Denver Journal of International Law & Policy

Volume 39
Number 2 *Spring*

Article 3

April 2020

Prosecution and Peace: A Role for Amnesty before the ICC

Kate Allan

PROSECUTION AND PEACE: A ROLE FOR AMNESTY BEFORE THE ICC?

KATE ALLAN*

INTRODUCTION

The adoption of the Statute of the International Criminal Court[1] at the Rome Conference was a landmark event in international law. It expressed states' intention to cede what was guardedly reserved as a sovereign power to prosecute in exchange for international justice and the prevention of impunity. To restrain the International Criminal Court (ICC), states adopted complementary jurisdiction; the ICC can only act where a state has not genuinely investigated or prosecuted perpetrators of serious crimes, or where it is unwilling or unable to do so.[2] The difficult question was how far should complementarity go?

It was not surprising, given divergent state practice and opinion, that a provision on amnesties was not agreed upon.[3] Some states argued that transitional justice mechanisms ought to be accommodated.[4] Domestic responses to mass atrocity or international crimes in previous years had involved a combination of complementary processes selected from what is becoming commonly referred to as the 'toolkit' of transitional justice.[5] These multi-faceted approaches combined limited prosecutions with truth commissions and blanket or conditional amnesties. Other states were nevertheless steadfast in their opposition. Consequently, the drafters of the ICC Statute left the provisions regulating jurisdiction "'creatively ambiguous.'"[6]

---

* Associate Legal Officer at the International Criminal Tribunal for the former Yugoslavia; L.L.M. (Harvard); L.L.B. (QUT); B.Bus (International) (QUT). The views expressed herein are those of the author's alone and do not necessarily reflect the views of the International Criminal Tribunal for the former Yugoslavia or the United Nations in general. I am grateful to Martha Minow for her supervision and comments on the Masters thesis upon which this article is based. All errors of fact and interpretation are my own.

1. Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), *available at* http://treaties.un.org/doc/source/RecentTexts/rome-en.htm [hereinafter Rome Statute].

2. Rome Statute, art. 17.

3. *See* Jessica Gavron, *Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court,* 51 INT'L & COMP. L.Q. 91, 107-108 (2002); Anja Seibert-Fohr, *The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions*, 7 MAX PLANCK Y.B. U.N.L. 553, 561 (2003).

4. Seibert-Fohr, *supra* note 3, at 561.

5. *See, e.g.,* Chandra Lekha Sriram, *Transitional Justice Comes of Age: Enduring Lessons and Challenges*, 23 BERKELEY J. INT'L L. 506, 508 (2005).

6. Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L LAW REV. 293, 320-22 (2005) (quoting the Chair of the drafting committee, Philippe Kirsch).

This paper asks whether the ICC can, and ought to, defer to domestic grants of amnesty. In doing so, this paper also questions more broadly whether the ICC ought to take the impact of prosecution on peace into account. Before this article goes on to outline the ways in which the ICC might do this, it is important to understand: (1) the position of amnesties in international law, and (2) the forms of amnesty that are granted and the justifications which aim to legitimize them.

In regard to the first issue, as a matter of international law, an express customary prohibition of amnesty has not yet crystallized. There is support for customary and treaty[7] based duties to prosecute pursuant to the Geneva Conventions (GCs), and *jus cogens* norms including torture, genocide. Various judicial and UN bodies confirm that amnesties are inconsistent with treaty based duties to prosecute.[8] Exceptions can nevertheless be made. The most notable of

7. *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 7, Dec. 10, 1984, 1465 U.N.T.S. 85; International Convention on the Suppression and Punishment of the Crime of Apartheid art. 4, Nov. 30, 1973, 1015 U.N.T.S. 243; Convention on the Prevention and Punishment of the Crime of Genocide art. 4, Dec. 9, 1948, 78 U.N.T.S. 277, 28 I.L.M. 760; *see also* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, Aug. 12, 1949, 75 U.N.T.S. 31, Geneva Convention for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50, Aug. 12, 1949, 75 U.N.T.S. 85, Geneva Convention relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 75 U.N.T.S. 135, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 146, Aug. 12, 1949, 75 U.N.T.S. 287 [collectively, hereinafter the Geneva Conventions]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 85, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

8. *See* Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 153, 155-56 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 165 (Jul. 29, 1988); Chumbipuma Aguirre v. Peru (Barrios Altos Case), Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶¶ 42-44 (Mar. 14, 2001); Mendoza v. Uruguay (Report on the Situation of Human Rights in Uruguay), Inter-Am. Comm'n. H.R., Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14, ¶¶ 26, 35, 50 (1993), *available at* http://www1.umn.edu/humanrts/cases/29-92-URUGUAY.htm; Consuelo *et al.* v. Argentina (Report on the Situation of Human Rights in Argentina), Inter-Am. Comm'n. H.R., Report No. 28/92, OEA/Ser.L/V/II.83, doc. 14, ¶¶ 32, 40, 50 (1992), *available at* http://www1.umn.edu/humanrts/cases/28-92-ARGENTINA.htm; Report on the Situation of Human Rights in El Salvador, Inter-Am. Comm'n. H.R., Report No. OEA/Ser.L/V/II.85, doc. 28 (1994), *available at* http://www1.umn.edu/humanrts/iachr/country-reports/elsalvador1994.html; X & Y v. Netherlands, App. No. 8978/80, 91 Eur. Ct. H.R. (ser. A), ¶¶ 27, 28 (1985); Streletz v. Germany, 2001-II Eur. Ct. H.R. 230, ¶ 86 (2001); Akkoç v. Turkey, 2000-X Eur. Ct. H.R. 389, ¶ 77 (2000); Bautista de Arellana v. Colombia, U.N. Human Rights Comm., Comm'n No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993, ¶¶ 8.3, 10 (1995), *available at* http://www1.umn.edu/humanrts/undocs/session55/vws56355.htm; Basilio Laureano Atachahua v. Peru, U.N. Human Rights Comm., Comm'n No. 540/1993, U.N. Doc. CCPR/C/56/D/540/1993, ¶ 10 (1996), *available at* http://www.unhcr.org/refworld/docid/3ae6b70910.html. In 2010, the UN Secretary-General released a guidance note on the UN's approach to transitional justice in which he stated that, in its transitional justice activities, the UN should "insist[] that peace agreements not grant amnesties for war crimes, crimes against humanity, genocide and gross violations of human rights." U.N. Secretary General, *Guidance Note of the Secretary General: United Nations Approach to the Transitional Justice*, 10 (March 2010), *available at* www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf. In his report to the Security Council in 2004 on the rule of law and transitional justice and post-conflict societies, UN Secretary-General Kofi Annan stated that "[c]arefully crafted amnesties . . . can never be permitted to excuse genocide, war crimes, crimes against humanity or gross violations of human rights," and called on the

these is Article 6(5) of Additional Protocol II to the GCs, which states that authorities "shall endeav[o]r 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."[9] The South African Constitutional Court in *Azapo v. President of the Republic of South Africa*[10] relied upon Article 6(5) to support an exception to the prohibition on amnesty.[11] The explicit or constructive duty to prosecute is nevertheless limited by subject matter and recipient, with the obvious gaps being crimes against humanity and war crimes, which do not give rise to grave breaches of the GCs. Customary international law established through state practice and *opinio juris* may fill these gaps.[12] There is an emerging state practice supporting an obligation to prosecute the most serious violations of international law,[13] with supportive *opinio juris*.[14] Nevertheless, courts have been

---

international community to reject them. U.N. Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General to the Security Council*, ¶ 32, U.N. Doc. No.S/2004/616 (Aug. 23, 2004), *available at* http://daccess-ods.un.org/TMP/5154000.52070618.html.

9. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 6(5), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]; *see also* American Convention on Human Rights art. 4(6), Nov. 22, 1969, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights art. 6(4), Dec. 16, 1966, 999 U.N.T.S. 171 (permitting amnesty to prevent imposition of the death penalty).

10. *AZAPO v. President of the Republic of South Africa* 1996 (4) SA 671 (CC) (S. Afr.).

11. Andreas O'Shea, *Amnesty for Crime*, *in* INTERNATIONAL LAW AND PRACTICE 50 (2002). The Constitutional Court's reasoning was flawed because it adopted an overly broad definition of *jus cogens,* applied Additional Protocol II to all other *jus cogens* norms and did not consider whether amnesty for offenses that were in fact *jus cogens* (such as torture and genocide) was permissible. *Id.*; FAUSTIN Z. NTOUBANDI, AMNESTY FOR CRIMES AGAINST HUMANITY UNDER INTERNATIONAL LAW 167, 171 (2007).

12. John Dugard, *Possible Conflicts of Jurisdiction with Truth Commissions, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 696-98 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

13. *Id.*; O'Shea, *supra* note 11, at 255.

14. The Resolution on the Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes against Humanity provides in Article 4 that "[s]tates shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed . . . crimes and, if they are found guilty, in punishing them." G.A. Res. 3074 (XXVIII), ¶ 4, U.N. GAOR, 28th Sess. Supp. No. 30, U.N. Doc. A/9030, at 79 (Dec. 3, 1973). The Resolution adopting the Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power called upon states to conduct impartial investigations and prosecute persons who victimize others by committing serious crimes or extradite such persons to another State having jurisdiction. G.A. Res. 40/34, ¶¶ 4, 5, 40, U.N. GAOR, Supp. No. 53, U.N. Doc. A/40/53, at 213 (Nov. 29, 1985); Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, G.A. Res. 2840 (XXVI), U.N. Doc. A/RES/2840 (Dec. 18, 1971); Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, G.A. Res. 2712 (XXV), U.N. Doc. A/RES/2712 (Dec. 15, 1970); Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, G.A. Res. 2583 (XXIV), U.N. Doc. A/RES/2583 (Dec. 15, 1969); *see also* Rome Statute of the International Criminal Court, art. 7, Jul. 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), *available at* http://treaties.un.org/doc/source/RecentTexts/rome-en.htm; S.C. Res. 955, Statute of the International Tribunal for Rwanda art. 3, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (Nov. 8, 1994); S.C. Res. 827, Statute of the International Criminal Tribunal for Yugoslavia art. 5, U.N. SCOR, 48th Sess., U.N. Doc.

reluctant to find amnesties "unlawful *per se*."[15] While much of the debate concerns the permissibility of conditional amnesties,[16] it is nonetheless difficult to avoid the conclusion that while customary law had not crystallized before the Rome Conference, international law is heading towards the prohibition of amnesties for international crimes.[17]

Looking to the second issue, amnesties can come in a variety of forms including blanket amnesties, self-amnesties, and conditional amnesties. However, only conditional have attracted any real support. It is therefore only in the context of conditional amnesties that we ought to consider whether customary international law permits grants of amnesty. Conditional amnesties are ordinarily granted following a determination by a quasi-judicial body, such as a truth commission, applying legislative criteria.[18] Criteria might include: whether a perpetrator acted in pursuit of a political objective and whether he or she disclosed the truth regarding their role and the role of others in the commission of a crime.[19] Truth commissions gain legitimacy when they provide victims with an opportunity to participate by confronting perpetrators, with some form of reparation, and when they have authority to make broad findings and recommendations regarding the causes of and events giving rise to violations. It is not amnesty itself that is justifiable, but the process by which it is granted. Advocates of truth commissions also argue that, not only do they have a broader mandate than domestic prosecution, they have a greater capacity to reconcile communities and engender peace.[20] The quintessential example is that of South Africa, where conditional amnesty was bartered for democratic rule, and where the South Africa Truth and Reconciliation Commission (SATRC) was hailed as a key contributor to a relatively peaceful transition to stable democracy.[21] Its supporters argue that without the availability of amnesty, South Africa might have lapsed into civil war.[22] States have subsequently used this

---

S/RES/827 (May 25, 1993); NTOUBANDI, *supra* note 11, at 147-48.

15. Naomi Roht-Arriaza, *Amnesty and the International Criminal Court, in* INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 79 (Dinah Shelton ed., 2000); John Dugard, *Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?* 12 LEIDEN J. INT'L L. 1001, 1003 (1999); Yasmin Naqvi, *Amnesty for War Crimes: Defining the Limits of International Recognition*, 85 IRRC 583, 612 (2003); Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NOTRE DAME L. REV. 955, 1018 (2006).

16. *See* Dugard, *supra* note 15, at 1004-05; Naqvi, *supra* note 15, at 586-87, 624; Sadat, *supra* note 15, at 1021-22. The International Court of Justice adopted the more traditional approach. *Arrest Warrant of April 11th 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (Feb. 14) (finding that the arrest warrant issued by Belgium against Congo's incumbent Minister of Foreign Affairs failed to respect the immunity from criminal jurisdiction under international law); *see also* Newman, *supra* note 6, at 314; Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2540 (1991).

17. Dugard, *supra* note 15, at 1004; *see also* Sadat, *supra* note 15, at 963-65, 1022-23 (agreeing with this position).

18. Sadat, *supra* note 15, at 1027-28, n.343.

19. NTOUBANDI, *supra* note 11, at 161-162.

20. O'Shea, *supra* note 11, at 23-24.

21. Sadat, *supra* note 15, at 986.

22. *See, e.g.,* Richard Goldstone, 1998 Otto L. Walter Lecture, *International Human Rights at Century's End*, 15 N.Y.L. SCH. J. HUM. RTS. 241, 258 (1999) (noting that "amnesty was the price for a

model to argue that amnesty can be a vital ingredient of peace negotiations because they "stabilize and consolidate... transition."[23]

Amnesty is therefore a policy and rule of law issue. As a policy matter, it is justified by its contribution to resolving conflict, attaining peace, and preventing further human rights violations. As a rule of law matter, it is justified on the basis that it is granted by a quasi-judicial body pursuant to legislation, even though brought about by an executive act. The disentangling of law and politics however is not so easy in the contexts in which amnesties are granted:

> The construction of the transitional rule of law as independent of politics shares certain affinities with the understanding of the rule of law applicable in ordinary times. Yet, controversies over transitional justice in highly politicized contexts present hard cases for adherence to the rule of law. Despite radical political change, the aim is the rule of law not primarily motivated by politics. Transitional jurisprudence reveals a shining vision of the rule of law as antipolitics.[24]

Policy and rule of law considerations are relevant for the ICC, particularly given it is not limited to *post bellum* justice and separating law from politics is more difficult during conflict.[25] How then does and should the ICC respond? Does the process by which conditional amnesties are granted satisfy due process under international law and the ICC's admissibility requirements? Are conditional amnesties a matter of both law and politics beyond the national realm? Or, if amnesty is a matter of mere politics, what is the impact on prosecutorial discretion to act?

The Rome Statute sets out the roles for the Prosecutor, the Security Council, and the Pre-Trial Chamber in determining whether the ICC can exercise jurisdiction over a matter.[26] The Prosecutor plays a lead role because he has discretion to determine whether to proceed with an investigation or prosecution.[27] The Prosecutor has two avenues to defer to conditional amnesty. First, he can determine that amnesties satisfy the admissibility requirements of Article 17.[28] Second, pursuant to Article 53, he can determine that it is not in the interests of justice to proceed with an investigation or prosecution where an amnesty has been or might be granted.[29]

ICC Prosecutor Luis Moreno-Ocampo has been patently clear about his approach to admissibility and the interests of justice. In regard to admissibility, he

---

peaceful transition from apartheid to democracy").

23. RUTI G. TEITEL, TRANSITIONAL JUSTICE 54 (2000).

24. *Id.* at 21-22.

25. Rosanna Lipscomb, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV. 182, 189-93 (2006).

26. Rome Statute of the International Criminal Court, arts. 13-18, Jul. 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), *available at* http://treaties.un.org/doc/source/RecentTexts/rome-en.htm [hereinafter Rome Statute].

27. For ease of reference this paper adopts the Prosecutor's current gender throughout.

28. Rome Statute, art. 17.

29. Rome Statute, art. 53.

stated in a report to the Security Council that alternative justice mechanisms "are not criminal proceedings as such for the purpose of assessing the admissibility of cases before the [ICC], but they are an important part of the fabric of reconciliation for Darfur, as recognized in resolution 1593 (2005)."[30] Even where amnesty is granted by quasi-judicial bodies such as the SATRC, Prosecutor Moreno-Ocampo would not find that they are determinative of admissibility under Article 17 of the Rome Statute. While he seemed to leave open the question of whether amnesties might be in the interests of justice because of their reconciliatory capacity, he foreclosed this possibility in September 2007 when he released a policy paper on the interests of justice.[31] In that paper, he notes that justice and peace are not mutually exclusive,[32] and in dealing with the intersection of justice, peace, and security, he will work with other institutions such as the Security Council.[33] He further stated that while Security Council intervention would not presuppose the Prosecutor's position on the interests of justice, he will adopt "a presumption in [favor] of investigation or prosecution" and use his discretion only in exceptional circumstances.[34] In case of any doubt regarding his position on amnesties, the paper footnotes a quote from the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, who said "[j]ustice should never be sacrificed by granting amnesty in ending conflicts."[35]

Should the Prosecutor exercise unfettered discretion to determine admissibility and the interests of justice, we might then end the discussion here. However, Prosecutor Luis Moreno-Ocampo's paper is a policy document and not binding for the purposes of judicial review,[36] and could be amended by the next appointee.[37] While the object of preventing serious crimes through ending impunity is likely to continue to play a decisive role, it is possible that time and progressive development of the law may lead the Prosecutor to favor peace and security in certain circumstances. Moreover, the Prosecutor is subject to Security Council and Pre-Trial Chamber oversight. The Security Council has the power to issue a resolution referring a matter to the Prosecutor or requesting that the ICC defer an investigation or prosecution of a matter where it is a threat to international peace or security.[38] The Pre-Trial Chamber has authority to review the Prosecutor's decision to proceed (although it might adopt a less intrusive role regarding policy matters).[39] Neither the Security Council nor the Pre-Trial

30. U.N. S.C. Rep. of the Secretary-General on the Sudan, 3, U.N. Doc. S/PV. 5459, U.N. SCOR 5459th mtg (Jun. 14, 2009), *available at* http://www.un.org/Docs/journal/asp/ws.asp?m=S/PV.5459.

31. International Criminal Court, Office of the Prosecutor, *Policy Paper on the Interests of Justice* (Sept. 2007), *available at* http://www2.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf [hereinafter OTP Policy Paper].

32. *Id.* at 8.

33. *Id.*

34. *Id.* at 1, 3.

35. *Id.* at 3.

36. Jens David Ohlin, *Peace, Security and Prosecutorial Discretion, in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT, 251, 263 (Carsten Stahn & Göran Sluiter eds., 2009).

37. *See id.* at 259 (noting that the Assembly is charged with electing a Prosecutor).

38. *Id.* at 250.

39. *Id.* at 264.

Chamber have intervened on the basis of amnesty as of yet. Whether amnesty might be accommodated is, therefore, still open to debate.

There are two approaches that may be adopted by each of these bodies. The Prosecutor and the Pre-Trial Chamber can adopt a restrictive approach. With regard to admissibility, truth commissions would fail to satisfy the requirements of "criminal justice,"[40] and amnesty would indicate an unwillingness or inability to prosecute. The President of the International Crisis Group, Gareth Evans, aptly summarized the restrictive approach with regard to the interests of justice:

> I have no doubt that dealing with impunity and pursuing peace can work in tandem even in an ongoing conflict situation: these are not necessarily incompatible objectives. The prosecutor's job is to prosecute and he should get on with it with bulldog intensity. If a policy decision needs to be made, in a particular case, to give primacy to peace, it should be made not by those with the justice mandate, but with the political and conflict resolution mandate, and that is the Security Council. The Statute allows for this in Article 16, and this is the way the international community should be thinking about it.[41]

According to this approach, the ICC prioritizes its prosecutorial mandate and policy issues remain a matter for the Security Council.

Alternatively, the Prosecutor and the Pre-Trial Chamber can adopt an expansive view, where the process by which amnesty is granted satisfies the requirements of admissibility, and/or the interests of justice accommodate legal, political, and social issues.[42] The expansive approach allows the Prosecutor and Court to consider whether prosecution may prevent the conclusion of peace negotiations by deterring perpetrators from engaging in actions that might lead to their disarmament and arrest, and whether prosecution at the post-conflict stage may lead to the resumption of hostilities.[43]

Literature following the ratification of the Rome Statute adopted positions ranging from a narrow application of the law and confinement to prosecutorial criminal justice mechanisms[44] to expansive policy approaches, which argue that the Prosecutor could decline jurisdiction "where prosecution is likely to have [destabilizing] effects on the state which has granted the amnesty."[45] This paper builds upon that body of literature in two ways. First, it synthesizes the positions put forward by scholars and practitioners and frames them in terms of the

---

40. *OTP's Second Public Hearing: Looking Ahead*, NEWSLETTER (ICC, THE HAGUE), Oct. 2006, at 5, *available at* http://www.icc-cpi.int/NR/rdonlyres/A553E1FB-3662-497E-B06E-5B089B22D01B/278464/ICCNL9200610_En.pdf [hereinafter OTP's Newsletter].

41. *Id.*; *see also* Kenneth Roth, Discussion, *The International Criminal Court Five Years on; Progress or Stagnation?*, 6 J. INT'L CRIM. JUST. 763, 765 (2008) (agreeing with the ICC's approach in prioritizing its prosecutorial mandate).

42. Diba Majzub, *Peace or Justice? Amnesties and the International Criminal Court*, 3 MELB. J. OF INT'L L. 247, 275-78 (2002).

43. *Id.*

44. *See, e.g.*, Roth, *supra* note 41, at 765-66.

45. Majzub, *supra* note 42, at 272.

restrictive or expansive approach. Second, it applies these approaches to the situations of Uganda and Darfur, which are currently subject to ICC jurisdiction. Over the last few years, events in these countries and state responses to intervention by the ICC have altered the way in which one might view the role of the ICC. In Uganda, ICC intervention has led to attempts by the government to establish domestic criminal justice mechanisms that incorporate criminal prosecution, reparations, and reconciliatory mechanisms.[46] In Darfur, ICC arrest warrants for President Omar al-Bashir and other political leaders resulted in the expulsion of humanitarian aid groups and the withdrawal of some United Nations peacekeepers.[47] Much of the scholarly debate regarding amnesties and the ICC pre-dated the Prosecutor Moreno-Ocampo's policy, and subsequent reactions were few. As a result, the key contribution of this paper to that debate is its application of the synthesized debate to recent events in states subject to ICC jurisdiction. It determines whether, in the context of present circumstances in Uganda and Sudan, the Court should, or has scope to, take into account political factors.

The paper will be structured as follows. Part I will discuss the Prosecutor's application of the provisions regarding admissibility and the interests of justice to determine whether, *prima facie*, a restrictive or expansive approach may be applied. It will then go on to discuss the role of the Security Council and the Pre-Trial Chamber. Part II will discuss four case studies: Darfur, Uganda, Sierra Leone, and South Africa. Uganda is the only situation currently subject to ICC jurisdiction that provides an example of the intersection of domestic amnesty and international prosecution. While Sudan has not granted amnesties for the conflict in Darfur, the case study is useful because it provides insight into the role of the Security Council in maintaining international peace and security. The case studies of Sierra Leone and South Africa are pertinent because they granted amnesties (blanket and conditional respectively), established truth commissions, and conducted prosecutions, and they inform the extent to which amnesty may be desirable as a policy matter.[48] Part III will apply the findings of Parts I-II to the restrictive and expansive approaches. The key finding of this paper is that the restrictive approach should be adopted for both legal and policy reasons.

I. THE ROME STATUTE

A situation can fall within the jurisdiction of the ICC in one of three ways: (1) referral by a state party; (2) referral by the Security Council using its Chapter VII powers;[49] or (3) a *propio motu* investigation by the Prosecutor.[50] Even where a matter has been referred, prosecutorial discretion to investigate and prosecute is regulated by Article 53 of the Rome Statute. Article 53 provides that the

46. *See* Roth, *supra* note 41, at 765-66.

47. Wairagala Wakabi, *Aid Expulsion Leaves Huge Gap in Darfur's Health Services*, 373 LANCET 1068, 1068-69 (2009).

48. The models adopted by South Africa and Sierra Leone will also be considered in Parts I and II.

49. *See* U.N. Charter Chapter VII.

50. Rome Statute of the International Criminal Court, art. 13(c), Jul. 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), *available at* http://treaties.un.org/doc/source/RecentTexts/rome-en.htm [hereinafter Rome Statute].

Prosecutor shall consider: (1) whether he has sufficient factual evidence to support a reasonable basis for investigation or sufficient basis for an arrest warrant or summons,[51] (2) whether a matter is admissible in terms of article 17,[52] or (3) whether it is in the interests of justice to proceed.[53] For our purposes, admissibility and the interests of justice are determinative. Before proceeding to discuss these provisions, regard ought to be had to the objects and purposes of the Rome Statute.

A. Object and purpose of the Rome Statute

The Vienna Convention on the Law of Treaties (the Vienna Convention) provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to [its] terms... and in the light of its object and purpose,"[54] having regard to *inter alia* its preamble.[55] If the application of interpretive guides leads to a meaning that is ambiguous or obscure, or a result manifestly absurd or unreasonable, regard may be had to supplementary means including preparatory work and the circumstances of the treaty's conclusion.[56]

Preamble

The preamble provides that the Rome Statute:

> Affirm[s] 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[,]... [r]ecall[s] that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes,... [and] [e]mphasiz[es] that the [ICC] established under [the] Statute shall be complementary to national criminal jurisdictions.[57]

Notable phrases include that the most serious crimes "must not go unpunished" and that their "effective prosecution" must be ensured, as well as that it is a "duty" of states to exercise "criminal prosecution" to which the ICC shall be complementary. These objects must underscore the interpretation of provisions even where they are unambiguous. It is important to bear in mind, however, that the preamble and the procedural provisions (i.e. Articles 16, 17 and 53) were drafted by different committees within the conference which did not interact, and that there was little effort to make these sections of the Statute consistent.[58]

---

51. *Id.* at arts. 53(1)(a), (2)(a).

52. *Id.* at arts. 53(1)(b), (2)(b).

53. *Id.* at arts. 53(1)(c), (2)(c).

54. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; *see also* JEFFREY L. DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 39 (Aspen Pub., 2002) (noting the Vienna Convention is accepted as customary international law).

55. Rome Statute, art. 31(2)-(3). The latter of these was discussed.

56. *Id.* at art. 32.

57. Rome Statute, pmbl.

58. Sharon A. Williams & William A. Schabas, *Article 17, Issues of Admissibility*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 605, 611 (2d ed. 2008); Michael P. Scharf, *From the Exile Files: An Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 368 (2006).

Travaux Préparatoires

The issue of amnesties was "acutely controversial" in the debate over jurisdiction at the Rome Conference.[59] The United States advocated for amnesties by circulating a non-paper, which argued "that a decision by a democratic regime to grant an amnesty should be a consideration in determining the admissibility of a case before the ICC."[60] Some states, such as South Africa and Colombia, claimed that they reserved the right to grant amnesty in appropriate circumstances.[61] The treaty prohibited reservations so Colombia, which had considered granting amnesties and pardons to bring an end to decades of armed conflict,[62] entered its ratification with the following interpretive declaration:

> None of the provisions of the Rome Statute concerning the exercise of jurisdiction by the [ICC] prevent the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia.[63]

Whether interpretive declarations are binding depends upon a complex and often indeterminate examination of whether the declaration is, in effect, a reservation that is inconsistent with the object and purpose of the treaty and whether other ratifying states object.[64] As far as it is possible to ascertain, no states objected on this basis. Even so, the declaration is not necessarily determinative of the treaty's interpretation for all parties.

Nevertheless, there are two ways in which the omission of a provision on amnesty could be read. The absence of an explicit prohibition could indicate that amnesties are permissible under Article 17.[65] Whether or not participating states concurred that amnesty should be permitted may depend upon distinguishing unconditional from conditional amnesties.[66] On the other hand, it could indicate

---

59. *See* Sharon A. Williams, *The Rome Statute on the International Criminal Court: From 1947-2000 and Beyond*, 38 OSGOODE HALL L.J. 297, 328 (2000); *see also* Williams & Schabas, *supra* note 58, at 611.

60. Majzub, *supra* note 42, at 268.

61. Newman, *supra* note 6, at 318-28.

62. *Id.* at 326. Newman notes that "Colombia's ratification of the Rome Statute, absent its interpretive declaration, might have foreclosed the government's ability to offer immunity in exchange for peace, thereby removing any incentive for armed rebels to negotiate a truce." *Id.* at 326-27.

63. *Id.* at 325.

64. SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 74 (2006); HENRY STEINER, PHILLIP ALSTON, & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS LAW IN CONTEXT: LAW, POLITICS, MORALS 1143-50 (3rd ed., 2008).

65. *See* Iain Cameron, *Jurisdiction and Admissibility Issues under the ICC Statute, in* THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 90-91 (Dominic McGoldrick, Peter Rowe, & Eric Donnelly eds., 2004); Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 499 (2003).

66. In 2000, the UN Secretary General, Kofi Annan stated that "[n]o one should imagine that [the Rome Statute] 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." Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and*

they have no jurisdictional impact.[67] Neither approach appears to be appropriate. According to the Chairman of the Committee of the Diplomatic Conference, the question was deliberately undecided.[68] The *travaux préparatoires* might then be of little assistance, other than to confirm no state consensus exists and, therefore, no customary rule.

B. The Prosecutor

Before engaging in an analysis of admissibility and the interests of justice, it is important to note that the Prosecutor may exercise jurisdiction over an individual even where a domestic court is prosecuting him. The Pre-Trial Chamber held that "for a case arising from the investigation of a situation to be inadmissible, national proceedings must encompass both the person and the conduct which is the subject of the case before the Court."[69] Accordingly, in the case against Thomas Lubanga, the Court deemed the case admissible because he had not been charged with all crimes for which he could be accused.[70] The ICC's holding may have consequences for conditional amnesties. The SATRC allocated hearings by victim rather than perpetrator.[71] Perpetrators of numerous violations were only granted amnesty for conduct that would not necessarily encompass all acts that give rise to liability.[72] The jurisdiction of truth commissions might mean perpetrators are only granted amnesty for some but not all conduct (whether through rejection or through a perpetrator's omission in disclosing conduct in their application). In principle, in a way similar to the Lubanga case, the Court and Prosecutor might therefore exercise jurisdiction over an individual subject to amnesty for conduct that was not subject to an investigation or grant of amnesty by the SATRC.[73]

1. Admissibility

Article 17 of the Rome Statute sets out the test for admissibility. It provides that the Court, with regards to paragraph 10 of the Preamble and Article 1, shall

---

Truth Commissions Meet, 49 EMORY L.J. 205, 222 (2000).

67. Dugard, *supra* note 12, at 701.

68. Newman, *supra* note 6, at 320-21, n.123.

69. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-8, Decision on the Prosecutor's Application for a Warrant of Arrest, ¶ 37 (Feb. 10, 2006); *see also* Prosecutor v Ahman Harun & Ali Kushayb, Case No. ICC-02/05-01/07, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶ 24 (Apr. 27, 2007).

70. *See* Jennifer Easterday, *The Case Against Lubanga So Far*, THE LUBANGA TRIAL AT THE INTERNATIONAL CRIMINAL COURT (Aug. 17, 2009), http://www.lubangatrial.org/2009/08/17/the-case-against-lubanga-so-far/.

71. *See* ANDREW WOOLFORD & R.S. RATNER, INFORMAL RECKONINGS: CONFLICT RESOLUTION IN MEDIATION, RESTORATIVE JUSTICE AND REPARATIONS 99 (2008) (claiming that separate hearings were held for apartheid victims, and these hearings have led commentators to deem the SATRC as victim centered justice).

72. *See id.* (positing that perpetrators are held accountable through the SATRC to the extent that they must stand before the committee and tell the full truth about their involvement in politically motivated crime; remorse and regret are not necessary, as perpetrators are only required to tell the truth).

73. This approach could attest to the additional criteria of "inactive." Williams & Schabas, *supra* note 58, at 616. Should this be correct, it would be even more unlikely that it would defer to a conditional amnesty that did not encompass all conduct for which a perpetrator may be charged.

determine that a case is inadmissible: (a) where it is being investigated or prosecuted by the referring or affected state; (b) where that state has investigated the matter and decided not to proceed with prosecution, unless the state is unwilling or unable to genuinely investigate or prosecute;[74] or (c) where a person has been tried by another court for crimes falling within the Court's jurisdiction, unless the proceedings in the other court were, (i) for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, or (ii) otherwise not conducted independently or impartially in accordance with the norms of due process recognized by international law and conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.[75] While the provision is directed at the Court, the Prosecutor must have regard to admissibility pursuant to Article 53.[76] To determine whether amnesties and truth commissions prevent the prosecutor from exercising jurisdiction, it is necessary to determine whether the procedure for granting amnesty falls within the ambit of "investigation," "decision," "trial," "court," "independent and impartial," and "unwilling or unable."[77]

a. Investigation and Decision: Article 17(1)(a) and (b)

The requirement to investigate is found in of Article 17(1)(a) and (b). The preamble and Article 1, which refer to "criminal jurisdiction," infer that investigation means criminal investigation.[78] Sub-paragraph (a) itself refers to "criminal responsibility," and sub-paragraph (b) refers to the "intent to bring the person to *justice*."[79] Sub-paragraph (a) also requires "the case" to be investigated.[80] The provision impliedly contemplates criminal investigations.[81]

By adopting an expansive approach, institutions granting conditional amnesties, such as the SATRC, might satisfy the requirements of "investigation" and "case" where they engage in "good-faith, methodological evidence

74. Rome Statute of the International Criminal Court, art. 17(1)(c), Jul. 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), *available at* http://treaties.un.org/doc/source/RecentTexts/rome-en.htm [hereinafter Rome Statute]. The court may also determine that the matter is not of sufficient gravity. This will be considered under the interests of justice. *Id.*

75. *Id.* at arts. 17(1)(c), 20(3).

76. A referring state may only challenge a Prosecutor's decision not to proceed with an investigation or prosecution on the basis of article 53(1) and (2) (to be dealt with later). Rome Statute, art. 53(1)-(4).

77. *Id.* at art. 15(1)-(6); *see also Id.* at art. 53(1)-(4).

78. Rome Statute, pmbl. ("The States Party to this Statute, . . . recall[] that it is a duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.").

79. *Id.* at art. 17(1).

80. *Id.* at art. 17(1)(a). An unconditional amnesty, such as in Uganda, would fail that test because the decision to prosecute does not involve or follow an investigation at all. *See* Cameron, *supra* note 65, at 91; MURPHY, *supra* note 64, at 146; Robinson, *supra* note 65, at 499; Siebert-Fohr, *supra* note 3, at 564-65.

81. John T. Holmes, *Complementarity: National Courts versus the ICC, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667, 674 (Antonio Cassese et al. eds., 2002); Majzub, *supra* note 42, at 270; *but see* Siebert-Fohr, *supra* note 3, at 569 (discussing the interpretation of the Rome Statute, arts. 17(1) and (2), and how the interpretation of paragraph 2 to require "criminal investigation" goes beyond the scope of the paragraph).

gathering"[82] of facts, to make an objective determination of criminal liability in individual cases.[83] The SATRC operated as a quasi-judicial body,[84] because it conducted investigations through expansive powers of search and seizure,[85] and could subpoena the provision of information or attendance by any person and question such persons in public or *in camera* hearings.[86] Victims and amnesty applicants were entitled to be present at committee hearings with exception[87] and cross-examine witnesses,[88] and persons questioned were entitled to legal representation (albeit without a right to freedom from self-incrimination and a presumption of innocence).[89] Following a hearing, the Amnesty Committee provided written reasons for its decision regarding whether a perpetrator of human rights violations was granted amnesty.[90] Such institutions may also satisfy "criminal jurisdiction" by the mere fact of their jurisdiction over crimes and "criminal responsibility" where perpetrators were brought to account through submitting to the jurisdiction of the institution, facing victims, truth telling, and providing reparation. Moreover, recognizing "decisions" for individualized amnesties might be consistent with the references to "the case" and "person" in the provision, which suggests individual decisions are required.[91]

This approach could be adopted if the distinction between investigation *or* prosecution in Article 17(1)(a) and (b) accepts that an investigation can be conducted irrespective of the body that conducts it,[92] and irrespective of its purpose.[93] However, according to the rules of statutory interpretation, Articles 17(1)(a) and (b) must be read together.[94] Sub-paragraph (a) protects matters that

82. *See* MURPHY, *supra* note 64, at 427 (discussing how a state that is willing and genuinely able to carry out an investigation will preclude ICC jurisdiction).

83. BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 101 (Ian Brownlie & Vaughn Lowe eds., 2003); *see also* Robinson, *supra* note 65, at 499-500 (explaining that the court can adopt a broader approach and deem that "investigation" encompasses diligence, methodological effort to retrieve evidence, and ascertain facts in order to make an objective determination pursuant to pertinent criteria).

84. Gavron, supra note 3, at 114.

85. Promotion of National Unity and Reconciliation Act No. 34 of 1995 Ch. 6 art. 32, (S. Afr.), *available at* http://www.fas.org/irp/world/rsa/act95_034.htm

86. *Id.* at art. 29.

87. *Id.* at arts. 29, 33 (explaining that no person other than a member of the staff of the Commission or a person subpoenaed may attend any investigation, however, hearings of the Commission are open to the public unless an informed decision is made to hold the hearing behind closed doors).

88. *Id.* at art. 34.

89. *Id* at art. 31.

90. *Id.* at arts. 20-21.

91. Cameron, *supra* note 65, at 91.

92. Jennifer Llewellyn, *A Comment on the Complementarity Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Justice Contexts?,* 24 DALHOUSIE L.J. 192, 203 (2001).

93. *Id.* at 203; Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court,* 3 J. INT'L CRIM. JUST. 695, 711 (2005).

94. Llewellyn, *supra* note 92, at 203.

are in the preliminary phase of sub-paragraph (b),[95] i.e. where a decision not to prosecute has not yet been taken. The duty to prosecute is inextricably linked to "the triad of obligations – investigate, take action against those responsible, and provide redress," which "suggests that prosecution is thought necessary in order to fulfill the other two obligations in the triad."[96] An investigation and decision might be sufficient provided prosecution was one of the possible options for achieving justice; investigation must at least contemplate prosecution.[97] The provision cannot incorporate an investigation whose principle objective is to determine whether amnesty should be granted. The same principles might be applied to interpreting "decision," such that individualized decisions must be considered in terms of their purpose.

The SATRC conducted a broad range of investigations *propio motu* and upon application for amnesty.[98] Investigations connected to grants of amnesty would have been made upon an application and were, therefore, for the purpose of determining whether amnesty ought to be granted.[99] While denials of amnesty left the possibility of prosecution open,[100] SATRC investigations did not contemplate prosecution, rather, they contemplated amnesty.[101] The final outcome was a decision rejecting the amnesty application and possibly a recommendation (but not a decision) to prosecute,[102] but the exercise of jurisdiction precluded even the exercise of prosecutorial discretion. The National Prosecuting Authority (NPA) did not retain any discretion to determine whether or not to prosecute until the SATRC had made its decision.[103] Along a procedural spectrum, it is pre-investigation and would only have an impact upon the decision to prosecute if an amnesty arose from it. Whether a prosecution would occur following a rejection of amnesty was a matter for an entirely new investigation because of the restrictions on using evidence gathered during SATRC investigations in subsequent prosecutions.[104] If the SATRC type process was accommodated, a state could argue that it is investigating a matter with a view to granting amnesty rather than prosecuting, before an investigation regarding whether or not to prosecute has even occurred. Upon these grounds, a more restrictive approach is warranted.

---

95. *See id.* (explaining that paragraph (b) expressly discusses situations where investigations have been conducted and the State has decided not to prosecute, and the meaning of this Paragraph is dependent on Paragraph (a) which deems cases inadmissible if there is an investigation or prosecution).

96. *Id.* at 208.

97. Robinson, *supra* note 65, at 500.

98. *See* DRAZAN DJUKIC, TRANSITIONAL JUSTICE AND THE ICC: IN THE "INTERESTS OF JUSTICE"? 22 (2006), *available at* http://www.prix-henry-dunant.org/sites/prixhd/doc/2007_Drazan_Djukic.pdf.

99. Llewellyn, *supra* note 92, at 210-11.

100. Stahn, *supra* note 93, at 711-12.

101. *See* Seibert-Fohr, *supra* note 3, at 568 (claiming that the Rome Statute would permit case-by-case investigations, such as those done in South Africa, which result in an individualized grant of criminal impunity if offenders truthfully admit their wrongdoings).

102. Promotion of National Unity and Reconciliation Act No. 34 of 1995 Ch. 6 art. 21, (S. Afr.), *available at* http://www.fas.org/irp/world/rsa/act95_034.htm [hereinafter the SATRC Act]

103. *See NPA Prosecution Policy for Apartheid Crimes Struck Down*, ALLAFRICA.COM (Dec. 12, 2008), http://allafrica.com/stories/200812120792.html.

104. SATRC Act art. 31.

The South African example is complicated by the NPA's recent prosecution guidelines, which permit executive and prosecutorial grants of amnesty.[105] The guidelines allow perpetrators to apply for amnesty pursuant to conditions that are substantially similar to those applied by the SATRC, but which include additional factors such as whether the NPA has the resources to investigate and prosecute the matter.[106] An overly expansive construction of the term accommodating a broad executive decision would clearly be contrary to the objective of the Statute.[107] However, investigations conducted prior to grants of amnesty in such a case may not contemplate amnesty, because a grant of amnesty may be considered by the Minister of Justice following the NPA's investigation or upon the application of the accused.[108] An investigation may then still be conducted for the purpose of prosecution. Should a state incorporate amnesty decisions within the role of its NPA, such that amnesty might be an exception to the primary goal of prosecution, Article 17(1)(a) and (b) might be satisfied. This might even be the case where an application was made by a perpetrator prior to an investigation, if an investigation is nevertheless conducted. However, if the application is considered on its merits without investigation, the Prosecutor will be put in the same position as the TRC; the determination would first be whether amnesty should be granted. The existence of the amnesty policy would negate an expansive approach. Whether the guidelines withstand Article 17 is nevertheless determined by their expression of willingness.

b. Unwilling: Article 17(1) and (2)

Article 17(2) gives meaning to the term unwilling in Article 17(1)(a) and (b) by providing that the Court must consider the following: (1) whether a national decision was made for the purpose of shielding a person from criminal responsibility, (2) whether there has been an unjustified delay in proceedings which is inconsistent with an intent to bring a person to justice, and (3) whether the proceedings were not conducted independently or impartially but in a way inconsistent with an intent to bring a person to justice.[109] In interpreting the provision, the Prosecutor must consider the principles of due process recognized by international law.[110] An investigation and prosecution must be conducted genuinely,[111] and a judicial decision made, with a view to making a person criminally responsible.[112] The provision was inserted following consensus that it was necessary to "refute the presumption that a national system was handling the

105. President's Message to the National House of Parliament and the Nation on the Prosecution Policy and Directives Relating to Prosecution of Criminal Matters Arising From Conflicts of the Past, app. A, 22 (Dec. 1, 2005) (S. Afr), *available at* http://us-cdn.creamermedia.co.za/assets/articles/attachments/02475_npaprosecutionpolicy.pdf [hereinafter NPA Prosecution Policy].

106. *Id.; see also* ALLAFRICA.COM, *supra* note 103.

107. Robinson, *supra* note 65, at 496-97.

108. NPA Prosecution Policy, *supra* note 105, at 24.

109. Rome Statute of the International Criminal Court, art. 17(2), Jul. 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), *available at* http://treaties.un.org/doc/source/RecentTexts/rome-en.htm [hereinafter Rome Statute].

110. *Id.*

111. Rome Statute, art. 17 (1)(a)-(b).

112. Rome Statute, art. 25(3).

case in an adequate manner," so that states could not "easily prevent the ICC from taking jurisdiction by initiating an investigation or prosecution."[113] Some posit that the underlying purpose of the qualification is to filter *bona fide* from *mala fide* state conduct.[114] However the provision could be read more broadly, because even if a state subjectively demonstrates good faith, it may be objectively unable to achieve impartial and independent results through investigation or prosecution.[115] The requirement of "genuineness" in sub-paragraphs (1)(a) and (b) supports a broader reading.[116]

In order to determine whether a truth commission's grant of amnesty satisfies the qualification we must determine whether it "shields" a person.[117] An expansive approach requires the Prosecutor to demonstrate "a devious intent on the part of a State, contrary to its apparent actions."[118] The restrictive approach requires that shielding "must be an intended consequence [of the amnesty], whether or not there is a primary, greater intention."[119] The former position might be satisfied where an outgoing regime negotiates an amnesty, even conditional. Siebert-Fohr argues that a truth commission established to serve peace and security would demonstrate willingness because accountability may also be realized by non-judicial efforts even if they fall short of criminal prosecution.[120] This approach is flawed because the preamble calls precisely for criminal prosecution. There are other cogent reasons supporting this approach, the most compelling of which is that upon a broader approach the Pre-Trial Chamber is required to "pass judgment on the long-term political goals of a State,"[121] a decision which is not only highly difficult to make but beyond the authority of the Court.

In any event, it seems unnecessary to engage in this analysis because the ordinary meaning of the words is clear: the effective provision requires a willingness to investigate or to prosecute.[122] The grant of amnesty must ultimately fail at the prosecution stage even if it doesn't at the investigation stage because

113. Williams &. Schabas, *supra* note 58, at 610.

114. Claudia Angermaier, *The ICC and Amnesty: Can the Court Accommodate a Model of Restorative Justice?*, 1 EYES ON THE ICC 131, 144-45 (2004).

115. Holmes, *supra* note 81, at 674; *see also* Gavron, *supra* note 3, at 111 (submitting that the qualification imports a subjective element, as it is still necessary to first consider whether the state had the intention of bringing the person to justice or whether it intended to shield them from prosecution or fair punishment).

116. Gavron, *supra* note 3, at 110-11.

117. Rome Statute, art. 17(2)(a).

118. Louise Arbour & Morten Bergsmo, *Conspicuous Absence of Jurisdictional Overreach, in* REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS 67 (Herman H.A. von Hebel, Johan G. Lammers & Jolien Schukking eds., 1999).

119. Gavron, *supra* note 3, at 111; *see also* Sang Wook Daniel Han, *The International Criminal Court and National Amnesty*, 12 AUCKLAND U. L. REV. 97, 99 (2006); Roht-Arriaza, *supra* note 15, at 79.

120. Siebert-Fohr, *supra* note 3, at 571.

121. Helmut Gropengießer & Jörg Meißner, *Amnesties and the Rome Statute*, *in* 2 ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 171, 185 (Flavia Lattanzi & William A. Schabas eds., 2004).

122. Rome Statute, art. 17(1)(a)-(b).

amnesty shields a person from prosecution. One might then conclude that the intent to bring a person to justice requires a person to be investigated and, where appropriate, prosecuted. Even adopting the latter approach means that an amnesty, adopted with legitimate intent such as the "pacification and reconciliation of a society" will by default adopt the goal of shielding.[123] This is supported by the Inter-American Court on Human Rights, which found that national reconciliation is insufficient to make amnesties lawful.[124] Consequently, South Africa's "wider policy to restore social peace and reconciliation after a period of transition"[125] would not make an investigation or prosecution inadmissible. As will be further discussed in Part II of this article, amnesties granted by Uganda and Sierra Leone[126] would also fail the test of admissibility because their by-product is impunity from criminal responsibility. In the context of Uganda, MacMillan argues that it is possible to find in the present circumstances that the Amnesty Act 2000 does not shield persons from prosecution because it is used in context of a multi-pronged approach to accountability which incorporates domestic prosecutions and traditional justice mechanisms.[127] As with the South African situation, the decisive issue, however, is whether the amnesty shields the individual; the overall approach is not assessed. Even if the State seeks in good faith to achieve other legitimate goals, the foreseeable consequence of shielding can be nothing other than intentional. If we apply this reasoning to the terms "investigation," "prosecution," and "decision," an investigation conducted by a body such as a truth commission is not sufficient. To hold otherwise would mean that the Prosecutor is prevented from investigating a case where a state was investigating for the purposes of an amnesty

123. Gropengießer & Meißner, *supra* note 121, at 185.

124. *See* Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 153, 155-56 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); Velásquez Rodríguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 165 (Jul. 29, 1988); Chumbipuma Aguirre v. Peru (Barrios Altos Case), Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶¶ 42-44 (Mar. 14, 2001); Mendoza v. Uruguay (Report on the Situation of Human Rights in Uruguay), Inter-Am. Comm'n. H.R., Report No. 29/92, OEA/Ser.L/V/II.83, doc. 14, ¶¶ 26, 35, 50 (1993), *available at* http://www1.umn.edu/humanrts/cases/29-92-URUGUAY.htm; Consuelo *et al.* v. Argentina (Report on the Situation of Human Rights in Argentina), Inter-Am. Comm'n. H.R., Report No. 28/92, OEA/Ser.L/V/II.83, doc. 14, ¶¶ 32, 40, 50 (1992), *available at* http://www1.umn.edu/humanrts/cases/28-92-ARGENTINA.htm; Report on the Situation of Human Rights in El Salvador, Inter-Am. Comm'n. H.R., Report No. OEA/Ser.L/V/II.85, doc. 28 (1994), *available at* http://www1.umn.edu/humanrts/iachr/country-reports/elsalvador1994.html; X & Y v. Netherlands, App. No. 8978/80, 91 Eur. Ct. H.R. (ser. A), ¶¶ 27, 28 (1985); Streletz v. Germany, 2001-II Eur. Ct. H.R. 230, ¶ 86 (2001); Akkoç v. Turkey, 2000-X Eur. Ct. H.R. 389, ¶ 77 (2000); Bautista de Arellana v. Colombia, U.N. Human Rights Comm., Comm'n No. 563/1993, U.N. Doc. CCPR/C/55/D/563/1993, ¶¶ 8.3, 10 (1995), *available at* http://www1.umn.edu/humanrts/undocs/session55/vws56355.htm; Basilio Laureano Atachahua v. Peru, U.N. Human Rights Comm., Comm'n No. 540/1993, U.N. Doc. CCPR/C/56/D/540/1993, ¶ 10 (1996), *available at* http://www.unhcr.org/refworld/docid/3ae6b70910.html.

125. Christine Van den Wyngaert & Tom Ongena, *Ne bis in idem Principle, Including the Issue of Amnesty*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 705, 727 (Antonio Cassese et al eds., 2002).

126. Kathleen Ellen MacMillan, *The Practicability of Amnesty as a Non-Prosecutory Alternative in Post-Conflict Uganda*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 199, 204-205, 224 (2007).

127. *Id.* at 231-32.

determination, but would assume jurisdiction once the investigation was complete and amnesty was granted.

What forecloses the ability of a grant of amnesty by a truth commission to satisfy willingness is the extent to which it hinges on what "justice" means. An expansive approach incorporates restorative justice, while the restrictive approach is limited to retributive. We might find the answer in the principles of due process recognized by international law, and the objects and purposes of the Statute. While a conditional grant of amnesty requires a person to take responsibility through confession, disclosure of the truth, an apology, or financial compensation,[128] these do not import criminal responsibility because our traditional understanding of criminal responsibility entails punishment through imprisonment, community service, and/or fines.[129] If due process includes procedural as well as substantive fairness,[130] punishment is a component of due process recognized by international law. This approach is supported by the preamble, which states that the most serious crimes of concern must not go "unpunished."[131] Restorative justice cannot not be a substitute for retributive justice in any case, no matter the stage at which amnesty is granted. Therefore, amnesty does not just preclude admissibility because it shields a person from prosecution in a trial, but because it shields them from the criminal consequences of guilt, namely, punishment. Even where the current South African NPA prosecuting policy satisfies investigation and decision, amnesty does not determine a matter inadmissible because it shields a perpetrator from retributive justice.

c. Unable: Article 17(3)

Article 17(3) similarly gives meaning to "unable" by providing that the Court shall consider whether a State is unable to arrest the accused or obtain necessary evidence and testimony, or is otherwise unable to carry out its proceedings due to a total or substantial collapse or unavailability of its national judicial system.[132] Where a state grants amnesties as part of a package because the number of perpetrators makes it impossible, because it is unable to arrest the accused, or because its legal system is in a state of disarray or collapse,[133] it would be held "unable" upon a plain meaning of the word. Given the difficulty of satisfying the requirements of other key terms, it would be absurd to attempt to find ways in which an amnesty granted for these reasons would not be characterized as an indication of an inability. The South African, Sierra Leonean, and Ugandan situations demonstrate inability because the volume of perpetrators made it impossible for the states to investigate and prosecute them.

---

128. MURPHY, *supra* note 64, at 45; *see* HELENA COBBAN, AMNESTY AFTER ATROCITY? HEALING NATIONS AFTER GENOCIDE AND WAR CRIMES 71, 115, 216 (2007).

129. This is supported by treaty-based duties in international law.

130. Williams & Schabas, *supra* note 58, at 623.

131. Rome Statute of the International Criminal Court, pmbl., Jul. 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), *available at* http://treaties.un.org/doc/source/RecentTexts/rome-en.htm [hereinafter Rome Statute].

132. Rome Statute, art. 17(3).

133. Majzub, *supra* note 42, at 268.

d. Ne Bis In Idem - Trial and Court: Articles 17(1)(c) and 20

Articles 17(1)(c) and 20 preclude prosecution where the individual has been tried for the same conduct in another court and convicted or acquitted.[134] The ground is satisfied unless: (1) the trial shielded the accused from criminal responsibility, or (2) was not independent and impartial in accordance with the norms of due process and was inconsistent with an intent to bring a person to justice.[135] There are three ways in which truth and reconciliation commission processes granting amnesty fail to meet this provision.[136] First, a truth commission hearing does not comport with what we ordinarily understand as a "trial" and "court."[137] Even if we accept that the SATRC was sufficient because matters were heard before Commissioners making reasoned determinations on the basis of legislative criteria that were binding on local courts, it fails to meet the due process requirements of criminal trials.[138] While witnesses could be examined and cross-examined, the accused was not afforded the presumption of innocence and freedom from self-incrimination.[139] Rather, proceedings commenced from an assumption of guilt, and the grant of amnesty hinged on an ability to incriminate oneself and others. These requirements are contrary to fundamental rights contained in the right to a fair trial in Articles 9 and 14 of the International Covenant on Civil and Political Rights[140] and other regional instruments, such as the African Charter on Human and Peoples' Rights.[141] While the reference to "norms of due process recognized by international law" relates to independence and impartiality,[142] the

134. Rome Statute, arts. 17(1)(c), 20(1).

135. Rome Statute, art. 20(3)(a)-(b).

136. A footnote to the Preparatory Committee's draft of the Statute stated that draft article 15(1)(c) "should also address, directly or indirectly, cases in which there was a prosecution resulting in conviction or acquittal, as well as discontinuance of prosecution and possibly also pardons and amnesties" but that "[i]t was agreed that these issues would be revisited in light of further revisions to article 18." United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15 – July 17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 41, U.N. Doc. A/CONF.183/2/Add.1 (April 14, 1998), *available at* http://www.un.org/law/n9810105.pdf. The conference did not revisit the issue.

137. Van den Wyngaert & Ongena, *supra* note 125, at 727; *see also* Gavron, *supra* note 3, at 109; Dugard, *supra* note 12, at 702.

138. *See* Ziyad Motala, *The Use of the Truth Commission in South Africa as an Alternative Dispute Resolution Mechanism Versus the International Law Obligations,* 45 SANTA CLARA L. REV. 913, 924-25 (2005) (discussing independence and impartiality problems in South Africa).

139. *Id.*

140. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter the ICCPR].

141. African [Banjul] Charter on Human and Peoples' Rights, Jun. 27, 1981, 21 I.L.M. 58. Although it is arguable that these would only be relevant insofar as they are binding on the state.

142. Rome Statute of the International Criminal Court, pmbl., art. 20(3)(b), Jul. 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), *available at* http://treaties.un.org/doc/source/RecentTexts/rome-en.htm [hereinafter Rome Statute]. Article 20 contains an additional qualifier in requiring the proceedings to be conducted "independently or impartially." *Id.* These terms, which are contained in the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 (Dec.

Pre-Trial Chamber may nevertheless take these additional norms into account.[143] Second, amnesty does not meet the qualifying words of "convicted" and "acquitted." Not only does amnesty preclude a criminal trial in which a person can be convicted,[144] it can hardly be said that amnesty constitutes an "acquittal," which denotes an absence of guilt. Third, the traditional goal of the rule on double jeopardy is "to prevent the state from repeatedly prosecuting a person for offen[s]es arising out of the same incident until a conviction is obtained."[145] Given a truth and reconciliation process is neither a prosecution nor an attempt to obtain a conviction, upon a traditional approach, it would fall outside the ambit of *ne bis in idem*.

A more expansive approach encompassing truth commissions is advocated by states claiming that the restrictive approach is tainted by cultural imperialism and is therefore not truly satisfactory as a norm of due process recognized by international law.[146] This problem arises partly because treaty based rights and norms are not yet universal. Claims of cultural imperialism have some merit if the norms of due process were required to be customary. This is a hotly debated issue; how it might be resolved involves a complex analysis of custom, its role, and the participation of states in its establishment. It is tentatively posited that claims of cultural imperialism are often closely tied to claims of cultural relativism,[147] which are widely rejected on a number of grounds because the people often affected by them object. While affected perpetrators might benefit from exceptions based on cultural relativity, it cannot be said that victims would necessarily be so accepting. In any event, this issue is foreclosed by the fourth ground, which is that amnesty shields an accused from criminal responsibility and is inconsistent with the intent to bring a person to justice.

2. The Interests of Justice

Article 53 provides that the prosecutor shall initiate an investigation unless he or she determines that, when taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.[148] It also provides that the

10, 1948), and the ICCPR, ordinarily refer to courts, and require that they be "independent" of government. Motala, *supra* note 138, at 924-25. Blanket amnesties granted by the executive cannot be considered independent and impartial decisions or proceedings. It is unlikely that a body such as the TRC, albeit quasi-judicial, was sufficiently independent to satisfy these requirements.

143. Rome Statute, art. 20(3)(b).

144. Gwen Young, *Comment: Amnesty and Accountability*, 35 U.C. DAVIS L. REV. 427, 464-65, 469 (2002).

145. Majzub, *supra* note 42, at 270.

146. *See* Martha Minow, *Making History or Making Peace: When Prosecutions Should Give Way to Commissions and Peace Negotiations*, 7 J. HUM. RTS. 174 (2008) (noting that as a matter of principle, prosecutions may be preferred over TRCs).

147. *See e.g.*, Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211, 217-18 (1999).

148. Rome Statute, arts. 53(1)(c), (2)(c). Article 48 of the ICC Rules of Procedure and Evidence further require that the Prosecutor consider article 53(1) when deciding to conduct a preliminary examination of a situation.

prosecutor may decline to prosecute if, upon investigation, he or she concludes that there is no sufficient basis for a prosecution because it is not in the interests of justice, taking into account all the circumstances including the gravity of the crime, the interests of victims, the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.[149] The Prosecutor applies both an evidentiary and appropriateness test to determine whether to proceed with an investigation.[150] Whether the prosecutor can adopt an expansive approach accommodating amnesty or must adopt a restrictive and exclusive approach depends upon two issues: (1) the relevance and scope of the listed factors, including whether the interests of justice are confined to the individual or to the situation as a whole, and (2) whether those factors are exhaustive.

a. Scope of the Interests of Victims and the Role of the Perpetrator

In determining scope, the most relevant factor is the interests of victims.[151] Whether amnesties are relevant to the interests of victims depends upon whether those interests are limited to the matter at hand (i.e. the victims of the perpetrator) or to the situation (i.e. future victims). The latter interpretation includes considerations such as the extent to which prosecution might lead to further violations because it creates incentives for those indicted to avoid conflict resolution, and the extent to which alternative justice processes incorporating amnesty facilitate stability and reconciliation of communities. This expansive approach would require the Prosecutor to consider a tenuous connection between investigating and prosecuting a perpetrator of crimes and future unknown victims. The provision more logically requires that the interests of justice are limited to the matter at hand because it requires the Prosecutor to demonstrate that it is not in the interests of victims to investigate or prosecute.[152] In any event, even if a broader view is adopted, it is difficult to argue that prosecution is not in the interests of victims. In the case of actual victims, it does not presuppose an absence of other reparative benefits. In the case of future victims, it might prevent that perpetrator from committing further violations.[153] Upon the limited subset of factors, the interests of justice would not accommodate amnesty.

Whether the role of perpetrators is relevant depends upon whether the role regards their conduct in relation to the crime, their position in the organization to which they belong, or the conflict. If role is to be relevant to amnesty, the Prosecutor must be able to take a perpetrator's position into account. If a

149. Rome Statute, art. 53(2)(c). The different formulations may indicate nothing other than that the Prosecutor has more latitude to investigate a person until their role is determined and until he or she can establish who the perpetrator is. Morten Bergsmo & Pieter Kruger, *Article 53: Initiation of an Investigation, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 1065, 1072 (Otto Triffterer ed., 2d ed. 2008).

150. *See* Rome Statute, arts. 53(1)(a), 2(a) (containing the evidentiary test); Bergsmo & Kruger, *supra* note 149, at 1067.

151. The age of the perpetrator is not relevant to amnesty.

152. Rome Statute, arts. 15(1)(f), (2)(f).

153. *See* Anja Seibert-Fohr, Symposium, *Human Rights as Guiding Principles in the Context of Post Conflict Justice*, 13 MICH. ST. J. INT'L L. 179, 182 (2005) (noting that any model chosen has implications for preventing future atrocities).

perpetrator's role were relevant to amnesty, it would not be possible to adopt an entirely expansive approach that defers to all amnesties because the role in itself requires distinction between perpetrators. Role, in this regard, is relevant in one of two ways. On the one hand, if amnesty granted to an authoritative figure facilitates peace by permitting them to engage in negotiations without fear of prosecution, a less restrictive view would find it not in the interests of justice to proceed with an investigation or prosecution. The Prosecutor might take the role of the perpetrator into account by deferring to amnesties for individuals with authority to negotiate peace agreements. On the other hand, prosecuting authoritative figures might prevent them from committing further violations. The prosecutor might then prosecute only those most responsible, but not low-level perpetrators.

There is value in targeting those with authority and effective control to condone or effectuate crimes because it may provide the only deterrent: making government and rebel leaders aware of the possibility of prosecution might lead to fewer violations.[154] In Uganda, Kony's removal is vital to making the LRA ineffectual, as he "stands at the apex of the LRA structure, politically, militarily, and spiritually."[155] The situation in Sudan is more complicated because government leaders have been indicted, and instability in Darfur entrenches al-Bashir and other government leaders' positions (by preventing a unified front in the region).[156] If those indicted were arrested and successfully prosecuted, it is possible that regime change (and possible international intervention) could reduce crime and even stabilize the region.

The difficulty with this approach is that international courts and tribunals have tended to commence their investigations by focusing on lower level perpetrators in order to extract evidence to build their case against more senior officials.[157] Like the *ad hoc* tribunals, the ICC has statute-based mechanisms by which it can obtain evidence to build its case. For example, Article 93 provides that states' parties must assist the ICC with evidence gathering, including the taking of witness statements, execution of searches and seizures, and the provision of records and documents.[158] Gathering evidence necessarily relies on state support, initially proffered by Uganda, but not at all by Sudan.

How the Prosecutor and the Court might consider role can be deduced from the Appeals Chamber's decision in the *Lubanga* case.[159] While the case dealt with

154. *See* Nsongurua J. Udombana, *Pay Back Time in Sudan? Darfur in the International Criminal Court*, 13 TULSA J. COMP. & INT'L L. 1, 44 (2005) ("History has shown that the involvement of highly placed functionaries or officials of states makes the commission of most international crimes possible; it is great men, potential saints, not little men, who become merciless fanatics.")

155. Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403, 420 (2005).

156. *Al-Bashir Should be Delivered to the ICC, Editorial*, MMEGIONLINE (July 29, 2010), http://new.mmegi.bw/index.php?sid=9&aid=3774&dir=2010/July/Thursday29.

157. For example, the ICTY's first trial was against Tadić, who was a prison guard.

158. Rome Statute, art. 93(1)(b), (1)(h)-(i).

159. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-8, Decision on the Prosecutor's Application for a Warrant of Arrest, ¶ 37 (Feb. 10, 2006).

the role of the perpetrator in relation to gravity,[160] it discussed the relevant perpetrator's authority when determining the appropriateness of commencing an investigation and prosecution.[161] In considering gravity, the Pre-Trial Chamber held that the ICC's "deterrent effect would be greatest if [it] only dealt with the highest-ranking perpetrators" because they "are the ones who can most effectively prevent or stop the commission of such crimes."[162] Those "most senior leaders" could be identified by: (1) the position played by the accused; (2) their role in systemic or large-scale crimes; and (3) the role of state entities, organizations or armed groups.[163] On appeal, the Prosecutor opposed this test because he said it would:

> [I]nappropriately limit his Prosecutorial discretion and would make it impossible to investigate and prosecute perpetrators lower down the chain of command... ; the investigation and prosecution of low and mid-level perpetrators may in certain circumstances be necessary to generate evidence and build a case against the perpetrators on the highest level.[164]

He went on to argue that:

> [T]he Pre-Trial Chamber improperly placed emphasis on the authority of suspects to negotiate and sign peace agreements, and... improperly created a criterion that suspects have to be core actors in the decision-making process of policies or practices or have autonomy to change or to prevent the implementation of policies and practices.[165]

The Appeals Chamber agreed. It found that it is "more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is *per se* excluded from potentially being brought before the court,"[166] and the "capacity of individuals to prevent crimes in the field should not be implicitly or inadvertently assimilated to the preventative role of the Court more generally."[167] The Appeals

160. Gravity is relevant to admissibility at the investigation stage and the interests of justice. Rome Statute, arts. 17(1)(d), 53(1)(c), 2(c). While gravity should be interpreted the same way for both, its inclusion under article 53 ensures that the Prosecutor takes gravity into account when considering the interests of justice. So while gravity is not left entirely to the Prosecutor's discretion because it is a constituent part of article 17, it can nevertheless play a role in aspects of the Prosecutor's discretion that are subject to limited judicial review. *See* Bergsmo & Kruger, *supra* note 149, at 1071; Sharon A. Williams & William A. Schabas, *Article 17: Issues of Admissibility, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 605, 621 (Otto Triffterer ed., 2d ed. 2008) (discussing gravity).

161. Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-8, Decision on the Prosecutor's Application for a Warrant of Arrest, ¶ 37 (Feb. 10, 2006).

162. Ex parte Prosecutor, Case No. ICC-01/04, Judgment on the Prosecutor's Appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58," ¶73 (Jul. 13, 2006), http://www.icc-cpi.int/iccdocs/doc/doc183559.pdf.

163. *Id.* ¶ 56.

164. *Id.* ¶ 66.

165. *Id.* ¶ 67.

166. *Id.* ¶ 73.

167. *Id.* ¶ 74.

Chamber found that the criteria developed by the Pre-Trial Chamber ignored that "the highly variable constitutions and operations of different organizations could encourage any future perpetrators to avoid criminal responsibility before the [ICC] simply by ensuring that they are not a visible part of the high-level decision making process."[168] It emphasized that "individuals who are not at the very top of an organization may still carry a considerable influence and commit, or generate the widespread commission of, very serious crimes."[169] Consequently, the Appeals Chamber found the factors related to role identified by the Pre-Trial Chamber were "not necessarily directly related to gravity in article 17(1)(d)."[170]

The Prosecutor and the Court were concerned that: (1) the authority and influence of individuals is highly variable and may not be determined by ranking within an organization or in a situation, and (2) regard to role in an organization or conflict would detract from the preventative and punitive goals of the Court.[171] Even though the decision concerned gravity, these principles are highly pertinent to the scope and relevance of role more generally. The case indicates that not only the Prosecutor, but also the Court, will adopt the more restrictive approach; that is, that role relates to the crime rather than the perpetrator's authority and influence.[172] Adopting a middle road, where only amnesty for those most responsible is upheld, is not a viable option.

b. Other Factors

While subject to debate, the Prosecutor may take into account other grounds at both the investigation and prosecution stages. In determining whether to investigate, the Prosecutor must consider whether he has substantial reasons to believe investigation would not serve the interests of justice, even when taking into account the gravity of the crime and the interests of victims.[173] Additional factors are required to determine whether the Prosecutor can demonstrate substantial reasons.[174] Article 53(2)(c) adopts a more straightforward approach in its use of the word "including." Additional gaps in Article 53 lend support to a broad discretion to consider the additional political and social factors identified above.[175]

---

168. *Id.* ¶ 77.

169. *Id.*

170. *Id.*

171. *Id.*

172. It is notable that, in the Al Bashir case, the Pre-Trial Chamber found that it "neither has the power to review, nor is responsible for, the Prosecution's assessment that, under the current circumstances in Sudan, the initiation of a case against Omar Al Bashir and three alleged commanders of organized armed groups would not be detrimental to the interests of justice." Prosecutor v. Omar Hassan Ahmad al-Bashir, Case No. ICC-01/05-01/09, Decision on Prosecution's Application for Warrant of Arrest for Omar Hassan Ahmad al-Bashir, ¶ 15 (Mar. 4, 2009).

173. Rome Statute of the International Criminal Court, arts. 53(1)(c), 2(c), Jul. 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), *available at* http://treaties.un.org/doc/source/RecentTexts/rome-en.htm. [hereinafter Rome Statute].

174. According to Bergsmo & Kruger, the word "[shall] does not give the Prosecutor room for arbitrary decision making if he or she assesses the preliminary information as providing a reasonable basis on which to proceed under the Statute." Bergsmo & Kruger, *supra* note 149, at 1068.

175. Stahn, *supra* note 93, at 719-20.

The factors that may be taken into account depend upon what we mean by justice. There are three ways in which we might define it: (1) as a term of law limited to retributive justice (as per article 17); (2) as a term of law which has been broadened by state practice to incorporate peace building, reconciliation, and reparation; or (3) where law has not been broadened by state practice, as a term incorporating legal, political, and social factors.[176] The first and most restrictive view would limit justice to retributive justice. As noted in the introduction, the second approach is unclear as a matter of customary international law. The third and expansive approach leaves scope for amnesties to be accommodated.[177]

Many scholars put forward grounds supporting an expansive view.[178] According to Ohlin, "it is difficult to think of a factor that would not be relevant."[179] Gropengießer and Meißner concur, arguing that the interests of justice incorporate more than "just criminali[z]ation of an offence, because the circumstances of the offence, the perpetrator, and the victim can be outweighed by other factors not related to wrongfulness and guilt."[180] According to their interpretation, justice incorporates "a peaceful society."[181] Bourdon notes that the statute drafters "wished... to give 'carte blanche' to the Prosecutor to take a decision which is quite clearly entirely political, namely a decision in the course of which he would have to weigh the requirement of peace and reconciliation on the one hand against the need for justice on the other."[182] Goldstone and Fritz agree that "few would aver that [justice] is demanding in the sense that it is always retributive."[183] According to these scholars, the expansive approach allows the Prosecutor to consider broader goals such as amnesty's contribution to effecting

176. Rome Statute, art. 17.

177. According to Gavron, which ground a court adopts might be dependent on whether a civil rather than common law approach is adopted. Gavron, *supra* note 3, at 110. Given international courts and tribunals adopt a combination of civil and common law approaches, it is difficult to say which approach will be influential.

178. However, few of these argue that an expansive view is justified. *See* Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801, 803 (2006); Elizabeth M. Evenson, Note, *Truth and Justice in Sierra Leone: Coordination Between Commission and Court,* 104 COLUM. L. REV. 730, 733 (2004); Robert Gomez, *Transitional States, The ICC, and Amnesties: Establishing an Advisory Commission,* 3 Eyes on the ICC 57 (2006); Philipp Kastner, *The ICC in Darfur – Savior or Spoiler?* 14 ILSA J. INT'L & COMP. L. 145, 166-67 (2007); Majzub, *supra* note 42 at 249; Minow, *supra* note 146, at 175; Newman, *supra* note 6, at 322; Scharf, *supra* note 58 at 350; Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible*?, 43 VA. J. INT'L L. 173, 183-84 (2002); Charles Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT'L L. 284, 313 (2007).

179. Ohlin, *supra* note 36, at 188.

180. Gropengießer & Meißner, *supra* note 121, at 193.

181. *Id.*

182. William Bourdon, *Amnesty*, CRIMES OF WAR A-Z GUIDE, http://www.crimesofwar.org/thebook/amnesty.html (last visited Jan. 9, 2011). The problem with this approach is that it is circular; it distinguishes reconciliation from justice such that the interests of justice, upon a literal interpretation, exclude reconciliation.

183. Richard Goldstone & Nicole Fritz, *The ICC Prosecutor's Unprecedented Powers,* 13 LEIDEN J. INT'L L. 655, 662 (2000).

conflict resolution, reconciling communities, eliciting truth about and causes of the conflict, in addition to a need for certainty and stability (post-conflict) to maintain the rule of law.

Many others opt for the more restrictive approach.[184] While ICC's Office of the Prosecutor's Policy Paper on the Interests of Justice dealt with amnesty in passing, it comprehensively set out the grounds for adopting a more restrictive approach.[185] The Prosecutor submits that justice contributes to peace, which he reinforces with the statement made by the Secretary General of the United Nations that "[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives."[186] Discretion is to be guided by the objects and purposes of the Statute, "namely the prevention of serious crimes of concern to the international community through ending impunity" and the guarantee of "lasting respect for and enforcement of international justice."[187] The Prosecutor's conclusion is buttressed by the consistent trend in the last ten to fifteen years of imposing a duty on states to prosecute, which indicates that the pursuit of justice is not a question of whether we agree or disagree in moral or practical terms, but a matter of the law.[188] The policy is explicit that the ICC's justice mandate (i.e. to prosecute) must be carried out independently and that, for all other matters involving the interaction of humanitarian, security, political, development, and justice elements, the OTP will "work constructively with and respect the mandates of those engaged in other areas."[189] While the interests of justice accommodate "crime prevention and security[,]... the broader matter of international peace and security is not the responsibility of the Prosecutor" but that of the Security Council.[190] Factors which might then be taken into account in this restrictive approach would include those already identified by the objects of the statute, such as the prevention of impunity. The Prosecutor might then decide it is not in the interests of justice to proceed where the victims have already obtained some form of reparation, the perpetrator is a low-level offender who might have committed a small number of violations, investigation and prosecution of the matter will not extract evidence that might be useful in cases against more senior figures, and refraining from prosecution will not contribute to widespread impunity and lawlessness.

Before going on to consider how the Security Council and the situations in four countries affect the application of these approaches, there are three restrictions on Prosecutorial discretion that impact additional factors and might be taken into account. First, while it is desirable to accommodate all other relevant factors, it is necessary to exclude factors that are explicitly or impliedly taken into account by

184. For example, *see* Roth, *supra* note 41, at 765; Gareth Evans, cited in the OTP's Newsletter, *supra* note 40, at 5.

185. OTP Policy Paper, *supra* note 31, at 1.

186. *Id.* at 8.

187. *Id.* at 1, 4.

188. *Id.* at 4.

189. *Id.* at 8.

190. *Id.* at 8-9.

the interests of victims and the role of the perpetrator. These would include consideration of the Prosecutor's impact upon potential future victims, i.e. the possibility that prosecution might lead to further violations, and whether the perpetrator might be in a position to effect peace negotiations. Further, the factors must demonstrate that it is *not* in the interests of justice to investigate or prosecute. Second, because of the explicit phrase "under this Statute" in the chapeau of Article 53(1), when making decisions the Prosecutor must take into account the Statute's preambular objectives of ensuring that the most serious crimes do not go unpunished, effective prosecution is ensured, and ICC prosecutions are complementary to national criminal jurisdiction, put an end to impunity, and guarantee lasting respect for the enforcement of *international* justice.[191] What justice might mean is justice in the international rather than domestic sense; according to the weight of state practice, international justice generally requires criminal prosecution and punishment. Third, Articles 53(1)(c) and 2(c) adopt a higher burden of proof at both the investigation and prosecution stage.[192] The chapeau of Article 53(1) requires the Prosecutor to have a reasonable basis to refrain from investigating.[193] However, reasonable basis upon investigation is raised to reasonable grounds at the arrest warrant stage (Article 58) and substantial reasons and sufficient basis at the confirmation of indictment stage (Article 53(1)(c) and 2(c) respectively).[194] On their ordinary meaning, substantial and sufficient require more than "reasonable."[195] The Prosecutor must have more than suspicion that a prosecution (irrespective of whether amnesty had been granted) would impact upon peace negotiations.[196] Fourth, and as discussed in relation to the interests of victims, the factors should be limited to matters "directly bearing on the case itself," that is, the individual matter rather than the broad situation.[197] This might be supported by the substantial reasons test, because a more expansive approach would require a considerable amount of speculation regarding tenuous connections between potential victims and the effects of investigation and prosecution. Individualization is consistent with the scope of the other factors that the Prosecutor may take into account including the role and age of the perpetrator, and the gravity of the crime, which are necessarily individual in nature. This

191. The final paragraph of the Preamble provides that states resolve to "guarantee lasting respect for and the enforcement of international justice." Rome Statute of the International Criminal Court, pmbl., Jul. 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), *available at* http://treaties.un.org/doc/source/RecentTexts/rome-en.htm [hereinafter Rome Statute]. It is of no relevance that this phrase is not in the chapeau of article 53(2) because the Prosecutor must have already considered the objects of the statute in terms of the interests of justice at the investigation stage.

192. *See* Prosecutor v. Omar Hassan Ahmad al-Bashir, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir, ¶¶ 8-9 (Mar. 4, 2009) (Judge Ušacka Dissenting); *and* Prosecutor v. Omar Hassan Ahmad al-Bashir, Case No. ICC-02/05-01/09-OA, Judgment on the appeal of the Prosecutor against the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad al-Bashir," ¶ 30 (Feb. 3, 2010).

193. Rome Statute, arts. 15(3), 15(6), 53(1).

194. Rome Statute, art. 53(2).

195. Bergsmo & Kruger, *supra* note 149, at 1069.

196. *Id.* at 1071-72.

197. Gavron, *supra* note 3, at 110.

limitation alone could exclude amnesty from consideration because it requires the Prosecutor to consider the impact of prosecution of one individual on the peace process, rather than the impact of failing to give deference to national amnesties more generally.

C. The Security Council

The Security Council may request deferral of any investigation or prosecution into situations or of individuals for twelve months, irrespective of the method by which the ICC exercises jurisdiction.[198] It may do so under two circumstances: (1) when it has issued a resolution pursuant to Chapter VII of the UN Charter, and (2) where "deferral is consistent with the purpose and principles of the United Nations with respect to maintaining international peace and security, resolving threatening situations in conformity with principles of justice and international law, and promoting respect for human rights and fundamental freedoms under Article 24 of the UN Charter."[199] While each deferral may only extend for twelve months, there is no limit to the number of times it can be renewed;[200] it could defer indefinitely provided there is political willingness within the Security Council. Nevertheless, Chapter VII of the UN Charter limits the Security Council as the deferral must be justified on the grounds of peace and/or security.[201] When a situation has stabilized, and peace is seemingly achieved, the Security Council would lose its power to defer.

Some argue that the referral power in Article 13 nevertheless gives the Security Council greater scope to limit jurisdiction by allowing it to impose conditions on referrals of situations, and thereby allowing it to "insulate domestic amnesty arrangements from the reach of the ICC."[202] However, this view is unwarranted. Even if the phrase "acting under Chapter VII" in Article 13 could be interpreted to afford the Security Council a broad power, the drafting history justifies a restrictive view. The first draft put forward by the International Law Commission (ILC) in 1994 provided that the ICC could not exercise jurisdiction over a situation where the Security Council was dealing with it as a threat to peace or security, unless the Security Council issued a resolution.[203] Some ILC members opposed the provision on the basis that it was inappropriate that a political decision of another forum could prevent the Court from operating.[204] Investigations and prosecutions upon referral or *propio motu* were introduced and the Security

198. Rome Statute, art. 16.

199. *See* Scharf, *supra* note 58, at 369 (referring to U.N. Charter, arts. 24, 39, para. 1).

200. Rome Statute, art. 16.

201. The Security Council may only issue a resolution when the matter constitutes a threat to the peace, a breach of the peace, or an act of aggression. *See* U.N. Charter art. 39.

202. David Scheffer, *Staying the course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 90 (2002); *see also* Dan Sarooshi, *The Peace and Justice Paradox: The International Criminal Court and the UN Security Council, in* THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 95, 97 (Dominic McGoldrick, Peter Rowe, and Eric Donnelly eds., 2004).

203. Morten Bergsmo & Jelena Pejić, *Article 16: Deferral of Investigation or Prosecution, in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 595, 595 (Otto Triffterer ed., 2d ed. 2008).

204. *Id.* at 596.

Council's power was restricted to 12-month deferrals.[205]

Whether the Security Council would exercise its deferral power on the basis of amnesty is likely to depend upon the means by which the ICC came to exercise jurisdiction. It is difficult to reconcile deferral with a prior referral by the Security Council, such as in the case of Darfur, because referral assumes that exercising international criminal jurisdiction contributes to peace.[206] It is also unlikely that the Security Council would defer a matter where a state had referred the situation, unless that state made a subsequent request for it to do so. There are few obvious constraints impeding Security Council intervention in the case of a *propio motu* investigation[207] other than a desire to maintain the perception of prosecutorial independence.

While the Security Council has been willing over the last two decades to intervene in conflicts that will fall within the ICC's jurisdiction on the basis that they are a threat to peace and security,[208] the threshold might be such that the power would very rarely be used[209] in general, let alone for amnesty. Moreover, it is unlikely that the Security Council would vote for repeated and indefinite deferrals affecting the long-term ability of the Court to exercise jurisdiction. The consequence of a Security Council deferral is, at least in the short-term, a political one. It might add legitimacy to amnesties as a tool for ensuring peace and security, and strengthen the position of advocates of amnesty. However, in the face of eventual prosecution, the political impact is unlikely to lead to a customary norm in favor of amnesty, particularly given the debate regarding amnesties for serious crimes is more concerned with conditions imposed on the amnesties rather than on permission or prohibition *per se*.[210]

If the Security Council required deferral, the Prosecutor could challenge the resolution in the Pre-Trial Chamber. It is arguable that the Court would not be constrained by a Security Council resolution because it retains *competence de la competence*: the competence to determine its own jurisdiction over *rationae loci* and *rationae personae*.[211] It is not a subsidiary body. Rather, it "wrest[s] some powers from the [Security Council]."[212] If this were the case, the decision whether to uphold an amnesty turns on: (1) whether the Security Council has jurisdiction to

205. *Id.* at 597.

206. *Id.* at 599.

207. *But see* Han, *supra* note 119, at 101.

208. Gavron, *supra* note 3, at 109.

209. *Id.*

210. *See* discussion *infra* Part III.

211. Rome Statute of the International Criminal Court, art. 19(1), Jul. 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), *available at* http://treaties.un.org/doc/source/RecentTexts/rome-en.htm; *see also* Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 6 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Scharf, *supra* note 58, at 369 (arguing that the *Tadić* case "suggests that the ICC could assert that it has authority to independently assess whether these two requirements are met.").

212. Udombana, *supra* note 154, at 6. Parties opposed to the initial draft provision argued that it "infringed on the judicial independence of the court," and/or that that the International Court of Justice was not subject to similar controls. *See* Bergsmo & Pejić, *supra* note 204, at 596.

exercise its powers, and (2) whether it has done so in a way consistent with the purposes and principles of the UN Charter.

In regards to the first, it is debatable whether the Pre-Trial Chamber has the competence to determine the existence of a threat to peace or an act of aggression, as these are primarily political determinations.[213] States have conferred primary responsibility to the Security Council for the maintenance of peace and security.[214] According to Bergsmo, the ICC Statute does not and could not weaken the Council's ability to fulfill its obligations under the UN Charter; rather, the Court becomes a tool for maintaining peace and security.[215] While seemingly inconsistent with the independence of the Court, as a matter of constitutional order, authority to assess threats to peace and security could be an inappropriate extension of power in determining admissibility.[216] This is not to say that support for a residual power to determine whether the Security Council resolution is consistent with the purposes and principles of the UN isn't warranted. The *competence de la competence* of international judicial institutions to review Security Council resolutions was upheld in the International Criminal Tribunal for the Former Yugoslavia's (ICTY) *Tadić* case,[217] and the International Court of Justice's *Namibia, Wall*, and *Serbia* cases.[218] The Court's power of review would be limited to assessing its own jurisdiction,[219] and the extent to which a Security Council resolution complies with article 16 of the Rome Statute,[220] such as to determine

213. In regard to aggression, the Pre-Trial Chamber has not been authorized to determine an act of aggression as a matter of criminal culpability because states have not yet agreed on its definition; it therefore remains an essentially political rather than legal determination.

214. U.N. Charter arts. 24, 39.

215. Morten Bergsmo, *Occasional Remarks on Certain State Concerns About the Jurisdictional Reach of the International Criminal Court, and their Possible Implications for their Relationship Between the Court and the Security Council*, 69 NORDIC J. OF INT'L L. 87, 113 (2000).

216. Ntoubandi argues that the ICJ nevertheless is competent to determine a dispute between the ICC and the Security Council regarding the existence of a threat to peace or security. NTOUBANDI, *supra* note 11, at 206.

217. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ¶¶ 29, 30 (Oct. 2, 1995).

218. In *Tadić*, the ICTY found the power "implicit in the notion of adjudication itself." *Id.* ¶ 18. Although not reviewing resolutions directed at it, the ICJ used its power in the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J 16, 35, ¶¶ 66-67 (June 21); and in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 91, ¶ 212 (Feb. 26). *See* Sarooshi, *supra* note 203, at 114. The European Court of Justice, the Human Rights Committee and the United Kingdom House of Lords have also adopted various approaches to adjudicating Security Council Resolutions ranging from interventionist to deferent: Kadi & Al Barakaat Int'l Found. v. Council of the European Union & Comm'n of the European Comty., 2008 Eur. Ct. H. R. I-06351 (2008); Sayadi & Vinck v. Belgium, CCPR/C/94/D/1472/2006, Application to have names removed from the Consolidated List of the United Nations Sanctions Committe (U.N. Human Rights Committee Dec. 29, 2008); R (on the application of al-Jedda) v. Secretary of State for Defence, [2007] UKHL 58; Behrami v. France and Saramati v. France, Germany & Norway, Joined Cases 71412/01 & 78166/01, Eur. Ct. H. R. (2007), *available at* http://graduateinstitute.ch/faculty/clapham/hrdoc/docs/ECHRBehrami.doc.

219. Sarooshi, *supra* note 203, at 115.

220. *Id.* at 98-99; *see also* Rome Statute of the International Criminal Court, art. 42, Jul. 17, 1998,

whether it constitutes "an abuse of authority... or [an] obvious and grave deficiency."[221] Determining an abuse of process or grave deficiency would allow the Court to find that the resolution was unfounded because it was clearly outside Security Council power. The Court could also find that the resolution was inconsistent with the purposes and principles of the UN as required by Article 24, paragraph 2 of the UN Charter,[222] where the Security Council attempted to resolve a threatening situation in a way that is inconsistent with "justice and international law,"[223] a legal rather than political determination. This would require an assessment of the status of amnesties under international law.[224] It is arguable that the Court can find a resolution invalid if it does not take into account the *jus cogens* character of an obligation or a duty to prosecute.[225]

How this issue is resolved may still depend upon the international constitutional order, the hierarchical status between member states, the Security Council, and the ICC. According to Gropengießer and Meißner, any findings by the Court would be binding on ratifying states since they have subjected themselves to its authority.[226] However, states are also bound by Security Council resolutions pursuant to Article 103 of the UN Charter, which provides that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."[227] Security Council resolutions have a hierarchical supremacy over international treaties.[228]

One view is that, to the extent that a resolution would require a state to take or not take action, it would only bind that member state and not the ICC, which has a distinct legal personality.[229] The Security Council cannot operate beyond its own powers to require the ICC to act inconsistently with its own treaty obligations. The court retains authority to determine whether Article 16 was complied with[230]

2187 U.N.T.S. 90 (entered into force July 1, 2002), *available at* http://treaties.un.org/doc/source/RecentTexts/rome-en.htm [hereinafter Rome Statute]; *see also* the discussion of article 53 of the Rome Statute below.

221. Gropengießer & Meißner, *supra* note 121, at 191.

222. *See* Rome Statute, art. 16 (requiring that the Security Council act in accordance with Chapter VII of the U.N. Charter, which in turn requires it to comply with the purposes and principles of the UN laid out in article 24 of the U.N. Charter).

223. *See* U.N. Charter art. 24, para. 2; *see also* U.N. Charter pmbl.

224. Roht-Arriaza, *supra* note 15, at 80.

225. Gropengießer & Meißner, *supra* note 121, at 191.

226. *Id.*

227. U.N. Charter art. 103; *see* Bergsmo & Pejić, *supra* note 204, at 596 (noting that in the context of complete Security Council control over the jurisdiction of the ICC, a proposed preambular "savings clause" to ensure the Charter was paramount was rejected).

228. R (on the application of al-Jedda) v. Sec'y of State for Defence, [2007] UKHL 58.

229. Sarooshi, *supra* note 203, at 106; *see also* Rome Statute, art. 48(2) (requiring member States to carry out decisions of the Security Council "directly and through their action in the appropriate international agencies of which they are members"); Matthew Happold, *Darfur, The Security Council, and the International Criminal Court*, 55 INT'L & COMP. L.Q. 226, 233 (2006).

230. Sarooshi, *supra* note 203, at 106-07.

because neither member State obligations nor Security Council Resolutions could alter its treaty-based obligations.[231]

The alternate view is put forward by Gropengießer and Meißner, who argue that member states cannot contract out of the UN Charter and Security Council obligations by creating an international organization, and that any such international organization is indirectly bound by the obligations of its member states.[232] That resolutions are directed at the ICC rather than member states might be resolved by Cassese who described an analogous institution, the ICTY, as a "giant without arms and legs – it needs artificial limbs to walk and work. And those artificial limbs are state authorities."[233] The ICC becomes a conglomeration of member states. Sarooshi adds that the retention of Security Council "veto" rights supports the retention of Security Council discretion because states could merely have required a referral without a Chapter VII resolution.[234] That referral required such a resolution could indicate an intention to provide the Security Council with authority over the ICC. This is nevertheless resolved by accepting that the Court has the authority to determine whether the Security Council acted in excess of its power because as a judicial body, it is distinguished from member states.[235] The ICC fulfills a judicial function in an international separation of powers, and the Security Council the executive.[236] Member states will be bound by court decisions because the resolution would not be lawful and would not withstand Article 103 of the UN Charter.

Whether the Pre-Trial Chamber will adopt a cautious approach is yet to be seen; the paradox is that, while politicization might threaten the ICC's legitimacy, it needs political backing to maintain it. Nevertheless, as Ohlin notes, it might be "highly unlikely that the [ICC] will be staffed by sitting judges who are inclined to take the conservative legal view that the Court – an independent judicial body – must bow to determinations made by the Security Council, an explicitly political legal body."[237]

D. Summary

If the Prosecutor defers to amnesties granted by truth commissions in terms of admissibility, he must find that they satisfy two things: (1) the terms investigation and decision, or (2) the requirement of *ne bis in idem*.[238] In either case, they must

231. Kastner, *supra* note 179, at 153.

232. Gropengießer & Meißner, *supra* note 121, at 189-90; *see also* Lipscomb, *supra* note 25, at 201-02.

233. Antonio Cassese, *On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 13 (1998).

234. Sarooshi, *supra* note 203, at 100-101.

235. *Id.* at 106-107, 113-14.

236. *But see* Stefan Talmon, *The Security Council As World Legislature*, 99 AM. J. INT'L L. 175, 175, 177 (2005) (stating that the Security Council acts as a quasi-legislative body).

237. Ohlin, *supra* note 36, at 194.

238. Rome Statute of the International Criminal Court, arts. 17, 20, Jul. 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002), *available at* http://treaties.un.org/doc/source/RecentTexts/rome-en.htm [hereinafter Rome Statute]; *see* Han, *supra* note 119, at 98.

also demonstrate a willingness to bring a perpetrator to justice.[239] The first ground is arguable if investigation and decision do not require prosecution to be the objective of investigation (albeit unlikely given the intersection of investigation and prosecution in the statute). The second ground, *ne bis in idem*, is likely to fail largely because a truth commission does not have the power to convict or acquit. Even if either of those grounds were satisfied, a conditional amnesty granted by a truth commission will not satisfy admissibility because amnesty cannot do anything other than shield a perpetrator from prosecution and from retributive justice. The only avenue open to the Prosecutor to defer to amnesty is to find that it is in the interests of justice because: (1) justice is a term of law which has been broadened by state practice to incorporate peace building, reconciliation, and reparation; or (2) justice is a term incorporating legal, political, and social factors.[240] How the Prosecutor or the Pre-Trial Chamber might decide the latter could be informed by assessing the functional and structural significance of Security Council power. The residual deferral power of the Security Council indicates that the ICC's role is to, as contended by Gareth Evans, interpret its *rationae personae* as a purely legal matter to the exclusion of world, regional, or domestic politics.[241] The Security Council retains the power to trump ICC jurisdiction for a determinate period where policy matters prevail.[242]

II. CASE STUDIES

In order to consider whether the Prosecutor can or should adopt an expansive view of the interests of justice, it is necessary to place the framework outlined in context by examining the situations of Darfur and Uganda, which are currently subject to ICC jurisdiction, and Sierra Leone and South Africa, which offered amnesties in conjunction with domestic or international prosecution.

A. Darfur

The conflicts plaguing the South, West (Darfur), and East of Sudan since the 1980's evolved out of increasing marginalization of periphery communities from the centralized government led by General Omar al-Bashir.[243] Al-Bashir's military dictatorship following seizure of power in 1989 neglected periphery communities and exploited the cleavage between farmers and herdsman by abolishing tribal land allocation and the governing structure; it imposed government appointed administrators and politicized the divide between Africans and Arabs.[244] The

239. *See* Rome Statute, art. 17(2) (defining unwillingness on the part of a State); *see also* Han, *supra* note 119, at 98.

240. *See* Gropengießer & Meißner, *supra* note 121, at 192-94; Roht, *supra* note 15, at 81; *see also* Ohlin, *supra* note 36, at 198-99.

241. OTP's Newsletter, *supra* note 40, at 5.

242. *See* Bergsmo & Pejić, *supra* note 204, at 598 ("[T]he Security Council's deferral power confirms its decisive role in dealing with situations where the requirements of peace and justice seem to be in conflict."); *see also* Han, *supra* note 119, at 100.

243. *See* OMER ISMAIL & MAGGIE FICK, DARFUR REBELS 101, THE ENOUGH PROJECT (Jan. 2009), *available at* http://www.enoughproject.org/files/publications/Darfur%20Rebels%20101.pdf.

244. Kastner, *supra* note 179, at 156-57 ("[Arabs and Africans] have intermarried in the past and . . . are all Muslim and mostly speak Arabic"); Lipscomb, *supra* note 25, at 188-89; Peper A. Nyaba, *The*

simmering conflict in Darfur erupted in April 2003 when the rebel groups, the Sudanese Liberation Army/Movement (SLA/M), and later the Justice and Equality Movement (JEM), attacked government forces.[245] When the government failed to halt the insurrection it recruited mercenaries from other countries[246] and re-armed, trained, and funded the Arab militia group, the Janjaweed (literally 'devils on horseback'), and partly incorporated them into the army through the Popular Defense Force.[247] The Janjaweed, allegedly upon government orders, targeted the civilian populations of the Fur, Zaghawa, and Masalit tribes to prevent them from joining or supporting the SLA/M and JEM.[248] International crimes constituting crimes against humanity and war crimes[249] - including genocide, persecution, murder, rape, burning and pillaging of villages, disappearances, torture, the forced recruitment of child soldiers, and attacks on peacekeepers, humanitarian forces,[250] and internally displaced persons (IDPs) within IDP camps[251] - were allegedly committed by government or government backed actors. In May 2004, the Sudanese government established the National Commission of Inquiry (National Commission) to investigate alleged violations of human rights by armed groups in Darfur, which reported that all parties committed crimes, but that the numbers of persons killed was exaggerated, and that rape and crimes of sexual violence were not widespread or systemic.[252] It recommended judicial investigation of specific incidents and a committee to investigate property losses.[253]

The international community was slow to respond. It initially turned a blind eye to Darfur with the expectation that Sudan's demonstration of good faith and resolution of the North-South conflict would serve as a precursor and model for peace.[254] Despite invoking Chapter VII of the UN Charter,[255] deference to state

---

Grassroots Peace Making in South Sudan – A resort to an Indigenous African Justice System, 8(1) E. AFR. J. PEACE HUM. RTS. 97, 99 (2002).

245. Christopher D. Totten & Nicholas Tyler, *Arguing for an Integrated Approach to Resolving the Crisis in Darfur: the Challenges of Complementarity, Enforcement, and Related Issues in the International Criminal Court*, 98(3) J. CRIM. L. & CRIMINOLOGY 1069, 1083 (2008); Udombana, *supra* note 154, at 5-6.

246. Kastner, *supra* note 179, at 157.

247. *Id.* at 158-60; Udombana, *supra* note 154, at 6-7.

248. Kastner, *supra* note 179, at 159.

249. Lipscomb, *supra* note 25, at 185.

250. Heather Cash, *Security Council Resolution 1593 and Conflicting Principles of International Law: How the Future of the International Criminal Court is at Stake*, 45 BRANDEIS L.J. 573, 575 (2007); Robert Cryer, *Sudan, Resolution 1593, and International Criminal Justice*, 19(1) LEIDEN J. INT'L L. 195, 198 (2006); Udombana, *supra* note 154, at 6.

251. *See* Cryer, *supra* note 252, at 198 (stating 1.65 million remain displaced in camps in Sudan, and two million crossed into refugee camps in neighboring Chad); *see also* Lipscomb, *supra* note 25, at 187.

252. Int'l Comm'n of Inquiry on Darfur, *Report to the United Nations Secretary General pursuant to Security Council Resolution 1546 of 18 September 2004*, ¶¶ 456, 461, U.N. DOC. S/2005/60 (Jan. 25, 2005), *available at* http://www.un.org/News/dh/sudan/com_inq_darfur.pdf [hereinafter Int'l Comm'n of Inquiry on Darfur].

253. *Id.* ¶ 461.

254. Lipscomb, *supra* note 25, at 191-92; Kastner, *supra* note 179, at 161.

255. Cryer, *supra* note 252, at 199; *see also* S.C. Res., U.N. Doc. S/RES/1556 (July 30, 2004).

sovereignty and ongoing economic interests meant the Security Council only provided for a limited arms embargo that failed to include the government, and therefore, the Janjaweed, but did not impose economic sanctions or support intervention on humanitarian grounds.[256] When these measures were largely ineffective,[257] it established a Commission of Inquiry,[258] which recommended that the Security Council refer the matter to the ICC on the basis that prosecution outside of the *locus delicti* "might ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions."[259] The impossibility of domestic trials, it reasoned, was demonstrated by the insufficient findings of the Sudanese National Commission of Inquiry, which lacked impartiality because it was under pressure to present a view favorable to the government.[260] The Security Council referred the matter to the ICC in March 2005.[261] On June 6th, the Prosecutor opened an investigation into the situation, noting that it would "form part of a collective effort, complementing African Union and other initiatives [including traditional African mechanisms] to end the violence in Darfur and to promote justice."[262]

In response to the referral, the Sudanese government created the Darfur Special Criminal Court to prosecute crimes against humanity in June 2005.[263] The ICC Prosecutor indicated that he would monitor its role,[264] but it soon became apparent that the Court would not meet the test of genuineness.[265]

The unwillingness of the Sudanese government to genuinely resolve the situation was further demonstrated by the Darfur Peace Agreement negotiated by the Sudanese government in May 2006 in Abuja.[266] The agreement failed largely because the government insisted that the Comprehensive Peace Agreement for the North-South conflict define the boundaries of the Darfur agreement, which left little room for negotiation and indicated that the government held on to the

256. Kastner, *supra* note 179, at 162-63; *see also* Lipscomb, *supra* note 25, at 192 (stating that ongoing economic interests include oil interests (of three members) and arms deals by four of the permanent members of the Security Council).

257. Kastner, *supra* note 179, at 162-63.

258. Cryer, *supra* note 252, at 200; *see also* S.C. Res. 1564, ¶ 12, U.N. DOC. S/RES/1564 (Sept. 18, 2004).

259. Cryer, *supra* note 252, at 201, 203.

260. Int'l Comm'n of Inquiry on Darfur, *supra* note 254, at ¶ 462.

261. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

262. Press Release, ICC, The Prosecutor of the ICC opens investigations in Darfur, ICC-OTP-0606-104 (June 6, 2005), *available at* http://www.icc-cpi.int/NR/exeres/31F3684F-43BC-4D5E-9E0A-A6A8DAC308EB.htm.

263. Totten & Tyler, *supra* note 247, at 1096.

264. Luis Moreno-Ocampo, Second Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593, 2-3 (Dec. 13, 2005), *available at* http://www2.icc-cpi.int/NR/rdonlyres/2CFC1123-B4DF-4FEB-BEF4-52E0CAC8AA79/0/LMO_UNSC_ReportB_En.pdf; *see also* Cryer, *supra* note 252, at 220 (quoting Luis Moreno-Ocampo).

265. *See id.* at 5-6. As of Spring 2007, the court had prosecuted only thirteen low level offenders for crimes not of the "same gravity or magnitude as the crimes charged in the [ICC Prosecutor's indictments]." Totten & Tyler, *supra* note 247, at 1096.

266. Kastner, *supra* note 179, at 163.

possibility of a military victory.[267] As a result the JEM and some factions of the SLA (which had splintered by then) did not sign it,[268] which the government used as a justification to attack them.[269] The Prosecutor consequently obtained arrests warrants for Ahmad Harun,[270] Ali Kushayb,[271] and al-Bashir on multiple counts of crimes against humanity, two counts of war crimes, and genocide.[272] Despite the arrest warrants, al-Bashir and his party were re-elected in 2010 amidst claims of electoral fraud.[273]

Two key factors hinder peace in Darfur. First, there are few clear lines dividing the various groups involved in the conflict. The Darfur agreement led to infighting in the rebel groups, and division between them and the Darfurian population.[274] Some Arab tribes remained neutral or supported the government for strategic reasons and some have fought amongst themselves over land.[275] There are accounts of Janjaweed fighters switching sides and attacking government forces, possibly for fear of being used as scapegoats by them.[276] The interchange and division between groups supports the finding that the divide is a political rather than an ethnic one. Second, the Darfur situation cannot be isolated from the conflicts in the east and south of Sudan that were not subject to referral by the Security Council.[277] The peace agreements to which these conflicts are subject also exclude significant sections of society located in the periphery which have been

267. Sarah M. H. Nouwen, *Sudan's Divided (and Divisive?) Peace Agreement*, 19 HAGUE Y.B. INT'L L.113, 117 (2006).

268. Kastner, *supra* note 179, at 163.

269. Nouwen, *supra* note 269, at 117.

270. Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-al-Rahman, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun (Apr. 27, 2007), http://www.icc-cpi.int/iccdocs/doc/doc279813.PDF.

271. Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Al Abd-al-Rahman, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb (Apr. 27, 2007), http://www.icc-cpi.int/iccdocs/doc/doc279858.PDF. Harun is the former Minister of State for the Interior of the Government of Sudan and Minister of State for Humanitarian Affairs of Sudan, and Ali Kushayb alleged leader of the Janjaweed.

272. Prosecutor v. Omar Hassan Ahmad al-Bashir, Warrant of Arrest for Omar Hassan Ahmad al-Bashir, Case No. ICC-02/05-01/09, Public Document Warrant of Arrest for Omar Hassan Ahmad Al Bashir (Mar. 4, 2009), http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf. On February 3, 2010, the Appeals Chamber overturned the decision of the Pre-trial Chamber to exclude the charge of genocide. Prosecutor v. Omar Hassan Ahmad al-Bashir, Case No. ICC-02/05-01/09-OA, Judgment on Appeal of the Prosecutor against the "Decision on the Prosecution's Application for Warrant of Arrest Against Omar Hassan Ahmad al-Bashir" (Feb. 3, 2010).

273. Jeffrey Gettleman, *Bashir Wins Election as Sudan Edges Towards Split*, N.Y. TIMES, Apr. 26, 2010, http://www.nytimes.com/2010/04/27/world/africa/27sudan.html?scp=3&sq=sudan%20election&st=cse; *Rigged Elections in Darfur and the Consequences of a Probable NCP Victory in Sudan*, Africa Briefing N°72, INTERNATIONAL CRISIS GROUP (Mar. 30, 2010), http://www.crisisgroup.org/en/regions/africa/horn-of-africa/sudan/b072-rigged-elections-in-darfur-and-the-consequences-of-a-probable-ncp-victory-in-sudan.aspx.

274. Kastner, *supra* note 179, at 163; Nouwen, *supra* note 269, at 118.

275. Kastner, *supra* note 179, at 160.

276. Cash, *supra* note 252, at 575; Kastner, *supra* note 179, at 164.

277. Nouwen, *supra* note 269, at 123; *see also* Cryer, *supra* note 252, at 197.

marginalized, exploited, and subject to the "divide and rule" policies of the Sudanese government.[278] Comprehensive peace in Sudan requires much more than peace in Darfur. It is convincingly posited by some that what is required in Sudan is regime change,[279] a goal which was not discussed in negotiations. The indictment had positive and negative effects on the conflict in Darfur. On the one hand, it put international pressure on al-Bashir and the Sudanese government and reinforced the norm that no one is above the law, whether incumbent head of state or not. On the other, it served to ensure al-Bashir would do everything he could to maintain power to avoid arrest. The UN Special Envoy for Sudan argued that the Security Council should consider the impact that an arrest warrant might have on the implementation of North-South Peace Agreement of 2005.[280] The African Union, the Arab League, and China called on the Security Council to intervene, arguing that an arrest warrant would complicate the peace process in Sudan and that "the need for justice should not override the need for peace."[281] Costa Rica's Security Council representative, Jorge Urdina, responded that the peace and justice debate is a "false dilemma," and that the Security Council "supports peace and justice" through referring the case to the ICC.[282] The Security Council declined to vote on the matter, and an arrest warrant was issued on March 4th, 2009.[283] In response, al-Bashir suspended the operation of aid groups, leaving many Darfurians and IDPs without access to food, water, or health care services,[284] and there were subsequent reports of attacks on foreign aid workers.[285] The arrest warrants also had the effect of drumming up the support of the local population, although, notably, only in Khartoum.[286] The conflict was complicated by a dispute between Sudan and Chad in which each side accused the other of "aiding rebels to topple their respective governments."[287] An agreement to "normalize relations" signed between the respective governments in Doha in May 2009 was

278. Nouwen, *supra* note 269, at 119.

279. *See* Nouwen, *supra* note 269.

280. *See* Marlise Simons & Neil MacFarquhar, *Court Orders Arrest Warrant for Sudan's Leader*, N.Y. TIMES, Mar. 4, 2009, http://www.nytimes.com/2009/03/05/world/africa/05court.html.

281. *Arrest warrant draws Sudan scorn,* BBC ONLINE, Mar. 5, 2009, http://news.bbc.co.uk/2/hi/africa/7924982.stm.

282. *Sudan Warns of Ramifications if al-Bashir Arrested*, THAINDIAN NEWS, Feb. 5, 2009, http://www.thaindian.com/newsportal/world-news/sudan-warns-of-ramifications-if-al-bashir-arrested_100151716.html.

283. *Court Orders Arrest Warrant for Sudan's Leader*, N.Y. TIMES, Mar. 4, 2009, http://www.nytimes.com/2009/03/05/world/africa/05court.html.

284. *UN Pleads with Sudan Over Aid Ban*, BBC NEWS, Mar. 5, 2009, http://news.bbc.co.uk/2/hi/africa/7925509.stm.

285. Sarah El Deeb, *Aid Groups in Darfur Weigh Future After Kidnapping*, MAIL AND GUARDIAN ONLINE, Mar. 15, 2009, http://www.mg.co.za/article/2009-03-15-aid-groups-in-darfur-weigh-future-after-kidnapping.

286. Peter Martell, *Warrant Sparks Anger in Khartoum,* BBC ONLINE, Mar. 4, 2009, http://news.bbc.co.uk/2/hi/africa/7924324.stm; *Arrest Warrant Draws Sudan Scorn,* BBC ONLINE, Mar. 5, 2009, http://news.bbc.co.uk/2/hi/africa/7924982.stm.

287. Louis Charbonneau, *Sudan, Chad Trade Accusations of Aiding Rebels*, MAIL AND GUARDIAN ONLINE, May 9, 2009, http://www.mg.co.za/article/2009-05-09-sudan-chad-trade-accusations-of-aiding-rebels.

subsequently breached;[288] collapse of the agreement would serve to complicate and exacerbate the conflict in Darfur.

B. Uganda

Uganda has a long history of repression. British Colonial rule was followed by Milton Obote's dictatorial rule from 1962, Major-General Idi Amin's military rule from 1971, and a return to Obote rule in 1980.[289] The rigged elections returning Obote to power sparked a six-year civil war between Acholi forces in the north (representing the government) and the National Resistance Army led by Yoweri Kaguta Museveni in the south.[290] In a military coup in 1986, Museveni gained control of the capital.[291] In 1996, he banned political parties, and the one-party system was extended by referendum in 2000.[292] Following the 1986 coup, Joseph Kony formed the Lord's Resistance Army (LRA) to fight the Museveni led government,[293] and from its Sudanese base, started targeting the local population in northern Uganda.[294] Its members allegedly committed crimes against humanity and war crimes, including abduction, murder, rape, attacks on IDP camps, torture, forcible relocation, and child recruitment and enslavement.[295] The conflict caused the death of around 100,000 civilians and the displacement of up to two million.[296] The LRA does not have a popular base of support because it targets civilians, and abducts and conscripts children.[297] According to some sources, the LRA leadership contains around 150 to 200 commanders, with the remaining 1000 to 3000 members consisting of abducted children.[298]

In 2000 the Ugandan government passed the *Amnesty Act* in an attempt to abate the conflict.[299] Blanket amnesty was granted to those engaged in "war or

288. *Id.*

289. O'Shea, *supra* note 11, at 39.

290. *Id.*

291. *Id.*; *see also* Cecily Rose, *Looking Beyond Amnesty and Traditional Justice Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations*, 28 B.C. THIRD WORLD L.J. 345, 348 (2008).

292. O'Shea, *supra* note 11, at 40.

293. MURPHY, *supra* note 64, at 2-3.

294. Akhavan, *supra* note 155, at 406-07; William W. Burke-White & Scott Kaplan, *Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation, in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 80 (Carsten Stahn & Göran Sluiter Eds., 2009). The conflict was complicated by Sudan's support of the LRA and Uganda's support of SLA/M. MacMillan, *supra* note 126, at 202. While government support of rebel forces purportedly ceased subject to a bilateral agreement in 2002, the conflicts in both states did not abate. Rose, *supra* note 293, at 349. A joint Sudanese-Ugandan Operation "Iron Fist" purportedly made matters worse "when the LRA returned to northern Uganda for retaliatory and food-seeking attacks on the civilian population." MURPHY, *supra* note 64, at 21-22.

295. Burke-White & Kaplan, *supra* note 296, at 80.

296. Press Release, Security Council, Security Council Presidential Statement Demands Release of Women, Children by Lord's Resistance Army, Expeditious Conclusion of Peace Process, U.N. Press Release SC/8869 (Nov. 16, 2006).

297. Akhavan, *supra* note 155, at 407; Rose, *supra* note 294, at 349.

298. Rose, *supra* note 293, at 349.

299. Amnesty Act 2000 (Uganda); *see also* Rose, *supra* note 293, at 353. President Museveni had proclaimed general amnesties prior to this. O'Shea, *supra* note 11, at 39.

armed rebellion" against the government for acts committed between January 16th, 1986 and the expiry of the Act.[300] Amnesty prevents criminal[301] prosecution for all offences provided the participant reports to the authorities, renounces and abandons involvement in the rebellion, and surrenders their weapons.[302] An Amnesty Committee was established to "consider and promote appropriate reconciliation mechanisms in the affected areas," "promote dialogue and reconciliation within the spirit of [the] Act," "monitor progra[ms] of demobilization, reintegration[,] and resettlement of 'reporters,'" and "co-ordinate a progra[m] of sensitization of the general public."[303] The Committee was neither required nor empowered to investigate any conduct for which an amnesty is granted.[304] The Act was generally supported by the population and by non-government organizations and various states as a mechanism for reconciliation.[305] It resulted in around 21,000 reporters surrendering arms and renouncing the LRA,[306] but failed to attract high-level commanders.[307] It therefore failed to achieve its primary preambular objectives of facilitating peace and democracy[308] because the structure and mandate of the LRA remained intact, and violence continued after a short period of abatement.[309]

In December 2003, President Museveni referred the situation to the ICC.[310] The ICC issued arrest warrants for Joseph Kony and four other senior figures, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and the now deceased Raska Lukwiay,[311] on multiple counts of crimes against humanity and war crimes.[312] The

300. Amnesty Act 2000 § 3 (Uganda).

301. O'Shea, *supra* note 11, at 41.

302. Amnesty Act 2000 §§ 4(1)(a)-(c) (Uganda); *see also* Rose, *supra* note 293, at 353.

303. Amnesty Act 2000 §§ 9(a)-(d) (Uganda); O'Shea, *supra* note 11, at 42.

304. MURPHY, *supra* note 64, at 21.

305. Akhavan, *supra* note 155, at 409; Rose, *supra* note 293, at 353.

306. This number is as of December 2006. Rose, *supra* note 293, at 354.

307. Akhavan, *supra* note 155, at 410.

308. The democracy sought was nevertheless a "particular brand of democracy" that would maintain Museveni's power. O'Shea, *supra* note 11, at 40.

309. Akhavan, *supra* note 155, at 409. This may be due, in part, to the limitations of the amnesty process, which include limited ability to reintegrate combatants into the community, targeting of reporters by the LRA, and poor conditions in IDP camps (such that reporters returned to combat). Rose, *supra* note 293, at 357-58.

310. MacMillan, *supra* note 126, at 205. The Ugandan government referral of only LRA crimes was heavily criticized. The ICC did not limit its jurisdiction to the LRA and has conducted investigations into the violations allegedly committed by the Ugandan People's Defense Forces. Despite initial protests, as far as is possible to ascertain the Ugandan government has not attempted to prevent it from doing so. *See* Akhavan, *supra* note 155, at 411; MacMillan, *supra* note 126, at 203-04; MURPHY, *supra* note 64, at 3; O'Shea, *supra* note 11, at 39-41.

311. Each respectively alleged: Commander-in-Chief of the LRA, Vice-Chairman and Second-in-Command, Deputy Army Commander and Brigade Commander of Trinkle and Stockree Brigades, Brigade Commander of the Sinia Brigade, and alleged Deputy Army Commander.

312. *See* Prosecutor v. Joseph Kony, Case No. ICC-02/04-01/05-53, Warrant of Arrest (Jul. 8, 2005), http://www.icc-cpi.int/iccdocs/doc/doc97185.pdf (amended Sept. 27, 2005); Prosecutor v. Vincent Otti, Case No. ICC-02/04-01/05-54, Warrant of Arrest (Jul. 8, 2005), http://www.icc-cpi.int/iccdocs/doc/doc97189.pdf; Prosecutor v. Okot Odhiambo, Case No. ICC-02/04-01/05-56, Warrant of Arrest (Jul. 8, 2005), http://www.icc-cpi.int/iccdocs/doc/doc97197.pdf; Prosecutor v.

LRA allegedly responded to the indictments by burning villages and IDP camps, killing at least 337 people.[313] After issuance of arrest warrants in October 2005, the LRA attacked foreign aid workers, killing at least six people.[314] However, the UN reported that, after a period of renewed violence, matters improved.[315] The ICC Prosecutor submitted that the arrest warrants also led to an overall decrease in violence in northern Uganda:[316]

> The Court's intervention has galvanized the activities of the states concerned.... Thanks to the unity of purpose of these states, the LRA has been forced to flee its safe haven in southern Sudan and has moved its headquarters to the DRC border.
>
> As a consequence, crimes allegedly committed by the LRA in Northern Uganda have drastically decreased.... The loss of their safe haven led the LRA commanders to engage in negotiations, resulting in a cessation of hostilities agreement in August 2006.[317]

The reduction in violence, albeit swinging, was linked to the advantages the referral offered Museveni. It posed a credible threat of prosecution by raising the conflict's international profile and transferring the political and economic costs of prosecution to international actors.[318] Not only did referral and subsequent arrest warrants lead to the LRA's political and military isolation and incapacitation,[319] but resultant international pressure meant both sides had to genuinely participate in peace talks. Negotiations in Juba began on July 14th, 2006,[320] resulting in an agreement to cease hostilities that took effect on August 29th, 2006 and was revised on November 1, 2006 after renewed violence.[321]

While the arrest warrants served to compel negotiation, they were also a stumbling block because LRA was soon negotiating for a withdrawal of the arrest warrants in return for peace.[322] The Prosecutor refused to bow to pressure on the

---

Dominic Ongwen, Case No. ICC-02/04-01/05-57, Warrant of Arrest (Jul. 8, 2005), http://www.icc-cpi.int/iccdocs/doc/doc97201.pdf; Prosecutor v. Raska Lukwiya, Case No. ICC-02/04-01/05-55, Warrant of Arrest for Raska Lukwiya (Jul. 8, 2005), http://www.icc-cpi.int/iccdocs/doc/doc97193.pdf.

313. MacMillan, *supra* note 126, at 233.

314. *Id.* at 205.

315. Akhavan, *supra* note 155, at 418 (quoting U.N. Office for the Coordination of Humanitarian Affairs, Uganda 2005: Consolidated Appeals Process, 5 (Nov. 2004), *available at* http://ochadms.unog.ch/quickplace/cap/main.nsf/h_Index/CAP_2005_Uganda/$FILE/CAP_2005_Uganda_SCREEN.PDF?OpenElement).

316. Burke-White & Kaplan, *supra* note 296, at 81; Rose, *supra* note 293, at 350.

317. Luis Moreno-Ocampo, Prosecutor of the Int'l Criminal Court, Opening Remarks, Fifth Session of the Assembly of State Parties, at 2-3 (Nov. 23, 2006), *available at* http://www.icc-cpi.int/NR/rdonlyres/A0F5C933-65AC-4621-B607-C3F25D0C22B7/278557/LMO_20061123_en.pdf.

318. Burke-White & Kaplan, *supra* note 296, at 80-81. It also made support for the LRA more costly for Sudan. Akhavan, *supra* note 155, at 416-17; Burke-White & Kaplan, *supra* note 296, at 80-81.

319. Akhavan, *supra* note 155, at 404.

320. MacMillan, *supra* note 126, at 206.

321. U.N. Press Release SC/8869, *supra* note 298.

322. Burke-White & Kaplan, *supra* note 296, at 82.

basis that withdrawal was inconsistent with the Rome Statute.[323] In 2006, after initially promising immunity from ICC prosecution, Museveni supported the arrest warrants but extended the availability of amnesty for another two years.[324] When the arrest warrants were not withdrawn, Kony offered to submit cases to the domestic jurisdiction as an alternative.[325] In June 2007, the LRA and the Ugandan government agreed to a range of accountability measures, including domestic civil and criminal prosecutions, traditional justice mechanisms,[326] and a range of alternative sentences reflecting the gravity of the crimes and seeking to promote reconciliation, rehabilitation, and reparations.[327] The 2007 agreement was bolstered by further discussions in February 2008, which led to an agreement for the establishment of a "special division of the High Court of Uganda... to try individuals who are alleged to have committed serious crimes during the conflict,"[328] " planned or carried out widespread, systematic, or serious attacks directed against civilians or... committed grave breaches of the Geneva Conventions."[329] The agreement also provides that the government will examine traditional justice mechanisms and establish a truth-seeking body akin to the truth and reconciliation commissions of Sierra Leone and South Africa.[330]

While these have been significantly positive developments, settlement discussions are still ongoing and a conclusion to the conflict remains "elusive."[331] This is partly because "Kony and Otti have no serious interest in negotiations except perhaps as a means of buying time when under pressure."[332] Prosecutor Moreno-Ocampo argues that Kony strategically uses peace negotiations to avoid arrest and prosecution when he is in a weak position, and returns to violence when strengthened.[333] The commission of serious crimes therefore continues. In December and January, the LRA abducted and massacred hundreds of civilians and children.[334] In February 2009, the government launched a US backed offensive

323. *Id.* at 82-83.

324. Burke-White & Kaplan, *supra* note 296, at 104; MacMillan, *supra* note 126, at 205-06. As will be noted later, Museveni did not have the power to withdraw the referral and his only option is to bring a challenge to the arrest warrants in the Pre-Trial Chamber on the basis that the matters are inadmissible under article 17 of the Rome Statute.

325. MacMillan, *supra* note 126, at 206.

326. Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Uganda-Sudan, ¶ 4.1 (June 29, 2007), http://www.beyondjuba.org/peace_agreements/Agreement_on_Accountability_And_Reconcilition.pdf.

327. Burke-White & Kaplan, *supra* note 296, at 82-84.

328. Annexure to the Agreement on Accountability and Reconciliation, Uganda-Sudan, ¶ 7 (Feb. 19, 2008), http://www.coalitionfortheicc.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf.

329. *Id.* ¶ 14.

330. *Id.*

331. Burke-White & Kaplan, *supra* note 296, at 80.

332. Akhavan, *supra* note 155, at 417.

333. Interview with Lois Moreno-Ocampo, ICC Prosecutor, in Den Haag, Neth. (Mar. 24, 2009).

334. Press Release, Human Rights Watch, DR Congo: LRA slaughters 620 in 'Christmas Massacres' (Jan. 17, 2009), *available at* http://www.hrw.org/en/news/2009/01/17/dr-congo-lra-slaughters-620-christmas-massacres.

aiming to crush the LRA, which was hiding in northern Congo.[335] The plan backfired when the leaders escaped and the LRA splintered into small groups that went through towns "in northeastern Congo hacking, burning, shooting and clubbing to death anyone in their way."[336] Despite poor planning being responsible for many of the operation's failures, the reaction of the LRA demonstrates that neither amnesty, nor threat of prosecution, has prevented the continuing commission of atrocities.[337] The Ugandan government maintains that, since Kony refused to sign the most recent peace treaty, the only available option is a military one.[338]

C. Sierra Leone

Conflict erupted in Sierra Leone when Liberian forces, accompanied by the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and forces from Guinea, Burkina Faso, and Libya, invaded the diamond fields in the remote east of the country.[339] The resultant war was brutal. Atrocities, including mass rape, sexual slavery, forced rape of family members, child abduction, torture, killing of civilians, maiming (by cutting off arms, legs, ears, and lips), and mass displacement,[340] resulted in the physical and psychological scarring of a significant section of the population.[341] The RUF, the dominant rebel group, did not "articulate... a political agenda other than ousting successive governments."[342] It is nevertheless largely accepted that rampant corruption, centralization of government, unemployment, and "ethnocization of national policies" were causal factors in the conflict.[343]

In November 1996, the RUF and President Kabbah's Sierra Leone's Peoples Party (SLPP) signed the Abidjan Peace Accord, which provided that, in return for peace and disarmament, members of the RUF would not be prosecuted, all political prisoners would be released, and the RUF would be afforded the opportunity to transform itself into a political party with representation before domestic bodies.[344] Nevertheless, the RUF continued to perpetrate atrocities against the civilian

335. Jeffrey Gettlemen & Eric Schmitt, *U.S. Aided a Failed Plan to Rout Ugandan Rebels*, N.Y. TIMES, Feb. 7, 2009, www.nytimes.com/2009/02/07/world/africa/07congo.html?hp=&pagewanted=print.

336. *Id.*

337. Albeit that they were subject to attack and, perhaps, had the government maintained a ceasefire in favor of peace negotiations (albeit with the adverse effect of strengthening LRA forces), the volume of atrocities might have been less.

338. Gettlemen & Schmitt, *supra* note 337.

339. David Crane, *The Politics of International Criminal Law: The West African Experience – A Case Study: Operation Justice in Sierra Leone* 3 (Crimes Against Humanity Initiative Experts' Meeting, Washington University, St. Louis, Working Paper, 2009) (on file with the author).

340. Nsongurua Udombana, *Globalization of Justice and the Special Court for Sierra Leone's War Crimes*, 17 EMORY. INT'L L. REV. 55, 73-74 (2003).

341. *Id.* at 74.

342. *Id.* at 72.

343. *Id.* at 70-71.

344. Daniel. J. Macaluso, *Absolute and Free Pardon: The Effect of the Amnesty Provision in the Lomé Peace Agreement on the Jurisdiction of the Special Court for Sierra Leone*, 27 BROOK. J. INT'L L. 347, 349 (2001); Udombana, *supra* note 342, at 74-75.

population. In 1997 the AFRC staged a coup, but was ousted in 1998 by the Security Council endorsed Economic Community of West African States Monitoring Group (ECOMOG) and President Kabbah was restored to power.[345] When the government was again overthrown in 1999, Kabbah returned to the negotiation table under international pressure.[346] On July 7th, 1999, the government, the RUF and the AFRC signed the Lomé Accord.[347] It transformed the RUF into a political party whose members would be appointed to public office and cabinet.[348] It also granted Foday Sankoh, the RUF leader, an explicit pardon,[349] gave "absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them,"[350] and provided for the creation of a Truth and Reconciliation Commission (the SLTRC).[351] The agreement stated that amnesty was granted "[t]o consolidate the peace and promote the cause of national reconciliation."[352] Prior to the agreement, prosecutions and executions had taken place for actions related to the 1997 coup.[353] The RUF had therefore faced a real threat of prosecution.[354] It was clear to all parties that the RUF, and Foday Sankoh in particular, would not have signed the agreement without amnesty.[355] According to Hayner, there was local support for amnesty provided it led to cessation of violence,[356] but the international community condemned it. The Special Representative for the UN was instructed at the last minute to insert a reservation declaring that the amnesty would not apply to genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.[357] Foday Sankoh was not aware of the reservation until after he signed the document.[358]

Constraining amnesty by imposing conditions on its availability was never seriously considered.[359] The *Truth and Reconciliation Commission Act* 2000 (SLTRC Act) provided a forum for perpetrators and victims to tell their stories

345. Macaluso, *supra* note 346, at 349; Udombana, *supra* note 342, at 76-78.

346. Macaluso, *supra* note 346, at 350; Udombana, *supra* note 342, at 78.

347. Macaluso, *supra* note 346, at 350.

348. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, arts. II-V, Jul. 7, 1999, http://www.sierra-leone.org/lomeaccord.html [hereinafter Lomé Accord].

349. *Id.* at art. IX, ¶ 1.

350. *Id.* at art. IX, ¶ 2.

351. *Id.* at art. XXVI.

352. *Id.* at art. IX, ¶ 3.

353. PRISCILLA HAYNER, CENTRE FOR HUMAN DIALOGUE REPORT: NEGOTIATING PEACE IN SIERRA LEONE: CONFRONTING THE JUSTICE CHALLENGE 6-7 (2007), *available at* http://www.ictj.org/static/Africa/SierraLeone/HaynerSL1207.eng.pdf.

354. *Id.*

355. *Id.* at 13.

356. *Id.* at 7.

357. Macaluso, *supra* note 346, at 358; *see also* William A. Schabas, *Truth Commissions and Courts Working in Parallel: The Sierra Leone Experience*, 98 AM. SOC'Y INT'L L. PROC. 189, 190 (2004).

358. HAYNER, *supra* note 355, at 6.

359. *Id.* at 13-19.

without offering the carrot of amnesty.[360] The SLTRC aimed, among other things, "to address impunity,... to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered."[361] The SLTRC could "investigate all or any abuses and violations of human rights and international humanitarian law related to the armed conflict in Sierra Leone."[362]

Ongoing disputes between the parties led to a breakdown of the ceasefire, resurgence in violence, and repeated violations of the terms of the Accord.[363] When it became clear that the "RUF had no intention of allowing peace to reign in Sierra Leone and, in particular, letting the UN take control of the country's diamond-rich areas,"[364] an agreement between the United Nations and Sierra Leone,[365] ratified pursuant to the *Special Court Agreement (Ratification) Act* 2002, established the Special Court for Sierra Leone (SCSL) with a mandate to try those "who bear the greatest responsibility for serious violations of international humanitarian law and the laws of Sierra Leone."[366]

While conducting investigations, the Prosecutor of the SCSL and his team determined that it would be necessary to arrest all indictees simultaneously "because arresting the key players one at a time would be political suicide"; the indictees might rally support, return to violence, and secure their positions so as to

360. Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the special Court for Sierra Leone*, 25 FORDHAM INT'L L.J. 391, 423 (2001).

361. The Truth and Reconciliation Commission Act 2000, § 6(1) (2000) (Sierra Leone), *available at* http://www.usip.org/files/file/resources/collections/commissions/SeirraLeone-Charter.pdf.

362. Abdul Tejan-Cole, *The Complementary and Conflicting Relationship Between the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, 6 YALE HUM. RTS. & DEV. L.J. 139, 146-47 (2003).

363. Udombana, *supra* note 342, at 81.

364. *Id.* at 82.

365. Macaluso, *supra* note 346, at 352; Tejan-Cole, *supra* note 364, at 144-45.

366. Schabas, *supra* note 359, at 190; *see also* William A. Schabas, *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone*, 25 HUM. RTS. Q. 1035, 1038-40 (2003) (discussing these debates over amnesty); William A. Schabas, *Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court*, 2 J. INT'L CRIM. JUST. 1082, 1083-85 (2004) (stating that despite concurrent operation and significant overlaps in jurisdiction, neither the SLTRC Act nor the SC Statute made specific reference to the other; the Prosecutor of the SCSL, David Crane, merely indicated his intention not to use the resources of the SLTRC); *see also* Prosecutor v. Norman, Case No. SCSL-2003-08-PT, Decision on the Request of the Truth and Reconciliation Commission of Sierra Leone to conduct a public hearing with Samuel Hinga Norman, ¶¶ 10-16 (Oct. 29, 2003), *available at* http://www.sc-sl.org/scsl/Public/SCSL-03-08-Norman/SCSL-03-08-PT-049/SCSL-03-08-PT-049-I.pdf; Prosecutor v. Gbao, Case No. SCSL-04-15-PT, Appeal by the Truth and Reconciliation Commission and Accused against the Decision of Judge Bankole Thompson, Delivered on November 3, 2003 to Deny the TRC's Request to hold a public hearing with Augustine Gbao (May 7, 2004) (showing that as result, primacy was never subject to legislation or agreement and was therefore a causal factor in disputes over amnesty), *available at* http://www.sc-sl.org/scsl/Indictments/SCSL-04-15-PT%20RUF%20Indictment.pdf; *see also* Prosecutor v. Kallon, Case No. SCSL-2004-15-AR72(E), Decision to challenge jurisdiction, ¶¶ 42-44, 48-49, 61-62, 72, 84 (Mar. 13, 2004), *available at* http://www.transcrim.org/07%20SCSL%20-%202004%20-%20Kallon%20Kamara; Prosecutor v. Kondewa, Case No. SCSL-04-14-T, Judgment, ¶ 14 (Aug. 2, 2007), *available at* http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=46e123dc2&page=search.

prevent arrest.[367] The covert operation, coined "Operation Justice," involved the cooperation of several local, regional, and international actors including diplomats, the Chief of Staff of the UN peacekeeping force, and the Inspector-General of the Sierra Leone National Police.[368] The indictments and arrest warrants were sealed, and all indictees (with the exception of Charles Taylor) were arrested simultaneously on March 10th, 2003, without a shot fired.[369] While serious problems persist, including corruption, serious rule of law deficiencies, and a poor human rights record,[370] mass violence has been abated thus far and, as according to reports, the groups most responsible for the atrocities have been disabled.[371]

D. South Africa

The minority rule of the apartheid State was characterized by legalized racial discrimination of groups defined "on a territorial, residential, political, social, and economic basis" in all areas of life including land, housing, education, health, and access to services and premises.[372] The resultant conflict spanning four decades led to extensive human rights violations, including arbitrary imprisonment, forced displacement, denationalization, torture, disappearances, killings, and other human rights violations.[373] When oppression heightened in the 1970's and 1980's, the African National Congress (ANC) established Umkhonto we Sizwe (literally "spear of the nation"), a military wing engaged in guerrilla warfare.[374] The increasing public face of violence and resultant international pressure in the 1980s led the National Party to abandon movement control laws, un-ban political parties, and release political prisoners.[375] In 1990, the National Party initiated secret negotiations with ANC leader Nelson Mandela,[376] and Parliament enacted the *Indemnity Act*,[377] by which the President could pronounce oppressed persons

367. Crane, *supra* note 341, at 9-10.

368. *Id.* at 8-9.

369. *Id.* at 11-13.

370. HUMAN RIGHTS WATCH, WORLD REPORT 2009, COUNTRY SUMMARY: SIERRA LEONE 1 (Jan. 2009), *available at* http://www.hrw.org/sites/default/files/related_material/sierraleone.pdf.

371. Scott Worden & Emily Wann, *Special Court of Sierra Leone Briefing: The Taylor Trial and Lessons from Capacity-Building and Outreach*, UNITED STATES INSTITUTE OF PEACE, http://www.usip.org/publications/special-court-sierra-leone-briefing-taylor-trial-and-lessons-capacity-building-and-outreac (last visited Jan. 10, 2011).

372. Alex Boraine, *Truth and Reconciliation Commission in South Africa Amnesty: The Price of Peace, in* RETRIBUTION AND REPATRIATION IN THE TRANSITION TO DEMOCRACY 299, 300 (Jon Elster ed., 2006).

373. Motala, *supra* note 138, at 916.

374. Christopher C. Burris, *Re-examining the Prisoner of War Status of PLO Fedayeen*, 22 N.C.J. INT'L L. & COM. REG. 943, 999 - 1000 (1997).

375. Daisy M. Jenkins, *From Apartheid to Majority Rule: A Glimpse into South Africa's Journey Towards Democracy*, 13 ARIZ. J. INT'L & COMP. L. 463, 478 (1996).

376. Gavron, *supra* note 3, at 113.

377. Indemnity Act No. 35 of 1990, as amended by Indemnity Act No. 124 of 1992 (S. Afr.) (replacing Indemnity Act No. 14 of 1961 and Indemnity Act No. 13 of 1977, which granted political leaders and persons employed by the State amnesty from civil and criminal liability).

indemnified for conduct if necessary for negotiation of peace.[378] In democratic elections in 1994, the ANC gained power and Mandela was elected president.[379]

Peace negotiations gave rise to a political compromise: free and fair elections in exchange for conditional amnesty.[380] The 1993 *Interim Constitution* and the SATRC Act provided that amnesty from civil and criminal liability[381] could be granted for offenses "associated with a political objective and committed in the course of the conflicts of the past."[382] The SATRC granted amnesty to applicants that gave "a full account of what they had done and the context within which it was done," where their act was associated with a political objective.[383] Accordingly, applicants must have demonstrated that they "acted in support of a publicly known political organization, the state, or in furtherance of a *coup d'etat*."[384] While around 9,000 applications were received,[385] the posited success of the judicial stick and TRC carrot was limited by the very few applications received from government operatives.[386]

The SATRC was lauded in some quarters, and quietly accepted in others.[387] Some praised the approach as a domestic solution, based on "the African notion of ubuntu, which explicitly excludes retribution and favors restorative justice."[388] Others were more pragmatic in their support. Senior generals of the security forces warned that "dire consequences [would result] if members of those forces had to face compulsory trials and prosecutions after the election."[389] Some, like Archbishop Desmond Tutu, the SATRC Chairperson, and Justice Richard Goldstone,[390] were convinced that criminal trials like Nuremberg were not appropriate because they would have been sabotaged by security forces and right wing groups, and negotiations would have broken down.[391] In the middle of the spectrum, the UN General Assembly was silent on amnesty despite having

378. O'Shea, *supra* note 11, at 44.

379. Gavron, *supra* note 3, at 113.

380. Boraine, *supra* note 374, at 315.

381. Promotion of National Unity and Reconciliation Act No. 34 of 1995 § 20(7)(A) (S. Afr.) [hereinafter SATRC Act].

382. Gavron, *supra* note 3, at 113.

383. O'Shea, *supra* note 11, at 45.

384. SATRC Act § 20(2); *see also* O'Shea, *supra* note 11, at 43.

385. Minow, *supra* note 146, at 178 (noting that only a few hundred of these were granted amnesty).

386. Boraine, *supra* note 374, at 308; Dugard, *supra* note 15, at 1011.

387. Minow, *supra* note 146, at 179.

388. Wafula Okumu, *Human Rights in Transition Societies: The Cases of Somalia and South Africa, in* HUMAN RIGHTS AND SOCIETIES IN TRANSITION 291, 309 (Shale Horowitz & Albrecht Schnabel eds., 2004).

389. Boraine, *supra* note 374, at 302.

390. Former South African Constitutional Court Judge, Chief Prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda, and Chair of the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation.

391. Gavron, *supra* note 3, at 115; Boraine, *supra* note 374, at 302.

previously called for prosecutions.[392] There were nevertheless many who opposed amnesty, so much so that they brought an unsuccessful constitutional challenge.[393]

On the one hand, supporters of the SATRC were vindicated. According to Black, "South Africa's transition from racial authoritarianism of the apartheid era to the non-racial democratic institutions and entrenched constitutional rights of the post-1994 period is... one of the great human rights triumphs of the post-Second World War era."[394] This is undoubtedly due the significant role the SATRC played in airing dirty laundry, identifying those responsible, establishing a historical record to prevent future denials, offering a forum for victims and their families to be given a voice, and providing some form of financial reparations to those most affected by apartheid policies.[395] The success of the transition must also be attributed to the exemplary role played by senior figures such as Mandela in adopting a conciliatory, forgiving, and pragmatic position in peace negotiations.[396]

On the other hand, whether the model will play a real and lasting contribution in combating impunity in South Africa is yet to be seen. Its intention was that those who were not granted amnesty would be subject to investigation, and possibly prosecution, by the South African National Prosecuting Authority (NPA).[397] Since the close of its operations, and despite referral of around 900 cases, only a handful have been subject to investigation and prosecution, and many of those have been unsuccessful or unsatisfactory.[398] The NPA's reluctance to pursue apartheid crimes has been apparent since the completion of the SATRC's work. In 2002, then President Mbeki granted pardon to thirty-three persons who fought against

---

392. G.A. Res. 48/159, ¶ 3, U.N. Doc. A/RES/48/159 (Dec. 20, 1993); Gavron, *supra* note 3, at 115.

393. *AZAPO v. President of the Republic of South Africa* 1996 (4) SA 671 (CC) at 36 (S. Afr.); Boraine, *supra* note 374, at 308; Gavron, *supra* note 3, at 114 (noting critiques of the model, including that it did not differentiate between perpetration of and resistance to apartheid or "acknowledge the essential criminality of apartheid," and that its temporal jurisdiction was too limited).

394. Wafula Okumu, *supra* note 390, at 291, 303 (citing David Black, *The Long and Winding Road: International Norms and Domestic Political Change in South Africa, in* THE POWER OF HUMAN RIGHTS – INTERNATIONAL NORMS AND DOMESTIC CHANGE (Thomas Risse et al eds., 1999)).

395. Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 84 (2008).

396. Jenkins, *supra* note 377, at 490.

397. Ward Ferdinandusse, *The Grave Breaches Regime in the Geneva Conventions: A Reassessment Sixty Years On*, 7 J. INT'L CRIM. JUST. 723, 733 (2009).

398. INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE, RESEARCH BRIEF: COUNTRY CASE STUDIES ON THE USE OF PARDONS 13 (Nov. 2008), *available at* http://www.ictj.org/static/Americas/ICTJ_Research_Brief-Country_case_studies_on_the_use_of_pardons.pdf. In the recent prosecution of Adrian Vlok, the former Minister of Law and Order, the NPA agreed to a plea bargain in which Vlok was awarded a five year suspended sentence, despite that his Department played a central role in the formulation of policies that constituted, or led to the commission of, human rights violations. It is concerning that they bowed to a lenient sentence in one of the only recent cases to be brought against a political leader, who had confessed to approving the poisoning of former church leader Frank Chikane. One of the only successful prosecutions against a senior official took place in 1996 against Eugene de Kock, a police Colonel and Commander of the notorious Vlakplaas hit squad. *De Kock Trial to Conclude on Wednesday*, S. AFRICAN PRESS ASS'N (Oct. 29, 1996), http://www.doj.gov.za/trc/media/1996/9610/s961029m.htm.

apartheid, some of whom had either applied for amnesty and been rejected or been convicted of murder.[399] In 2005, the NPA issued guidelines for prosecuting apartheid era offenses, which allow the Minister to grant amnesty, without publication, under specified conditions.[400] While the factors that may be taken into account are substantially similar to those considered by the TRC, the Minister may also consider whether the NPA has the resources to investigate and prosecute the matter.[401] In a successful Constitutional Court challenge to the policy[402] the South African High Court found that it amounted to an unlawful "copy or duplication" of the TRC amnesty process[403] because the NPA is under a constitutional obligation to prosecute when there is sufficient evidence to do so, many of the criteria were irrelevant to deciding whether to prosecute,[404] and the policy infringed victims' constitutional rights, such as the rights to life, dignity, freedom, equality, and security of the person.[405] Despite the finding, the NPA's inability to prosecute is likely to be decisive. In a conference held by the Institute for Justice and Reconciliation in March 2006, Dr. J. P. Pretorius, an Advocate in the Priority Crimes Litigation Unit in the Department of Justice, stated that the NPA did not have investigators dedicated to apartheid era offenses and it was likely that not more than half a dozen cases would be prosecuted.[406]

The success of amnesty must be considered in the current context of mass violent crime, not connected to conflict but to a range of political, social, and

399. INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE, RESEARCH BRIEF, COUNTRY CASE STUDIES ON THE USE OF PARDONS 13 (Nov. 2008) *available at* http://www.ictj.org/static/Americas/ICTJ_Research_Brief-Country_case_studies_on_the_use_of_pardons.pdf; Llewellyn, *supra* note 92, at 214 (citing Joanna Ross, *South African Amnesty Raises Storm*, BBC NEWS ONLINE, May 19, 2002, http://news.bbc.co.uk/2/hi/africa/1997262.stm).

400. *NPA Prosecution Policy*, *supra* note 105, ¶ 3.

401. *NPA Prosecution Policy*, *supra* note 105, ¶ 4; *see also NPA Prosecution Policy for Apartheid Crimes Struck Down*, LEGAL RESOURCES CENTRE (Dec. 12, 2008), http://www.lrc.org.za/press-releases/261-2008-12-12-npa-prosecution-policy-for-apartheid-crimes-struck-down.

402. *Nkadimeng v. Nat'l Dir. of Public Prosecutions* 2008 ZAGPHC 422 ¶ 15.5.4 (S. Afr.).

403. *Id.* ¶ 15.4.3.1.

404. *Id.* ¶¶ 15.4.4, 15.5.2, 15.5.3.

405. *See id.* ¶ 36. The applicants' challenge included arguments pursuant to international law, however the court declined deal with these in its judgment. The NPA's application for leave to appeal was dismissed.in May 2009. *Nkadimeng v. Nat'l Dir. of Public Prosecutions,* Case 32079/07, Application for leave to Appeal, Jan. 8, 2009 (S. Afr.); NPA Prosecution Policy for Apartheid Crimes: State's application for leave to appeal, Centre for the Study of Violence and Reconciliation (May 4, 2009), *available at* http://www.csvr.org.za/index.php?option=com_content&task=view&id=1092&Itemid=206. In a separate but related matter, the Constitutional Court found that a 2007 policy on presidential pardons was unconstitutional because it infringed the right to victim participation. *Albutt v. Centre for the Study of Violence and Reconciliation* [2010] ZACC 4 (S. Afr.); *Judgment on Special Pardons A Significant Victory for Victims' Rights*, S. AFRICAN HISTORY ARCHIVE (Feb. 23, 2010), http://www.saha.org.za/news/2010/February/press_statement_judgment_on_special_pardons_a_significant_victory_for_victims_rights.htm.

406. Dr J. P. Pretorius, Advocate, National Prosecuting Authority, *The Truth and Reconciliation Commission: Ten years On*, Cape Town, South Africa, (Apr. 20, 2006) (conference information available with the author); *see also* Shaun Benton, Prosecutor Complains of Lack of Investigators Over Apartheid-Era Crimes, allAfrica.com, Apr. 20, 2006, *available at* Westlaw, 4/20/06 allAfrica.com 17:32:06.

economic factors.[407] Should some of the resources directed to the SATRC have been directed to building the NPA's capacity to combat the conduct that has led to one of the highest crime rates in the world? Did impunity breed impunity? Such conclusions must be acknowledged as crude and unsophisticated. The TRC can be credited with assisting to prevent lapse into civil war and some individuals' moves from helplessness and persecution to relative hope and equality. However the crudeness of the conclusion serves the point: do we really know what the long-term outcome and impact of amnesty is on South Africa? Can we really say it hasn't led to impunity? Can we accept that those most responsible have walked free to live what may be comfortable lives without punishment?

III. AMNESTIES AND THE INTERESTS OF JUSTICE

International law has not yet accommodated the political and social goals underpinning amnesties and truth commissions in justice as a term of law. Amnesties can only be upheld if the Prosecutor finds that the interests of justice do and should accommodate political and social factors, and that there are substantial reasons or a sufficient basis to show that they will contribute to peace and reconcile the community. Should legal and policy reasons dictate an expansive or restrictive approach? Is it the ICC's role to facilitate peace, or is it merely to punish wrongdoing and prevent impunity?

A. The ICC and Politics: Adopting an Expansive Approach

The factors that may be taken into account under the expansive view may be restricted by the inherent limitations in article 53 of the ICC Statute: the negative nature of the burden and its application to the individual case rather than the situation as a whole. In the interests of exploring the most expansive role that the Prosecutor might adopt, the first two grounds apply only to the limited view, but the remainder apply to all grounds that support conditional amnesties accompanied by truth commissions.

Amnesty is a Persuasive Bargaining Chip

As demonstrated in South Africa, amnesty can be a useful bargaining chip in peace negotiations.[408] The Prosecutor may deter perpetrators from disarming or contribute to the resumption of hostilities at the post-conflict stage, and therefore the commission of more serious crimes, because he poses a real threat of arrest.[409] Deferring to amnesty might force leaders to make a choice between survival and peace. While amnesty is not presently offered in Darfur, some posit that the possibility of deterring violence in Darfur is now a "specious hope."[410] The arrest warrant for al-Bashir has led to the withdrawal of humanitarian groups and peacekeeping forces and the creation of a "nothing-to-lose" attitude among the leaders of belligerent groups has "increase[d] the incentive to ramp up the attacks

407. Graeme Simpson, *Urban Crime and Violence in South Africa, in* JUSTICE FOR CHILDREN: CHALLENGES FOR POLICY AND PRACTICE IN SUB-SAHARAN AFRICA 66, 66-69 (Celia Petty & Maggy Brown eds., 1998), *available at* http://www.csvr.org.za/wits/papers/papgsurb.htm.

408. Slye, *supra* note 179, at 198.

409. Scharf, *supra* note 58, at 342; Trumbull, *supra* note 179, at 314.

410. Kastner, *supra* note 179, at 165.

and force[d] a final resolution by eliminating [civilians and rebel groups],"[411] arguably, strengthening al-Bashir's position.[412] Uganda might support amnesty where it can be shown that indictments have stalled peace; indeed the Ugandan government attempted to persuade the Office of the Prosecutor to suspend the indictments to allow domestic judicial processes to be put in place.[413] Amnesty might expedite the transition and "decrease the probability of the continuation of human rights violations."[414]

Deferring to Amnesty Reduces Uncertainty

The restrictive approach creates uncertainty for parties to peace negotiations and results in the failure of amnesty as a bargaining chip.[415] It might become a zero sum game; greater prosecutions, less prospects for peace. Support for al-Bashir has increased since he was indicted;[416] certainly regional support has lessened support for the ICC.[417] The ICC might avoid this problem by sealing indictments and arrest warrants such as Crane did in Sierra Leone, or waiting until peace negotiations are relatively successful before investigating or prosecuting perpetrators.[418] However, over the long term it will become apparent that the ICC will not respect amnesty.[419]

Truth Commissions Advance Political Transformation

Conditional amnesty might "play a part in advancing the political transformation"[420] of States by mobilizing institutions and actors to submit to an accountability mechanism, identifying systemic causes of the conflict and actors most responsible, and making recommendations for institutional reform.[421] The identification of systemic causes and the self-examination that flows from truth commissions "provides a critical buffer against repeated abuses" by demanding "civic and social transformation needed to ensure that abuses are not repeated in

411. *Id.* at 178.

412. *See* Susanne Koelbl & Volkhard Windfuhr, *I feel completely safe*, SPIEGAL ONLINE (Mar. 22, 2010), http://www.spiegel.de/international/world/0,1518,684941,00.html; *but see As Sudanese elections near, UN voices concern over reports of harassment*, UN NEWS CENTRE, http://www.un.org/apps/news/story.asp?NewsID=34172&Cr=sudan&Cr1=election (last visited Mar. 25, 2010) (suggesting that the imminent elections will not be a fair indicator of whether this support translates into democratic support, which is doubtful).

413. Kastner, *supra* note 179, at 179.

414. Gomez, *supra* note 179, at 62.

415. Trumbull, *supra* note 179, at 314.

416. *See* Koelbl & Volkhard, *supra* note 414; *but see* UN NEWS CENTRE, *supra* note 414.

417. *See* Koelbl & Volkhard, *supra* note 414.

418. Kastner, *supra* note 179, at 175 (asking whether the "international community should continue to provide strong support for Prosecutor and only consider asking the court to suspend its activity when and if the LRA leaders are begging to implement a fair settlement'") (quoting INTERNATIONAL CRISIS GROUP, AFRICA REPORT NO. 124, NORTHERN UGANDA: SEIZING THE OPPORTUNITY FOR PEACE 15 (Apr. 26, 2007), *available at* http://www.crisisgroup.org/home/index.cfm?id=4791).

419. Although the impact on the second option might be reduced because it might provide perpetrators with at least some hope that only the possibility of amnesty is worth the risk. In any event, the benefits of complementarity would also be lost.

420. TEITEL, *supra* note 23, at 51.

421. Evenson, *supra* note 179, at 752-53. The benefits of conducting domestic trials may also translate to such a process, including increased access for victims and to information.

the future"[422] and "building a culture of respect for human rights."[423] There is little doubt that international prosecutions fail to fulfill these goals on the domestic level, if at all.[424] Moreover, their deterrence capacity, which "is unclear at best,"[425] has a limited ability to address collective consciousness that often leads to the justification of unlawful conduct on a systemic or mass scale.[426] Prosecutions can hinder national reconciliation by isolating supporters of former regimes and pushing them into hostile subcultures.[427] The Ugandan model does not advance political transformation because of its unconditional nature, its failure to ensure victim participation, and its lack of investigatory procedure, while the SATRC provides a more useful basis from which to develop a conditional amnesty model.[428]

Mass Atrocities, the Interests of Victims, and Recognition of Guilt

In situations in which mass atrocities have occurred, domestic and international justice systems cannot investigate and punish all perpetrators.[429] Truth Commissions offer an alternative that fulfills a number of goals. They provide victims with a forum within which to tell their story, confront perpetrators, and obtain reparation. They expose crimes, identify perpetrators, and reveal more facts than the handful of prosecutions that might be conducted,[430] and therefore facilitate public condemnation, respect for victims' rights, and recognition of guilt.[431] Moreover, they ensure that perpetrators are accountable in some way[432] and victims are afforded some redress through confrontation, participation, and reparation.

Development of a Norm

Deferring to grants of amnesty would contribute, by default, to the crystallization of a norm of international law in which amnesty would be a recognized exception to a duty to prosecute provided it meets particular criteria.[433]

---

422. *Id.* at 753.

423. Minow, *supra* note 146, at 180; *see also* Newman, *supra* note 6, at 305.

424. Minow, *supra* note 146, at 177.

425. *Id.*

426. ERVIN STAUB, THE ROOTS OF EVIL: THE ORIGINS OF GENOCIDE AND OTHER GROUP VIOLENCE 67 (1992).

427. Majzub, *supra* note 42, at 251.

428. *See* Young, *supra* note 144, at 465, 469 (suggesting criteria and conditions upon which a model could be based).

429. *See* Newman, *supra* note 6, at 306; *see also* Majzub, *supra* note 42, at 251-52 (noting the difficulty of prosecuting in situations in which perpetrators destroy evidence, which occurred on a mass scale in South Africa).

430. Blumenson, *supra* note 179, at 862-63.

431. *Id.* at 863, 870.

432. *Id.* at 869; *see also* James L. Gibson, *Truth Justice, and Reconciliation: Judging the Fairness of Amnesty in South Africa,* 46 AM. J. POL. SCI. 540, 544 (2002) (quoting Justice Richard Goldstone who stated that "amnesty applicants 'suffered a very real punishment' by the shame they suffered following their public confessions").

433. Trumbull, *supra* note 179, at 317.

The ICC could thereby be instrumental in determining that criteria and play a lead role in ensuring that the model adopted meets the goals of justice.

State Control and Cultural Imperialism

A state is best placed to determine how justice mechanisms contribute to conflict resolution and reconciliation because the needs of different societies experiencing different conflicts will vary. Affording states latitude to determine appropriate solutions to conflicts ensures their sovereignty is not overborne and contributes to a broader notion of complementarity. Affording states latitude also ensures that application of the Rome Statute does not lead to cultural imperialism, in which western notions of criminal justice overcome more traditional and alternative accountability mechanisms more commonly adopted by non-western states. The international community's failure to defer to sovereignty in such circumstances by insisting on prosecution can be viewed as a substitute for their failure to intervene to stop the injury because it "is not worth the cost associated with military intervention."[434] On the one hand, the importance of sovereignty has lessened in the past two decades because the international community has acknowledged that infringements of human rights are of global concern.[435] However, states have failed to follow through with meaningful actions that prevent atrocities.[436] As a result, the cost of prosecution is placed on the victims and communities of the conflicted state.[437]

Facilitating Information Exchanges

If the Prosecutor deferred to amnesty, he could still prosecute those who are not granted amnesty. Truth Commissions and amnesties might facilitate prosecutions through information exchange by providing the Prosecutor with lead evidence that will assist him to target investigations and gather other information necessary to build his case.[438] They might also assist the Prosecutor to overcome language constraints and difficulties collecting local evidence.[439] While the information and evidence gathered by the SATRC could not be used as probative

434. *Id.* at 316.

435. *Id.* at 315.

436. Although states might prefer to retain their sovereignty and not wish for other states to intervene uninvited.

437. Trumbull, *supra* note 179, at 316.

438. Rome Statute of the International Criminal Court, art. 93(1), Jul. 17, 1998, 2187 U.N.T.S. 90 (providing that States are required to cooperate with the Prosecutor by taking evidence and providing records and documents, among other things) [hereinafter Rome Statute]; *see* Minow, *supra* note 146, at 179.

439. Rome Statute, art. 93 (envisaging cooperation between the ICC and the relevant state in regard to the taking of evidence, questioning of persons, and the provision of records, including official records and documents. Forensic and other evidence would also be useful to the ICC); Bruce M. MacKay, *A View from the Trenches: The Special Court for Sierra Leone – The First Year*, 35 CASE W. RES. J. INT'L L. 273, 280-81 (2003); *see also* Laura Hall & Nahal Kazemi, *Prospects for Justice and Reconciliation in Sierra Leone*, 44 HARV. INT'L L.J. 287, 289 (2003); MARIEKE WIERDA, PRISCILLA HAYNER, & PAUL VAN ZYL, EXPLORING THE RELATIONSHIP BETWEEN THE SPECIAL COURT AND THE TRUTH AND RECONCILIATION COMMISSION OF SIERRA LEONE 6 (Int'l Cent. for Transitional Justice, 2002), *available at* http://www.ictj.org/images/content/0/8/084.pdf.

evidence in prosecutions, the NPA has nevertheless been able to use that information as lead evidence.[440] This might assist the Prosecutor to expend resources more appropriately on those most responsible. [441]

B. The ICC and Law: Adopting a Restrictive Approach

Theoretically valid arguments are put forward for an expansive approach, however, a restrictive approach is justified. Given the negative burden imposed on the Prosecutor, the question to be answered is not whether it *is* in the interests of justice to prosecute, but whether it is not. Accordingly, the following grounds set out the reasons why the Prosecutor should determine that it cannot be concluded that prosecution is not in the interests of justice where an amnesty has been granted.

The Rome Statute and the Norms of International Law Do Not Conclusively Support Amnesties

Article 53 of the Rome Statute does not make reference to international norms[442] and international duties on member states to prosecute are not binding on the ICC.[443] However, the objects of the Rome Statute and international norms and duties should be taken into account in interpretation of ambiguous treaty provisions.[444] If we apply a purposive approach to the Rome Statute, it serves three primary goals: to combat impunity by prosecuting individuals for international crimes,[445] to "prevent governments from shielding perpetrators from prosecution for political reasons"[446] and, by doing so, "restore and improve regional peace and security."[447] While the last goal may be perceived as justifying amnesty where it leads to conflict resolution, the underlying presumption of the Court is that prosecution in itself contributes to peace and security, apparent in both states' rejections of immunities for heads of state or persons in official positions[448] and the Security Council's referral of the Darfur situation to the ICC.[449] If we will not permit immunities, why then would we permit amnesties? The mere establishment of the ICC and state ratification contributes to a customary duty to prosecute because it indicates that "[t]he international community...

440. *See* Thapelo Sakoana & Richard Mantu, *NPA to Prosecute Apartheid-Era Criminals*, BUA NEWS ONLINE, Jan. 24, 2006, http://www.buanews.gov.za/news/06/06012416451001.

441. *See* Trumbull, *supra* note 179, at 311.

442. *See* Rome Statute, art. 53(1) (referring to "under this statute"); *see also* Rome Statute, pmbl (recalling that it is "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes").

443. Siebert-Fohr, *supra* note 3, at 573-74; *see also* Gavron, *supra* note 3, at 108.

444. Article 31, ¶¶ 1 and 3 of the Vienna Convention provides that a treaty should be interpreted in light of its object and purpose, and that regard can be had to any relevant rules of international law applicable between the parties.

445. Gropengießer & Meißner, *supra* note 121, at 181, 183; O'Shea, *supra* note 11, at 318.

446. Llewellyn, *supra* note 92, at 204.

447. Ohlin, *supra* note 36, at 192.

448. Rome Statute, art. 27.

449. Press Release, Security Counsel, Security Counsel Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005), *available at* http://www.un.org/News/Press/docs/2005/sc8351.doc.htm.

decided that justice, in the form of prosecution, must take priority over peace and national reconciliation."[450] States' intention to send such a message is apparent in the preamble, which recalls "it is the duty of every State to exercise its criminal jurisdiction [as understood in relation to admissibility] over those responsible for international crimes."[451] Moreover, the states intending that justice meant international justice (i.e. retributive) is indicated in the preambular resolution to "guarantee lasting respect for and enforcement of international justice."[452] Ratification goes some way in dispelling claims of cultural imperialism.

Despite the Rome Statute's contribution to crystallization of a norm, and despite customary and treaty based duties to prosecute some serious crimes and other *jus cogens* norms, a norm prohibiting or permitting amnesty *per se* has not yet crystallized. Except for the SATRC, no state has adopted a conditional amnesty model with comprehensive criteria; whether a State might be partly dependent on whether it views amnesty as contrary to international law. Whether it is contrary to international law brings us back to our original question: is there a prohibition on amnesty? In regard to member states in particular, we might simply answer this question by finding that they have irrevocably "conferred the authority to exercise their criminal jurisdiction to the [ICC]."[453] This has little significance for Sudan, which is not a member state, but is relevant to Uganda, which invoked jurisdiction by referral.[454] In any event, this leads to the conclusion that the term "justice" has not yet been broadened as a matter of law by state practice to incorporate peace building, reconciliation, and reparation. The ICC might assist crystallization of a norm permitting amnesty if it finds that "justice" incorporates political and social factors. However, it should not do so for three reasons. First, according to Scharf a strong argument can be made that the Rome Statute does not incorporate procedural aspects of the Geneva Conventions or the Genocide Convention that require prosecution.[455] However, it would be incongruous for the Prosecutor to

450. Dugard, *supra* note 15, at 702; *see also* Williams & Schabas, *supra* note 58, at 561.

451. Rome Statute, preamble. While it may be argued that this, in conjunction with other preambular passages, imposes a duty to prosecute which prevents amnesty, it is inconsistent with the intention of states entering into the Statute, state practice since its adoption, and article 25 which provides that "no provision in this Statue relating to individual criminal responsibility shall affect the responsibility of States under international law." Siebert-Fohr, *supra* note 3, at 558-59 (quoting Rome Statute art. 25, ¶ 4).

452. Rome Statute, preamble. Colombia's interpretive declaration serves as a counter to this assertion, however it has no binding effect in relation to other states. United Nations Treaty Collection, Chapter XVIII Penal Matters, Rome Statute of the International Criminal Court, Declarations and Reservations, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter= 18&lang=en#EndDec (last visited Jan. 10, 2011).

453. Gropengießer & Meißner, *supra* note 121, at 182. Whether States can alter or withdraw their treaty ratification is linked to whether the Rome Statute itself imposes an obligation on states to prosecute. This is doubtful; the only reference to state duties is in the preamble. In any event, a conferral basis wrongly assumes that the jurisdiction of the ICC is absolute.

454. *See State Parties to the Rome Statute,* INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/Menus/ASP/states+parties/ (last visited Nov. 7, 2010).

455. Scharf, *supra* note 58, at 370. For reasons related to selectivity it is not feasible to constrain amnesties by subject matter.

apply a more permissive approach than that which states have agreed to,[456] or to override amnesty for crimes where a duty is imposed but not for others where it is not (i.e. crimes against humanity and war crimes). Even though the ICC applies complementarity rather than universal jurisdiction, the purpose is to retain the operation of domestic criminal justice processes where possible, not to limit ICC jurisdiction with regard to personal or subject matter jurisdiction. Second, if the ICC determines what is and what is not an appropriate amnesty model, it would in fact impinge on the role of states that are, as advocates of an expansive approach might posit, better placed to determine appropriate solutions to conflicts. Third, any such determination would have adverse legal consequences on state obligations to prosecute.[457] The Court would serve to solidify the law on amnesties when its permissibility and precise contours are still subject to debate in the international community and within states. Should states wish to permit an amnesty model, they ought not to ratify the Rome Statute on the one hand and argue for crystallization of a norm on the other. They ought, rather, to adopt explicit provisions which resolve the inter-relationship of the duties to prosecute, deference to the ICC, and grants of amnesty.

Prosecution by the ICC Facilitates a Comprehensive Approach

The ICC cannot be "a panacea for the world's ills,"[458] but neither can truth commissions nor amnesties. Adopting an expansive approach limits justice for victims because it excludes retribution. South Africa is a case in point. It is doubtful that a significant percentage of victims do not want retributive justice as well as reconciliation and reparation. Defining the interests of justice to exclude amnesty should not and does not presuppose the exclusion of alternative justice mechanisms altogether. Rather, it permits a "three pronged approach involving the ICC... truth commissions," and, where possible, national prosecutions.[459] The Prosecutor has recognized that traditional African mechanisms can achieve local reconciliation and be a complementary tool to the Court's efforts.[460] A multi-faceted approach facilitates complementarity by punishing perpetrators, promoting reconciliation, and building a comprehensive picture of the situation.[461] Prosecution by the ICC also strengthens the rule of law in national systems by compelling states to conduct domestic prosecutions, as demonstrated by the proposal of the Ugandan government to adopt a multi-layered approach involving prosecutions and traditional justice mechanisms.[462] Prosecution also prevents

456. Gropengießer & Meißner, *supra* note 121, at 193-94.

457. Siebert-Fohr, *supra* note 3, at 563.

458. Sadat, *supra* note 15, at 1034; *see* also Blumenson, *supra* note 179, at 867 ("No mechanism will ever deliver perfect justice."); Udombana, *supra* note 154, at 3 ("[I]t is wrong to mistake a particular medicine – international criminal justice – as the elixir of Africa's many ailments.").

459. MURPHY, *supra* note 64, at 52; *see also* Lipscomb, *supra* note 25, at 186; Rose, *supra* note 293, at 383; Totten & Tyler, *supra* note 247, at 1080-81.

460. Press Release, Office of the Prosecutor, Int'l Criminal Court, The Prosecutor of the ICC Opens Investigations in Darfur, ICC-OTP-0606-104 (2005), *available at* http://www.icc-cpi.int/NR/exeres/31F3684F-43BC-4D5E-9E0A-A6A8DAC308EB.htm.

461. Udombana, *supra* note 154, at 20-21.

462. Orentlicher, *supra* note 16, at 2547-48.

revisionism by state actors[463] and ensures that victims' fundamental rights under international law are not infringed.[464]

Alternative mechanisms that do not grant amnesty could most clearly operate concurrently with ICC prosecutions. Amnesty would give rise to uncertainty regarding whether a perpetrator would in fact benefit from it but, as shall be discussed below, uncertainty for perpetrators is outweighed by the uncertainty regarding recidivism.

Deferring to Amnesty Holds the ICC Hostage

If the Prosecutor refrains from prosecuting for political reasons, whether framed solely in terms of amnesty or premised on facilitating peace negotiations more generally, the ICC may be "held hostage by the likes of Kony."[465] This might set a precedent for future indictees because it provides an incentive for leaders guilty of perpetrating serious crimes to refuse to negotiate peace unless amnesty is assured. While they may do this in any event, a greater incentive is available should the possibility of amnesty be made available. This applies equally to governments negotiating or granting amnesty, because it is seldom the case that individual actors within government have not committed violations. Relying on the state in pursuit of culturally specific justice might fail to combat impunity or ensure lasting peace.

Selectivity

The Prosecutor must assess the interests of justice on a case-by-case approach;[466] a legitimate amnesty in one instance may not be so in another. Decisions turn on the information and evidence on hand and rely on inextricably interlinked factual circumstances, such as the granting of amnesty, the role and number of perpetrators, the number of victims, and whether the country is at the conflict or post-conflict stage. Moreover, one size does not fit all when considering the complexity of the "interface of international law and politics."[467] This issue was central to the inability of states to draft a provision for amnesty in the Rome Statute.[468] States had sympathy for South Africa's position, but were concerned about decisions not to prosecute by South American dictators.[469] If the Prosecutor engages in an assessment of models, it might give rise to selectivity in application of an exception to prosecution and to resultant challenges to the ICC's legitimacy. How would the Prosecutor differentiate between the case studies described? Would

463. Majzub, *supra* note 42, at 251.

464. Slye, *supra* note 179, at 191-97. According to Slye, these include the right to justice (defined as investigation, prosecution and punishment), the right to truth, the right to judicial protection, the right to reparations and the right to access to a Court. *Id.*

465. Roth, *supra* note 41, at 767. This applies to both the Security Council and the Prosecutor.

466. Sadat, *supra* note 15, at 1028.

467. Mahnoush H. Arsanjani, *The International Criminal Court and National Amnesty Laws*, 93 AM. SOC'Y INT'L L. PROC 65, 66 (1999).

468. Siebert-Fohr, *supra* note 3, at 561-62.

469. Williams & Schabas, *supra* note 58, at 617.

Ugandan perpetrators be permitted amnesty because they played a lead role in negotiations and amnesties served as a valuable bargaining tool? Or, despite that the situation was post-conflict, would South African perpetrators be permitted amnesty because of the relative merits of a model that facilitated victim participation and reparations? Deferring to political interests might compromise the independence of the ICC and politicize the pursuit of international justice because it would be required to make assessments about the value of one system over another.[470] If we move from the case studies into an international armed conflict, these concerns might be further exacerbated where one state grants amnesty, which is upheld by the Prosecutor, but another other doesn't.

Lack of Empirical Evidence

Kastner submits that one way to determine whether to defer to amnesties is to hold "individuals accountable [only] 'if the benefits of accountability over the long term are likely to outweigh the costs on the short term of prolonging an ongoing conflict.'"[471] The problem is one of ascertainment. While there are many situations in which amnesties have been granted since individual criminal liability was established as a matter of international law, there have been very few empirical studies on the long-term impact of amnesties and alternative justice mechanisms.[472] Moreover, there are competing claims regarding whether amnesties or refraining from prosecution for political reasons lead to peace and reconciliation. In regard to South Africa, Slye submits that, "even assuming amnesties contribute to short-term social stability, in the long-term they undercut efforts to establish a stable democracy that honors human rights and the rule of law" and create a culture of impunity.[473] Contrary to this position, Helena Cobban "concludes that the TRC in South Africa, granting conditional amnesties, and the absence of any individual accountability in Mozambique have delivered much better results than, for instance, international prosecutions in Rwanda."[474] Even accepting Cobban's position, comparing South Africa with Rwanda is like comparing apples and oranges. To understand the impact of alternative justice mechanisms, long-term comprehensive and contextual analysis needs to be undertaken. While it is also yet to be shown whether international prosecutions result in peace and security and entrenchment of the rule of law, it is difficult to rely on examples like South Africa to demonstrate amnesties do.

470. Roht-Arriaza, *supra* note 15, at 89.

471. Kastner, *supra* note 179, at 151-52.

472. Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMPORARY PROBLEMS 127, 144 (1996); Newman, *supra* note 6, at 301-02.

473. Slye, *supra* note 179, at 197.

474. Kastner, *supra* note 179, at 150 (referring to HELENA COBBAN, AMNESTY AFTER ATROCITY? HEALING NATIONS AFTER GENOCIDE AND WAR 194 (2007)).

The Impact of Amnesty and Indictment on the Peace Process

We might argue that amnesty encourages leaders to the negotiating table and to cease-fire. Archbishop Tutu and others argued that prosecutions in South Africa would have been sabotaged and would have led to more violence.[475] However, if we look at Sierra Leone and Uganda, this position is not always substantiated over the short or long term. Sankoh and the RUF returned to violence following grants of unconditional amnesty, and Kony and other leaders of the LRA didn't come forward to claim amnesty, even though the law permitted them to do so.[476] In Uganda, dealing with Kony has been described by Roth as "dealing with a madman."[477] There is no certainty that such leaders would seize amnesty or cease violent acts if offered it. The same might be said for indicted Sudanese leaders. The problem is that trading amnesty for peace is not always so simple. Some leaders with authority to negotiate don't accept the carrot of amnesty, and some continue to perpetrate violations despite it. The benefits of amnesty, grassroots reconciliation, rehabilitation, and reparation might still be realized if prosecution by the ICC is "sufficiently removed" to enable it to prosecute without disturbing the internal balance that amnesty may bring.[478]

What the Sudanese and Ugandan situations show us is that indictment served to bring leaders to the negotiating table. In Sudan, attempts to negotiate peace in Darfur had been deferred (with the acceptance of the international community) on the basis that resolution of the North-South conflict and implementation of its peace agreement was a necessary prerequisite.[479] On the one hand, the position acknowledged the links between the conflicts by acknowledging that there would be no resolution in one until the other was resolved. However, at the same time it served to dissociate the North-South conflict from that in Sudan by failing to recognize that the conflict in Darfur might serve to destabilize that in the south. In addition, in order to motivate the international community to act, the indictments served to provide a compelling incentive for the government to reduce its support for the Janjaweed.[480] The indictments further served to isolate rebel groups from international support and motivate them to negotiate.[481] Even the prospect of prosecuting enemies might in itself motivate leaders to negotiate.[482] The Security Council referral, and subsequent investigation by the Prosecutor, may then have been a crucial factor in the 2006 peace agreement.

475. Jonathan D. Tepperman, *Truth and Consequences*, 81 FOREIGN AFF. 128, 134 (2002).

476. Emily E. Bartholomew, *Constructing Durable Peace: Lessons from Sierra Leone*, 38 CAL. W. INT'L L.J. 117, 132-33 (2007); Kimberly Hanlon, *Peace or Justice: Now that Peace is Being Negotiated in Uganda, Will the ICC Still Pursue Justice?* 14 TULSA J. COMP. & INT'L L. 295, 296 (2007).

477. Roth, *supra* note 41, at 767.

478. Gavron, *supra* note 3, at 116.

479. Kastner, *supra* note 179, at 178.

480. *Id.* at 177-78.

481. *Id.* at 175.

482. *Id.* at 175-76.

In Uganda, the indictment of LRA leaders not only drew them to the negotiating table, but contributed to a decrease in crime.[483] While there were a number of factors that led to Kony's involvement in negotiation, the ICC served a useful role by de-legitimizing the LRA. Subsequently, it less frequently "ran off [to hide] in a game reserve in north-eastern Congo."[484] Moreover, it might serve to strengthen the domestic rule of law. As noted, the Ugandan government has sought the withdrawal of ICC indictments on the basis of admissibility; it proposes to conduct domestic criminal prosecutions of, at least, those most responsible.[485] Representatives of Kony and the LRA have agreed to participate.[486] The indictment of leaders may, if domestic processes operate in accordance with the requirements of admissibility, serve to "augment the number of national prosecutions in the future"[487] and meet the goals of complementarity.[488]

While the ability of international prosecutions to have any significant deterrent effect is doubted, if the ICC upholds grants of amnesty for those most responsible, any deterrent effect would be reduced. One can only hope that "political and military leaders will be more careful in their decisions once the Prosecutor's role has switched from a theoretical threat to a concrete Prosecutorial organ."[489]

Complexity

The case studies demonstrate the inordinate complexity involved in conflict, amnesty, and international prosecutions. In Sudan, the periphery-centre divide is complicated by a one-party system, oil revenues, Sudan's geographic expanse, shifting loyalties between rebel groups, the Janjaweed, the PDF, and government institutions and authorities, and cross-border disputes with Chad.[490] In Uganda, Kony's attempts to evade prosecution and peace by entering negotiations only when necessary to buy time,[491] and the LRA's attacks on Ugandan and Congolese civilians and retreat to the DRC,[492] make it difficult to ascertain their movements, intentions, and sincerity. Even if the Prosecutor deferred to amnesty only for those less responsible[493] for atrocities, or for those with less negotiating power, differentiating between those with *de jure* and *de facto* power is an impossible task

483. See the discussion on pages 139-142 herein.

484. Roth, *supra* note 41, at 765-66.

485. *Id.* at 775-76.

486. *Id.* at 766.

487. Kastner, *supra* note 179, at 154.

488. The Security Council reiterated this goal in Resolution 1593 when it called on states to support domestic efforts to establish the rule of law. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005) [hereinafter Resolution 1593].

489. Kastner, *supra* note 179, at 154.

490. Cash, *supra* note 252, at 575; Kastner, *supra* note 179, at 163-64; Nouwen, *supra* note 269, at 116-18.

491. Katy Glassborow, *LRA on Rampage in Congo*, HUM. RTS. TRIB., Oct. 30, 2008, http://www.humanrights-geneva.info/spip.php?article3662.

492. *Id.*

493. Despite the complexities in the South African and Sierra Leonean conflicts, they both envisaged prosecution of those most responsible (only by default in the former case).

when low level perpetrators wield the power to wage violence even if they don't have the authority to negotiate peace.[494] Establishing whether amnesty will serve the interests of justice in these contexts would therefore be extremely difficult, if not impossible.

Collective vs. Individual Justice: the Security Council and Functional Limitations

It is difficult to dismiss political considerations entirely given the Security Council's residual role in the ICC Statute and the inherent interplay of law and politics in international law. However, the temporal restriction on Security Council deferrals indicates that politics, ever-changing, are not a permanently determinative factor,[495] the appropriate body to determine the impact of politics is the Security Council, and the Prosecutor retains an ultimate discretion in respect to all other issues.[496] We might nevertheless consider three different scenarios: (1) where the Security Council referred the situation to the ICC; (2) where the state referred the situation; and (3) where the Prosecutor commenced an investigated *propio motu.*

In discussing whether the Prosecutor could determine that an investigation was not warranted despite the Security Council's referral of the situation in Darfur, Ohlin puts forward a cogent basis for rejecting amnesty under the first scenario:

> If one takes the legal basis for such referrals seriously – i.e. one thinks of Chapter VII authority as something more than just an excuse or legal fiction to make such pronouncements – then the Security Council's actions would seem to allow less room for prosecutorial discretion than the Assembly of State Parties had initially anticipated. Indeed, however one wishes to conceive of prosecutorial discretion, it cannot be interpreted in such a way that the prosecutor has the power to ignore judgments made by the Security Council – a power that no one has under international law.[497]

Referral presupposed the question of peace and justice; they were assumed to go hand in hand.[498] The logical conclusion is that the ICC does not have the power to make determinations about collective peace and security itself. The Security

494. *See* Newman, *supra* note 6, at 305.

495. Moreover, the politics of conflict resolution becomes the politics of dominant powers in the Security Council.

496. Han, *supra* note 119, at 101. The proposal at the Rome Conference to constrain the Prosecutor's discretion through the Security Council was defeated. Alexander K. A. Greenawalt, *Justice with Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U.J. INT'L L. & POL. 583, 585 (2007).

497. Ohlin, *supra* note 36, at 191.

498. The Prosecutor stated that the Darfur situation was referred to him because, in "adopting resolution 1593 (2005), the Security Council had affirmed that justice and accountability were critical to achieving lasting peace and security in Darfur." Press Release, Security Council, International Criminal Court Prosecutor Briefs Security Council on Darfur, Says Will Not Draw Conclusions on Genocide Until Investigation Complete, U.N. Press Release SC/8748 (Jun. 15, 2006).

Council seeks peace and security as a collective action,[499] whereas the Prosecutor considers the interests of justice in individual cases. Limiting the Prosecutor to considerations of individual justice is appropriate given the converse limitations on the Security Council, which can refer a situation, but has limited authority to restrain the Court in individual matters.[500] In referring Darfur to the Prosecutor, the Security Council acted pursuant to its authority to make determinations regarding peace and security.[501] Consequently, the Prosecutor should be restricted to a range of factors relevant to the individual case, rather than the broader impact on peace.[502] Collective assessments by the Prosecutor would undermine the international constitutional order and possibly destabilize the peace process.

By default, the remaining two scenarios are answered because it will never be within the Prosecutor's scope to determine threats to peace and security. In any case, where a state refers a situation, it is difficult to conclude other than that the state itself is competent to determine such issues and that its referral impliedly rejects amnesty. While the Ugandan government sought the withdrawal of ICC indictments post-referral because they are purportedly hampering peace negotiations, it did not do so because it seeks to uphold amnesty, but on the basis that it would conduct domestic trials.[503]

Regime Change

One of the ways in which prosecution contributes to peace and security is by preventing those responsible for serious crimes from committing them, and by criminalizing actors, groups, or regimes. The symbolic act of criminalization may pressure the international community, governments, and other groups such as civilians from supporting perpetrators. According to Udombana, "[h]istory has shown that the involvement of highly placed functionaries or officials of states makes the commission of most international crimes possible; it is great men, potential saints, not little men, who become merciless fanatics."[504] In Uganda, Kony's removal is a vital step in making the LRA ineffective, as he "stands at the apex of the LRA structure, politically, militarily, and spiritually."[505] The situation in Sudan is more complicated because instability in Darfur serves to entrench al-Bashir and other government leaders' positions by preventing a unified front in the region.[506] If those indicted were arrested and successfully prosecuted, it is possible

499. Ohlin, *supra* note 36, at 191, 196.

500. *See* Douglas Eisner, Note, *Humanitarian Intervention in the Post-Cold War Era*, 11 B.U. INT'L L.J. 195, 198 (1993). Despite the United States expectation that "the Council will continue to exercise such oversight as investigations and prosecutions pursuant to the referral proceed." Quoted (but not referenced) in Happold, *supra* note 230, at 234.

501. With the exception that the Pre-Trial Chamber can determine whether the Security Council acted lawfully.

502. Ohlin, *supra* note 36, at 207.

503. *See* Justin Coleman, Comment, *Showing Its Teeth: The International Criminal Court Takes on Child Conscription in the Congo, but Is Its Bark Worse Than Its Bite?*, 26 PENN ST. INT'L L. REV. 765, 782-83 (2008).

504. Udombana, *supra* note 154, at 44.

505. Akhavan, *supra* note 155, at 420.

506. Kastner, *supra* note 179, at 169.

that a regime change (and possible international intervention) could reduce crime and stabilize the region.[507]

Indictment by the ICC may nevertheless have the opposite effect. While indictments, arrest warrants, and consequent international attention regarding the Darfur crisis purportedly reduced Sudanese government support for the Janjaweed,[508] they also served to strengthen support for al-Bashir within the country and within regional blocks or alliances.[509] Since issuance of the arrest warrant, al-Bashir has visited up to half a dozen countries within the region.[510] Nevertheless, indictment might have the adverse effect of ensuring that indictees will do everything to hold on to power by committing more serious crimes and impeding the investigation and prosecution. In any event, the extent to which prosecutions could facilitate regime change and conflict resolution would be hampered where removal from office simply creates space for individuals who may also perpetrate crime.

What this tells us though, is not that we must uphold amnesty (because it will have no impact on regime or institutional change anyway), but that there are broader constitutional and functional problems with international law, which the ICC should not attempt to resolve. Akhavan aptly states:

> The view that dialogue with fanatical murderous leaders would somehow lead to a peaceful settlement is a chimera, often encouraged by an international community that is eager to insulate itself from genuine engagement in putting an end to the atrocities. As one observer concluded, Kony's "refusal for years to accept olive branches and huge concessions including total amnesty... indicate his mental incapacity."... But even if Kony proves to be willing and able to negotiate when presented with the right incentives, the best means of ensuring such a negotiation appears to be sustained military and political pressure. In this respect, peace and justice are by no means mutually exclusive."[511]

That a state engages with leaders despite their unwillingness to refrain from violence is linked to the international community's reluctance "to use force to topple a rogue regime."[512] In an ideal world, the ICC would be supported by economic sanctions, and arms embargoes,[513] and possibly even an obligatory norm

507. *Id.*

508. *Id.* at 165.

509. *See Al-Bashir Concludes Eritrea Visit,* ALJAZEERA, Mar. 24, 2009, http://english.aljazeera.net/news/africa/2009/03/200932392756117570.html; *Sudan Leader's Qatar Visit Risks His Arrest on War Crimes*, CNN, Mar. 29, 2009, http://www.cnn.com/2009/WORLD/africa/03/29/sudan.bashir/index.html; Joseph Mayton, *Rights Groups Lash Out at Bashir's Visit to Egypt*, MIDDLE E. TIMES, Mar. 26, 2009, http://www.metimes.com/International/2009/03/26/rights_groups_lash_out_at_ bashirs_visit_to_egypt/9028/; *Sudanese Media Advertise Bashir's Visit to Ethiopia,* SUDAN TRIB., Apr. 20, 2009, http://www.sudantribune.com/spip.php?article30941.

510. *See supra* note 511 sources.

511. Akhavan, *supra* note 155, at 419.

512. Scharf, *supra* note 58, at 343.

513. Kastner, *supra* note 179, at 170.

to intervene on humanitarian grounds pursuant to the responsibility to protect. On a smaller scale, the investigation and prosecution of al-Bashir and other leaders would have been buttressed by a further resolution calling on states to cooperate with the ICC. That the Security Council doesn't adopt complementary measures is a consequence of the freedom to act (or not to act) under its constitution, i.e. the veto power of states such as the United States, China, and Russia, with economic, ideological and political interests to protect.

IV. CONCLUSION

The Prosecutor of the ICC has adopted the correct approach to admissibility and the interests of justice. Amnesties granted by truth commissions do not satisfy the terms of admissibility under article 17 of the Rome Statute when interpreted in light of the Statute's objects and purposes. An expansive interpretation of the interests of justice, incorporating political and social factors underpinning grants of amnesty, is inconsistent with states' intention in enacting the Rome Statute. Moreover, it is undesirable and impractical given the position of amnesties in international law, the complexity of both internal and international conflicts and associated peace negotiations (even at the post-conflict stage), and the retention of Security Council authority over international peace and justice.[514] The Pre-Trial Chamber is not best placed to determine or define an international norm regarding conditional amnesties, which it would inevitably do if it makes judicial determinations regarding whether the amnesties are in the interests of justice. The role of the Prosecutor is to determine whether the interests of justice are served, by considering factors such as whether the victims have access to some form of justice, whether the perpetrator is a low-level offender who has committed a small number of violations, and whether investigation and prosecution of the matter will extract evidence which might be useful in cases against more senior figures. The Pre-Trial Chamber's role is to determine whether the Prosecutor has exercised his role in an appropriate manner, and to apply the law to the exclusion of global, regional, or domestic politics. Where the Security Council does intervene on the basis of amnesty, the Pre-Trial Chamber may only engage in judicial review of a resolution to the extent that it complies with Article 16 of the Rome Statute, such as to determine whether it constitutes "an abuse of authority... or [an] obvious and grave deficiency."[515] This approach allows States to engage in actions that lead to the development of a treaty or customary norm regarding alternative justice mechanisms and their reconciliatory and reparatory functions, and how, or even whether, amnesties might feature in restoration; such States being best placed to do so.

514. Bergsmo & Pejić, *supra* note 204, at 598; *see also* Han, *supra* note 119, at 100.

515. Gropengießer & Meißner, *supra* note 121, at 191.