

# Table of Contents

<b>Introduction</b> .....	17
<i>Chapter I</i>	
<b>Prosecutorial Discretion in National and International Criminal Law</b>	22
Section I	
<b>The Concept of Discretion</b>	22
Section II	
<b>The Prosecutor in National Legal Systems</b>	35
A. The Mandatory Model .....	35
I. The Italian System .....	36
1. Historical Background .....	37
2. The Initiation of the Prosecution. Introductory Remarks .....	39
3. The Concept of ' <i>esercizio dell'azione penale</i> ' .....	40
4. The Function of the Investigations .....	42
5. The Request for Dispense from Prosecution .....	45
6. The Judicial Review on the Request for Initiation of the Prosecution .....	49
7. The Amendment of the Charges .....	51
II. The German System .....	51
1. The Initiation of the Prosecution. Introductory Remarks .....	52
2. The Investigation .....	53
3. The Charges .....	55
4. Some Margin for Discretion .....	56
5. The Proceedings to Compel Public Charges .....	60
B. The Discretionary Model .....	60
I. The English System (England and Wales) .....	61
1. The Investigation .....	62
2. The Decision on whether to Continue with the Prosecution .....	63
3. The Discontinuance of the Proceedings after the Initiation of the Trial .....	65

4. The Control over the Decision to Prosecute .....	66
5. The Selection of the Charges .....	67
II. The U.S. System .....	67
1. The Decision on whether to Prosecute .....	69
2. The Limits to Discretion .....	72
3. The Control over the Attorney's Decision .....	73
4. The Selection of the Charges .....	74
5. Additional Remarks .....	74
III. The French System .....	77
1. The Public Prosecutor: Structure and Role in the Preliminary Stage .....	79
2. The Public Prosecutor and the Decision not to Prosecute .....	82
3. The <i>juge d'instruction</i> .....	83
4. Function of the Public Prosecutor in Instruction .....	85
5. The <i>Chambre de l'instruction</i> .....	85

### Section III

<b>The Prosecutor in International Criminal Law</b> .....	86
A. The Prosecutor of the International Military Tribunals .....	90
B. The Prosecutor of the <i>ad hoc</i> Tribunals .....	93
I. The Independence .....	94
II. The Selection of the Cases, Discretion and Limits .....	95
III. Concluding Remarks .....	101
C. The Prosecutor of the International Criminal Court .....	101
I. Historical Background .....	102
II. The Independence of the Prosecutor and the Legal Framework .....	107
III. The Initiation of the Investigations: Discretionary or Mandatory? Article 53 of the Statute: an Overview .....	112

### Section IV

<b>Introduction to the Activity of the ICC Prosecutor</b> .....	118
A. The Jurisdiction of the Court and the Triggering Mechanism .....	119
I. The State Referral .....	121
II. The Referral by the UN Security Council .....	123
III. The <i>proprio motu</i> Investigation under Article 15 of the Statute .....	126
1. The Content of Article 15 of the Statute .....	129
2. The Relationship between Article 15 and Article 53 of the Statute .....	132
B. The Distinction between Situation and Case .....	135
I. Historical Background .....	135

II. 'Situation' and 'Case' in the Statutory Framework .....	137
C. The Stages of the Proceedings .....	142
I. Investigation and Prosecution .....	142
II. The Preliminary Examination .....	144
1. The Information .....	146
2. The Structure and Length of the Examination .....	148
3. Concluding Remarks .....	152

## *Chapter II*

### **The Object of the ICC Prosecutor's Assessment** 156

#### Section I

#### **The Reasonable Basis for the Initiation of an Investigation** 159

A. The 'Reasonable Basis' in the <i>chapeau</i> of Article 53 and in Para. (1)(a) .....	159
B. The Concept of 'Reasonable Basis' .....	160
C. The 'Reasonable Basis' of Article 53(1) and the 'Sufficient Basis' of Article 53(2) .....	166

#### Section II

#### **The Jurisdiction** 168

#### Section III

#### **The Admissibility** 170

A. The Complementarity Principle .....	170
B. Article 17(1) of the Rome Statute, 'Issues of Admissibility' .....	172
I. Admissibility and Initiation of the Investigation .....	173
II. Admissibility and Prosecution .....	178
III. The Complementarity Test .....	178
IV. The Gravity Test under Article 17 of the Statute .....	181
1. The Object of the Gravity Assessment .....	187
a) The Gravity of the Crime .....	187
b) Gravity in Relation to the Alleged Perpetrator .....	187
c) The 'Gravity of the Situation' and the 'Gravity of the Case' .....	195
d) Gravity: The 'Selective Approach' and the 'Threshold Approach' .....	203
2. Conclusions .....	209
C. The Prosecutorial Strategies: Case Selection and Prioritisation .....	211

## Section IV

<b>The Interests of Justice</b>	218
A. The Interests of Justice in ICL	218
B. The Notion of ‘Interests of Justice’	223
C. The Exceptional Nature of the Interests of Justice Clause and the Presumption in Favour of Investigation and Prosecution	228
D. Relevant Factors in the Assessment of the Interests of Justice	233
I. The Adverb ‘Nonetheless’ – the First Interpretation	234
II. The Adverb ‘Nonetheless’ – the Second Interpretation	236
III. The Relevant Factors	237
E. Concluding Remarks	244

*Chapter III*

<b>The Control over the Activity of the ICC Prosecutor</b>	247
--	-----

## Section I

<b>The Control from External Entities</b>	249
A. The Assembly of the States Parties	249
B. The UN Security Council	251
I. The Security Council’s Referral	251
II. The Security Council’s Deferral	256
III. The Role of the Security Council with Regards to the Crime of Aggression	261
IV. Concluding Remarks	263
C. The States	265

## Section II

<b>Judicial Control under Article 53 of the Statute</b>	268
A. Judicial Control during the Preliminary Examination	270
B. The Authorisation for the Initiation of an Investigation under Article 15	273
I. The Pre-Trial Chamber’s Review	274
II. The Chamber’s Different Reading of the Information	283
III. The Extent of the Reviewing Power	285
IV. Concluding Remarks	290
V. The Scope of the Authorisation	291
1. The Temporal Limitation	291
2. The Territorial Limitation	294

3. The Material Limitation .....	295
4. The Personal Limitation .....	297
5. The Scope of Authorisation with regards to the 'Potential Cases' .....	298
6. Concluding Remarks .....	302
VI. The Possible Issues of a Binding Authorisation .....	304
C. The Decision not to Investigate or Prosecute and the Chamber's Power of Review	306
I. The Duty to Inform .....	311
II. The Review of the Prosecutor's Decision under Article 53(3)(a) and (b) .....	313
III. A Comparison between Article 53(3)(a) and (b) .....	316
IV. The Reviewing Procedure .....	319
V. The Prosecutor's Autonomous Reconsideration under Article 53(4) .....	329
VI. Concluding Remarks .....	332
D. The Judicial Control during the Investigations .....	335

## Section III

<b>Judicial Control under Article 58 of the Statute</b>	<b>336</b>
---	------------

## Section IV

<b>Judicial Control under Article 61 of the Statute</b>	<b>337</b>
A. The Concept of 'Substantial Grounds to Believe' .....	339
B. The Purpose of the Confirmation of the Charges .....	341
I. The Protection from Wrongful Charges .....	342
II. The Determination of the Scope of the Trial .....	343
1. The Concept of Charge .....	349
2. The Facts and Circumstances, the Subsidiary Facts and the Evidence .....	351
C. The Decision Declining to Confirm the Charges and the Decision Adjourning the Hearing .....	358
D. The Continuation of the Investigations after the Confirmation .....	360
E. The Amendment and the Withdrawal of the Charges .....	364
I. Regulation 55 of the Regulations of the Court .....	369
1. The Recharacterisation <i>vis-à-vis</i> the Charges .....	370
2. The Role of the Prosecutor in the Recharacterisation .....	378
F. Concluding Remarks .....	382

## Section V

<b>Judicial Control throughout the Trial: The No Case to Answer Procedure</b>	<b>383</b>
A. The Ruling of the 'No Case to Answer' in Common Law Systems .....	384

B. The Ruling of Analogous Situations in Civil Law Systems .....	387
C. The Ruling of the 'No Case to Answer' in International Tribunals .....	388
I. The First Practice of the Trial Chambers of the ICTY .....	390
II. The Jurisprudence of the Appeals Chamber of ICTY .....	393
III. The Following Jurisprudence .....	395
D. The No Case to Answer in the Practice of the ICC .....	397
I. The <i>Ruto and Sang Case</i> .....	398
II. The <i>Ntaganda Case</i> .....	402
III. The <i>Gbagbo and Blé Goudé Case</i> .....	402
IV. Outstanding Issues .....	408
1. The Adversarial Nature of the Procedure .....	408
2. The Risk of Pre-Judging the Case .....	409
3. The Nature of the Decision .....	410
4. The Standard of Review .....	410
5. The Consistency of the No Case to Answer with the Statute .....	413
V. Concluding Remarks .....	413
<b>Conclusions</b> .....	<b>416</b>
<b>Abstract (English)</b> .....	<b>431</b>
<b>Abstract (Italian)</b> .....	<b>432</b>
<b>Abstract (German)</b> .....	<b>433</b>
<b>Bibliography</b> .....	<b>434</b>
<b>Subject Index</b> .....	<b>450</b>