecution stage, victims of the case will have been identified and some may have received recognition by the court.⁴⁹ It is possible that there will be strongly divergent views among those recognized as to what is in their interests and how they perceive the balance should be struck between the interests of justice and the interests of victims.

For example, in some of the countries that have experienced conflict in recent years, women do not have a right to inherit land owned by their families; therefore, the loss of a father or husband during a conflict could mean that a woman is effectively rendered homeless.⁵⁰ Her situation may be exacerbated by the need to care for other family members, such as children, parents or siblings. This group of victims may not believe that prosecutions against those responsible for the death of family members should cease in the interests of justice as their ongoing harm leads them to believe they will be better served if the accused is tried. They may perceive a trial as one way of gaining better recognition for their plight within their own country. However, males in the community who have been able to inherit property from those killed in the conflict will have a diametrically opposed view of their interests. Although they too are indirect victims of the conflict, having watched family members die, their interests may be served by having the prosecution cease as this might bring to fruition a peace agreement that endorses the existing law with respect to inheritance.

It is important that the OTP begins to explore how the office will deal with these issues when they arise as they are part of the social context that forms the backdrop to the work of the OTP. The Statute states that the ICC is not to interpret the law in a manner that would create any adverse distinctions founded on matters such as gender.⁵¹ Presumably the OTP will not wish to put forward an 'interests of justice' argument that could lead to such a result, as this would bring the law into disrepute (this itself is an 'interests of justice' concern).⁵² This highlights the necessity of the OTP engaging in the 'morally reflective' practice described by Deborah Rhode.

The next two sections of this chapter deal with broader concerns about prosecutorial discretion and the gender dimensions of the concept of justice that could affect an assessment of whether or not the OTP is engaging in an ethical and 'morally reflective' decision-making process that takes due account of gender.

8.3 Gender and the exercise of prosecutorial discretion

Individuals and organizations working with women and girl children are aware of the past failures of international law with respect to the prosecution of gendered crimes. Traditionally, '[w]omen's interests fared notoriously poorly when accountability was sought for the behaviour of combatants'.⁵³ Despite some references to gendered crimes in the post-Second World War trials, it was not until the 1990s that the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) made it clear that rape and other forms of sexual violence 'were serious violations of international humanitarian law'.⁵⁴

Due to these past shortcomings, those working in the area of women's rights have welcomed the inclusion of a more victim-centred approach in the Rome Statute. However, if the 'interests of justice' can either 'trump' the rights of victims or if the interests of victims can be considered a factor in a decision not to proceed in the 'interests of justice', then serious questions arise about the extent to which decision-making will be gender sensitive.

The OTP has acknowledged the need for a detailed policy framework on gender, 'addressing legal and operational issues relevant to the investigation and prosecution of crimes of gender and sexual violence'.⁵⁵ However, what appears to be missing is an understanding that gender bias can appear in all facets of its work. It is of concern that the gender dimensions of the OTP's decision-making powers pursuant to Article 53 were not addressed in its policy paper. In order for women survivors and those working with women who may have been subjected to or witnessed crimes within the jurisdiction of the court to have confidence in the operation of the OTP, it is crucial that issues related to gender be explicitly acknowledged by the OTP. This makes the public documents of the OTP about the operation of the office and the manner in which it will exercise its discretion vitally important. Ultimately, the ICC in general and the OTP in particular have to rely on international public opinion in order to continue to be effective. Increased levels of grievance against the court will undermine its effectiveness.

As noted earlier, the exercise of discretion is an integral part of the work of the OTP; however, there is little recognition in the published documents of that office of the possible negative consequences that can arise when discretion is not exercised in accordance with established guidelines and in a manner that is accessible to the community at large. 'Where law ends, discretion begins, and the exercise of discretion may mean either . . . justice or injustice . . .'.⁵⁶ The need for greater public articulation of the criteria by which decisions will be made is thoughtfully elucidated by Allison Marston Danner in her article 'Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court'.⁵⁷ She highlights the significant effort that will have to be undertaken by the OTP to prioritize its workload due to both budgetary and statutory constraints on its work.⁵⁸ A potential problem in any situation where discretion is crucial to the functions of an organization is that it can be exercised arbitrarily or in a discriminatory fashion.⁵⁹

Discretionary areas hold the biggest challenge to women. In exercising judgment, professionals often believe that they act without bias – but the day-to-day experience of women is to the contrary.⁶⁰ Gender bias can range from not taking seriously crimes against women to not thinking through the ways in which domestic hierarchical structures can silence women. Issues such as who categorizes individuals as victims of crime, who interviews potential victims and witnesses, who acts as an intermediary between the staff of the OTP and victims and witnesses, who translates the accounts of victims and witness, and whether or not barriers to women's participation have been identified by the OTP before it undertakes grassroots work are all important to the credibility of the process.

None of these comments should be read as insinuating that the OTP will inevitably make decisions that could be viewed as biased. Rather, without the formulation of guidelines that delineate in a clear and precise fashion⁶¹ the manner in which gender can affect its work, it remains unclear whether the OTP has a sufficient understanding of the potential for bias in its work and whether it is taking adequate steps to ensure that any bias will be identified and overcome. As noted by Allison Marston Danner, it is the cumulative effect of a series of discretionary decisions that leads to the formation of policy.⁶² It is incumbent on the office to acknowledge that its decisions about what will and will not be considered to be a factor in its decision-making pursuant to the 'interests of justice' clause will result in a series of precedents for future prosecutors, and that each of its decisions will have an impact on the future administration of international criminal justice.

A specific area of concern in this regard, and one that is related to an example utilized in the OTP policy paper, is a decision not to prosecute because adequate protection cannot be provided to witnesses and victims.⁶³ The manner in which this assessment is made can have consequences for women. If the decision is made in part on the basis of information supplied by local leaders, as suggested by the OTP, then questions need to be asked about the extent to which they speak on behalf of the entire population. It has been the case that some members of society do not wish to discuss in public the crimes that have been committed against women. This may have many underlying reasons, from a sense of shame for their inability to protect women as a group to a belief that such crimes are not as important as other crimes such as murder or torture. There are also issues related to the domestic treatment of such crimes. If few resources are given to the prosecution of crimes of sexual violence and if women face a criminal justice system that is unsympathetic to their concerns, then it is likely that such attitudes will carry forward when discussions are held about the possibility of bringing prosecutions before the ICC. Again, the author is not suggesting that the OTP itself is unsympathetic to women's concerns. The issue is the articulation of gender as a matter for reflection and the public's need to feel that the prosecutor has thought through the gender implications of its work and the manner in which it will deal with specific problems when they arise.

Although focused on deaths in custody, the observations of His Honour Gerald Butler QC during the 1999 Inquiry into the Crown Prosecution Service is apt:

What, however, is clear is this. Any decision as to whether or not there should be a prosecution in a case where there has been a death in custody is always a decision of great importance . . . If a prosecution is not brought when it should be, then the family and friends of the deceased will suffer a deep sense of grievance, accompanied by a loss of confidence in the criminal justice system.⁶⁴

The past failure of international law to take seriously issues of importance to women has meant that women do not yet have confidence that the system will operate with their concerns in mind. There is a potential for both victims of gender-based crimes and observers of the court to lose confidence in its operations unless the decision-making process is explained fully. The type of ethical approach to the OTP's work being suggested in this chapter would assist in strengthening victims' and the international community's respect for the institutions of international criminal justice, as it would ensure that the OTP had publicly explained its understanding of the consequences of its work on affected societies.

8.4 Gender and the concept of justice

Giving meaning to the phrase 'interests of justice' is problematic, as it is open to a range of interpretations because the word 'justice' itself is so amorphous.⁶⁵ As a concept, justice has legal, moral and philosophical overtones.⁶⁶ The literature on transitional justice contains material that is both about traditional criminal justice as well as restorative justice and nation-building – issues which are outside the scope of traditional criminal justice concerns. Although indicating its awareness of the debates surrounding the term 'justice', the OTP appears to have taken the position that its role is to fulfil traditional criminal justice objectives – that is, accountability requires a trial and that retribution and deterrence are the two main purposes of the criminal justice system.⁶⁷

Following on from this interpretation, the phrase 'interests of justice' is more likely to be perceived as being akin to some of the concerns in common law legal systems that come under the rubric 'administration of justice'.⁶⁸ Among the issues that a prosecutor would have to consider would be whether or not a particular investigation or prosecution would serve the purposes of the Rome Statute, the operation of the ICC and the furtherance of international criminal law. Examples of such a consideration are: the ability of the OTP to obtain the support of the international community in carrying out investigations or in arresting a suspect,⁶⁹ as it would significantly undermine public confidence in the court if an arrest warrant were issued in circumstances where a state had and would continue to refuse all cooperation with the court and the court was viewed as impotent; continuing an investigation or prosecution where the evidence had been obtained through the use of torture;⁷⁰ and the pursuit of an investigation or the bringing of a prosecution that was viewed as discriminatory.⁷¹

The OTP has expressed its view that the concept of 'interests of justice' is tied

to the importance of ending impunity for mass atrocities. Effectively, this position puts a premium on the idea that the prosecution acts as a deterrent to the commission of crimes in the future.⁷² But the focus on deterrence can result in a failure to address the complexities of mass violence and the relationship between societal breakdown and the occurrence of violence. By not articulating its understanding of the connection between impunity and justice, the OTP leaves itself open to a critique that it does not fully appreciate the connection between state-building and justice or the need for communities to re-establish moral order in their societies. The complex nature of mass atrocities, as well as the fact that they 'would not [have] reach[ed] truly epidemic levels but for the vigorous participation of the masses',⁷³ makes it crucial that thought be given to how prosecutorial strategies fit in with the need to acknowledge the complicity of many ordinary people.⁷⁴

8.4.1 Mass atrocities and 'philosophical justice'

Reading the policy paper, it appears that the OTP has not sufficiently addressed what Tom Campbell terms 'philosophical justice'.⁷⁵ This is also a component of ending impunity as it relates to societal transformation. The process of handling investigations and potential prosecutions should acknowledge that mass atrocities occur because of the suspension of moral values, and should encourage the community to reassert them. When the OTP refers to discussions with local leaders, one has to ask how they will be selected, what assurances the OTP will seek to demonstrate that they are not tainted with complicity in the events under consideration, and how the OTP will ensure they are in fact speaking for a larger group.

Another facet of this problem is that in any situation the OTP is likely to consider for investigation, multiple actors will have contributed to the breakdown in societal cohesion and the local population may perceive all of them as having a role in the harms that have occurred. The population may perceive themselves as pawns in a game being played by the government and other groups. On the other hand, significant numbers of the local population may have played a role in the conflict and their views about security and about the need for retribution may be skewed by their own allegiances:

For the victims and survivors of acts of mass atrocities justice has a range of connotations. For them justice is about the restoration of their dignity, receiving a reaffirmation of their value as human beings, obtaining assurances that the larger community understands the impact mass atrocities have had on their lives, and knowing that the perpetrators either have been punished or been made to acknowledge their crimes. It is also about being part of a process that empowers rather than dehumanises them.⁷⁶

Research undertaken in Northern Uganda by the Gulu District NGO Forum/Liu Institute for Global Issues⁷⁷ supports this characterization of a victim's/survivor's perspective of justice. Consultations were organized with survivors and the families of victims of past atrocities. During this process, participants expressed their

desire to learn about the fate of relatives, to hear admissions from those responsible about their activities and to receive an acknowledgement from the perpetrators that their acts were crimes. They also recognized the necessity of discussing the underlying tensions and societal fault lines in order to avoid future conflicts. Further, community members emphasized the importance of a partnership between the Acholi people, the Government of Uganda and the ICC and their desire to have the ICC recognize their knowledge and their right to influence decisions about what would constitute justice.⁷⁸

8.4.2 Empowering victims

When balancing the ‘interests of justice’ and the interests of victims, it is important that the OTP thinks carefully about how an assessment will be made in light of the possibility that victims of sexual assault in particular may be continuing to experience severe ongoing trauma. Former Gender Adviser to the International Tribunal for Yugoslavia, Patricia Viseur Sellers, observed that in her conversations with interpreters and investigators about their interactions with victims, they opined that sexual assault witnesses ‘tended to be more severely affected by the overall ordeal, placing them into a different category of witness altogether . . . It tended to detrimentally affect the personal relations of the victims/witnesses for years – especially with men’.⁷⁹ Further: ‘The emotionally and physically devastating experience of sexual assault victims/witnesses seemed to be the issue that tested the professional skills of a number of investigations/interpreters interviewed’.⁸⁰

This is not to suggest that such victims would not want the criminal process to proceed. Despite the emotional hardship of discussing events, it is also true that many victims and witnesses find that the telling of their stories assists them to recover from their trauma. They can develop a sense of empowerment and a feeling of control over their lives.⁸¹ Many women want to tell their stories in the hope that it will prevent atrocities from occurring in the future. In undertaking consultations with ‘local leaders’,⁸² the OTP should ensure that its consultations do not undermine the rights of women.⁸³ The utilization of leaders or other proxies may undermine the ability of victims to speak for themselves and to work for societal change. Even where there are sound reasons for not commencing or continuing an investigation or prosecution, the manner in which the decision-making process is undertaken and explained can be crucial in either fostering or diminishing a sense of empowerment.

The observations of André Laperrière, the Executive Director of the Victims’ Trust Fund are pertinent:

Our first challenge is to change the perception of the Western World from seeing victims as hopeless dependents, into their true nature as fully fledged citizens wanting to contribute to their community and country. Victims are and deserve to be considered as partners, which [sic] deserve our respect and support . . . We have to show them that they are not alone, and that they have

nothing to be ashamed of; on the contrary, they have to be proud to have been able to manage despite the atrocities they had to face.⁸⁴

Another issue that can arise from the focus on consultations with local leaders and non-government organizations is the possibility that local hierarchal structures exclude the participation of women.⁸⁵ The Victims' Rights Working Group⁸⁶ has observed that:

obtaining a real understanding of the views and concerns of victims is a complex process, owing to the fact that often the most marginalized victims have the least access to debates about such issues . . . This is because 'victims' as such are not a homogenous group and will generally have a variety of views and perspectives.⁸⁷

Working through the range of issues that have to be considered when interacting with victims is not a simple task. As the discussion in this chapter demonstrates, there is an ever-present concern that the marginalization of women could be exacerbated if the process is not handled carefully. Adding to the complexity is the fact that, in some cases, women who have been forced into being a victim/survivor by the crimes perpetrated against them have emerged as actors for political change. They may have become involved in politics within their own countries or become active participants in regional and international movements.⁸⁸ The OTP must ensure that, when thinking about the necessity of balancing the protection of victims with the 'interests of justice', it does not undermine the steps women have taken towards their own empowerment. Decisions should not be made that assume women are passive and require protection. Some women may be willing to take the risk of telling their stories in order to influence the international community's understanding of events in their country or to further the rights of women more generally.

8.4.3 Unrecognized bias and its implications for women

One of the most difficult steps for lawyers (and judges) to take is to acknowledge that there can be biases in the system within which they operate. The professionalism of those working within the system provides them with a sense that they are operating impartially and with objectivity. Yet when a systematic examination is undertaken of the interactions that occur within the legal system, biases become evident. The findings of the review of the Ninth Circuit in the United States included the following observation: 'Thus we know that is not only having a different experience but also that, when witnessing or engaging in the very same behaviours, women and men experience, describe, and report different events'.⁸⁹ The recognition of the potential for bias – and the differing ways in which women, particularly women who have experienced gendered violence – should be the starting point for the outreach work of the OTP and those who will engage in the investigation and prosecution of possible crimes.

A further area requiring exploration by the OTP is the effect of its work on the levels of violence, including domestic violence, experienced by women in the post-conflict period. The chaos brought about by a conflict may have led to a generalized increase in crimes of violence against women. Members of the population can take advantage of the breakdown in law and order to commit crimes.⁹⁰ This violence often does not cease when the conflict ends; the general level of societal disarray and the proliferation of small arms in conflict-ridden states can lead to a sustained level of crimes of violence against women during the transitional period.⁹¹ The failure of the OTP to acknowledge the effect its work can have on the continued vulnerability of women can be a cause of dissatisfaction and as with other issues addressed in this paper could lead to a loss of confidence in its work.⁹² Once again, it is important to stress that it is not being suggested that the OTP must investigate or prosecute every crime; rather, a thoughtful analysis of how its efforts affect the lives of ordinary women is necessary. The desire of the OTP to be viewed as effective (in the sense of bringing targeted and resource-limited prosecutions)⁹³ should not outweigh its obligation to set standards and to work closely with national governments to ensure that an unintended consequence of its activities is to contribute to the marginalization of women.⁹⁴

The OTP has indicated that it will pay regard to alternative justice mechanisms when working with countries to address what has been termed the 'impunity gap' – that is, the limited ability of courts, whether national or international, to deal with all perpetrators of mass atrocities.⁹⁵ However, traditional justice mechanisms are not always sympathetic to the rights of women. Those working with women who have lived through conflict are aware that the utilization of such mechanisms should be reformed so that they reflect a commitment to women's equality including their right to be treated as both decision-makers and active participants.⁹⁶ As Mark Drumbl has observed, it is necessary to be careful when dealing with local structures because they may 'institutionalize the power of unaccountable local elites'.⁹⁷

A further consideration that should be addressed by the OTP is the impact a decision not to proceed will have on the ability of victims and witnesses to recover from what they might consider to be a breach of trust. It is beyond the scope of this chapter to consider the manner in which the OTP initiates contact with affected populations and the nature of its outreach work in explaining the processes of the ICC, as well as the possibility that there may not be a tangible outcome from their cooperation. What is clear, however, is that the lack of comprehensible and sensitive case management can lead to a further loss of self-esteem and a diminution in a victim's or witness's ability to trust authority figures.

A victim undertakes a difficult emotional journey to come to the point where they are willing to recount the traumatic story of sexual violence. The sensitivity and respect displayed by interpreters and investigators instils a sense of trust in the victims and witnesses.⁹⁸ To find out that their effort to give an accurate narrative of the acts of extreme horror inflicted on them will not result in a prosecution can be emotionally damaging for a victim. For some, it was the belief that

what happened to them would be placed before a court, and that this would help them to find closure,⁹⁹ that allowed them to find the strength to divulge their secrets.

Flowing on from the above is the necessity of giving effect to one of the basic rights of victims: the right to be informed about the progress of the proceedings.¹⁰⁰ The right is not only about being given adequate information and a reasoned explanation, but also about receiving the information in a manner that respects the dignity of the individual. If not handled sensitively, communications may contribute to the ongoing isolation of the victim.

The reasons for a decision not to proceed must be made clear to the local population and materials should be distributed in local languages.¹⁰¹ Witnesses and victims can feel that their testimony is being appropriated for a purpose outside of their control. Their experiences form the basis of the work of the OTP, yet they are not in control of their own stories or the impact that the telling of their stories will have.¹⁰² For women, the decision to come forward may be extremely difficult due to the fear of the community's reaction. A decision not to proceed may leave women feeling and being even more marginalized and subject to community control and approbation. Without an adequate explanation of the OTP's decision, it might be possible for either the women themselves or members of their communities to come to the conclusion that they were not believed. The consequences for women if such a view did develop could be devastating to their future relationship with family members and their communities.

8.5 Conclusion

In order for the work of the OTP to be described as 'morally reflective', it must demonstrate that is attempting to come to grips with the mismatch of perceptions between institutional actors and those working with women. The former assume that they act in the common good, with impartiality and objectivity. The latter are aware of the historical failure of international law and its institutions to deal with crimes against women. When decisions are made not to investigate or prosecute crimes of sexual violence or to terminate prosecutions without ensuring adequate consultations with the full panoply of victims, many women and organizations will question whether or not those decisions are compromised due to a lack of appreciation of the seriousness of the crimes or through the operation of subtle biases about women's ability to speak for themselves. In order for the work of the OTP to further the interests of justice, it is essential that it publicize its understanding of the factors that will guide the exercise of its discretion and that its policy papers contain an explicit and transparent gender analysis. Unless the OTP adopts such an approach, there will be an ongoing fear that the past failures of the international legal system will be replicated in its work. This fear has the potential to erode public confidence in the ICC, an outcome that would undermine rather than garner support for the institutions of international criminal law.

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Notes

- 1 Article 5, Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9. Available from: <www.un.org/law/icc/statute/romefra.htm> (accessed 10 July 2008).
- 2 S. Economides, 'The International Criminal Court: Reforming the politics of international justice', *Government and Opposition: An International Journal of Comparative Politics*, 2003, vol. 38, 29–30.
- 3 Pursuant to Article 13, the ICC has jurisdiction over the nominated crimes resulting from investigations conducted by the prosecutor as a result of a referral of situations by either the Security Council or a state party. The prosecutor may initiate their own investigations in accordance with Article 15 of the Statute. The powers of the prosecutor with respect to investigations and prosecutions are set out in Articles 53–61, Rome Statute of the International Criminal Court.
- 4 Articles 1, 12 and 17, Rome Statute of the International Criminal Court.
- 5 The recent submission by the ICC to the Assembly of States Parties encompasses an overview of the OTP's expenditures since 2006. The following information is taken from Table 14: Changes in OTP budget and staff allocation per situation which sets out the budgetary figures from 2006 onward that have been allocated to the cases being investigated by the OTP. For 2009 the approved budget included the following costs (set out in euros) with figures in parentheses setting out the number of staff working in a particular area and the number of cases being pursued: Operational Support, 5,012,700 (59) (9 cases); Uganda, 898,900 (3) (one case); Democratic Republic of Congo 6,124,300 (53) (four cases); Darfur 4,590,500 (32) (three cases); Central African Republic 4,206,300 (24) (one case). See ICC-ASP/8/10, Assembly of States Parties, Proposed Programme Budget for 2010 of the International Criminal Court, 30 July 2009 <www.icc-cpi.int/NR/rdonlyres/F945056A-F020-24F6A-A626-B8015D20D925/0/ICCASP810ENG.pdf> (accessed 31 October 2009).
- 6 *R (on the application of Purdy v Director of Public Prosecutions)* [2009] UKHL 45.
- 7 *Ibid.*; see also B. A. Grosman, *The Prosecutor*, Toronto: University of Toronto Press, 1969, pp. 100–105, although – unlike the House of Lords in *R (on the application of Purdy v Director of Public Prosecutions)* [2009] UKHL 45, which found the Director of Public Prosecutions was obliged to issue publicly available guidelines – Grosman suggests that guidelines may be too restrictive. It should be noted that the House of Lords' judgment relies, in part, on the judgment of the European Court of Human Rights in *Pretty v United Kingdom* (2002) 35 EHRR 1, and therefore is both more recent and more in tune with the development of human rights law.
- 8 *Ibid.*
- 9 R. K. Flowers, 'Foreword to the Prosecution Law Symposium', *Stetson Law Review*, 1999–2000, vol. 29, 2.
- 10 M. Wade, B. Aubusson de Cavarlay and J. Zila, 'Tinker, tailor, policy-maker: The wider context of prosecution service work', *European Journal on Criminal Policy and Research*, 2008, vol. 13, 181–90.

- 11 D. L. Rhode, 'Law, lawyers, and the pursuit of justice', *Fordham Law Review*, 2001–2, vol. 70, 1543: 'Lawyers, individually and collectively, need to assume greater responsibility for the consequences of their professional actions [and] for the performance of the legal system . . .' (p. 1545).
- 12 D. L. Rhode, 'Personal integrity and professional ethics', Keynote Address to Third Legal Ethics Conference, Gold Coast, Australia, 14 July 2008, p. 2; a copy of the paper is in the personal possession of the author.
- 13 Rhode, 'Law, lawyers, and the pursuit of justice', 1546.
- 14 Rhode, 'Personal integrity', 4.
- 15 Commonly referred to as the laws of war or the law and customs of armed conflict.
- 16 F. Ní Aoláin, 'Political violence and gender during times of transitional justice', *Columbia Journal of Gender and Law*, 2005, vol. 15, 838; J. Campanaro, 'Women, war, and international law: The historical treatment of gender-based war crimes', *Georgetown Law Journal*, vol. 81, 2557–92. P. V. Sellers, 'Individual(s)' liability for collective sexual violence', in K. Knop (ed.), *Gender and Human Rights*, Oxford: Oxford University Press, 2004.
- 17 H. Charlesworth, 'Not waving but drowning: Gender mainstreaming and human rights in the United Nations', *Harvard Human Rights Journal*, 2005, vol. 18, 1–17; International Committee of the Red Cross, *Addressing the Needs of Women Affected by Armed Conflict*, Geneva: International Committee of the Red Cross, 2004; C. Chinkin, *Peace Agreements as a Means for Promoting Gender Equality and Ensuring the Participation of Women*, United Nations Division for the Advancement of Women, EGM/PEACE/2003/BP.1, 31 October 2003; UNHCR, *Respect our Rights, Partnerships for Equality – Report on the Dialogue with Refugee Women*, Geneva: 2001. Available from: <www.unhcr.org/refworld/docid/4649d5d72.html> (accessed 31 October 2009); UNDAW, International Peace Research Institute Oslo, Expert Group Meeting on Political Decision-Making and Conflict Resolution: The Impact of Gender Difference (October 1996). EGM/PRDC/1996/REP.1, 7 November 1996.
- 18 Most of the discussion has centred on whether or not the wording of this paragraph would allow the OTP to decide not to go forward with an investigation or prosecution if proceeding would jeopardize peace negotiations, the argument being that victims are part of the general population and it is in everyone's interest for a peace agreement to be reached. See, for example, H. Kaul, 'Developments at the International Criminal Court. Construction site for more justice: The International Criminal Court after two years', *American Journal of International Law*, 2005, vol. 99, 375; H. M. Lovat, 'Delineating the interests of justice: Prosecutorial discretion and the Rome Statue of the International Criminal Court', 2006. Available from: <<http://law.bepress.com/expresso/eps/1435>> (accessed 20 October 2009). Others have argued that it gives the prosecutor discretion to accept the granting of amnesties to some perpetrators in order to assist the transition to peace (particularly in situations where other mechanisms are used to identify perpetrators such as truth and reconciliation procedures). See, for example, R. J. Goldstone and N. Fritz, '"In the interests of justice" and independent referral: The ICC prosecutor's unprecedented powers', *Leiden Journal of International Law*, 2000, vol. 13, 655–57 and E. Blumenson, 'The challenge of a global standard of justice: Peace, pluralism and punishment at the International Criminal Court', *Columbia Journal of Transnational Law*, 2006, vol. 44, 801–74. A more cautious approach is taken by R. Wedgwood, 'The International Criminal Court: An American view', *European Journal of International Law*, 1999, vol. 10, 93–107, J. Gavron, 'Amnesties in the light of developments in international law and the establishment of the International Criminal Court', *International and Comparative Law Quarterly*, 2002, vol. 51, 91–118. See C. Gallavin, 'Article 53 of the Rome Statute of the International Criminal Court: In the interests of justice?', *Kings Law Journal*, vol. 14, 185–86; D. Robinson, 'Serving the interests of justice: Amnesties, Truth Commissions and the International Criminal Court', *European Journal of International Law*, 2003, vol. 14, 488. The counter-argument

is that amnesties allow those who perpetrated crimes to continue to wield influence and act as a corrupting force on the rule of law, and ultimately may lead to renewed violence. See discussion of *Vélásquez-Rodríguez* in C. Bassiouni, 'International recognition of victims' rights', *Human Rights Law Review*, 2006, vol. 6, 226–28 and the work of D. Orentlicher, appointed by the United Nations Secretary-General as the independent expert to update the Set of Principles to combat impunity, cited in Office of the Prosecutor (OTP), 'Policy paper on the interests of justice', ICC-OTP-2007. Available from: <www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf> (accessed 11 October 2009). See also D. G. Newman, 'The Rome Statute, some reservations concerning amnesties, and a distributive problem', *American University International Law Review*, 2005, vol. 20, 93: 343, who argues that the analysis of amnesties in context of international criminal law is 'analytically underdeveloped'. He focuses on the hardships that may be experienced by states that do prosecute or refer in accordance with international expectations, and argues that the global community, having demanded adherence to its standards, has an obligation to offer real support for 'democratic transition in conflict ridden states' (p. 357). The OTP has stated that in its view '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'. OTP, 'The interests of justice', 1.

19 OTP, 'The interests of justice'.

20 Ibid., 1 and 3.

21 P. J. P. Tak describes the two main underpinnings of prosecutorial work as the legality principle and the opportunity (expediency) principle. (See P. J. P. Tak, 'Prosecutorial discretion: The filter function of the prosecution service', Keynote Address, 11th IAP annual conference, Paris, 2006.) The legality principle operates on the premise 'prosecutions[s] must take place in all cases in which sufficient evidence exists of the guilt of a suspect and in which no legal hindrances prohibit prosecution' (p. 2). In contrast, the opportunity principle 'does not demand compulsory prosecution [but rather] allows the prosecution service discretion over the prosecutorial decision' (p. 2). Tak notes that the following European countries have adopted the opportunity principle: Belgium, Cyprus, Denmark, England and Wales, France, Ireland, Luxembourg, Malta and the Netherlands (p. 2). The principle also operates in Australia, Canada, New Zealand and the United States. Hassan Jallow, the chief prosecutor at the International Criminal Tribunal for Rwanda, has noted that 'certain factors came to be accepted as relevant to the exercise of the discretion of whether to prosecute or not to prosecute. Among such factors, apart from the obvious technical one of *evidential sufficiency*, were such public-interest issues relating to the *gravity of the offence*, the *staleness* of the offence, the *likely penalty*, the *potential impact* on community stability of a decision either way, the *age* of the offender – and of the victim too'. H. B. Jallow, 'Prosecutorial discretion and international criminal justice', *Journal of International Criminal Justice*, 2005, vol. 3, 145–61, n. 1. See also P. Webb, 'The ICC prosecutor's discretion not to proceed in the "interests of justice"', *Criminal Law Quarterly*, 2005, vol. 50, 305–48 for a discussion of how discretion is slowly entering legal systems that traditionally employed the legality principle.

22 Jallow, 'Prosecutorial discretion', 145.

23 See *R (on the application of Purdy v Director of Public Prosecutions)* [2009] UKHL 45.

24 Tak, 'Prosecutorial discretion: The filter function', p. 5. See, for example, Commonwealth Director of Public Prosecutions (Australia), 'Prosecution policy of the Commonwealth'. Available from: <www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf> (accessed 30 January 2007).

25 Tak, 'Prosecutorial discretion: The filter function'; Jallow, 'Prosecutorial discretion'; Webb, 'The ICC'. A comparative study of 13 European countries revealed that in all but three guidelines were issued regulating the manner in which discretion could be

exercised in order 'to ensure uniform application in line with defined public interest and or policy considerations'; J. Jehle, P. Smit and J. Zila, 'The public prosecutor as key-player: Prosecutorial case-ending decisions', *European Journal on Criminal Policy and Research*, 2008, vol. 14, 173. Examples of such codes are contained in Gallavin, 'Article 53', 188–90; see also Commonwealth Director of Public Prosecutions (Australia), 'Prosecution policy'.

26 See material cited in notes 18, 21, 24, 25 and 26 above.

27 Article 53(1)(c), Rome Statute of the International Criminal Court.

28 The judicial functions of the court are carried out by three divisions known as Chambers: Pre-Trial Chamber, Trial Chamber and Appeals Chamber. For a description of each of the divisions, see the official website of the ICC at <www.icc-cpi.int/organs/chambers.html>.

29 Article 53(2)(c), Rome Statute of the International Criminal Court. There is a divergence in language between paragraphs in Article 53(1) and (2). Paragraph 1 seems to create a dichotomy between the gravity of the crime and the 'interests of victims' on one side with the 'interests of justice' on the other, suggesting that the interests of justice could outweigh the other factors. See Gallavin, 'Article 53', 185–86; Robinson, 'Serving the interests', 488. See also Human Rights Watch, 'Policy paper: the meaning of the interests of justice in Article 53 of the Rome Statute', June 2005. Available from: <www.iccnw.org/?mod=interestsofjustice> (accessed 11 October 2009). Human Rights Watch, while not exploring this point fully, observed that the difference 'between the two provisions was most probably not accidental': p. 19. The OTP paper does not comment on the difference in the wording of the two sub-sections. It merely notes that they 'create an obligation to consider various factors'. OTP, 'The interests of justice', 2. Paragraph 2, in contrast, lends itself to an interpretation that the interests of victims, the gravity of the crimes and the other nominated factors are all possible circumstances to be taken into account in determining that there is 'not a sufficient basis for a prosecution' because 'a prosecution [would] not [be] in the interests of justice'.

30 Article 53(3)(b), Rome Statute of the International Criminal Court.

31 Article 53(3)(a), Rome Statute of the International Criminal Court.

32 Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum, A/Conf 183/2/Add 1, paragraph 54(2)[ii].

33 Ibid., para. 54(6).

34 Human Rights Watch, 'Policy paper'. See also Webb, 'The ICC', 325.

35 OTP, 'The interests of justice', 2–3.

36 The potential for such a problem is alluded to in J. D. van der Vyver, 'Book review: *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*', *Emory International Law Review* 2004, vol. 18, 139; van der Vyver then explains how the utilization of traditional international law principles could overcome the problem.

37 A suggestion that the Government of Uganda had political motivations for referring the situation in Northern Uganda to the International Criminal Court is contained in M. H. Arsanjani and W. M. Reisman, 'Developments at the International Criminal Court: The law-in-action of the International Criminal Court', *American Journal of International Law*, 2005, vol. 99, 385–403. In contrast, Akhavan Payam argues that the referral was a positive step toward the restoration of peace: see A. Payam, 'Developments at the International Criminal Court: The *Lords Resistance Army Case*: Uganda's submission of the first state referral to the International Criminal Court', *American Journal of International Law*, 2005, vol. 99, 403–21.

38 International Criminal Court, 'Rules of procedure and evidence': UN Doc. PCNICC/2000/1/Add.1, 2000. Available from <www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf> (accessed 31 October 2009).

39 In contrast, Article 15, Rome Statute of the International Criminal Court merely

requires the OTP to inform those who provided information of its decision not to proceed with an investigation; no explanation for this course of action is required.

40 Article 53(3)(b), Rome Statute of the International Criminal Court.

41 OTP, 'The interests of justice', 1, 9.

42 Ibid.

43 For a discussion of the complex nature of the case law surrounding the recognition of victims, see E. Baumgartner, 'Aspects of victim participation in the proceedings of the International Criminal Court', *International Review of the Red Cross*, 2008, vol. 409 and Human Rights Watch, 'Courting history: the landmark International Criminal Court's first years', 10 July 2008, Section VII. Available from: <www.hrw.org/en/reports/2008/07/10/courting-history> (accessed 29 August 2009).

44 For an overview of the efforts made at outreach, see Human Rights Watch, 'Courting history', Sections V and VI.

45 Ibid.

46 For a description of some of the recent cases concerning victim participation, see Women's Initiatives for Gender Justice, *2008 Gender Report Card on the International Criminal Court*, 2008, pp. 52–63. Available from: <www.iccwomen.org/publications/index.php> (accessed 11 October 2009).

47 Pursuant to Article 21(3), Universal Declaration of Human Rights, GA res. 217A (III), UN Doc A/810 at 71 (1948): 'The application and interpretation of law . . . must be consistent with internationally recognized human rights'. Article 7 states: 'All are equal before the law and are entitled without any discrimination to equal protection of the law'. Article 10 states: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal'. Universal Declaration of Human Rights, GA res. 217A (III), UN Doc A/810 at 71 (1948). Available from: <www.unhchr.ch/udhr/lang/eng.htm> (accessed 26 February 2008). For an elucidation of the nature of the right to equality before the courts contained in Article 14 of the International Covenant on Civil and Political Rights, UN Doc. A/6316 (1966) (ICCPR), see General Comment 32. The Human Rights Committee observed that the right to equality before the courts included equal access to the courts. Human Rights Committee, General Comment No 32, CCPR/C/GC/32, 23 August 2007. Although the ICCPR applies only to state parties, the commentary of the Human Rights Committee on the rights protected by the Covenant is persuasive authority on the meaning and interpretation of those rights. The Committee has also highlighted the importance of ensuring equal access to justice for women in its General Comment on Article 3 of the ICCPR (equality of rights between men and women). See Human Rights Committee, General Comment 28, CCPR/C/2/Rev.1/Add.10.

48 L. Montada, 'Injustice in harm and loss', *Social Justice Research*, 1994, vol. 7, 1573–6725.

49 In determining whether or not to allow the participation of victims, the court must make an assessment that their participation is appropriate to the stage of the proceedings and ensure that their participation would not jeopardize the rights of the accused. For a discussion of the various interpretations that have been given to this Article by the Pre-Trial and Trial Chambers, see Baumgartner, 'Aspects of victim participation' and Human Rights Watch, 'Courting history'.

50 Burundi is a case in point. With respect to the problems faced by women in the post-conflict period due to their inability to own or inherit land, see U. Dolgop, 'Women and peace building: What we can learn from the Arusha Peace Agreement', *Australian Feminist Studies*, 2006, vol. 21, 257–73 and UNDP, *Rapport d'Avancement, Objectifs du Millénaire pour le Développement* (2004), 17–18 (copy with author and editors). Problems facing women in the pursuit of economic rights, and the situation of women with respect to land and their participation in the informal economy, are cogently outlined in R. Rebouché, 'Labor, land, and women's rights in Africa: Challenges of the new Protocol on the Rights of Women', *Harvard Human Rights Journal*, 2006, vol. 19, 235–56.

- 51 Article 21(3), Rome Statute of the International Criminal Court.
- 52 Several authors have argued that the phrase 'interests of justice' is analogous to the responsibility of domestic prosecutors to make decisions in the 'public interest'. See, for example, Gallavin, 'Article 53'; Webb, 'The ICC'; D. D. Ntanda Nsereko, 'Prosecutorial discretion before national courts and international tribunals', *Journal of International Criminal Justice*, 2005, vol. 5, 124–44.
- 53 Ni Aoláin, 'Political violence', 838; Campanaro, 'Women, war, and international law', 2557.
- 54 P. V. Sellers, 'Individual(s) liability for collective sexual violence', in K. Knop (ed.), *Gender and Human Rights*, Oxford: Oxford University Press, 2004. See also, U. Dolgopol and S. Paranjape, *Comfort Women: The Unfinished Ordeal*, Geneva: International Commission of Jurists, 1993; and Jallow, 'Prosecutorial discretion'.
- 55 Summary of recommendations received during the first public hearing of the Office of the Prosecutor, convened from 17–18 June 2003 at The Hague, Comments and Conclusions of the Office of the Prosecutor, ICC-OTP 2003, p. 6.
- 56 K. Davis, *Discretionary Justice: A Preliminary Inquiry*, 1969, 3, cited in A. M. Danner, 'Prosecutorial discretion and legitimacy', 13 June 2005, Guest Lecture Series of the Office of the Prosecutor, n. 65, originally published as 'Enhancing the legitimacy and accountability of prosecutorial discretion at the International Criminal Court', *American Journal of International Law*, 2003, vol. 97, 510–52.
- 57 Ibid.
- 58 Ibid., 520.
- 59 Ibid., 521.
- 60 The final report of the Ninth Circuit Gender Bias Task Force, 'The effects of gender in the federal courts', *Californian Law Review*, 1994, vol. 67, 1106.
- 61 The decision of the House of Lords in *R (on the application of Purdy v Director of Public Prosecutions)* [2009] UKHL 45, emphasizes the importance of precision in a prosecutor's analysis of what will be taken into account when a decision is being made about whether or not to go forward with a criminal prosecution. Although the decision concerns the importance of potential defendants and their relatives being able to determine the likelihood of a criminal prosecution in the case of assisted suicides in foreign jurisdictions, the reasoning is applicable to the situation of victims of mass conflicts.
- 62 'Discretion also forces prosecutors to make decisions that cumulatively affect the criminal justice system as a whole. It requires them to make judgments about the purpose and priorities of their particular system. Of all the by-products of discretion, this policy-making role has perhaps the greatest systemic consequences for criminal justice.' Danner, 'Prosecutorial discretion and legitimacy', 518.
- 63 OTP, 'The interests of justice', 5–6.
- 64 See Inquiry into Crown Prosecution Service, Decision-Making in Relation to Deaths in Custody and Related Matters, His Honour Gerald Butler QC, August 1999, section 9, para. 4. Available from: <www.archive.official-documents.co.uk/document/cps/custody/sec9.htm> (accessed 30 January 2007).
- 65 Wedgwood, 'The International Criminal Court', 662: '[Justice] conveys a concept which is tremendously contested – meaning different things to different people'. The OTP, although recognizing the difficulty created by the lack of any definition of the phrase in the statute, does not explain fully its understanding of the term but rather leaves the reader with the impression that it prefers a narrow criminal justice approach. OTP, 'The interests of justice'.
- 66 T. Campbell, 'Justice', in P. Jones and A. Weale (eds), *Issues in Political Theory*, 2nd edn, Basingstoke: Macmillan, 2001; and Ni Aoláin, 'Political violence', 814.
- 67 OTP, 'The interests of justice'. See M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Boston: Beacon Press, 1998, who contrasts traditional criminal law understandings of justice with a moral approach to justice in her exploration of the role of truth commissions.

- 68 This phrase itself does not have a precise meaning and some authors consider it analogous to the responsibility of prosecutors to make decisions in the 'public interest'. See, for example, Webb, 'The ICC'; Gallavin, 'Article 53'; Nsereko, 'Prosecutorial discretion'. The phrase is often used in statements suggesting that taking (or failing to take) a particular course of action would undermine public confidence in the administration of justice. Not all the factors falling within either the notions of administration of justice or the public interest can be transposed to the phrase interests of justice in Article 53 as many of them relate to factors that are dealt with either in other paragraphs of Article 53 or in other articles of the Rome Statute such as the severity of the crime, the strength of the evidence available to the OTP and the health of the accused. A traditional factor in determining whether or not to proceed with a criminal prosecution is the effect such a course of action would have on the physical and mental health of the victim. Gallavin, 'Article 53', 190 and OTP, 'The interests of justice', 5–6. Pursuant to Article 21 of the Rome Statute of the International Criminal Court, the ICC has the ability to take account of general principles of law from national legal systems.
- 69 Office of the Prosecutor, 'Paper on some policy issues before the Office of the Prosecutor', ICC-OTP 2003, September 2003. Available from: <www.amicc.org/docs/OcampoPolicyPaper9_03.pdf> (accessed 11 October 2009).
- 70 International Association of Prosecutors, 'Draft code of professional conduct for prosecutors for the International Criminal Court', 2002, Article 8 (a copy is in the personal possession of the author), and OTP, 'The interests of justice', 7.
- 71 International Association of Prosecutors, 'Draft code', Article 1.
- 72 OTP, 'The interests of justice', 3–4.
- 73 M. A. Drumbl, 'Collective violence and individual punishment: The criminality of mass atrocity', *Northwestern University Law Review*, 2005, vol. 99, 569.
- 74 Ibid.
- 75 Campbell, 'Justice'.
- 76 U. Dolgopoul, 'Redressing partial justice: A possible role for civil society', in U. Dolgopoul and J. Gardam (eds), *The Challenge of Conflict, International Law Responds*, The Hague: Martinus Nijhoff, 2006.
- 77 Notes from Hannah Gaertner and Stephen Arthur Lamony on the July 2007 launch of research reports entitled: *The Cooling of the Hearts: Community Truth Telling in Acholi-land* and *Remembering the Atiak Massacre: April 20, 1995*, distributed by the Coalition for the International Criminal Court on 22 August 2007.
- 78 This particular report focused on the Acholi. Work undertaken by the Women's Initiatives has encompassed the Greater North of Uganda which includes the Acholi, Lango, Teso and West Nile. See reference to *Position Paper: Views of women from North and North Eastern Uganda on the Peace Talks, Mechanisms for Accountability and Reconciliation*, August 2007. Available from: <www.iccwomen.org/news/docs/Views_of_women_from_North_and_North_Eastern_Uganda_on_the_Peace_Talks2.pdf> (accessed 11 October 2009).
- 79 P. V. Sellers, 'The other voices: Interpreters and investigators of sexual violence in international criminal prosecutions', in H. Durham and T. Gurd (eds), *Listening to the Silences: Women and War*, Leiden: Brill, 2005, p. 162.
- 80 Ibid.
- 81 U. Dolgopoul and S. Paranjape, *Comfort Women: An Unfinished Ordeal*, Geneva: International Commission of Jurists, 1994; and Minow, *Between Vengeance*.
- 82 OTP, 'The interests of justice', 5–6.
- 83 Women in conflict situations have made clear pronouncements about the importance of including them in both the peace process and the design of accountability mechanisms. See, for example, Greater North Women's Voices for Peace Network and the description of the Burundi All-Party Women's Conference in Dolgopoul, 'Women and peace building'.

- 84 Access, 'Interview with André Laperrière, the new Executive Director of the Victims' Trust Fund', *Victims' Rights Working Group Bulletin*, summer/autumn 2007, 4.
- 85 Initial Reports of State Parties – Burundi, CEDAW/C/BDI/1, 3 July 2000; special report of the Secretary-General on the United Nations Operation in Burundi, S/2005/586, 14 September 2005; and fifth report of the Secretary-General on the United Nations Operation in Burundi, S/2005/728, 21 November 2005.
- 86 Victims' Rights Working Group website. Available at <www.vrwg.org> (accessed 20 October 2009).
- 87 'Interests of victims', statement on web page of Victims' Rights Working Group. Available from: <www.vrwg.org/Interests_of_Victims.html> (accessed 20 August 2007).
- 88 V. Nesiha, 'Discussion lines on gender and transitional justice: An introductory essay reflecting on the ICTJ Bellagio Workshop on Gender and Transitional Justice', *Columbia Journal of Gender and Law*, 2006, vol. 15, 808.
- 89 The final report of the Ninth Circuit Gender Bias Task Force, 'The effects of gender', p. 193.
- 90 Special report of the Secretary-General on the United Nations Operation in Burundi; and fifth Report of the Secretary-General on the United Nations Operation in Burundi; and Greater North Women's Voices for Peace Network et al.
- 91 See Report of the Secretary-General on Burundi, S/2004/210, 16 March 2004 and UNIFEM, Burundi. Available from: <www.womenwarpeace.org/burundi/burundi/htm> (accessed 27 May 2005). See also Ni Aoláin, 'Political violence', 848.
- 92 This point has similarities to the issue of 'pragmatic accountability', discussed in Danner, 'Prosecutorial discretion and legitimacy', 525.
- 93 The Office of the Prosecutor, 'Report on prosecutorial strategy', 14 September 2006.
- 94 H. Charlesworth, 'Building democracy and justice after conflict', Academy of the Social Sciences Australia, Cunningham Lecture, Canberra, 21 November 2006.
- 95 OTP, 'The interests of justice', 7–8; OTP, 'Paper on some policy issues'.
- 96 'Voices of women from north and north eastern Uganda on the peace talks: Mechanisms and accountability and reconciliation, August, 2007'.
- 97 Drumbl, 'Collective violence and individual punishment', 549.
- 98 Sellers, 'The other voices'.
- 99 Ibid., 162.
- 100 This issue is connected to the general right of equality of access to justice discussed in Section II B above. Article 6 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34, 29 November 1985 states that that: 'The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by: (a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information'. Although at the time of its adoption the Declaration's focus was the domestic legal systems of member states of the United Nations, the focus on the rights of victims in the Rome Statute and the ability of the court to give effect to human rights norms pursuant to Article 21 of the Statute makes the Declaration relevant to the activities of the OTP. See the discussion of this issue in *The Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04–01/06, 18 January 2008. Further, Article 21 would allow the OTP to incorporate practices that are common in many of the legal systems of UN member states (see International Federation for Human Rights, 'Chapter 1: The Evolution of Victims' Access to Justice' in *Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs*, 2007, vol. 36. Available from: <www.fidh.org/IMG/pdf/4-CH-I_Background.pdf> (accessed 11 October 2009)). Although the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,

A/RES/60/147, 21 March 2006, does not contain similar precise wording, the importance of informing the public as well as victims of their rights and remedies is contained in Article 24, and many of the other articles assume communication between the victim and those responsible for assisting them to access justice.

- 101 The necessity of establishing community outreach programmes for groups affected by indictments has been acknowledged by the OTP. See Summary of Recommendations received during the first public hearing of the Office of the Prosecutor, convened from 17–18 June 2003 at The Hague, 'Comments and conclusions of the Office of the Prosecutor', ICC-OTP 2003, p. 5.
- 102 Nesiah, 'Discussion lines on gender and transitional justice'; K. M. Franke, 'Gendered subjects of transitional justice', *Columbia Journal of Gender and Law*, 2006, vol. 15, 821.