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## A Comment on the Complementary Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Contexts?

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Jennifer J. Llewellyn\*

A Comment on the  
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*The author examines the principle of complementarity on which the jurisdiction of the International Criminal Court (ICC) is based. Unlike its predecessors, the International Criminal Tribunals for the former Yugoslavia and Rwanda, the ICC can only take jurisdiction over a case when a state is unwilling or unable to investigate or prosecute. The Court is thus designed to complement the work of national criminal courts. This article assesses whether this admissibility standard will allow the ICC to complement the work of truth commissions like that of the South African Truth and Reconciliation Commission. It concludes that the prospect of an ICC poised to assert its jurisdiction in cases where countries have chosen to forego prosecution in favour of a South African-style truth commission could undermine the effectiveness of such commissions. Such a prospect might thus dissuade states from utilizing truth commissions, thereby adding insult to already existing injuries in countries undergoing transition from pasts marred by gross violations of human rights.*

*L'auteur s'interroge sur le principe de la complémentarité sur lequel repose la compétence de la Cour pénale internationale. Contrairement aux tribunaux pénaux internationaux qui l'ont précédé, notamment ceux pour le Rwanda et l'ancienne Yougoslavie, la Cour pénale internationale ne peut intervenir qu'à partir du moment où un État refuse de traduire une cause devant ses propres tribunaux ou en est incapable. La Cour pénale internationale joue donc un rôle complémentaire par rapport à celui de l'appareil judiciaire des états-nations. Cependant ce critère d'admissibilité permet-il à la Cour pénale internationale de jouer ce même rôle par rapport aux commissions d'enquête comme la South African Truth and Reconciliation Commission (Commission sud-africaine sur la recherche de la vérité et de la réconciliation). Ainsi les pays qui, au lieu de recourir aux tribunaux, choisiraient de créer une commission d'enquête fondée sur le modèle sud-africain, pourraient être interpellés par la Cour pénale internationale conclut l'auteur. Ceci aurait pour conséquence de dissuader le recours à la voie extrajudiciaire entravant sérieusement le redressement de la situation dans les pays accablés par un lourd passé d'abus des droits de la personne.*

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## *Introduction*

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### *Introduction*

The preamble to the *Rome Statute* establishing the International Criminal Court (ICC) emphasizes that the new Court “shall be complementary to national criminal jurisdictions.” In a convocation address at the University of Witwatersrand in South Africa, Kofi Annan, Secretary General of the United Nations, considered the effect that the new Court might have on countries opting for a South African-style truth and reconciliation commission as a means of dealing with past human rights abuses. He assured the audience that,

[t]he purpose of the clause [which allows the Court to intervene where the state is ‘unwilling or unable’ to exercise jurisdiction] is to ensure that mass-murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order. *No one should imagine that it would apply to a case like South Africa’s, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power.*<sup>1</sup>

This article asks whether such application is actually beyond the realm of imagination. It examines the principle of complementarity upon which the jurisdiction of the ICC is founded and inquires whether the ICC as it is currently envisioned would complement the work of South African-style truth commission processes or whether it would, instead, add insult to already existing injuries in countries emerging from pasts marred by massive human rights abuses. The paper concludes that not only could

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1. As quoted in C. Villa-Vicencio, “Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet” (2000) 49 *Emory L.J.* 205 at 222 (emphasis added).

one imagine the ICC posing an obstacle to states contemplating South African-style alternatives to dealing with past abuses, such an outcome is even perhaps likely given the wording and the structure of the *Rome Statute*.

### I. *The Principle of Complementarity*

As Johan D. van der Vyver explains, the deliberations on the ICC

added a new word to the English language: ‘complementarity’ – or a new meaning to the word as defined by American English. ... Within the meaning of ICC usage, ‘complementarity’ denotes a secondary role – not in importance but in the sequence of events. In other words, national courts have the first right and obligation to prosecute perpetrators of international crimes, and because ICC jurisdiction is complementary to national courts, ICC jurisdiction can only be invoked if the national court is unwilling or unable to prosecute.<sup>2</sup>

This jurisdictional arrangement is a significant departure from the structure of the precursors to the ICC: the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR respectively). The ad hoc tribunals were established by the United Nations Security Council and given primacy over national courts.<sup>3</sup> The ICTY and ICTR are able to seize jurisdiction over any case, pending in any court, at any time, so long as the case falls within their authority.<sup>4</sup> The primacy of the ad hoc tribunals raised for the first time the issue of the relationship

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2. J. D. van der Vyver, “Personal and Territorial Jurisdiction of the International Criminal Court” (2000) 14 *Emory Int’l L. Rev.* 1 at 66.

3. *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res. 827, 3217th Mtg., UN Doc. S/RES/827 (1993) art. 9(2); *Statute of the International Criminal Tribunal for Rwanda*, SC Res. 955 3453d Mtg., UN Doc. S/RES/955 (1994) art. 8(2). See also Decision on the Defence Motion on Jurisdiction, *Prosecutor v. Dusko Tadic A/K/A “Dule”*, (1995) Case No. IT-94-1, (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber), online: United Nations <<http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm>> (date accessed: 26 May 2002) [hereinafter *Tadic Trial*]; Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Dusko Tadic A/K/A “Dule”* (1995) Case No. IT-94-1, (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber), online: United Nations <<http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>> (date accessed: 26 May 2002) [hereinafter *Tadic appeal*]; J. Pejic, “The International Criminal Court Statute: An Appraisal Of The Rome Package” (2000) 34 *Int’l Lawyer* 65 at 80-81; J. Pejic, “The Tribunal and the ICC: Do Precedents Matter?” (1997) 60 *Albany L. Rev.* 841 at 854-855. For a general discussion of the jurisdiction of the ad hoc tribunals see B. S. Brown, “Primacy Or Complementarity: Reconciling The Jurisdiction Of National Courts And International Criminal Tribunals” (1998) 23 *Yale J. Int’l L.* 383.

4. See J.J. Llewellyn & S. Raponi, “The Protection of Human Rights Through International Criminal Law: A Conversation with Madam Justice Louise Arbour, Chief Prosecutor for the International Criminal Tribunals for the Former Yugoslavia and Rwanda” (1999) 57 *U. Toronto Fac. L. Rev.* 83 at 94-95 [hereinafter: *Arbour*] for a discussion of practical effects of the tribunals’ jurisdiction.

between national and international courts.<sup>5</sup> The primacy of the ICTY and the ICTR's jurisdiction has not been the subject of much criticism in large part because of the limited nature of the tribunals' mandates.<sup>6</sup> It did, however, place the issue of primary versus complementary jurisdiction squarely on the table in the early stages of the negotiations over the ICC.<sup>7</sup> States were concerned about protecting their rights to try those responsible for perpetrating war crimes within the bounds of their own criminal justice systems – to preserve their right to deal with their own citizens in a manner consistent with their laws. Granting the ICC primacy over national courts would, it was thought by some, result in a serious interference with State sovereignty.<sup>8</sup> After difficult negotiations during the fourth session of the Preparatory Committee in August 1997, an agreement was reached on the admissibility standard for cases coming before the ICC. Once compromise was reached on admissibility, the issue was not reopened for substantive negotiation during the Rome Conference.<sup>9</sup> According to this standard, now contained in Article 17 of the *Rome Statute*, the ICC must find a case inadmissible if it is being investigated or prosecuted by a State that has jurisdiction over the case, "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."<sup>10</sup>

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5. Brown, *supra* note 3 at 385.

6. The lack of concern over this issue is also likely related to the fact that the judicial systems in question were obviously unable (in the case of Rwanda) or unwilling (in the case of the former Yugoslavia) to deal with the situations at issue.

7. See generally, M. P. Scharf, "The Amnesty Exception to the Jurisdiction of the International Criminal Court" (1999) 32 *Cornell Int'l L.J.* 507 at 521-522. As the author notes, the issue was raised in the context of a concern over whether the Court would prevent efforts to halt further abuses and restore peace.

8. Van der Vyver, *supra* note 2 at 67-68.

9. M. Bergsmo, "The Jurisdictional Régime of the International Criminal Court (Part II, Articles 11-19)" (1998) 6:4 *Eur. J. of Crime, Crim. L. & Crim. Just.* 345 at 360. The issue was only dealt with throughout the remaining negotiations in the context of addressing conflicting provisions within the draft statute. See also, Van der Vyver, *supra* note 2 at 68-69, "...the Preparatory Committee eventually did reach consensus on the question of complementarity and transmitted to Rome an unbracketed provision that spelt out the substance of its meaning. The wording was received in undiluted form in the final statute." But see Scharf, *supra* note 7 at 522. He suggests that while the issue of what complementarity would mean for the domestic efforts to halt abuse and ensure peace through amnesties was discussed at this stage of the negotiations, it was not resolved at the Diplomatic Conference. In fact, he claims the issue was never fully resolved and as a result "the provisions that were adopted reflect 'creative ambiguity'" leaving the question an open one with which the Court will have to contend.

10. *Rome Statute of The International Criminal Court*, 17 July 1998, U.N. Doc A/CONF 183/9th (as corrected 10 November 1998 and 12 July 1999) art. 17.1 (a) online: United Nations <<http://www.un.org/law/icc/statute/rome.htm>> (date accessed: 26 May 2002) [hereinafter *Rome Statute*].

As it stands, then, the International Criminal Court is intended to complement the work of national courts. It is only when states are unwilling or unable to investigate or prosecute that the ICC can assert its jurisdiction over a case. Many states have lauded this jurisdictional arrangement as a means of restricting the reach of the ICC.<sup>11</sup> Others have criticized the admissibility standard fearing it will weaken the Court's independence and power.<sup>12</sup> There has been less consideration, however, of the effect the complementary jurisdiction provision might have on states choosing to deal with those who commit crimes within the jurisdiction of the ICC via alternative mechanisms rather than through national courts.<sup>13</sup> The ICC was designed to complement national court systems but what about institutions like the South African Truth and Reconciliation Commission? How would this truth commission model fare under the admissibility standard? Will the ICC assume jurisdiction over cases when countries have chosen to deal with them through these processes rather than through the courts? In other words, will the ICC's jurisdiction add insult to injury in transitional contexts by precluding truth commissions as a viable means of dealing with the past?

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11. For example, David J. Scheffer, Ambassador-at-Large for War Crimes Issues and Head of the U.S. Delegation to the UN Diplomatic Conference on the Establishment of a Permanent International Criminal Court, in Department of State testimony before the Senate Foreign Relations Committee, Washington, DC, 23 July 1998. Scheffer identified the improved regime of complementary jurisdiction as one of the achievements of the U.S. delegation in the negotiations over the ICC statute.

12. See e.g. *Arbour*, *supra* note 4 at 96. See also van der Vyver, *supra* note 2 at 68-69. He notes that "[i]nitially, some delegations in the Ad Hoc Committee and Preparatory Committee lamented the fact that complementarity was included in the Preamble because they believed that it afforded to the principle of complementarity too great a significance. The view was that the concept of complementarity should not create a presumption in favor of the jurisdiction of national courts and that the ICC should, on the contrary, be entrusted with primacy of jurisdiction."

13. Two notable exceptions are Scharf's discussion of whether an exception to the ICC jurisdiction might be made for amnesties generally, not limited to those embedded in truth commission processes (*supra* note 7), and Van der Vyver's consideration of the significance of the principle of complementarity in the context of a general examination of the ICC's jurisdiction (*supra* note 2). Also see Villa-Vicencio's discussion of the potential relationship between the ICC and truth commissions. The author does not delve into the legal implications of the principle of complementarity (*supra* note 1). Recently this issue was mentioned by Marc Grossman, Under Secretary for Political Affairs for the United States, in his statement explaining the decision by the Bush administration to withdraw support for the ICC statute. M. Grossman, "American Foreign Policy and the International Criminal Court" Center for Strategic and International Studies, Washington D.C. 6 May 2002 online: U.S. Department of State < <http://www.state.gov/p/9949.htm> > (date accessed: 26 May 2002).

## II. *Truth Commissions*

During the past two decades truth commissions have become commonplace on the landscape of state efforts to deal with pasts marred by violations of human rights and war crimes.<sup>14</sup> Daan Bronkhorst, in his survey of initiatives included under the rubric of truth commissions since the mid-1980's, identifies two distinct periods in the development of these institutions. The 1991 truth commission in Chile serves, he suggests, as the line of demarcation between these periods.<sup>15</sup> For the most part, commissions in the early period (before 1991) lacked independence and amounted to little more than government puppets and propaganda agents.<sup>16</sup> The latter period was different. Commissions were frequently endowed with investigative powers that enabled them to undertake more substantial and independent investigations.<sup>17</sup> According to Bronkhorst's research, by 1995 truth commissions investigating past human rights abuses had appeared in approximately 30 countries.<sup>18</sup>

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14. H. J. Steiner, "Introduction" in *Truth Commissions: A Comparative Assessment - An interdisciplinary discussion held at Harvard Law School* (Cambridge, Mass.: Harvard Law School Human Rights Program, 1997) at 7. The introduction also notes that "[t]he historical analogies to today's truth commissions range from international commissions of inquiry to many forms of national investigative bodies. Nonetheless, in major respects we witness today an institution that is distinctive: the number of countries utilizing it within so brief a period, its popular appeal and powerful political effects, and the ambitious scope of its work." *Ibid.* at 10. See also P. B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge Press, 2001); P. B. Hayner, "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study" (1994) 16 *Hum. Rts. Q.* 597 [hereinafter: Hayner 2]; M. Parlevliet, "Considering Truth: Dealing with a Legacy of Gross Human Rights Violations" (1998) 16 *Netherlands Q. of Hum. Rts.* 141; D. Bronkhorst, *Truth and Reconciliation: Obstacles and Opportunities for Human Rights* (Amsterdam: Amnesty International, Dutch Section 1995) at 10; and R.I. Rotberg & D. Thompson, eds., *Truth V. Justice: The Morality of Truth Commissions* (Princeton, N.J.: Princeton University Press, 2000).

15. Bronkhorst, *supra* note 14 at 70-72. See also Hayner 2, *supra* note 14 at 606-607. The author also notes the differences between truth commissions pre and post 1991. On the Chile Commission see J. Correa, "Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship" (1992) 67 *Notre Dame L. Rev.* 1455.

16. Bronkhorst, *supra* note 14 at 69-70. As examples of early commissions he cites those in Israel, Guinea, Uganda and Argentina.

17. Bronkhorst, *supra* note 14 at 72-77. Examples of commissions during this later period include those in Chad, El Salvador, Guatemala, Honduras, Sri Lanka and Thailand. The investigative powers these commissions enjoyed generally included the ability to take statements and protect witnesses.

18. Bronkhorst, *supra* note 14 at 10. Hayner relates the marked increase in truth commissions to the publication of the report from the United Nations Commission on Truth for El Salvador in 1993. Hayner 2, *supra* note 14 at 598.

The South African Truth and Reconciliation Commission (TRC), established in 1995, marks yet a third period in the development of the truth commission model.<sup>19</sup> Though the Commission was modeled after the Chilean Truth and Reconciliation Commission, it enjoyed much broader investigative powers.<sup>20</sup> The South African Commission also developed the potential of such institutions as meaningful alternatives to trials to deal with past abuses, through the introduction of amnesty into the truth commission process.

Truth commissions have often come on the heels of general or blanket amnesties granted at the end of a conflict.<sup>21</sup> Such blanket amnesties often have the effect of covering up the facts of what happened and who was

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19. The Commission was established by the *Promotion of National Unity and Reconciliation Act*, The Republic of South Africa, Act No.34 of 1995, as amended by *The Promotion of National Unity and Reconciliation Amendment Act* No. 84 of 1995 [hereinafter: *TRC Act*]. The Commission was charged with the difficult task of establishing "...as complete a picture as possible of the causes, nature and extent of gross violations of human rights which occurred between 1 March 1960 and 10 May 1994." Section 1(1) (ix) of the *TRC Act*, which governs the *TRC Act*, defines gross violations of human rights as the violation of human rights through –

- (a) the killing, abduction, torture or severe ill-treatment of any person; or
- (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from the conflicts of the past and which was committed during the period 1 March 1960 to the cut-off date within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive.

See generally *Truth and Reconciliation Commission of South Africa Report* (Cape Town: Juta & Co Ltd., 1998). The report consists of five volumes: the first deals with the guiding concepts of the TRC and the political and legislative background to its establishment; the second offers a national overview of the gross violations of human rights in South Africa during the period under investigation; the third addresses gross human rights violations from the perspective of the victim; the fourth examines the broader social, political, and economic context of gross human rights violations, including accounts and analysis of hearings that dealt with particular institutions and groups, including women, children, military conscripts, the legal and medical professions, the media, and business; the fifth contains analysis, conclusions, and the recommendations of the *TRC Act*.

20. Section 29 and 32 of the *TRC Act*, *supra* note 19. The Commission was vested with the authority, in connection with or for the purposes of conducting an investigation or a hearing, to: conduct inspections *in loco*, force individuals to produce relevant material for inspection, subpoena individuals to appear before and give evidence to the Commission and seize any article or thing relevant to an investigation or hearing.

21. For example, in the last twenty years amnesty laws have been passed in Chile (1978), Brazil (1979), Columbia (1982), Uruguay (1986), Argentina (1983, 1986, 1987, 1989), Guatemala (1986), Honduras (1987), El Salvador (1987, 1993), South Africa (1990, 1992, 1993) and Peru (1995). See generally R. Slye, "Justice and the South African Amnesty" in W. Verwoerd & C. Villa-Vicencio eds., *Looking Back/Reaching Forward: Reflections on the South African Truth and Reconciliation Commission* (Cape Town: University of Cape Town Press, 2000)174. Slye argues that amnesties of one form or another were used to limit the accountability of individuals responsible for gross violations of human rights in every major political transition in the twentieth century.



responsible. Truth commissions are often viewed as a means of discovering and revealing the truth of what happened in the past in the wake of a generalized amnesty grant. They provide some remedy to amnesty induced amnesia and are founded on the firm belief that truth is a necessary precondition of reconciliation. Amnesties, however, often present the greatest obstacle to the work of these commissions. The impunity assured by blanket amnesties means that those with the most information, the perpetrators, have no reason to participate, and, as a result, commissions are often only able to offer at best an incomplete picture of the past – one told primarily by the victims. South Africa set out to tackle this obstacle to achieving the goal of truth and reconciliation. South Africa also faced an amnesty provision negotiated as part of the transition of power from the Apartheid regime.<sup>22</sup> The South African parliament did not, however, enact a blanket amnesty to fulfill the constitutional requirement of amnesty. Instead, they chose to use amnesty as a vehicle for attaining truth and reconciliation. Amnesty, in the South African context, was individualized and embedded in the truth and reconciliation process. This process also included the victims against

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22. The amnesty provision was negotiated at such a late stage in the multi-party negotiations over the Interim Constitution that it was added as a postamble located after section 251, the last section in the document. The postamble, entitled “National Unity and Reconciliation,” included the following provision with respect to amnesty:

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed (Republic of South Africa, Act 200 of 1993. The “postamble” is located after s. 251).

These provisions were incorporated into the final Constitution tabled May 8, 1996 under s. 22 of Schedule 6 on Transitional Arrangements.

whom human rights violations were perpetrated,<sup>23</sup> thereby enabling the commission to obtain information from both victims and perpetrators and to create as complete a picture as possible of the events of the past.

Amnesty, in the South African process, was granted in exchange for truth. In order to gain amnesty, individuals had to make application to the Commission and offer full disclosure of their actions.<sup>24</sup> If these actions were associated with a political motive,<sup>25</sup> and found proportional to their objective, then amnesty would be granted with respect to those specific acts. The South African Truth and Reconciliation Commission thus managed to avoid the concerns associated with blanket amnesty by bringing perpetrators into the truth and reconciliation process and thereby building accountability into amnesty.

The South African model offers countries undergoing democratic transition a viable alternative to criminal prosecutions in the wake of mass human rights abuses. But, the prospects of an international criminal court poised to seize jurisdiction from countries unwilling or unable to prosecute, could threaten this newly developed and promising alternative with extinction.

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23. The *TRC Act* defines victims as—

(a) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights —

(i) as a result of a gross violation of human rights; or

(ii) as a result of an act associated with a political objective for which amnesty has been granted;

(b) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights, as a result of such person intervening to assist persons contemplated in paragraph (a) who were in distress or to prevent victimization of such persons; and

(c) such relatives or dependants of victims as may be prescribed. Section 1(1)(xix).

24. See section 20 of the *TRC Act*, *supra* note 19.

25. See section 20(2) of the *TRC Act*, *supra* note 19 which specifies that amnesty can only be granted with respect to:

...any act or omission which constitutes an offence or delict which, according to the criteria in subsection (3), is associated with a political objective and which is advised, planned, directed, commanded, ordered or committed within or outside the Republic during the period 1 March 1960 to the cut-off date...

### III. Article 17

Article 17 of the *Rome Statute* of the International Criminal Court provides the grounds upon which a case will be admissible to the Court.<sup>26</sup>

Article 17.1 reads:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:
  - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, *unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;*
  - (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, *unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;*
  - (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
  - (d) The case is not of sufficient gravity to justify further action by the Court.

Under the terms of Article 17 a case is inadmissible if a State with jurisdiction is investigating or prosecuting or has investigated and decided not to prosecute. A case will also be inadmissible where the person concerned has already been prosecuted,<sup>27</sup> or if the case is not of sufficient gravity to justify further action by the Court.<sup>28</sup> There is, however, a qualification to these rules; a case that would otherwise be inadmissible can be admitted if the State concerned is unwilling or unable to genuinely investigate or prosecute.

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26. *Rome Statute*, *supra* note 10. The statute was adopted on July 17, 1998. The treaty was closed for signatures as of December 31, 2000. 139 countries signed the treaty as of that date. The Statute came into effect 60 days after the 60th country ratifies the treaty. On April 11, 2002, 10 states ratified the treaty bringing the total number of ratifications to 66, surpassing the required number of ratifications to bring the treaty into force. The Rome Treaty entered into force on July 1st 2002. For a listing of the signators and ratifications see The CICC International Criminal Court Home Page at <http://www.igc.org/jcc/rome/html/ratify.html>.

27. See Article 20 of the *Rome Statute*, *supra* note 10. This provision is discussed later in this section.

28. This determination is in the hands of the prosecutor. Article 53 grants the prosecutor a similar discretion with respect to which cases to pursue. The article allows the prosecutor to refuse to investigate a case where there is "substantial reason to believe that an investigation would not serve the interests of justice." This discretion is subject to review by the trial chamber according to section 3 of Article 53.

This paper is narrowly focused on the admissibility standard. However, it is worth noting that another source to which one might look to protect the truth commission option is the power granted to the Security Council under Article 16 to request the Court not to commence an investigation or prosecution or to defer any proceedings already in progress. This provision essentially allows the Security Council to trump the power of the Court where matters of peace and security are at issue. If countries fail in their bid to avoid the jurisdiction of the Court using Article 17 of the Statute one option might be to request the intervention of the Security Council.

Whether a state is unwilling or unable to genuinely investigate or prosecute is ultimately left for the Pre-Trial Chamber of the Court to determine.<sup>29</sup> The burden of proof rests with the Prosecutor seeking to admit a case for consideration. Given the frequency with which countries undergoing democratic transitions are turning to truth commission models, it seems likely that the Court will eventually face the question as to whether a state's choice to forego traditional prosecution in favour of a South African-style truth commission warrants an assertion of jurisdiction. That is, whether cases currently being dealt with or previously dealt with via a truth commission should be deemed admissible under Article 17. In addressing this question, will the ICC, while complementing national courts, nevertheless fail to respect the role of alternative mechanisms for dealing with past violations of human rights?

The plain wording of the *Rome Statute* suggests the existence of a truth commission process would not prevent the ICC from admitting a case for prosecution. The key phrase in this respect is "unwilling to genuinely investigate or prosecute."<sup>30</sup> A truth commission process, which includes the provision of amnesty, precludes prosecution (at least for those granted amnesty) and thus would seem to imply an unwillingness to prosecute.

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29. See *Rome Statute*, *supra* note 10 at Article 18.2 and 19.6. Determinations of admissibility will be referred to the Pre-Trial Chamber prior to the confirmation of the charges. After such time the Court will consider any challenges to admissibility. Sections 2 and 3 of Article 17 offer the Court some guidance in determining unwillingness and inability. They provide:

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
- (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

30. As section 3 explains, "inability" refers to contexts where there is a total or substantial collapse or unavailability of the national judicial system. While it is possible that a truth commission approach might be attempted in this context it is more often the case that truth commissions are chosen instead of the court system and thus are more likely to fall under the category of unwilling not inability.

One might inquire whether there is room within the wording of Article 17 to determine a case inadmissible owing to the fact that it is being dealt with, or has been dealt with, through a national truth commission process. The first avenue to explore in this regard is the investigative role of truth commissions. Section 1, paragraph (a) provides that a case will be deemed inadmissible if it is being investigated *or* prosecuted by a state which has jurisdiction. The use of the word “or” might suggest that all that is required to preserve the primacy of a national process is for one or the other activity to be underway. Thus, the argument might be made that so long as the case is being investigated by a state the ICC could not assume jurisdiction. Further, since the Statute does not specify otherwise, it would seem an investigation ought to be sufficient regardless of whether it is carried out via ordinary investigative institutions (such as the police or other security apparatus) or via a special commission such as a truth commission. An interpretation that reads the requirements of investigation and prosecution as distinct and separable leaves room for a state to argue it is investigating the case in question even though such an investigation is not being conducted for the purposes of prosecution.

It seems likely that such an assertion would protect against the ICC taking jurisdiction while a truth commission is in the midst of an investigation. The problem with this interpretation, however, arises when paragraph (a) is read in conjunction with paragraph (b), which accords with common rules of interpretation requiring that sections be read in their entirety. Paragraph (b) specifically addresses the situation in which an investigation has been conducted and a decision has been made not to prosecute. Here again, such cases are inadmissible unless the decision resulted from an unwillingness or inability of a state genuinely to prosecute. This section suggests why the reference was made in paragraph (a) to investigation *or* prosecution. It was precisely to protect cases where, after a full investigation, a state decides not to pursue prosecution. There may, then, be cases where investigation alone is enough to stave off ICC jurisdiction. However, these cases seem to be limited to those where prosecution was a live option and indeed was the motivating factor behind the investigation. Paragraph (b) clearly contemplates a state making a decision not to prosecute after an investigation has been conducted. In the case of a truth commission process with an amnesty provision, the decision with respect to prosecution is never on the table. A decision with respect to prosecution is only an issue after an individual has applied for and been denied amnesty. A state utilizing a truth commission mechanism would thus seem to fall into the “unwilling” category, having chosen amnesty over prosecutions well before investigations began.

Perhaps one way states utilizing a truth commission process might avail themselves of the protection against the ICC's interference offered by the admissibility standard, is to claim that the decision against prosecution was not technically made until the results of an investigation revealed whether or not the individual qualified for amnesty. One might expect such an assertion to be met by the objection that this is inconsistent with the intention of Article 17 because states using a South African-style truth commission process will forego prosecution if the conditions for amnesty are met even where an investigation reveals clear evidence that the individual committed the crime alleged. The choice to offer amnesty, then, amounts to an unwillingness to prosecute and cannot, it seems, be likened to a decision not to proceed on the basis of a lack of evidence. This response is consistent with the traditional Western understandings of the relationship between investigation and prosecution processes; however, it is important to note that there is no limitation in the Statute on what might count as an acceptable reason to forego prosecution. Indeed, it is often the case that decisions about whether to prosecute a particular case in the domestic context are based on a number of factors only one of which is the evidentiary basis of the case. Other factors can include resource allocation concerns, the likelihood of conviction, the effect of prosecution on the community, and other political considerations.<sup>31</sup> Given the Statute's silence on the scope of legitimate reasons to forego prosecution after a full investigation it seems at least possible that the existence of a truth commission process might be viewed as an acceptable reason to forego prosecution. However, making such a case on political grounds may be difficult given that the purpose of the Statute is to prevent governments from shielding perpetrators from prosecution for political reasons.<sup>32</sup> Further, the inclusion of inability as a ground upon which the Court could assert jurisdiction seems to preclude lack of resources or harm to the community as legitimate reasons to forego prosecution and thus might invite the Court's intervention.

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31. The latter is perhaps a more prominent factor in jurisdictions where the prosecutor is an elected official.

32. The preamble of the *Rome Statute* reads in part:

... **Affirming** that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

**Determined** to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, ...

Paragraph (c) contemplates another ground for determining a case inadmissible, that is, where a person has already been tried for the conduct that is the subject of the charge. Individuals are also protected against double jeopardy by Article 20, which embodies the international principle of *ne bis in idem*.<sup>33</sup> For those attempting to defend the use of truth commissions, this raises the issue of whether being the subject of a hearing to determine whether or not amnesty will be granted would count as having been “tried”. Van der Vyver claims it “is difficult to predict whether amnesty hearings of truth commissions will qualify as proceedings of ‘another court’ for the purposes of *ne bis in idem*.”<sup>34</sup> At first blush, the answer seems to be that it obviously would not. The common understanding of “tried” means tried by a Court, and a truth commission is clearly not a national court as it does not have the authority to carry out prosecutions. In fact, truth commissions (at least those of the South African type) preclude individuals from being tried by granting amnesty. But the case may not be quite this simple. As explained earlier, the South African model of truth commission does not grant a general amnesty to all those involved in the conflict; that would prevent all prosecutions for acts committed during the period specified by the terms of the amnesty act. Rather, under the South African model, individuals must apply and qualify for amnesty before such protection is granted. For applications involving gross violations of human rights (crimes within the jurisdiction of the ICC), individuals must appear before an Amnesty Committee in a

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33. *Rome Statute*, *supra* note 10, Art. 20 provides that:

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.
3. No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 [the jurisdiction of the International Criminal Court] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:
  - (a) Were for the purposes of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
  - (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice (*Supra* note 10).

34. Van der Vyver, *supra* note 2 at 81 (footnotes omitted). He does however advocate that “the ICC ought to be sensitive to *bona fide* attempts of countries in transition to come to terms with their past and seek reconciliation through strategies of restorative justice.” *Ibid.* at 82.

public hearing. At these hearings amnesty applicants must offer full disclosure of their actions and demonstrate that they have met the other conditions for amnesty.<sup>35</sup> Given that individuals must admit responsibility for their actions, and give a full account of what they did and why, an individualized amnesty process more closely resembles a pardon than general blanket amnesty provisions.<sup>36</sup> As paragraph 17.1 (c) does not require individuals to have previously been found guilty or punished, it requires only that they have been tried, this section would seem to preclude the court from admitting cases where an individual was tried, convicted, and then granted a pardon, or even situations where a pardon followed a guilty plea (instead of a trial) and sentencing by a Court. One might argue, then, that the individualized amnesty process ought to count as having been tried by a Court. However, individualized amnesties and pardons are different in a few significant respects that might dissuade the ICC from rendering cases inadmissible where an individual has gone through a truth commission process. Amnesties, even when they are individualized, are mandatory so long as the individual meets all the requirements set out in the act, whereas, whether to grant a pardon or not is generally a prerogative power of the executive. Also, pardons are granted after a prosecution has taken place, or, in the case of a guilty plea, after a court has passed sentence on an individual. A truth commission process does not afford courts the same opportunity to rule on a case before an amnesty is granted.

There may be further problems with utilizing the Article 20 *ne bis in idem* provision to insulate against the interference of the ICC where a truth commission process has been undertaken. Article 20 contains two exceptions to the *ne bis in idem* principle, namely in those cases where the proceedings in the other court

- (a) Were for the purposes of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.<sup>37</sup>

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35. See generally section 20 of the *TRC Act*, *supra* note 19.

36. Van der Vyver offers a slightly different approach to the amnesty/double jeopardy question. He likens amnesty to a non-guilty finding and claims that given this interpretation a plea of *autrefois acquit* might be entered by an accused brought before the ICC who had previously been granted amnesty with respect to the crime at issue (*supra* note 2 at 78-79). I think there are difficulties with analogizing amnesty with a non-guilty finding. The analogy seems particularly strained in the context of a truth commission process where individuals must admit responsibility publicly for their crimes as a precondition of amnesty.

37. *Rome Statute*, *supra* note 10, Art. 20, s. 3(a), 3(b).



With respect to the first exception the argument might be made that truth commission proceedings function as a means of shielding perpetrators. This might be thought to be particularly true where the amnesty was demanded by the outgoing regime as a condition of the transfer of power. Even in cases where truth commissions are not portrayed in this light—where they represent a democratic choice of a state to provide accountability for past abuses—the second exception to the *ne bis in idem* may be problematic for a state seeking to prevent the ICC from asserting jurisdiction in the face of a truth and reconciliation process. Quite simply the Court may find that an amnesty hearing in a truth commission process was not conducted in a manner consistent with an intent to bring the person concerned to justice. The success of this argument will of course depend on the understanding of justice animating the *Rome Statute*. The references to prosecution and punishment in the preamble and elsewhere in the statute suggest that the reference to bringing the person to justice in Article 20 will likely be interpreted as requiring at least prosecution and probably punishment as well.<sup>38</sup> Whether a state will be able to ward off the jurisdiction of the ICC in order to pursue a truth commission process seems then to depend on a close examination of the call for prosecution in the ICC's statute. The next section explores this issue in an attempt to determine whether there might be room for other conceptions of justice despite the wording of the current statute.

#### IV. *What Does the Duty to Prosecute Require?*

The reference to the word “tried” in Article 17.1 (c) reflects the prosecution requirement evident in the rest of section 1, Article 17. Admissibility thus may turn on the definition of prosecution underlying Article 17. In this respect, the *Rome Statute* must be read in the context of the international legal framework out of which it was born. In the aftermath of World War II the Nuremberg trials established that a state's treatment of its own citizens was appropriately the concern of international law.<sup>39</sup> As a result, many of the multilateral treaties since the end of World War II have begun

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38. For a discussion of the other possible conceptions of justice appropriate to transitional contexts see J. J. Llewellyn & R. Howse, “Institutions for Restorative Justice: The South African Truth and Reconciliation Commission” (1999) 49 U. Toronto L.J. 355; J. J. Llewellyn, “Justice for South Africa: Restorative Justice and the South African Truth and Reconciliation Commission” in C. M. Koggel, ed., *Moral Issues in Global Perspectives* (Peterborough, Ont.: Broadview Press, 1999) at 96; J. J. Llewellyn, “Just Amnesty and Private International Law” in C. Scott, ed., *Torture as Tort: Comparative Perspectives in the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001) at 567 [hereinafter “Just Amnesty”].

39. See H. Koh, “Transnational Public Law Litigation” (1991) 100 Yale L.J. 2347 at 2348; N. Roht-Arriaza, *Impunity and Human Right in International Law and Practice* (New York: Oxford University Press, 1995) at 24 [hereinafter *Impunity and Human Rights*].

the task of defining the obligations of states to their citizens. One such obligation is “to investigate violations of personal integrity, take action against those responsible, and provide redress to victims.”<sup>40</sup> The aspect of this obligation requiring action against those responsible has come to be known in international law as “the duty to prosecute.”<sup>41</sup> The necessity of the ICC is often defended in terms of this duty to prosecute under international law. It is clear from the foregoing discussion that a South African type of truth commission would not meet the demands of the duty to prosecute if that duty is taken literally to require that individuals be tried by a court according to the rules and procedures of domestic criminal law. However, it is worth looking behind the language of prosecution to inquire as to the initial motivation for this duty. A brief examination of the roots of the duty to prosecute reveals it as shorthand for accountability and redress. If this is so, would a South African-style truth commission satisfy these requirements? If the answer were yes, this would seem to suggest that the ICC should respect such processes in so far as they achieve the same goals through other means.

Rooted as it is in the triad of obligations – investigate, take action against those responsible, and provide redress – the duty to prosecute is inextricably linked to these other obligations.<sup>42</sup> This ought to provide some clue as to the underlying purpose of prosecution. An examination of the justificatory language surrounding the duty to prosecute suggests that prosecution is thought necessary in order to fulfill the other two obligations in the triad.<sup>43</sup> Quite simply, prosecution is viewed to be a

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40. *Impunity and Human Rights*, *supra* note 39 at 24.

41. See D. Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime” (1991) 100 *Yale L.J.* 2537; T.M. Scanlon, “Punishment and the Rule of Law” in H. Koh & R. Slye eds., *Deliberative Democracy and Human Rights* (New Haven: Yale University Press, 1999) at 257.

42. *Velasquez Rodriguez v. Honduras* (1988) 9 HRLJ 212 (Inter- American Court of Human Rights) stands as a watershed in the articulation of this triad particularly with respect to the Americas.

43. In his progress report, special rapporteur Louis Joinet addressed the connection between prosecution and these other rights. He explained that “impunity conflicts with the duty to prosecute and punish the perpetrators of gross violations of human rights which is inherent in the entitlement of victims to obtain from the State not only material reparation but also satisfaction of the ‘right to know’ or, more precisely, the ‘right to the truth’” L. Joinet, *Progress Report on the question of the impunity of perpetrators of violations of human rights (civil and political rights)* UN Doc. E/CN.4/Sub.2/1993/8 at para 137 (emphasis added). Likewise, Special Rapporteur on Impunity (economic, social and cultural rights) El Hadji Guissé explained that, “the obligation to protect and promote all human rights includes that to punish and compensate the harm and damage which result from their violation.” E. H. Guissé, *The Realization of Economic, Social and Cultural Rights – Second Interim report on the question of the impunity of perpetrators of human rights violations* UN Doc. E/CN.4/Sub.2/1996/15 at para 23 (emphasis added).

requirement in order to get at the truth and to provide redress to victims.<sup>44</sup> Defenders of the duty to prosecute also commonly point to the importance of holding individuals accountable for wrongdoing.<sup>45</sup> The objective underlying the duty to prosecute, then, appears to mirror the triad of obligations of which it was born, namely: to find out what happened, ensure those responsible are held accountable, and repair the harm resulting from the wrongdoing. Once this goal is distilled one might ask why it must be achieved through prosecution.<sup>46</sup> Could a South African-style truth and reconciliation commission not achieve the same goal?

The Court could also look to international law to support the idea that the duty to prosecute, interpreted as the need for criminal trials, might not be appropriate in all circumstances. International law offers support for alternative responses to violations of the laws of war in precisely the contexts in which truth commissions are often utilized – namely, in the context of states recovering from internal armed conflict. While the ICC includes within its jurisdiction crimes committed in both international and non-international armed conflicts,<sup>47</sup> there is a distinction drawn between the two within international law, specifically with respect to the duty to prosecute. The Geneva Conventions are the most often cited treaties for the duty to prosecute those guilty of grave breaches of international law. However, the Geneva Conventions may actually serve to support the case for the ICC deferring to truth commission processes. It is notable that the provisions in the Geneva Conventions requiring prosecutions deal with *international* armed conflicts.<sup>48</sup> In contrast,

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44. The importance of redress for victims is addressed in the *Rome Statute*. See Article 75 of the *Rome Statute*, *supra* note 10.

45. See, for example, Human Rights Watch's policy statement on accountability for gross human rights abuses: "It is a responsibility of governments to seek accountability regardless of whether the perpetrators of such abuses are officials of the government, or members of anti-government forces, or others. We oppose laws and practices that purport to immunize those who have committed gross abuses from the exposure of their crimes, from civil suits for damages for those crimes, or from criminal investigation, prosecution and punishment." Human Rights Watch, "Special Issue: Accountability for Past Human Rights Abuses" (newsletter) (December 1989) No. 4, at 1. See also Orentlicher, *supra* note 41.

46. In fact, one might go further and ask how it is that prosecutions could actually achieve these goals. For a discussion of the limits of criminal trials in this respect see Llewellyn & Howse, *supra* note 38.

47. Article 8 (c), *Rome Statute*, *supra* note 10.

48. See Scharf, *supra* note 7 at 516. In his efforts to carve out an amnesty exception to the ICC's jurisdiction, the author notes that the duty to prosecute does not exist in situations of internal armed conflict under the Geneva Convention. The author does suggest, however, that such a duty may still exist (pursuant to Article 8, subsections 2(c) and 2 (e) of the *Rome Statute*) with respect to war crimes committed in these conflicts.

common Article 3, which deals with non-international conflicts, contains no such explicit duty to prosecute. Furthermore, Article 6.5 of Protocol II of the Geneva Conventions, which deals exclusively with non-international armed conflicts, states:

At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.<sup>49</sup>

This provision seems to reflect the recognition that a different approach might be necessary in the context of internal armed conflicts. Van der Vyver cautions that while the significance of this provision speaks for itself, "it must not be overstated."<sup>50</sup> Read on its face the text of Protocol II could be taken to support amnesty in even its broadest terms. It could be interpreted, for example, as supporting blanket or general amnesties that would, as discussed earlier, thwart rather than assist efforts to ascertain the truth of what happened and offer redress. Taking this provision in the context of the purpose of the treaty as a whole, however, mitigates against such a broad interpretation of the amnesty provision. The treaty has as its purpose the prevention of war crimes and the fulfilment of the triad of obligations associated with the duty to prosecute. Some have used this context to suggest that the amnesty obligation does

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49. *1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, entered into force, Dec. 7, 1978. UN Doc. A/32/144, Annex II (1977). There was some discussion of limiting the availability of amnesty to certain offences and for the purpose of reintegrating former insurgents back into society but none of it was reflected in the final article. As it stands, amnesties are to be pursued regardless of the nature of the offences committed. For a general discussion of the provision see H.S. Levie, *The Law of Non-International Armed Conflict* (Dordrecht, Netherlands: M. Nijhoff, 1987) at 301; *Impunity and Human Rights*, *supra* note 39 at 58-59.

50. Van der Vyver, *supra* note 2 at 82.

not apply to grave breaches of international law.<sup>51</sup> Such a restriction seems overly broad. It is reasonable to read the Protocol in this context as precluding amnesties that would thwart efforts to fulfil the triad of obligations under international law. However, as I have argued, this is not true of all amnesties. Thus while Article 6.5 might sit uncomfortably for some as a compromise of the duty to prosecute for the sake of peace and stability, this need not be the case as demonstrated by the example of the South African Truth and Reconciliation Commission. The value of holding perpetrators accountable and responsible and providing redress for victims can be preserved in a system that utilizes individualized amnesties embedded in a commission process aimed at truth and reconciliation.<sup>52</sup> Indeed, such a model stands able to preserve the objectives of the duty to prosecute while recognizing the wisdom of the amnesty requirement in Protocol II.

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51. The United States, for example, argued in the Tadic trial before the International Criminal Tribunal for the Former Yugoslavia that the provisions in the 1949 Geneva Conventions requiring the prosecution of grave breaches should apply to internal conflicts just as they do in international conflicts as a matter of customary law. See Tadic Trial, *supra* note 3. John Dugard has argued, however, that “state practice at this time is too unsettled to support a rule of customary international law obliging a successor regime to prosecute those alleged to have committed crimes against humanity in all circumstances.” J. Dugard, “Reconciliation and Justice: The South African Experience” (1998) 8 *Transnat’l L. & Contemp. Probs.* 277 at 306. Others have argued that Protocol II does not apply to violations of international law at all but rather only to violations of the national law committed by the parties involved in the conflict. The International Committee of the Red Cross has taken this position in private correspondence. See M. Popkin and N. Bhuta “Latin American Amnesties in Comparative Perspective: Can the Past be Buried?” (1999) 13 *Ethics & Int’l Affairs* 99 at 103, n. 8. There may be another significant obstacle for the use of Protocol II as a means of defending the use of amnesties following internal conflicts and that is the steady erosion of the distinction between international and internal armed conflict under international law. This distinction is increasingly viewed as anachronistic to the state-centered nature of international law and impracticable if human rights are understood in individualistic terms. The creation of the International Criminal Tribunal for Rwanda is a significant step towards international law applying equally to internal conflicts. In addition, the ICC statute applies to both international and internal armed conflicts alike. See, for example, Article 8.2 (c), *Rome Statute*, *supra* note 10. As it stands currently, however, the distinction between internal and international armed conflict persists and thus could be used to defend against the ICC’s assertion of jurisdiction in the case where a truth commission process is in place. Further, I would argue that there are important differences between internal and international armed conflict that warrant maintaining the distinction under international law. Specifically, what is required in order to ensure a peaceful and democratic future post conflict differs when conflict was internal to a state than when it is external. I am grateful to Ron Slye for his clarification on this point.

52. My argument thus differs significantly from Scharf’s in this respect. Scharf accepts the characterization of amnesty as a trade off between justice (read: prosecution) and peace and stability. I do not agree that amnesty need always entail such a trade off. Rather, as embedded in the context of a truth and reconciliation process, amnesty may well serve the interests of justice equally as well as prosecution. Thus, the choice between justice and peace may be avoided.

If applied to the *Rome Statute*, an interpretation of the duty to prosecute as the duty to provide accountability and redress would force the ICC to respect states' choices regarding the means and mechanisms through which they deal with violations of the laws of war and human rights, so long as they meet these criteria. Such an interpretation would enable the Court to truly complement the work of states to ensure a just response, rather than risk adding insult to injury by denying states recovering from internal armed struggle an alternative means of dealing with their past.

#### *V. Forging a Relationship – The Role of the ICC in Truth Commission Processes*

The possibility that the ICC's statute might be interpreted so as to respect state chosen truth and reconciliation processes raises the question of what the nature of the relationship between the ICC and South African-style truth commissions ought to be. Why, one might inquire, must the ICC defer to the jurisdiction of truth commissions at all? Could these institutions not co-exist? Why, for instance, could the ICC not take jurisdiction over the serious cases and leave the rest to be dealt with through whatever mechanism a state chooses? After all, this will be how the system works with respect to national courts. Even in situations where the ICC finds a case admissible (either because the State is unwilling or unable to investigate or prosecute) the ICC will no doubt be unable to deal with all the cases arising from a particular conflict.<sup>53</sup> Paragraph (d) of Article 17 acknowledges this reality when it allows the Court to deem a case inadmissible on the grounds that it is not of sufficient gravity to justify further action by the ICC. Thus, the Court will focus on the important cases and leave the State to deal with the rest. This would be true even where the Court has made a finding that a state is unwilling or unable to prosecute – a fact that might give the Court reason to proceed carefully with such determinations. Why, then, given the fact that a truth commission would probably wind up dealing with the majority of cases anyway, ought we to care that the ICC might take jurisdiction over a few select cases?

The problem with this sort of relationship between the ICC and a truth commission is that it could undermine the integrity of the truth commission, and ultimately might undo the advantages brought by the South African developments to the truth commission model. The advantage gained by embedding amnesty in a truth commission process is that it brings perpetrators into the truth-telling and reconciliation process. Perpetrators exchange truth for amnesty – a bargain that could be undermined by the threat of prosecution at the ICC. Individuals might not come forward and

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53. Arbour, *supra* note 4 at 95.

risk revealing themselves if their amnesty would be meaningless owing to the possibility of prosecution by the ICC. Even given the reality that the ICC could not prosecute everyone, individuals contemplating whether to apply for amnesty would have no way of estimating whether they would be subject to prosecution by the ICC or not. The command level of perpetrators or the nature of their actions might not offer any clear indication of which cases the ICC would pursue since such choices would turn upon available evidence. There is no guarantee, for example, that only those at the very top of the command structure would be subjected to prosecution. Further, one of the ways in which an individualized amnesty process works to get perpetrators to participate is by creating fear that they will be implicated in the amnesty applications submitted by others. Commissions are thus able to use the evidence of low-level actors to entice those further up in the chain of command to come forward and reveal information. This incentive scheme might be disturbed by the threat of prosecutions at the ICC and if so would ultimately limit the amount of information available to a commission.

Another problem with the co-existence model is that victims would likely perceive it as unfair. What would justify pursuing prosecutions in some cases but denying other victims the right to have those who perpetrated acts against them prosecuted and punished? The legitimacy of a truth commission process is derived from the fact that it is the result of a democratic decision by a state to deal with its past in a particular way.<sup>54</sup> This legitimacy would be undermined if such decisions were taken out of a state's hands.

What, if any, role could the ICC play in states that choose a truth and reconciliation process? Could the ICC complement truth commission processes? The ICC has the potential to play an important role in ensuring that prosecutions are pursued against those individuals who are either denied amnesty or chose not to apply for it. Under these circumstances the ICC would assume jurisdiction as it would in any situation, with the notable exception that the ICC would not admit a case if an individual had

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54. Of course not all decisions made by a state (whether arrived at democratically or not) would be legitimate means of dealing with the past. Legitimacy will rely not only on the process through which the decision is made but also on the substance of the decision. For example, it would have to meet some minimum requirements for justice. It is beyond the scope of this paper to explore what this substantive content would be, however, the triad of obligations discussed earlier would seem to form a sound starting point. For further discussion on what standards might be developed as a means of assessing a state's choice for dealing with the past see my discussion of standards for just amnesty developed in an earlier piece. "Just Amnesty", *supra* note 38. Again, I am indebted to Ron Slye for his comments on this issue.

been granted amnesty through a truth and reconciliation process.<sup>55</sup> Amnesty, then, could serve as a bar to admissibility just as a previous trial does under paragraph (c) of Article 17. Some concern might be raised as to whether this could result in the Court deferring to amnesties that do not, in fact, promote accountability and redress. This concern could be addressed in much the same way as that over the genuineness of a prosecution. The Court could develop standards by which to judge truth commission processes and evaluate whether they are genuinely committed to accountability and investigating the truth of what happened, or if they are merely an attempt to shield individuals from the jurisdiction of the Court.<sup>56</sup>

The ICC might thus play an important role in ensuring the legitimacy of truth commission processes. South African-style truth commissions can only maintain their legitimacy if the threat of prosecution in the absence of amnesty is perceived to be real, otherwise there will be no motivation for perpetrators to participate. One of the difficulties for countries undergoing democratic transformations is that they often lack either the will or the resources to pursue prosecutions after a truth commission process is complete. While it may be too early to pass judgment in the South African case, since the amnesty committee has only recently finished its work, there is a general concern that the state will pursue few if any prosecutions of individuals who did not receive or apply for amnesty.<sup>57</sup> If this were to become a pattern in countries utilizing

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55. Here again, I am referring to an individualized process that includes redress for victims.

56. For a discussion of the standards that might be used see: "Just Amnesty", *supra* note 38. Villa-Vicencio, in his discussion of the relationship between the ICC and truth commissions, also calls for an international mechanism to emerge that could assess various truth commissions and their initiatives. *Supra* note 1 at 221. Also see generally for a discussion of standards for evaluating amnesties R. O. Weiner, "Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties" (1995) 26 *St. Mary's L.J.* 857.

57. Recent events in South Africa have sent conflicting messages on this issue. The recent Presidential pardons granted to 33 people described by the President as having been engaged in the fight against Apartheid included among them some who had been denied amnesty by the Truth and Reconciliation Commission. See D. Donian & L. Flanagan, "Mbeki's secret amnesty list revealed" *The Star* (13 May 2002) online: Independent Newspapers <<http://www.iol.co.za>> (last modified: 29 May 2002). This has raised questions as to whether the government might be considering some form of a general amnesty for those engaged in the struggle over Apartheid. See J. Battersby, "Tutu: pardons make a mockery of TRC" *The Sunday Independent* (18 May 2002) online: Independent Newspapers <<http://www.iol.co.za>> (last modified: 29 May 2002); H. de Wet, "Retired generals and ANC made amnesty deal" *The Star* (27 May 2002) online: Independent Newspapers <<http://www.iol.co.za>> (last modified: 29 May 2002). At the same time, however, the South African police have announced the reopening of one million cases some dating back as far as thirty years. They have suggested that charges may follow and could include some of those persons denied amnesty before the Truth and Reconciliation Commission. See L. Oelofse, "Police re-open one million criminal cases" *Cape Argus* (10 May 2002) online: Independent Newspapers <<http://www.iol.co.za>> (last modified: 29 May 2002).



the truth commission model, it might affect the willingness of perpetrators to participate in similar commissions in the future. The willingness of the ICC to step in and prosecute those not granted amnesty would help to make the stick of prosecutions real and the carrot of amnesty all the more attractive. The role of the ICC, in this regard, would serve two purposes: it would encourage countries to make good on the threat of prosecutions, at least to some extent, and, failing that, it would conduct prosecutions itself.<sup>58</sup>

### *Conclusion – Protecting States’ Options*

Of course there is no indication in the wording of the *Rome Statute* or the negotiations surrounding its passage that the ICC would limit its jurisdiction with respect to truth commissions in the way suggested above.<sup>59</sup> Where, then, does this leave states wanting to preserve the truth commission option? It seems states are left with two obvious choices – do not sign<sup>60</sup> or ratify the treaty, or refuse to cooperate with the Court should it request extradition of an individual who has received amnesty. Neither alternative is very attractive or even practical. Under the first option, states would not become a party to the treaty. Yet many states where truth commissions might be considered an alternative in the future did sign the treaty and have already ratified or expressed their intention to ratify.<sup>61</sup> There was a considerable amount of international pressure to sign the ICC treaty and similar pressure to ratify. Countries undergoing or contemplating democratic transition – the very countries most likely to consider the use of a truth commission model – might feel such pressure particularly strongly. However, should these states elect not to ratify, this would not preclude them from calling upon the Court’s assistance if needed. Under the Statute they could accept the jurisdiction of the Court in a particular case pursuant to Article 12.3.

The other alternative would be for a state to sign and ratify the treaty but refuse to cooperate with the Court should it assert jurisdiction over an individual who is being dealt with through a truth commission process or

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58. The ICC’s prosecutor may decide whether to prosecute in consultation with a state in cases where the decision not to prosecute those who have been denied amnesty or did not apply for it was made as a result of a lack of resources, in other words where the state is *unable* to prosecute.

59. Although some have argued that the final text of the *Rome Statute* contains intentional ambiguities that might allow the Prosecutor or the Court to interpret the Statute so as to allow for truth commission processes and amnesties. Scharf, *supra* note 7 at 508, 521-22.

60. The *Rome Statute* closed for signatures on 31 December 2000 as provided in Article 125. Thus, the decision as to whether or not to sign has passed.

61. As of May 16, 2002, 139 states have signed the Statute and 67 have ratified. See *supra* note 26.

who has received amnesty through such a process. Failure to cooperate would constitute a violation of the treaty.<sup>62</sup> Under Article 87, if a state fails to cooperate, “thereby preventing the Court from exercising its functions and powers under [the] Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.”<sup>63</sup> It is unclear at this stage to what extent, if any, the Court will be able to enforce its requests in cases where the Security Council is not involved. However, it is clear that an indictment by the ICC would, in most cases, render a domestic amnesty meaningless outside the borders of the granting country. Individuals charged by the Court would likely not be able to leave the country in which they enjoy amnesty for fear that another state might cooperate with the ICC and turn them over to the Court.<sup>64</sup>

There may be a third less obvious option for countries wishing to utilize a truth commission process.<sup>65</sup> The State might ask the Security Council to use its power under Article 16 of the *Rome Statute* to request the prosecutor not to commence or continue with an investigation or prosecution. This option would only be open, however, where it could be argued that a threat to peace and security exists. Even if such an argument could be made (and there may be reason to believe that the case would not be hard to make that an internal conflict might threaten peace and security) the veto power of the Security Council can only effect a twelve-month suspension of investigation or prosecution. While this suspension can be renewed, it does not offer any certainty that investigation or prosecution would not be pursued at some later date when the threat to security and peace had ceased. Thus, the Security Council veto would not resolve the problems for truth commissions caused by the pending threat of prosecution by the ICC.

Yet a further option for states wanting to preserve the truth commission possibility would be to declare, at the time of ratification, as provided for in Article 124, that the State will not accept the jurisdiction of the Court for a period of seven years after the entry into force of the Statute. Seven years is the amount of time after which amendments to the Statute are permitted under Article 121. However, this strategy is dependent upon a state’s ability to garner the support of two-thirds of the parties for

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62. Article 87, *Rome Statute*, *supra* note 10.

63. Article 87.7, *Rome Statute*, *supra* note 10.

64. The recent Pinochet situation gives this possibility more than an air of reality. Pinochet was arrested by British authorities on October 16, 1998 while in Britain to receive medical treatment. He was arrested pursuant to a Spanish arrest warrant.

65. See discussion, *supra* note 28.

a proposed amendment with respect to a truth commission exception to the courts jurisdiction.

It seems from the analysis above that states wanting to preserve their right to utilize South African-style truth and reconciliation commissions may have been well advised not to have signed or, if they signed, not to ratify the Rome Treaty. Admittedly this may only be a marginally superior option, and is not one that states appear ready to take up. The only remaining alternative, then, is to advocate for a reconsideration of the notion of prosecution animating the Court's admissibility standards, to one that respects not only the sovereignty of national courts, but also the right of states to pursue accountability and redress via national truth and reconciliation commissions. Some might be tempted to suggest that there is no cause for concern at all on this issue because the decision of whether or not to pursue an investigation and prosecution is within the Prosecutor's discretion. Article 53 grants the Prosecutor the power to refrain from investigating a case where he or she determines it would not be in the interests of justice to do so. Thus, states wanting to preserve the option to deal with cases through a truth commission process might appeal to the Prosecutor's discretion on a case-by-case basis and argue that it would not be in the interests of justice to prosecute. However, making the case that proceeding through a truth commission approach better serves the interests of justice would, as discussed earlier, require a substantial revision of the notion of justice underlying the ICC Statute.<sup>66</sup> For the discretion of the Prosecutor to be of comfort, one would have to be confident that he/she will share Kofi Annan's sense of what is imaginable within the bounds of the ICC. Further, while one might feel confident that no prosecutor would ever pursue prosecutions in the case of South Africa, what of other less romanticized transitions that involve a similar truth commission processes? What if, for example, a South African-styled truth commission process was undertaken in Yugoslavia or Rwanda? Could we be so sure of what a prosecutor might imagine to be possible? Without a clear interpretation of the meaning of prosecution and what might be included within its bounds, prosecutorial discretion should be of little comfort to countries contemplating alternative means of dealing with past abuses. For such states to proceed with confidence in their work of dealing with the past they must have some surety from the new Court that interference in the face of a legitimate truth and reconciliation process would be an unimaginable insult.

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66. See Llewellyn & Howse, *supra* note 38 in which my co-author and I argue for such a revision to a restorative conception of justice. But see Scharf, *supra* note 7 at 524. Scharf argues that Article 53 could, as it stands, be used to ground an amnesty exception to the jurisdiction of the ICC.