

THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, AMNESTIES, AND THE “INTERESTS OF JUSTICE”: STRIKING A DELICATE BALANCE

I. INTRODUCTION

The International Criminal Court (ICC) represents a “quantum-leap”¹ in the enforcement of international criminal law and a monumental response to the “the most serious crimes of concern to the international community as a whole.”² It stands as a determination that *de facto* impunity should no longer be enjoyed by those perpetrating genocide, war crimes and crimes against humanity by ensuring that cases are tried even when states are unwilling or unable to do so themselves.³ The Court is one of last resort and is not intended to replace domestic legal systems.⁴ Indeed, the aspirations of its drafters will be fulfilled just as surely if national systems carry out legitimate investigations and prosecutions on

1. LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* 19 (2002) [hereinafter SADAT, *THE INTERNATIONAL CRIMINAL COURT*]. “It is conceivable, perhaps, that we have reached a stage during which a quantum leap in our thinking and behavior has become possible—enabling us to transform the prohibitions on the commission of genocide, war crimes, crimes against humanity and aggression into real tools to deter the cruel and powerful.” *Id.*

2. Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, Annex II, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute], pmbl. The Rome Statute was adopted by a vote of 120 to 7 on July 17, 1998. Press Release, U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Court (July 17, 1998), U.N. Doc. L/ROM/22 (1998), <http://www.un.org/icc/pressrel/1rom22.htm> (last visited Nov. 12, 2004). For a brief description of the statute’s coming into force on July 1, 2002, see Leila Nadya Sadat, *The International Criminal Court Treaty Enters into Force*, ASIL INSIGHT (April 2002), at <http://www.asil.org/insights/insigh86.htm> (last visited Nov. 6, 2004).

3. Rome Statute, *supra* note 2, pmbl. The seriousness of this issue is brought into clear focus when one considers that 170 million civilians have been killed in various conflicts around the world since the end of World War II. M. Cherif Bassiouni, *The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities*, 8 *TRANSNAT’L L. & CONTEMP. PROBS.* 199, 203 (1998). The “culture of impunity that has prevailed to date” must be addressed, and the ICC represents a real advance in the international legal community’s effort to develop an institution and institutional framework in which to combat and deter these international crimes. Leila Nadya Sadat, *Universal Jurisdiction, National Amnesties & Truth Commissions: Reconciling the Irreconcilable*, in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 193, 194 (Stephen Macedo ed., 2003).

4. Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 *COLUM. HUM. RTS. L. REV.* 291, 308–09 (1998).

their own.⁵ Thus, while a creation of historic import, the Rome Statute of the International Criminal Court (Rome Statute) envisions a Court that “may never be employed.”⁶ This perspective is reflected in two very significant ICC salutes to state sovereignty: complementarity⁷ and prosecutorial deferrals in “the interests of justice.”⁸

These “salutes” are the product of one of the most difficult negotiation points of the Rome Conference: When should the ICC defer to national proceedings?⁹ There was a battle of conflicting purposes at Rome. On the one hand, there was the international obligation of states to prosecute international crimes¹⁰ added to the practical impossibility of placing that burden solely upon international tribunals (*ad hoc* or permanent).¹¹ Opposing this view were those who advocated state sovereignty and the need to retain flexibility with regard to truth and reconciliation efforts, especially amnesty, in the context of difficult regime change. The result: a system in which prosecutorial discretion will be exercised in the context of purposefully vague provisions that recognize that “peace and justice are sometimes incompatible goals.”¹² Thus, amnesty-granting programs and alternative justice schemes remain possible, even in situations where there

5. See, e.g., Mark S. Ellis, *The International Criminal Court and its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 221–25 (2002). The author states that “. . . at the heart of this principle is the understanding that the most serious crimes of concern to the international community must be prosecuted at a national level.” *Id.* at 221; Jerry Fowler, *Not Fade Away: The International Criminal Court and the State of Sovereignty*, 2 SAN DIEGO INT'L L.J. 125, 130–35 (2001); Jeffrey L. Bleich, *Report of the International Law Association; Published Jointly with Association Internationale de Droit Penal*, 13 NOUVELLES ETUDES PENALES 1997: Complementarity, 25 DENV. J. INT'L L. & POL'Y 281, 281–83 (1997); Lieutenant Colonel Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 26–27 (2001).

6. John T. Holmes, *Complementarity: National Courts versus the ICC*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 667 (Antonio Cassese et al. eds., 2002) [hereinafter Holmes, *Complementarity*].

7. Rome Statute, *supra* note 2, art. 17.

8. *Id.* art. 53(1)(c).

9. David J. Scheffer, *Fourteenth Waldemar A. Solf Lecture in International Law: A Negotiator's Perspective on the International Criminal Court*, 167 MIL. L. REV. 1, 10–12 (2001).

10. For instance, there is a legal obligation of all signatories of the Geneva Conventions to prosecute “grave breaches” of the Geneva Conventions and for signatories of the 1949 Genocide Convention to criminally prosecute those who perpetrate genocide. To the extent that the Geneva Conventions and the Genocide Convention represent the present state of customary international law, an obligation exists for all states to criminally prosecute those who commit such serious international crimes. M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROB. 63 (1996).

11. Holmes, *Complementarity*, *supra* note 6, at 670.

12. Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 507 (1999) [hereinafter Scharf, *The Amnesty Exception*].

would otherwise appear to be an obligation on the ICC to prosecute criminally.

While the statute's final draft created a compromise agreeable to the 120 countries that voted for it,¹³ observers are left with some significant questions, including those that form the focus of this inquiry. First, when would the Court likely defer to a national prosecution, truth and reconciliation campaign, or amnesty? Second, what are the significant predictive factors? As the ICC has begun its work with an investigation of events in the Democratic Republic of Congo¹⁴ and has been referred a case by Uganda, a state party to the Rome Statute,¹⁵ these points have taken on greater significance and must be addressed in the near-term. Indeed, the question of amnesty (and amnesty laws) has been specifically raised in the Uganda referral¹⁶ and, as a result, an understanding of these mechanisms must be developed.

Part I of this Note describes means by which the Court may defer to the efforts of states party to the Rome Statute: complementarity and prosecutorial deferrals "in the interests of justice."¹⁷ Put briefly, complementarity precludes ICC jurisdiction in scenarios in which a state with jurisdiction is willing or able to prosecute. The deferral power allows the ICC Prosecutor to defer to alternative justice mechanisms and amnesty-granting programs when it will be in the interest of justice, thus giving him broad discretion. Part II considers some of the factors the Court will likely take into account in deciding whether to defer to a national proceeding. These include, *inter alia*: whether the state is willing or able

13. Press Release, U.N. Diplomatic Conference Concludes in Rome with Decision to Establish Permanent International Court (July 17, 1998), U.N. Doc. L/ROM/22 (1998), <http://www.un.org/icc/pressrel/lrom22.htm> (last visited Nov. 12, 2004). For details of the Rome Conference, including a list of the countries participating, see *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF.183/10 (1998). Notably, nearly 250 Non-governmental Organizations (NGOs) also participated in the negotiations at Rome. M. Cherif Bassiouni, *Historical Survey: 1919-1998*, in *STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 1, 26 n.135 (M. Cherif Bassiouni ed., 1998).

14. *Democratic Republic of Congo @ Int'l Criminal Court: 2nd Referral; International Criminal Court Announces State Referral from the Democratic Republic of Congo*, M2 PRESSWIRE, Apr. 19, 2004, 2004 WL 74987752 (on file with The Washington University Global Studies Law Review).

15. *A Catastrophe Ignored*, *ECONOMIST*, July 24, 2004, at 46.

16. See Press Release, ICC, President of Uganda refers situation concerning the Lords' Republican Army (LRA) to the ICC (Jan. 29, 2004), available at http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html (last visited Mar. 18, 2005).

17. Rome Statute, *supra* note 2, art. 53(2)(c). There remains a further option by which the ICC may delay proceedings: a Security Council request for deferral under article 16 of the Rome Statute. While significant, this topic lies outside the scope of this paper as I intend to focus on those means of deferral that rely on the actions of the ICC and the nation party to the Rome Statute exclusively, and not those of third-party actors (the Security Council).

to prosecute; whether there is a legal obligation to prosecute; and whether the alternative justice or amnesty-granting program is partial or blanket and meets certain other criteria described herein. Part III presents four hypothetical scenarios based loosely on real-life events that will describe the significant predictive factors and discuss the likely treatment by the Court.

II. BACKGROUND

A. *Brief History of the ICC*

The historical roots of the ICC can be traced to 1899,¹⁸ though no significant progress toward the creation of the Court was made until after the Second World War.¹⁹ The most significant moment of the Twentieth

18. SADAT, THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 21–26. In Professor Sadat’s words, the “adoption of the International Criminal Court Statute is the culmination of a Century of hard work and false starts.” *Id.* at 4.

19. *Id.* at 24. Conferences were held in The Hague in 1899 and 1907 at the invitation of Czar Nicholas II, out of which grew much of the international law of war and international humanitarian law. *Id.* at 22–23. There were some encouraging moments at the end of World War I when, according to article 228 of the Treaty of Versailles, Germany acknowledged the right of the Allies to try German citizens for their role in the commission of war crimes. Treaty of Peace with Germany (Treaty of Versailles), June 28, 1919, 2 BEVANS 43. A similar provision was included in the Treaty of Sévres, which ended the war with Turkey. Treaty of Peace Between the Allied Powers and Turkey (Treaty of Sévres), Aug. 10, 1920, art. 230, *reprinted in* 15 AM. J. INT’L L. 179, 235 (Supp. 1921) (never entered into force), cited in Paul D. Marquardt, *Law Without Borders: The Constitutionality of an International Criminal Court*, 33 COLUM. J. TRANSNAT’L L. 73, 79 (1995).

However, little came of these treaty provisions and, indeed, the notions of justice and law arising from The Hague conferences and World War I were hamstrung by the still-dominant notion of state sovereignty. Indeed, the German War Crimes Trials were “merely symbolic,” the Dutch refused to extradite the Kaiser after he took refuge in the Netherlands, and the war crimes and crimes against humanity provisions in the Treaty of Sévres were left out of the Treaty of Lausanne. *Id.* See also M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish an International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 19 (1997).

It was not until after Europe twice lay in ruins that the notion of criminal liability for individuals came to the fore. SADAT, THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 24–25. Important questions needed to be addressed before the idea of an international criminal court could be seriously pursued. Jordan J. Paust, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: It’s No Defense: Nullum Crimen, International Crime, and the Gingerbread Man*, 60 ALB. L. REV. 657, 658 (1997). First was the ever-present obstacle of states religiously clinging to their particular notion of sovereignty. Second, the absence of positive law with regard to international crimes, thus implicating the principle of *nullum crimen sine et lege* (no crime without law). *Id.* Finally, questions remained with regard to whether an international criminal court would actually be an effective deterrent to future wars. SADAT, THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 25.

These concerns were, in significant part, addressed by the Nuremberg Tribunals, which arguably provided the “positive law thought to be lacking prior to [their] existence.” *Id.* at 30. They also notably rejected arguments based on state sovereignty, providing instead that individuals—not “abstract

Century in the development of international law in general, and the development of the ICC in particular, were the Nuremberg Trials²⁰ at the end of World War II.²¹ For it was at this time individuals began to take on international legal personality²² and became subject to prosecution for their individual roles in the perpetration of international crimes.²³

Unfortunately, the legacy of Nuremberg was stunted by Cold War political competition and politics until the 1990s,²⁴ when the U.N. Security Council, at last released from the straight-jacket placed upon it by competition among its permanent members,²⁵ made two significant contributions to the legacy of Nuremberg with the creation of the *ad hoc*

entities”—can be found culpable for international crimes. *Id.* at 29. This outlook gave the international community greater reason to believe in the deterrent power of international law. *Id.*

20. The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, August 8, 1945, 8 U.N.T.S. 279, reprinted in 39 AM. J. INT'L L. 257 (Supp. 1945).

21. Leila Nadya Sadat & Richard S. Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 385 (2000). The Nuremberg Trials were accompanied by the International Military Tribunal for the Far East (“Tokyo Tribunal”), which was established by General MacArthur’s Special Proclamation. See Charter of an International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 3, 4 Bevans 20.

Generally, the Tokyo Tribunals are not as well regarded, mostly as a result of the “perception” that this tribunal was not administered fairly with regard to defendants. SADAT, THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 27. See also *In re Yamashita*, 327 U.S. 1, 28–29 (1946) (Murphy, J., dissenting), cited in *Fair Trials and the Role of International Criminal Defense*, 114 HARV. L. REV. 1982 n.1; Marquardt, *Law Without Borders*, *supra* note 19, at 83; Bassiouni, *From Versailles to Rwanda*, *supra* note 19, at 31–35 (stating “[f]or the Japanese, the trials were victors’ vengeance couched in terms of victors’ justice.”).

Both tribunals are obviously open to the criticism that they were merely “victors’ justice.” Even the Nuremberg Trials, while characteristic of greater rights to the accused, were “one-sided.” *Id.* at 29.

22. SADAT, THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 29.

23. With regard to this issue, the Tribunals issued the following famous statement: “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.” Judgment of October 1, 1946, International Military Tribunal (Nuremberg), Judgment and Sentences, 41 AM. J. INT'L L. 172, 221 (1947).

24. See, e.g., Bassiouni, *From Versailles to Rwanda*, *supra* note 19, at 39 (stating “[j]ustice was the Cold War’s casualty.”). As the reader is aware, the permanent members of the Security Council (France, China, Great Britain, the former Soviet Union and the United States) each individually hold a veto over the actions of the Security Council. The Security Council was yet another forum in which the United States and Soviet Union played out their Cold War competition—measures supported by either party were often seen as either a capitalist or communist conspiracy and the opposing party would automatically employ its veto. *Id.* at 49–57. See also W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 85 (1993) (declaring “. . . the Cold War . . . ended and, suddenly, the Council, by national or international governmental standards, seems remarkably effective.”); David Bills, *International Human Rights and Humanitarian Intervention: The Ramifications of Reform of the United Nations’ Security Council*, 31 TEX. INT'L L.J. 107, 110 (1996) (remarking “[w]ith the end of the Cold War, however, the United Nations finds itself at the forefront of international relations, and the political deadlocks within the Security Council have abated substantially.”).

25. Bassiouni, *From Versailles to Rwanda*, *supra* note 19, at 49, 52.

tribunals for the former Yugoslavia and Rwanda.²⁶ The successes and shortcomings of these tribunals led many to believe that a permanent court should be the next step in the evolution of international justice,²⁷ and provided an impetus for the Rome Conference at which the ICC finally realized its creation.²⁸

B. *Limits on the ICC's Jurisdiction*

The ICC's jurisdiction is limited to "the most serious crimes of concern to the international community as a whole."²⁹ These crimes include genocide, crimes against humanity, and war crimes.³⁰ The Court's

26. Statute of the International Tribunal for the Former Yugoslavia, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993); Statute of the International Tribunal for Rwanda, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994). While laudable in their intent and significant in their role in the evolution of international law, these tribunals have significant shortcomings. They suffer from their political nature (they were created by the Security Council, a political organ), and "tribunal fatigue," which many supporters have experienced due to the necessity of building each court from the ground up, a proposition with high costs administratively and, most significantly, in terms of jurisprudence. Michael P. Scharf, *The Politics of Establishing an International Criminal Court*, 6 DUKE J. COMP. & INT'L L. 167, 169–70 (1995); Michael P. Scharf, *Results of the Rome Conference for an International Criminal Court*, ASIL INSIGHTS (Aug. 1998), at <http://www.asil.org/insights/insigh23.htm> (last visited Nov. 6, 2004).

27. See Patricia M. Wald, *Why I Support the International Criminal Court*, 21 WIS. INT'L L.J. 513 (2003); M. Cherif Bassiouni, *Foreword to SADAT, THE INTERNATIONAL CRIMINAL COURT*, *supra* note 1, at xiv. Indeed, various Security Council Members argued that a permanent international criminal court would be the most appropriate response to the crimes committed in the former Yugoslavia and Rwanda; however, the political advantages of courts created—and for the most part controlled—by the Security Council carried the day. Bassiouni, *From Versailles to Rwanda*, *supra* note 19, at 42, 52.

28. The development of the Rome Statute began anew in unexpected fashion when, in 1989, the General Assembly, pursuant to a resolution introduced by sixteen Caribbean and Latin American nations, requested that the International Law Commission draft a report regarding jurisdiction over persons involved in drug trafficking. The ILC went beyond that mandate to create a Draft Statute for an International Criminal Court. See *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, U.N. GAOR, 48th Sess., U.N. Doc. A/CN.4/L.490 (1993); *Revised Report of the Working Group on the Draft Statute for an International Criminal Court: Addendum*, U.N. GAOR, 48th Sess., U.N. Doc. A/CN.4/L.490/Add.1 (1993). The General Assembly created a Preparatory Committee in order to consider the ILC's Draft Statute. *Id.* The Preparatory Committee held six official and several inter-sessional sessions (including important sessions in Zutphen, the Netherlands, and Siracusa, Italy) in preparation for the Rome Conference in the Summer of 1998. SADAT, *THE INTERNATIONAL CRIMINAL COURT*, *supra* note 1, at 40–43.

29. Rome Statute, *supra* note 2, art. 5.

30. These crimes (genocide, war crimes, and crimes against humanity) are defined in articles 6–8 of the Rome Statute. Note that aggression (the "supreme international crime" according to the Nuremberg Judgment (Judgment of Oct. 1, 1946, *International Military Tribunal (Nuremberg) Judgment and Sentences, October 1, 1946 Judgment* 41 AM. J. INT'L L. 172, 186 (1947)) is also slated to become part of the Court's jurisdiction upon agreement by the Assembly of States Parties with regard to its definition. See Rome Statute, *supra* note 2, arts. 121, 123 (describing the procedure by which the Rome Statute may be amended). The definition of aggression has long been a difficult political problem. The General Assembly appointed four Special Committees on the Question of

jurisdiction over these crimes is non-retroactive³¹ and, thus, crimes committed before the treaty came into force, or before the ratification of the party-State with jurisdiction, are outside the jurisdiction of the Court.³² Cases may come before the Court³³ through referral by the Security Council,³⁴ referral by a state party to the Rome Statute,³⁵ or through an

Defining Aggression from 1952 to 1974. The fourth committee's recommended definition was adopted by the General Assembly by consensus resolution. *Definition of Aggression*, G.A. Res. 3314(xxix), U.N. GAOR 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974). See Bassiouni, *From Versailles to Rwanda*, *supra* note 19, at 53–54; SADAT, THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 133. Defining aggression was no less difficult in Rome, and the issue threatened to derail the entire conference until a compromise was agreed upon that put aggression within the crimes under the ICC's jurisdiction, though leaving it to be defined by the Assembly of States Parties to the ICC not before seven years after the Statute enters into force, in accordance with article 123 of the Rome Statute. Rome Statute, *supra* note 2, art. 123.

31. Rome Statute, *supra* note 2, art. 11. The *ratione temporis* of the Court is restricted to crimes committed after the coming into force of the Rome Statute on July 1, 2002, or after the time when a state that has territorial or national jurisdiction becomes a party to the Court. *Id.* Note that the principle of non-retroactivity *ratione personae* uses broader language and provides that “no person shall be criminally responsible under this Statute for conduct prior to the entry into force of this Statute.” *Id.* art. 24.

Use of the term “conduct” clearly represents a broader bar than the use of the term “crime” in article 11. Conduct, according to the preparatory history of the statute, was included in order to limit the court's jurisdiction over “continuing crimes”—those that begin before the temporal jurisdiction of the court, but continue into the court's *ratione temporis*. SADAT, THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 185–86. See also Alan Nissel, *Continuing Crimes in the Rome Statute*, 25 MICH. J. INT'L L. 653 (2004).

The question of temporal jurisdiction may yet be open to a broader interpretation. For instance, in *The Media Cases*, recently decided by the International Criminal Tribunal for Rwanda, the court held that a continuing crime (in that case, the crime of direct and public incitement to genocide), though its perpetration may begin before the temporal jurisdiction of the court begins, may be found within the jurisdiction of the court so long as the “acts contemplated” occur within the *ratione temporis* of the ICTR. Prosecutor v. Nahimana, Barayagwiza and Ngeze, Case No. ICTR-99-52-T, Judgment (Trial Chamber I, Dec. 3, 2003), para. 1017; see also Prosecutor v. Nsengiyumva, Case No. ICTR-96-12-I, Decision on the Defence Motions Objecting to the Jurisdiction of the Trial Chamber on the Amended Indictment, (Trial Chamber III, Apr. 13, 2000), para. 28. Thus, crimes that were found to have begun in their commission before Jan. 1, 1994 were considered as falling within the temporal jurisdiction of the ICTR. The ICC may choose to follow a similar route with regard to continuing crimes in order that it might carry out the object and purposes of the Rome Statute.

32. Rome Statute, *supra* note 2, arts. 11, 25.

33. For a useful summary of the means by which matters may be referred to the court, see SADAT, THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 294.

34. Rome Statute, *supra* note 2, art. 13(b). Note that an article 13 referral by the Security Council, on the basis of its Chapter VII powers over international peace and security, is binding on all nations, not just those who are states parties to the Rome Statute. U.N. CHARTER, arts. 25, 103; Certain Expenses of the United Nations (Article 17, Paragraph 2, of the Charter), 1962 I.C.J. 151 (July 20); Legal Consequences for States of the Continued Presence of South Africa in Namibia notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 52 (Jan. 26). Thus, in these instances, many of the issues herein discussed are no longer applicable as an investigation by the Prosecutor would be required.

35. Rome Statute, *supra* note 2, arts. 13(a), 14.

investigation by the prosecutor, *ex proprio motu*.³⁶

The ICC must, in general, defer to national proceedings or investigations,³⁷ a principle that has come to be known as complementarity.³⁸ In general, the ICC has no jurisdiction when a case is being, or has been, investigated or prosecuted, “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”³⁹ As noted above, the ICC may also defer to national proceedings if the Prosecutor decides that action by the ICC would not be “in the interests of justice.”⁴⁰ Thus, the Prosecutor⁴¹ has a measure of

36. *Id.* arts. 13(c), 15. “*Ex proprio motu*” is defined as “of one’s own accord.” BLACK’S LAW DICTIONARY (7th ed. 1999). While referrals by state parties and investigations by the prosecutor are limited to instances in which the state of the perpetrator’s nationality or the state on whose territory the crime was committed is a party to the Rome Statute (Rome Statute, *supra* note 2, art. 12(2)), this limitation does not apply to Security Council referrals based on its Ch. VII powers as all nations must comply with such directives. U.N. CHARTER, art. 103. *See generally* Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), 1992 I.C.J. (Apr. 14) [hereinafter *The Lockerbie Case*], at 26 (separate opinion of Judge Lachs), at 32 (separate opinion of Judge Shahabuddeen, pt. iii). Note that non-parties may also accept the exercise of jurisdiction by the ICC. Rome Statute, *supra* note 2, art. 12(3).

37. Rome Statute, *supra* note 2, art. 17.

38. For a useful (and extensive) look at the history and development of the principle of complementarity, see Mohamed El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT’L L. 869 (2002). *See also* Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 308–10 (1998); Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court*, 14 EMORY INT’L L. REV. 1, 66–98 (2000); Jennifer J. Llewellyn, *A Comment on the Complementary Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Contexts?*, 24 DALHOUSIE L.J. 192 (2001); David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L L.J. 47, 59–63 (2001); Jordan J. Paust, *The Reach of ICC Jurisdiction over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT’L L. 1, 8–10 (2000).

39. Rome Statute, *supra* note 2, art. 17(1)(a), (b). For a discussion of complementarity from the viewpoint of the leader of the U.S. Delegation to the Rome Conference and former U.S. Ambassador-at-Large for War Crimes, see David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12 (1999).

In a further compromise to those stressing state sovereignty and in an effort to allay U.S. concerns, complementarity was given “teeth,” or strengthened by a regime in which the Prosecutor must notify states that could otherwise exercise jurisdiction that he intends to begin an investigation. Rome Statute, *supra* note 2, art. 18. States have one month to announce that they are investigating; so long as they do so, the Prosecutor must automatically defer. *Id.* *See generally* *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcommittee on Int’l Operations of the Senate Comm. on Foreign Relations*, 105th Cong. 34 (1998) (statement by Michael P. Scharf), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_senate_hearings&docid=f:50976.wais (last visited Nov. 8, 2004).

40. Rome Statute, *supra* note 2, art. 53(2)(c). Note that, under article 16 of the Rome Statute, the Security Council, when acting under its Ch. VII powers, may also request the ICC to defer a prosecution. Such a request under Ch. VII implies a belief that prosecution by the ICC would interfere with some Security Council effort to maintain international peace and security. Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*,

discretion,⁴² though his⁴³ decisions to defer are reviewable by the Court's Pre-Trial Chamber.⁴⁴

14 EUR. J. INT'L L. 481, 486 (2003) [hereinafter Robinson, *Amnesties*]. Security Council Resolutions 1422 and 1487 purported to act under this rationale when they requested, under article 16, that the ICC "not commence or proceed with investigation or prosecution" of personnel from a contributing state that is not Party to the Rome Statute, "unless the Security Council decides otherwise." S.C. Res. 1422, U.N. SCOR, 57th Sess., U.N. Doc. S/RES/1422 (2002); S.C. Res. 1487, U.N. SCOR, 58th Sess., U.N. Doc. S/RES/1487 (2003). See Carsten Stahn, *The Ambiguities of Security Council Resolution 1422*, 14 EUR. J. OF INT'L LAW 85 (2003).

The Security Council made a further request, this time not based on article 16 of the Rome Statute, when it adopted Resolution 1497 in response to the situation in Liberia. S.C. Res. 1497, U.N. SCOR, 58th Sess., U.N. Doc. S/RES/1497 (2003). Much has been made of these requests, and the debate over whether these actions were *ultra vires* has been hotly contested. For debate within the Security Council, see U.N. SCOR 57th Sess., 4568th mtg., U.N. Doc. S/PV.4568 (2002); U.N. SCOR 57th Sess., 4568th mtg. at 10, U.N. Doc. S/PV.4568 (Resumption 1). For a useful discussion of the legality of this Security Council action, see Amnesty International, *International Criminal Court: The Unlawful Attempt by the Security Council to Give U.S. Citizens Permanent Impunity from International Justice*, AI Index: IOR 40/006/2003 (May 2003), at <http://www.iccnw.org/documents/otherissues/1422/Amnesty1422May2003.pdf> (last visited Nov. 6, 2004); Roberto Lavalle, *A Vicious Storm in a Teacup: The Action by the United Nations Security Council to Narrow the Jurisdiction of the International Criminal Court*, 14 CRIM. L.F. 195 (2003); Mohamed El Zeidy, *The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power of Deferrals and Resolution 1422*, 35 VAND. J. TRANSNAT'L L. 1503, 1510 (2002); Brian MacPherson, *Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings*, ASIL INSIGHT, July 2002, at <http://www.asil.org/insights/insigh89.htm> (last visited Nov. 6, 2004); Morten Bergsmo & Jelena Pejic, *Article 16: Deferral of Investigation or Prosecution*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 373 (Otto Triffterer ed., 1999). While a fascinating point that contributes indirectly to this topic, this area of debate is beyond the scope of this work.

41. Generally, the investigative process proceeds as follows: a case is referred to the Prosecutor by a state party to the statute (or, in certain circumstances, a non-state party according to article 12(3)) or by the Security Council. Upon receiving the information, the Prosecutor is to consider whether the information provides a reasonable basis upon which to proceed, and whether the case would be admissible under article 17 (the complementarity provisions). Rome Statute, *supra* note 2, art. 15(1). It is at this point that the prosecutor may determine "that an investigation would not serve the interests of justice." Rome Statute, *supra* note 2, art. 53(1)(c). If the prosecutor determines that there is no reasonable basis to proceed, he must then inform both the Pre-Trial Chamber and the referring state, or the Security Council. The decision may then be reviewed by the Pre-Trial Chamber at the request of either the referring state or by the Pre-Trial Chamber, *ex proprio motu*. *Id.* art. 15(3). See Allison Marston Danner, *Enhancing the Legitimacy & Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 516-18 (2003).

42. The deferral is also a reflection of "the statutory principle of prosecutorial independence . . . based on the interest of impartial justice on which the credibility and legitimacy of the criminal justice process depends. At the core of any notion of prosecutorial discretion lies the power to decide whether or not to investigate and prosecute." 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 702 (Otto Triffterer ed., 1999).

43. For bibliographic information regarding the current prosecutor of the ICC, Luis Moreno-Ocampo, see Official Website of the International Criminal Court, *The Chief Prosecutor*, at http://www.icc-cpi.int/otp/otp_bio.html (last visited Nov. 6, 2004). Moreno-Ocampo is a renowned human rights academic and served as prosecutor during the high-profile trials of the Argentine military junta. He has been a visiting professor at Harvard and Stanford law schools. Marlise Simons, *Argentina is Expected to be Prosecutor for War Crimes Court*, N.Y. TIMES, Mar. 24, 2003 (late ed.), at

III. WHEN DOES THE ROME STATUTE REQUIRE THAT THE ICC ADJUDICATE?

A. *In Some Instances, Criminal Prosecution May Be the Only Legal Option*

Criminal prosecution is required for some of the crimes within the ICC's jurisdiction.⁴⁵ For example, genocide and "grave breaches" of the 1949 Geneva Conventions necessitate criminal prosecutions.⁴⁶ This obligation finds its source, first, in treaty law. The Genocide Convention⁴⁷ and the "grave breaches" provisions of the Geneva Conventions of 1949⁴⁸ explicitly require that states criminally prosecute the perpetrators of acts outlawed by the respective treaties.⁴⁹ Second, genocide has achieved *jus*

A2; *World Briefing Europe: The Hague: International Prosecutor Sworn In*, N.Y. TIMES, June 17, 2003 (late ed.), at A6.

44. Note that the precise meaning of "interests of justice" is not defined in the statute. The chapeau of the Rome Statute merely states that the decision may not be invoked upon "arbitrary grounds" and that the discretion must be exercised "in a reasonable manner." *Bergsmo & Kruger*, *supra* note 42, at 709–10. It is likely that a decision to defer will be confirmed, as "interests of justice" appears to be a relatively broad concept. Robinson, *Amnesties*, *supra* note 40, at 488.

45. John Dugard, *Possible Conflicts of Jurisdiction with Truth Commissions*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 693, 696 (Cassese et al. eds., 2001).

46. M. CHERIF BASSIOUNI, POST-CONFLICT JUSTICE 259 (2002) (noting that "the notion of granting amnesty for genocide, crimes against humanity, and serious war crimes would be inconsistent with the principles of individual criminal responsibility recognized in the Nuremberg Charter and Judgment."); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2542, 2542–44 (1991); Michael P. Scharf, *The Amnesty Exception*, *supra* note 12, at 514–21.

47. Convention on the Prevention and Punishment of the Crime of Genocide, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277, 28 I.L.M. 760 (*entered into force* Jan. 12, 1951) [hereinafter Genocide Convention].

48. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field Aug. 12, 1949, arts. 49–50, 6 U.S.T. 3114, 75 U.N.T.S. 31 (*entered into force* Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War Aug. 12, 1949, arts. 146–147, 6 U.S.T. 3516, 75 U.N.T.S. 287 (*entered into force* Oct. 21, 1950) [hereinafter Fourth Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War Aug. 12, 1949, arts. 129–130, 6 U.S.T. 3316, 75 U.N.T.S. 135 (*entered into force* Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea Aug. 12, 1949, arts. 50–51, 6 U.S.T. 3217, 75 U.N.T.S. 85 (*entered into force* Oct. 21, 1950).

49. Grave breaches of the Geneva Conventions are defined, for example, in article 147 of Geneva Convention (IV) Relative to the Protection of Civilians in Time of War, and include:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive

cogens status as an international crime,⁵⁰ creating *obligatio erga omnes*,⁵¹ while the Geneva Conventions are considered representative of the current state of customary international law.⁵² Accordingly, the requirement of prosecution extends even to those states not party to the treaties.⁵³ As a result, alternative justice programs that do not require criminal prosecution for the crimes of genocide and the “grave breaches” will not meet the requirements of international law.⁵⁴

The rule with regard to the other crimes under the ICC’s jurisdiction—crimes against humanity and war crimes not falling under the grave breaches provisions—is less clear.⁵⁵ For these crimes, there is no generally

destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Fourth Geneva Convention, *supra* note 48, art. 147. Article 146 requires that all states criminally prosecute those who violate these “grave breaches” provisions. *Id.* art. 146. With regard to the duty to prosecute for genocide, see the Genocide Convention, which provides: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.” Genocide Convention, *supra* note 47, art. 1. See also M. CHERIF BASSIOUNI, POST-CONFLICT JUSTICE 259 (2002); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 215–28 (1989); 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, 182–84 (2002).

50. The term *jus cogens* means “compelling law” or, similarly, peremptory norm. Bassiouni, *International Crimes*, *supra* note 10, at 67. *Jus cogens* crimes represent a nonconsensual and non-derogable source of international law. This category of crimes holds “the highest hierarchical position among all other norms and principles” (*Id.*), and includes the crimes of aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture. *Id.* at 63–72.

51. *Obligatio erga omnes* refer to the obligations and legal implications requisite upon states toward the international community as a whole arising out of a crime’s designation as *jus cogens*. In this sense, *jus cogens* and *obligatio erga omnes* “are often presented as two sides of the same coin.” *Id.* at 72. “[C]haracterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to violators of such crimes.” *Id.* at 66. See also INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 504–05 (Edward M. Wise & Ellen S. Podgor eds., 2000); INTERNATIONAL CRIMINAL LAW 40–46 (M. Cherif Bassiouni ed., 2d ed. 1999).

52. INTERNATIONAL CRIMINAL LAW, *supra* note 51, at 70; SADAT, THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 63.

53. Scharf, *The Amnesty Exception*, *supra* note 12, at 516; Orentlicher, *supra* note 46, at 2565, citing Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), 1951 I.C.J. 15, at 23 (May 28); accord SADAT, THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 62–69; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. d (1987).

54. PROGRAM IN LAW AND PUBLIC AFFAIRS, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001); Naomi Roht-Ariaza, *Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitation and Superior Orders*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 59–60 (Naomi Roht-Ariaza ed., 1995).

55. State practice in this area does measure up to what, in an ideal world, would be the requisite standard of behavior. As Ronald Slye has stated, “[s]tate practice in the area, of course, does not live up to this high expectation, although this may be due more to a failure of political will and the lack of effective enforcement machinery at the international level than a belief that such prosecutions are not required or desirable.” Slye, *supra* note 49, at 183.

binding treaty obligation and the state of customary international law is controversial.⁵⁶ While recent state practice appears to support a duty to prosecute⁵⁷ and the body of jurisprudence supporting this notion is growing,⁵⁸ at this point, the required legal response to these crimes remains unclear.⁵⁹ Thus, it is possible that amnesties may yet be a legitimate response to these crimes.⁶⁰

56. See Sadat, *Universal Jurisdiction*, *supra* note 3, at 202–04. Customary international law constitutes one of the major sources of international law, as evidenced by its inclusion in article 38 of the Statute of the International Court of Justice (ICJ). Statute of the International Court of Justice, as annexed to the U.N. CHARTER, art. 38.

Generally, in order for a principle of law to crystallize into custom, there must be widespread state practice and *opinio juris*, or a feeling of legal obligation with regard to the rule. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 5 (5th ed. 1998). Custom may be evidenced by international and national judicial decisions, the practice of international organs, the work of the International Law Commission, and resolutions passed regarding questions of law by the General Assembly of the United Nations, the work of multilateral diplomatic conferences, and regional organizations. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 543–44 (1993) (arguing no hierarchal order of evidentiary sources is implied by this list, nor should it be considered exclusive.) Custom may crystallize over a long period of time, or it may be “instant,” as was held in dictum by the ICJ in the *North Sea Continental Shelf case*. *North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3, 44 (Feb. 20).

57. For example, “international crimes” are not eligible for grants of amnesty by the Special Court for Sierra Leone. The bilateral treaty (between the United Nations and Sierra Leone) provides that the court will have jurisdiction over crimes against humanity, violations of common article 3 of the Geneva Conventions, violations of Additional Protocol II of the Geneva Conventions and other serious violations of international law under articles 2–4. Article 5 grants the court jurisdiction over several crimes under the national criminal system of Sierra Leone, including crimes relating to abuse of women and the wanton destruction of property. Amnesty is only available for the crimes under article 5 as the Lomé Agreement provides that amnesty is not available for the international crimes of articles 2–4. Micaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 EUR. J. INT'L L. 857, 859–69 (2000). See also *Seventh Progress Report of the Secretary-General on the UN Observer Mission in Sierra Leone*, para. 7, U.N. Doc. S/1999/836 (1999) (holding that the U.N. rejects the right of a state to immunize its nationals for the commission of serious violations of international humanitarian law); *Report of the Secretary General on the Establishment of a Special Court for Sierra Leone*, para. 22, U.N. Doc. S/2000/915 (2000) (stating that “the United Nations has consistently maintained . . . that amnesty cannot be granted in respect of . . . serious violations of international humanitarian law.”); Robinson, *supra* note 40, at 492 (noting that international crimes were excluded from the community reconciliation process in East Timor).

58. See generally Velasquez Rodriguez Case, Case 7920, Inter-Am. C.H.R. (Series C) no. 4, paras. 174, 186 (1988) (holding that Chile’s amnesty laws were in violation of Chile’s obligation to prevent, investigate, and punish violations of the rights found in the Inter-American Convention on Human Rights); Barrios Altos Case, Inter-Am. C.H.R. (Series C) no. 75, paras. 41–44; Inter-Am. C.H.R., Report No. 24/92 (Argentina), Doc. 24 (1992), paras. 33–50; Inter-Am. C.H.R., OEA/L/V/11.85, Doc. 28 (El Salvador) (1994); In the Case of X and Y v. The Netherlands, 8 EUR. H.R. REP. 235 (E.C.H.R. 1985) (holding that the Netherlands must adopt criminal law provisions as criminal prosecutions are required in order to ensure that sexually-abused, mentally-handicapped children are adequately protected); United Nations Human Rights Committee, General Comment, No. 20 (44) (art. 7), UN Doc. CCPR/C21/Rev.1/Add.3, para. 15 (1992).

59. Roman Boed believes that while there is *opinio juris* regarding the duty to prosecute, the prerequisite condition of consistent state practice is lacking here. Roman Boed, *The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious*

B. National Proceedings Are Ineffective in Precluding ICC Jurisdiction When They Evidence Unwillingness or Inability to Bring the Accused to Justice

The rule of complementarity does not foreclose ICC jurisdiction in scenarios in which states are “unwilling or unable genuinely”⁶¹ to prosecute. A national proceeding will be deemed ineffectual to preclude ICC jurisdiction if the proceedings are undertaken with the intention of shielding the accused from criminal responsibility.⁶² An “unjustified delay . . . inconsistent with an intent to bring the person concerned to justice”⁶³ may be exemplary of a state’s unwillingness to prosecute.⁶⁴ The prohibition on jurisdiction may also be overcome when the proceedings do not meet international standards—i.e., they are not independent or impartial.

Other states may no longer have the ability to properly carry out a criminal prosecution due to war or other hardship. In these cases, the

Human Rights Violations, 33 CORNELL INT’L L.J. 297, 316–18 (2000). Accord Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 41, 57 (1996); Michael Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEXAS INT’L L.J. 1, 36 (1996).

60. Sadat, *Universal Jurisdiction*, *supra* note 3, at 202–12. Cf. Roht-Ariaazza, *supra* note 54, at 59–60; Dr. Kristin Henrard, *The Viability of National Amnesties in View of the Increasing Recognition of Individual Criminal Responsibility at International Law*, 8 MSU-DCL J. INT’L L. 595, 595–96 (1999).

Article 6(5) of Protocol II relating to the Protection of Victims of Non-International Armed Conflict is often relied upon by those who advocate amnesties in non-international armed conflicts. Article 6(5) provides that “at the end of hostilities . . . authorities . . . shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 6(5), 1125 U.N.T.S. 609, 614 [hereinafter Protocol II].

The broad application of amnesty based on Protocol II was upheld by the South African Supreme Court in the AZAPO Case, though this interpretation has been highly criticized. Azanian Peoples Organization (AZAPO) v. President of the Republic of South Africa, 1996(4) SALR 671 (CC), at 691 (“ . . . there is no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which would ordinarily be characterized as serious invasions of human rights.”). The AZAPO case is, in fact, a misapplication of Protocol II, as the amnesties encouraged by the Geneva Conventions are those granted for “acts that violate national, but not international, law. They permit a state to suspend accountability for actions that do not rise to the level of an international law violation . . . in fact, they are designed and intended to further, rather than thwart, human rights principles.” Slye, *supra* note 49, at 178.

61. Rome Statute, *supra* note 2, art. 17(1)(a).

62. *Id.* art. 17(2)(a).

63. *Id.* art. 17(2)(b). An unjustified delay will be determined by comparison to the usual standards and practices of the state’s criminal justice system. Holmes, *Complementarity*, *supra* note 6, at 667.

64. Rome Statute, *supra* note 2, art. 17(2)(b).

Court will consider whether “the State is unable to obtain the accused or the necessary evidence and testimony or [is] otherwise unable to carry out its proceedings.”⁶⁵ Declaring a state “unable” may be an uncomfortable proposition as it will require that the entire criminal justice system of the state be put on trial.⁶⁶

IV. WHEN WILL THE ICC REFUSE TO PROSECUTE?

In instances not including genocide or “grave breaches,” the ICC Prosecutor has the option to defer to a national proceeding⁶⁷ when it would be in the interests of justice to do so. The “interests of justice” standard implies broad discretion for the Prosecutor and leaves him to contemplate the following considerations.

A. Arguments for Criminal Prosecution

*“When we neither punish nor reproach evildoers, we are not simply protecting their trivial old age, we are thereby ripping the foundations of justice from beneath new generations.”*⁶⁸—Solzhenitsyn

In many instances, criminal prosecution is the most appropriate response. While criminal justice is typically justified⁶⁹ on the basis of utilitarian⁷⁰ or retributive theories,⁷¹ criminal prosecution may also provide

65. *Id.* art. 17(3).

66. Louise Arbour, *Litigation Before the ICC: Not If and When, But How?*, 40 COLUM. J. TRANSNAT’L L. 1, 4–5 (2001).

67. The major alternatives to criminal prosecutions—the “national proceedings” in this sense—are truth commissions and amnesty-granting programs. For a description of several important truth commissions around the world, see Priscilla B. Hayner, *Fifteen Truth Commissions—1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597 (1994). In the last twenty years, eleven Latin American countries have employed amnesty-granting programs, in addition to South Africa and Cambodia. Boed, *supra* note 59, at 298 (citing Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROBS. 197, 200–01 (1996)); accord Scharf, *Letter of the Law*, *supra* note 59, at 41.

68. ALEKSANDR I. SOLZHENITSYN, *THE GULAG ARCHIPELAGO* 178 (Thomas Whitney trans., Harpe & Row 1974) (1918–1956), *quoted in* Orentlicher, *supra* note 46, at 2539.

69. Theories of criminal punishment include: prevention or intimidation, by which the aim is to deter the criminal himself “by giving him an unpleasant experience he will not want to endure again” (WAYNE R. LAFAVE, *CRIMINAL LAW* 23 (3d ed. 2000)); restraint or incapacitation, where criminal prosecution is justified, so society may protect itself from dangerous persons, judged by their conduct (*id.* at 24); rehabilitation (*id.* at 24); education, where a public trial is believed to educate the public “as to the proper distinctions between good conduct and bad—distinctions which, when known, most of society will observe” (*id.* at 25); and retribution (*see infra* note 71 and accompanying text).

70. Utilitarian theories justify criminal prosecution in terms of rehabilitation or incapacitation of the offender. This theory regards criminal punishment as a sort of treatment that will rehabilitate the criminal, thereby allowing him to return to and become a productive member of society. *See* Sadat,

deterrence by sending a message to future perpetrators that their crimes will not go unpunished.⁷² Reconciliation can be facilitated through criminal prosecutions⁷³ as it tends to expose the extremists for what they are—criminals—“thereby stigmatizing them, diminishing their influence, and removing them from power and society.”⁷⁴ Also, criminal prosecution can individualize guilt by exposing a leadership group’s role in carrying out the crimes,⁷⁵ allowing the public separation from the crime.

Criminal prosecution may end cycles of revenge and vigilante justice by ensuring that those who are most responsible for crimes receive their just desserts.⁷⁶ In this sense, it may provide moral satisfaction.⁷⁷ Furthermore, while a state has the ability to forgive crimes against itself (such as treason or sedition), crimes against individuals may deserve a remedy as they can give significance to these individuals’ suffering.⁷⁸

Criminal trials may strengthen the rule of law by reinforcing the basic beliefs of a society and educating it in the proper workings of democracy.⁷⁹ They may “inspire societies that are reexamining their basic values to affirm the fundamental principles of respect for the rule of law and for the inherent dignity of individuals.”⁸⁰ In doing so, they will not only reinforce general respect for law, but also will strengthen the legitimacy of the newly-installed democratic government by serving an educational role.⁸¹ Those who advocate criminal prosecutions argue that amnesties actually sabotage the educational demands of traditional societies with regard to the rule of law because “a government that begins its term by rejecting the rule of law and accountability undermines its own claims to legitimacy.”⁸²

Universal Jurisdiction, *supra* note 3, at 195; LAFAVE, *supra* note 69, at 24.

71. Retributive justice theories are based on a belief that a criminal is morally culpable and, therefore, deserving of punishment. “This is the oldest theory of punishment, and the one which still commands considerable respect from the general public.” LAFAVE, *supra* note 69, at 26.

72. Scharf, *The Amnesty Exception*, *supra* note 12, at 512.

73. *Id.*

74. Robinson, *Amnesties*, *supra* note 40, at 489.

75. *Id.*

76. *Id.* at 489–90.

77. *Id.*

78. Scharf, *The Amnesty Exception*, *supra* note 12, at 513.

79. *Id.*

80. Orentlicher, *supra* note 46, at 2542.

81. Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT’L L. REV. 301, 386 (2003).

82. *Id.* at 389.

B. Arguments for the Alternatives to Criminal Prosecution

“[T]he way a new civilian government chooses to deal with the crimes of the former regime reflects the new government’s perception of its strength.”⁸³

On the other hand, a country in transition cannot simply ignore issues of the present created by the conflicts of the past. Many of the arguments against criminal prosecution stem from the grim realities faced by countries struggling to overcome the legacies of brutal genocidal rule or internal conflict. As Orentlicher noted, “. . . some of the fledgling democracies have been presented with a Hobson’s choice between their very survival and the principles upon which their existence was founded.”⁸⁴ Thus, states may be forced into a choice between upholding fundamental governmental principles and values, or submitting to the harsh reality of compromise.

A firm insistence on criminal prosecutions may prolong a conflict and cause more pain and suffering to a country’s citizens.⁸⁵ A promise of amnesty to an abusive regime may soften the blow, as it were, of relinquishing power. In contrast, regimes that face punishment in the future may be less likely to walk away.⁸⁶ Thus, the pressing need for peace may require that amnesty be a bargaining chip available to those negotiating for an end to conflict.⁸⁷ Furthermore, the newly-installed government may be threatened, as politically charged and controversial trials may test it in ways for which it is not yet prepared.⁸⁸ In these situations, truth commissions⁸⁹ and alternative justice programs, including amnesty-granting programs,⁹⁰ can offer some significant advantages.

83. Scharf, *Swapping Amnesty*, *supra* note 59, at 8.

84. Orentlicher, *supra* note 46, at 2539.

85. Scharf, *The Amnesty Exception*, *supra* note 12, at 507.

86. Jon M. Van Dyke & Gerald W. Berkley, *Redressing Human Rights Abuses*, 20 DENV. J. INT’L L. & POL’Y 243, 246 (1992); Diane F. Orentlicher, *Judging Global Justice: Assessing the International Criminal Court*, 21 WIS. INT’L L.J. 495, 500 (2003).

87. See Chandra Lekha Sriram, *Revolutions in Accountability*, *supra* note 81, at 378–82.

88. Orentlicher, *supra* note 46, at 2544–45.

89. As Professor Leila Sadat has stated, “[t]he Rome Statute in no way impedes the establishment of truth commissions, and it explicitly recognizes the rights of victims.” SADAT, THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 53.

90. While truth commissions have remembrance (by the creation of a record by which the reconciliation of society may be facilitated) as one of their purposes, the purpose of amnesties is forgetfulness or oblivion. SADAT, THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 55 (citing Fania Domb, *Treatment of War Crimes in Peace Settlements—Prosecution or Amnesty?*, 24 ISRAEL Y.B. HUM. RTS. 253 (1994)). Indeed, the word is derived from the Greek *amnesia*, meaning forgetfulness. SADAT, THE INTERNATIONAL CRIMINAL COURT, *supra* note 1, at 55. A further

First, they may allow the “greater context or root causes”⁹¹ of a conflict to be discovered and made public as part of the healing of the group psyche. Criminal trials may not suffice as mechanisms by which an appropriate record of the conflict can be recorded and expounded. From the victims’ perspective, a criminal prosecution may be an intimidating arena. A “more welcoming forum”⁹² may not only make the victims more comfortable and aid in their own individual healing process, but, because more information (both in terms of reliability and quantity) is likely to be obtained in such an environment, a more accurate record can be developed with regard to the roots and causes of the turmoil and conflict.⁹³

The practicalities of trial in a context of mass atrocities may also lead to the conclusion that it makes more sense to attempt alternative justice mechanisms. Some conflicts have seen thousands of perpetrators of crimes, and to prosecute each and every individual would overload even the most qualified and well-supported tribunals, let alone the criminal justice system of a transitional state with few resources and little funding.⁹⁴ Furthermore, a more flexible approach may also deal more ably with the varying levels of culpability amongst those who have committed atrocities. Those who were merely carrying out orders or were at the lower levels of authority may merit more lenient treatment.⁹⁵ Alternative justice systems may provide such flexibility while standard criminal prosecution may not.

distinction between truth commissions and amnesties is that while truth commissions are often individualized in procedural terms, amnesties are granted to broad groups of persons, often either to dictators and military leaders as a condition of their having relinquished power, or to broad swaths of society when the crimes do not rise to the level of genocide or “grave breaches” and the criminal justice system is, due to their numbers or other circumstances, unable to cope. *Id.* at 56–57. “[Amnesties] are thus practical, if somewhat unsatisfactory solutions to the problem of mass atrocities: justice is traded for peace, or at least a temporary truce, in the hopes that the atrocities will stop and the society will be able to move on.” Sadat, *Universal Jurisdiction*, *supra* note 3, at 196.

91. Robinson, *Amnesties*, *supra* note 40, at 484.

92. *Id.*

93. See Sriram, *supra* note 81, at 385–86.

94. Robinson, *Amnesties*, *supra* note 40, at 494.

95. Bassiouni, *From Versailles to Rwanda*, *supra* note 19, at 12. Since Nuremberg, superior orders have not constituted a complete defense to international crime. *Id.* See also Rome Statute, *supra* note 2, art. 33. “The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order . . . shall not relieve that person of criminal responsibility unless:” (1) there was a legal obligation to carry out the orders; (2) the person was unaware that the order was unlawful; and (3), “the order was not manifestly unlawful.” Rome Statute, *supra* note 2, art. 33(1). The Rome Statute makes clear that “orders to commit genocide or crimes against humanity are manifestly unlawful.” *Id.* art. 33(2).

V. A FRAMEWORK FOR UNDERSTANDING WHEN THE ICC PROSECUTOR IS
 LIKELY TO DETERMINE THAT PROSECUTION WOULD NOT BE IN THE
 “INTERESTS OF JUSTICE”

Article 53 of the Rome Statute allows the ICC Prosecutor to defer to national investigations “in the interests of justice.”⁹⁶ While the issue of how to deal with alternatives to criminal prosecutions—including national amnesties, truth and reconciliation efforts, etc.—was raised in the ICC negotiations, it was not explicitly dealt with in the Rome Statute.⁹⁷ Instead, the drafters at Rome “turned to the faithful and familiar friend of diplomats, *ambiguity* . . .”⁹⁸ As a result, the guidelines must yet be interpreted in order to develop any potential framework within which alternative justice programs may be allowed to operate.

Two categories of alternative justice programs will be addressed herein: responses based on alternative or restorative justice measures, including truth commissions; and responses that include amnesties, blanket or otherwise. With the treatment of these programs in the Rome Statute clearly in mind, and aided by the above discussion of the requirements of international law with regard to the crimes under the Court’s jurisdiction, general rules that should guide the Prosecutor in determining whether an investigation is in “the interests of justice” can be described.

A. *Does the ICC Foreclose Alternative Means of Dealing With Past Regimes (Truth and Reconciliation Commissions, etc.) and/or the Use of Amnesties?*

*“It is unrealistic to expect . . . leaders to agree to a peace settlement if, directly following the agreement, they would find themselves or their close associates facing life imprisonment.”*⁹⁹

The relationship between the ICC and alternative justice may appear, at least at first glance, uneasy. Indeed, one commentator finds the ICC at once “both morally impressive and legally a little frightening” because he fears that “it could be misinterpreted, albeit incorrectly, as foreclosing the use of truth commissions.”¹⁰⁰ There were two sides of this debate at Rome:

96. Rome Statute, *supra* note 2, art. 53(c).

97. Robinson, *Amnesties*, *supra* note 40, at 483.

98. *Id.*

99. Scharf, *The Amnesty Exception*, *supra* note 12, at 508.

100. Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the*

those who believed prosecution to be the sole appropriate response and those who believed that alternative mechanisms may be acceptable and “had misgivings about laying down an iron rule for all time, mandating prosecution as the *only* acceptable response in all situations.”¹⁰¹ Indeed, the US delegation reportedly took this latter position at Rome, as it circulated a “nonpaper” making just such a claim.¹⁰²

If one looks at the “big picture,” the two options are not necessarily mutually exclusive. Indeed, “[r]etributive justice, symbolized by the ICC, and restorative justice, represented by truth commissions, ultimately have similar goals and can benefit from each other.”¹⁰³ With this in mind, it becomes clearer that the ICC is intent not on confronting or eliminating truth and reconciliation or amnesties, but merely upon ensuring that serious international crimes are, in fact, punished.¹⁰⁴ The Rome Statute’s drafters understood that the use of these programs may, at times, be an unfortunate necessity and that the argument, when “stripped to its essence . . . is one of lesser evils.”¹⁰⁵ Because of these considerations, the legal regime established by the Rome Statute does not, in cases where the jurisdictional requirements of the Court are otherwise met, foreclose the use of amnesties and alternative justice mechanisms when they are in “the interests of justice.”

B. The Guidelines: When Will the Prosecutor Determine that Prosecution by the ICC is not in the “Interests of Justice”

*“In deciding whether a necessity exception might apply, one should consider the balance between the extent of the departure from full prosecution, i.e., the quality of the measures taken, and the severity of the factors necessitating a deviation.”*¹⁰⁶

International Criminal Court and Truth Commissions Meet, 49 EMORY L.J. 205, 205 (2000).

101. Robinson, *Amnesties*, *supra* note 40, at 483.

102. Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. INT’L L. 93, 96 [hereinafter Wedgwood, *An American View*]; Scharf, *The Amnesty Exception*, *supra* note 12, at 508; Scharf, *The Letter of the Law*, *supra* note 59, at 41–42. The paper is said to have suggested that “a responsible decision by a democratic regime to allow an amnesty was relevant in judging the admissibility of a case.” Wedgwood, *An American View*, *supra*, at 96.

103. Villa-Vicencio, *supra* note 100, at 217–18. Indeed, as Darryl Robinson has pointed out, there is “no inherent hostility or contradiction” between the ICC and truth and reconciliation efforts “*per se*.” Robinson, *Amnesties*, *supra* note 40, at 484.

104. *Id.*

105. Orentlicher, *supra* note 46, at 2537.

106. Robinson, *Amnesties*, *supra* note 40, at 497 (emphasis added).

A few guidelines with regard to the application of amnesties and alternative justice mechanisms must be established in order to effectively predict their likely treatment by the ICC. What follows is a general outline of how these situations will likely be resolved by the Prosecutor.

1. Complementarity

The determination to prosecute is controlled by whether the ICC can have jurisdiction over the events and parties in question. As mentioned, the ICC will not have jurisdiction unless a state that would otherwise have jurisdiction is unwilling or unable genuinely to prosecute.¹⁰⁷ Unwillingness is exemplified by proceedings that show evidence of an intent to shield,¹⁰⁸ unjustified delay¹⁰⁹ (shown through comparison to domestic standards¹¹⁰), or through derogation from international norms of due process.¹¹¹ Inability is shown by putting the entire criminal justice system of the domestic state “on trial.”¹¹²

If the complementarity regime is not satisfied, then the ICC will not be able to take jurisdiction over the particular crimes. It is only in cases where complementarity is satisfied that the prosecutorial deferral is available.

2. Prosecutorial Deferrals

In determining when it would be in the interests of justice for the ICC to defer to a national proceeding, the Court should first look to the nature of the crime. If the crime represents *jus cogens*, there may be a treaty obligation or an *obligatio erga omnes* on the part of the state involved to prosecute.¹¹³ This obligation to prosecute criminally would render amnesties and alternative justice mechanisms not amounting to criminal

107. Rome Statute, *supra* note 2, art. 17.

108. *Id.* art. 17(2)(a) (“... the Court shall consider, having regard to the principles of due process recognized by international law, whether ... [t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.”)

109. *Id.* art. 17(2)(b) (“... the Court shall consider, having regard to the principles of due process recognized by international law, whether ... [t]here has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice.”)

110. Holmes, *Complementarity*, *supra* note 6, at 669–70.

111. Rome Statute, *supra* note 2, art. 17(2)(c) (“... the Court shall consider, having regard to the principles of due process recognized by international law, whether ... the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”)

112. Louise Arbour, *Litigation Before the ICC*, *supra* note 66, at 4.

113. *See supra* notes 50, 51, 52 and accompanying text and citations.

prosecution illegitimate and insufficient to satisfy the demands of international law.¹¹⁴

Second, the Court should look to the particular response. Overall, any amnesty or alternative justice mechanism must be part of an overall scheme to rehabilitate and aid in a troubled country's transition—it must be, in fact, part of a scheme to break with the past regime.¹¹⁵ Thus, self-dealing on the part of the past-regime will not, in the eyes of the Prosecutor, merit a deferral. The voices of the victims must be heard¹¹⁶ and the opposition to the program must be given the opportunity to question its legitimacy.¹¹⁷ This will help to create the social consensus necessary to ensure that these programs are successful. Indeed, in order to be in the “interests of justice,” any alternative mechanism or amnesty must be convincingly accepted by the populace,¹¹⁸ and the decision not to criminally prosecute must be part of a program that genuinely penetrates the society in terms of its genesis, application, and acceptance. Further, those granted amnesty must be members of strictly defined categories¹¹⁹ and the proceedings of these programs should be regularized and carefully conducted in order to create a record sufficient to teach a historical lesson that will help avoid future conflict.¹²⁰

Dealing specifically with amnesties, if the response is a blanket, general amnesty, the Prosecutor will almost certainly not defer. Amnesty should be a “bargaining tool of last resort”¹²¹ and not the means by which the former regime can buy its freedom wholesale. If the response is a partial amnesty, the default rule must still be considered: perpetrators, especially those most responsible, must be prosecuted, except in cases of severe necessity, by standard criminal processes. Thus, the “quality” of the amnesty program should be examined and targeted amnesty-granting programs should be considered carefully and with a healthy amount of skepticism.

It is important to determine whether the amnesty will serve the security and social-rehabilitation requirements of the transitional society. A crucial indicator of whether the amnesty was granted with the proper purposes in

114. Note that these obligations apply only to states; the prosecutor of the ICC is not limited by these principles, and his choice is restrained only by the principle of prosecutorial discretion.

115. See Gwen K. Young, *All the Truth and as Much Justice as Possible*, 9 U.C. DAVIS J. INT'L L. & POL'Y 209, 212–16 (2003).

116. Villa-Vicencio, *supra* note 100, at 209.

117. Slye, *supra* note 49, at 245.

118. Villa-Vicencio, *supra* note 100, at 216.

119. Slye, *supra* note 49, at 241.

120. *Id.*

121. Scharf, *The Amnesty Exception*, *supra* note 12, at 512.

mind is the identities of the parties responsible for the amnesty. If amnesty was granted under an internationally negotiated agreement, in which parties from the former regime, representatives from the newly-installed government, and international officials and observers participated, then it can likely be presumed that the amnesty was not given illegitimately. The presence of representation of the transitional regime at these negotiations—especially if democratically elected—is particularly credible evidence that the amnesty should be respected.

Under the same logic, programs of self-amnesty by a former regime will generally not qualify. This is particularly so in cases where the military was a main perpetrator. Amnesties should, under no circumstances, be given to the military in order simply to relieve the potentially great pressure that the armed forces can bring to bear. Despite the danger to the transitional government, the harmful effects of impunity are compounded in situations where groups formerly in power are able to negotiate impunity for crimes they have committed. In these situations, the argument that amnesties are simply a kind of forced amnesia and not a tool for social rehabilitation is particularly prescient. Amnesty must be regarded as independent from gross manipulation in order for its intended benefits to be realized.¹²²

If, on the other hand, the response is a truth and reconciliation committee or other alternative justice system, it should be analyzed with similar factors in mind. Were high-level perpetrators prosecuted, except in cases of severe necessity, by standard criminal processes? If not, was the deviation justified? Factors to examine in these cases include the state's resources and ability to prosecute the crimes, the populace's acceptance and ratification of the alternative system, the number of victims to be prosecuted, and the effectiveness of alternative mechanisms in providing benefits to the victims and in creating a legitimate historical record.

VI. FOUR ILLUSTRATIVE SCENARIOS

The following fact patterns will help illustrate some of the concepts just discussed. In each, assume that all states described are states party to the Rome Statute and that the operative facts took place on the territory of a state party to the Rome Statute. Thus, the ICC would be able to exercise jurisdiction if it so chose in each of these situations, if not for considerations presented herein.

122. Orentlicher, *supra* note 46, at 2543.

A. Scenario One: ICC Jurisdiction is Clearly Precluded

A soldier serving in a state party to the Rome Statute is leading a peacekeeping platoon. The platoon is attacked by rebel forces. In retaliation, the soldier orders an attack on a local village and commits a crime akin to the My Lai massacre.¹²³ The soldier's government immediately investigates and tries the soldier through its regular military processes. The soldier is convicted of war crimes in accordance with military code, is court-martialed, and is sentenced to a significant prison term.

The jurisdiction of the ICC would be precluded by the principle of complementarity in this scenario. The response was immediate, the perpetrator was tried through regular processes, and, appears to have received appropriate punishment. Importantly, there is no indication of an unwillingness or inability to try the perpetrator.

B. Scenario Two—The ICC Prosecutor May Defer to the National Process

A Southeast-Asian country was racked by a bloody civil war in which leaders of the warring sides ordered crimes constituting genocide and ethnic cleansing. Both sides participated in the attacks. As part of the peace agreement, an internationally-sponsored and Security Council-created tribunal was created to try those most responsible for the atrocities in the country. Unfortunately, the international tribunal has been bogged down by the effort and very few prosecutions were completed.

In response, the country's leadership allowed for traditional tribal tribunals to take up much of the burden of prosecuting lower and middle-level perpetrators.¹²⁴ However, these traditional tribunals have failed to meet due process obligations under the International Covenant for Civil and Political Rights.¹²⁵ In spite of this, the government has continued to refer many of the genocide-related crimes to them.

123. For a detailed description of the My Lai Incident, see I REPORT OF THE DEPARTMENT OF THE ARMY REVIEW OF THE PRELIMINARY INVESTIGATIONS INTO THE MY LAI INCIDENT (1970).

124. L. Danielle Tully, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. INT'L & COMP. L. REV. 385 (2003); Sadat, *Universal Jurisdiction*, *supra* note 3, at 8. This hypothetical is based upon the Gacaca tribunals in Rwanda. The Gacaca system is made up of nineteen-member lay tribunals that, though traditionally designed only to hear property and marital disputes, may hear many of the crimes under Rwanda's Genocide Law.

125. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No 16, at 52, U.N. Doc. A/6316 (1966).

These tribal judicial processes would likely be accepted by the Prosecutor as legitimate responses to some crimes within the jurisdiction of the Court. In this situation, it is first necessary to ask whether the proceedings in the tribal courts constitute a criminal prosecution. If these tribunals are not (or are incapable of) conducting criminal prosecutions, genocide, for example, would not be a crime that the tribunals could legitimately try.¹²⁶ A second major concern would be the due process rights of the accused, as it can be argued in this situation they would not be adequately protected.

Despite these concerns, however, the tribal program seems to promote the interests of justice. The program has popular support, indicating that these processes may promote reconciliation through trying of those culpable. The tribal processes may also meet the very real concern of a system becoming bogged down by the high number of trials that must be conducted. Third, and most importantly, this process does not appear to lend itself to the perception that it is influenced by illegitimate pressure—whether exerted by the military or other sources.

C. Scenario Three: Prosecutorial Deferral is Unlikely

A European country was under the control of a particularly brutal and oppressive authoritarian regime, whose main instrument of coercion, the “disappearance,” resulted in the abduction of tens of thousands of civilians. After decades, the regime was finally brought down and the perpetrators are now being punished. Thus far, a few regime members and officers were charged for their role in the disappearances; however, in response to military uprisings, junior and mid-level officers as a class were amnestied. The process has taken years, and public support, which was lukewarm initially, is now described by observers as declining.

In this scenario, the main concern is with regard to the grant of amnesty as a class to members of the military. While it appears that the upper level military leaders remain open to prosecution, the amnesty will surely be considered a result of the military’s great influence. Such an exercise of influence will likely poison the reconciliation process and popular support based on a perception of legitimacy is certain to be lacking. Under these circumstances, it seems likely that the Prosecutor would not defer to these proceedings and the ICC would assume jurisdiction.

126. See *supra* notes 46–60 and accompanying text.

D. Scenario Four: The ICC Would Clearly Step In

A particularly brutal minority government was in power in a small island nation and is eventually met with a campaign by the majority not only to eliminate the minority leadership, but to wipe out the minority presence in the country altogether. Widespread crimes against humanity and attempts at genocide are committed throughout an entire decade. An internationally-sponsored peace agreement comes into force that allows the country, now controlled by the majority ethnic group, to prosecute the crimes committed as part of the conflict and to grant a blanket amnesty to the majority. Charges were brought only against the lower-level perpetrators in a specially-created court and were characterized by apparent ineptitude and corruption. The proceedings were, in general, riddled with irregularities and the court purported to have the authority to amnesty even those crimes that took place outside its territory, so long as they had anything to do with the overall conflict.

Here, the ICC would clearly retain jurisdiction. First, it is questionable whether the principle of complementarity would preclude ICC jurisdiction in response to such proceedings. There appears to have been inept prosecution in a non-standard format compared to that typical of the country. As a result, the proceedings may represent an intent to shield the accused from justice. Second, treaty and customary law obligations appear to have been breached by the wholesale amnesty granted to the majority. As noted, there is a legal obligation to try criminally the crime of genocide and a developing legal obligation to try many of the crimes under the court's jurisdiction. In such a case, an insistence on non-criminal prosecution may also represent an indication of unwillingness to try the perpetrators genuinely. Thus, the principle of complementarity is probably not satisfied.

Furthermore, these proceedings would not lead the Prosecutor to defer in the interests of justice in any case. The amnesty was blanket, which presumably would not be looked upon favorably. Those that were tried were not those most culpable, but were a class of lower-level perpetrators. Thus, the reconciliation process will be hindered as those most responsible for the crimes will be perceived to have been given preferential treatment and, as a result, have retained their liberty. In such a situation, one could easily state that “[t]his is not amnesty; it is forcible amnesia.”¹²⁷

127. Scharf, *Swapping Amnesty for Peace*, *supra* note 59, at 2, *accord* Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, para. 22, U.N. Doc. S/2000/915 (2000).

VII. CONCLUSION

The ICC represents a “revolution”¹²⁸ in international criminal law and, appropriately, was created at the beginning of a “new millennium”¹²⁹ in order to address the injustices that in past centuries had gone unpunished. Its structure represents the competing interests of states in retaining their sovereign rights while respecting the human rights of individuals worldwide. The result is a Court that embodies the hope that states will fulfill their obligations and try those most responsible for the most serious international crimes while, at the same time, preparing for those instances when states will fail to live up to this responsibility.

The prosecutorial deferral and complementarity regimes are designed to allow the ICC to achieve this goal. Through somewhat ambiguous provisions, the drafters of the Rome Statute left the court with a great deal of flexibility to determine when it should refuse to exercise jurisdiction. This ambiguity may leave some uncomfortable, but it is absolutely necessary to provide the ICC Prosecutor with the tools he needs to ensure that justice appropriately tailored to the particular situation is done.

The application of these mechanisms likely will evolve over time. However, taken in the context of the growing international humanitarian law obligation to prosecute criminally in certain circumstances, and in light of the object and purpose of the ICC, the international community should consider itself well-served by this new, prudently designed adjudicatory mechanism. It is a Court that, while respecting traditional notions of sovereignty, strikes a compromise allowing it to reach beyond the obstacles that have historically frustrated international legal enforcement. As a result, it is a major advance in the fight to ensure that the victims of international crimes receive the redress they so richly deserve.

*Thomas Hethe Clark**

128. Sadat & Carden, *An Uneasy Revolution*, *supra* note 21, at 381.

129. SADAT, *THE INTERNATIONAL CRIMINAL COURT*, *supra* note 1, title.

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