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Bringing Peace to Darfur and Uganda: A Matter for Sovereign States or the ICC?

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Introduction

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

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

This paper asks whether the ICC can, and ought to, defer to domestic grants of amnesty. In doing so it also questions more broadly whether it ought to take the impact of prosecution on peace, into account. Before it goes on to outline the ways in which it might do this, it is important to understand (i) the position of amnesties in international law, and (ii) the forms of amnesty are granted and the justifications which aim to legitimate them. In regard to issue (i), as a matter of international law, an express customary prohibition of amnesty has not yet crystallized. There is support for customary and treaty based duties to prosecute pursuant to

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grave breaches of the GCs, torture, genocide, and other *jus cogens* norms that might include crimes against humanity. Various judicial and UN bodies confirm that amnesties are inconsistent with treaty based duties to prosecute. Exceptions can nevertheless be made. The most notable of these is article 6(5) of Additional Protocol II to the GCs, which states that authorities “shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the

armed conflict . . .”6 The South African Constitutional Court in Azapo v President of the Republic of South Africa7 relied upon article 6(5) to support an exception to the prohibition on amnesty.8 The explicit or constructive duty to prosecute is anyway limited by subject matter and recipient; the obvious gaps are crimes against humanity and war crimes not giving rise to grave breaches of the GCs. Customary international law, established through state practice and opinio juris, may fill these gaps. There is an emerging state practice supporting an obligation to prosecute the most serious violations of international law,9 and supportive opinio juris.10 Nevertheless, courts have been reluctant to find amnesties “unlawful per se.”11 While

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7 Azapo v President of the Republic of South Africa 1996 (4) SALR 617 [hereinafter the Azapo case].

8 ANDREA O’SHEA, AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE 50 (2002). The Constitutional Court's reasoning was flawed because it adopted an overly broad definition of jus cogens, applied Additional Protocol II to all other jus cogens norms and did not consider whether amnesty for offences that were in fact jus cogens (such as torture and genocide) was permissible: FAUSTIN Z. NOTUBANDI, AMNESTY FOR CRIMES AGAINST HUMANITY UNDER INTERNATIONAL LAW 167 and 171 (2007); and O’Shea, supra note 8, at 50.


much of the debate concerns the permissibility of conditional amnesties,\(^\text{12}\) it is nevertheless difficult to avoid the conclusion that customary law had not crystallized by the Rome Conference, and that international law is leading toward prohibition of amnesties for international crimes.\(^\text{13}\)

In regard to issue (ii), amnesties can come in a variety of forms – blanket amnesties, self-amnesties, and conditional amnesties – however only conditional have attracted any authority. It is therefore only in the context of conditional amnesties that we ought to consider whether customary international law permits grants of amnesty. Conditional amnesties are ordinarily granted following a determination by a quasi-judicial body applying legislative criteria, such as a truth commission. Criteria might include whether a perpetrator acted in pursuit of a political objective, and whether he or she disclosed the truth regarding their role and the role

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\(^3\) Dugard, supra note 11, at 1004. Sadat agrees with this position: Sadat, supra note 10, at 963-5.
of others in commission of a crime. Truth Commissions gain legitimacy when they provide victims with an opportunity to participate by confronting perpetrators and with some form of reparation, and when they have authority to make broad findings and recommendations regarding the causes of and events giving rise to violations. It is not then amnesty itself that is justifiable, but the process by which it is granted. Advocates of truth commission argue that, not only do they have a broader mandate than domestic prosecution, they have a greater capacity to reconcile communities and engender peace. The quintessential example is that of South Africa, where conditional amnesty was bartered for democratic rule, and where the Truth and Reconciliation Commission (SATRC) was hailed as a key contributor to a relatively peaceful transition to a stable democracy. Advocates argue that without the availability of amnesty, South Africa might have lapsed into civil war. This model has been subsequently used by states to argue that amnesty can be a vital ingredient of peace negotiations because they “stabilize and consolidate transition.”¹⁴

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

The construction of the transitional rule of law as independent of politics shares certain affinities with the understanding of the rule of law applicable in ordinary times. Yet,

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controversies over transitional justice in highly politicized contexts present hard cases for adherence to the rule of law. Despite radical political change, the aim is the rule of law not primarily motivated by politics. Transitional jurisprudence reveals a shining vision of the rule of law as antipolitics.\footnote{Id. at 21-22.}

Policy and rule of law considerations are relevant for the ICC because, while international criminal justice or domestic justice for international crimes has historically followed conflict and regime change, the ICC is not limited to \textit{post bellum} justice; separating law from politics is more difficult during conflict.\footnote{Rosanna Lipscomb, \textit{Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan}, 106 COLUM. L. REV. 182, 189-93 (2006).} How does and should the ICC respond? Does the process by which conditional amnesties are granted satisfy international law’s due process and the ICC’s admissibility requirements? Are conditional amnesties a matter of both law and politics beyond the national realm? Or, if amnesty is matter of mere politics, what is the impact on prosecutorial discretion to act?

The Rome Statute sets out the roles for the Prosecutor, the Security Council and the Pre-Trial Chamber in determining whether the ICC can exercise jurisdiction over a matter. The Prosecutor plays a lead role because he has discretion to determine whether to proceed with an investigation or prosecution.\footnote{For ease of reference this paper adopts the Prosecutor’s current gender through this paper.} The Prosecutor has two avenues to defer to conditional amnesty. First, he can determine that amnesties satisfy the admissibility requirements of article 17. Second, pursuant to article 53, he can determine that it is not in the interests of...
justice to proceed with an investigation or prosecution where an amnesty has been or might be granted. The Prosecutor, Luis Moreno-Ocampo, has been patently clear about his approach to admissibility and the interests of justice. In regard to admissibility, he stated in a report to the Security Council that alternative justice mechanisms “are not criminal proceedings as such for the purpose of assessing the admissibility of cases before the [ICC], but they are an important part of the fabric of reconciliation for Darfur, as recognized in resolution 1593 (2005”). Even where amnesty is granted by quasi-judicial bodies such as the SATRC, the Prosecutor would not find that they are determinative of admissibility under article 17 of the Rome Statute. While he seems to leave open the question of whether they might be in the interests of justice because of their reconciliatory capacity, he foreclosed this possibility in September 2007 when he released a policy paper on the interests of justice. In that paper he notes that justice and peace are not mutually exclusive, and that in dealing with the intersection of justice, peace and security, he will work with other institutions such as the Security Council. He goes on to state that, while Security Council intervention would not presuppose the Prosecutor’s position on the interests of justice, he will adopt “a presumption in favor of investigation or prosecution” and use his discretion only in exceptional circumstances. In case of any doubt regarding his position on amnesties, the paper footnotes a quote from the

20 Id.
21 Id. at 1 & 3.
Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, who said “[j]ustice should never be sacrificed by granting amnesty in ending conflicts.”

Should the Prosecutor exercise unfettered discretion to determine admissibility and the interests of justice, we might then end the discussion here. However, the paper is a policy document not binding for the purposes of judicial review, and could be amended by the next appointee. While the object of preventing serious crimes through ending impunity is likely to continue to play a decisive role, it is not outwith reasonability that time and progressive development of the law may lead the Prosecutor to favor consider peace and security. Moreover, the Prosecutor is subject to Security Council and Pre-Trial Chamber oversight. The Security Council has the power to issue a resolution referring a matter to the Prosecutor, or requesting that the ICC defer an investigation or prosecution of a matter where it is a threat to international peace or security. The Pre-Trial Chamber has authority to review the Prosecutor’s decision to proceed (although it might adopt a less intrusive role regarding policy matters). Neither the Security Council nor the Pre-Trial Chamber have intervened on the basis of amnesty as yet. Whether amnesty might be accommodated is therefore still open to debate.

There are two approaches that may be adopted by each of these bodies. The Prosecutor and the Pre-Trial Chamber can adopt a restrictive approach. In regard to admissibility, truth commissions would fail to satisfy the requirements of “criminal justice”, and amnesty would indicate an unwillingness or inability to prosecute. The President of the International Crisis

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22 Id. at 3.

Group, Gareth Evans, aptly summarized the restrictive approach with regard to the interests of justice:

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

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

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

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Literature following adoption of the Rome Statute adopt positions ranging from a strict application of black letter law and confinement to traditional (i.e. western) criminal justice mechanisms,\textsuperscript{25} to expansive policy approaches which argue that the Prosecutor could decline jurisdiction “where prosecution is likely to have destabilizing effects on the state which has granted the amnesty.”\textsuperscript{26} This paper builds upon this work in two ways. First, it synthesizes the positions put forward by scholars and practitioners and frames them in terms of the restrictive or expansive approach. Second, it applies these approaches to the situations of Uganda and Darfur, which are currently subject to ICC jurisdiction. Over the last few years events in these countries, and state responses to intervention by the ICC, have altered the way in which we might view the role of the ICC. Briefly, in Uganda ICC intervention has led to attempts by the government to establish domestic criminal justice mechanisms that incorporate criminal prosecution, reparations, and reconciliatory mechanisms. In Darfur, ICC arrest warrants for President Omar al-Bashir and other political leaders resulted in the expulsion of humanitarian aid groups and the withdrawal of some United Nations peacekeepers. Much of the scholarly debate regarding amnesties and the ICC pre-dated the Prosecutor’s policy, and subsequent reactions were few. The key contribution of this paper to the debate, then, is its application of the synthesized debate to recent events in situations subject to ICC jurisdiction. It determines whether, in the context of present circumstances in Uganda and Sudan, the Court should, or has scope to, take into account political factors.


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

**PART I. THE ROME STATUTE**

A situation can fall within the jurisdiction of the ICC in one of three ways: (i) referral by a state party; (ii) referral by the Security Council using its Chapter VII\(^{28}\) powers; or (iii) a *propio motu* investigation by the Prosecutor. Even where a matter has been referred, prosecutorial discretion to investigate and prosecute is regulated by article 53 of the Rome Statute. Article 53 provides that the Prosecutor shall consider (i) whether he has sufficient factual evidence to support a reasonable basis for investigation or sufficient basis for an arrest.

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

28 U.N. Charter, Chapter VII.
warrant or summons,
(ii) whether a matter is admissible in terms of article 17, or (iii) whether it is in the interests of justice to proceed. For our purposes, admissibility and the interests of justice are determinative. Before proceeding to discuss these provisions, regard ought to be had to the objects and purposes of the Rome Statute, and its travaux preparatoires.

1. Objects and purpose of the Rome Statute

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

Preamble

The preamble provides that the Rome Statute:

Affirm[s] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured....

29 Rome Statute, art. 53, ¶¶ 1(a) and 2(a) respectively.
30 Rome Statute, art. 53, ¶¶ 1(b) and 2(b).
31 Rome Statute, art. 53, ¶¶ 1(c) and 2(c).
33 Rome Statute, art. 31, ¶¶ 2 and 3. The latter of these was discussed
34 Rome Statute, art. 32.
Recalls that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes…

[E]mphasiz[es] that the International Criminal Court established under [the] Statute shall be complementary to national criminal jurisdictions.

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

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Travaux Preparatoires

The issue of amnesties was “acutely controversial” in the debate over jurisdiction at the Rome Conference. 36 The United States advocated for amnesties by circulating a non-paper that argued “that a decision by a democratic regime to grant an amnesty should be a consideration in determining the admissibility of a case before the ICC.” 37 Some states, such as South Africa and Colombia, claimed that they reserved the right to grant amnesty in appropriate


36 Williams & Schabas, supra note 35, at 611.

37 Majzub, supra note 26, at 269.
circumstances. The treaty prohibited reservations, so Colombia, which had considered granting amnesties and pardons to bring an end to decades of armed conflict,38 entered its ratification with the following interpretive declaration:

None of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia.39

Whether interpretive declarations are binding depends upon a complex and often indeterminate examination of whether the declaration is, in effect, a reservation that is inconsistent with the objects and purposes of the treaty, and whether other ratifying states object.40 As far as is possible to ascertain, no states objected on this basis. Even so, the declaration is not necessarily determinative of the treaty’s interpretation for all parties.

Nevertheless, there are two ways in which the omission of a provision on amnesty could be read. The absence of an explicit prohibition could indicate that amnesties are permissible

38 Newman, supra note 12, at 326. Newman notes that “Colombia’s ratification of the Rome Statute, absent its interpretive declaration, might have foreclosed the government’s ability to offer immunity in exchange for peace, thereby removing any incentive for armed rebels to negotiate a truce”: id. at 327.

39 Id, at 325.

under article 17. Whether or not participating states concurred that amnesty should be permitted may depend upon distinguishing unconditional from conditional amnesties. On the other hand, it could indicate they have no jurisdictional impact. Neither approach appears to be appropriate. According to the Chairman of the Committee of the Diplomatic Conference, the question was deliberately undecided. The *travaux preparatoires* might then be of little assistance, other than to confirm there is no state consensus and therefore no customary rule.

2. The Prosecutor

Before engaging in an analysis of admissibility and the interests of justice, is important to note that the Prosecutor may exercise jurisdiction over an individual even where a domestic court is prosecuting them. The Pre-Trial Chamber held that "for a case arising from the investigation of a situation to be inadmissible, national proceedings must encompass both the person and the conduct which is the subject of the case before the Court." Accordingly, in the case against Lubanga, the Court deemed the case admissible because he had not been

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42 In 2000, the UN Secretary General, Kofi Annan, stated that "no one should imagine that [the Rome Statute] would apply to a case like South Africa’s, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power": Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 222 (2000).

43 Dugard, supra note 9, at 701.

44 Newman, supra note 12, at 321-2, footnote 123.

charged with all crimes for which he could be accused. The ICC’s holding may have consequences for conditional amnesties. The SATRC allocated hearings by victim rather than perpetrator. Perpetrators of numerous violations were only granted amnesty for conduct that would not necessarily encompass all acts that give rise to liability. The jurisdiction of truth commissions might mean perpetrators are only granted amnesty for some but not all conduct (whether through rejection or through a perpetrator’s omission in disclosing conduct in their application). In principle, in a way similar to the Lubanga case, the Court and Prosecutor might therefore exercise jurisdiction over an individual subject to amnesty for conduct that was not subject to an investigation or grant of amnesty by the SATRC.46

Admissibility

Article 17 of the Rome Statute sets out the test for admissibility. It provides that the Court, having regard to paragraph 10 of the Preamble and article 1, shall determine that a case is inadmissible (a) where it is being investigated or prosecuted by the referring or affected state, (b) where that state has investigated the matter and decided not to proceed with prosecution, unless the state is unwilling or unable to genuinely investigate or prosecute, 47 (c) or where a person has been tried by another court for crimes falling within the Court’s jurisdiction, unless the proceedings in the other court were (i) for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court, or (ii) otherwise

46 This approach could attest to additional criteria of “inactive”: Williams & Schabas, supra note 35, at 616. Should this be correct, it would be even more unlikely that it would defer to a conditional amnesty that did not encompass all conduct for which a perpetrator may be charged.

47 Rome Statute, art. 17, ¶1. The court may also determine that the matter is not of sufficient gravity. This will be considered under the interests of justice.
not conducted independently or impartially in accordance with the norms of due process recognized by international law and conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.\(^{48}\) While the provision is directed at the Court, the Prosecutor must have regard to admissibility pursuant to article 53.\(^{49}\)

To determine whether amnesties and truth commissions prevent the prosecutor from exercising jurisdiction, it is necessary to determine whether the procedure for granting amnesty falls within the ambit of “investigation”, “decision”, “trial”, “court”, “independent and impartial”, and “unwilling or unable”.

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

The requirement to investigate is found in sub-paragraphs (a) and (b) of article 17(1). The preamble and article 1, which refer to “criminal jurisdiction”, infer that investigation means criminal investigation. Sub-paragraph (a) itself refers to “criminal responsibility”, and sub-paragraph (b) to an “intent to bring the person to justice”. Sub-paragraph (a) also requires “the case” to be investigated.\(^{50}\) The provision impliedly contemplates criminal investigations.\(^{51}\)

\(^{48}\) Rome Statute, art. 17, \(\S 1(\text{c})\), read in conjunction with art. 20, \(\S 3\).

\(^{49}\) A referring state may only challenge a Prosecutor’s decision not to proceed with an investigation or prosecution on the basis of article 53(1) and (2) (to be dealt with later): Article 53(3) & (4) of the Rome Statute.

\(^{50}\) An unconditional amnesty, such as in Uganda, would fail such a test because the decision to prosecute does not require or follow an investigation at all: Cameron, supra note 41, at 91; Murphy, supra note 40, at 45-6; Robinson, supra note 41, at 500-1; and Siebert-Fohr, supra note 2, at 564-5.

By adopting an expansive approach, institutions granting conditional amnesties such as the SATRC might conduct satisfy the requirements of “investigation” and “case” where they engage in “good-faith, methodological evidence gathering”\(^{52}\) of facts, to make an objective determination of criminal liability in individual cases.\(^{53}\) The SATRC operated as a quasi-judicial body,\(^{54}\) because it conducted investigations through expansive powers of search and seizure,\(^{55}\) and could subpoena the provision of information or attendance by any person and question such persons in public or \textit{in camera} hearings.\(^{56}\) Victims and amnesty applicants were entitled to be present at committee hearings (with exception)\(^{57}\) and cross-examine witnesses,\(^{58}\) and persons questioned were entitled to legal representation (albeit without a right to freedom from self-incrimination and a presumption of innocence).\(^{59}\) Following a hearing the Amnesty Committee provided written reasons for its decision regarding whether a perpetrator of human rights violations was granted amnesty. Such institutions may also satisfy “criminal jurisdiction” by the mere fact of their jurisdiction over crimes, and “criminal responsibility” where perpetrators were brought to account through submitting to the jurisdiction of the institution, facing victims, truth telling, and providing reparation. Moreover, recognizing “decisions” for individualized amnesties might be consistent with the references to “the case”

\(^{52}\) Murphy, supra note 40, p44.


\(^{54}\) Gavron, supra note 2, at 114.

\(^{55}\) Promotion of National Unity and Reconciliation Act No. 34 of 1995 [hereinafter the SATRC Act], art. 32.

\(^{56}\) The SATRC Act, art. 29 & 31.

\(^{57}\) The SATRC Act, art. 29 (in camera) & 33 (public).

\(^{58}\) The SATRC Act, art. 34.

\(^{59}\) The SATRC Act, art. 34.
and “person” in the provision, which suggest individual decisions are required.\footnote{Cameron, supra note 41, at 91.}

This approach could be adopted if the distinction between investigation or prosecution in article 17(1)(a) and (b) accepts that an investigation can be conducted irrespective of the body that conducts it,\footnote{Jennifer Llewellyn, \textit{A Comment on the Complementarity Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Justice Contexts?}, 24 DALHOUSIE L.J. 192, 203 (2001).} and irrespective of its purpose.\footnote{Llewellyn, supra note 61, at 203; Carsten Stahn, \textit{Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court}, 3 J. INT’L CRIM. JUST. 695, 711 (2005).} However, according to the rules of statutory interpretation, articles 17(1)(a) and (b) must be read together.\footnote{Llewellyn, supra note 61, at 203.} Sub-paragraph (a) protects matters that are in the preliminary phase of sub-paragraph (b), i.e. a decision not to prosecute has not yet been taken. The duty to prosecute is inextricably linked to “the triad of obligations – to investigate, take action against those responsible, and provide redress,” which “suggests that prosecution is thought necessary in order to fulfill the other two obligations in the triad.”\footnote{Llewellyn, supra note 61, at 208.} An investigation and decision might be sufficient provided prosecution was one of the possible options for achieving justice; investigation must at least contemplate prosecution.\footnote{Robinson, supra note 41, at 500.} The provision cannot incorporate an investigation whose principle objective is to determine whether amnesty should be granted. The same principles might be applied to interpreting “decision,” such that individualized decisions must be considered in terms of their purpose.

\footnote{Cameron, supra note 41, at 91.}
\footnote{Llewellyn, supra note 61, at 203; Carsten Stahn, \textit{Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court}, 3 J. INT’L CRIM. JUST. 695, 711 (2005).}
\footnote{Llewellyn, supra note 61, at 208.}
\footnote{Robinson, supra note 41, at 500.}
The SATRC conducted a broad range of investigations *propio motu* and upon application for amnesty. Investigations connected to grants of amnesty would have been made upon an application and were therefore for the purpose of determining whether amnesty ought to be granted. While denials of amnesty left the possibility of prosecution open, SATRC investigations did not contemplate prosecution; rather, they contemplated amnesty. The final outcome was a decision rejecting the amnesty application, and possibly a recommendation (but not a decision) to prosecute, but the exercise of jurisdiction precluded even the exercise of prosecutorial discretion. The National Prosecuting Authority (NPA) did not retain any discretion to determine whether or not to prosecute until the SATRC had made its decision. Along a procedural spectrum, it is pre-investigation, and will only have an impact upon the decision to prosecute if an amnesty arises from it. Whether a prosecution might occur following a rejection of amnesty is a matter for an entirely new investigation because of the restrictions on using evidence gathered during SATRC investigations in subsequent prosecutions. If the SATRC process was accommodated, a state could argue that it is investigating a matter with a view to granting amnesty rather than prosecuting, before an investigation regarding whether or not to prosecute has even occurred. Upon these grounds, a more restrictive approach is warranted.

The South African example is complicated by the NPA’s recent prosecution guidelines, which

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66 Stahn, supra note 62, at 711.

67 But see Siebert-Fohr, supra note 2, at 568.
permit executive and prosecutorial grants of amnesty. The guidelines allow perpetrators to apply for amnesty pursuant to conditions that are substantially similar to those applied by the SATRC, but which include additional factors such as whether the NPA has the resources to investigate and prosecute the matter. An overly expansive construction of the term accommodating a broad executive decision would clearly be contrary to the objective of the Statute. However, investigations conducted prior to grants of amnesty in such a case may not contemplate amnesty, because a grant of amnesty may be considered by the Minister of Justice following the NPA’s investigation, or upon the application of the accused. An investigation may then still be conducted for the purpose of prosecution. Should a state incorporate amnesty decisions within the role of its NPA, such that amnesty might be an exception to the primary goal of prosecution, article 17(1)(a) and (b) might be satisfied. This might even be the case where an application was made by a perpetrator prior to an investigation, if an investigation is nevertheless conducted. However, if the application is considered on its merits without investigation, the Prosecutor will be put in the same position as the TRC; the determination would first be whether amnesty should be granted. The existence of the amnesty policy would negate an expansive approach. Whether the guidelines withstand article 17 is nevertheless determined by their expression of willingness.

68 Prosecuting Policy and Directives Relating to the Prosecution of Offences Emanating from Conflicts of the Past and which were Committed on or before 11 May 1994, (South African National Prosecuting Authority, tabled 2005) [hereinafter NPA Prosecution Policy].


70 Robinson, supra note 41, at 500.
Unwilling: Article 17(1) and (2)

Article 17(2) gives meaning to the term unwilling in article 17(1)(a) and (b) by providing that the Court must consider (i) whether a national decision was made for the purpose of shielding a person from criminal responsibility, (ii) whether there has been an unjustified delay in proceedings which is inconsistent with an intent to bring a person to justice, and (iii) whether the proceedings were not conducted independently or impartially but in a way inconsistent with an intent to bring a person to justice. In interpreting the provision the Prosecutor must have regard to the principles of due process recognized by international law. An investigation and prosecution must be conducted genuinely,\(^71\) and a judicial decision made, with a view to making a person criminally responsible. The provision was inserted following consensus that it was necessary to “refute the presumption that a national system was handling the case in an adequate manner,” so that “states [could not] easily prevent the ICC from taking jurisdiction by initiating an investigation or prosecution.”\(^72\) Some posit that the underlying purpose of the qualification is to filter *bona fide* from *mala fide* state conduct.\(^73\) However the provision could be read more broadly, because even if a state subjectively demonstrates good faith, it may be objectively unable to achieve impartial and independent results through investigation or prosecution.\(^74\) The requirement of “genuineness” in sub-paragraphs (1)(a) and (b) supports a broader reading.\(^75\)

\(^{71}\) Rome Statute, art. 17, ¶¶ 1(a) and 1(b).

\(^{72}\) Williams & Schabas, supra note 35, at 610.


\(^{74}\) Holmes, supra note 51, at 674. Gavron submits that the qualification imports a subjective element, as it is still necessary to consider, first, whether the state had the intention of bringing the person to justice or whether it intended to shield them from prosecution or fair punishment; Gavron, supra note 2, at 111.
In order to determine whether a truth commission’s grant of amnesty satisfies the qualification we must determine whether it “shields” a person. An expansive approach requires the Prosecutor to demonstrate “a devious intent on the part of a State, contrary to its apparent actions.” The restrictive approach requires that shielding “must be an intended consequence [of the amnesty], whether or not there is a primary, greater intention.” The former position might be satisfied where an outgoing regime negotiates an amnesty, even conditional. Siebert-Fohr argues that a truth commission established to serve peace and security would demonstrate willingness because accountability may also be realized by non-judicial efforts even if they fall short of criminal prosecution. This approach is flawed, because the preamble calls precisely for criminal prosecution. There are other cogent reasons supporting this approach, the most compelling of which is that upon a broader approach the Pre-Trial Chamber is required to “pass judgment on the long-term political goals of a State,” a decision which is not only highly difficult to make but beyond the authority of the Court.

75 Id.


77 Gavron, supra note 2, at 111. See also Sang Wook Daniel Han, The International Criminal Court and National Amnesty, 12 AUCKLAND U.L. REV. 97, 99 (2006); Roht-Arriaza, supra note 11, at 79.

78 Siebert-Fohr, supra note 2, at 571.

In any event it seems unnecessary to engage in this analysis because the ordinary meaning of the words seem clear: the effective provision requires a willingness “to investigate” or to “prosecute.” The grant of amnesty must ultimately fail at the prosecution stage even if it doesn’t at the investigation stage because amnesty shields a person from prosecution. One might then conclude that intent to bring a person to justice requires a person to be investigated and, where appropriate, prosecuted. Even adopting the latter approach means that an amnesty, adopted with legitimate intent such as the “pacification and reconciliation of a society” will by default adopt the goal of shielding.80 This is supported by the Inter-American Court on Human Rights, which found that national reconciliation is insufficient to make amnesties lawful.81 Consequently, South Africa’s “wider policy to restore social peace and reconciliation after a period of transition”82 would not make an investigation or prosecution inadmissible. Amnesties granted by Uganda and Sierra Leone would also fail the test of admissibility because their by-product is impunity from criminal responsibility. In the context of Uganda, MacMillan argues that it is possible to find in the present circumstances that the Amnesty Act 2000 does not shield persons from prosecution because it is used in context of a multi-pronged approach to accountability which incorporates domestic prosecutions and traditional justice mechanisms.83 As with the South African situation, the decisive issue, however, is whether the amnesty shields the individual; the overall approach is not assessed. Even if the State seeks, in

80 Gropengießer & Meißner, supra note 79, at 185.
81 For citations of these cases see footnote 5 above.
good faith, to achieve other legitimate goals, the foreseeable consequence of shielding can be nothing other than intentional. If we apply this reasoning to the terms investigation, prosecution, and decision, it seems logical to find that an investigation conducted by a body such as a truth commission is not sufficient. To hold otherwise would mean that the Prosecutor is prevented from investigating a case where a state was investigating for the purposes of an amnesty determination, but would assume jurisdiction once the investigation was complete and amnesty was granted.

What forecloses the ability of a grant of amnesty by a truth commission to satisfy willingness is the extent to which it hinges on what “justice” means. An expansive approach incorporates restorative justice, while the restrictive is limited to retributive. We might find the answer in the principles of due process recognized by international law, and the objects and purposes of the Statute. While a conditional grant of amnesty requires a person to take responsibility through confession, disclosure of the truth, an apology, or financial compensation, these do not import criminal responsibility, because our traditional understanding of criminal responsibility entails punishment through imprisonment, community service and/or fines. If due process includes procedural as well as substantive fairness, punishment is a component of due process recognized by international law. This approach is supported by the preamble, which states that the most serious crimes of concern must not go “unpunished.” Restorative justice cannot not be a substitute for retributive justice in any case, no matter which stage amnesty is granted. Therefore, amnesty does not just preclude admissibility because it shields

84 Murphy, supra note 40, at 45.

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

86 Williams & Schabas, supra note 35, at 623.
a person from prosecution in a trial, but because it shields them from the criminal consequences of guilt, namely, punishment. Even where the current South African NPA prosecuting policy satisfies investigation and decision, amnesty does not determine a matter inadmissible because it shields a perpetrator from retributive justice.

_Unable: Article 17(3)_

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

_Ne Bis In Idem - Trial and Court: Articles 17(1)(c) and 20_

Articles 17(1)(c) and 20 preclude prosecution where the individual has been tried for the same conduct in another court and convicted or acquitted. The ground is satisfied unless: the trial

87 Majzub, supra note 26, at 270.
88 Rome Statute, art. 17, ¶¶ 1(c) and 20(1).
shielded the accused from criminal responsibility, or was not independent and impartial in accordance with the norms of due process and was inconsistent with an intent to bring a person to justice. There are four ways in which truth and reconciliation commission processes granting amnesty fail to meet this provision. First, a truth commission hearing does not comport with what we ordinarily understand as a “trial” and “court.” Even if we accept that the SATRC was sufficient on the basis that matters were heard before Commissioners making reasoned determinations on the basis of legislative criteria that was binding on local courts, it fails to meet the due process requirements of criminal trials. While witnesses could be examined and cross-examined, the accused was not afforded the presumption of innocence, and freedom from self-incrimination. Rather, proceedings commenced from an assumption of guilt, and the grant of amnesty hinged on an ability to incriminate oneself and others. These requirements are contrary to fundamental rights contained in the right to a fair trial in articles 9 and 14 of the International Covenant on Civil and Political Rights and other regional instruments such as the African Charter on Human

89 Rome Statute, art. 20, ¶¶ 3(a) and 3(b) respectively.

90 A footnote to the Prepatory Committee’s draft of the Statute stated that draft article 15(1)(c) “should also address, directly or indirectly, cases in which there was a prosecution resulting in conviction or acquittal, as well as discontinuance of prosecution and possibly also pardons and amnesties” but that “[i]t was agreed that these issues would be revisited in the light of revisions…on ne bis in idem:” Rome Conference on the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, ¶ 41, U.N. Doc. A/CONF.183/2/Add.1 (14 April 1998), available at http://www.un.org/law/n9810105.pdf. The conference did not revisit the issue.

91 Van den Wyngaert & Ongena, supra note 82, at 727. See also Gavron, supra note 2, at 109; and Dugard, supra note 9, at 702.


and Peoples’ Rights. While the reference to “norms of due process recognized by international law” relates to independence and impartiality, the Pre-Trial Chamber may nevertheless take these additional norms into account. Second, amnesty does not meet the qualifying words of “convicted” and “acquitted.” Not only does amnesty preclude a criminal trial in which a person can be convicted, but it can hardly be said constitute “acquittal,” which denotes an absence of guilt. Third, the traditional goal of the rule on double jeopardy is “to prevent the state from repeatedly prosecuting a person for offences arising out of the same incident until a conviction is obtained.” Given a truth and reconciliation process is not a prosecution, nor an attempt to obtain a conviction, upon a traditional approach it would fall outside the ambit of ne bis in idem.

A more expansive approach encompassing truth commissions is advocated by states claiming that the restrictive approach is tainted by cultural imperialism, and is therefore not truly satisfactory as a norm of due process recognized by international law. This problem arises

94 Although it is arguable that these would only be relevant insofar as they are binding on the state.

95 Article 20 contains an additional qualifier in requiring the proceedings to be “independent and impartial.” These terms, which are contained in the Universal Declaration of Human Rights G.A. res. 217A (III), U.N. Doc A/810 (1948) and the ICCPR, ordinarily refer to courts, and require that they be “independent” of government: Zyala Motala, The Use of the Truth Commission in South Africa as an Alternative Dispute Resolution Mechanism Versus the International Law Obligations 45 SANTA CLARA L. REV. 913, 924-5 (2004-2005). Blanket amnesties granted by the executive cannot be considered independent and impartial decisions or proceedings. It is unlikely that a body such as the TRC, albeit quasi-judicial, was sufficiently independent to satisfy these requirements.

96 Rome Statute, art. 20, ¶ 3(b).


98 Majzub, supra note 26, at 272.
partly because treaty based rights and norms are not yet universal. Claims of cultural imperialism have some merit if the norms of due process were required to be customary. This is a hotly debated issue; how it might be resolved involves a complex analysis of custom, its role, and the participation of states in its establishment. It is tentatively posited that claims of cultural imperialism are often closely tied to those of cultural relativism, claims which are widely rejected on a number of grounds, not least because the people often affected by them object. While affected perpetrators might benefit from exceptions based on cultural relativity, it cannot be said that victims would necessarily be so accepting. In any event, this issue is foreclosed by the fourth ground, which is that amnesty shields an accused from criminal responsibility, and is inconsistent with intent to bring a person to justice.

**The Interests of Justice**

Article 53 provides that the prosecutor shall initiate an investigation unless he or she determines that when taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.\(^9\) It also provides that the prosecutor may decline to prosecute if, upon investigation, he/she concludes that there is no sufficient basis for a prosecution because a prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims, the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime.\(^10\) The Prosecutor applies both an

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\(^9\) Rome Statute, art. 53, ¶¶ 1(c) & 2(c). Article 48 of the ICC Rules of Procedure and Evidence further require that the Prosecutor consider article 53(1) when deciding to conduct a preliminary examination of a situation.

\(^10\) Article 53(2)(c). The different formulations may indicate nothing other than that the Prosecutor has more latitude to investigate a person until their role is determined, and until he or she can establish who the perpetrator is: Morten Bergsmo &
evidentiary and appropriateness test to determine whether to proceed with an investigation.\textsuperscript{101} Whether the prosecutor can adopt an expansive approach accommodating amnesty, or must adopt a restrictive and exclusive approach depends upon two issues: (i) the relevance and scope of the listed factors, including whether the interests of justice are confined to the individual or to the situation as a whole, and (ii) whether those factors are exhaustive.

\textit{Scope of the Interests of Victims and the Role of the Perpetrator}

In determining scope the most relevant factor is the interests of victims.\textsuperscript{102} Whether amnesties are relevant to the interests of victims depends upon whether those interests are limited to the matter at hand (i.e. the victims of the perpetrator), or to the situation (i.e. future victims). The latter interpretation includes political considerations such as the extent to which prosecution might lead to further violations because it creates incentives for those indicted to avoid conflict resolution. It might also include social factors such as the extent to which alternative justice processes incorporating amnesty facilitate stability and reconciliation of communities. What the provision requires the Prosecutor to do, though, is demonstrate that it is not, rather than is, in the interests of victims to investigate or prosecute. The expansive approach would require the Prosecutor to consider a tenuous connection between investigating and prosecuting a perpetrator of crimes and future unknown victims, and to determine that it is not in the

\textsuperscript{101} The evidentiary test is contained in article 53(1)(a) and 2(a) of the Rome Statute. See Bergsmo & Kruger, supra note 100, at 1067.

\textsuperscript{102} The age of the perpetrator is not relevant to amnesty.
interests of those unknown victims for the perpetrator to be investigated or prosecuted. The provision logically requires that the interests of justice are limited to the matter at hand. In any event, even if a broader view is adopted, it is difficult to argue that prosecution is not in the interests of victims. In the case of actual victims it does not presuppose an absence of other reparative benefits. In the case of future victims it might prevent that perpetrator from committing further violations. Upon the limited subset of factors amnesty would not be accommodated by the interests of justice.

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

103 Siebert-Fohr, supra note 2, at 579.
There is value in targeting those with authority and effective control to condone or effectuate crimes. It may provide the only deterrent value of the ICC; making government and rebel leaders aware of the possibility of prosecution might lead to fewer violations.\textsuperscript{104} In Uganda, Kony’s removal is vital to making the LRA ineffectual, as he “stands at the apex of the LRA structure, politically, militarily, and spiritually.”\textsuperscript{105} The situation in Sudan is more complicated because government leaders have been indicted, and instability in Darfur entrenches al-Bashir and other government leaders’ positions (by preventing a unified front in the region). If those indicted were arrested and successfully prosecuted, it is possible that regime change (and possible international intervention) could reduce crime and even stabilize the region.

The difficulty with this approach is that international courts and tribunals have tended to commence their investigations by focusing on lower level perpetrators in order to extract evidence to build their case against more senior officials.\textsuperscript{106} Like the ad hoc tribunals, the ICC has Statute based mechanisms by which it can obtain evidence to build its case. For example, article 93 provides that states parties must assist the ICC with evidence gathering, including the taking of witness statements, execution of searches and seizures, and the provision of evidence.

\textsuperscript{104} Nsongurua J. Udombana, \textit{Pay Back Time in Sudan? Darfur in the International Criminal Court}, 13 TULSA J. COMP. & INT’L L. 1, 44 (2005) (“\textsc{h}istory has shown that the involvement of highly placed functionaries or officials of states makes the commission of most international crimes possible; it is great men, potential saints, not little men, who become merciless fanatics.”)


\textsuperscript{106} For example, the ICTY’s first trial was against Tadic, who was a prison guard.
records and documents.\textsuperscript{107} Gathering evidence necessarily relies on state support, initially forthcoming in the Uganda situation, but not at all in the Sudanese.

How the Prosecutor and the Court might consider role can be deduced from the Appeals Chamber’s decision in the\textit{Lubanga} case. While the case dealt with the role of the perpetrator in relation to gravity,\textsuperscript{108} it discussed the relevance perpetrator’s authority when determining the appropriateness of commencing an investigation and prosecution. In considering gravity the Pre-Trial Chamber held that the ICC’s “deterrent effect would be greatest if [it] only dealt with the highest-ranking perpetrators” because they “are the ones who can most effectively prevent or stop the commission of crimes.”\textsuperscript{109} Those “most senior leaders” could be identified by: (i) the position played by the accused; (ii) their role in systemic or large-scale crimes; and (iii) the role of state entities, organizations or armed groups.\textsuperscript{110} On appeal, the Prosecutor opposed this test because he said it would:

\begin{quote}
[Inappropriately limit his Prosecutorial discretion and would make it impossible to investigate and prosecute perpetrators lower down the chain of command . . . ; the
\end{quote}

\begin{minipage}{1\textwidth}
\textsuperscript{107} Rome Statute, art. 93, ¶ (1)(b), (1)(h), and (1)(i) respectively.

\textsuperscript{108} Gravity is relevant to admissibility at the investigation stage, and the interests of justice.: Articles 17 and 53 of the Rome Statute. While gravity should be interpreted the same way for both, its inclusion under article 53 ensures that the Prosecutor takes gravity into account when considering the interests of justice. So while gravity is not left entirely to the Prosecutor’s discretion because it is a constituent part of article 17, it can nevertheless play a role in aspects of the Prosecutor’s discretion that are subject to limited judicial review. For a discussion of this point see Bergsmo & Kruger, supra note 100, at 1071; and Williams & Schabas, supra note 35, at 621.

\textsuperscript{109} Ex parte Prosecutor,\textit{ Prosecutor v Lubanga}, Case No. ICC-01/04, Judgment on the Prosecutor’s Appeal against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58”, ¶73 (Jul. 13, 2006).

\textsuperscript{110} \textit{Id.} ¶ 56.
\end{minipage}
investigation and prosecution of low and mid-level perpetrators may in certain circumstances be necessary to generate evidence and build a case against the perpetrators on the highest level.\(^{111}\)

He went on to argue that:

\[ \text{The Pre-Trial Chamber improperly placed emphasis on the authority of suspects to negotiate and sign peace agreements, and … improperly created a criterion that suspects have to be core actors in the decision making process of policies or practices or have autonomy to change or to prevent the implementation of policies and practices.}\(^{112}\)

The Appeals Chamber agreed. It found that it is “more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is \textit{per se} excluded from potentially being brought before the court,” and that the “capacity of individuals to prevent crimes should not be implicitly or inadvertently assimilated to the preventative role of the Court more generally.”\(^{113}\) It found that the criteria developed by the Pre-Trial Chamber ignored that “the highly variable constitutions and operations of different organizations could encourage any future perpetrators to avoid criminal responsibility before the [ICC] simply by ensuring that they are not a visible part of the high-level decision making process.”\(^{114}\) It emphasized that “individuals who are not at the very top of an organization may still carry a considerable

\(^{111}\) Id. ¶ 66.
\(^{112}\) Id. ¶ 67.
\(^{113}\) Id. ¶ 73.
\(^{114}\) Id. ¶ 77.
influence and commit, or generate the widespread commission of, very serious crimes." It consequently found factors related to role identified by the Pre-Trial Chamber were “not necessarily directly related to gravity in article 17(1)(d).

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

**Other Factors**

While subject to debate, it is more than plausible that the Prosecutor may take into account other grounds at both the investigation and prosecution stages. In determining whether to investigate, the Prosecutor must consider whether he has substantial reasons to believe

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115 *Id.* ¶ 77.

116 *Id.* ¶ 74.

117 It is notable that in the Al Bashir case the Pre-Trial Chamber found that it “neither has the power to review, nor is responsible for, the Prosecution’s assessment that, under the current circumstances in Sudan, the initiation of a case against Omar Al Bashir and three alleged commanders of organized armed groups would not be detrimental to the interests of justice”: Prosecutor v Omar Hassan Ahmad al-Bashir, Decision on Prosecution’s Application for Warrant of Arrest for Omar Hassan Ahmad al-Bashir, ICC-02/05-01/09 (Mar. 4, 2009), para.15.
investigation would not serve the interests of justice, even where taking into account the gravity of the crime and the interests of victims. Additional factors are required to determine whether the Prosecutor can demonstrate substantial reasons. Article 53(2)(c) adopts a more straightforward approach in its use of the word “including.” The ICRC’s argument that, “[i]f the interests of justice are satisfied on the [limited] subset of conditions of the interests of justice, the Prosecutor must proceed,”¹¹⁸ cannot be correct in relation to investigation because the Prosecutor must find substantial reasons despite the listed factors. Additional gaps in article 53 lend support to a broad discretion to consider the additional political and social factors identified above.¹¹⁹

The factors that may be taken into account depend upon what we mean by justice. There are three ways in which we might define it: (i) as a term of law limited to retributive justice (as per article 17); (ii) as a term of law which has been broadened by state practice to incorporate peace building, reconciliation, and reparation; or (iii) where law hasn’t been broadened by state practice, as a term incorporating legal, political, and social factors. The first and most restrictive view would limit justice to retributive justice. As noted in the introduction, the second approach is unclear as a matter of customary international law. The third and expansive approach leaves scope for amnesties to be accommodated.¹²⁰

¹¹⁸ According to Bergsmo & Kruger, the word “[shall] does not give the Prosecutor room for arbitrary decision making if he or she assesses the preliminary information as providing a reasonable basis on which to proceed under the Statute”: Bergsmo & Kruger, supra note 100, at 1068.

¹¹⁹ Stahn, supra note 62, at 270.

¹²⁰ According to Gavron, which ground a court might adopt might be dependent on whether adopt a civil rather than common law approach is adopted: Gavron, supra note 2, at 110. Given international courts and tribunals adopt a combination of civil and common law approaches, it is difficult to say which approach will be influential.
Many scholars put forward grounds supporting an expansive view. According to Ohlin, “it is difficult to think of a factor that would not be relevant.” Gropengießer and Meißner concur, arguing that the interests of justice incorporate more than “just criminalization of an offence, because the circumstances of the offence, the perpetrator and the victim can be outweighed by other factors not related to wrongfulness and guilt.” According to their interpretation, justice incorporates “a peaceful society.” Bourdon notes that the statute drafters “wished … to give “carte blanche” to the Prosecutor to take a decision which is quite clearly entirely political, namely a decision in the course of which he would have to weigh the requirement of peace and reconciliation on the one hand against the need for justice on the other.”


122 Ohlin, supra note 23.

123 Gropengießer & Meißner, supra note 79, at 192-3.

124 Gropengießer & Meißner, supra note 79, at 192-3.

125 William Bourdon, Amnesty Crimes of War Project: A-Z Guide, available at http://www.crimesofwar.org/thebook/amnesty.html. The problem with this approach is that it is circular; it distinguishes reconciliation from justice such that the interests of justice, upon a literal interpretation, exclude reconciliation.
sense that it is always retributive.” According to these scholars, the expansive approach allows the Prosecutor to consider broader goals such as amnesty’s contribution to effecting conflict resolution, reconciling communities, eliciting truth about and causes of the conflict, and a need for certainty and stability (post-conflict) to maintain the rule of law.

Many others opt for the more restrictive approach. While ICC’s Office of the Prosecutor’s Policy Paper on the Interests of Justice (OTP policy paper) dealt with amnesty in passing, it comprehensively set out the grounds for adopting a more restrictive approach. The Prosecutor submits that justice contributes to peace, which he reinforces with the statement made by the Secretary General of the United Nations that “[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives.” Discretion is to be guided by the objects and purposes of the statute, “namely the prevention of serious crimes of concern to the international community through ending impunity” and the guarantee of “lasting respect for and enforcement of international justice.” The Prosecutor’s conclusion is buttressed by the consistent trend in the last 10 to 15 years of imposing a duty on states to prosecute, which indicates that the pursuit of justice is not a question of whether we agree or disagree in moral or practical terms, but a matter of the law. The policy is explicit that the ICC’s justice mandate (i.e. to prosecute) must be carried out independently,


127 For example, see Roth, supra note 25, at 765; and Gareth Evans cited in the OTP Newsletter.

128 OTP Policy Paper, at 1.

129 OTP Policy Paper, at 8.

130 OTP Policy Paper, at 1 and 4.

and that for all other matters involving the interaction of humanitarian, security, political, development and justice elements, the OTP will “work constructively with and respect the mandates of those engaged in other areas.”\textsuperscript{132} While the interests of justice accommodate “crime prevention and security, … the broader matter of international peace and security is not the responsibility of the Prosecutor” but that of the Security Council.\textsuperscript{133} Factors which might then be taken into account in this restrictive approach would include those already identified by the objects of the statute, such as the prevention of impunity. The Prosecutor might then decide it is not in the interests of justice to proceed where the victims have already obtained some form of reparation, the perpetrator is a low-level offender who might have committed a small number of violations, investigation and prosecution of the matter will not extract evidence which might be useful in cases against more senior figures, and refraining from prosecution will not contribute to widespread impunity and lawlessness.

Before going on to consider how the Security Council and the situations in four countries affect the application of these approaches, there are three restrictions on Prosecutorial discretion that impact upon additional factors that might be taken into account. First, while it is desirable to accommodate all other relevant factors, it is necessary first to exclude factors that are explicitly or impliedly taken into account by the interests of victims and the role of the perpetrator. These would include consideration of the Prosecutor’s impact upon potential future victims, i.e. the possibility that prosecution might lead to further violations, and whether the perpetrator might be in a position to effect peace negotiations. Further, the factors

\textsuperscript{132} OTP Policy Paper, at 8.

\textsuperscript{133} OTP Policy Paper, at 8-9.
must demonstrate that it is *not* in the interests of justice to investigate or prosecute. Second, because of the explicit phrase “under this Statute” in the chapeau of article 53(1), when making decisions the Prosecutor must take into account the Statute’s preambular objectives of ensuring that the most serious crimes do not go unpunished, that effective prosecution must be ensured, and that ICC prosecutions should be complementary to national criminal jurisdiction, put an end to impunity, and guarantee lasting respect for the enforcement of *international* justice.\(^\text{134}\) What justice might mean is justice in the international rather than domestic sense; according to the weight of state practice, international justice generally requires criminal prosecution and punishment. Third, articles 53(1)(c) and 2(c) adopt a higher burden of proof at both the investigation and prosecution stage.\(^\text{135}\) The chapeau of article 53(1) requires the Prosecutor to have a reasonable basis to refrain from investigating,\(^\text{136}\) however reasonable basis upon investigation is raised to reasonable grounds at the arrest warrant stage (Article 58), and substantial reasons and sufficient basis at the confirmation of indictment stage (article 53(1)(c) and 2(c) respectively).\(^\text{137}\) On its ordinary meaning, substantial and sufficient require more than “reasonable.”\(^\text{138}\) The Prosecutor must have more than suspicion that a

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\(^{134}\) The final paragraph of the Preamble provides that states resolve to “guarantee lasting respect for and the enforcement of international justice.” It is of no relevance that this phrase is not in the chapeau of article 53(2) because the Prosecutor must have already considered the objects of the statute in terms of the interests of justice at the investigation stage.

\(^{135}\) For example, *see* Prosecutor v Omar Hassan Ahmad al-Bashir, Warrant of Arrest for Omar Hassan Ahmad al-Bashir: Separate and Partly Dissenting Opinion of Judge Ušacka, ICC-02/05-01/09 (Mar. 4, 2009), paras.8-9; Prosecutor v Omar Hassan Ahmad al-Bashir, Warrant of Arrest for Omar Hassan Ahmad al-Bashir, ICC-02/05-01/09-OA (Feb. 3, 2010), para.30.

\(^{136}\) Articles 15 and 53(1).

\(^{137}\) Rome Statute, art. 53(2).

\(^{138}\) Bergsmo & Kruger, supra note 100, at 1069.
prosecution (irrespective of whether amnesty had been granted) would impact upon peace negotiations.\textsuperscript{139} Fourth, and as discussed in relation to the interests of victims, the factors should be limited to matters “directly bearing on the case itself,” that is the individual matter rather than the broad situation.\textsuperscript{140} This might be supported by the substantial reasons test, because a more expansive approach would require a considerable amount of speculation regarding tenuous connections between potential victims and the effects of investigation and prosecution. Individualization is consistent with the scope of the other factors that the Prosecutor may take into account – the role and age of the perpetrator, and the gravity of the crime – which are necessarily individual in nature. This limitation alone could exclude amnesty from consideration because it requires the Prosecutor to consider the impact of prosecution of one individual on the peace process, rather than the impact of failing to give deference to national amnesties more generally.

3. The Security Council

The Security Council may request deferral of any investigation or prosecution into situations or of individuals for twelve months, irrespective of the method by which the ICC exercises jurisdiction.\textsuperscript{141} It may do so (i) when it has issued a resolution pursuant to chapter VII of the UN Charter, and (ii) where “deferral is consistent with the purpose and principles of the United Nations with respect to maintaining international peace and security, resolving threatening situations in conformity with principles of justice and international law, and promoting respect for human rights and fundamental freedoms under article 24 of the UN

\textsuperscript{139} Bergsmo & Kruger, supra note 100, at 1071-2.

\textsuperscript{140} Gavron, supra note 2, at 110.

\textsuperscript{141} Rome Statute, art. 16.
While each deferral may only extend for 12 months, there is no limit to the number of times it can be renewed; provided there is political willingness within the Security Council, it could defer indefinitely. The Security Council is nevertheless limited by Chapter VII of the UN Charter: the deferral must be justified on the grounds of peace and/or security. When a situation has stabilized, and peace is seemingly achieved, the Security Council would lose its power to defer.

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

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143 The Security Council may only issue a resolution when the matter constitutes a threat to the peace, a breach of the peace, or an act of aggression: see article 39 of the UN Charter.

Court from operating.\textsuperscript{145} Investigations and prosecutions upon referral or \textit{propio motu} were introduced, and the Security Council’s power was restricted to 12-month deferrals.

Whether the Security Council would exercise its deferral power on the basis of amnesty is likely to depend upon the means by which the ICC came to exercise jurisdiction. It is difficult to reconcile deferral with a prior referral by the Security Council, such as in the case of Darfur, because referral assumes that exercising international criminal jurisdiction contributes to peace.\textsuperscript{146} It is also unlikely that the Security Council would defer a matter where a state had referred the situation, unless that state made a subsequent request for it to do so. There are few obvious constraints impeding Security Council intervention in the case of a \textit{propio motu} investigation,\textsuperscript{147} other than a desire to maintain the perception of prosecutorial independence.

While the Security Council has been willing over the last two decades to intervene in conflicts that will fall within the ICC’s jurisdiction on the basis that they are a threat to peace and security,\textsuperscript{148} the threshold might be such that the power would very rarely be used\textsuperscript{149} in general, let alone for amnesty. Moreover, it is unlikely that the Security Council would vote for repeated and indefinite deferrals affecting the long-term ability of the Court to exercise

\textsuperscript{145} Morten Bergs\r{m}o & Jelena Peji\v{c}, Article 16, \textit{Deferral of investigation or prosecution}, in \textsc{Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article} 595, 596 (Otto Triffterer ed., 2008).

\textsuperscript{146} Bergs\r{m}o & Peji\v{c}, supra note 145, at 599.

\textsuperscript{147} \textit{But see} Han, supra note 77, at 101.

\textsuperscript{148} Gavron, supra note 2, at 109.

\textsuperscript{149} Gavron, supra note 2, at 109.
jurisdiction. The consequence of a Security Council deferral is, at least in the short-term, a political one. It might add legitimacy to amnesties as a tool for ensuring peace and security, and strengthen the position of advocates of amnesty. However, in the face of eventual prosecution, the political impact is unlikely to lead to a customary norm in favour of amnesty, particularly given the debate regarding amnesties for serious crimes is more concerned with conditions imposed on them than on permission or prohibition per se.150

If the Security Council required deferral, the Prosecutor could challenge the resolution in the Pre-Trial Chamber. It is arguable that the Court would not be constrained by a Security Council resolution because it retains competence de la competence: the competence to determine its own jurisdiction over rationae loci and rationae personae.151 It is not a subsidiary body, rather, it “wrest some powers from the Security Council.”152 If this were the case, the decision whether to uphold an amnesty turns on (i) whether the Security Council has jurisdiction to exercise its powers, and (ii), whether it has done so in a way consistent with the purposes and principles of the UN Charter.

In regard to (i), it is debatable that the Pre-Trial Chamber has the competence to determine the existence of a threat to peace or an act of aggression, as they are primarily political

150 See the discussion on pages 51-51.

151 Rome Statute, art. 19, ¶ 1. See Scharf, supra note 35, at 369, who argues that the Tadić case “suggests that the ICC could assert that it has authority to independently assess whether these two requirements are met”: see Tadić case, ¶ 6. See also Ntoubandi, supra note 8, at 205-6.

152 Udombana, supra note 104, at 6. Parties opposed to the initial draft provision argued that it “infringed on the judicial independence of the court,” and/or that the International Court of Justice was not subject to similar controls: see Bergsmo & Pejić, supra note 145, at 596.
determinations.\textsuperscript{153} States have conferred primary responsibility on the Security Council for the maintenance of peace and security.\textsuperscript{154} According to Bergsmo, the ICC Statute does not and could not weaken the Council’s ability to fulfill its obligations under the UN Charter; rather, the Court becomes a tool for maintaining peace and security.\textsuperscript{155} While his latter submission seems inconsistent with the independence of the Court, as a matter of constitutional order, authority to assess threats to peace and security could be an inappropriate extension of power in determining admissibility.\textsuperscript{156} This is not to necessarily say that support for a residual power to determine whether the Security Council resolution is consistent with the purposes and principles of the UN isn’t warranted. The \textit{competence de la competence} of international judicial institutions to review Security Council resolutions was upheld in the ICTY’s Tadić case,\textsuperscript{157} and the International Court of Justice’s \textit{Namibia, Wall, and Serbia} cases.\textsuperscript{158} The

\textsuperscript{153} In regard to aggression, the Pre-Trial Chamber has not yet been authorized to determine an act of aggression as a matter of criminal culpability because states have not yet agreed on a definition of aggression: it therefore remains an essentially political rather than legal determination.

\textsuperscript{154} U.N. Charter, arts. 24 and 39.

\textsuperscript{155} Morten Bergsmo, \textit{Occasional Remarks on Certain State Concerns About the Jurisdictional Reach of the International Criminal Court, and Their Possible Implications for their Relationship Between the Court and the Security Council}, 69 NORDIC JOURNAL OF INTERNATIONAL LAW 87, 113 (2000).

\textsuperscript{156} Ntoubandi argues that the ICJ would nevertheless is competent to determine a dispute between the ICC and the Security Council regarding the existence of a threat to peace or security: Ntoubandi, supra note 8, at 206.

\textsuperscript{157} Tadić case, ¶ 29-30.

\textsuperscript{158} In Tadić, the ICTY found the power “implicit in the notion of adjudication itself”: Tadić case, ¶ 18. Although not reviewing resolutions directed at it, the ICJ used its power in the \textit{Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)}, 1971 I.C.J 16, at 35; and \textit{Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)}, 2007 I.C.J. 91, ¶ 212 (Feb. 26). \textit{See} Sarooshi, supra note 144, at 114. The European Court of Justice, the Human Rights Committee and the United Kingdom House of Lords have also adopted various
Court’s power of review would be limited to assessing its own jurisdiction,\(^\text{159}\) and the extent to which a Security Council resolution complies with article 16 of the Rome Statute,\(^\text{160}\) such as to determine whether it constitutes “an abuse of authority…or [an] obvious and grave deficiency.”\(^\text{161}\) Determining an abuse of process or grave deficiency would allow the Court to find that the resolution was unfounded because it was clearly outside Security Council power. The Court could also find that the resolution was not consistent with the purposes and principles of the UN as required by article 24, paragraph 2 of the UN Charter,\(^\text{162}\) where the Security Council attempted to resolve a threatening situation in a way that is inconsistent with “justice and international law,” a legal rather than political determination. This would require an assessment of the status of amnesties under international law.\(^\text{163}\) It is arguable that the Court can find a resolution invalid if it does not take into account the \textit{jus cogens} character of an obligation, or a duty to prosecute.\(^\text{164}\)

\(^{159}\) Sarooshi, supra note 144, at 115.

\(^{160}\) Sarooshi, supra note 144, at 98-99. See article 42 and the discussion of article 53 of the Rome Statute below.

\(^{161}\) Gropengießer & Meißner, supra note 79, at 191.

\(^{162}\) Article 16 of the Rome Statute requires that the Security Council act in accordance with Chapter VII of the U.N. Charter, which in turn requires it to comply with the purposes and principles of the of the UN (art.24, para.2).

\(^{163}\) Roht-Ariaza, supra note 11, at 80.

\(^{164}\) Gropengießer & Meißner, supra note 79, at 191.
How this issue is resolved may still depend upon the international constitutional order – the hierarchical status between member states, the Security Council and the ICC. According to Gropengießer and Meißner, any findings by the Court would be binding on ratifying states since they have subjected themselves to its authority.\(^{165}\) However, states are also bound by Security Council resolutions pursuant to article 103 of the UN Charter, which provides that, “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”\(^{166}\) Security Council resolutions have a hierarchical supremacy over international treaties.\(^{167}\) One view is that, to the extent that a resolution would require a state to take or not take action, it would only bind that member state and not the ICC, which has a distinct legal personality.\(^{168}\) The Security Council cannot operate beyond its own powers to require the ICC to act inconsistently with its own treaty obligations. The court retains authority to determine whether article 16 was complied with,\(^{169}\) because neither member State obligations, nor Security Council Resolutions, could alter its treaty-based obligations. The alternate view is put forward by Gropengießer and Meißner, who

\(^{165}\) Gropengießer & Meißner, supra note 79, at 191.

\(^{166}\) In the context of complete Security Council control over the jurisdiction of the ICC, a proposed preambular “savings clause” to ensure the Charter was paramount was rejected: Bergsmo & Pejić, supra note 145, at 596. This was nevertheless.

\(^{167}\) Al-Jedda case.

\(^{168}\) Sarooshi, supra note 144, at 107. See article 48(2) of the Rome Statute, which requires members States to carry out decision of the SC “directly and through their action in the appropriate international agencies of which they are members”. See also Matthew Happold, Darfur, The Security Council, and the International Criminal Court, 55 INT’L & COMP. L.Q. 226, 229 (2006).

\(^{169}\) Sarooshi, supra note 144, at 106-7.
argue that member states cannot contract out of the UN Charter and Security Council obligations by creating an international organization, and that any such international organization is indirectly bound by the obligations of its member states.\textsuperscript{170} That resolutions are directed at the ICC rather than member states might be resolved by Cassese who described an analogous institution, the ICTY, as a “giant without arms and legs – it needs artificial limbs to walk and work. And those artificial limbs are state authorities.”\textsuperscript{171} The ICC becomes a conglomeration of member states. Sarooshi adds that the retention of Security Council “veto” rights supports the retention of Security Council discretion, because states could merely have required a referral without a Chapter VII resolution.\textsuperscript{172} That referral required such a resolution could indicate an intention to provide the Security Council with authority over the ICC. This is nevertheless resolved by accepting that the Court has the authority to determine whether the Security Council acted in excess of its power, because as a judicial body it is distinguished from member states. The ICC fulfills a judicial function in an international separation of powers, and the Security Council the executive.\textsuperscript{173} Member states will be bound by court decisions because the resolution would not lawful and would not withstand article 103 of the UN Charter.

\textsuperscript{170} Gropengießer & Meißner, supra note 79, at 189-90. See also Lipscomb, supra note 16, at 201-202.


\textsuperscript{172} Sarooshi, supra note 144, at 100-1.

\textsuperscript{173} This analogy is problematic because the Security Council acts as a quasi-judicial body at times: see Stefan Talmon, \textit{The Security Council As World Legislature}, 99 AMJIL 175 (2005).
Whether the Pre-Trial Chamber will adopt a cautious approach is yet to be seen: the irony is that, while politicization might threaten its legitimacy, it needs political backing to maintain it. Nevertheless, as Ohlin notes, it might be “highly unlikely that the International Criminal Court will be staffed by sitting judges who are inclined to take the conservative legal view that the Court – an independent judicial body – must bow to determinations made by the Security Council, an explicitly political legal body.”

4. Summary

If the Prosecutor defers to amnesties granted by truth commissions in terms of admissibility, he must find that they satisfy (i) the terms investigation and decision, or (ii) the requirement of *ne bis in idem*. In either case they must also demonstrate a willingness to bring a perpetrator to justice. The first ground is arguable if investigation and decision do not require prosecution to be the objective of investigation (albeit unlikely given the intersection of investigation and prosecution in the statute). The second ground, *ne bis in idem*, is likely to fail largely because a truth commission does not have the power to convict or acquit. Even if either of those grounds were satisfied, a conditional amnesty granted by a truth commission will not satisfy admissibility because amnesty cannot do anything other than shield a perpetrator from prosecution and from retributive justice. The only avenue open to the Prosecutor to defer to amnesty is to find that it is in the interests of justice because: (i) justice is a term of law which has been broadened by state practice to incorporate peace building, reconciliation, and reparation; or (ii) justice is a term incorporating legal, political, and social factors. How the Prosecutor or the Pre-Trial Chamber might decide the latter could be informed by assessing the functional and structural significance of Security Council power. The residual deferral

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174 Ohlin, supra note 23, at 194.
power of the Security Council indicates that the ICC’s role is to, as contended by Gareth Evans, interpret its *rationae personae* as a purely legal matter to the exclusion of world, regional, or domestic politics. The Security Council retains the power to trump ICC jurisdiction for a determinate period where policy matters prevail.175

**Part III. Case studies**

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

1. **Darfur**

The conflicts plaguing the South, West (Darfur), and East of Sudan since the 1980s evolved out of increasing marginalization of periphery communities from the centralized government led by General Omar al-Bashir. Al-Bashir’s military dictatorship following seizure of power in 1989, neglected periphery communities and exploited the cleavage between farmers and herdsman by abolishing tribal land allocation and the governing structure, by imposing government appointed administrators, and by politicizing the divide between Africans and Arabs.176 The simmering conflict in Darfur erupted in April 2003 when the rebel groups, the

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175 Bergsmo and Pejić state that “the Security Council’s power confirms its decisive role in dealing with situations where the requirements of peace and justice seem to be in conflict”: see Bergsmo & Pejić, supra note 145, at 598. See also Han, supra note 77, at 100.

Sudanese Liberation Army/Movement (SLA/M),\textsuperscript{177} and later the Justice and Equality Movement (JEM), attacked government forces.\textsuperscript{178} When the government failed to halt the insurrection it recruited mercenaries from other countries,\textsuperscript{179} and rearmed, trained and funded the Arab militia group, the Janjaweed – literally ‘devils on horseback’ – and partly incorporated them into the army through the Popular Defense Force.\textsuperscript{180} The Janjaweed, allegedly upon government orders, targeted the civilian populations of the Fur, Zaghawa and Masalit tribes to prevent them from joining or supporting the SLA/M and JEM. International crimes constituting crimes against humanity and war crimes,\textsuperscript{181} including genocide, persecution, murder, rape, burning and pillaging of villages, disappearances, torture, the forced recruitment of child soldiers, and attacks on peacekeepers, humanitarian forces,\textsuperscript{182} internally displaced persons (IDPs) within IDP camps,\textsuperscript{183} were allegedly committed by government or government backed actors. In May 2004 the Sudanese government established


\textsuperscript{178} Christopher D. Totten & Nicholas Tyler, Arguing for an Integrated Approach to Resolving the Crisis in Darfur: the Challenges of Complementarity, Enforcement, and Related Issues in the International Criminal Court, 98(3) J. CRIM. L. & CRIMINOLOGY 1069, 1074 (Spring 2008); and Udombana, supra note 104, at 3.

\textsuperscript{179} Kastner, supra note 121, at 157.

\textsuperscript{180} Kastner, supra note 121, at 158-160; Udombana, supra note 104, at 3.

\textsuperscript{181} Lipscomb, supra note 16, at 184.


\textsuperscript{183} Up to 2.5 million persons have been displaced. 1.65 million remained in camps in Sudan, and the remainder crossed into refugee camps in neighboring Chad: Cryer, supra note 182, at 198; and Lipscomb, supra note 16, at 187.
the National Commission of Inquiry (National Commission) to investigate alleged violations of human rights by armed groups in Darfur, which reported that crimes were committed by all parties, but that the numbers of persons killed were exaggerated, and that rape and crimes of sexual violence were not widespread or systemic.\textsuperscript{184} It recommended judicial investigations of specific incidents and a committee to investigate property losses.\textsuperscript{185}

The international community was slow to respond. It initially turned a blind eye to Darfur with the expectation that Sudan’s demonstration of good faith and resolution of the North-South conflict would serve as a precursor and model for peace in the rest of Darfur.\textsuperscript{186} Despite invoking Chapter VII of the UN Charter,\textsuperscript{187} deference to state sovereignty and ongoing economic interests meant the Security Council did not impose economic sanctions, did not support intervention on humanitarian grounds, and only provided for a limited arms embargo that failed to include the government and therefore the Janjaweed.\textsuperscript{188} When these measures were largely ineffective,\textsuperscript{189} it established a Commission of Inquiry\textsuperscript{190} which recommended that the Security Council refer the matter to the ICC on the basis that a trial outside of the


\textsuperscript{185} Id.

\textsuperscript{186} Lipscomb, supra note 16, at 191, and Kastner, supra note 121, at 161.

\textsuperscript{187} Cryer, supra note 182, at 199. See UNSC resolutions 1556.

\textsuperscript{188} Kastner, supra note 121, at 162-3. Ongoing economic interests include oil interests (of three members) and arms deals (by four): Lipscomb, supra note 16, at 192.

\textsuperscript{189} Kastner, supra note 121, at 163.

\textsuperscript{190} Cryer, supra note 182, at 199. See UNSC resolutions 1564.
locus delicti “might ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions.”\textsuperscript{191} The impossibility of domestic trials, it reasoned, was demonstrated by the insufficient findings of the Sudanese National Commission of Inquiry, which lacked impartiality because it was under pressure to present a view favorable to the government.\textsuperscript{192} The Security Council referred the matter to the ICC in March 2005.\textsuperscript{193} On 6 June the Prosecutor opened an investigation into the situation, noting that it would “form part of a collective effort, complementing African Union and other initiatives [including traditional African mechanisms] to end the violence in Darfur and to promote justice.”\textsuperscript{194}

In response to the referral, in June 2005 the Sudanese government created the Darfur Special Criminal Court to prosecute crimes against humanity. The ICC Prosecutor indicated that he would monitor its role,\textsuperscript{195} but it soon became apparent that the Court would not meet the test of genuineness.\textsuperscript{196}

\textsuperscript{191} Cryer, supra note 182, at 201 and 203.

\textsuperscript{192} Report of the International Commission of Inquiry on Darfur, ¶ 462.


\textsuperscript{196} Luis Moreno-Ocampo, Statement of the Prosecutor of the International Criminal Court, to the Security Council Pursuant to UNSCR 1593 (2005), at 5-6, available at http://www2.icc-cpi.int/NR/rdonlyres/2CFC1123-B4DF-4FEB-BEF4-52E0CAC8AA79/0/LMO_UNSC_ReportB_En.pdf. As of Spring 2008 the court had prosecuted only 14 low level offenders for crimes not of the “same gravity or magnitude [of the crimes] charged in the [ICC Prosecutor’s] indictments”: Totten & Tyler, supra note 178, at 1065.
The unwillingness of the Sudanese government to genuinely resolve the situation was further demonstrated by the Darfur Peace Agreement negotiated by the Sudanese government in May 2006 in Abuja. The agreement failed largely because the government insisted that the Comprehensive Peace Agreement for the North-South conflict define the boundaries of the Darfur agreement, which left little room for negotiation and indicated that the government held on to the possibility of a military victory.\textsuperscript{197} The JEM and some factions of the SLA (which had splintered by then) consequently did not sign it,\textsuperscript{198} which the government used as a justification to attack them.\textsuperscript{199} The Prosecutor consequently obtained arrest warrants for Ahmad Harun,\textsuperscript{200} Ali Kushayb,\textsuperscript{201} and al-Bashir on multiple counts of crimes against humanity, two counts of war crimes and genocide.\textsuperscript{202} Despite the arrest warrants al-Bashir and his party were re-elected in 2010 amidst claims of electoral fraud.\textsuperscript{203}

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\textsuperscript{198} Kastner, supra note 121, at 163.
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\textsuperscript{199} Nouwen, supra note 197, at 116-118.
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Two key factors hinder peace in Darfur. First, there are few clear lines dividing the various groups involved in the conflict. The Darfur agreement led to infighting in the rebel groups and division between them and the Darfurian population.204 Some Arab tribes remained neutral or supported the government only for strategic reasons, and some have fought amongst themselves over land.205 There are accounts of Janjaweed fighters switching sides and attacking government forces, possibly for fear of being used as scapegoats by them.206 The interchange and division between groups supports the finding that the divide is a political rather than an ethnic one. Second, the Darfur situation cannot be isolated from the conflicts in the east and south of Sudan that were not subject to referral by the Security Council.207 The peace agreements to which these conflicts are subject also exclude significant sections of society located in the periphery which have been marginalized, exploited, and subject to the “divide and rule” policies of the Sudanese government.208 Comprehensive peace in Sudan requires much more than peace in Darfur. It is convincingly posited by some that what is required in Sudan is regime change, a goal which did not feature in negotiations.

204 Nouwen, supra note 197, at 116-118; Kastner, supra note 121, at 163.
205 Kastner, supra note 121, at 160.
206 Cash, supra note 182, at 575; and Kastner, supra note 121, at 164.
207 Nouwen, supra note 197, at 117. See also Cryer, supra note 182, at 197.
208 Nouwen, supra note 197, at 117-8.
The indictment had positive and negative effects on the conflict in Darfur. On the one hand it put international pressure on al-Bashir and the Sudanese government, and reinforced the norm that no one is above the law, whether incumbent head of state or not. On the other, it served to ensure al-Bashir would do everything he could to maintain power to avoid arrest. The UN Special Envoy for Sudan argued that the Security Council should consider the impact that an arrest warrant might have on the implementation of North-South Peace Agreement of 2005.\footnote{Id.}

The African Union, the Arab League, and China called on the Security Council to intervene, arguing that an arrest warrant would complicate the peace process in Sudan, and that “the need for justice should not override the need for peace.”\footnote{Arrest Warrant Draws Sudan Scorn, BBC Online, March 5, 2009, available at http://news.bbc.co.uk/2/hi/africa/7924982.stm.} Costa Rica’s Security Council representative, Jorge Urdina, responded that the peace and justice debate is a “false dilemma,” and that in referring the case to the ICC the Security Council “supports peace and justice.”\footnote{Id.}

The Security Council declined to vote on the matter, and an arrest warrant was issued on 4 March 2009. In response, al-Bashir suspended the operation of aid groups, leaving many Darfurians and IDPs without access to food, water, or health care services;\footnote{UN Pleads with Sudan Over Aid Ban, BBC News Mar. 5, 2009, available at http://news.bbc.co.uk/2/hi/africa/7925509.stm.} there were subsequent reports of attacks on foreign aid workers.\footnote{Sarah El Deeb, Aid Groups in Darfur Weigh Future After Kidnapping, Mail and Guardian Online (Mar. 15, 2009), available at http://www.mg.co.za/article/2009-03-15-aid-groups-in-darfur-weigh-future-after-kidnapping.} The arrest warrants also had the effect
of drumming up the support of the local population, although notably only in Khartoum. More recently, the conflict has been complicated by a dispute between Sudan and Chad in which each side accuses the other of “aiding rebels to topple their respective governments.” An agreement to “normalize relations” signed between the respective governments in Doha in May 2009 was subsequently breached; collapse of the agreement would serve to complicate and exacerbate the conflict in Darfur.

2. Uganda

Uganda has had a long history of repression. British Colonial rule was followed by Milton Obote’s dictatorial rule from 1962, Major-General Idi Amin’s military rule from 1971, and a return to Obote rule in 1980. The rigged elections returning Obote to power sparked a six-year civil war between Acholi forces in the north (representing the government) and the National Resistance Army led by Yoweri Kaguta Museveni in the south. In a military coup in 1986 Museveni gained control of the capital. In 1996 he banned political parties, and the one-party system was extended by referendum in 2000. Following the 1986 coup, Joseph


216 Id.

217 Id.

218 O’Shea, supra note 8, at 39-41.


220 Id.
Kony formed the Lord’s Resistance Army (LRA) to fight the Museveni led government, and from its Sudanese based started targeting the local population in northern Uganda. Its members allegedly committed crimes against humanity and war crimes, including abduction, murder, rape, attacks on IDP camps, torture, forcible relocation, and child recruitment and enslavement. The conflict caused the death of around 100,000 civilians and the displacement of up to two million. The LRA does not have a popular base of support because it targets civilians, so it abducts and conscripts children. According to some sources, the LRA leadership numbers around 150-200 commanders, with the remaining 1000-3000 members consisting of abducted children.

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221 Murphy, supra note 40, at 33-34.
222 Akhavan, supra note 105, at 407; and William W. Burke-White & Scott Kaplan, Shaping the contours of domestic justice: The ICC and an admissibility Challenge in the Uganda Situation, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 80 (Carsten Stahn & Göran Sluiter Eds., 2009). The conflict was complicated by Sudan’s support of the LRA and Uganda’s support of SLA/M (MacMillan, supra note 83, at 202). While government support of rebel forces purportedly ceased subject to a bilateral agreement in 2002 (Rose, supra note 219, at 349), the conflicts in both states did not abate. A joint Sudanese-Ugandan Operation “Iron Fist” purportedly made matters worse “by driving the LRA back to northern Uganda to conduct retaliatory and food-seeking attacks on the civilian population”: Murphy, supra note 40, at 33-4.
223 Burke-White & Kaplan, supra note 222, at 80.
225 Akhavan, supra note 105, at 407; and Rose, supra note 219, at 349.
226 Id.
In 2000 the Ugandan government passed the *Amnesty Act* of 2000 in an attempt to abate the conflict.\(^{227}\) Blanket amnesty was granted to those engaged in “war or armed rebellion” against the government for acts committed between 26 January 1986 and the expiry of Act;\(^{228}\) amnesty prevents criminal\(^{229}\) prosecution for all offences provided the participant reports to the authorities, renounces and abandons involvement in the rebellion, and surrenders weapons.\(^{230}\) An Amnesty Committee was established to “consider and promote appropriate reconciliation mechanisms in the affected areas, . . . promote dialogue and reconciliation within the spirit of [the] Act, . . . monitor programmes of demobilization, reintegration and resettlement of ‘reporters’ . . . and co-ordinate a programme of sensitization of the general public . . . “\(^{231}\) The Committee was not required nor empowered to investigate any conduct for which an amnesty is granted.\(^{232}\) The Act was generally supported by the population, and by non-government organizations and various states as a mechanism for reconciliation.”\(^{233}\) It resulted in around 21,000 reporters surrendering arms and renouncing the LRA,\(^{234}\) but failed to attract high-level commanders.\(^{235}\) It therefore failed to achieve its primary preambular

\(^{227}\) Amnesty Act 2000. *See* Rose, supra note 219, at 353. President Museveni had proclaimed general amnesties prior to this: O’Shea, supra note 8, at 39.

\(^{228}\) Amnesty Act 2000, § 3.

\(^{229}\) O’Shea, supra note 8, at 41.

\(^{230}\) Amnesty Act 2000, §§ 4(1)(a) to (c). *See also* Rose, supra note 219, at 353.

\(^{231}\) Amnesty Act 2000, §§ 9(a) and 42.

\(^{232}\) Murphy, supra note 40, 44.

\(^{233}\) Akhavan, supra note 105, at 409; and Rose, supra note 219, at 353.

\(^{234}\) As of December 2006: Rose, supra note 219, at 354.

\(^{235}\) Akhavan, supra note 105, at 410; and Murphy, supra note 40, at 40.
objectives of facilitating peace and democracy, because the structure and mandate of the LRA remained intact and violence continued after a short period of abatement.

In December 2003 President Museveni referred the situation to the ICC. The ICC issued arrest warrants for Joseph Kony and four other senior figures, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and the now deceased Raska Lukwiya, on multiple counts of crimes against humanity and war crimes. The LRA allegedly responded to the indictments by burning villages and IDP camps, killing at least 337 people. After issuance of arrest

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236 The democracy sought was nevertheless a “particular brand of democracy” that would maintain Museveni’s power: O’Shea, supra note 8, at 40.

237 Akhavan, supra note 105, at 409; and Murphy, supra note 40, at 33-4 and 40. This may be due, in part, to the limitations of the amnesty process, which include limited ability to reintegrate combatants into the community, targeting of reporters by the LRA, poor conditions in IDP camps (such that reporters returned to combat): Rose, supra note 219, at 357-8.

238 The Ugandan government referral of only LRA crimes was heavily criticized. The ICC did not limit its jurisdiction to the LRA and has conducted investigations into the violations allegedly committed by the Ugandan People’s Defense Forces. Despite initial protests, as far as is possible to ascertain the Ugandan government has not attempted to prevent it from doing so. See Akhavan, supra note 105, at 411; MacMillan, supra note 83, at 203-4; Murphy, supra note 40, at 40-1; and O’Shea, supra note 8, at 39-41.

239 Respectively alleged Commander-in-Chief of the LRA, Vice-Chairman and Second-in-Command, Deputy Army Commander and Brigade Commander of Trinkle and Stockree Brigades, Brigade Commander of the Sinia Brigade, alleged Deputy Army Commander.


241 MacMillan, supra note 83, at 233.
warrants in October 2005, the LRA attacked foreign aid workers, killing at least six people.\textsuperscript{242} However, the UN reported that, after a period of renewed violence, matters improved.\textsuperscript{243} The ICC Prosecutor also submitted that the arrest warrants also led to an overall decrease in violence in northern Uganda:\textsuperscript{244}

The court’s intervention has galvanized the activities of the states concerned. . . . Thanks to the unity of purpose of these states, the LRA has been forced to flee its safe haven in southern Sudan and has moved its headquarters to the DRC border. As a consequence, crimes allegedly committed by the LRA in Northern Uganda have drastically decreased . . . The loss of their safe haven led the LRA commanders to engage in negotiations, resulting in a cessation of hostilities agreement in August 2006.\textsuperscript{245}

The reduction in violence, albeit swinging, was linked to the advantages the referral offered Museveni. It posed a credible threat of prosecution by raising the conflict’s international profile and transferring the political and economic costs of prosecution to international actors.\textsuperscript{246} Not only did referral and subsequent arrest warrants lead to the LRA’s political and

\textsuperscript{242} MacMillan, supra note 83, at 205 and 233.


\textsuperscript{244} Burke-White & Kaplan, supra note 222, at 81; and Rose, supra note 219, at 350.


\textsuperscript{246} Burke-White & Kaplan, supra note 222, at 80-1. It also made support for the LRA more costly for Sudan: Akhavan, supra note 105, at 416-7; and Burke-White & Kaplan, supra note 222, at 80-1.
military isolation and incapacitation, but resultant international pressure meant both sides had to genuinely participate in peace talks. Negotiations in Juba began on July 14, 2006, resulting in an agreement to cease hostilities that took effect on 29 August 2006 and was revised on 1 November 2006 after renewed violence.

While the arrest warrants served to compel negotiation, they were also a stumbling block because LRA was soon negotiating for a withdrawal of the arrest warrants in return for peace. The Prosecutor refused to bow to pressure on the basis that withdrawal was inconsistent with the Rome Statute. In 2006, after initially promising immunity from ICC prosecution, Museveni supported the arrest warrants but extended the availability of amnesty for another two years. When the arrest warrants weren’t withdrawn, Kony offered to submit cases to the domestic jurisdiction as an alternative. In June 2007 the LRA and the Ugandan government agreed to a range of accountability measures, including domestic civil and

247 Akhavan, supra note 105, at 404.
248 MacMillan, supra note 83, at 206.
250 Burke-White & Kaplan, supra note 222, at 82.
251 Burke-White & Kaplan, supra note 222, at 82-3.
252 MacMillan, supra note 83, at 205-6; and Burke-White & Kaplan, supra note 222, at 104. As will be noted later, Museveni did not have the power to withdraw the referral and his only option is to bring a challenge to the arrest warrants in the Pre-Trial Chamber on the basis that the matters are inadmissible under article 17 of the Rome Statute.
253 MacMillan, supra note 83, at 206.
criminal prosecutions, traditional justice mechanisms,\textsuperscript{254} and a range of alternative sentences reflecting the gravity of the crimes and seeking to promote reconciliation, rehabilitation and reparations.\textsuperscript{255} The 2007 agreement was bolstered by further discussions in February 2008, which led to an agreement for the establishment of a “special division of the High Court of Uganda . . . to try individuals who are alleged to have committed serious crimes during the conflict,”\textsuperscript{256} and who are “alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed grave breaches of the GCs.”\textsuperscript{257} The agreement also provides that the government will examine traditional justice mechanisms, and establish a truth-seeking body akin to the truth and reconciliation commissions of Sierra Leone and South Africa.\textsuperscript{258}

While these have been significantly positive developments, settlement discussions are still ongoing and a conclusion to the conflict remains “elusive.”\textsuperscript{259} This is partly because Kony and Otti “[have] no serious interest in negotiations except perhaps as a means of buying time when under pressure.”\textsuperscript{260} Prosecutor Ocampo argues that Kony is using peace negotiations as a

\textsuperscript{254} Agreement on Accountability and Reconciliation, Between the Government of the Republic of Uganda and the Lord’s Resistance Army/Movement Juba, Sudan (June, 29, 2007), available at http://www.beyondjuba.org/peace_agreements/Agreement_on_Accountability_And_Reconciliation.pdf.

\textsuperscript{255} Burke-White & Kaplan, supra note 222, at p 82-4.

\textsuperscript{256} Annexure to the Agreement on Accountability and Reconciliation Between the Lords Resistance Army/Movement and the Government of Uganda (Feb. 19, 2008), paragraph 7, available at http://www.iccnow.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf.

\textsuperscript{257} Id.

\textsuperscript{258} Id.

\textsuperscript{259} Burke-White & Kaplan, supra note 222, at 80.

\textsuperscript{260} Akhavan, supra note 105, at 417.
strategy to avoid arrest and prosecution when he is in a weak position, and that when he is strengthened he returns to violence.261 The commission of serious crimes therefore continues. In December and January the LRA abducted and massacred hundreds of civilians and children.262 In February 2009 the government launched a US backed offensive aiming to crush the LRA, which was hiding in northern Congo. The plan backfired when the leaders escaped and the LRA splintered into small groups that went through towns “in northeastern Congo hacking, burning, shooting and clubbing to death anyone in their way.”263 Despite poor planning being responsible for many of the operation’s failures, the reaction of the LRA demonstrates that neither amnesty, nor threat of prosecution, has prevented the continuing commission of atrocities.264 The Ugandan government maintains, since Kony refused to sign the most recent peace treaty, that the only available option is a military one.265

3. **Sierra Leone**

Conflict erupted in Sierra Leone when Liberian forces, accompanied by the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and forces from Guinea, Burkina Faso, and Libya, invaded the diamond fields in the remote east of the


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

country. The resultant war was brutal. Atrocities, including mass rape, sexual slavery, forced rape of family members, child abduction, torture, killing of civilians, maiming (by cutting off arms, legs, ears, and lips), and mass displacement, resulted in the physical and psychological scarring of a significant section of the population. The RUF, the dominant rebel group, did not “articulate…a political agenda other than ousting successive governments.”

It is nevertheless largely accepted that rampant corruption, centralization of government, unemployment, and “ethnocization of national policies” were causal factors in the conflict.

In November 1996 the RUF and President Kabbah’s Sierra Leone’s Peoples Party (SLPP) signed the Abidjan Peace Accord, which provided that, in return for peace and disarmament, members of the RUF would not be prosecuted, all political prisoners would be released, and the RUF would be afforded the opportunity to transform itself into a political party with representation before domestic bodies. Nevertheless the RUF continued to perpetrate atrocities against the civilian population. In 1997 the AFRC staged a coup, however was ousted in 1998 by the Security Council endorsed Economic community of West African


268 Udombana, supra note 267, at 72.

269 Udombana, supra note 267, at 70-1.

States Monitoring Group (ECOMOG); President Kabbah was restored to power.271 When the government was again overthrown in 1999, Kabbah returned to the negotiation table under international pressure.272 On 7 July 1999 the RUF, the AFRC and the government signed the Lomé Accord.273 It transformed the RUF into a political party whose members would be appointed to public office and cabinet.274 It also granted Foday Sankoh, the RUF leader, an explicit pardon,275 gave “absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them,”276 and provided for the creation of a Truth and Reconciliation Commission (the SLTRC).277 The agreement stated that amnesty was granted “[t]o consolidate the peace and promote the cause of national reconciliation.”278 Prior to the agreement, prosecutions and executions had taken place for actions related to the 1997 coup. The RUF had therefore faced a real threat of prosecution.279 It was clear to all parties that the RUF, and Foday Sankoh in particular, would not have signed the agreement without amnesty.280 According to Hayner, there was local support for amnesty provided it led to

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271 Macaluso, supra note 270, at 349; and Udombana, supra note 267, at 77.
272 Macaluso, supra note 270, at 350; Udombana, supra note 267, at 78.
273 Macaluso, supra note 270, at 350.
274 Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, art. I-V, (Jul. 7, 1999) [hereafter the Lomé Accord].
275 Lomé Accord, art. IX, ¶ 1.
276 Lomé Accord, art. IX, ¶ 2.
277 Lomé Accord, art. XXVI.
278 Lomé Accord, art. IX, ¶ 3.
280 Hayner, supra note 279, at 13.
cessation of violence, but the international community condemned it. The Special Representative for the UN was instructed at the last minute to insert a reservation declaring that the amnesty would not apply to genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law. Foday Sankoh was not aware of the reservation until after he signed the document.

Constraining amnesty by imposing conditions on its availability was never seriously considered. The Truth and Reconciliation Commission Act 2000 (SLTRC Act) provided a forum for perpetrators and victims to tell their stories without offering the carrot of amnesty. The SLTRC aimed, among other things, “. . . to address impunity . . . to promote healing and reconciliation and to prevent repetition of the violations and abuses suffered.” The SLTRC could “investigate all or any abuses and violations of human rights and international humanitarian law related to the armed conflict in Sierra Leone.”

281 Hayner, supra note 279, at 7.
282 Macaluso, supra note 270, at 358. See also William A. Schabas, Truth Commissions and Courts working in Parallel: The Sierra Leone Experience, 98 AM. SOC. INT’L LAW PROC. 189, 190 (2004)
283 Hayner, supra note 279, at 6
284 Hayner, supra note 279, at 13-19.
286 SLTRC Act, § 6(1).
Ongoing disputes between the parties led to a breakdown of the ceasefire, resurgence in violence, and repeated violations of the terms of the Accord. When it became clear that the “RUF had no intention of allowing peace to reign in Sierra Leone and, in particular, letting the UN take control of the country’s diamond-rich areas,” an agreement between the United Nations and Sierra Leone, ratified pursuant to the Special Court Agreement (Ratification) Act 2002, established the Special Court for Sierra Leone (SCSL) with a mandate to try those “who bear the greatest responsibility for serious violations of international humanitarian law and the laws of Sierra Leone.”

While conducting investigations, the Prosecutor of the SCSL and his team determined that it would be necessary to arrest all indictees simultaneously “because arresting the key players one at a time would be political suicide” because the indictees might rally support, return to

288 Udombana, supra note 267, at 82.
289 Macaluso, supra note 270, at 352; and Tejan-Cole, supra note 287, at 144-5.
290 See also Schabas, supra note 282, at 190. For a discussion of these debates see William A. Schabas, The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone, 25 HUM. RTS. Q. 1035, 1038-1040 (2003). Despite concurrent operation and significant overlaps in jurisdiction, neither the SLTRC Act nor the SC Statute made specific reference to the other. The Prosecutor of the SCSL, David Crane, merely indicated his intention not to use the resources of the SLTRC (William A. Schabas, Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court, 2 J. INT’L CRIM. JUST. 1082, 1083-5 (2004)). As result, primacy was never subject to legislation or agreement and was therefore a causal factor in disputes over amnesty: see Prosecutor v TRC, Decision on the Request of the Truth and Reconciliation Commission of Sierra Leone to conduct a public hearing with Samuel Hinga Norman (Case No. SCSL-2003-08-PT (3257-3264)), 29 October 2003, ¶¶ 10-16; and Prosecutor v Augustine Gbao, Case No. SCSL-04-15-PT, Decision on appeal by the Truth and Reconciliation Commission and Accused against the Decision of Judge Bankole Thompson, Delivered on 3 November 2003 to Deny the TRC’s Request to hold a public hearing with Augustine Gbao (May 7, 2004). See also allon and Kamara case, ¶¶ 42-44, 48-49, 61-62, 72, 84, and Kondewa case, ¶¶ 66-74.
violence, and secure their positions so as to prevent arrest. The covert operation, coined “Operation Justice,” involved the cooperation of several local, regional and international actors including diplomats, the Chief of Staff of the UN peacekeeping force, and the Inspector-General of the Sierra Leone National Police. The indictments and arrest warrants were sealed, and all indictees (with the exception of Charles Taylor) were arrested simultaneously on 10 March 2003, without a shot fired. While serious problems persist, including corruption, serious rule of law deficiencies, and a poor human rights record, mass violence has been abated thus as far and, as far as reports go, the groups most responsible for the atrocities have been disabled.

4. South Africa

The minority rule of the apartheid State was characterized by legalized racial discrimination of groups defined “on a territorial, residential, political, social, and economic basis” in all areas of life including land, housing, education, health, and access to services and premises. The resultant conflict, which spanned four decades, led to extensive human rights violations, including arbitrary imprisonment, forced displacement, denationalization, torture, disappearances, killings, and other human rights violations. When oppression heightened in

291 Crane, supra note 266, at 9-10.
292 Crane, supra note 266, at 8-9.
293 Crane, supra note 266, at 11-13.
296 Motala, supra note 95, at 916.
the 1970s and 1980s, the African National Congress (ANC) established Umkhonto we Sizwe (literally “spear of the nation”), a military wing engaged in guerrilla warfare. The increasing public face of violence and resultant international pressure in the 1980s led the National Party to abandon movement control laws, un-ban political parties, and release political prisoners. In 1990 the National Party initiated secret negotiations with ANC leader Nelson Mandela, and Parliament enacted the *Indemnity Act*, by which the President could pronounce oppressed persons indemnified for conduct if necessary for negotiation of peace. In democratic elections in 1994 the ANC gained power and Mandela was elected president.

Peace negotiations gave rise to a political compromise: free and fair elections in exchange for conditional amnesty. The 1993 *Interim Constitution* and the SATRC Act provided that amnesty from civil and criminal liability could be granted for offences “associated with a political objective and committed in the course of the conflicts of the past”. The SATRC granted amnesty to applicants that gave “a full account of what they had done and the context within which it was done,” where their act was associated with a political objective. Accordingly, applicants must have demonstrated that they “acted in support of a publicly

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297 Gavron, supra note 2, at 113.
299 O’Shea, supra note 8, at 44.
300 Gavron, supra note 2, at 113.
301 Boraine, supra note 295, at 315.
302 SATRC Act, § 20(7).
303 Gavron, supra note 2, at 113.
304 O’Shea, supra note 8, at 45.
known political organization, the state, or in furtherance of a *coup d’etat).* While around 9000 applications were received, the posited success of the judicial stick and TRC carrot model was limited by the very few applications received from government operatives.

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

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305 SATRC Act, § 20(2). See O’Shea, supra note 8, at 43.
306 Of these, only a few hundred were granted amnesty: Minow, supra note 121, at 178.
307 Boraine, supra note 295, at 308; and Dugard, supra note 11, at 1011.
308 Minow, supra note 121, at 179.
310 Boraine, supra note 295, at 302.
311 Former South African Constitutional Court Judge, Chief Prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda, and Chair of the Commission of Inquiry Regarding the Prevention of Public Violence and Intimidation.
312 Gavron, supra note 2, at 115; and Boraine, supra note 295, at 302.
313 Gavron, supra note 2, at 115; UNGA RES/48/159 20 December 1993.
were nevertheless many who opposed amnesty, so much so that they brought an unsuccessful constitutional challenge.\textsuperscript{314}

On the one hand, supporters of the SATRC were vindicated. According to Black, “South Africa’s transition from racial authoritarianism of the apartheid era to the non-racial democratic institutions and entrenched constitutional rights of the post-1994 period is...one of the great human rights triumphs of the post-Second World War era.”\textsuperscript{315} This is undoubtedly due the significant role the SATRC played in airing dirty laundry, identifying those responsible, establishing a historical record to prevent future denials, offering a forum for victims and their families to be given a voice, and providing some form of financial reparations to those most affected by apartheid policies. The success of the transition must also be attributed to the exemplary role played by senior figures such as Mandela in adopting a conciliatory, forgiving, and pragmatic position in peace negotiations.

On the other hand, whether the model will play a real and lasting contribution in combating impunity in South Africa is yet to be seen. Its intention was that those who were not granted amnesty would be subject to investigation, and possibly prosecution, by the South African National Prosecuting Authority (NPA). Since the close of its operations, and despite referral

\textsuperscript{314} The Azapo Case. Critiques of the model included that it did not differentiate between perpetration of and resistance to apartheid, or “acknowledge the essential criminality of apartheid,” and that its temporal jurisdiction was too limited: Gavron, supra note 2, at 114, and Boraine, supra note 295, at 308.

of around 900 cases, only a handful have been subject to investigation and prosecution, and many of those have been unsuccessful or unsatisfactory. The NPA’s reluctance to pursue apartheid crimes has been apparent since the completion of the SATRC’s work. In 2002, then President Mbeki granted pardon to 33 persons who fought against apartheid, some of whom had either applied for amnesty and been rejected or been convicted of murder. In 2005 the NPA issued guidelines for prosecuting apartheid era offences, which allow the Minister to grant amnesty, without publication, under specified conditions. While the factors that may be taken into account are substantially similar to those considered by the TRC, the Minister may also consider whether the NPA has the resources to investigate and prosecute the

316 Research Brief: Country Case Studies on the Use of Pardons, International Centre for Transitional Justice, at 13 (Nov. 2008), available at http://www.ictj.org/static/Americas/ICTJ_Research_Brief-Country_case_studies_on_the_use_of_pardons.pdf. In the recent prosecution of Adrian Vlok, the former Minister of Law and Order, the NPA agreed to a plea bargain in which Vlok was awarded a five year suspended sentence, despite that his Department played a central role in the formulation of policies that constituted, or led to the commission of, human rights violations. It is concerning that they bowed to a lenient sentence in one of the only recent cases to be brought against a political leader, who had confessed to approving the poisoning of former church leader Frank Chikane. One of the only successful prosecutions against a senior official took place in 1996 against Eugene de Kock, a police Colonel and Commander of the notorious Vlakplaas hit squad: De Kock Trial to Conclude on Wednesday, SAPA Oct. 29, 1996, available at http://www.doj.gov.za/trc/media/1996/9610/s961029m.htm.


318 NPA Prosecution Policy.
In a successful Constitutional Court challenge to the policy\textsuperscript{320} the South African High Court found that it amounted to an unlawful “copy or duplication” of the TRC amnesty process\textsuperscript{321} because the NPA is under a constitutional obligation to prosecute when there is sufficient evidence to do so, many of the criteria are irrelevant to deciding whether to prosecute,\textsuperscript{322} and the policy would infringe victims’ constitutional rights, such as the rights to life, dignity, freedom and security of the person and equality.\textsuperscript{323} Despite the finding, the NPA’s inability to prosecute will likely be decisive. In a conference held by the Institute for Justice and Reconciliation in March 2006, Dr. J. P. Pretorius, an Advocate in the Priority Crimes Litigation Unit in the Department of Justice, stated that the NPA did not have investigators dedicated to apartheid era offences and it was likely that not more than half a dozen cases would be prosecuted.\textsuperscript{324}


\textsuperscript{320} Nkadimeng \& Others v The National Director of Public Prosecutions and Others, Case No. 32709/07, In the High Court of South Africa, Transvaal Provincial Division (Dec. 12, 2008) [hereinafter the Nkadimeng case].

\textsuperscript{321} Id. ¶ 15.4.3.1.

\textsuperscript{322} Id. ¶¶ 15.4.4, 15.5.2, and 15.5.3 respectively

\textsuperscript{323} The applicants’ challenge included arguments pursuant international law, however the court declined deal with these in its judgment. The matter is currently on appeal: Application for leave to Appeal, Jan. 8, 2009, Nkadimeng case. In a separate but related matter the Constitutional Court found that a 2007 policy on presidential pardons was unconstitutional because it infringed the right to victim participation: Ryan Albutt and the Centre for the Study of Violence and Reconciliation and Others, Case CCT 54/09 [2010] ZACC 4. See also http://www.saha.org.za/news/2010/February/judgment_on_special_pardons_a_significant_victory_for_victims_rights.htm.

\textsuperscript{324} The Truth and Reconciliation Commission: Ten years On, Cape Town, South Africa, Dr J. P. Pretorius, Advocate, National Prosecuting Authority, 20 April 2006.
The success of amnesty must be considered in the current context of mass violent crime, unconnected to conflict, but to a range of political, social, and economic factors. Should some of the resources directed to the SATRC have been directed to building the NPA’s capacity to combat the conduct that has led to one of the highest crime rates in the world? Did impunity breed impunity? Such conclusions must be acknowledged as crude and unsophisticated. The TRC can be credited with assisting to prevent lapse into civil war and some individuals’ move from helplessness and persecution to relative hope and equality. However the crudeness of the conclusion serves the point: do we really know what the long-term outcome and impact of amnesty is on South Africa? Can we really say it hasn’t led to impunity? Can we accept that those most responsible have walked free to live what may be comfortable lives without punishment?

**Part IV. Amnesties and the Interests of Justice**

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

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1. **The ICC and Politics: Adopting an Expansive Approach**

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

**Amnesty is a Persuasive Bargaining Chip**

As demonstrated in South Africa, Amnesty has can be a useful bargaining chip in peace negotiations.\(^{326}\) The Prosecutor may deter perpetrators from disarming, or contribute to the resumption of hostilities at the post-conflict stage and therefore the commission of more serious crimes, because he poses a real threat of arrest.\(^{327}\) Deferring to amnesty might force leaders to make a choice between survival and peace. While amnesty is not presently offered in Darfur, some posit that the possibility of deterring violence in Darfur is now a “specious hope.”\(^{328}\) The arrest warrant for al-Bashir has led to the withdrawal of humanitarian groups and peacekeeping forces and the creation of a “nothing-to-lose” attitude among the leaders of belligerent groups, has “[increased] the incentive to ramp up the attacks and force a final resolution by eliminating [civilians and rebel groups]”\(^{329}\) and, arguably, strengthened al-

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\(^{326}\) Slye, supra note 121, at 198.

\(^{327}\) Scharf, supra note 35, at 342; and Trumbull IV, supra note 121, at 315.

\(^{328}\) Kastner, supra note 121, at 165.

\(^{329}\) Kastner, supra note 121, at 178.
Bashir’s position. Ugandan might support amnesty where it can be shown that indictments have stalled peace; indeed the Ugandan government attempted to persuade the OTP to suspend the indictments to allow domestic judicial processes to be put in place. Amnesty might expedite transition, and “decrease the probability of the continuation of human rights violations.”

Deferring to Amnesty Reduces Uncertainty

The restrictive approach creates uncertainty for parties to peace negotiations and results in the failure of amnesty as a bargaining chip. It might become a zero sum game; greater prosecutions, less prospects for peace. Support for al-Bashir has increased since he was indicted; certainly regional support has lessened support for the ICC. The ICC might avoid this problem by sealing indictments and arrest warrants such as Crane did in Sierra Leone, or waiting until peace negotiations are relatively successful before investigating or prosecuting


331 Kastner, supra note 121, at 179.

332 Gomez, supra note 121, at 62.

333 Trumbull, supra note 121, at 315.

perpetrators,\textsuperscript{335} however over the long term it will become apparent that the ICC won’t respect amnesty.\textsuperscript{336}

\textit{Truth Commissions Advance Political Transformation}

Conditional amnesty might “[play] a part in advancing the political transformation”\textsuperscript{337} by mobilizing institutions and actors to submit to an accountability mechanism, identifying systemic causes of the conflict and actors most responsible, and making recommendations for institutional reform.\textsuperscript{338} The identification of systemic causes and self-examination that flows from truth commissions “provides a buffer against repeated abuses” by demanding “civic and social transformation needed to ensure that abuses are not repeated in the future,”\textsuperscript{339} and “build[ing] a culture of for human rights.”\textsuperscript{340} There is little doubt that international prosecutions fail to fulfill these goals on the domestic level, if at all.\textsuperscript{341} Moreover, their deterrence capacity, which “is unclear at best,”\textsuperscript{342} has a limited ability to address collective consciousness that often leads to the justification of unlawful conduct on a systemic or mass

\textsuperscript{335} Kastner asks whether the “international community should ‘continue to provide strong support for Prosecutor and only consider asking the court to suspend its activity when and if the LRA leaders are begging to implement a fair settlement’”: Kastner, supra note 121, at 175

\textsuperscript{336} Although the impact on the second option might be reduced because it might provide perpetrators with at least some hope that only the possibility of amnesty is worth the risk. In any event, the benefits of complementarity would also be lost.

\textsuperscript{337} Teitel, supra note 14, at 51.

\textsuperscript{338} Evenson, supra note 121, at 752-3. The benefits of conducting domestic trials may also translate to such a process, including increased access for victims and to information.

\textsuperscript{339} Evenson, supra note 121, at 753.

\textsuperscript{340} Minow, supra note 121, at 180. See also Newman, supra note 12, at 305.

\textsuperscript{341} Minow, supra note 121, at 177.

\textsuperscript{342} Minow, supra note 121, at 177.
scale. Prosecutions can hinder national reconciliation by isolating supporters of former regimes and pushing them into hostile subcultures. The Ugandan model does not advance political transformation because of its unconditional nature, its failure to ensure victim participation, and its lack of investigatory procedure; the SATRC provides a more useful basis from which to develop a conditional amnesty model.

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

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

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343 Majzub, supra note 26, at 53.
344 See footnote 244 herein for suggested criteria and conditions upon which a model could be based.
345 See Newman, supra note 12, at 306. Majzub notes the difficulty of prosecuting in situations in which perpetrators destroy evidence, which occurred on a mass scale in South Africa: Majzub, supra note 26, at 53-4.
346 Blumenson, supra note 121, at 862-63.
347 Blumenson, supra note 121, at 863, and 870.
Development of a Norm

Deferring to grants of amnesty would contribute, by default, to the crystallization of a norm of international law in which amnesty would be a recognized exception to a duty to prosecute provided it meets particular criteria.349 The ICC could thereby be instrumental in determining that criteria, and play a lead role in ensuring that the model adopted meets the goals of justice.

State Control and Cultural Imperialism

A State is best placed to determine how justice mechanisms contribute to conflict resolution and reconciliation because the needs of different societies experiencing different conflicts will vary. Affording states latitude to determine appropriate solutions to conflicts ensures their sovereignty is not overborne and contributes to a broader notion of complementarity. Affording states latitude also ensures that application of the Rome Statute does not lead to cultural imperialism, in which western notions of criminal justice overcome more traditional and alternative accountability mechanisms more commonly adopted by non-western states. The international community’s failure to defer to sovereignty in such circumstances by insisting on prosecution can be viewed as substitute for their failure to intervene to “[stop] the injury . . . [because it] is not worth the cost associated with military intervention.”350 On the one hand the importance of sovereignty has lessened in the past two decades because the international community has acknowledged that infringements of human rights are of global concern.351 However States have failed to follow through with meaningful actions that prevent

349 Trumbull, supra note 121, at 319.
350 Trumbull, supra note 121, at 318.
351 Trumbull, supra note 121, at 317.
atrocities.\footnote{Trumbull, supra note 121, at 318.} As a result, the cost of prosecution is placed on the victims and communities of the conflicted state.\footnote{Although states might prefer to retain their sovereignty and might not wish for other states to intervene uninvited.}

Facilitating Information Exchanges

If the Prosecutor deferred to amnesty, he could still prosecute those who aren’t granted amnesty. Truth Commissions and amnesties might facilitate prosecutions through information exchange, that is, by providing the Prosecutor with lead evidence that will assist him to target investigations and gather other information necessary to build his case.\footnote{States are required to cooperate with the Prosecutor by taking evidence and providing records and documents, among other things: the Rome Statute, art. 93(1). See Minow, supra note 121, at 179.} They might also assist the Prosecutor to overcome language constraints and difficulties collecting local evidence.\footnote{Bruce M. MacKay, A View from the Trenches: The Special Court for Sierra Leone – The First Year, 35 CASE W. RES. J. INT’L L. 273, 280-1 (2003). Article 93 of the Rome Statute envisages cooperation between the ICC and the relevant state in regard to the taking of evidence, questioning of persons, and the provision of records, including official records and documents. Forensic and other evidence would also be useful to the ICC. See Laura Hall & Nahal Kazemi, Prospects for Justice and Reconciliation in Sierra Leone, 44(1) HARV. L. J. 287, 289-289 (2003); and Marieke Wierda, Priscilla Hayner, & Paul Van Zyl, Exploring the Relationship between the Special Court and the Truth and Reconciliation Commission of Sierra Leone, The International Centre for Transitional Justice, 24 June 2002, at 6, available at http://www.ictj.org/images/content/0/8/084.pdf.} While the information and evidence gathered by the SATRC could not be used as probative evidence in prosecutions, the NPA has nevertheless been able to use that information as lead evidence. This might assist the Prosecutor to expend resources more appropriately on those most responsible.\footnote{Trumbull, supra note 121, at 313.}
2. The ICC and Law: Adopting a Restrictive Approach

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

The Rome Statute and the norms of international law do not conclusively support amnesties

Article 53 of the Rome Statute does not make reference to international norms,\(^\text{357}\) and international duties on member states to prosecute are not binding on the ICC.\(^\text{358}\) However, the objects of the Rome Statute, and international norms and duties should be taken into account in interpretation of ambiguous treaty provisions.\(^\text{359}\) If we apply a purposive approach to the Rome Statute, it served three primary goals: to combat impunity by prosecuting individuals for international crimes,\(^\text{360}\) to “prevent governments from shielding perpetrators from prosecution for political reasons”\(^\text{361}\) and, by doing so, “restore and improve regional peace and security.”\(^\text{362}\) While the latter may be perceived as justifying amnesty where it leads

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\(^{357}\) An implicit suggestion could be constructed through paragraph 1’s chapeau reference to “under this Statute” combined with the preambular recall that it is “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”

\(^{358}\) Siebert-Fohr, supra note 2, at 573-4. See also Gavron, supra note 2, at 108.

\(^{359}\) Article 31, ¶¶1 and 3 of the Vienna Convention provides that a treaty should be interpreted in light of its object and purpose, and that regard can be had to any relevant rules of international law applicable between the parties.

\(^{360}\) Gropengießer & Meißner, supra note 79, at 181 and 183; and O’Shea, supra note 8, at 318.

\(^{361}\) Llewellyn, supra note 61, at 204.

\(^{362}\) Ohlin, supra note 23, at 192.
to conflict resolution, the underlying presumption of the Court is that prosecution in itself contributes to peace and security, apparent in both states’ rejection of immunities for heads of state or persons in official positions, and the Security Council’s referral of the Darfur situation to the ICC. If we won’t permit immunities why then would we permit amnesties? The mere establishment of the ICC and State ratification contributes to a customary duty to prosecute because it indicates that “[t]he international community… decided that justice, in the form of prosecution, must take priority over peace and national reconciliation.” States’ intention to send such a message is apparent in the preamble, which recalls that “it is the duty of every State to exercise its criminal jurisdiction [as understood in relation to admissibility] over those responsible for international crimes.” Moreover, that states intended that justice meant international justice (i.e. retributive) is indicated in the preambular resolution to “guarantee lasting respect for and enforcement of international justice.” Ratification goes some way in dispelling claims of cultural imperialism.

Despite the Rome Statute’s contribution to crystallization of a norm, and despite customary and treaty based duties to prosecute some serious crimes and other jus cogens norms, a norm prohibiting or permitting amnesty per se has not yet crystallized. Except for the SATRC, no

363 Rome Statute, art. 27.
364 Dugard, supra note 9, at 703 See also Williams & Schabas, supra note 35, at 561; Murphy, supra note 40, at 52.
365 While it may be argued that this, in conjunction with other preambular passages, imposes a duty to prosecute which prevents amnesty, it is inconsistent with the intention of states entering into the Statute, state practice since its adoption, and article 25 which provides that “no provision in this Statue relating to individual criminal responsibility shall affect the responsibility of States under international law”: Siebert-Fohr, supra note 2, at 558-9.
366 Colombia’s interpretive declaration serves as a counter to this assertion, however it has no binding effect in relation to other states.
state has adopted a conditional amnesty model with comprehensive criteria; whether a State might seems dependent on whether it views amnesty as contrary to international law. Whether it is contrary to international law brings us back to our original question: is there a prohibition on amnesty? In regard to member states in particular, we might simply answer this question by finding that they have irrevocably “conferred their authority to exercise their criminal jurisdiction to the [ICC].”\textsuperscript{367} This has little significance for Sudan, which is not a member state, but is relevant to Uganda, which invoked jurisdiction by referral. In any event, this leads to the conclusion that the term “justice” has not yet been broadened as a matter of law by state practice to incorporate peace building, reconciliation, and reparation. The ICC might assist crystallization of a norm permitting amnesty if it finds that “justice” incorporates political and social factors. However, it should not do so for three reasons. First, according to Scharf a strong argument can be made that the Rome Statute does not incorporate procedural aspects of the Geneva Conventions or the Genocide Convention that require prosecution.\textsuperscript{368} However, it would be incongruous for the Prosecutor to apply a more permissive approach than that which states have agreed to,\textsuperscript{369} or to override amnesty for crimes for which a duty is imposed, but not for others for which it is not (i.e. crimes against humanity and war crimes). Even though the ICC applies complementary rather than universal jurisdiction, the purpose is to retain the operation of domestic criminal justice processes where possible, not to limit the ICC jurisdiction with regard to personal or subject matter jurisdiction. Second, if the ICC

\textsuperscript{367} Gropengießer & Meißner, supra note 79, at 182. Whether States can alter or withdraw their treaty ratification is linked to whether the Rome Statute itself imposes an obligation on states to prosecute. This is doubtful; the only reference to state duties is in the preamble. In any event, a conferral basis wrongly assumes that the jurisdiction of the ICC is absolute.

\textsuperscript{368} Scharf, supra note 35, at 370. For reasons related to selectivity it is not feasible to constrain amnesties by subject matter.

\textsuperscript{369} Gropengießer & Meißner, supra note 79, at 193-4.
determines what is and what is not an appropriate amnesty model, it would in fact impinge on the role of States which are, as advocates of an expansive approach might posit, better placed to determine appropriate solutions to conflicts. Third, any such determination would have adverse legal consequences on state obligations to prosecute. The Court would serve to solidify the law on amnesties when its permissibility and precise contours is still subject to debate in the international community and within states. Should States wish to permit an amnesty model, they ought not to ratify the Rome Statute on the one hand, and argue for crystallization of a norm on the other. They ought, rather, to adopt explicit provisions which resolve the inter-relationship of the duties to prosecute, deference to the ICC, and grants of amnesty.

**Prosecution by the ICC Facilitates a Comprehensive Approach**

The ICC cannot be “a panacea for the world’s ills,” but neither can truth commissions or amnesties. Adopting an expansive approach limits justice for victims because it excludes retribution; South Africa is a case in point. It is doubtful that a significant percentage of victims do not want retributive justice as well as reconciliation and reparation. Defining the interests of justice to exclude amnesty should not and does not presuppose the exclusion of alternative justice mechanisms altogether. Rather, it permits a “three pronged approach

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370 See Siebert-Fohr, supra note 2, at 563.

371 See Sadat, supra note 10, at 1034. See Udombana, who states that “it is wrong to mistake a particular medicine – international criminal justice – as the elixir of Africa’s many ailments”: Udombana, supra note 104, at 3. See also Blumenson, supra note 121, at 876, who states that “[n]o mechanism will ever deliver perfect justice.”
involving the ICC . . . truth commissions,” and, where possible, national prosecutions.\footnote{Murphy, supra note 40, at 52. See also Lipscomb, supra note 16, at 186; Rose, supra note 219, at 383; and Totten & Tyler, supra note 178.} The Prosecutor has recognized that traditional African mechanisms can achieve local reconciliation and be a complementary tool to the Court’s efforts.\footnote{Press Release, The Prosecutor of the ICC opens investigations in Darfur, ICC-OTP-0606-104, available at http://www.icc-cpi.int/NR/exeres/31F3684F-43BC-4D5E-9E0A-A6A8DAC308EB.htm (undated).} A multi-faceted approach facilitates complementarity by punishing perpetrators, promoting reconciliation, and building a comprehensive picture of the situation.\footnote{Udombana, supra note 104, at 20-1.} Prosecution by the ICC also strengthens the rule of law in national systems by compelling states to conduct domestic prosecutions, as demonstrated by the proposal of the Ugandan government to adopt a multi-layered approach involving prosecutions and traditional justice mechanisms.\footnote{Orentlicher, supra note 12, at 254.} Prosecution also prevents revisionism by state actors,\footnote{Majzub, supra note 26, at 53.} and ensures that victims’ fundamental rights under international law are not infringed.\footnote{Slye, supra note 121, at 191-7. According to Slye, these include the right to justice (defined as investigation, prosecution and punishment), the right to truth, the right to judicial protection, the right to reparations and the right to access to a Court.}

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

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

Selectivity

The Prosecutor must assess the interests of justice on a case-by-case approach; a legitimate amnesty in one instance may not be so in another. Decisions turn on the information and evidence on hand, and rely on inextricably interlinked factual circumstances, such as the granting of amnesty, the role and number of perpetrators, the number of victims, and whether the country is at the conflict or post-conflict stage. Moreover, one size does not fit all when considering the complexity of the “interface of international law and politics.” This issue was central to the inability of states to draft a provision for amnesty in the Rome Statute. States had sympathy for South Africa’s position, but were concerned about decisions not to

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378 Roth, supra note 25, at 767. This applies to both the Security Council and the Prosecutor.

379 Sadat, supra note 10, at 1028.

prosecute by South American dictators.\textsuperscript{381} If the Prosecutor engages in an assessment of models, it might give rise to selectivity in application of an exception to prosecution, and to resultant challenges to the ICC’s legitimacy. How would the Prosecutor differentiate between the case studies described? Would Ugandan perpetrators be permitted amnesty because they played a lead role in negotiations and amnesties served as a valuable bargaining tool? Or, despite that the situation was post-conflict, would South African perpetrators be permitted amnesty because of the relative merits of a model which facilitated victim participation and reparations? Deferring to political interests might compromise the independence of the ICC and politicize the pursuit of international justice because it would be required to make assessments about the value of one system over another.\textsuperscript{382} If we move from the case studies into an international armed conflict, these concerns might be further exacerbated where one state grants amnesty, which is upheld by the Prosecutor, but another other doesn’t.

\textit{Lack of Empirical Evidence}

Kastner submits that one way to determine whether to defer to amnesties is to hold “individuals accountable [only] ‘if the benefits of accountability over the long term are likely to outweigh the costs on the short term of prolonging an ongoing conflict’.”\textsuperscript{383} The problem is one of ascertainment. While there are many situations in which amnesties have been granted since individual criminal liability was established as a matter of international law, there have been very few empirical studies on the long-term impact of amnesties and alternative justice

\begin{footnotes}
\item[381] Williams & Schabas, supra note 35, at 617.
\item[382] Roht-Ariaza, supra note 11, at 89.
\item[383] Kastner, supra note 121, at 152.
\end{footnotes}
mechanisms.\textsuperscript{384} Moreover, there are competing claims regarding whether amnesties, or refraining from prosecution for political reasons, lead to peace and reconciliation. In regard to South Africa, Slye submits that, “even assuming amnesties contribute to short-term social stability, in the long-term they undercut efforts to establish a stable democracy that honors human rights and the rule of law” and create a culture of impunity.\textsuperscript{385} Contrary to this position, Helena Cobban “concludes that the TRC in South Africa, granting conditional amnesties, and the absence of any individual accountability in Mozambique have delivered much better results than, for instance, international prosecutions in Rwanda.”\textsuperscript{386} Even accepting the latter’s position, comparing South Africa with Rwanda is like comparing apples and oranges. To understand the impact of alternative justice mechanisms, long-term comprehensive and contextual analysis needs to be undertaken. While it is also yet to be shown that international prosecutions result in peace and security and entrenchment of the rule of law, it is difficult to rely on examples like South Africa to demonstrate amnesties do.

\textit{The Impact of Amnesty and Indictment on the Peace Process}

We might argue that amnesty encourages leaders to the negotiating table and to cease fire. Archbishop Tutu and others argued that prosecutions in South Africa would have been sabotaged and would have led to more violence. However if we look at Sierra Leone and Uganda this position is not always substantiated over the short or long term. Sankoh and the


\textsuperscript{385} Slye, supra note 121, at 197.

\textsuperscript{386} Kastner, supra note 121, at 150, referring to COBBAN, H. AMNESTY AFTER ATROCITY? HEALING NATIONS AFTER GENOCIDE AND WAR CRIMES, 194 (2007).
RUF returned to violence following grants of unconditional amnesty, and Kony and other leaders of the LRA didn’t come forward to claim amnesty, despite that the law permits them to do so. In Uganda, dealing with Kony has been described by Roth as “dealing with a madman.”387 There is no certainty that such leaders would seize amnesty or cease violent acts if offered it. The same might be said for indicted Sudanese leaders. The problem is that trading amnesty for peace is not always so simple. Some leaders with authority to negotiate don’t accept the carrot of amnesty, and some continue to perpetrate violations despite it. The benefits of amnesty, grassroots reconciliation, rehabilitation, and reparation might still be realized if prosecution by the ICC is “sufficiently removed” to enable it to prosecute without disturbing the internal balance that amnesty may bring.388

What the Sudanese and Ugandan situations show us is that indictment served to bring leaders to the negotiating table. In Sudan, attempts to negotiate peace in Darfur had been deferred (with the acceptance of the international community) on the basis that resolution of the north-south conflict and implementation of its peace agreement was a necessary prerequisite. On the one hand the position acknowledged the links between the conflicts, by saying you couldn’t have resolution in one until the other was resolved. However, at the same time it served to dissociate the north-south conflict from that in Sudan by failing to recognize that the conflict in Darfur might serve to destabilize that in the south. In addition to motivating the international community to act, the indictments served to provide a compelling incentive for the government itself to commence negotiations and to, at least initially, pressure the

387 Roth, supra note 25, at 767.

388 Gavron, supra note 2, at 116.
government to reduce its support for the Janjaweed.\textsuperscript{389} The indictments further served to isolate rebel groups from international support, and motivate them to negotiate.\textsuperscript{390} Even the prospect of prosecution of enemies might in itself motivate leaders to negotiate.\textsuperscript{391} The Security Council referral, and subsequent investigation by the Prosecutor, may then have been a crucial factor in the 2006 peace agreement.

In Uganda, the indictment of LRA leaders not only drew them to the negotiating table, but served to decrease crime.\textsuperscript{392} While there were a number of factors that led to Kony’s involvement in negotiation, the ICC served a useful role by de-legitimizing the LRA; subsequently it less frequently “ran off [to hide] in a game reserve in north-eastern Congo”.\textsuperscript{393} Moreover, it might serve to strengthen the domestic rule of law. As noted, the Ugandan government has sought the withdrawal of ICC indictments on the basis of admissibility; it proposes to conduct domestic criminal prosecutions or, at least, those most responsible. Representatives of Kony and the LRA have agreed to participate.\textsuperscript{394} The indictment of leaders may, if domestic processes operate in accordance with the requirements of admissibility, serve

\textsuperscript{389} Kastner, supra note 121, at 177-178.
\textsuperscript{390} Kastner, supra note 121, at 175.
\textsuperscript{391} Kastner, supra note 121, at 175-6.
\textsuperscript{392} See the discussion on pages 61-63 herein.
\textsuperscript{393} Roth, supra note 25, at 765-6.
\textsuperscript{394} Roth, supra note 25, at 766.
to “augment the number of national prosecutions in the future,” and meet the goals of complementarity.

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

Complexity

The case studies serve to demonstrate the inordinate complexity involved in conflict, amnesty and international prosecutions. In Sudan, the periphery-centre divide is complicated by a one-party system, oil revenues, its geographic expanse, shifting loyalties between rebel groups, the Janjaweed, the PDF, and government institutions and authorities, and cross-border disputes with Chad. In Uganda, Kony’s attempts to evade prosecution and peace by entering negotiations only when necessary to buy time, and the LRA’s attacks on Ugandan and Congolese civilians and retreat to the DRC, make it difficult to ascertain their movements, intentions, and sincerity. Even if the Prosecutor deferred to amnesty only for those less  

395 Kastner, supra note 121, at 154.
396 The Security Council reiterated this goal in Resolution 1593 when it called on states to support domestic efforts to establish the rule of law: U.N. Resolution 1593, Mar. 31, 2005, S/RES/1593 (2005) [hereinafter Resolution 1593].
397 Kastner, supra note 121, at 154.
398 Cash, supra note 182, at 575; Nouwen, supra note 197, at 116-118; and Kastner, supra note 121, at 163-4.
responsible\textsuperscript{400} for atrocities, or for those with less negotiating power, differentiating between those with \textit{de jure} and \textit{de facto} power is an impossible task when low level perpetrators wield the power to wage violence even if they don’t have the authority to negotiate peace.\textsuperscript{401} Establishing whether amnesty will serve the interests of justice in these contexts would therefore be extremely difficult, if not impossible.

\textit{Collective vs. Individual Justice: the Security Council and Functional Limitations}

It is difficult to dismiss political considerations entirely given the Security Council’s residual role in the ICC Statute and the inherent interplay of law and politics in international law. However, the temporal restriction on Security Council deferrals indicates that politics, ever-changing, are not a permanently determinative factor,\textsuperscript{402} that the appropriate body to determine the impact of politics is the Security Council, and that Prosecutor retains an ultimate discretion in respect to all other issues.\textsuperscript{403} We might nevertheless consider three different scenarios: (i) where the Security Council referred the situation to the ICC; (ii) where the State referred the situation; and (iii) where the Prosecutor commenced an investigated \textit{propio motu}.

\textsuperscript{400} Despite the complexities in the South African and Sierra Leonean conflicts, they both envisaged prosecution of those most responsible (only by default in the former case).

\textsuperscript{401} See Newman, supra note 12, at 305.

\textsuperscript{402} Moreover, the politics of conflict resolution becomes the politics of dominant powers in the Security Council.

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

If one takes the legal basis for such referrals seriously – i.e. one thinks of Chapter VII authority as something more than just an excuse or legal fiction to make such pronouncements – then the Security Council’s actions would seem to allow less room for prosecutorial discretion than the Assembly of State Parties had initially anticipated. Indeed, however one wishes to conceive of Prosecutorial discretion, it cannot be interpreted in such a way that the Prosecutor has the power to ignore judgments made by the Security Council – a power that no one has under international law.\footnote{Ohlin, supra note 23, at 191.}

Referral presupposed the question of peace and justice; they were assumed to go hand in hand.\footnote{The Prosecutor stated that the Darfur situation was referred to him because, in “adopting resolution 1593 (2005), the Security Council had affirmed that justice and accountability were critical to achieving lasting peace and security in Darfur”: Press Release, Security Council, International Criminal Court Prosecutor Briefs Security Council on Darfur, Says Will Not Draw Conclusions on Genocide Until Investigation Complete, U.N. Doc. SC/8748 (June 14, 2006).} The logical conclusion is that the ICC does not have the power to make determinations about collective peace and security itself. The Security Council seeks peace and security as a collective action,\footnote{Ohlin, supra note 23, at 191 and 196.} whereas the Prosecutor considers the interests of justice in individual cases. Limiting the Prosecutor to considerations of individual justice is appropriate given the converse limitations on the Security Council, which can refer a
situation, but has limited authority to restrain the Court in individual matters.\footnote{407} In referring Darfur to the Prosecutor, the Security Council acted pursuant to its authority to make determinations regarding peace and security.\footnote{408} Consequently, the Prosecutor should be restricted to a range of factors relevant to the individual case (rather than the broader impact on peace).\footnote{409} Collective assessments by the Prosecutor would undermine the international constitutional order, and possibly destabilize the peace process.

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

\textit{Regime Change}

One of the ways in which prosecution contributes to peace and security is by preventing those responsible for serious crimes from committing them, and by criminalizing actors, groups, or regimes. The symbolic act of criminalization may pressure the international community, governments, and other groups such as civilians, from supporting perpetrators. According to

\footnote{407} {Despite the United States expectation that “the Council will continue to exercise such oversight as investigations and prosecutions pursuant to the referral proceed”: Quoted (but not referenced) in Happold, supra note 168, at 234.}

\footnote{408} {With the exception that the Pre-Trial Chamber can determine whether the Security Council acted lawfully.}

\footnote{409} {Ohlin, supra note 23, at 207.}
Udombana, “[h]istory has shown that the involvement of highly placed functionaries or officials of states makes the commission of most international crimes possible; it is great men, potential saints, not little men, who become merciless fanatics.” 410 In Uganda, Kony’s removal is a vital step in making the LRA ineffective, as he “stands at the apex of the LRA structure, politically, militarily, and spiritually.” 411 The situation in Sudan is more complicated because instability in Darfur serves to entrench al-Bashir and other government leaders’ positions by preventing a unified front in the region. 412 If those indicted were arrested and successfully prosecuted, it is possible that regime change (and possible international intervention) could reduce crime and stabilize the region. 413

Indictment by the ICC may nevertheless have the opposite effect. While indictments, arrest warrants and consequent international attention regarding the Darfur crisis purportedly reduced Sudanese government support for the Janjaweed, 414 they also served to strengthen support for al-Bashir within the country and within regional blocks or alliances. Since issuance of the arrest warrant al-Bashir has visited up to half a dozen countries within the region. 415 While regional support might be a result peculiar to Security Council referral,

410 Udombana, supra note 104, at 44.
411 Akhavan, supra note 105, at 420.
412 Kastner, supra note 121, at 169.
413 Kastner, supra note 121, at 169.
414 Kastner, supra note 121, at 165
Nevertheless, indictment might have the adverse effect of ensuring that indictees will do
everything to hold on to power, including by committing more serious crimes, and impeding
the investigation and prosecution. In any event, the extent to which prosecutions could
facilitate regime change and conflict resolution would be hampered where removal from
office simply creates space to fill for individuals who may similarly perpetrate crime.

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

The view that dialogue with fanatical murderous leaders would somehow lead to a
peaceful settlement is a chimera, often encouraged by an international community that
is eager to insulate itself from genuine engagement in putting an end to the atrocities.
As one observer concluded, Kony’s “refusal for years to accept olive branches and
huge concessions including total amnesty indicate his mental incapacity.” But even if
Kony proves to be willing and able to negotiate when presented with the right
incentives, the best means of ensuring such a negotiation appears to be sustained
military and political pressure. In this respect, peace and justice are by no means
mutually exclusive.”416

416 Akhavan, supra note 105, at 419.
That a state engages with leaders despite their unwillingness to refrain from violence is linked to the international community’s reluctance “to use force to topple a rogue regime.”\textsuperscript{417} In an ideal world, the ICC would be supported by economic sanctions, and arms embargoes,\textsuperscript{418} and possibly even an obligatory norm to intervene on humanitarian grounds pursuant to the responsibility to protect. On a smaller scale, the investigation and prosecution of al-Bashir and other leaders would have been buttressed by a further resolution calling on states to cooperate with the ICC. That the Security Council doesn’t adopt complementary measures is a consequence of freedom to act (or not to act) its and its constitution, i.e. the veto power of states such the United States, China and Russia, with economic, ideological and political interests to protect.

**Conclusion**

The Prosecutor of the ICC has adopted the correct approach to admissibility and the interests of justice. Amnesties granted by truth commissions do not satisfy the terms of admissibility under article 17 of the Rome Statute when interpreted in light of the Statute’s objects and purposes. An expansive interpretation of the interests of justice, incorporating political and social factors underpinning grants of amnesty, is inconsistent with states’ intention in enacting the Rome Statute. Moreover, it is undesirable and impractical given the position of amnesties in international law, the complexity of both internal and international conflicts and associated peace negotiations (even at the post-conflict stage), and the retention of Security Council authority over international peace and justice.\textsuperscript{419} The Pre-Trial Chamber is not best placed to

\textsuperscript{417} Scharf, supra note 35, at 343.

\textsuperscript{418} Kastner, supra note 121, at 170.

\textsuperscript{419} Bergsmo & Pejić, supra note 145, at 598. See also Han, supra note 77, at 100.
determine or define an international norm regarding conditional amnesties, which it would inevitably do should it make judicial determinations regarding whether they are in the interests of justice. The role of the Prosecutor then, is to determine whether the interests of justice are served by considering factors such as whether the victims have access to some form of justice, whether the perpetrator is a low-level offender who has committed a small number of violations, and whether investigation and prosecution of the matter will extract evidence which might be useful in cases against more senior figures. The Pre-Trial Chamber’s role is to determine whether the Prosecutor has exercised his role in an appropriate manner, and to apply the law, to the exclusion of world, regional, or domestic politics. Where the Security Council does intervene on the basis of amnesty, the Pre-Trial Chamber may only engage in judicial review of a resolution to the extent that it complies with article 16 of the Rome Statute, such as to determine whether it constitutes “an abuse of authority…or [an] obvious and grave deficiency.”420 This approach allows States to engage in actions that lead to the development of a treaty or customary norm regarding alternative justice mechanisms and their reconciliatory and reparatory functions, and how, or even whether, amnesties might feature in restoration; such States being best placed to do so.

420 Gropengießer & Meißner, supra note 79, at 191.