Amnesties and the *Rome Statute* — A Legitimate Bar to Prosecution?

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Abstract

In the wake of violent conflicts, amnesties continue to be granted for serious international crimes. This article focuses on the recognition that the International Criminal Court should afford such amnesties where they are intended to cover crimes which otherwise fall within the Court's jurisdiction. It is argued that a zero-tolerance policy is required on the basis of the text of the *Rome Statute* itself, and also on the grounds that such a stance is in accordance with the general trend of international law against recognising amnesties for serious international crimes. The shifting attitude towards amnesties is examined in light of the emerging body of international jurisprudence dealing with the issue, and a principled approach for the ICC to adopt in dealing with amnesties is put forward. This approach takes into account the inherent limitations of the ICC as a post-conflict mechanism and more accurately accords with the Court's unique mandate for securing accountability.

Introduction

The entry into force of the *Rome Statute*[1] on 1 July 2002 was heralded by many as signaling a new era of accountability for the perpetrators of international crimes. It was seen as a demonstration of the will of the international community to end the 'culture of impunity' and was 'in many ways the culmination of a series of international efforts in that direction'.[2] This article examines the ability of the International Criminal Court ('ICC' or 'the Court') to adhere to the high expectations placed upon it by focusing on the recognition the Court should afford national amnesties that have been granted for crimes that would otherwise fall within the jurisdiction of the Court. Now is an important time to reflect on the approach that the ICC can and should adopt in relation to this difficult issue, considering that amnesty issues have already arisen in relation to the situation in Northern Uganda which is currently before the Court.

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1 *Rome Statute of the International Criminal Court*, opened for signature on 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

2 Philippe Kirsch, 'The International Criminal Court: Current Issues and Perspectives' (2001) 64 *Law and Contemporary Problems* 3 at 3.

Part I of this article situates the practice of granting amnesties within post-conflict measures, before discussing the restrictions which international law currently places on this means of dealing with past atrocities. This section will focus on the extent to which an obligation to prosecute the crimes contained in the *Rome Statute* currently exists under international law.

Part II then examines the compatibility of amnesties with the text of the *Rome Statute* itself, and offers some concrete suggestions as to the most appropriate course for the ICC to adopt. The argument presented here is that amnesties should not form a bar to prosecution on the basis of the wording of the *Rome Statute* itself, and also on account of the fact that deferring to national amnesties is fundamentally incompatible with the role and purpose of the ICC in ensuring accountability and ending impunity. A principled approach for the ICC to adopt in dealing with amnesties is put forward, which not only recognises the inherent limitations of the ICC but also accords more accurately with its unique mandate.

PART I

1. The Granting of Amnesties and Shifting Attitudes — Achieving Peace *and* Justice?

The term amnesty refers to 'an act of sovereign power immunising persons from criminal prosecutions for past offences',[3] and should be differentiated from a pardon which is generally granted *post-conviction* and is 'an act or an instance of officially nullifying punishment or other legal consequences of a crime'.[4] Andreas O'Shea dates the first recorded amnesty as occurring between Rameses II and the Hittites in 1286 BC and the practice has continued until the present day.[5] Amnesties have recently been granted in the wake of conflict in countries as diverse as Sierra Leone, Uganda, Cambodia, South Africa, El Salvador, Guatemala, Haiti, Chile, Angola and Togo, and were intended to serve a range of different purposes.[6] Despite their continued usage as a matter of State practice, there has been a discernible shift in the international community's stance as to the recognition they should be afforded under international law — as reflected in a 'sea-change in attitudes towards impunity' to use Justice Geoffrey Robertson's phrase.[7] Whilst sovereign powers may have previously been at liberty to proclaim amnesties with

3 Michael Scharf, 'The Amnesty Exception to the Jurisdiction of the International Criminal Court'(1999) 32 *Cornell International Law Journal* 507 at 507–8. He also notes that the word amnesty derives from the Greek word 'amnestia', meaning forgetfulness or oblivion.

4 Bryan Garner (ed), *Black's Law Dictionary* (7th ed) (1999) at 1137.

5 Andreas O'Shea, *Amnesty for Crimes in International Law and Practice* (2004) at 5–6. See Norman Weisman, 'A History and Discussion of Amnesty' (1972) 4 *Columbia Human Rights Law Review* 529.

6 Regular justifications for amnesties include their potential for ending violent conflicts and also facilitating national reconciliation. On these and other rationales see Ben Chigara, *Amnesty in International Law: The Legality under International Law of National Amnesty Laws* (2002) at 1–21 and Louis Joinet, *Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights* at [33]–[37] UN Doc E/CN.4/Sub.3/1985/16 (1989).

7 *Prosecutor v Kondewa* [SCSL–2004–14–AR72(E)] (Appeals Chamber) (25 May 2004) at [19] and [33] ('*Kondewa*').

unfettered discretion, international law has evolved to the point where there are now restrictions on the types of amnesties that may be considered legitimate.[8]

The shift away from according recognition to amnesties may be linked to several concurrent themes, of which Gropengießer & Meißner highlight three of particular importance.[9] The first is a growing skepticism towards amnesties generally — and in particular to blanket or self-amnesties.[10] The second concerns the *'juridification'* of amnesties whereby courts have more frequently been called upon to determine the legality or otherwise of an amnesty and its compliance with a State's constitutional and international legal obligations.[11] Similarly, international courts now have to grapple with the issue of national amnesties when determining the limits of their jurisdiction. The final trend relates to the *'internationalisation'* of the practice of granting amnesties — which again emphasises the importance of international law in regulating the limits of State activity.[12]

In addition, the increased attention now accorded to victims' rights[13] has further contributed to making the perceived legitimacy of amnesties 'limited and conditional' where it is acknowledged at all and 'an increasingly widespread view is that broader reconciliation processes are a *desirable supplement to but no substitute for criminal prosecution*' (Emphasis added).[14] The importance of victims' rights as forming a bar to the legal recognition of amnesties has been highly influential in the jurisprudence of the Inter-American Court of Human Rights in particular.[15] Article 53(2)(c) of the *Rome Statute* also explicitly provides for the 'interests of the victims' to be taken into account by the

8 See, for example, Ronald Slye, 'The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?' (2002–2003) 43 *Virginia Journal of International Law* 173.

9 Helmut Gropengießer & Jörg Meißner 'Amnesties and the Rome Statute of the International Criminal Court' (2005) 5 *International Criminal Law Review* 267 at 271.

10 On self-amnesties in Latin America, see Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 *California Law Review* 449 and Naomi Roht-Arriaza & Lauren Gibson, 'The Developing Jurisprudence on Amnesty' (1998) 20 *Human Rights Quarterly* 843. On blanket amnesties see Darryl Robinson, 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003) 13 *European Journal of International Law* 481. Furthermore, the Venezuelan and Ecuadorian Constitutions contain express bans on the granting of amnesties with regards to certain offences – Arts 29 and 23 No 2 of the respective Constitutions – see Helmut Gropengießer & Jörg Meißner, above n9 at 271. For further examples of this trend see Carsten Stahn, 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice* 695 at footnote 25.

11 See, for example, *Simón, Julio Héctor y otros s/privación ilegítima de la libertad*, [causa No.17.768] (Argentine Supreme Court) (14 June 2005) S.1767.XXXVIII, and *Juan Contreras Sepúlveda y otros (crimen) casación fondo y forma*, [517/2004, Resolution 22267] (Supreme Court of Chile) (21 April 2005). This decision held that there could be no amnesty or statute of limitation for enforced disappearances. See Fannie Lafontaine 'No amnesty or Statute of Limitation for Enforced Disappearances: The *Sandoval* Case before the Supreme Court of Chile' (2005) 3 *Journal of International Criminal Justice* 469.

12 Helmut Gropengießer & Jörg Meißner, above n9 at 271.

13 In the Inter-American context even an amnesty which had been approved by plebiscite was found to be contrary to the obligation to investigate human rights violations. Inter-American Commission on Human Rights, *Legal Effects of the 1986 Amnesty Law (confirmed by referendum) incompatible with the ACHR* (2 October 1992) at [22] ('*Uruguay Report*'). On amnesties and victims see also Michael Scharf & Nigel Rodley, 'International Law Principles on Accountability' in Cherif Bassioni (ed), *Post-Conflict Justice* (2002) at 91.

Prosecutor when deciding whether it is in the interests of justice to proceed with a prosecution.[16]

This general trend away from the recognition of amnesties raises important questions as to the relationship between peace and justice. Whilst they are generally viewed as complementary objectives, in certain circumstances it has been suggested that justice must be forgone in order to achieve peace.[17] Forsaking justice in the name of peace may be seen as the only alternative for ending a bitter and protracted conflict, and prosecutions may be perceived as a destabilising factor. As will be further drawn out below, however, these are the very circumstances which the ICC was established to address in order to provide an alternative means of securing accountability in instances where a State is unwilling or unable to proceed such that 'justice' is no longer dispensed with in the name of peace. The former Secretary-General Kofi Annan saw peace and justice as fundamentally complementary objectives, such that they are 'indivisible' in all post-conflict situations 'where the dawn of peace must begin with the light of justice'. Furthermore, he saw the ICC as the 'symbol of our highest hopes for this unity of peace and justice'.[18]

This is not to suggest that criminal prosecutions alone are capable of achieving these ends, but simply that prosecutions are an indispensable element for attaining *both* ends, especially where crimes of concern to the international community as a whole have been committed. One recent experiment which sought to unify the objectives of peace and justice was the establishment of a Truth and Reconciliation Commission ('TRC') in Sierra Leone alongside the Special Court. William Schabas, a member of the TRC, has written that 'the Sierra Leone experience may help us to understand that post-conflict justice requires a sometimes complex mix of therapies, rather than a unique choice of a single approach from a menu of alternatives'.[19] He further notes that the existence of the

14 Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003) at 95. In discussing these developments Ellen Lutz even goes so far as to pose the question 'are amnesties dead?' – see Ellen Lutz 'Transitional Justice: Lessons Learned and the Road Ahead' in Naomi Roht-Arriaza & Javier Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (2006) at 329–330.

15 *Chumbipuma Aguirre et al v Peru* (*Barrios Altos Case*) [Series C, No.75] (*Merits, Judgment*) (14 March 2001) at [43]. Further, see the concurring opinion of Judge A.A. Cancado-Trindade in *Case of Almonacid-Arellano et al v Chile* [Series C No.154] (*Preliminary Objections, Merits, Reparations & Costs*, *Judgments*) (26 September 2006) at [2]–[7].

16 For further discussion of article 53 of the *Rome Statute* see Part II below.

17 Yasmin Naqvi has suggested that article 16 of the *Rome Statute* can be seen to reflect the fact that peace and justice do not always coincide with one another, and that where they are in conflict, article 16 has the effect that 'the objective of securing or maintaining peace will prevail' – see Yasmin Naqvi, 'Amnesty for war crimes: Defining the limits of international recognition' (2003) 85 *International Review of the Red Cross* 583 at 592.

18 Kofi Annan, 'Advocating for an International Criminal Court' (1997) 21 *Fordham International Law Journal* 363 at 365. On the interconnectedness of peace and justice in post-conflict situations see Cherif Bassiouni in Cherif Bassioni (ed), *Post-Conflict Justice* (2002) at 9, 40–1. Also on this point see John Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions' in Antonio Cassese, Paola Gaeta & John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Vol.1) (2002) at 702–3 and Juan Méndez, 'National Reconciliation, Transnational Justice, and the International Criminal Court' (2001) 15 *Ethics and International Affairs* 25 at 28.

TRC alongside the Special Court did not have the expected result of discouraging perpetrators from testifying.[20] It is crucial that the ICC conduct its work alongside other post-conflict mechanisms, in recognition of the fact that the ICC 'will not be the panacea for all the ills of humankind'.[21] The Court is one part of an emerging system of international accountability and however important its role is, it must be remembered that the purpose of the Court is to secure the prosecution and punishment of individual perpetrators, not necessarily to promote reconciliation at a national level. Furthermore, the Court will not be capable of prosecuting all alleged perpetrators in circumstances where it has jurisdiction to do so when one has regard to practical and fiscal constraints. Therefore, the ICC does not replace the need for States to prosecute persons accused of international crimes where they are properly capable of doing so, indeed the entire *Rome Statute* is founded upon the notion of complementarity.[22] The question that this article seeks to raise, however, is whether the fact that an amnesty has been granted can or should be a taken into account by the ICC when determining whom to prosecute.[23]

Before examining the scope for such recognition under the provisions of the *Rome Statute* itself it is necessary to elucidate the offences for which amnesties may not validly be granted under conventional and customary international law as this will provide part of the answer to the question posed directly above.

2. The Ability to Grant Amnesties under International Law

Those seeking to buttress support for the validity of amnesties under international law most commonly cite article 6(5) of *Additional Protocol II* to the *Geneva Conventions*[24] in support of their position.[25] That provision, the only one to explicitly allow for amnesties in a major international instrument, states:

> At the end of the hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or

19 William Schabas, 'Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court' (2004) 2 *Journal of International Criminal Justice* 1082 at 1088. Prosecutions alongside a TRC also occurred in East Timor – see Erica Harper, 'Delivering Justice in the Wake of Mass Violence: New Approaches to Transitional Justice' (2005) 10 *Journal of Conflict and Security Law* 149.

20 William Schabas, above n19 at 1098, also states that 'the willingness or otherwise of perpetrators to testify seems to have more to do with the mysteries of the human soul than it does with issues of amnesty'.

21 Cherif Bassiouni, 'Combating Impunity for International Crimes' (2000) 71 *University of Colorado Law Review* 409 at 421.

22 See Preamble to the *Rome Statute*, which states that 'the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'.

23 As to the other considerations to be taken into account see Philippe Kirsch, above n2 at 4–5, Cherif Bassiouni, above n18 at 32 and William Schabas, *An Introduction to the International Criminal Court* (2001) at 57.

24 *Protocol II Additional to the Geneva Convention of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 513, art 6(5) (entered into force 7 December 1978) ('*Additional Protocol II*').

25 This provision has been invoked in support of national amnesties in El Salvador and South Africa – see *Guevara Portillo Case* (Sala de lo Penal de la Corte Suprema de Justicia, San Salvador) (16 August 1995) at [11] and *AZAPO v. President of the Republic of South Africa* [CCT 17/96] (25 July 1996) at [29]–[32].

> those deprived of their liberty for reasons relating to the armed conflict, whether they are interned or detained.

As *Additional Protocol II* applies only to non-international armed conflicts, and no comparable provision is contained in either *Additional Protocol I*[26] or any of the four *Geneva Conventions*,[27] it is preferable to interpret this provision as pertaining to *national*, as opposed to international, crimes.[28] The ICRC Commentary states that the object of this sub-paragraph was to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation that has been divided.[29] In line with the shifting attitudes towards amnesties noted above, this provision should be construed as encouraging amnesties for those who have *participated* in the conflict, but not those who have violated IHL or committed other atrocities.[30] This interpretation is further supported by the fact that customary international law now recognises that war crimes may be committed in non-international armed conflicts.[31] It would therefore appear that article 6(5) cannot be invoked to support the recognition of an amnesty covering crimes which otherwise fall within the jurisdiction of the ICC.

As amnesties are not otherwise expressly provided for under international treaty law, it is necessary to determine whether international law more broadly proscribes the granting of amnesties for international crimes on the basis of a duty to prosecute.

Although not specifically prohibited *per se*, it would appear that there is growing support for the proposition that amnesties for the crimes contained in the *Rome Statute* are generally incompatible with international law.[32] This is reflected not only in the Preamble to the *Rome Statute* itself, but also in numerous soft law instruments, including General Assembly Resolutions[33] and the Princeton Principles on Universal

26 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3, (entered into force 7 December 1979) ('*Additional Protocol I*')

27 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force October 21 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287, (entered into force 21 October 1950) ('*Geneva Conventions*').

28 See *Kondewa* at [32] (Justice Geoffrey Robertson).

29 International Committee of the Red Cross, *Commentary to Protocol II Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (1977) at 1402. Ronald Slye contends that the 'overwhelming majority of commentators rights conclude' that this interpretation of article 6(5) is the correct one – see Ronald Slye, 'Cambodian Amnesties: Beneficiaries and the Temporal Reach of Amnesties for Gross Violation of Human Rights' (2004) 22 *Wisconsin International Law Journal* 99 at 104.

30 Such an interpretation would confer 'combatant status' on those who participate in non-international armed conflicts – such that they cannot be prosecuted for acts of rebellion under national legislation – see Bruce Broomhall, above n14 at 97 and Naomi Roht-Arriaza & Lauren Gibson, above n10 at 865.

31 Rules 156–159 of the ICRC Customary International Law Study – see Jean-Marie Henckaerts & Loiuse Doswald-Beck, *Customary International Law: Volume 1: Rules* (2005) at 568–614. As to discussion of ICTY jurisprudence see Laura Olson, 'Provoking the Dragon on the Patio – Matters of Transitional Justice: Penal Repression vs. Amnesties' (2006) 88 *International Review of the Red Cross* 275 at 280.

32 Carsten Stahn, above n10 at 701.

Jurisdiction[34] as well as in a growing body of international jurisprudence. The remainder of this section will examine the extent to which a duty to prosecute the crimes contained in the *Rome Statute* exists under international law, thus proscribing the circumstances within which States may validly grant amnesties.[35] It will be further argued that even where the obligation to prosecute is unclear or remains contentious, there are nonetheless compelling reasons why the ICC should refuse to defer to a national amnesty that covers such crimes.

Where the obligation to prosecute flows from treaty requirements the position is perhaps clearest.[36] This is the case in relation to genocide,[37] torture[38] and 'grave breaches' of the Geneva Conventions[39], and for these crimes there is also a high level of academic consensus that such a duty also exists under customary international law.[40] The prohibitions against genocide and torture have also been held to have the status of *jus cogens* norms.[41] In relation to treaties containing the obligation to prosecute, article 27 of the *Vienna Convention*[42] also provides that 'a party may not invoke the provisions of its internal law as justification for failure to perform a treaty'[43] thus precluding States from relying on domestic amnesty legislation in order to circumvent their international obligations.

The obligation to prosecute crimes against humanity is generally held to be more controversial on account of the fact that it is not contained in any specific treaty.[44] One of the strongest proponents of the view that the obligation to prosecute extends to crimes against humanity is M. Cherif Bassiouni, who even goes so far as to suggest that *all* crimes under the *Rome Statute* have 'risen to the level of *jus cogens*' and the obligation to prosecute or extradite is to be considered '*obligatio erga omnes*, the consequence of which

33 Resolutions of the General Assembly speak not only of an obligation to prosecute but also to *punish* – see for example UNGA Resolution 3074 (1974) which states, 'war crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, punishment'. Note also the position of the Special Representative of the Secretary-General in relation to the *Lomé Amnesty*, stating that the United Nations did not interpret the amnesty as applying to the international crimes of genocide, war crimes, crimes against humanity and other serious violations of international law. See the Preamble to UNSC Resolution 1315(2000). See also the UN Commission on Human Rights Resolution 2002/79 'Impunity' UNCHR Resolution 79 (2002) <www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/cd893dbd5bbd5ed7c1256bab0051565d?Opendocument> accessed 22 April 2008. Further, see *UN Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* UNCHR Res 102, UN CHROR, UN Doc E/CN.4/2005/102 (2005), Principle 25 of which states that national amnesties do not cover international crimes except where the State concerned has investigated, prosecuted and punished the offenders. For discussion of these and other soft law instruments see John Dugard, above n18 at 697 and Ben Saul, 'Forgiving Terrorism: Trading Justice for Peace, or Imperiling the Peace?', forthcoming in Pene Mathew & Miriam Gani (eds), *ANU E-Press* (2008) at 4.

34 See Princeton Principle 7 which states, 'Amnesties are generally inconsistent with the obligations of States to provide accountability for serious crimes under international law, *including war crimes, crimes against humanity and genocide*' (Emphasis added). Cherif Bassiouni et al, *The Princeton Principles on Universal Jurisdiction* (May 2001) <www.law.uc.edu/morgan/newsdir/unive_jur.pdf > accessed 20 February 2008.

35 Laura Olson, above n31 at 279.

36 An obligation to prosecute has also been 'read into' international Conventions in some instances 'despite the absence of a 'black-letter' obligation to prosecute' – see Laura Olson, above n33 at 282. The Inter-American Court of Human Rights has also taken such an approach – see Michael Scharf & Nigel Rodley, above n13 at 91.

is that impunity cannot be granted'.[45] Although it is submitted that this would be a desirable state for the law to be in, it is questionable whether Bassiouni's position provides an accurate reflection of the *current* state of the law when one has regard to contemporary State practice and *opinio juris*.[46] In order to provide further insight into the current state of international law on this question, it is necessary to have regard to the international jurisprudence which has considered the permissibility of amnesties under international law.

In the *Lomé Amnesty Case*, the Special Court for Sierra Leone was called upon to consider the extent to which the Lomé Amnesty Agreement operated as a bar to prosecution, notwithstanding the fact that article 10 of the *Statute of the Special Court* specifically stated that it would not.[47] In determining the issue, the Court concluded that the crimes enumerated in articles 2-4 of the Statute[48] gave rise to universal jurisdiction on the basis that 'the obligation to protect human dignity is a peremptory norm and has assumed the nature of obligation *erga omnes*'.[49] More specifically for present purposes however, the Court accepted Antonio Cassese's view that there is not yet any general obligation for states to refrain from enacting amnesty laws. This is so despite the fact that if a Court of another State, or an international tribunal, had in custody a person accused of an international crime they may choose to prosecute them, *even though that person would have benefited from an amnesty law in their home State*.[50] The Court further accepted in concrete terms that there was a 'crystallizing international norm' against the granting of amnesties for international crimes.[51] In the case of *Kondewa*, Justice Geoffrey Robertson referred to

37 Under both the *Convention on the Prevention and Punishment of the Crime of Genocide,* opened for signature 9 December 1948, 78 UNTS 277 (entered into force January 12 1951) and as a rule of customary international law – see Roman Boed, 'The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations' (2000) 33 *Cornell International Law Journal* 297 at 308–310.

38 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force June 26 1987). See also John Dugard, above n18 at 697.

39 The 'grave breaches' regime refers to Arts 50, 51, 130 & 147 of the four *Geneva Conventions* respectively and Art 85 of *Additional Protocol I*.

40 See, for example, Diane Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537 at 2599–2600; Michael Scharf, above n3 at 514–21; Yasmin Naqvi, above n17 at 596–8; Cherif Bassiouni, 'International Crimes: "Jus Cogens" and "Obligatio Erg Omnes"' (1996) 59 *Law and Contemporary Problems* 63 at 68–70 and Ziyad Motala, 'The Promotion of National Unity and Reconciliation Act, the Constitution and International Law' (1995) 28 *Comparative and International Law Journal of Southern Africa* 338 at 338–362. As to the opposing position, see, for example, John Dugard, 'Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International Law* 1001 at 1002, commenting that it is 'doubtful' whether international law has reached the stage of actually prohibiting amnesties, and also Ronald Slye, above n8 at 177.

41 In relation to genocide see *Prosecutor v Kayishema and Ruzindana,* [ICTR–95–1–T] (Trial Chamber) (21 May 1999) at [88]. With respect to torture this point was confirmed by the Trial Chamber of the ICTY in *Prosecutor v Furunzjia* [IT–95–17/1–T] (Trial Chamber) (10 Dec 1998).

42 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*Vienna Convention*').

43 This also applies to arrest and surrender under article 89 and States may not invoke a national amnesty to refuse compliance – see Anja Siebert-Fohr, 'The Relevance the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions' (2003) 7 *Max Planck Yearbook of United Nations Law* 553 at 584–5.

the 'sea-change' in the international community's approach to amnesties and went a step further than the Appeals Chamber in the *Lomé Amnesty Case*, stating:

> The rule against impunity which *has* crystallized in international law is a norm which denies the legal possibility of pardon to those *who bear the greatest responsibility* for crimes against humanity and widespread and serious war crimes (emphasis added).[52]

The approach adopted by the Special Court offers valuable guidance for the ICC in light of the fact that the Court was of the opinion that it was not desirable to work *against* the formation of the 'crystallizing norm'. Further, the Court held that even if it could not be definitively stated that Sierra Leone contravened customary international law when granting the amnesty, the Court may still attribute 'little or no weight to the grant of such amnesty which is contrary to the direction in which customary international law is developing'.[53]

The trend away from according recognition to amnesties can also be observed in the jurisprudence of the Inter-American Court of Human Rights,[54] as well as the higher national Courts of numerous South American countries.[55] In the landmark *Barrios Altos Case*, the Inter-American Court held that blanket amnesties were incompatible with the duties of States party to the *Inter-American Convention on Human Rights*. In coming to this conclusion, the Court held that *all* provisions designed to eliminate responsibility for human rights violations were impermissible, on the grounds that they violate non-derogable rights recognised by international human rights law.[56] Further, Judge A.A.

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44 There are, however, soft-law instruments which call for the prosecution of crimes against humanity – for example in 1973 the United Nations General Assembly adopted the *Principles of International Co-operation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, UNGA Resolution 3074 (1973); and also the 1993 Vienna Declaration, World Conference on Human Rights, UN Doc A/CONF.157/23 (1993). See also Sang Wook Han, 'The International Criminal Court and National Amnesty' (2006) 12 *Auckland University Law Review* 97 at 104–7.

45 Cherif Bassiouni, above n18 at 25–26 and also Cherif Bassiouni, above n40 at 68. This view is shared by Diane Orentlicher, above n40 at 2537–2615. Furthermore, Bruce Broomhall, above n14 at 56, agrees that this is the case with regards to crimes against humanity and Olson suggests that State practice is emerging whereby amnesties can only be given to those *not* suspected of war crimes – see Laura Olson, above n31 at 286. Daryl Robinson takes the view that 'there are persuasive reasons to conclude that there is a duty, or at least an emerging duty, to bring to justice those responsible for genocide, crimes against humanity or war crimes, at least where the crimes are committed on a State's territory or by its nationals' – see Darryl Robinson, above n10 at 491–3.

46 See Michael Scharf, above n4 at 521 and John Dugard, above n18 at 699. See also Roman Boed, above n37 at 314–8. Further see Dwight Newman, 'The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem' (2004–2005) 20 *American University International Law Review* 293 at 309–311 and Ronald Slye, above n8 at179–180. For further discussion of State practice in this area see Andreas O'Shea, above n6 at 259–260 and Sang Wook Han, above n44 at 103–4. In the case of *Kondewa* Justice Robertson suggested that despite the ongoing practice of granting amnesties there is now a 'hand-wringing quality about the excuses for amnesty by States which grant them' at [47] and on account of the decision of the ICJ in *Nicaragua*, this could be taken as evidence in support of, rather than against, the formation or existence of a rule of customary international law, at [47]–[48].

47 *Prosecutor v Kallon*; *Prosecutor v Kamara* [SCSL–2004–15–AR72(E)] (13 March 2004) at [53].

48 Namely, crimes against humanity, violations of Common article 3 and other serious violations of International Humanitarian Law respectively.

Cancado Trindade, in a concurring opinion, held that amnesties were not only manifestly incompatible with the Convention, but that they had 'no legal validity at all in the light of norms of the International Law of Human Rights'.[57]

These cases have been highlighted here as they provide support for the general trend against amnesties referred to above. The key point to be taken from this body of jurisprudence, and from the *Lomé Amnesty Case* in particular, is that even if a duty to prosecute does not currently exist under international law in relation to a particular crime, this does not entail that Courts should defer to an amnesty granted over such acts. It would appear, however, that on the basis of the above discussion the only crime within the jurisdiction of the Court for which no clear duty to prosecute currently exists under international law is a crime against humanity, although it may be suggested that there is at least an emerging duty in relation to this particular crime.[58] As Part II will demonstrate, this should not be seen as providing a basis for the recognition of an amnesty over such crimes, as compelling policy reasons continue to favour prosecution.

Therefore, with the above discussion in mind, it is necessary to turn to the specific provisions of the *Rome Statute* which commentators have suggested leave open the possibility for the Court to defer to a national amnesty.

PART II

The ongoing use of amnesties in post-conflict societies entails that the ICC must formulate a principled basis on which to deal with this issue. As noted in the introduction, this issue is all the more pressing considering Uganda's 2003 referral to the ICC and its subsequent efforts to provide an amnesty for members of the Lord's

49 *Lomé Amnesty Case* at [71]. Interestingly for present purposes, counsel for one of the two accused had accepted in their submissions that if the Special Court were a 'truly international tribunal' rather than a 'hybrid court', then 'the actions of the Government of Sierra Leone and the amnesty would be of no relevance'. *Lomé Amnesty Case* at [55].

50 See Antonio Cassese, *International Criminal Law* (2003) at 315 and the *Lomé Amnesty Case* at [71].

51 *Lomé Amnesty Case* at [82].

52 *Kondewa* at [49]. It may be noted that such a rule would be in perfect accordance with the objectives of the *Rome Statute*, and with the Court's stated focus of ensuring the effective prosecution of those *most responsible* for violating international law. The current Chief Prosecutor has indicated that his focus lies on the 'big fish' in relation to the commission of international crimes. See Luis Moreno-Ocampo, *Letter of the Prosecutor on the situation in Iraq* (February 2006) <www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> accessed 8 November 2006.

53 *Lomé Amnesty Case* at [84].

54 See *Case of Castillo-Paez v Peru* (*Reparations and Costs*) (27 November 1998); *La Cantuta v Peru* [Series C, No.162] (*Merits, Reparations and Costs*)(29 November 2006); *Case of Almonacid-Arellano et al v Chile* [Series C, No.154] (*Preliminary Objections, Merits, Reparations and Costs*)(26 September 2006); and *Barrios Altos Case*. See generally Naomi Roht-Arriaza & Lauren Gibson, above n10 at 843–885.

55 See the cases listed at n11.

56 *Barrios Altos Case* at [41].

57 Id at [10]–[11], An opinion reiterated separate opinions in *Almonacid* at [2]–[8] and *La Cantuta* at [27].

58 It should be highlighted here that torture also forms a part of crimes against humanity under the *Rome Statute* (article 7(1)(f)) and as such occupies somewhat anomalous position – see Sang Wook Han, above n44 at106 and Darryl Robinson, above n10 at 491–3.

Resistance Army ('LRA').[59] The argument advanced below is that a zero-tolerance policy towards amnesties for all crimes contained in the *Rome Statute* should be adopted by the Court, as such an approach is not only justifiable with regards to the terms of the Statute itself, but it is also in line with the central role of the ICC in ending impunity and the general trend of international law outlined in Part I above. While this section will focus mostly on the specific provisions of the *Rome Statute*, the policy rationales which support a stance of refusing to recognise amnesties over crimes which otherwise fall within the Court's jurisdiction will be drawn upon.[60]

3. The Drafting of the *Rome Statute* and the Contentious Issue of Amnesties

The divergent views of States as to the permissibility of amnesties were evident at the Rome Conference and resulted in no specific provision being included in the Statute.[61] During the negotiations the United States' delegation circulated a 'non-paper' which argued that amnesties should be recognised in the interest of international peace and national reconciliation when deciding whether to investigate and/or prosecute in a given instance. This proposal did not, however, garner sufficient support.[62] Although there appeared to be some level of consensus that blanket and self-proclaimed amnesties should not form a bar to prosecution, many delegations felt that certain other forms of amnesty should not be seen as equally unacceptable.[63] By way of example, the South African model of granting amnesties was regarded by many as an instance where the Court should refrain from instituting proceedings against anyone who had applied for and been granted such immunity.[64]

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59 See Manisuli Ssenyonjo, 'The International Criminal Court and the Lord's Resistance Army: Prosecution or Amnesty?' (2007) 7 *International Criminal Law Review* 36 and Robin Murphy, 'Establishing a Precedent in Uganda: The Legitimacy of National Amnesties under the ICC' (2006) 3 *Eyes on the ICC* 33.

60 This is in recognition of the complexity and sensitivity of the issues which national amnesties raise. For instance, Arsanjani has commented that the conflict between national amnesty laws and the jurisdiction of the ICC cannot be resolved simply by reference to 'black-letter law techniques of legal analysis' – see Mahnoush Arsanjani, 'The International Criminal Court and National Amnesty Laws' (1999) 93 *ASIL Proceedings* 65.

61 See William Schabas, above n23 at 1–21 and Luigi Condorelli, 'War Crimes and Internal Conflicts in the Statute of the International Criminal Court' in Mauro Politi & Giuseppe Nesi (eds), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001) at 115.

62 See Anja Siebert-Fohr, above n43 at 562. Furthermore, in May 2002, the United States informed the Secretary-General of its intention not to ratify the Rome Statute despite its earlier signature, and one of the stated reservations concerned the lack of a provision regulating how the Court was to deal with the issue of amnesties – see Anja Siebert-Fohr, above n43 at 556. See also Ruth Wedgwood, 'The International Criminal Court: An American View' (1999) 10 *European Journal of International Law* 93 at 95–7.

63 Bruce Broomhall, above n14 at 98.

64 Interestingly, the former Secretary-General Kofi Annan endorsed this position and even went so far as to state that it would be 'inconceivable' for the Court to 'substitute its judgment for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future' – quoted in Charles Villa-Vicencio, 'Why Perpetrators Should not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet' (2000) 49 *Emory Law Journal* 205 at 222.

Whilst in no way discouraging the pursuit of truth and reconciliation measures such as those undertaken in South Africa and elsewhere, it is submitted that these efforts should be *supplementary* to criminal proceedings, and that by ratifying the *Rome Statute*, States have agreed to effectively cede a portion of their jurisdiction to the ICC for certain crimes as contained in article 12(1) of the Statute.[65] It is also recognised that although certain forms of amnesty provide for greater accountability, all amnesty laws by their nature prevent perpetrators from being held criminally liable for their actions. If the ICC were to defer to national amnesty laws this would fly in the face of the very rationale behind the Court's creation, and undermine the principle of complementarity on which the *Rome Statute* is founded. The ICC represents a new and unique means of addressing impunity for international crimes, on account of the fact that it is both 'independent' and 'permanent', with jurisdiction over 'the *most serious crimes* of concern to the international community as a whole' (emphasis added).[66] The true deterrent value of the Court can only be felt over time if it fulfils its mandate of ending impunity by acting in circumstances where individual states are either unwilling or unable to do so. According recognition to amnesties would seriously detract from this goal.

(i) Preamble — Emphasis on Prosecution and Ending Impunity

In accordance with article 31 of the *Vienna Convention*, the Preamble of a treaty may be used as an aide in the interpretation of the substantive provisions. On this basis, the language employed in the Preamble to the *Rome Statute* would appear to directly preclude the recognition of amnesties by the Court. In particular, paragraph four affirms that the crimes contained in the *Rome Statute* 'must not go *unpunished* and that their *effective prosecution* must be ensured' (emphasis added). The Preamble then goes on to emphasise the determination of the international community to 'put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.[67] Therefore, the fact that 'prosecution' is specifically referred to would appear to preclude reliance on other accountability mechanisms as a bar to admissibility.

Despite the clear wording of the Preamble, commentators have continued to suggest that certain other provisions of the *Rome Statute* leave open the possibility for the Court to accord some degree of recognition to national amnesties.[68] The argument advanced below, however, is that the strong wording of the Preamble clearly reflects the nature and purpose of the *Rome Statute*, and must be taken into consideration when interpreting the scope of other provisions.

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65 It should also be noted that the *Rome Statute* does not provide for the making of reservations (Art 120). For discussion of the interpretative declarations submitted by States see Dwight Newman, above n46 at 322–336.

66 *Rome Statute*, Preamble at [10].

67 The Chief Prosecutor of the ICC has also stated that in his view, 'my real duty is to investigate and prosecute in order to contribute to the prevention of future crimes.' See Luis Moreno-Ocampo, 'Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives' (2006) 21 *American University International Law Review* 497 at 497.

68 Aside from the actual provisions themselves, it has been suggested that as no obligation to prosecute can be implied into the Rome Statute itself, amnesties may be accorded some recognition. See Anja Siebert-Fohr, above n43 at 559–560.

(ii) Article 15 — Ability of the Prosecutor to Initiate Proceedings Proprio Motu

Article 15 has been a cause of considerable consternation for States who fear the actions of a 'rogue' prosecutor. Indeed, the opposition of the United States to the *Rome Statute* in its current form has often centred on the inclusion of this provision.[69] Although such fears appear somewhat overstated when one has regard to the limitations on the Prosecutor contained in the *Rome Statute*,[70] it is submitted that in order to prevent the politicisation of the Prosecutor's discretion, or the appearance thereof, article 15 should not be relied upon to deal with the issue of amnesties. Such an interpretation is also supported by the fact that the Prosecutor must seek the authorisation of the Pre-Trial Chamber under article 15(3) before commencing any such proceedings. This provision further dictates that the decision of the Pre-Trial Chamber must be based on evidentiary rather than political grounds or considerations. Therefore, it is to the sufficiency of the evidence that the Prosecutor must have regard, rather than the existence or otherwise of an amnesty, before deciding whether to proceed or not.[71]

On this basis it is not desirable to interpret article 15 in such a way as to incorporate the political considerations which recognising an amnesty would entail.[72]

(iii) Article 16 — Security Council Deferral

Against considerable opposition at the Rome Conference, the 'controversial' article 16 was included in the final text.[73] This provision provides that the Security Council may request the Court not to commence or continue with an investigation or prosecution for a period of twelve months, a request which may, theoretically at least, be renewed indefinitely. The intention behind the article is to prevent the Court taking action in situations where delicate political negotiations are on foot and where the likelihood of criminal prosecutions would interfere or destabilise the situation.[74] It has also been suggested, however, that it may be used in circumstances where the Security Council is seeking to 'lend international validity to a national amnesty'.[75] In order to fully

69 See, for example, Max Du Plessis, 'The Universal Aspirations of the International Criminal Court: A Short Comment on the American Position' (2002) 11(4) *African Security Review* <www.iss.co.za/pubs/ASR/11No4/duPlessis.html> accessed 21 February 2008, and UN Press Briefing, 'Press Conference on the International Criminal Court', (Press Release, 21 April 2003).

70 For instance, article 18 of the *Rome Statute* requires the ICC prosecutor to notify all states parties and states with jurisdiction over a particular case before commencing an ICC investigation. Furthermore, the Prosecutor cannot commence proceedings *proprio motu* without first receiving the approval of a Chamber of three judges – see below.

71 Furthermore, the discretion of the Prosecutor to initiate an investigation *proprio motu* must be exercised in a manner which is consistent with the admissibility considerations set out in article 17 of the *Rome Statute*.

72 This view is shared by Anja Siebert-Fohr, above n43 at 582.

73 Opponents of the inclusion of this article argued that such action would have the effect of unduly politicising the prosecution process, thereby tarnishing the impartiality of the Court. See William Schabas, above n23 at 64–6.

74 At the time of writing there are reports suggesting that the government of Uganda is preparing to request the Security Council to exercise its power under article 16 in relation to the proceedings against Joseph Kony – see BBC News, 'Ugandan rebels 'will sign deal'', *Focus on Africa program*, 5 March 2008 <news. bbc.co.uk/ 2/hi/africa/ 7279394.stm> accessed 06 March 2008.

75 Helmut Gropengießer & Jörg Meißner, above n9 at 288–9.

understand the implications of this article for the recognition of amnesties, it is important to briefly set out the limitations that exist in relation to actions that may be taken by the Security Council.

4. Limitations on the Security Council's power

The Security Council is bound by the purposes and principles of the UN Charter[76] and may not, save in limited circumstances under article 103, act otherwise contrary to the corpus of international law as a whole.[77] In particular, the Security Council is bound by the peremptory norms of international law from which no derogation is permitted — *jus cogens* norms.[78] It is also not possible for States constituting the Security Council to empower it to disobey standards not at their disposal. Thus, to the extent that an offence is subject to a peremptory obligation to prosecute, 'the Security Council… may not *permanently* prohibit its prosecution'.[79] This stems from the fact that even if the Security Council *itself* cannot be subject to *obligatio erga omnes*, the individual States parties would be in breach of *their* international obligations if they were to take such measures.[80]

As noted in Part I above, the prohibition against both torture and genocide should be taken to constitute *jus cogens* norms such that the Security Council could not seek to prevent the prosecution of perpetrators of these crimes.[81] The real issue arises, therefore, in instances where the Security Council is not so precluded and chooses to act in the interests of international peace and security by deferring an investigation or prosecution. Taking such a step requires the Council to undertake a two-stage determination. It must first determine that there is a threat to or breach of the peace in accordance with article 39 of the Charter. Secondly, it must satisfy itself that requesting the Court *not* to proceed is consistent with both the principles *and* purposes of the United Nations.[82] Therefore, the Security Council must implicitly find that investigations or proceedings before the Court actually contradict the goals of international peace and security.[83] It has been suggested that such a determination 'is not easy to establish and not very likely, given the United Nations' own restrictive policy towards amnesties and the increasing recognition that "justice" and "peace" are not "mutually exclusive objectives, but rather mutually reinforcing imperatives"'.[84] The general movement within the Security Council in recent times appears to be towards increased accountability at the international level. This is

76 *Charter of the United Nations,* articles 1 & 2 respectively set out the purposes and principles of the United Nations.

77 *Charter of the United Nations*, article 130.

78 See Cherif Bassiouni, above n40 at 63–7.

79 Helmut Gropengießer & Jörg Meißner, above n9 at 292.

80 See William Schabas, above n23 at 65–6.

81 With regards to grave breaches of the Geneva Conventions, although it may confidently be stated that an obligation to prosecute is a rule of customary international law, such a rule does not currently have the status of a *jus cogens* norm – see Yasmin Naqvi, above n17 at 596–7.

82 *Charter of the United Nations,* article 24(2) states that, 'In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations.'

83 The Preamble to the *Rome Statute* also explicitly states at [3] that the commission of the crimes contained in the Statute 'threaten the peace, security and well-being of the world'.

evidenced by its refusal to recognise the amnesty in Sierra Leone as a bar to prosecution before the Special Court[85] and its referral of the situation in Darfur to the ICC.[86] Therefore, whilst it cannot be ruled out in advance that situations may arise in the future whereby the Security Council chooses to act under article 16 in the interests of international peace and security and defer proceedings before the Court, such deferral must be temporary in nature and article 16 must not be used in such a way as to perpetuate impunity at the international level. Furthermore, despite the controversy surrounding the inclusion of article 16, it may be seen as a more appropriate means for dealing with particularly sensitive situations, rather than relying on the Prosecutor to make such judgments under article 53.[87] It is also possible that the Court may have the ability to review a deferment request by the Security Council made under article 16 where it appears that the Resolution requesting the deferment is itself *ultra vires* or otherwise contrary to international law.[88]

In the short history of the Court, the Security Council has already invoked article 16 in order to pass the controversial Resolution 1422 (2002).[89] That resolution, at the insistence of the United States,[90] sought to provide blanket immunity to United Nations peacekeepers, and prevent them from ever appearing before the ICC.[91] The passing of Resolution 1422, however, went beyond the limits of the situation that article 16 was intended to address. In particular, it sought to confer immunity *in advance* of any crimes actually being committed or any proceedings being underway, and was further intended to be of general, rather than case-specific, application. The wording of article 16 makes it clear that it is intended to provide a mechanism for deferring investigations or prosecutions on a case-by-case basis, with formal revision procedures and subject to strict time limitation periods.[92]

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84 Carsten Stahn, above n10 at 717 – quoting from Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (August 2004) UN Doc S/2004/616. See also William Schabas, above n23 at 66.

85 See Kofi Annan, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone* (October 2000) UN Doc S/2000/915, at 23. Furthermore, the Special Rapporteur of the Secretary-General in the case of Sierra Leone made clear that in signing as moral guarantor of the Lomé Amnesty, the United Nations was not foreclosing the possibility of prosecutions for genocide, war crimes and crimes against humanity – see *Lomé Amnesty Case* at 26.

86 UN Security Council Resolution 1593 (2005).

87 See below.

88 If the Court were to do this it could draw on the decision of the ICTY Appeals Chamber in *Tadic* and review the request on the basis that it is empowered to determine the propriety of its own jurisdiction – on this point see Carsten Stahn, above n10 and Helmut Gropengießer & Jörg Meißner, above n9 at 293. On challenging this view see Anja Siebert-Fohr, above n43 at fn 130. As to the legality of Security Council resolutions more generally see Karl Doehring, 'Unlawful Resolutions of the Security Council and their Legal Consequences' (1997) *Max Planck Yearbook of United Nations Law* at 91–109.

89 UNSC Resolution 1422 (2002).

90 See Salvatore Zappalá, 'The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and article 98 Agreements' (2003) 1 *Journal of International Criminal Justice* 114.

91 This resolution, and those extending it, have been the subject of sustained criticism, and the Security Council ultimately decided not to renew the Resolution. See Amnesty International, *International Criminal Court: The unlawful attempt by the Security Council to give US citizens permanent impunity from international justice* (May 2003) <www.amnesty.org/en/library/info/IOR40/006/2003> accessed 26 April 2008.

It would therefore appear unlikely that article 16 could be used to secure *permanent* respect for a national amnesty law,[93] particularly when one also notes that article 29 of the *Rome Statute* precludes the possibility of a statute of limitations for the crimes contained therein. Furthermore, if the Council did seek to act on the basis of article 16 to temporarily defer ICC proceedings, such action is more fittingly construed as having being taken in the interests of international peace and security, rather than out of respect for or recognition of a national amnesty law granted as part of peace negotiations. This would also be in accordance with the generally restrictive stance of the Security Council towards amnesties.

Although this article is primarily concerned with the approach of the ICC to *national* amnesties, it is important to briefly highlight some of the issues which may arise if the Security Council itself sought to confer an 'international' amnesty outside the framework of article 16.[94] If the Council were to pass a resolution that explicitly conferred an amnesty upon on a particular person, or group of persons, then article 103 of the Charter provides that the obligations of States under the Charter are to prevail over all other international agreements.[95] As the ICC was established by means of a treaty (namely the *Rome Statute*), the obligations of States to cooperate with the Court could be overridden by the action taken by the Security Council. The issue is a complex one, particularly if the Security Council sought to confer an amnesty over crimes of a *jus cogens* character. As noted above, it would appear that the Security Council may not seek to override peremptory norms of international law. However, as Ben Saul points out, 'the question of conflict of a *jus cogens* norm and a Chapter VII Security Council measure has not been definitely settled by any superior international court'.[96] If it is accepted, and it is submitted that it should be, that the Security Council cannot lawfully override *jus cogens* norms, then in relation to the crimes of torture and genocide at least, the Council would be prohibited from conferring an amnesty in the manner described.[97] In relation to the other crimes contained in the *Rome Statute*, whilst the possibility of such an international amnesty theoretically exists, it is relatively unlikely that the Security Council would take such measures on account of its recent attitude towards amnesties generally, as highlighted above.

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92 The incorporation of the phrase 'no investigation or prosecution may be commenced or proceeded with' indicates that deferral cannot be requested prior to a particular situation actually being before the Court. See further Human Rights Watch Legal Analysis, *The ICC and the Security Council: Resolution 1422* (May 2003) <www.hrw.org/campaigns/icc/docs/1422legal.htm> accessed 1 March 2008.

93 Jessica Gavron, 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court' (2002) 51 *International and Comparative Law Quarterly* 91 at 109.

94 This is to be distinguished from the situation where the United Nations is merely a party to peace negotiations, as in Sierra Leone. In the *Lomé Amnesty Case*, the Special Court held that although the United Nations had acted as 'moral guarantor' for the Lomé Amnesty, along with several other states, this did not entail that the agreement was a treaty. See *Lomé Amnesty Case* at [42]–[44]. This aspect of the decision has also been subject to criticism – see Antonio Cassese, 'The Special Court and International Law: The Decision Concerning the Lomé Agreement Amnesty' (2004) 2 *Journal of International Criminal Justice* 1130. Further, see Yasmin Naqvi, above n17 at 591–2.

95 *Charter of the United Nations,* article 103.

96 Ben Saul, above n33 at 12.

97 Id at 12.

5. Articles 17-19 — Admissibility Requirements and Amnesties

It has been suggested that the most appropriate means by which the ICC may recognise amnesties is via the admissibility requirements contained in articles 17-19 of the *Rome Statute*.[98] Admissibility under the *Rome Statute* is governed by the principle of 'complementarity'. In short, 'the Court's purpose is to *complement*, not supplant, national proceedings'.[99] Article 17 goes into some detail as to what is meant by the principle of complementarity and each of the four subparagraphs of Art 17(1) deal with a different aspect of this principle. The essential concept for present purposes is that of a State being 'unwilling or unable' genuinely to carry out the investigation or prosecution of persons alleged to have committed crimes under the Statute. Article 17(2) provides some guidance as to what constitutes 'unwillingness' for the purposes of admissibility. A case will be *admissible* before the ICC if the national proceedings were conducted for the purpose of shielding the person from criminal responsibility — so called 'sham trials',[100] or because there was an unjustified delay incompatible with an intention to bring the person to justice, or if the proceedings were conducted in a manner inconsistent with an intent to bring the person to justice.[101]

It is clear from the terms of article 17 that self-proclaimed or blanket amnesties where no investigation of any kind has been undertaken would not justify inadmissibility, nor would an amnesty over offences for which there is a clearly established duty to prosecute be recognised.[102] It has been argued, however, that where an amnesty has been granted in exchange for participation in a TRC or where some other form of individualised investigation has been undertaken, it should be respected.[103] The role of alternative accountability mechanisms was raised during the Rome Conference, with certain countries keen to include a provision explicitly stating that this should *not* be taken as evidence of an unwillingness or inability to prosecute. Perhaps unsurprisingly, South Africa was insistent on this point during negotiations on account of their concern that approaches like their Truth and Reconciliation Commission, which offered amnesty in exchange for truthful confession, would be dismissed as evidence of a State's

98 See for example Jessice Gavron, above n94 at 113.

99 Declan Roche, 'Truth Commission Amnesties and the International Criminal Court' (2005) 45 *British Journal of Criminology* 565 at 568.

100 It has been suggested that a determination that a state has conducted *criminal* proceedings either in a manner inconsistent with an intent to bring a person to justice or for the purpose of shielding that person is not a decision that either the Prosecutor or the Court would make lightly – see, for example, Jessica Gavron, above n94 at 109–110.

101 *Rome Statute,* articles 17(2)(a) to (c) respectively.

102 See Part I. As to the range of post-conflict mechanisms which may be employed see Stephan Landsman, 'Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions' (1996) 59 *Law and Contemporary Problems* 81.

103 As to the range of post-conflict mechanisms which may be employed see Stephan Landsman, above n102 at 81–92. For a survey of Truth and Reconciliation Commissions see Priscilla Hayner, 'Fifteen Truth Commissions 1974–1994 – A Comparative Study' (1994) 16 *Human Rights Quarterly* at 597 and also Carsten Stahn, 'Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor' (2001) 95 *The American Journal of International Law* 952.

unwillingness to prosecute.[104] As no consensus which would allow for 'legitimate amnesties' but exclude others was ultimately reached,[105] what remains to be determined is whether article 17 should be construed so as to achieve this same result. It must also be ascertained whether the absence of an express provision governing the approach to be taken in relation to amnesties entails that the Court is left to consider amnesties on a case-by-case basis. As the following discussion will demonstrate, the wording of article 17 as well as more general considerations regarding the particular mandate of the ICC, suggest against any approach which leaves open the possibility for amnesties to be recognised by the Court.

The most plausible means by which amnesties may be recognised in determining admissibility is under article 17(1)(b), which states that the Court shall determine that a case is inadmissible where:

> The case has been investigated by a State which has jurisdiction over it and the State has decided not to *prosecute* the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute. (Emphasis added)

As Darryl Robinson highlights, in order to construe this provision so as to recognise amnesties granted in exchange for cooperation with a TRC, three hurdles must be overcome. It would first be necessary to show that the truth commission or other body 'investigated' the matter; second, that it 'decided' not to prosecute, and third, that the decision did not result from the unwillingness or inability of the state to genuinely prosecute.[106] Construing the article as a whole, it would appear that, at an absolute minimum, some form of *individualised* inquiry into the offences in a quasi-judicial proceeding would be required.[107] This is reinforced by the fact that there must be a decision *not to prosecute,* which would appear to imply that prosecution must be *one* of the options available.[108] Such an approach would also only be possible if the Court chose to interpret the term 'investigation' as not referring solely to a *criminal* investigation.[109]

It is further submitted that the fact that an amnesty has been granted should be disregarded when interpreting the gravity requirement in article 17(1)(d).[110] Amnesties are granted *after* the crimes have been committed, and can therefore have no bearing on

104 William Schabas, above n23 at 68–9. For criticisms of the South African model, including the procedure by which amnesties were granted, see Dwight Newman, above n46 at 301–3.

105 See William Schabas, above n23 at 69.

106 Darryl Robinson, above n10 at 499. Also John Dugard, above n18 at 702.

107 This is supported by the view of Anja Siebert-Fohr, above n43 at 569 who argues that a truth commission's mechanisms may be regarded as an investigation, and so the issue becomes whether there is an unwillingness to prosecute.

108 Carsten Stahn, above n10 at 712. See also Darryl Robinson, above n10 at 501–2 and Ben Saul, above n33 at 6–9.

109 Broomhall takes the view that while it may be open to the Court to take such an approach, it involves a 'rather broad' interpretation of the term investigation – see Bruce Broomhall, above n14 at 102. See also Michael Scharf, above n3 at 525.

110 On the issue of gravity under article 17(1)(d) Siebert-Fohr sensibly suggests that the scope of this provision should be restricted to the character/seriousness of the offence rather than incorporating any broader notions of 'interests of justice' – see Anja Siebert-Fohr, above n43 at 566–7.

the objective gravity of the crime at the time of its commission. Such an interpretation should be strongly endorsed on the grounds that it is in accordance with the object and purpose of the *Rome Statute* and is further defensible on the grounds that 'the Court finds the justification for its very existence precisely in putting an end to the impunity of the perpetrators of the most serious crimes of concern to the international community as a whole'.[111]

It is therefore both possible and preferable to read article 17 strictly according to its terms such that amnesties can never form a bar to prosecution on the basis of admissibility. The granting of an amnesty is by definition an indication of an unwillingness or inability to prosecute, and these are the very circumstances in which the Court is intended to and should act in order to properly fulfill its mandate of ending impunity.

Before turning to the remaining provisions of the *Rome Statute*, it is important to further elaborate the policy rationale as to why the Court should refuse to recognise amnesties over crimes which fall within its jurisdiction. As noted above, the Court is not, and could never be, the panacea for all the ills of the world, and the argument presented here does not intend to suggest that prosecution is the only required response to mass violations of international criminal law. The *Rome Statute* rightly states in the Preamble that international crimes 'deeply shock the conscience of humanity', but it must also be acknowledged that all international crimes are 'simultaneously local crimes, with local effects and with local costs'.[112] It must therefore be stressed again that arguing against the recognition of amnesties does not seek to diminish the importance of other post-conflict mechanisms for dealing with atrocities, but simply to note that local bodies must now seek to work in tandem with the ICC in fulfilling its mandate of ending impunity.[113] As Neil Kritz notes, the ICC should not be seen as 'taking over' in instances where it does act and local initiatives remain vital.[114]

The importance of prosecution, as one element of post-conflict measures, is drawn out by Louise Arbour, former chief prosecutor of the ICTY and ICTR. According to Arbour, criminal sanctions serve to affirm a shared preference for law-abiding conduct 'which then becomes the basis upon which a community of like-minded individuals, or nations, is formed'.[115] Therefore, the ICC should not provide legitimacy to amnesty laws granted in societies that are seeking to move towards governance in accordance with human rights norms and the rule of law, on the basis that amnesties represent the very

111 Helmut Gropengießer & Jörg Meißner, above n9 at 282–3.

112 Dwight Newman, above n46 at 346.

113 On integrating the work of the ICC with local justice initiatives see the comments of the current Chief Prosecutor Luis Moreno-Ocampo, above n67 at 497–503.

114 See Neil Kritz, 'Progress and Humility: The Ongoing Search for Port-Conflict Justice' in Cherif Bassioni, (ed), *Post-Conflict Justice* (2002) at 66, 82–3.

115 Louise Arbour, 'Litigation before the ICC: Not If and When, But How?' (2001–2002) 40 *Columbia Journal of Transnational Law* 1 at 10. This sentiment is also captured by Solzhenitsyn, who wrote, '[w]hen we neither punish nor reproach evildoers, we are not simply protecting their trivial old age, we are thereby ripping the foundations of justice from beneath new generations.' Quoted in Diane Orentlicher, above n40 at 2539.

antithesis of the rule of the law. In the words of Oliver Jackman, the peace that is 'bought' at the price of amnesty is 'supported by a thread slenderer even than the thread by which the sword of Damocles was suspended'.[116]

Amnesty is most frequently a tool of last resort, acceded to when all other means of halting atrocities or securing peace have failed.[117] Yet this is the very reason why the ICC is so important and represents such a quantum leap forward in regards to securing accountability at the international level. To take a brief example of one situation presently before the Court, Northern Uganda has endured protracted fighting for upwards of two decades and the inability of the Ugandan government to secure peace in the region ultimately led it to refer the situation to the ICC in December 2003.[118] As the Chief Prosecutor himself has noted, the fact that investigations were subsequently underway did not entail that there was interference in the peace process more generally.[119] It has been further suggested that the issuance of ICC indictments can also be credited with spurring the LRA into further and more substantial peace talks with the government.[120] Although further challenges remain in relation to the prosecution of LRA members against whom indictments have been issued, it would appear from the activities of the Court to date that the Prosecutor intends to proceed despite the existence of any amnesty provision or the possible contents of the peace deal with the Ugandan government.[121] Such an approach is to be welcomed, and may serve as an important precedent for the Court's future stance on this issue.

116 Speech by Oliver H. Jackman before the First Committee of the XIX Regular meeting of the General Assembly to Present the Annual Report of the IACHR, Nov. 1989, quoted in Diane Orentlicher, above n40 at 2579.

117 *Kondewa* at [20] where Justice Robertson states that amnesties are usually either the product of convenience (where there are insufficient resources to properly prosecute) or duress. See also Roderick O'Brien, 'Amnesty and International Law' (2005) 74 *Nordic Journal of International Law* 261.

118 ICC, 'Prosecutor of the International Criminal Court opens an investigation into Northern Uganda' (Press Release, 29 July 2004) <www.icc-cpi.int/pressrelease_details&id=33&l=en.html> accessed 1 February 2008.

119 Luis Moreno-Ocampo, above n67 at 499.

120 See Manisuli Ssenyonjo, above n59 at 373 and Robin Murphy, above n59. There remain numerous hurdles in relation to the Ugandan situation, most recently in relation to requests from the Ugandan Government to withdraw the indictments issues against LRA leaders. As Ssenyonjo rightly points out, however, the Court should proceed with the prosecutions, rather than be used as a political bargaining tool in peace negotiations – see Manisuli Ssenyonjo, above n59 at 373. At the time of writing, the Ugandan Government has also proposed the establishment of a special division of the High Court to try offences related to the conflict, however it is too early whether this initiative will proceed and what impact it is to have on ICC proceedings – see Katherine Southwick, 'Uganda: Challenges of Peace and Justice' (2008) *Refugees International* <www.refugees_international.org/content/article/detail/10466> accessed 21 February 2008.

121 Most recently the Chief Prosecutor refused to meet with the lawyers representing Joseph Kony who wished to discuss the possibility of dropping the indictment against their client – see Emma Thomasson, 'ANALYSIS-Uganda highlights tension between peace, justice' *Reuters* (4 March 2008) <www.reuters. com/ article/ featuredCrisis/ idUSL03416900> accessed 5 March 2008.

(i) Article 20 — the ne bis in idem Principle and Amnesties

Article 20 contains the *ne bis in idem* principle, otherwise known as the rule against double jeopardy, and should not be regarded as offering any support for the recognition of amnesties. The specific reference in article 20(3) to proceedings in a 'court' precludes the recognition of amnesties granted by a TRC; however, it has been suggested that the article offers a loophole whereby accountability may be circumvented by a State so inclined.[122] This is due to the failure of the *Rome Statute* to explicitly deal with post-conviction measures such as pardon, parole, and commutation of sentence, which appear to fall outside the scope of the admissibility provisions.[123] In such circumstances it would appear that the ICC is precluded from prosecuting the person concerned unless the proceedings themselves are deemed to be 'for the purposes of shielding the person from criminal responsibility' or were conducted in a manner 'inconsistent with an intent to bring the person to justice'.[124] In dealing with this issue the Court may have regard to the fact that during negotiations at the Rome Conference both amnesty and pardon were explicitly rejected by delegates in the context of the defence of *ne bis in idem*.[125]

Therefore, despite no specific provision being included in the Statute itself, it would appear that article 20 cannot be construed in such a way as to prevent the Court from proceeding on the grounds that amnesties or other post-conviction measures have been granted at the national level.

(ii) Article 53 — Prosecutorial Discretion

It is necessary to turn now to the final provision of the *Rome Statute* that has been suggested to provide scope for the recognition of amnesties. Just as the Prosecutor has discretion as to whether to initiate an investigation *propriu motu*, it is also for the Prosecutor to decide whether to *proceed* with an investigation on the basis of the information available. If the Prosecutor decides not to proceed, however, the Pre-Trial Chamber may review this decision on its own initiative or at the request of a State under article 14 or the Security Council under article 13.[126] Articles 53(1)(c) and 53(2)(c) stipulate that the Prosecutor may choose not to proceed if doing so would not be 'in the interests of justice', taking into account all the circumstances of the case, including the gravity of the crime, the interests of victims, the age or infirmity of the alleged perpetrator, as well as his or her role in the alleged crime. Thus, the issue for determination concerns the scope to be accorded to the term 'justice' in this context. The argument advanced here is that a narrow interpretation of 'interests of justice' best

122 This has been described as a 'serious lacuna' – see Christine Van den Wyngaert & Tom Ongena, '*Ne bis in idem* Principle, Including the Issue of Amnesty', in Antonio Cassese, Paola Gaeta, & John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Vol.1) (2002) at 726–7.

123 See Bruce Broomhall, above n14 at 101.

124 Art 20(3)(a) and (b) respectively. See Helmut Gropengießer & Jörg Meißner, above n9 at 284 and also Bruce Broomhall, above n14 at 101.

125 See Yasmin Naqvi, above n17 at 590.

126 Article 53(2) and (3). See also Rule 110 of the *ICC Rules of Procedure and Evidence* which deals with this same issue.

serves the objectives of the *Rome Statute* in ending impunity and may further help to quell concerns about politically motivated prosecutions.[127]

This position can be supported on the basis that articles 53(1)(c) and 53(2)(c) require there to be *substantial reasons* for concluding that proceeding with the matter would *not* be in the interests of justice. It is important to note that this is a higher threshold than that contained in article 53(1)(a), which requires only that there is a *reasonable basis to believe* that a crime has been or is being committed.[128] Reading these two tests together, it would appear that the concern of the drafters was more related to evidentiary issues than to broader notions of whether a particular prosecution would be in the interests of national reconciliation.[129] A further point to be made is that even where amnesties have been granted as part of peace-negotiations, there can be no guarantee that reconciliation will ensue — or that peace will last. Indeed a common feature of amnesties, and peace agreements more generally, is the propensity with which they are broken and dishonoured.[130] As a final point, just as article 53 itself makes no explicit mention of amnesties when setting out the factors which the Prosecutor is to consider, the Draft Regulations issued by the Office of the Prosecutor are also silent on the issue of amnesties in the context of discussing article 53. Instead, the focus is once again on the availability and quality of evidence.[131] This would appear to indicate that the intended approach of the Prosecutor is to evaluate each case with reference to its specific facts and the likelihood of attaining a successful prosecution, rather than basing the decision on some wider notion of justice or the existence of an amnesty.[132]

Advocates of a broad reading of article 53 generally agree that any recognition of amnesties must be restricted to exceptional cases.[133] However, in the interests of certainty and consistency, it is submitted that the Prosecutor should refuse as a matter of course to take into consideration the existence of an amnesty over crimes which otherwise fall within the jurisdiction of the Court when initiating or deciding to proceed with an investigation. In line with the Prosecutor's stated policy of seeking out those who bear the greatest responsibility for international crimes,[134] it would be preferable that the decision not to proceed relates to the gravity of the crime, rather than the existence or otherwise of an amnesty. A process of recognising amnesties involves the Prosecutor and the Court in making politically sensitive decisions and subjective judgments as to the

127 See Human Rights Watch, *Human Rights Watch Policy Paper The Meaning of "Interests of Justice" in Article 53 of the Rome Statute* (2005) <www.hrw.org/campaigns/icc/docs/ij070505.pdf> accessed 22 February 2008.

128 This is considerably lower than that to prove guilt – the standard being beyond reasonable doubt as per article 66(3).

129 See Mahnoush Arsanjani, above n60 at 67. Also Anja Siebert-Fohr, above n43 at 579–80.

130 Prior to the Lomé Amnesty Agreement in Sierra Leone, a blanket amnesty had been offered – the 'Abidjan Amnesty' – to RUF fighters, however it was quickly forgotten amidst subsequent outbreaks of fighting. See *Kondewa* at [5].

131 ICC, *Draft Regulations of the Office of the Prosecutor (Annotated)* (2003) at 17, 18–20 <www.icc-cpi.int/library/organs/otp/draft_regulations.pdf> accessed 26 February 2008.

132 Similarly, O'Shea notes that a broad discretion for the Prosecutor would be incompatible with the Preamble and 'would not be consistent with the spirit of the Rome Statute' – see Andreas O'Shea, above n5 at 318.

133 See Charles Villa-Vicencio, above n62 at 220, Declan Roche, above n99 at 565 and Darryl Robinson, above n10 at 483.

utility of amnesties for achieving peace and/or reconciliation which they are not properly placed to make. Although 'public interest' can form the basis for prosecutorial discretion in national systems, it is submitted that this concept is not appropriate in the context of the ICC, considering that its mandate covers the 'most serious international crimes' for which impunity should no longer be an option.

(iii) Amnesties and Sentencing

While the central argument advanced above is that amnesties should not be recognised as a bar to prosecution, a final issue which remains to be addressed is whether the fact that an amnesty has been granted may be taken into account when sentencing. The ICC Rules of Procedure and Evidence[135] appear to provide the possibility at least for this to occur. Rule 145(2)(a)(ii) states that the Court should take into consideration, as appropriate, 'the convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court'. It is therefore possible that the Court may take the view in a given case that the fact that the convicted person submitted to a peace process and was granted an amnesty in exchange for participation in other reconciliation initiatives should operate as a mitigating factor when determining the appropriate sentence. This would necessarily depend on the particular facts of the case, but the Court may have reference to the practice of the international tribunals in determining sentences. In the case of *Erdemović*, the ICTY held that the defendant's voluntary surrender was a mitigating factor to be taken in consideration, on account of the need to encourage other perpetrators to come forward.[136] In the case of *Kambanda,*[137] however, the ICTR held that the defendant's aggravating factors, including his Ministerial posting, outweighed his cooperation with the Prosecutor and guilty plea. Such examples can only provide limited assistance as each case involves different facts. Furthermore, when one has regard to the fact that the ICC is concerned only with those who bear the greatest responsibility for international crimes, the sheer gravity and extent of the crimes may often outweigh the value of the convicted person's post-offence conduct and cooperation with the Court.[138]

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134 This position is set out in numerous documents including International Criminal Court – Office of the Prosecutor, *Summary of Recommendations received during the first Public Hearing of the Office of the Prosecutor: Comments and Conclusions of the Office of the Prosecutor* (2003) <www.icc-cpi.int/library/organs/otp/ph/ph1_conclusions.pdf> accessed 25 February 2008 at [1(b)] and also in the International Criminal Court, *Policy Paper* (2003) <www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf> accessed 25 February 2008 at 3, 6–7.

135 International Criminal Court, *Rules of Procedure and Evidence for the International Criminal Court* (September 2002).

136 *Prosecutor v Erdemović* [IT–96–22–T] (Sentencing Judgment) (5 March 1998) at [5].

137 *Prosecutor v Kambanda* [ICTR–97–23–T] (Judgment and Sentence) (4 September 1998) at [62]. See also *Prosecutor v Rutaganda* [ICTR–96–3] (Sentence) (6 December 1999) at [473] where the perpetrator's position of authority and conscious participation in the crimes outweighed the assistance he provided to particular victims and his own poor health.

138 For instance, the indictments issued against LRA leaders for atrocities committed in Northern Uganda include rape, murder, enslavement, sexual enslavement and the forced enlisting of children – see International Criminal Court, 'Statement by the Chief Prosecutor on the Ugandan Arrests Warrants' (Press Release, 14 October 2005) <www.icc-cpi.int/press/pressreleases/114.html> accessed 25 February 2008.

Conclusion

This article has sought to argue that amnesties should not be recognised as a bar to prosecution for crimes which would otherwise fall within the jurisdiction of the ICC — even in exceptional cases. Such a stance is not only defensible, but should be preferred, on account of the wording of the *Rome Statute* itself and the general trend in which international law has been developing. It is not yet entirely clear what position the Court itself will take on this issue, and until a body of jurisprudence develops there is a degree of uncertainty as to which alternative accountability mechanisms societies in transition should adopt. It is both possible and desirable, however, that if the Court adopts a 'zero-tolerance' policy towards amnesties this may have an impact on the frequency with which they are granted in the future. Such a policy would also take the Court a step closer towards matching the rhetoric surrounding its creation of ending impunity for international crimes. It would furthermore be in accordance with the Court's obligation to respect customary international law and human rights standards under article 21 of the *Rome Statute*, particularly in instances where an obligation to prosecute already exists.

As a final comment, in advocating that the ICC refuse to recognise amnesties, it is reiterated that criminal prosecutions before the ICC are not a panacea for a country which has been torn apart by conflict, and supplementary post-conflict mechanisms must continue to play a key role. Perhaps the final word should go to the Office of the Prosecutor itself, stating as it did in a 2006 Report: 'the Office reaffirms that the Prosecutor's specific mandate for international justice should be clearly distinguished from those bearing the responsibility for establishing peace'.[139] This is not to suggest that peace and justice do not serve the same ends, but simply that one institution cannot be responsible for single-handedly achieving both.

139 Office of the Prosecutor, *Annex to the Three Year Report and the Report on the Prosecutorial Strategy* (2006) <www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-Annex_En.pdf> accessed 18 February 2008.