
Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court

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Abstract

With the entry into force of the Rome Statute of the International Criminal Court, many issues which were once theoretical will soon have significant practical ramifications. Prominent among these is whether and when the ICC might defer to national reconciliation programmes that involve amnesties. This article discusses the provisions of the Statute that might allow deference and suggests propositions for the ICC. First, given the mandate of the ICC and the imperative of removing expectations of impunity for serious international crimes, prosecution is of the highest importance. Second, in situations of transition from mass violence, involving large numbers of perpetrators, the ICC could nevertheless defer to a national programme whereby only those most responsible are prosecuted and low-level offenders are dealt with by non-prosecutorial alternatives (truth commissions). Third, national programmes whereby amnesties may be sought even by those persons most responsible for international crimes are most unlikely to garner deference, but it is at least conceivable that the ICC could conclude that it would not be in the 'interests of justice' to interfere with a democratically adopted, good faith alternative programme that creatively advanced accountability objectives. Finally, blanket amnesties could never warrant deference, as they are the antithesis of the ICC; even in situations of extreme political necessity, to accept a blanket amnesty would be for the ICC to succumb to blackmail.

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1 Introduction

The entry into force of the Rome Statute of the International Criminal Court (ICC) on 1 July 2002 means that many issues which were once of purely theoretical interest will soon arise in concrete form with very real legal and political ramifications.¹ Prominent among these issues is the sensitive and controversial question of the relationship between the ICC and national reconciliation measures such as truth commissions.

The ICC is a vital part of the international effort to eliminate the persistent climate of impunity which has so often sheltered those who commit serious international crimes. The ICC is a permanent international judicial institution designed to complement national judicial systems by prosecuting persons responsible for genocide, crimes against humanity and war crimes where national judicial systems are unable or unwilling to do so.² It is expected that the ICC will contribute to a climate of accountability not only through the demonstrative effect of its own prosecutions but, more importantly, through the ‘multiplier effect’ of its complementary jurisdiction, as it encourages states to more diligently apprehend and prosecute international criminals.

While welcoming the creation of the ICC, some commentators have expressed concerns that its approach may prove to be too blunt in dealing with the varied and complex situations facing democracies in transition. For example, Charles Villa-Vicencio greets the ICC as ‘both morally impressive and legally a little frightening’ because ‘it could be misinterpreted, albeit incorrectly, as foreclosing the use of truth commissions’.³ Similarly, Alex Boraine observes that

[i]t is to be hoped . . . that when the International Criminal Court comes into being, it will not, either by definition or by approach, discourage attempts by national states to come to terms with their past. . . . It would be regrettable if the only approach to gross human rights violations comes in the form of trials and punishment. Every attempt should be made to assist countries to find their own solutions provided that there is no blatant disregard of fundamental human rights.⁴

Other commentators, including strong supporters of the ICC and individual accountability, have suggested that there should be some scope for the ICC to defer to truth commission initiatives where such initiatives are legitimate and necessary mechanisms for a transition from repression or violence to a stable democracy.⁵

¹ Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9*, as corrected, reprinted in 37 ILM (1998) 999. The 60th instrument of ratification was deposited on 11 April 2002, such that, in accordance with Article 126 of the Statute, the Statute entered into force on 1 July 2002.

² See Article 17 of the ICC Statute.

³ Villa-Vicencio, ‘Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet’, 49 *Emory Law Journal* (2000) 205, at 205.

⁴ A. Boraine, *A Country Unmasked: South Africa’s Truth and Reconciliation Commission* (2000).

⁵ See, e.g., Arsanjani, ‘The International Criminal Court and National Amnesty Laws’, *ASIL Proceedings* (1999), 65; and Scharf, ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’, 32 *Cornell International Law Journal* (1999) 507. UN Secretary-General Kofi Annan has suggested that it would be ‘inconceivable’ for the ICC to set aside an approach like that adopted in the South African situation: Kofi Annan, Speech at the Witwatersrand University Graduation Ceremony (1 September 1998), quoted in Villa-Vicencio, *supra* note 3, at 222.

The issue of how to deal with national amnesties and national truth and reconciliation efforts was raised in the ICC negotiations,⁶ but was not explicitly dealt with in the Rome Statute. Views on the matter clashed sharply, as many participants felt very strongly that prosecution is the sole appropriate response (and indeed an obligatory response), whereas others felt very strongly that alternative mechanisms were acceptable.⁷ Even among those delegations most committed to prosecution of all international crimes, many had misgivings about laying down an iron rule for all time mandating prosecution as the *only* acceptable response in all situations.⁸ On the other hand, creating an explicit exception allowing amnesties was equally untenable. Some delegations opposed any exceptions in principle, whereas others were concerned that any exception would be immediately exploited and abused. Indeed, the very purpose of the ICC was to ensure the investigation and punishment of serious international crimes, and to prompt states to overcome the considerations of expedience and *realpolitik* that had so often led them to trade away justice in the past.

The drafters of the Rome Statute wisely chose not to delve into these difficult questions. First of all, agreement would likely have been impossible, given the sharply clashing views on the matter. Second, even if there were agreement in principle, it would have been unwise to attempt to codify a comprehensive test to distinguish between acceptable and unacceptable reconciliation measures and to lock such a test into the Statute.⁹ Thus, the drafters turned to the faithful and familiar friend of diplomats, *ambiguity*, leaving a few small avenues open to the Court and allowing the Court to develop an appropriate approach when faced with concrete situations.

This article will review some of the possible avenues available to the ICC and suggest possible interpretative approaches for the Court. The most likely point at which the ICC will determine whether to defer to national programmes is pursuant to the discretion of the Prosecutor to decline to prosecute where it would not be in the 'interests of justice'. The basic argument presented here is that the ICC, given its mandate, *must* generally insist on prosecution, but that there may be exceptional circumstances where it would not be in the interests of justice to interfere with a reconciliation mechanism, even though that mechanism falls short of prosecution of all offenders. First, for transitional societies dealing with mass atrocities, a program of truth commissions and conditional amnesties for lower-level offenders, coupled with

⁶ This discussion arose particularly in the context of Article 17. This author assisted with the coordination of the relevant negotiations and the drafting of that Article.

⁷ For example, an informal discussion paper on the subject circulated by the United States is still available at gopher://gopher.igc.apc.org/00/orgs/icc/natldocs/prepcom4/amnesty.us.

⁸ The question was also raised whether the international community must *always* insist on a programme of prosecutions, even where it would provoke the collapse of a fragile democracy in transition, thus bringing about violence, repression and further crimes against humanity. Some delegates were also mindful of the powerful images of sincere repentance by offenders and spontaneous forgiveness from victims in some of the South African TRC proceedings, and wondered whether it would be *hubris* to declare that the formality of prosecution is the only response in all cases of international crimes.

⁹ See, e.g., Morris, 'Foreword', 59 *Law and Contemporary Problems* (1996) 1, discussing the pros and cons of crafting guidelines governing the acceptability of truth commissions.

prosecution of the persons most responsible for such crimes, would likely be a sufficient response deserving deference from the ICC, especially where the number of offenders is prohibitive. Second, if a state went further and allowed even the persons most responsible for international crimes to apply for conditional amnesties, it would be dramatically more difficult to justify. However, the door is not necessarily completely closed, and the ICC may keep an open mind to creative and good faith alternatives to traditional models of prosecution. In the light of the mandate of the ICC, the circumstances would have to be quite compelling, and one would require both pressing circumstances of necessity as well as an impressive non-prosecutorial approach advancing the objectives of accountability. Third, a blanket amnesty for international crimes would be the antithesis of the purpose of the ICC and should never enjoy deference from the Court.

It is important to clarify at the outset that there is no inherent hostility or contradiction between the objectives of the International Criminal Court and truth and reconciliation efforts *per se*. Where used to *supplement* criminal investigations and prosecutions, truth commissions offer many important benefits that are not provided by prosecution alone. Criminal trials are a highly formalized process to determine the culpability of particular accused persons; they are not appropriate fora to deal with the greater context or root causes of a conflict or repressive regime, nor – in the light of the rules of procedure and evidence – are they a welcoming forum for victims to share their experiences.¹⁰ Truth commissions can supplement prosecutions as a valuable means to give a voice to victims, to build a comprehensive record of events, patterns and causes, to provide meaningful official and societal acknowledgment, to promote reconciliation, to facilitate compensation of victims, to educate the public, and to make recommendations for the future.

Thus, prosecutions and truth commissions each serve valuable objectives which are not inherently in conflict.¹¹ The problem arises where truth commissions are accompanied by amnesties. The problem for the International Criminal Court is not the truth and reconciliation efforts, but rather the fact that serious international crimes are going unpunished. Indeed, the very *raison d'être* of the ICC is to help ensure that serious international crimes do not go unpunished.¹²

¹⁰ See e.g., Minow, 'The Hope for Healing: What Can Truth Commissions Do?', in R. Rotberg and D. Thompson (eds), *Truth v. Justice: The Morality of Truth Commissions* (2000) 235.

¹¹ It is true that the simultaneous functioning of a national or international prosecution effort and a truth and reconciliation effort can raise significant technical or practical complications. For example, a truth commission may complicate prosecution efforts when hearing statements from victims who would also be excellent witnesses for a prosecution, because it creates a record that might be used for cross-examination. There are also questions of whether a truth commission should share evidence with the international criminal proceeding (as this might impair the willingness to give information to the commission). In addition, the overlapping efforts of two investigative bodies can cause 'witness fatigue' within a population. These are important questions, but they do not represent fundamental conflicts and are beyond the scope of this paper.

¹² ICC Statute, preamble, para. 4.

2 Interpreting the ICC Statute

In determining an appropriate approach for the ICC with respect to national reconciliation efforts that fall short of full prosecution, it is useful to bear in mind several important features of the Court's jurisdiction.

The first point is that the jurisdiction of the ICC is limited to 'the most serious crimes of concern to the international community as a whole', namely genocide, crimes against humanity and war crimes.¹³ These crimes are cautiously defined so as to focus on atrocities of particular scale and severity. Thus, these are the very crimes for which the imperative of punishment is greatest and for which amnesties are the most widely seen as inappropriate.¹⁴

The second point is that the purpose of the ICC is to ensure that violators do not escape punishment. The guiding philosophy is articulated in paragraphs 3 to 5 of the preamble of the ICC Statute, which state:

Recognizing that such grave crimes threaten the peace, security and well-being of the world, Affirming that the most serious crimes of concern to the international community as a whole *must not go unpunished* and that their *effective prosecution must be ensured* by taking measures at the national level and by enhancing international cooperation, Determined to *put an end to impunity* for the perpetrators of these crimes and thus to contribute to the prevention of such crimes . . . (emphasis added).

These are the 'marching orders' given by the international community to the ICC.

Third, it is important to bear in mind the narrow jurisdiction of the ICC and its basis in express state acceptance. This narrow jurisdictional regime militates against the argument that ICC insistence on prosecution would undermine sovereignty or legitimate democratic decisions.¹⁵ The ICC has jurisdiction only where the Security Council refers a matter or where the state on whose territory the crime occurred or the state of nationality of the accused has accepted the jurisdiction of the ICC (such acceptance may be furnished by ratifying the Statute or by submitting a declaration of acceptance to the Court).¹⁶ In the case of a Council referral, special deference to the national choices of the state concerned is not necessary, since a Security Council decision under Chapter VII of the Charter entails that the situation is a threat to international peace and security, and makes compliance by all states mandatory under the UN Charter.¹⁷ Absent a Council referral, the ICC can only have jurisdiction relating to civil conflict or repression within a state where that state has ratified the

¹³ Articles 5 to 8 of the ICC Statute. The crime of aggression may also be added to the Court's jurisdiction in the future, once a suitable definition is agreed upon by 7/8 of the ICC states parties at a review conference. See Articles 5(2), 121 and 123 of the Statute.

¹⁴ Amnesties may even be impermissible under international law, see the discussion below of the duty to bring perpetrators to justice, Section 3C.

¹⁵ An argument raised, for example, by Grossman, US Under Secretary for Political Affairs, 'American Foreign Policy and the International Criminal Court', Remarks to the Center for Strategic and International Studies, Washington D.C., (6 May 2002), available at www.state.gov/p/9949.htm.

¹⁶ Articles 12 and 13 of the ICC Statute. Moreover, Article 11 provides that the state's acceptance is only effective for crimes occurring *after* the ratification or acceptance, unless the state specifically declares that it accepts jurisdiction over earlier crimes.

¹⁷ Articles 12 and 13 of the ICC Statute, and Articles 25, 48 and 103 of the UN Charter.

Statute or expressly declared its willingness to have those crimes judged by the ICC.¹⁸ In a sense, the state concerned has *entered into a compact with the ICC, specifically mandating the ICC to prosecute wherever the state itself fails to do so*.¹⁹ Therefore, arguments that ICC insistence on prosecution may interfere with sovereignty or domestic democratic choices should not be given too much weight, since in reality the state has already specifically *contracted* with the ICC to perform precisely this function.

In the light of the ICC's specific mandate and the compact into which states have entered with it, the ICC must be committed to prosecution and can defer to non-prosecutorial programmes only in exceptional situations. Given the framework of the Statute, there are three mechanisms by which deference is possible:

1. The Prosecutor may in some circumstances decline to prosecute on the grounds that it would not serve the *interests of justice* (Article 53);
2. Where the alternative mechanisms being employed so closely meet the goals of accountability that they can be considered '*genuine*' proceedings, deference is possible under the 'complementarity' regime (Article 17);
3. Where the Security Council determines that investigation or prosecution would interfere with efforts to maintain or restore *international peace and security*, the Security Council may require the Court to suspend action (Article 16).

3 The Interests of Justice: Discretion Not to Proceed

A The Structure of Article 53

The most likely point at which deference could be accorded to non-prosecutorial reconciliation measures would be the exercise of prosecutorial discretion not to proceed with an investigation or prosecution. Article 53(1) of the ICC Statute governs the decision by the Prosecutor whether to launch an investigation once jurisdiction has been 'triggered' by a referral from a state party or the Security Council.²⁰ Article

¹⁸ A very interesting exception to this proposition would occur in cases where members of one state carry out international crimes on the territory of another state, and that victim state has accepted the Court's jurisdiction. In such a case, it would be highly dubious for the offending society to carry out non-prosecutorial means of 'forgiving' itself and its nationals for the crimes committed against nationals of another state. Such a procedure would not satisfy any of the objectives normally associated with truth and reconciliation commissions and would likely be properly disregarded. An interesting variation would be a situation of international armed conflict, which could theoretically end with a peace accord providing, on a mutual basis, for some form of amnesties and truth commissions. In such a case, the considerations articulated below for deferring in appropriate cases to such a mechanism would likely be equally pertinent. Note however Article 148 of the Fourth Geneva Convention of 1949 (non-absolution of liability for war crimes).

¹⁹ See, e.g., Article 17 of the Statute and preamble, paras 4 to 7 of the Statute.

²⁰ Articles 13(c) and 14 of the Rome Statute. For the ICC to exercise jurisdiction, a situation must be referred by a state party, by the Security Council, or the Prosecutor may initiate investigations *proprio motu*. The literal application of Article 53(1) makes less sense following an initiation *proprio motu* by the Prosecutor under Article 15(3), since Article 15(3) already requires that the Prosecutor be convinced that there is a 'reasonable basis to proceed'. It is more logical that the Prosecutor would already take into account issues such as the availability of evidence, the existence of genuine national proceedings, as well as the 'interests

53 provides that the Prosecutor *shall* initiate an investigation *unless* he or she determines that there is 'no reasonable basis' to proceed. More specifically, Article 53(1)(c) requires the Prosecutor to consider whether, '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*'.²¹ This same consideration arises again under Article 53(2), which governs the decision of the Prosecutor, following the investigation, as to whether to continue to the next stage, namely, prosecution.²²

This determination is not, however, purely a matter of prosecutorial discretion; the Prosecutor is subjected to a significant degree of oversight by the Pre-trial Chamber.²³ With respect to decisions not to proceed based on the 'interests of justice', Article 53 allows for particularly careful scrutiny, in two ways.

First, where the Prosecutor's decision not to proceed is based on other grounds (e.g. lack of legal or factual basis, inadmissibility due to complementarity, or a crime of insufficient gravity to justify ICC action), the Pre-trial Chamber can review the decision only upon request of the referring state party (or the Security Council in the case of a Security Council referral).²⁴ In contrast, where the decision not to proceed is based on the 'interests of justice', the Pre-trial Chamber may also initiate a review of that decision 'on its own initiative'.²⁵

Second, where the Prosecutor's decision not to proceed is based on other grounds, the Pre-trial Chamber can only 'request the Prosecutor to reconsider' his or her decision.²⁶ In contrast, where the Pre-trial Chamber decides of its own initiative to

of justice' before deciding to launch such a process. This interpretation has now been confirmed in the ICC Rules of Procedure and Evidence, Rule 48, which states that, 'In determining whether there is a reasonable basis to proceed under Article 15, paragraph 3, the Prosecutor shall consider the factors set out in Article 53, paragraph 1(a) to (c).' See also Friman, 'Investigation and Prosecution', in R. Lee *et al.* (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), at 495–498.

²¹ Article 53(1)(c) of the Rome Statute (emphasis added).

²² The same 'interests of justice' test is mentioned in Article 53(2)(c), but Article 53(2)(c) refers to four factors, not only 'gravity of the crime and the interests of victims' but also 'the age or infirmity of the alleged perpetrator and his or her role in the alleged crime'. Because these factors are only matters to 'take into account', the underlying 'interests of justice' test should be seen as the same. The additional two factors can be regarded as particularly relevant in Article 53(2)(c) because at the prosecution stage (as opposed to the initiation of an investigation), the Prosecutor will have in mind one or more particular suspects and is therefore able to consider relating to the specific situation of the suspect. See Bergsmo and Kruger, 'Article 53', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999).

²³ This tendency toward judicial supervision reflects the hybrid nature of the ICC as reflecting both common law and civil law approaches; it also reflects the desire to infuse the Court with 'checks and balances' wherever possible.

²⁴ Article 53(3)(a) of the Rome Statute.

²⁵ Article 53(3)(b) of the Rome Statute. See also ICC Rules of Procedure and Evidence (RPE), Rule 109.

²⁶ Article 53(3)(a) of the Rome Statute (emphasis added). The RPE make clear that this is indeed only a 'reconsideration' and not an obligation to reach a different decision. The obligation on the Prosecutor is to 'reconsider that decision as soon as possible' (Rule 108), and then to notify the Pre-Trial Chamber and other participants of his or her 'final decision' (Rule 109).

review a decision based on the ‘interests of justice’, the Prosecutor’s decision requires the *approval* of the Pre-trial Chamber.²⁷ Thus, the Pre-trial Chamber can oblige the Prosecutor to continue with the investigation or prosecution.²⁸

As a result, in order for prosecution to be declined on the grounds of the ‘interests of justice’, not only would the Prosecutor have to be persuaded, but also very likely the Pre-trial Chamber.

B Interpretation of ‘Interests of Justice’

A fundamental preliminary question is whether the notion of ‘interests of justice’ is confined only to the interests of *retributive, criminal* justice, or whether broader considerations of ‘justice’ can also be taken into account. The latter appears to be the only supportable interpretation. Article 53(2)(c) specifically contemplates that the Prosecutor may take into account broader factors, including compassionate considerations such as the age or infirmity of the accused. Moreover, Article 53(1)(b) specifically juxtaposes the traditional criminal justice considerations – the gravity of the crime and the interests of the victims – with the broader notion of ‘interests of justice’ and clearly indicates that the latter might trump the former. Thus, the ordinary meaning of this text, examined in the light of its object and purpose, suggests that ‘interests of justice’ is a relatively broad concept.

Three ‘propositions’ for interpreting the interests of justice in transitional situations are suggested here as one possible way for the Court to interpret and apply Article 53.

C Proposition One: The ICC Must Generally Insist on Prosecution of International Crimes

As mentioned above, the mandate of the ICC is to promote effective prosecution of serious international crimes. Before considering possible exceptions in the pursuit of that mandate, it is necessary to examine some of the important reasons why prosecution of international crimes is a high priority.²⁹

²⁷ Article 53(3)(b) of the Rome Statute.

²⁸ This interpretation is expressly confirmed in Rule 110 of the ICC RPE. This approach could lead to the unusual prospect of a Prosecutor being forced to carry out an investigation that the Prosecutor does not believe is in the interests of justice. One may legitimately wonder about the efficacy of such a requirement, and one can wonder how vigorous the investigation might be in such a situation.

²⁹ The reasons for prosecution are canvassed in the groundbreaking article by Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, 100 *Yale Law Journal* (1991) 2537; as well as in Méndez, ‘Accountability for the Past’, 19 *Human Rights Quarterly* (1997) 255; Bassiouni, ‘Searching for Peace and Achieving Justice: The Need for Accountability’, 59 *Law and Contemporary Problems* (1996) 9; Reisman, ‘Legal Responses to Genocide and Other Massive Violations of Human Rights’, 59 *Law and Contemporary Problems* (1996) 75; Landsman, ‘Alternative Responses to Serious Human Rights Abuses: Of Prosecutions and Truth Commissions’, 59 *Law and Contemporary Problems* (1996) 197; Huysse, ‘Justice after Transition: On the Choices Successor Elites Make in Dealing With the Past’, in N. J. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (1995); Huntington, ‘The Third Wave: Democratization in the Late Twentieth Century’, in *ibid.*; Benomar, ‘Justice After Transition’, in *ibid.*; Pasqualucci, ‘The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System’, 12 *Boston University International Law Journal* (1994) 255.

First, a central objective of accountability is to deter future violations and thereby help spare future victims.³⁰ For international crimes, this has an importance extending beyond the borders of the state concerned: the granting of impunity sends a message to other regimes and other potential violators that they too may continue committing such crimes and hope for amnesty when their time comes.³¹ One could understandably entertain doubts about the extent to which punishment has a deterrent effect in the context of entrenched regimes committing large-scale crimes, since they do not expect to lose power nor to be punished.³² However, such a criticism is largely circular: it assumes a continued practice of allowing such regimes to enjoy impunity. The more the international community holds firm in apprehending and punishing those who commit international crimes, the more potential violators will be forced to consider the consequences and start to be dissuaded from launching criminal campaigns.

Second, although the pursuit of justice is often portrayed as conflicting with reconciliation, prosecution can facilitate reconciliation and nation-building in various ways. First, it can help expose violent extremists for what they are – criminals – thereby stigmatizing them, diminishing their influence and removing them from power and society. Second, by providing survivors with a sense that justice has been done, it can help end cycles of revenge and vigilante justice, a precondition for real reconciliation. Third, by individualizing guilt and exposing the role of a leadership group in inciting hatred, prosecution helps a society overcome an ‘us’ versus ‘them’ outlook and demonstrates how opportunists manipulated sentiments for their own goals. Fourth, prosecution signifies a clean break with the regimes of the past and establishes the legitimacy of the new democratic government, demonstrating that it respects human rights and the rule of law.

Third, there is an important moral dimension. In discussions about amnesties, forgiveness and truth commissions, there is sometimes a tendency to treat the crimes in a rather abstract manner, focusing on lesser crimes and overlooking serious international crimes. It is therefore vitally important to bear firmly in mind that the ICC deals only with the most serious international crimes, crimes which imply inconceivable horror and cruelty. These are situations of mass murder, gang rape and torture. There is a profoundly important deontological basis for punishment of such atrocious crimes, as a moral obligation to the victims, to denounce and repudiate the

³⁰ See, e.g., the findings of the Working Group on Enforced or Involuntary Disappearance, expressing concern about amnesty laws granting impunity to alleged violators of human rights (para. 23) and noting that: Perhaps the single most important factor contributing to the phenomenon of disappearances may be that of impunity. The Working Group’s experience over the past 10 years has confirmed the age-old adage that impunity breeds contempt for the law. Perpetrators of human rights violations, whether civilian or military, will become all the more brazen when they are not held to account before a court of law.’ Report of the Working Group on Enforced or Involuntary Disappearances, 46th Session, reproduced in Kritz, *supra* note 29, 473 at 474.

³¹ See, e.g. Reisman, *supra* note 29; Scharf, *supra* note 29.

³² See, e.g. Villa-Vicencio *supra* note 3, at 210; Tallgren, ‘The Sense and Sensibility of International Criminal Law’, 13 *EJIL* (2002) 561.

violations, and to reassert basic moral values.³³ The intensity of the natural need for justice – not only truth – should not be underestimated. This is why victims groups have continued to press vigorously for justice even when truth has been uncovered and acknowledged through a truth commission process.³⁴

Fourth, there is also an important question of international legal *obligations*. This article will not attempt an exhaustive enquiry into the issue of the duty to bring to justice perpetrators of certain crimes, because the responsibility of the ICC to prosecute flows not from any breach of duty by the state,³⁵ but rather from the mandate given to the ICC by the accepting state or by the Security Council.³⁶ Nevertheless, the question of whether a state is or is not breaching a duty to prosecute would certainly be a factor for consideration in the exercise of discretion, so the matter will be touched on here. Moreover, the literature on possible limitations to the duty suggests useful principles that could be adopted by the ICC.

Even among international lawyers who argue that prosecution should sometimes give way to alternative means of dealing with the past, many or most would also allow that there are exceptionally serious crimes for which prosecution may be required under international law.³⁷ The first pertinent question is *which crimes* are covered by the duty. To summarize very briefly, it is relatively clear that states are under a duty to bring to justice those responsible for genocide, acts of torture, and grave breaches of

³³ I. Kant, *Groundwork of the Metaphysics of Morals* (1785); see also Roht-Arriaza, 'Punishment, Redress and Pardon', in N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (1995).

³⁴ '[T]hose who posited that truth could substitute for justice ... are now seeing that even almost twenty years later the thirst for justice is there even after at least a good part of the truth has been officially acknowledged', Roht-Arriaza, 'Truth Commissions and Amnesties in Latin America: The Second Generation', *ASIL Proceedings* (1998) 313, referring *inter alia* to the efforts to bring Pinochet to justice. This basic fact can also be seen in the repeated national and international challenges brought against amnesty laws even where truth commissions have been provided (for example, the challenges in El Salvador, Argentina, Uruguay and South Africa). See also H. Rousso, *The Vichy Syndrome: History and Memory in France since 1944* (1991), at 215: 'Nothing but a trial could satisfy the victims' need for justice, however. And their statements after the trial made it clear that this was what they felt too, far more than they cared about participating in any educational process.' See also Dugard, 'Retrospective Justice: International Law and the South African Model', in A. J. McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies* (1997), at 284.

³⁵ Even if one concluded that a state was not under a duty to prosecute particular crimes, the ICC would not necessarily defer to an amnesty: the ICC would nevertheless be mandated under its Statute to investigate and prosecute such crimes, unless one of the Statute's conditions for non-action were met. Conversely, even if a state were contravening its duty by failing to prosecute certain offenders (for example, low-level perpetrators of genocide), this would not mean that the ICC was *obliged* to prosecute: the ICC might decide not to prosecute after considering all the relevant factors. Thus, this issue of a duty to prosecute, which gives rise to state obligations, is undoubtedly *relevant* but is not *determinative* of the stance of the ICC in carrying out its mandate. See Meintjes, 'Domestic Amnesties and International Accountability', in D. Shelton (ed.), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (2000), esp. at 90.

³⁶ See *supra* at Section 2.

³⁷ See, e.g., R. J. Teitel, *Transitional Justice* (2000), at 60–62, arguing that crimes against humanity pose a limit on considerations of clemency and political restraints, 'a limit that appears to be largely immune to national politics', at 60. See also Landsman, *supra* note 29; and Cassel, 'Lessons from the Americas: Guidelines for the International Response to Amnesties for Atrocities', 59 *Law and Contemporary Problems* (1996) 197.

the Geneva Conventions of 1949. These obligations are derived from treaties,³⁸ but are now widely considered to be reinforced by equivalent customary international law obligations.³⁹

With respect to the other crimes in the ICC Statute (crimes against humanity and serious violations of the laws of armed conflict), the situation is less clear. There is no treaty expressly imposing a duty to prosecute such crimes, and the state of customary international law on the point is controversial. In fact, it has often been noted that actual state practice has traditionally been distinctively unsupportive of such a duty, and tended in the past to condone the granting of amnesties.⁴⁰ Nevertheless, there are convincing reasons to suggest that under current or emerging customary international law, there is a duty to bring to justice⁴¹ perpetrators of genocide, crimes against humanity and war crimes, at least with respect to crimes committed on the state's territory or by its nationals.⁴² First, there has been a marked revolution in state practice, decisively shifting from history's tacit endorsement of amnesties to today's consistent rejection of them for serious international crimes. This is illustrated by the disclaimer attached by the UN to the 1999 Lomé peace accord⁴³ and the subsequent

³⁸ Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS (1951) 277, Article 4; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 ILM (1984) 1027, Article 7; Geneva Convention relative to the Protection of Civilian Persons in Times of War, 75 UNTS (1950) 287, Articles 146 and 147.

³⁹ See, e.g., *Reservations to the Convention on the Prevention and Punishment of Genocide*, Advisory Opinion, 28 May 1951, ICJ Reports (1951), at 15; *Prosecutor v. Anto Furundzija*, ICTY, Case No. IT-95-17/1-7 (10 December 1998), paras 137-148 and 155; and for further analysis see Joyner, 'Redressing Impunity for Human Rights Violations', 26 *Denver Journal of International Law and Policy* (1998) 591; Edelenbos, 'Human Rights Violations: A Duty to Prosecute?', 7 *Leiden Journal of International Law* (1994) 5; Roht-Arianna, 'Non-treaty Sources of the Obligation to Investigate and Prosecute', in Roht-Arianna, *supra* note 33; and Orentlicher, *supra* note 29.

⁴⁰ See Scharf, *supra* note 5, at 521, noting that with respect to crimes against humanity, the most common state practice traditionally has been to grant amnesties or *de facto* impunity. See also Scharf, 'The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes', 59 *Law and Contemporary Problems* (1996) 41; Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions', in A. Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) and Schabacker, 'Reconciliation or Justice and Ashes: Amnesty Commissions and the Duty to Punish Human Rights Offences', 12 *New York International Law Review* (1999) 1, reviewing the state practice on this matter.

⁴¹ The term 'duty to prosecute' may be somewhat misleading, as it may be misunderstood as implying that *domestic* prosecution is the only acceptable response. In fact, the duty *aut dedere aut judicare* can be satisfied through national prosecution, extradition to another willing state, or surrender to an international court or tribunal for prosecution. Thus, the term 'bring to justice' is used wherever possible in this article.

⁴² The following observations relate only to a state's obligation with respect to crimes committed on its territory or by its nationals, because that is all that is relevant in the context of concurring jurisdiction of the ICC. The issue of a duty to prosecute under other heads of jurisdiction, such as universal jurisdiction, is considerably more controversial. (See, e.g., Amnesty International, 'Universal Jurisdiction: The Duty of States to Enact and Implement Legislation', AI Index: IOR 53/002-018/2001, available at http://web.amnesty.org/web/web.nsf/pages/legal_memorandum, arguing for this broader duty.)

⁴³ The disclaimer asserted that the amnesty did not include genocide, crimes against humanity and war crimes. Seventh Progress Report of the Secretary-General on the UN Observer Mission in Sierra Leone on 30 June 1999, UN Doc. S/1999/836, para. 7.

rejection of amnesties,⁴⁴ and the exclusion of international crimes from the community reconciliation process in East Timor.⁴⁵ Second, this practice is accompanied by numerous declarations affirming a duty to prosecute, in resolutions (such as the Resolution on Impunity adopted by the Commission on Human Rights),⁴⁶ declarations (such as the Vienna Declaration and Programme of Action)⁴⁷ and even the preamble of the ICC Statute.⁴⁸ Without overstating the weight to be given to ‘paper practice’, these declarations are relevant in combination with the actual practice of states, as it shows that the practice of rejecting amnesties is accompanied by a sense of legal obligation. Third, a growing body of jurisprudence, generated by the Inter-American human rights system,⁴⁹ the UN human rights system,⁵⁰ and other national and international bodies,⁵¹ affirms that amnesties for serious violations also are incompatible with a state’s basic human rights obligations. Fourth, given that the ICC crimes are equally considered ‘the most serious crimes of concern to the international community as a whole’, it would seem incongruous and convoluted to recognize a duty for some ICC Statute crimes (e.g. an isolated war crime of torture) but not for equally serious or more serious ICC Statute crimes (e.g. crime against humanity of

⁴⁴ See Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, 16 January 2002 and Statute of the Special Court of Sierra Leone, especially Article 10 (amnesties no bar to prosecution), available at www.specialcourt.org.

⁴⁵ ‘Serious criminal offences’ are excluded from the Community Reconciliation Process; see Schedule 1 to Regulation 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10, 13 July 2000; ‘serious criminal offence’ includes genocide, crimes against humanity, war crimes, murder, sexual offences and torture: see Section 1.3 of UNTAET/REG/2000/15 of 6 June 2000.

⁴⁶ CHR Resolution on Impunity, UN Doc. E/CN.4/RES/2001/70 of 25 April 2001.

⁴⁷ Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, para. 60. ‘States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law.’

⁴⁸ Paragraph 6 of the preamble to the ICC Statute recalls ‘that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes . . .’. However, in fairness, it must also be recalled that this provision appears in the preamble because states could not accept such a provision in the operative text.

⁴⁹ See for example the conclusion of the Inter-American Court of Human Rights in *Velásquez-Rodríguez* that the state ‘has a legal duty . . . to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation’: *Velásquez-Rodríguez*, 1988 Annual Report of the Inter-American Court of Human Rights, 35 at para. 174. See also the *Barrios Altos* case, Inter-American Court of Human Rights, 14 March 2001, Series C, No. 75, paras 41–45 (declaring two 1995 amnesty laws incompatible with the American Convention on Human Rights, and hence without legal effect). For further analysis, see Cassel, *supra* note 37 and Pasqualucci, *supra* note 29.

⁵⁰ For example, the Human Rights Committee has held that amnesties for torture are incompatible with the ICCPR: General Comment No. 20 (44) (Article 7), UN Doc. CCPR/C21/Rev.1/Add.3, para. 15 (1992). See also the review of several relevant decisions in *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report Submitted by Mr. Theo van Boven*, Special Rapporteur, reproduced in 59 *Law and Contemporary Problems* (1996) 284.

⁵¹ See, e.g., the review in Roht-Arriaza and Gibson, ‘The Developing Jurisprudence on Amnesty’, 20 *Human Rights Quarterly* (1998) 843; Orentlicher, *supra* note 29; Scharf, *supra* note 40; Schabacker, *supra* note 40; and Van Boven, *supra* note 50.

murder, extermination or sexual violence). Thus, there are persuasive reasons to conclude that there is a duty, or at least an emerging duty, to bring to justice those responsible for genocide, crimes against humanity or war crimes, at least where the crimes are committed on a state's territory or by its nationals.⁵²

The other major question is the *extent* of that duty. Those critical of the idea of a duty to prosecute have argued that it does not take account of the potentially precarious position of new fragile democracies, that it would be reckless to require fragile democracies to proceed with a course that may lead to their destruction and, in addition, that in situations involving thousands of perpetrators, prosecuting everyone may be logistically impossible, financially ruinous and socially divisive.⁵³

In response, many advocates of the duty have recognized two limitations. First, the duty does not necessarily require a transitional government to prosecute *all* offenders; the duty may be satisfied by prosecuting the ringleaders and persons most responsible.⁵⁴ Second, the duty may be subject to an exception of 'necessity' in situations of a 'grave and imminent threat', such that governments would not be required 'to press prosecution to the point of provoking their own collapse'.⁵⁵ Such an exception is not to be lightly invoked; the international duty is intended to provide a counterweight to pressure from groups seeking impunity and thereby help embolden fragile democracies to carry out prosecutions rather than seeking an 'easy escape route'.⁵⁶ It is proposed below that these two suggested limitations provide a useful frame of reference for the ICC in deciding whether to defer to a national programme falling short of full prosecution.

D Proposition Two: In Transitional Situations following Mass Violence, a Targeted Programme Prosecuting Only Those Most Responsible May Be Appropriate

Transitional societies may be faced with extraordinary situations where prosecution of all offenders is simply not possible nor even desirable. In such cases, it may be useful to draw a distinction between those persons most responsible for international crimes

⁵² See, e.g., *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119*, reproduced in 59 *Law and Contemporary Problems* (1996) 250.

⁵³ See Nino, 'The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina', 100 *Yale Law Journal* (1991) 2619 and see Zalaquett, 'Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations', 43 *Hastings Law Journal* (1992) 1425.

⁵⁴ This is discussed in more detail below, Section 3D.

⁵⁵ Orentlicher, *supra* note 29, at 2548. This necessity exception is not to be lightly invoked; it refers to situations of real necessity, and a state cannot evade its duty simply to appease the powerful or because it is politically inexpedient: *ibid.*, at 2595. See also, for example, Méndez, 'In Defence of Transitional Justice', in McAdams, *supra* note 34, at 4: 'Just as it makes no sense to exaggerate the political obstacles, it is equally wrong to postulate an obligation to punish the perpetrators of past offences without regard to the potential consequences for the future enjoyment of rights by all others'.

⁵⁶ Orentlicher, *supra* note 29, at 2549, see also Landsman, *supra* note 29, at 89.

and lesser offenders. There is *practical, legal* and *moral* justification for dealing with lesser offenders through truth commissions and conditional amnesties, whereas the persons most responsible – i.e., planners, leaders, and those committing the most notorious crimes – should still be held criminally accountable.

First, on a practical level, prosecution of thousands of perpetrators may be financially and logistically completely impossible. In addition, to deal with a significant portion of the population through criminal proceedings and incarceration may not be the best approach to rebuilding a traumatized society.

Second, on a legal level, the duty to bring perpetrators to justice in transitional situations arguably extends only to persons most responsible. As Diane Orentlicher concludes,

customary law would . . . not require prosecution of every person. . . . Prosecution of those who were most responsible for designing and implementing a system of human rights atrocities or for especially notorious crimes that were emblematic of past violations would seemingly discharge governments' customary law obligation . . . provided the criteria used to select potential defendants did not appear to condone or tolerate past abuses.⁵⁷

The fact that a state is satisfying its international legal obligations is a factor weighing in favour of deference. Moreover, the ICC will generally focus only on persons most responsible, so domestic prosecution of such persons will prevent most potential jurisdictional conflicts with the ICC.⁵⁸

Third, and most importantly, on a moral level, there is a significant difference between the situation of the low-level perpetrator and those who orchestrate the crimes or who distinguish themselves with their sadistic enthusiasm. There is a greater case for deference to the judgment of a democratic society as to how to deal with those individuals who were manipulated by propaganda and swept up in a tide of

⁵⁷ Orentlicher, *supra* note 29, at 2599. Likewise, Kritz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights', 59 *Law and Contemporary Problems* (1996) 123, at 134 notes that 'international law does not, however, demand the prosecution of every individual implicated in the atrocities. A symbolic or representative number of prosecutions of those most culpable may satisfy international obligations, especially where an overly extensive trial program will threaten the stability of the country.' See also Morris, 'International Guidelines against Impunity: Facilitating Accountability', 59 *Law and Contemporary Problems* (1996) 80 and Pasqualucci, *supra* note 29, at 334.

⁵⁸ A potential jurisdictional conflict could still arise where crimes in a particular locality, or crimes by a particular accused, are considered important by the ICC Prosecutor and yet happen not to be selected for prosecution by the national process. In such a case, complementarity would not bar ICC action, since complementarity is case-specific. Nevertheless, provided that the state's efforts to select the most serious crimes for prosecution were based on objective criteria and carried out in good faith, it would be appropriate for the Prosecutor to defer to the national programme, even if the Prosecutor would have made a few different choices in selecting perpetrators. A more activist, interventionist stance on the part of the Prosecutor would be justified where there was reason to believe that the omission to prosecute particular persons was more than a simple 'difference in judgment' but rather a politically-motivated decision.

evil.⁵⁹ For low-level perpetrators, one can imagine the value of sincere repentance and forgiveness, and should not preclude creative and good faith experiments with community-rooted alternatives.

The situation is quite different with respect to those persons 'most responsible' for serious international crimes. These include the individuals who plan, foment and orchestrate international crimes, as well as those individuals who enthusiastically embrace the policies of terror, and who take advantage of a context of lawlessness to indulge their own sadistic tendencies. For these architects and enthusiasts, the idea of granting amnesty is particularly problematic. These are individuals who may be responsible for hundreds, thousands, or even hundreds of thousands of deaths. Punishment of such individuals is essential to honour the victims, to uphold basic values, and to send a message of deterrence to other potential ringleaders.

E Proposition Three: Situations of Drastic Necessity Could Conceivably Justify Making Non-Prosecutorial Alternatives Available Even to the Persons Most Responsible for International Crimes; Any Such Exception Would Have To Be Very Stringently Justified

It is often argued that amnesties are a practical necessity to stop a conflict or to secure and maintain a transition from a military regime to a democratic government.⁶⁰ Groups responsible for international crimes may not be willing to cease hostilities or cede power 'if they or their close associates will face life imprisonment as a result'.⁶¹ In such situations, amnesties might be regarded as 'the price for getting rid of tyrants and their associates', and they have therefore been considered 'one of the techniques for ending civil wars or enabling transitions from authoritarian to democratic governments'.⁶² Similarly, where a new democracy has a fragile hold on power, and the former military is still intact and threatened, launching prosecutions may amount to 'political suicide'.⁶³

Many advocates of prosecution of all international crimes have conceded a potential exception in situations where insistence on prosecution would compel a fragile democracy to bring about its destruction or would trigger further conflict and violence.⁶⁴ José Zalaquett has argued that 'political leaders cannot afford to be moved only by their convictions, oblivious to real-life constraints', and that although 'ideological purists' would say 'it is preferable to suffer longer under tyranny . . . than

⁵⁹ This is not to say that punishment would be *inappropriate*; indeed, it would be the normal response. Punishment of all offenders can reinforce the message that it is every human being's duty to resist evil, and that there are fundamental laws of humanity that transcend the peer pressures of a fallen society, the laws of a tyrannical regime, or the orders of a superior.

⁶⁰ For a thorough review of the various policy arguments, see the works cited *supra* note 29, as well as Zalaquett, 'Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints', in Kritz, *supra* note 29; Villa-Vicencio, *supra* note 3; Arsanjani, *supra* note 5; and Scharf, *supra* note 5.

⁶¹ Scharf, *supra* note 5, at 508.

⁶² Arsanjani, *supra* note 5, at 65.

⁶³ See Benomar, *supra* note 29, and Schabacker, *supra* note 40.

⁶⁴ Orentlicher, *supra* note 29, at 2548; Méndez, *supra* note 55, at 4.

to make progress through untidy compromises', such a position reflects an arrogant disdain for the 'dreadful costs of such a cavalier gamble'.⁶⁵ As has been argued by Carlos Nino:

Though it is true that many people approach the issue of human rights violations with a strong retributive impulse, almost all who think momentarily about the issue are not prepared to defend a policy of punishing those abuses once it becomes clear that such a policy would probably provoke, by a causal chain, similar or even worse abuses ...⁶⁶

However, any 'necessity' exception should be very carefully and narrowly construed.

First, granting for the sake of argument that a 'necessity' exception is justified on consequentialist grounds, it is appropriate to weigh *all* of the consequences, including the long-term global consequences of granting impunity to violators.⁶⁷ If governments adopt a general approach that 'impunity may be granted whenever expedient', then the consequence of giving into expediency in case after case will be impunity in case after case, thus reinforcing expectations of impunity and encouraging future violators. Therefore, there must be serious scrutiny of the claims of 'necessity' to ensure that decision-makers do not give in to the easy temptation of concluding that an amnesty is unavoidable in their specific circumstances. As Méndez argues, 'it is important to assess the threats before the new government realistically, to take into consideration the countervailing strength of democratic forces in society'.⁶⁸

Indeed, recent experience has tended to contradict the supposedly 'pragmatic' view that prosecution is destabilizing and that amnesties are necessary for peace, as indeed the very opposite propositions have been recently borne out. For example, in Sierra Leone, blanket amnesties were granted for horrific crimes against humanity in the belief that this was necessary for peace and reconciliation; instead this merely reinforced a culture of impunity in which brutal acts of mutilation and lawlessness continued. After more conflict and more atrocities, the policy was reversed in favour of prosecution and punishment of those bearing the greatest responsibility for international crimes.⁶⁹ Likewise, many argued that the indictment of Slobodan Milosevic by the ICTY during the Kosovo conflict would only stiffen his resolve and prolong the conflict, and yet a peace agreement was reached shortly after the indictment, and Mr. Milosevic is now in The Hague facing trial.⁷⁰ These and other cases cast considerable doubt on the received wisdom that peace and justice are somehow at odds.

Second, any necessity 'exception' should not be an excuse to completely abdicate the duty to deal with such crimes. An automatic amnesty for all perpetrators, including ringleaders, would be entirely contrary to the emerging principles in this

⁶⁵ Zalaquett, *supra* note 53.

⁶⁶ Nino, *supra* note 53, at 2620.

⁶⁷ See, e.g., Dugard, *supra* note 34.

⁶⁸ *Ibid.*, at 9.

⁶⁹ See UN Security Council Resolution 1315 (2000), 14 August 2000; *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, 4 October 2000, UN Doc. S/2000/915.

⁷⁰ See, e.g., 'Milosevic Indicted', ABC News, 27 May 1999, available <http://abcnews.go.com/sections/world/DailyNews/milosevic990527.html#sidebar>. See also ICTY Press Release, 'Slobodan Milosevic Transferred Into the Custody of the International Criminal Tribunal for the former Yugoslavia', 29 June 2001, C.C./P.I.S./597-e, available at www.un.org/icty.

area and would properly invite condemnation. The international community has a significant stake in deterring such sweeping amnesty agreements, due to the message such agreements send to other regimes and other potential violators that they too may unleash large scale brutality against human beings and then make an amnesty deal if and when necessary. Moreover, blanket amnesties are the *precise antithesis* of the purpose of the ICC.⁷¹ For the ICC to defer to a blanket amnesty for fear that those responsible will resort to violence would be for the ICC to capitulate to blackmail. Moreover, ICC jurisdiction arises because the state concerned has accepted the Court's jurisdiction (and therefore 'contracted' with the ICC to prosecute where the state fails to do so) or because the Security Council has determined under Chapter VII that impunity is a threat to international peace and security. Accordingly, the ICC should probably consider itself institutionally incapable of deferring to blanket amnesties under any circumstances.

Acknowledging the possibility of a necessity exception should be seen not as an invitation to condone blanket amnesties, but rather as a means for the international community to keep an open mind about good-faith creative alternatives to prosecution, which might include truth commissions granting conditional amnesties. As was discussed above, such alternative approaches are easiest to accept with respect to low-level offenders following situations of mass atrocities. Where even the persons most responsible are entitled to apply for amnesties under a national reconciliation mechanism, far more careful scrutiny is needed.

This author would suggest that, 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*, to decide whether the society has done everything possible to advance accountability-related goals. Different authors have suggested different lists of criteria or factors to consider,⁷² but the following seem generally recognized as relevant:

- Was the measure adopted by democratic will?
- Is the departure from the standard of criminal prosecution of all offenders based on necessity, i.e. irresistible social, economic or political realities?
- Is there a full and effective investigation into the facts?
- Does the fact-finding inquiry 'name names'?
- Is the relevant commission or body independent and suitably resourced?

⁷¹ Blanket amnesties bestowed by a regime for its own benefit ('self-amnesties') have been singled out for particular criticism, as they purport to allow a regime to unilaterally protect itself from the consequences of its own wrongdoing. See e.g., Méndez, *supra* note 29 and Pasqualucci, *supra* note 29, at 344.

⁷² See Dugard, 'Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?', 12 *Leiden J. Int. L.* (1999) 1001; Arsanjani, *supra* note 5, Landsman, *supra* note 29, Zalaquett, *supra* note 53, Cassel, *supra* note 37, Villa-Vicencio, *supra* note 3, and Van Zyl, 'Justice without Punishment: Guaranteeing Human Rights in Transitional Societies', in C. Villa-Vicencio and W. Verwoerd (eds), *Looking Back/Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (2000).

- Is there at least some form of punishment of perpetrators (are they identified, required to come forward, required to do community service, subject to lustration)?
- Is some form of remedy or compensation provided to victims?⁷³
- Does the national approach provide a sense of closure or justice to victims?
- Is there a commitment to comply with other human rights obligations?

In the light of the core purpose of the ICC and its prior compact with the state concerned, a programme where even the persons most responsible may apply for amnesties should receive deference ‘only in the most compelling of cases’.⁷⁴

4 Genuine Proceedings: Complementarity

Where the Prosecutor concludes that a prosecution should proceed, a state carrying out a programme falling short of full prosecution still has an avenue to argue for deference, under the complementarity regime of Article 17. However, the scope for such an argument is narrower because Article 17 is focused on the narrower question of whether there is or has been a genuine national proceeding to investigate and prosecute the accused. This is the principle of ‘complementarity’: states are given the first opportunity to prosecute, and a case will be inadmissible before the ICC if a state with jurisdiction is or has investigated and prosecuted the matter.⁷⁵ Article 17 provides as follows:

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;⁷⁶

...⁷⁷

2. In order to determine unwillingness in a particular case, the Court shall consider, having

⁷³ This criterion, although often suggested (see, e.g. for example, Arsanjani, *supra* note 5 and Landsman, *supra* note 29), might not be strictly pertinent since criminal prosecution does not necessarily achieve this objective either.

⁷⁴ Scharf, *supra* note 5, at 527.

⁷⁵ Holmes, ‘Complementarity: National Courts versus the ICC’, in Cassese, *supra* note 40; Williams, ‘Article 17: Issues of Admissibility’, in Triffterer, *supra* note 22.

⁷⁶ Article 20(3) deals with the principle *ne bis in idem*.

⁷⁷ Article 17(1)(d) adds ‘The case is not of sufficient gravity to justify further action by the Court’, which is not strictly relevant to complementarity but rather the restriction of jurisdiction to the most serious crimes of international concern.

regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

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

During the negotiations, some delegations (most importantly, the delegation of South Africa) sought explicit recognition of truth and reconciliation commissions in Article 17. Other delegations, as well as NGOs, resisted any such provision. Due to the politically controversial and philosophically difficult nature of any such provision, the issue was deliberately sidestepped in Article 17, although a narrow doorway was left for the Court to consider whether such a procedure was indeed a 'genuine' effort to do justice.

This doorway is presented in Article 17(1)(b).⁷⁸ Article 17(1)(a) deals with situations of ongoing investigations and prosecutions, and thus does not provide a durable solution where a state does not proceed with prosecutions. Article 17(1)(c), read in conjunction with Article 20 (*ne bis in idem*), is applicable only where there has been a 'trial' by a 'court',⁷⁹ and thus is not relevant to non-prosecution situations. Thus, Article 17(1)(b) is the only feasible avenue. In order to satisfy the terms of Article 17(1)(b), it would have to be possible to say, first, that the truth commission or other body 'investigated' the matter; second, that it 'decided' not to prosecute; and third, that the decision did not result from the unwillingness or inability of the state to genuinely prosecute.

The first critical issue is the meaning of the term '*investigation*'.⁸⁰ The Court could interpret the term as referring only to a *criminal* investigation,⁸¹ which will mean that

⁷⁸ '[I]t is also conceivable that an amnesty granted in the context of a 'truth commission' process could be considered an 'investigation' followed by a *bona fide* decision not to proceed for purposes of Article 17(1)(b)': Broomhall, 'The International Criminal Court: A Checklist for National Implementation' in Association Internationale de Droit Pénal, *ICC Ratification and National Implementing Legislation* (1999) 144.

⁷⁹ See Article 17(1)(c) and Article 20 (*ne bis in idem*).

⁸⁰ Indeed, a critical and often overlooked point with respect to Article 17 is that, to fall even *prima facie* within any of the headings (a) to (c), there must at minimum be an '*investigation*' by the state. Where no investigation has been initiated at all, none of the grounds of Article 17(1)(a) to (c) are applicable, and thus one cannot even turn to an assessment of the 'genuineness' of the state's proceedings.

⁸¹ Holmes, 'The Principle of Complementarity', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), at 77 suggests: 'It is clear that the Statute's provisions on complementarity are intended to refer to criminal investigations. . . . A truth commission and the amnesties it provides may not meet the test of a criminal investigation . . .'.

deference to truth and reconciliation efforts would only be possible under Article 53. It is also open to the Court to adopt a slightly broader approach. For example, the Court could determine that the term ‘investigation’ also comprises a diligent, methodical effort to gather the evidence and ascertain the facts relating to the conduct in question, in order to make an objective determination in accordance with pertinent criteria (e.g. sufficiency of evidence, seriousness of the conduct, role of the perpetrator). These criteria are consistent with typical criminal investigations but might also be satisfied by other forms of investigation, such as those carried out in fulfilment of the ‘right to know’ (i.e., to uncover the truth and determine who was responsible).⁸²

The second issue will be the meaning of the term ‘decision’ not to prosecute. It is suggested here that the term ‘decision’ can only have meaning where there is more than one option available to the purported decision-maker. Thus, there must at least be a possibility of prosecution. Where a body cannot choose prosecution because prosecution is already barred by legislation, it would be disingenuous to refer to a ‘decision’ not to prosecute.

The third issue is whether a decision resulted from an unwillingness or inability to carry out a genuine prosecution. In making this determination, the Court will be guided *inter alia* by the considerations appearing in Article 17(2) and (3), such as whether there was an intent to shield perpetrators from justice. The test arising from those provisions is a rigorous one, although the list of criteria should not be interpreted as a closed list: the open-ended wording ‘shall consider whether’ was deliberately chosen, as opposed to language imposing a fixed requirement (e.g. ‘means’ or ‘must conclude that’), thus indicating that terms such as ‘intent to shield’ are illustrative.

Interestingly, the result produced by these requirements is not dissimilar from the three propositions suggested above, although the scope for the ‘necessity’ exception is decidedly narrower. Some examples will illustrate how these tests might be applied.

Scenario one: targeted prosecution. A targeted programme prosecuting only the persons most responsible, and dealing with lower-level perpetrators by truth commissions and amnesties could pass the complementarity test, assuming that the number of persons selected for prosecution were not so small that it is evidently a gesture to avoid real prosecutions. In such a case, if there were a credible effort to gather the facts and select the most responsible offenders, and a particular offender of interest to the ICC was in good faith not selected for prosecution, it could still be said that the case has been ‘investigated’ by the screening body, and that there was ‘a decision not to prosecute’, thus satisfying the criteria of Article 17(1)(b). Moreover, it could not be said that the decision flowed from a desire to ‘shield’ the person from prosecution or an unwillingness or inability to genuinely prosecute; on the contrary, it flowed from objective and reasonable criteria, such as the evidence available and the

⁸² See the review of Inter-American and Human Rights Committee jurisprudence on the right to know and the duty to investigate in Cassel, *supra* note 37, esp. at 208–219, as well as Joinet, *supra* note 53 and the CHR Resolution on Impunity, *supra* note 46, para. 8.

role of the perpetrator. Thus, a credible procedure to assess all the information and select persons most responsible for prosecution could arguably satisfy Article 17 even with respect to those not selected for prosecution.

Scenario two: blanket amnesties. The bestowal of blanket amnesties could never satisfy the complementarity test. First, there would likely be no ‘investigation’. Second, even if there were an ‘investigation’, for example by a truth commission, it could hardly be said that there was a ‘decision’ not to prosecute, since prosecution was not even an option, as it was barred by legislation. Even if one attempted to characterize the adoption of the amnesty legislation as the ‘decision’, that legislative act would be a decision resulting from an unwillingness or inability to carry out genuine prosecutions, with a patent objective of shielding perpetrators from justice. One could argue that the *primary* intent was to promote reconciliation and not to shield perpetrators, but nevertheless it would be undeniable that the means chosen was to shield perpetrators. Thus there would clearly be *an* intent (a substantial even if not primary intent) to shield perpetrators.

Scenario three: conditional amnesties. The most challenging scenario would be where a state creates a truth and reconciliation commission authorized to grant amnesties on a case-by-case basis. In principle, it would likely be very difficult for a truth commission bestowing conditional amnesties to satisfy the complementarity regime, but it is at least conceivable.

The first question would be whether there had been an ‘investigation’. If the term were interpreted in the broad manner suggested above, then a detailed and rigorous inquiry by a truth commission could suffice.

With respect to the second requirement, a ‘decision’ not to prosecute, it was suggested above that the term ‘decision’ requires that prosecution is at least an option. Thus the granting of amnesty would have to be conditional on meeting certain criteria, rather than something automatic; the truth commission would have to have the power to deny amnesty. The South African model could satisfy this requirement.⁸³

The third step, the assessment of whether the decision not to prosecute resulted from an ‘unwillingness’ or ‘inability’ to genuinely prosecute, is the most philosophically challenging question. The ICC would be required by its statute to determine whether the system established was a system to shield perpetrators or whether it could be said to be a ‘genuine’ proceeding aimed at providing justice, given all of the relevant circumstances. These relevant circumstances would likely include the nature and credibility of the commission and the extent to which any departures from the normal model of prosecution are justified by necessity. Given the focus of Article 17 on procedures designed ‘to bring the person concerned to justice’, the Court would probably look for prosecution-like hallmarks such as:

- *Quasi-judicial character*: Does the decision-making body determine the facts and assess those facts in accordance with objective criteria? Is the person concerned required to appear before the decision-making body?

⁸³ See sections 16–21 of the *Promotion of National Unity and Reconciliation Act, 1995*, Republic of South Africa Government Gazette, Vol. 361, No. 16579, 26 July 1995.

- *Independence*: Is the decision-making body independent, and seen to be independent, of political influence? Is it an impartial decision-maker?
- *Effectiveness*: Is the decision-making body equipped with sufficient resources and the powers necessary to carry out its mandate? Does it have the powers needed to determine the truth, including obtaining testimony and documents and obtaining compliance with its orders?
- *The Article 17 objective of 'bringing to justice'*: To what extent is the procedure aimed at providing justice? Where prosecution is denied, are there other forms of significant sanction or punishment (public naming, lustration, obligations of reparation, public service to help repair the harm done)?
- *Necessity*: Is the departure from classical prosecution necessitated by compelling political, social and economic constraints? Is this a genuine effort to do justice? Is the measure democratically adopted and supported by majority will as a necessary and appropriate measure?

Overall, it will be important to assess the extent to which a procedure similar in quality to prosecution is genuinely implemented. It is suggested here that the door is not entirely closed to alternative methods of providing justice, and that there is room for the Court to consider other approaches. However, given the *teleos* of Article 17, the grounds for flexibility are quite narrow, especially in comparison with Article 53.

5 Maintenance of Peace and Security: Security Council Deferral

A third mechanism by which the ICC might defer to national reconciliation efforts is through Article 16. Article 16 provides that:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Security Council under the same conditions.

This provision reflects a compromise between those who sought complete Security Council control over the ICC docket and those who thought any Security Council role would be an inappropriate political interference.⁸⁴ The resulting provision is rather akin to the discretionary power of the executive branch in many countries to issue a

⁸⁴ The draft Statute prepared by the International Law Commission suggested that the ICC would be unable to act in situations being dealt with by the Security Council, except with Security Council approval. Given that most situations of large-scale crimes would likely be on the Security Council agenda, this was widely seen as allowing the members of the Security Council to control the Court's docket, raising the prospect of selective justice. A compromise proposal by Singapore suggested reversing this proposition, so that the ICC was in general unhindered by the Security Council *unless* the Security Council took the affirmative step of asking the ICC to defer. This suggestion thus removed the potential problem of abuse of the veto power (since the exercise of a veto would no longer insulate a situation but rather have the effect of ensuring that ICC proceedings continue unhindered) and reduced the likelihood of use of the provision by requiring positive action. A modification suggested by Canada introduced a 12-month time limit, so that

'stay of proceedings'. Given the need for a Council majority (and unanimity of the permanent five members), and the anticipated hesitance of states to frustrate accountability for international crimes, it was thought that this provision was unlikely to be abused,⁸⁵ although the Council's startling actions on 12 July 2002 cast the gravest doubt on this.⁸⁶

Such a request can only be issued by the Security Council acting under Chapter VII of the UN Charter, which deals with the maintenance of international peace and security. It is possible that the Security Council might request deferral from the ICC where a delicate non-prosecutorial truth and reconciliation process is underway. For the Council, the determinative considerations will relate to the promotion of international peace and security, which could involve many considerations similar to those canvassed in this article, such as necessity, peacebuilding, reconciliation, conflict prevention, threats to democracy, and risks of future mass atrocities.

6 Prosecution by Other States

Finally, it should also be recalled that the ICC is not the only stakeholder in upholding the principle of accountability. Many other states will be in a position to exercise jurisdiction over genocide, crimes against humanity and war crimes on grounds such as passive nationality jurisdiction (jurisdiction based on the nationality of the victim) and universal jurisdiction (jurisdiction based on the seriousness of the offence against international law). These states are not bound by the amnesty deals struck within a

such a decision would have to be reconsidered and reaffirmed by the Security Council in order to remain effective. For more information on the negotiating history, see Yee, 'The International Criminal Court and the Security Council', in Lee, *supra* note 81 and Bergsmo and Peji, 'Article 16: Deferral of Investigation or Prosecution', in Triffterer, *supra* note 22.

⁸⁵ As has been observed by Roht-Arriaza, 'there would be a political cost to the Security Council in detailing its reasons for invoking its right to deferral': 'Amnesty and the International Criminal Court', in D Shelton (ed.), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (2000). See also Kirsch and Robinson, 'Reaching Agreement at the Rome Conference', in Cassese, *supra* note 40, at 82.

⁸⁶ On 12 July 2002, the Council purported to adopt Resolution 1422, requesting a deferral for any ICC investigation of any peacekeeper who is a national of a non-state party to the ICC Statute. The request stands for one year, but the Council expressed its intention to renew the request. The resolution was adopted at the insistence of the US, which threatened to veto all UN peacekeeping mandate renewals until its demands were met. The resolution was resoundingly condemned by the numerous UN Member States that addressed the Council on 10 July 2002, on the grounds that the resolution was unnecessary, that there was no threat to international peace and security, that prophylactic use to exempt a class of persons was not contemplated in Article 16, that peacekeepers did not need to be above the law, and that it was against the principles of the UN for the Council to endorse impunity rather than accountability. Although Council members were initially opposed 14:1, Council members eventually caved in, given the threat of the US to paralyze all UN peacekeeping missions. This resolution seems to distort Article 16 of the ICC Statute, but more profound is its implications for the UN Charter and the credibility of the Council, as the Council has purported to adopt a Chapter VII resolution in the absence of even a pretext of a threat to international peace and security, contrary to the terms of Chapter VII of the UN Charter. For commentary on Resolution 1422, see, e.g. Stahn, 'The Ambiguities of Security Council Resolution 1422', 14 *EJIL* (2003) 85, available at www.ejil.org/journal/new/new0210.html.

particular society,⁸⁷ nor are they restricted by any principle of complementarity requiring them to defer to the prosecutorial efforts of others. Moreover, even if the ICC declines to prosecute, on the view that doing so would not serve the interests of justice, nothing in the ICC Statute or in international law would preclude other states from exercising extra-territorial jurisdiction in accordance with their own laws.

Nevertheless, it is likely that states will also choose to take into account factors similar to those discussed in this article. In accordance with their own domestic legislation and interests, states would generally not choose to initiate prosecution of international crimes in another state where they conclude that doing so would be contrary to the interests of justice.⁸⁸ This supposition is already borne out in practice. For example, the Spanish request for the extradition of Senator Pinochet reflected a dissatisfaction with the sweeping self-amnesty granted in Chile.⁸⁹ On the other hand, up to the present date, states have declined to initiate prosecutions for crimes against humanity committed under the *apartheid* regime in South Africa, which likely reflects the higher level of international regard for the reconciliation measures adopted in the unique circumstances of South Africa.⁹⁰

7 Conclusion

There is no intrinsic tension between the goals of the ICC (accountability and deterrence through punishment of offenders) and the goals of truth and reconciliation commissions (to heal societies, expose the past, and facilitate reconciliation). There is however a difficulty when truth commissions are combined with amnesties for serious international crimes, because the very purpose of the International Criminal Court is to ensure that perpetrators of genocide, crimes against humanity and war crimes do not escape prosecution for their crimes.

As an institution, it is absolutely appropriate and necessary for the ICC to maintain a narrow focus on the objective of prosecution and punishment of those responsible for these serious international crimes.⁹¹ This does not mean, however, that the ICC must be absolutely close-minded toward alternative experiments in dealing with the

⁸⁷ See the observations in *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Trial Chamber II, 10 December 1998, at para. 155.

⁸⁸ In this connection, a 'rule of reasonableness' has been suggested in deciding whether to respect national amnesties: Boed, 'The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations', 33 *Cornell International Law Journal* (2000) 297, at 325. See also Dugard, *supra* note 72, at 1009.

⁸⁹ See, e.g., International Commission of Jurists, *Crimes against Humanity: Pinochet Faces Justice* (1999), at 20–23 and 98.

⁹⁰ See, e.g., Dugard, 'Reconciliation and Justice: The South African Experience', 8 *Transnational Law and Contemporary Problems* (1998) 301.

⁹¹ This posture reflects (1) the long-term imperative of eradicating impunity in order to deter future violation, as well as the societal benefits of providing justice; (2) the desirability of dissuading transitional states from giving in to easy temptation, and ensuring that they make the fullest possible efforts to advance accountability; (3) the narrow subject-matter jurisdiction of the Court, capturing only the most shocking international crimes; and (4) the 'social compact' into which states have already entered with the ICC, mandating it to prosecute where they fail to do so.

past which are genuine and democratic efforts advancing the goals of accountability. There may be exceptional circumstances in which a rigid approach by the ICC would be irresponsible. The most significant mechanism by which deference is possible will be under the discretion not to proceed where prosecution would not serve 'the interests of justice'. The complementarity regime presents another possible means of deference, but this is much narrower due to its specific focus on genuine proceedings. If it were possible for an alternative procedure to meet this test, it would have to be a very sophisticated process providing many of the same features and benefits of prosecution.

Developing appropriate standards for assessing transitional justice mechanisms will be an extremely challenging exercise for the ICC, both politically and philosophically. This paper suggests some possible considerations. Any approach will likely involve an assessment of the extent of the departure from the ideal of prosecution, as well as the reasons for that departure. First, where there are no prosecutions at all – particularly if this is due to a blanket amnesty – deference would in any circumstance be contrary to the letter and spirit of the Statute. Second, where a transitional society is unable to prosecute all offenders, but has established a programme to prosecute those most responsible for the most serious international crimes, deference will likely be granted in the interests of justice. Third, a particularly challenging scenario would be where even those persons most responsible for international crimes are able to apply for conditional amnesties. The design of the ICC is such that it should generally not defer to such an arrangement, but the door is not necessarily completely closed. In situations of grave necessity, a thoughtful assessment of all relevant circumstances, including the criteria applied and the nature of the decision-making body, would be necessary to determine whether ICC action was in the interests of justice.