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The Amnesty Exception to the Jurisdiction of the International Criminal Court

Michael P. Scharf*

Introduction

This article examines the paradoxical question of whether the International Criminal Court will require justice at the expense of peace. Notwithstanding the popular catch phrase of the 1990s — “no peace without justice”¹ — peace and justice are sometimes incompatible goals. To end an international or internal conflict, negotiations must often be conducted with the very leaders who were responsible for war crimes and crimes against humanity. When this is the case, insisting on criminal prosecutions can prolong the conflict, resulting in more death, destruction, and human suffering.²

Reflecting this reality, during the past several years, Argentina, Cambodia, Chile, El Salvador, Guatemala, Haiti, Uruguay, and South Africa have each granted amnesty to members of the former regime that committed international crimes within their respective borders as part of a peace arrangement.³ With respect to four of these countries — Cambodia, El Salvador, Haiti, and South Africa — the United Nations pushed for, helped negotiate, and/or endorsed, the granting of amnesty as a means of restoring peace and democratic government.⁴

The term “amnesty” derives from the Greek word “amnestia” — mean-

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1. See, e.g. David Rieff, *The Precious Triumph of Human Rights*, N.Y. TIMES, Aug. 8, 1999, at 37.

2. As an anonymous government official stated in an oft-quoted article: “The quest for justice for yesterday’s victims of atrocities should not be pursued in such a manner that it makes today’s living the dead of tomorrow.” Anonymous, *Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 249, 258 (1996). One commentator has concluded that this anonymous author is Lord David Owen, the Co-Chairman of the Yugoslavia Peace Talks, see David Forsyth, *International Criminal Courts: A Political View*, 15 NETHERLANDS Q. HUM. RTS. 5, 9 n.11 (1997), but it is more likely from the context of the article that the author was a member of the U.S. Delegation to the Dayton talks.

3. See Michael P. Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, 59 LAW & CONTEMP. PROBS. 1, 1 (1996); Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 451, 458-61, 484 n.187 (1990).

4. See Scharf, *supra* note 3, at 1.

ing "forgetfulness" or oblivion.⁵ In the present context, amnesty refers to an act of sovereign power immunizing persons from criminal prosecution for past offenses.⁶

At the preparatory conference for the establishment of a permanent International Criminal Court in August 1997, the U.S. Delegation circulated a "nonpaper," which suggested that the proposed permanent court should take into account such amnesties in the interest of international peace and national reconciliation when deciding whether to exercise jurisdiction over a situation or to prosecute a particular offender.⁷ According to the U.S. text, the policies favoring prosecution of international offenders must be balanced against the need to close "a door on the conflict of a past era" and "to encourage the surrender or reincorporation of armed dissident groups," and thereby facilitate the transition to democracy.⁸

While the U.S. proposal met with criticism from many quarters, the final text of the Rome Statute contains several ambiguous provisions which could be interpreted as codifying the U.S. proposal. This article examines the policies and legal issues related to recognizing an amnesty exception to the jurisdiction of a permanent international criminal court and analyzes whether the text of the Rome Statute should be read as embodying such an exception. This Article concludes that the existence of the International Criminal Court does not remove amnesty as a bargaining chip available to mediators attempting to bring an end to an international or internal conflict.

I. Practical Considerations

A. Interests Favoring Amnesty

As Payam Akhavan of the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia has observed, "it is not unusual in the political stage to see the metamorphosis of yesterday's war monger into today's peace broker."⁹ Leaders of the various parties to a conflict must cooperate to put an end to the fighting and violations of international humanitarian law. Yet, it is unrealistic to expect such leaders to agree to a peace settlement if, directly following the agreement, they would find themselves or their close associates facing life imprisonment. Case studies in Haiti, South Africa, and the Dayton Accords demonstrate that the offer of

5. See Norman Weisman, *A History and Discussion of Amnesty*, 4 COLUM. HUM. RTS. L. REV. 529, 529 (1972).

6. See Commission on Human Rights, *The Question of Human Rights of Persons Subjected to Any Form of Detention or Imprisonment, Progress Report on the Question of the Impunity of Perpetrators of Human Rights Violations*, July 19, 1993, U.N. Doc. E/CN.4/Sub.2/1993/6, at 12.

7. See generally U.S. Delegation Draft (Rev.) to the ICC PrepCom (Aug. 1997) (on file with the author).

8. *Id.* at 1.

9. Payam Akhavan, *The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond*, 18 HUM. RTS. Q. 259, 271 (1996).

amnesty may be a necessary bargaining chip to induce human rights violators to agree to peace and relinquish power.¹⁰

1. Haiti

From 1990 to 1994, Haiti was ruled by a military regime headed by General Raoul Cedras and Brigadier General Philippe Biamby, which executed over 3000 civilian political opponents and tortured scores of others.¹¹ The United Nations mediated negotiations at Governors Island in New York Harbor, in which the military leaders agreed to relinquish power and permit the return of the democratically-elected civilian President (Jean-Bertrand Aristide) in return for full amnesty for the members of the regime and a lifting of the economic sanctions imposed by the Security Council.¹² Under pressure from the United Nations mediators, Aristide agreed to the amnesty clause of the Governors Island Agreement.¹³ The U.N. Security Council immediately "declared [its] readiness to give the fullest possible support to the Agreement signed on Governors Island,"¹⁴ which it later said "constitutes the only valid framework for resolving the crisis in Haiti."¹⁵ When the military leaders initially failed to comply with the Governors Island Agreement, on July 31, 1994, the Security Council took the extreme step of authorizing an invasion of Haiti by a multinational force.¹⁶ On the eve of the invasion, General Cedras agreed to retire his command "when a general amnesty [was] voted into law by the Haitian parliament."¹⁷ The amnesty deal produced the desired effects: Aristide was permitted to return to Haiti and reinstate a civilian government, the military leaders left the country, much of the military surrendered its arms, and most of the

10. See Leslie A. Benton & Glenn T. Ware, *Haiti: A Case Study of the International Response and the Efficacy of Nongovernmental Organizations in the Crisis*, 12 EMORY INT'L L. REV. 851 (1998). See generally John Dugard, *Retrospective Justice: International Law and the South African Model*, in TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES (A. James McAdams ed., 1997).

11. See Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L L.J. 1, 4-5 (1996).

12. See *The Situation of Democracy and Human Rights in Haiti*, Report of the Secretary-General, U.N. GAOR, 47th Sess., Annex 1, Agenda Item 22, at 4, U.N. Doc. A/47/975, S/26063 (1993) (reproducing the text of the Governors Island Agreement). The Governors Island Agreement was supplemented by a document known as the New York Pact, which was signed by the two sides on July 16, 1993. Paragraph 4 of the New York Pact provides that "[t]he political forces and parliamentary blocs undertake to ensure that the following laws are passed, on the bases of an emergency procedure: . . . (ii) Act concerning the amnesty." *Id.*

13. See Irwin P. Stotzky, *Haiti, Searching for Alternatives*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 185, 188 (N. Roht-Arriaza ed., 1995) (Professor Stotzky of the University of Miami School of Law served as Aristide's Legal Adviser while Aristide was in exile in the United States).

14. *Statement of the President of the Security Council*, U.N. SCOR, 48th Sess., 3238th mtg. at 120, U.N. Doc. S/INF/49 (1993).

15. *Statement of the President of the Security Council*, U.N. SCOR, 48th Sess., 3298th mtg. at 126, U.N. Doc. S/INF/49 (1993).

16. See U.N. SCOR, 49th Sess., 3413th mtg. ¶ 4, U.N. Doc. S/RES/940 (1994).

17. *Haitian Lawmakers Pass Partial Amnesty to Pressure Cedras*, COMMERCIAL APPEAL (Memphis), Oct. 8, 1994, at 1A, available in LEXIS, NEWS Library, COMAPP File.

human rights abuses ended — all with practically no bloodshed or resistance.¹⁸

2. South Africa

From 1960 to 1994, thousands of black South Africans were persecuted under that country's apartheid system.¹⁹ With the prospect of a bloody civil war looming over negotiations, "[t]he outgoing leaders made some form of amnesty for those responsible for the regime a condition for the peaceful transfer to a fully democratic society."²⁰ The leaders of the majority black population decided that the commitment to grant amnesty was a fair price for a relatively peaceful transition to full democracy.²¹ In accordance with the negotiated settlement between the major parties, on July 19, 1995, the South African Parliament created a Truth and Reconciliation Commission, consisting of a Committee on Human Rights Violations, a Committee on Amnesty, and a Committee on Reparation and Rehabilitation.²² Under this process, amnesty would only be available to individuals who personally applied for it and who fully disclosed the facts of their apartheid crimes.²³ After conducting 140 public hearings and considering 20,000 written and oral submissions, the South African Truth Commission published a 2739-page report of its findings on October 29, 1998.²⁴ Most observers believe the amnesty in South Africa headed off increasing tensions and a potential civil war.²⁵

3. The Dayton Accords

As a counterpoint to these examples, commentators cite the successful negotiation of the Dayton Peace Accord, which required the parties of the Bosnian conflict to cooperate in the prosecution of offenders before an international tribunal.²⁶ The facts behind the Dayton Accord, however, suggest that "realpolitik" considerations once again prevailed over principles of justice.²⁷ On the eve of the Dayton talks, the Prosecutor of the Yugoslavia Tribunal, Richard Goldstone, formally asked the United States to make the surrender of indicted suspects a condition for any peace accord.²⁸ The U.S. negotiators responded that they would not make such a

18. See Maggie O'Kane, *After the Yanks Have Gone*, THE GUARDIAN, Feb. 18, 1995, at 24, available in LEXIS, NEWS Library, CURNWS File.

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

20. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 52 (1998).

21. See *id.* at 55.

22. See The National Unity and Reconciliation Act, Act No. 34, 1995, Republic of South Africa, Government Gazette, vol. 361, No. 16579 (Cape Town, July 26, 1995).

23. See *id.* at 20(c).

24. The text of the South African Truth Commission's Report is available on the Internet at <www.truth.org.za>.

25. See MINOW, *supra* note 20, at 55.

26. See, e.g., Akhavan, *supra* note 9, at 259-85.

27. Stephen Engelberg, *Panel Seeks U.S. Pledge on Bosnia War Criminals*, N.Y. TIMES, Nov. 3, 1995, at A1.

28. See *id.*

condition a "show stopper" to the larger peace settlement.²⁹ While the accord ultimately contained several vague references to cooperating with the international tribunal,³⁰ it did not stipulate a role for the 60,000-strong NATO implementation force in apprehending indicted war criminals. As one of the Dayton negotiators confided, "[E]veryone who was at the Dayton proximity talks knew that if this issue was pressed it could have ruined the talks."³¹ As a consequence, NATO argued first that it did not have the authority, and later that it did not have the mandate, to apprehend such persons.³² Some nineteen months after the NATO deployment in Bosnia, the NATO troops began to arrest a handful of Serb warlords who were perceived as a threat to NATO's mission and security, but as of October 1999, the two most wanted indictees — Radovan Karadzic and Ratko Mladic — remain at large in Bosnia.³³

Even more telling is the fact that during the Dayton negotiations, chief U.S. negotiator Richard Holbrooke refused to address the issue of Serbian President Slobodan Milosevic's responsibility for the atrocities in Bosnia, saying it is "not my role here to make a judgment," and adding: "You can't make peace without President Milosevic."³⁴ Although Milosevic was subsequently indicted by the International Tribunal for the role he played in atrocities in Kosovo in 1999,³⁵ he has not been charged with responsibility for war crimes, crimes against humanity, and acts of genocide committed in Bosnia from 1992-95. Moreover, while President Clinton has conditioned the lifting of sanctions on Serbia on the ouster of Milosevic, the surrender of Milosevic to the International Tribunal is not part of the bargain.³⁶ Thus, there is little chance that Milosevic will ever be brought to justice, although in a sense he has become a prisoner within the borders of his own country. This has led at least one commentator to conclude: "It highly appears likely that Slobodan Milosevic . . . was at least implicitly promised some type of immunity from prosecution in return for his reducing support to the Bosnian Serbs and agreeing to the Dayton and Paris Accords."³⁷

29. See *id.*

30. See Permanent Representative of the United States: Report to the Secretary-General, U.N. Doc. A/50/790, S/1995/999 (1995).

31. Anonymous, *supra* note 2, at 256.

32. See Col. Frederick Michael Lorenz, *Peace Operations and War Criminals: Testing the Limits of Military Force* (Nov. 17, 1996); MICHAEL P. SCHARF, *BALKAN JUSTICE* 89 (1997).

33. Michael P. Scharf, *Indicted for War Crimes, Then What*, WASH. POST, Oct. 3, 1999, at B-1.

34. Jurek Martin, *U.S. Fears Wider War in Balkans If Bosnia Talks Fail*, FIN. TIMES (London), Nov. 2, 1995, at 3.

35. Prosecutor v. Slobodan Milosevic, Milan Milutinovic, Nikola Sainovic, Dragoljub Ojdanic, and Vlatko Stojiljkovic, Indictment issued 22 May 1999 (visited Oct. 1, 1999) <<http://www.org.icty/indictment>>.

36. See Michael P. Scharf, *War Criminals Must Be Prosecuted*, BOSTON HERALD, July 3, 1999, at 15.

37. Forsyth, *supra* note 2, at 11.

4. *Amnesty Is Not Equivalent to Impunity*

It is a common misconception that granting amnesty from prosecution is equivalent to foregoing accountability and redress. As the Haitian and South African situations indicate, amnesty is often tied to accountability mechanisms that are less invasive than domestic or international prosecution. Where amnesty has been traded for peace, the concerned governments have made monetary reparations to the victims and their families, established truth commissions to document the abuses (and sometimes identify perpetrators by name), and have instituted employment bans and purges (referred to as "lustration") that keep such perpetrators from positions of public trust.³⁸ While not the same as criminal prosecution, these mechanisms do encompass the fundamentals of a criminal justice system: prevention, deterrence, punishment, and rehabilitation.³⁹ Indeed, some experts believe that these mechanisms do not just constitute "a second best approach" when prosecution is impracticable, but that in many situations they may be better suited to achieving the aims of justice.⁴⁰

B. The Benefits of Prosecution

Although providing amnesty may sometimes be necessary to achieve peace, there are important considerations favoring prosecution that suggest amnesty should be a bargaining tool of last resort reserved only for extreme situations. In particular, prosecuting persons responsible for violations of international humanitarian law can serve to discourage future human rights abuses, deter vigilante justice, and reinforce respect for law and the new democratic government.

While prosecutions might initially provoke resistance, some analysts believe that national reconciliation cannot take place as long as justice is foreclosed.⁴¹ As Professor Cherif Bassiouni, Chairman of the U.N. Investigative Commission for Yugoslavia, has stated, "if peace is not intended to be a brief interlude between conflicts," then it must be accompanied by justice.⁴²

Failure to prosecute leaders responsible for human rights abuses breeds contempt for the law and encourages future violations. The U.N. Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities have concluded that impunity is a major reason for continuing human rights violations of throughout the world.⁴³ Fact-finding reports on Chile and El Salvador indicate that

38. See NAOMI ROHT-ARRIAZA, *IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE* 281-304 (1995).

39. See, e.g., JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 21-63 (1994).

40. MINOW, *supra* note 20, at 9 (contending that prosecutions "are slow, partial, and narrow").

41. See M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW & CONTEMP. PROBS. 9, 13 (1996).

42. *Id.*

43. See United Nations Commission on Human Rights: Report on the Consequences of Impunity, U.N. Doc. E/CN.4/1990/13, reproduced in 3 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 18, 19 (N. Kritz ed., 1995).

amnesty or de facto impunity has led to an increase in abuses in those countries.⁴⁴

What a new or reinstated democracy needs most is legitimacy, which requires a fair, credible and transparent account of what took place and who was responsible. Criminal trials (especially those involving proof of widespread and systematic abuses) can generate a comprehensive record of the nature and extent of violations: how they were planned and executed, the fate of individual victims, and who gave the orders and who carried them out. While there are various means to develop the historic record of such abuses, the most authoritative rendering of the truth is only possible through a trial that accords full due process. Supreme Court Justice Robert Jackson, the Chief Prosecutor at Nürnberg, underscored the logic of this proposition when he reported that the most important legacy of the Nürnberg trial was the documentation of Nazi atrocities "with such authenticity and in such detail that there can be no responsible denial of these crimes in the future."⁴⁵ According to Jackson, the establishment of an authoritative record of abuses that would endure the test of time and withstand the challenge of revisionism required proof "of incredible events by credible evidence."⁴⁶

In addition to truth, there is a responsibility to provide justice. While a state may appropriately forgive crimes (such as treason or sedition) against itself, serious crimes against persons (such as rape and murder) are an altogether different matter. A state may owe a duty to the victims and their families to hold violators accountable for their acts. Prosecuting and punishing the violators would give significance to the victims' suffering and serve as partial remedy for their injuries. Moreover, prosecutions help restore victims' dignity and prevent private acts of revenge by those who, in the absence of justice, may take it into their own hands.⁴⁷

While prosecution and punishment can reinforce the value of law by displacing personal revenge, failure to punish former leaders responsible for widespread human rights abuses encourages cynicism about the rule of law and distrust toward the political system. To the victims of human rights crimes, amnesty represents the ultimate in hypocrisy: while victims struggle to put their suffering behind them, those responsible are allowed to enjoy a comfortable retirement. When those with power are seen to be above the law, the ordinary citizen will find it difficult to believe in the

44. See, e.g., Report Prepared by the Special Rapporteur on the Situation of Human Rights in Chile, U.N. GAOR, 38th Sess., Annex, Agenda Item 12, ¶ 341, U.N. Doc. A/38/385 (1983).

45. Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, Oct. 7, 1946, *reprinted in* REPORT OF ROBERT H. JACKSON, U.S. REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 432 (Dept. of State, Pub. 3080, 1949).

46. Report to the President from Justice Robert H. Jackson, Chief of Counsel for the United States in the Prosecution of Axis War Criminals, June 7, 1945, *reprinted in* 39 AM. J. INT'L L. 178, 184 (Supp. 1945).

47. Haitian citizens, for example, have committed acts of violence against the former members of the brutal military regime who were given amnesty for their abuses. See *Former General is Killed in Haiti*, BOSTON GLOBE, Oct. 4, 1995, at 4.

principle of the rule of law as a fundamental necessity in a democratic country.

Finally, where international organizations give their imprimatur to amnesty, there is a risk that rogue regimes in other parts of the world will be encouraged to engage in gross abuses. For example, history records that the international amnesty given to the Turkish officials responsible for the massacre of over one million Armenians during World War I encouraged Adolf Hitler some twenty years later to conclude that Germany could pursue his genocidal policies with impunity.⁴⁸ In a 1939 speech to his reluctant General Staff, Hitler remarked, "Who after all is today speaking about the destruction of the Armenians?"⁴⁹ Richard Goldstone, former Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, has concluded that the failure of the international community to prosecute Pol Pot, Idi Amin, Saddam Hussein, and Mohammed Aidid, among others, encouraged the Serbs to launch their policy of ethnic cleansing in the former Yugoslavia with the expectation that they would not be held accountable for their international crimes.⁵⁰ When the international community encourages or endorses amnesty for human rights abuses, it sends a signal to other rogue regimes that they have nothing to lose by instituting repressive measures. Such regimes can always bargain away their crimes by agreeing to peace.

II. The Limited International Legal Obligation to Prosecute

In a few narrowly defined situations, there is an international legal obligation to prosecute regardless of the underlying practical considerations. An amnesty given to the members of a former regime could be invalidated in a proceeding before either the state's domestic courts⁵¹ or an international forum.⁵² It would be inappropriate for an international criminal court to defer to a national amnesty in a situation where the amnesty violates obli-

48. See Adolf Hitler, Speech to Chief Commanders and Commanding Generals (Aug. 22, 1939), reprinted in M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 176 n.96 (1992).

49. *Id.*

50. See Michael Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375, 398 n.128 (1997).

51. When the South African amnesty scheme was challenged on the grounds that it violated the rights of families to seek judicial redress for the murders of their loved ones, the newly-created Constitutional Court rejected the claim on the ground that neither the South African Constitution nor any applicable treaty prevented granting amnesty in exchange for truth. See *Azanian Peoples Organization v. President of the Republic of South Africa*, Case CCT 17.96, Constitutional Court of South Africa, July 25, 1996.

52. "Challenges to amnesty laws enacted in Argentina, Chile, El Salvador, Suriname, and Uruguay have been lodged with the Inter-American Commission on Human Rights of the Organization of American States." Dianne F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2540 n.5 (1991).

gations contained in the very international conventions that make up the court's subject matter jurisdiction.⁵³

A. Crimes Defined in International Conventions

A state's prerogative to issue amnesty for an offense can be circumscribed by treaties to which the state is a party.⁵⁴ There are several international conventions that clearly provide a duty to prosecute humanitarian or human rights crimes defined therein, including in particular the "grave breaches" provisions of the 1949 Geneva Conventions,⁵⁵ and the Genocide Convention.⁵⁶ When these Conventions are applicable, the granting of amnesty to persons responsible for committing the crimes defined therein would constitute a breach of a treaty obligation for which there can be no excuse or exception.⁵⁷ It is important to recognize, however, that these Conventions were negotiated in the context of the cold war and by design apply only to a narrow range of situations.

1. *The 1949 Geneva Conventions*

The four 1949 Geneva Conventions codified the international rules relating to the treatment of prisoners of war and civilians in occupied territory.⁵⁸ Almost every country of the world is party to these conventions.⁵⁹ Each of the Geneva Conventions contains a specific enumeration of grave breaches, which are war crimes under international law for which there is individual criminal liability and for which states have a corresponding duty to prosecute or extradite.⁶⁰ Grave breaches include willful killing, torture or inhuman treatment, willfully causing great suffering or serious injury to body or health, extensive destruction of property not justified by military necessity, willfully depriving a civilian of the rights of fair and reg-

53. See Gerhard Hafner et al., *A Response to the American View as Presented by Ruth Wedgwood*, 10 EUR. J. INT'L L. 109, 111 (1999).

54. See generally Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF.39/27, 1155 U.N.T.S. 331, 8 I.L.M. 679.

55. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 50, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 51, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 130, 6 U.S.T. 3316, 75 U.N.T.S. 238; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 147, 6 U.S.T. 3316, 75 U.N.T.S. 287.

56. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

57. Vienna Convention on the Law of Treaties, *supra* note 54, art. 26.

58. See Geneva Conventions, *supra* note 55.

59. See Bassiouni, *supra* note 48, at 164 ("Presently, over 155 countries have included [Geneva provisions] in their military laws . . .").

60. See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 55, art. 50.

ular trial, and unlawful confinement of a civilian.⁶¹ The Rome Statute reproduces this list in Article 8, subsection (2)(a).⁶²

Parties to the Geneva Conventions have an obligation to search for, prosecute and punish perpetrators of grave breaches of the Geneva Conventions unless they choose to hand over such persons for trial by another state party.⁶³ The Commentary to the Geneva Conventions, which is the official history of the negotiations leading to the adoption of these treaties, confirms that the obligation to prosecute Grave Breaches is "absolute," meaning, *inter alia*, that States Parties can under no circumstances grant perpetrators immunity or amnesty from prosecution for grave breaches of the Conventions.⁶⁴

It is important to recognize that there is no corresponding obligation to prosecute with respect to "other violations of the laws and customs of war" applicable in international armed conflicts, as listed in Article 8, subsection (2)(b) of the Rome Statute.⁶⁵ In addition, while states or international tribunals may prosecute persons who commit war crimes in internal armed conflicts (see Article 8, subsections (2)(c) and (2)(e) of the Rome Statute), the duty to prosecute grave breaches under the Geneva Conventions is limited to the context of international armed conflict.⁶⁶ Further, there is a high threshold of violence necessary to constitute a genuine armed conflict, as distinct from lower level disturbances such as riots or isolated and sporadic acts of fighting.⁶⁷ Moreover, to be an international armed conflict, the situation must constitute an armed conflict involving two or more states, or a partial or total occupation of the territory of one state by another.⁶⁸

2. The Genocide Convention

The International Court of Justice has determined that the substantive provisions of the Genocide Convention constitute customary international law binding on all states.⁶⁹ Like the Geneva Conventions, the Genocide Convention provides an absolute obligation to prosecute persons responsible for genocide as defined in the Convention.⁷⁰

61. *See id.*

62. Rome Statute of the International Criminal Court, art. 8(2)(a), U.N. Doc. A/Conf. 183/9, July 17, 1998, *reprinted in* 3 M. CHERIF BASSIOUNI, INTERNATIONAL CRIMINAL LAW 723, 726 (2d ed. 1999) [hereinafter Rome Statute].

63. *See, e.g.,* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 55, art. 49.

64. *See* VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 114 (1995) (*quoting* J. Pictet ed., COMMENTARY TO GENEVA CONVENTION I, Commentary to article 51, at 373); *see also* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 215 (1989).

65. Rome Statute, *supra* note 62, art. 8(2)(b).

66. *See* Geneva Conventions I, II, III, and IV, *supra* note 55, art. 2.

67. Rome Statute, *supra* note 62, arts. 8(2)(c), (f).

68. *See* Geneva Conventions I, II, III, and IV, *supra* note 55, art. 2.

69. *See* Reservations to the Convention on Genocide, 1951 I.C.J. 23 (advisory opinion).

70. Article 4 of the Genocide Convention states: "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are consti-

Both the Genocide Convention and the Rome Statute define genocide as one of the following acts when committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such":

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁷¹

There are several important limitations inherent in this definition. First, to constitute genocide, there must be proof that abuses were committed with the specific intent required by the Genocide Convention.⁷² It is not enough that abuses were intended to repress opposition—the intent must be literally to destroy the opposition.⁷³ Second, and even more importantly, the victims of such abuses must constitute one of the four specific groups enumerated in the Genocide Convention, namely, national, ethnic, racial, or religious groups.⁷⁴ In this respect, it is noteworthy that the drafters of the Genocide Convention deliberately excluded acts directed against "political groups" from the Convention's definition of genocide.⁷⁵

B. General Human Rights Conventions

General human rights conventions include the International Covenant on Civil and Political Rights,⁷⁶ the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁷⁷ and the American Convention on Human Rights.⁷⁸ Although these treaties do not expressly require states to prosecute violators, they do obligate states to "ensure" the rights

tutionally responsible rulers, public officials or private individuals." Article 5 requires states to "provide effective penalties" for persons guilty of genocide. See Genocide Convention, *supra* note 56, art. 4.

71. *Id.* art. II. See also Rome Statute, *supra* note 62, art. 6.

72. See Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMP. L.J. 1, 22-26 (1994).

73. See *id.* (describing the "intent to destroy").

74. See Genocide Convention, *supra* note 56.

75. The exclusion of "political groups" was due in large part to the fact that the Genocide Convention was negotiated during the Cold War, during which the Soviet Union and other totalitarian governments feared that they would face interference in their internal affairs if genocide were defined to include acts committed to destroy political groups. See L. KUPER, GENOCIDE 30 (1982). According to Professor Kuper, "one may fairly say that the delegates, after all, represented governments in power, and that many of these governments wished to retain an unrestricted freedom to suppress political opposition." *Id.*

76. International Covenant on Civil and Political Rights, 16 Dec. 1966, art. 15, 999 U.N.T.S. 171.

77. Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 221.

78. American Convention on Human Rights, adopted Jan. 7, 1970, O.A.S. Official Records, OEA/ser.K/XVI/1.1, doc. 65 rev. 1, corr. 1 (1970), reprinted in 9 I.L.M. 673 (1970).

enumerated therein. There is growing recognition that the duty to ensure rights implies a duty to hold specific violators accountable.⁷⁹

A careful examination of the jurisprudence of the bodies responsible for the implementation and enforcement of the conventions suggests that methods of obtaining specific accountability other than criminal prosecutions would meet the requirement of "ensuring rights."⁸⁰ This jurisprudence indicates that a state must fulfill five obligations in confronting gross violations of human rights committed by a previous regime. States must (1) investigate the identity, fate and whereabouts of victims; (2) investigate the identity of major perpetrators; (3) provide reparation or compensation to victims; (4) take affirmative steps to ensure that human rights abuse does not recur; and (5) punish those guilty of human rights abuse.⁸¹ Punishment can take many non-criminal forms, including imposition of fines, removal from office, reduction of rank, and forfeiture of government or military pensions and/or other assets.⁸²

C. Customary International Law: Crimes Against Humanity

The Rome Statute in Article 7 defines "crimes against humanity" as:

any of the following acts when committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecutions against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;

79. See Orentlicher, *Settling Accounts*, *supra* note 52, at 2568; Thomas Buergenthal, *To Respect and To Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS* 72, 77 (L. Henkin ed., 1981) ("obligation to 'ensure' rights creates affirmative obligations on the state—for example, to discipline its officials"); Yoram Dinstein, *The Right to Life, Physical Integrity, and Liberty*, in *THE INTERNATIONAL BILL OF RIGHTS* 114, 119 (L. Henkin ed., 1981) (Parties to the Covenant arguably must exercise due diligence to prevent intentional deprivation of life by individuals, "as well as to apprehend murderers and to prosecute them in order to deter future takings of life.").

80. See Scharf, *supra* note 3, at 41, 49-51; Valasquez, *Inter-Am. Ct. H.R. (ser. C) No. 4*, ¶¶ 164, 194; Gary Hermosilla et. al., case no. 10.843, *Inter-Am. C.H.R.* (1996), ¶¶ 57, 63, 66, 77.

81. See *id.*

82. See *id.*

- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.⁸³

Unlike grave breaches of the Geneva Conventions and the crime of genocide, no treaty exists requiring states to prosecute crimes against humanity, which are purely a creature of customary international law.⁸⁴ Traditionally, those who committed crimes against humanity were treated like pirates, as *hostes humani generis* (an enemy of all humankind),⁸⁵ and any state, including their own, could punish them through its domestic courts.⁸⁶ In the absence of a treaty containing the *aut dedere aut judicare* (extradite or prosecute) principle, this so called "universal jurisdiction" is generally thought to be permissive, not mandatory.⁸⁷ Yet, several commentators and human rights groups have recently taken the position that customary international law not only establishes permissive jurisdiction over perpetrators of crimes against humanity, but also requires their prosecution and prohibits amnesty for such persons.⁸⁸

There are strong jurisprudential reasons for recognizing such a rule. The perpetrator of crimes against humanity incurs criminal responsibility and is subject to punishment as a direct consequence of international law notwithstanding the national laws of any state or states to the contrary.⁸⁹ This unique characteristic of crimes under international law makes it questionable whether any state or group of states would be competent to negate this responsibility. Moreover, the notion of granting amnesty for crimes against humanity would be inconsistent with the principles of individual criminal responsibility recognized in the Nürnberg Charter and Judgment. The fundamental purpose of these principles is to remove any possibility of immunity for persons responsible for such crimes, from the most junior officer acting under the orders of his superior, to the most senior government officials, including the head of state.⁹⁰

Notwithstanding these jurisprudential justifications, there is scant evidence that customary international law requires the prosecution of crimes against humanity. Customary international law, which is just as binding

83. Rome Statute, *supra* note 62, art. 7.

84. The Charter of the Nürnberg War Crimes Tribunal was the first international instrument that codified crimes against humanity. See Charter of the International Military Tribunal annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, signed at London, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, as amended by the Berlin Protocol of 6 October 1995, reprinted in VIRGINIA MORRIS & MICHAEL P. SCHARF, 2 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 473-80 (1998).

85. See BLACK'S LAW DICTIONARY 664 (5th ed. 1979).

86. See Naomi Roht-Arriaza, *Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress*, in IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 25 (N. Roht-Arriaza ed., 1995).

87. See *id.* at 25.

88. See Carla Edelenbos, *Human Rights Violations: A Duty to Prosecute?*, 7 LEIDEN J. INT'L L. 5, 15 (1994); Orentlicher, *Settling Accounts*, *supra* note 52, at 2585, 2593; BASIOUNI, *supra* note 48, at 500-01; AMERICA'S WATCH, SPECIAL ISSUE: ACCOUNTABILITY FOR PAST HUMAN RIGHTS ABUSES 2 (Dec. 1989).

89. See Roht-Arriaza, *supra* note 86, at 25.

90. See MORRIS & SCHARF, *supra* note 64, at 112-13.

upon states as treaty law, arises from "a general and consistent practice of states followed by them from a sense of legal obligation" referred to as *opinio juris*.⁹¹ Under traditional notions of customary international law, "deeds were what counted, not just words."⁹² Yet, those who argue that customary international law precludes amnesty for crimes against humanity base their position on non-binding General Assembly Resolutions,⁹³ hortative declarations of international conferences,⁹⁴ and international conventions that are not widely ratified,⁹⁵ rather than on any extensive state practice consistent with such a rule.

Scholars have cited the U.N. Declaration on Territorial Asylum as the

91. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES Section 102(2) (1987); Statute of the International Court of Justice, art. 38(1)(b), 59 Stat. 1055, 1060 (1945) (explaining that sources of international law applied by the Court include "international custom, as evidence of a general practice accepted as law").

92. BRUNO SIMMA, *INTERNATIONAL HUMAN RIGHTS AND GENERAL INTERNATIONAL LAW: A COMPARATIVE ANALYSIS* 223 (1995).

93. See, e.g., *Declaration on Territorial Asylum*, G.A. Res. 2312, U.N. GAOR, 22d Sess., Supp. No. 16, at 81, U.N. Doc. A/6716 (1967); *Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity*, G.A. Res. 2712, U.N. GAOR, 25th Sess., Supp. No. 28, at 78-79, U.N. Doc. A/8028 (1970) (adopted by a vote of 55 in favor to 4 against with 33 abstentions) (condemning crimes against humanity and "call[ing] upon the States concerned to bring to trial persons guilty of such crimes"); G.A. Res. 2840, U.N. GAOR, 26th Sess., Supp. No. 29, at 88, U.N. Doc. A/8429 (1971) (adopted by a vote of 71 in favor to none against with 42 abstentions) (affirming that a state's refusal "to cooperate in the arrest, extradition, trial and punishment" of persons accused or convicted of crimes against humanity is "contrary to the purposes and principles of the Charter of the United Nations Charter and to generally recognized norms of international law"); *Principles of International Cooperation in the Detection, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074, U.N. GAOR, 18th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (1973) (adopted by a vote of 94 in favor to none against with 29 abstentions) (explaining that crimes against humanity "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, to punishment"); *Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, G.A. Res. 1989/65 (1989) (explaining that states shall bring to justice those accused of having participated in extra-legal, arbitrary or summary executions); *Declaration on the Protection of All Persons From Enforced Disappearances*, G.A. Res. 47/133 (1992) (equating disappearances to a crime against humanity and requiring states to try any person suspected of having perpetrated an act of enforced disappearance).

94. The final Declaration and Programme of Action of the 1993 World Conference on Human Rights affirms that "[s]tates should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law." World Conference on Human Rights, Declaration and Programme of Action, Vienna, June 1993, U.N. Doc. A/Conf./57/23, pt. 2.

95. See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 753 U.N.T.S. 73 (entered into force Nov. 11, 1970) (creating no statutory limitation for crimes against humanity, irrespective of the date of their commission), reprinted in 8 I.L.M. 68 (1969) (ratified by just 39 states). Even if the Convention was more widely ratified, the prohibition on applying a statute of limitations to crimes against humanity is not the equivalent of a duty to prosecute such crimes.

earliest international recognition⁹⁶ of a legal obligation to prosecute perpetrators of crimes against humanity. The Declaration provides that states shall not grant asylum to any "person with respect to whom there are serious reasons for considering that he has committed a . . . crime against humanity."⁹⁷ Yet, according to the historic record of this resolution, "[t]he majority of members stressed that the draft declaration under consideration was not intended to propound legal norms or to change existing rules of international law, but to lay down broad humanitarian and moral principles upon which States might rely in seeking to unify their practices relating to asylum."⁹⁸ This demonstrates that, from the outset, the General Assembly resolutions concerning crimes against humanity were not intended to create any binding duties.⁹⁹

In addition to this contrary legislative history, the problem with an approach which bases the existence of customary international law so heavily on words rather than deeds is "that it is grown like a flower in a hot-house and that it is anything but sure that such creatures will survive in the much rougher climate of actual state practice."¹⁰⁰ To the extent that any state practice in this area is widespread, it is the practice of granting amnesties or de facto impunity to those who commit crimes against humanity.¹⁰¹ That the United Nations itself has felt free of legal constraints in endorsing amnesty for peace deals confirms that customary international law has not yet crystallized in this area.¹⁰²

III. Amnesty and the Rome Statute

The preceding discussion indicates that there are frequently no international legal constraints to the negotiation of an amnesty for peace deal. Moreover, swapping amnesty for peace can serve the interests of both peace and justice in certain circumstances. During the Rome Statute negotiations, the United States and a few other delegations expressed concern that the International Criminal Court would hamper efforts to halt human rights violations and restore peace and democracy in places like Haiti and South Africa.¹⁰³

According to Philippe Kirsch, the Chairman of the Rome Diplomatic Conference, the issue was not definitively resolved during the Diplomatic

96. G.A. Res. 2312, U.N. GAOR, 22d Sess., Supp. No. 16, at 81, U.N. Doc. A/6716 (1967). See *supra* note 88.

97. *Id.* Even if the Declaration were binding, the prohibition on granting asylum is not the equivalent of a duty to prosecute.

98. 1967 U.N.Y.B. 759.

99. See *id.*

100. SIMMA, *supra* note 92, at 217.

101. See Scharf, *supra* note 3, at 41, 57-58 (citing numerous examples of amnesty and de facto impunity).

102. See *id.*

103. See ICC PrepCom — August 1997, U.S. Delegation Draft (Rev.) (on file with the author); Hafner et al., *supra* note 53, at 108, 109.

Conference.¹⁰⁴ Rather, the provisions that were adopted reflect “creative ambiguity”¹⁰⁵ which could potentially allow the prosecutor and judges of the International Criminal Court to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the court.¹⁰⁶

A. The Preamble

The Rome Statute’s Preamble suggests that deferring a prosecution because of the existence of a national amnesty would be incompatible with the purpose of the Court, namely to ensure criminal prosecution of persons who commit serious international crimes.¹⁰⁷ In particular, the Preamble:

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

Recall[s] that it is the duty of every State to exercise its *criminal jurisdiction* over those responsible for international crimes.

[And] Emphasiz[es] that the International Criminal Court established under this Statute shall be complementary to *national criminal jurisdictions*.¹⁰⁸

The Preamble’s language is important because international law provides that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁰⁹ Thus, the Preamble constitutes a critical source of interpretation because it indicates both the treaty’s context and its object and purpose. Yet, notwithstanding this language, there are several articles of the Rome Statute¹¹⁰ that might be read as permitting the Court under certain circumstances to recognize an amnesty exception to its jurisdiction.¹¹¹ The apparent conflict between these Articles and the Preamble reflect the schizophrenic nature of the negotiations at Rome: the preambular language and the procedural provisions were negotiated by entirely different drafting groups, and in the rush of the closing days of the Rome Conference, the Drafting Committee never fully integrated and reconciled the separate portions of the Statute.¹¹²

B. Article 16: Action by the Security Council

With respect to a potential amnesty exception, the most important provision of the Rome Statute is Article 16. Under Article 16, the International Criminal Court would be required to defer to a national amnesty if the

104. The author discussed this issue with Mr. Kirsch during an international conference in Strasbourg, France, on November 19, 1998.

105. *Id.*

106. *Id.*

107. See Rome Statute, *supra* note 62, preamble.

108. *Id.* (emphasis added).

109. Vienna Convention on the Law of Treaties, *supra* note 54, art. 31(1).

110. See *infra* Part III.B-D.

111. See *id.*

112. The author confirmed this with the Chairman of the Drafting Committee, M. Cherif Bassiouni.

Security Council adopts a resolution under Chapter VII of the United Nations Charter requesting the Court not to commence an investigation or prosecution, or to defer any proceedings already in progress.¹¹³ The Security Council has the legal authority to require the Court to respect an amnesty if two requirements are met, namely: (1) where the Security Council has determined the existence of a threat to the peace, a breach of the peace or an act of aggression under Article 39 of the U.N. Charter; and (2) where the resolution requesting the Court's deferral is consistent with the purposes 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 U.N. Charter.¹¹⁴

The decision of the Appeals Chamber of the Yugoslavia Tribunal in the *Tadic* case suggests that the International Criminal Court could assert that it has the authority to independently assess whether these two requirements were met as part of its incidental power to determine the propriety of its own jurisdiction (*competence de la competence*).¹¹⁵ This aspect of the Appeals Chamber decision has been characterized by one commentator as "strongly supporting those who see the U.N. Charter not as unblinkered license for police action but as an emerging constitution of enumerated, limited powers subject to the rule of law."¹¹⁶ It is possible, then, that the International Criminal Court would not necessarily be compelled by a Security Council Resolution to terminate an investigation or prosecution were it to find that an amnesty contravenes international law.

While an amnesty accompanied by the establishment of a truth commission, victim compensation, and lustration might be in the interests of justice in the broad sense, it would nonetheless be in contravention of international law where the grave breaches provisions of the 1949 Geneva Conventions or the Genocide Convention are applicable.¹¹⁷ It is especially noteworthy that the Geneva Convention requires parties "to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the Convention,"¹¹⁸ and that the Genocide

113. Article 16 of the Rome Statute, titled, "Deferral of investigation or prosecution," states:

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

Rome Statute, *supra* note 62, art. 16.

114. See U.N. CHARTER art. 24.

115. Prosecutor v. *Tadic* Case No. IT-94-I-AR72 (Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995), at 6.

116. Jose E. Alvarez, *Nuremberg Revisited: The Tadic Case*, 7 EUROPEAN JOURNAL OF INTERNATIONAL LAW 245, 249 (1996).

117. See *supra* notes 55-75 and accompanying text.

118. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 55, art. 49.

Convention requires parties "to provide effective penalties for persons guilty of genocide."¹¹⁹ This would suggest that the International Criminal Court might not defer to the Security Council under Article 16 of the Rome Statute where the accused is charged with grave breaches of the 1949 Geneva Conventions or the crime of genocide. A counter argument can be made, however, that the Rome Statute codifies only the substantive provisions of the 1949 Geneva Conventions and the Genocide Convention, and does not incorporate those procedural aspects of the Conventions that require prosecution.¹²⁰ Accordingly, the nature of the charges might constitute a significant factor to be considered, but would not necessarily be a bar to recognizing an amnesty.

C. Article 53: Prosecutorial Discretion

Where the Security Council has not requested the International Criminal Court to respect an amnesty-for-peace deal and thereby to terminate a prosecution, the Court's Prosecutor may nevertheless choose to do so under Article 53 of the Rome Statute.¹²¹ That Article permits the Prosecutor to decline to initiate an investigation (even when a state party has filed a complaint) where the Prosecutor concludes there are "substantial reasons to believe that an investigation would not serve the interests of justice."¹²² However, the decision of the Prosecutor under Article 53 is subject to review by the Pre-Trial Chamber of the Court.¹²³ In reviewing whether respecting an amnesty and not prosecuting would better serve "the interests of justice," the Pre-Trial Chamber would have to evaluate the benefits of a particular amnesty and consider whether there is an international legal obligation to prosecute the offense.¹²⁴

D. Article 17: Complementarity

Where neither the Security Council nor the Prosecutor has requested the International Criminal Court to defer to a national amnesty, the concerned state can attempt to raise the issue under Article 17(1)(a) of the Rome Statute.

119. Genocide Convention, *supra* note 56, art. V.

120. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 55, art. 49.

121. Article 53 of the Rome Statute, entitled, "Initiation of an Investigation," provides in part:

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

- (c) 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.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

Rome Statute, *supra* note 62, art. 53.

122. *Id.*

123. *See id.* art. 53(3).

124. *See supra* Part II.

ute.¹²⁵ Article 17(1)(a) requires the Court to dismiss a case where “the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”¹²⁶ It is significant that the Article requires an investigation but does not specify a criminal investigation.¹²⁷ The concerned state could argue that a truth commission (especially one modeled on that of South Africa) constitutes a genuine investigation.¹²⁸ On the other hand, subsection (2) of the Article suggests that the standard for determining that an investigation is not genuine is whether the proceedings are “inconsistent with an intent to bring the person concerned to justice”¹²⁹ — a phrase which might be interpreted as requiring criminal proceedings.

E. Article 20: *Ne Bis In Idem*

Finally, the accused can attempt to raise the issue under Article 20, which codifies the *ne bis in idem* principle.¹³⁰ Article 20 provides:

No person who has been tried by another court for conduct also proscribed under [the jurisdiction of the international criminal court] shall be tried by the Court with respect to the same conduct unless the proceedings in the other Court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.¹³¹

Relying on this provision, the accused could argue that his or her confession before a truth commission, and any attendant penalties, is the functional equivalent of having been tried and convicted for the same offense that he or she is charged with by the International Criminal Court.

There are two problems with this argument, however. First, the provision speaks of trial by “another court,” and a truth commission is not a court; second, as with Article 17, Article 20 is not applicable to proceedings “inconsistent with an intent to bring the person concerned to justice.”¹³²

Conclusion

David J. Scheffer, the U.S. Ambassador-at-Large for War Crimes Issues has remarked that “one must understand that amnesty is always on the table in

125. See Rome Statute, *supra* note 62, art. 17(1)(a).

126. *Id.* art. 17(a).

127. See *id.*

128. See *id.*

129. *Id.* art. 17(2).

130. The international law equivalent to the prohibition against double jeopardy.

131. Rome Statute, *supra* note 62, art. 20.

132. *Id.*

[peace] negotiations.”¹³³ Ambassador Scheffer is largely correct in that there are frequently no legal constraints to the negotiation of an amnesty-for-peace deal.¹³⁴ This is because international procedural law imposing a duty to prosecute is far more limited than the substantive law establishing international offenses.

This can be illustrated with the situation in Kosovo in the spring of 1999. The reported Serb atrocities against the Kosovo Albanians would certainly constitute crimes against humanity and war crimes in an internal armed conflict, but they would not amount to grave breaches of the Geneva Conventions and it is not at all clear that acts of genocide had been committed.¹³⁵ Since there is no international duty to prosecute crimes against humanity, or war crimes in an internal conflict, an amnesty for peace deal would not violate international law.¹³⁶ Thus, the rejection of such a deal by the NATO negotiators was a political, not a legal, decision. Had an amnesty-for-peace deal been employed to end the Kosovo conflict, and had there existed an ICC with jurisdiction over the matter, what would have been the consequences? The answer would depend on the contours of the amnesty arrangement.

The Rome Statute is purposely ambiguous on the question of whether the International Criminal Court should defer to such an amnesty-for-peace arrangement in deciding whether to exercise its jurisdiction.¹³⁷ While amnesties are often a necessary bargaining chip in negotiations for the peaceful transfer of political power, it must be recognized that amnesties may vary greatly.¹³⁸ Some, as in South Africa, are closely linked to mechanisms for providing accountability and redress;¹³⁹ others are simply a mindful forgetting. The International Criminal Court should take only the former types of amnesties into account in prosecutorial decisions. Moreover, the Court should be particularly reluctant to defer to an amnesty in situations involving violations of international conventions that create obligations to prosecute.

Thus, in determining whether to defer to an amnesty arrangement in accordance with Articles 16, 53, 17, or 20 of its statute, the International Criminal Court should consider the following six questions: (1) Do the offenses constitute grave breaches of the Geneva conventions or genocide, for which there is an international obligation to prosecute? (2) Would an end to the fighting or transition from repressive rule have occurred without some form of amnesty agreement? (3) Has the State or international community instituted a mechanism designed to discover the truth about victims and attribute individual responsibility to the perpetrators? (4) Has the State provided victims with adequate reparation and/or compensation? (5)

133. Remarks by David Scheffer at International Law Weekend (Nov. 2, 1996), *quoted in* Scharf, *supra* note 3, at 60.

134. *See supra* Part II.

135. *See supra* notes 26-37 and accompanying text.

136. *See supra* Part II.

137. *See supra* Part III.

138. *See, e.g., supra* Part I.A.

139. *See supra* Part I.A.2.

Has the State implemented meaningful steps to ensure that violations of international humanitarian law and serious human rights abuses do not recur? (6) Has the State taken steps to punish those guilty of committing violations of international humanitarian law through non-criminal sanctions, such as imposition of fines, removal from office, reduction of rank, and forfeiture of government or military pensions and/or other assets?¹⁴⁰ Even where the answers to the above questions suggest that the particular amnesty arrangement serves both the interests of peace and justice, the International Criminal Court should defer prosecution only in the most compelling of cases in light of its core purpose as reflected in the Preamble to the Rome Statute.

140. See Norman Dorsen & Paul van Zyl, *Justice Without Punishment: Guaranteeing Human Rights in Transitional Societies* 16-19 (1999) (unpublished manuscript, on file with the author).