The International Criminal Court and National Amnesty

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I INTRODUCTION

Following the establishment of the International Criminal Court ("ICC"), one of the most controversial and practically relevant issues is whether the ICC, in investigating a State emerging from internal wars or conflicts, should respect an amnesty declared by a national government for the perpetrators of international crimes. An amnesty is different from other measures such as a pardon. While a pardon is a post-conviction measure, granted to individuals on the basis of individualised considerations, amnesty is a pre-conviction measure, granted to groups of people on the basis of public policy concerns. A pardon does not vitiate guilt for the underlying offence, whereas an amnesty erases the underlying offence itself.[1]

A declaration of amnesty by a national government means there is no criminal trial for the alleged offenders in the domestic sphere and may lead to impunity for the perpetrators at the international criminal level. This is especially problematic given the atrocity of international crimes. For example, a United Nations ("UN") report shows that there were 380 cases involving human rights abuses reported in the border area between Uganda and Ituri in the period of a few months in 2003, which included killings, forced disappearances, mutilations, and rape.[2] Any suggestion that those who are responsible for such horrible crimes may escape criminal prosecution would ordinarily be counter-intuitive. However, in certain situations, a national government may have persuasive reasons to declare amnesty, including the pursuit of peace and stability in newly emerging but divided and fragile democratic societies.[3]

Part two of this article will examine various legal, political, and moral arguments surrounding any acceptance by the ICC of an amnesty declared by a national government. It will investigate the implications of several articles in the Rome Statute, which is silent on the issue of amnesty, and then analyse international treaties and customary international law to see whether there is a duty to prosecute, notwithstanding a national amnesty. Part three will analyse the theoretical foundations of various concepts, of international criminal law in the context of the amnesty issue, examining competing social, political, and moral factors. Finally, it will discuss how the amnesty issue reveals three fundamental dilemmas inherent in international law, while evaluating the options for the ICC when faced with such a situation.

It is submitted that both ICC prosecution and amnesty are each necessary in different situations. There is no consensus as to the theoretical superiority of either

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[1] Roht-Arriaza, "Punishment, Redress, and Pardon: Theoretical and Psychological Approaches" in Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (1995) 22.

[2] *Fourteenth Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of Congo*, SC Res 1493,UN Doc S/2003/1098 (2003).

[3] For examples of national amnesty laws, see O'Shea, *Amnesty for Crime in International Law and Practice* (2002) 34-71. For the history of the development of the use of amnesty, see Ibid 7–23.

measure, due to differing values and ideas about the identity of international law. This article recommends ICC prosecution with an exception, respecting conditional amnesty where absolutely necessary. Such an option, although uncertain in its application, best accommodates both sides' interests and concerns.

II LEGAL ARGUMENTS

The Rome Statute

The first avenue of analysis ought to be the founding and governing document of the ICC – the Rome Statute. While the Rome Statute does not expressly deal with the issue of amnesty, there are several articles that may have implications for this issue.

1 Article 17: Issues of admissibility

Article 17.1 of the Rome Statute states that where the case is being investigated or prosecuted by a State, or where the case has been investigated by the State and the State has made a decision not to prosecute, a case cannot be brought at the ICC unless the State is unwilling or genuinely unable to carry out an investigation or prosecution. Article 17.2 defines unwillingness on the part of a State and article 17.3 defines inability. Article 17.2 seems to look primarily at legal factors, such as a national decision not to prosecute made in order to shield the alleged offenders, an unjustified delay in the proceeding, or if the proceedings were conducted in a biased manner which is inconsistent with the objective of bringing the perpetrator to justice. In determining whether the State was in fact unable to investigate or prosecute, article 17.3 expressly mentions factors such as inability to obtain evidence or testimony due to collapse of the national judiciary. The important question is whether a national government's decision to declare an amnesty can be categorised as "unwillingness" or "inability" under article 17.

The pro-amnesty side argues that amnesty with some components of investigation may qualify under this provision[4] and would thereby render a case inadmissible at the ICC. The text does not specify that the "investigation" under article 17.1 must be a criminal investigation, and so the component of investigation may be satisfied by the activities of a national Truth Commission.[5] This may be an acceptable compromise between ICC prosecution and impunity, but for the Truth Commission to qualify as conducting or having already conducted an investigation, so as to exclude the ICC's jurisdiction, the Commission ought to have inquired into facts in a sufficiently rigorous and independent way.[6] The decision not to prosecute must stem from the actual investigation to avoid controversy as to the meaning of "unwillingness" or "inability". Article 17.1 and 17.2 require a State to conduct a proper investigation of events in order to exclude ICC jurisdiction. Such an investigation may be an appropriate compromise for both sides. In that situation, article 17.1 certainly would not provide impunity from ICC prosecution where a national amnesty exists.

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[4] Young, "Amnesty and Accountability" (2002) 35 UC Davis L Rev 427, 466.

[5] Scharf, "The Amnesty Exception to the Jurisdiction of the ICC" (1999) 32 Cornell Int'L LJ 507, 525.

[6] Broomhall, *International Criminal Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2002) 101.

The pro-prosecution side has a weak but nonetheless valid argument that national amnesty does not fall within article 17.1. In article 17.1(b), which refers to situations where "[t]he case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned", the references made to "the case" and "the person" suggest that the text contemplates the State making individual decisions not to prosecute in individual cases. This further suggests that a blanket amnesty, without investigation, which would not involve any decision-making about prosecution of individual cases, does not fall under the ambit of article 17.[7] This argument is not so strong in that it is a technical argument, turning on two particular words in one of four sub-provisions, but it reflects the Rome Statute's unfavourable stance to blanket amnesty.

The pro-prosecution side has several strong arguments supporting the proposition that a national amnesty is captured by "unwillingness" or "inability". The literal meanings of "unwillingness" and "inability" under article 17.1(a) prima facie seem to include general and deliberate failure to investigate, and seems to capture a situation such as a de facto amnesty.[8] It is argued that a declaration of amnesty or a de facto amnesty demonstrates that the State is unwilling or unable to genuinely investigate or prosecute perpetrators. Regardless of whether the word "State" refers to the government or the judiciary, either interpretation supports the view that amnesty constitutes "unwillingness" and "inability" of the State under article 17.1(a).

Furthermore, the pro-prosecution side points to article 17.2(a), which specifies that when the State makes a decision not to prosecute in order to shield the alleged offenders, the case is admissible at the ICC. The provision seems to suggest that the subjective intention of the State is important. The pro-prosecution side argues that in granting amnesty, shielding is an intended consequence, whatever the primary intention of the State may have been,[9] and the case ought to be admissible at the ICC. The pro-amnesty side may respond that the shielding of the perpetrators has not been intended, but is a mere by-product of a decision not to prosecute, made for the purpose of national reconciliation.[10] This interesting argument turns on the difficult matter of interpreting the subjective intention of a government. However, given that the result - shielding the perpetrators - is a naturally flowing consequence of a declaration of amnesty, there would be a strong presumption that the government had at least partially intended that.

Article 17.2(c) states that a case is admissible at the ICC if the national proceeding is conducted in a biased manner, which is inconsistent with the object of bringing the person concerned to justice. The pro-prosecution side argues that the declaration of amnesty could be viewed as being inconsistent with that object.[11] However, this point is not as strong as other arguments in that article 17.2(c) has two parts to it, and both parts need to be satisfied. As well as inconsistency with the intent to bring the person to justice, the proceeding must be conducted in a biased manner. The wording suggests the provision deals with a situation where there has already, in fact, been a domestic prosecution. Hence, where there has been a declaration of

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[7] Cameron, "Jurisdiction and Admissibility Issues Under the ICC Statute" in McGoldrick et al (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 91.

[8] Ibid 90.

[9] Gavron, "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court" (2002) 51 Int'L & Comp L Q 91, 111.

[10] Roht-Arriaza, "Amnesty and the International Criminal Court" in Shelton (ed), *International Crimes, Peace, and Human Rights: the Role of the International Criminal Court* (2000) 79.

[11] Gavron, supra note 9, 111.

amnesty such that no prosecution occurs, the situation is outside of the scope of article 17.2(c).

The pro-amnesty side argues that bringing the person concerned to justice may broadly include a Truth Commission, and may not refer only to a judicial proceeding.[12] However, the pro-prosecution side interprets the same phrase in the opposite way, arguing that "bringing the person concerned to justice" contemplates a criminal prosecution.[13] A clue may be found in article 17.3, where "inability" is explained as a situation where "due to a total or substantial collapse or unavailability of its *national judicial system*, the State is...unable to carry out its *proceedings*."[14] "Proceeding" suggests that the drafters of the Rome Statute meant a proceeding conducted by a national judiciary, rather than by a Truth Commission. Hence, article 17.2(c) does not seem to support the pro-amnesty argument.

At a general level, the fact that the issue of amnesty was raised at the Rome conference, but the wording of article 17 has not been changed to accommodate this issue, implies that the drafters of the Rome Statute may have accepted amnesty as an exception to ICC jurisdiction.[15] However, again, this point does not render a decisive answer as to the implications of article 17 as the drafters may have simply canvassed the range of opinions and intended for the Court to handle this delicate issue.

On balance, article 17 does not give a decisive advantage to either side. While article 17.1(a) and 17.2(a) seem to support the pro-prosecution side, based on the literal meaning of the language, it is a difficult proposition to be fully committed to as the drafters have not expressly included amnesty in their definitions of "unwillingness" or "inability". Article 17.2(c) fails to shed light on this issue. Perhaps the most certain thing that can be said about article 17 is that it reveals distaste for blanket amnesty declared without investigation.

2 Article 16: Deferral of investigation or prosecution

Article 16 of the Rome Statute states that when the UN Security Council adopts a resolution under Chapter VII of the UN Charter, requesting that the ICC defer investigation or prosecution, the ICC must comply with such a request for 12 months, whereupon the Security Council may renew the same request. The pro-amnesty side argues that the Rome Statute impliedly acknowledges the amnesty exception by giving this power to the Security Council, who may exercise this power to uphold an amnesty declared by the relevant State.[16] However, it is difficult to see how article 16 advances the position of the pro-amnesty side. Rather, article 16 would support the pro-prosecution side by implying that the drafters of the Rome Statute must have intended for the ICC to focus only on the legal dimensions of the case, and the Security Council to deal with the political and social dimensions of the case, such as the pursuit of peace and reconciliation contemplated by a declaration of amnesty.[17] Article 16 should encourage the ICC to press ahead with prosecution until the Security Council intervenes to respect the amnesty where necessary.

There is a rather radical view that even when the Security Council intervenes

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[12] Young, supra note 4, 468.

[13] Scharf, supra note 5, 525; Roht-Arriaza, supra note 10, 79.

[14] Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 37 ILM 999, Art 17.3 (entered into force 1 July 2002) ["Rome Statute"] [Emphasis Added].

[15] Cameron, supra note 7, 91.

[16] O'Shea, supra note 3, 124-125.

[17] Ibid 328.

with such a resolution, the ICC may ignore the resolution and press ahead with prosecution in certain situations. This argument concerns the constitutional relationship between the Security Council and other international bodies, namely the amenability of a Security Council Chapter VII determination to judicial review. Such a complex issue is outside of the scope of this article, and in reality, the ICC is highly unlikely, for political reasons, to challenge a Security Council resolution.

In any event, despite a strong pro-prosecution argument based on article 16, the drafters may not have contemplated the amnesty situation when drafting that article. National amnesty law is usually declared as a result of a peace agreement, which would bring relative peace and stability in the domestic context. In such a case, the Security Council is unlikely to be required to make a Chapter VII determination.[18] Also, the instruction to defer a prosecution, although renewable, lasts only for a period of 12 months. This suggests that article 16 was intended only as a delay mechanism, to prevent interference in the Security Council's pursuit of a peace agreement or domestic stability.[19]

Article 16 does not authorise the ICC to distinguish and disregard non-legal considerations from its work. Rather, article 16 is a peculiar provision that expressly promotes political considerations over legal ones only on the specific occasion of a Security Council Chapter VII determination, for 12 months. Article 16 gives clarity only in this narrow area, and does not relieve the ICC Prosecutor of considering all political, social, and moral factors in deciding whether to bring a prosecution. Hence, article 16 ought not to be relied on for the general proposition that the ICC should press ahead with prosecution notwithstanding a national amnesty.

3 Article 53: Initiation of an investigation

Article 53.2(c) of the Rome Statute confers a wide discretionary power on the ICC prosecutor. It allows the prosecutor to choose not to prosecute the alleged offenders if the prosecution is not in the interests of justice, taking into account all of the circumstances, "including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime"[20]. The implications of article 53 for the amnesty issue are dependent on which notion of "justice" the Rome Statute is referring to – justice in a judicial sense or justice in a social sense (although the two are often not clearly distinct).[21]

The pro-amnesty side points to the fact that article 53 is framed widely such that it ought to grant the prosecutor discretionary power to take national amnesty into account.[22] However, the notion of the prosecutor taking political factors into account may be problematic in that it would involve speculation about the future.[23] This begs the question as to what mandate the prosecutor has in deciding what is just in a social and political sense.[24] The prosecutor, who may lack an understanding of the delicate mixture of values and history of a particular State, as well as any democratic mandate,

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[18] Gavron, supra note 9, 108-109.
[19] Ibid 109.
[20] Rome Statute, supra note 14, Art 53.2(c).
[21] See Gavron, supra note 9, 110.
[22] Cameron, supra note 7, 91.
[23] Gavron, supra note 9, 110.
[24] Rubin, "The International Criminal Court, a Skeptical Analysis" in Schmitt, *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of his Eightieth Birthday* (2000) 426.

would be making decisions about the future of the State and its people, which necessarily involves much speculation and uncertainty. On the other hand, the pro-prosecution side argues that "justice" refers to the judicial sense, because article 53 suggests that the interests of justice ought to be considered in light of the question of whether to proceed to prosecute under the Statute.[25]

Whether prosecution serves the interests of justice depends on which notion of justice is referred to. As there is no clear guideline on this issue, article 53 fails to make a decisive point about the amnesty issue. However, it is to be noted that in practice, under article 53, the prosecutor can wait and see what the practical effect of the amnesty is before exercising his prosecutorial discretion.[26]

4 Preamble

The Rome Statute preamble reflects the strong emphasis the Statute places on ensuring individual accountability for human rights abusers.[27] The preamble affirms "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"[28] and that impunity of these perpetrators must be ended. Article 31.1 of the Vienna Convention on the Law of Treaties states 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"[29]. The preamble is thus a critical guide to interpretation.[30] Deferring to amnesty is arguably incompatible with the purpose of ending impunity for human rights violators. However, the preamble also displays respect for national sovereignty, and places emphasis on the complementarity of the ICC jurisdiction with national criminal jurisdiction.

Overall, while articles 16, 17, 53, and the preamble of the Rome Statute give rise to some persuasive arguments on the issue of amnesty, they fail to give a decisive answer. It is necessary to look outside of the Statute in search of more guidance.

International Law Rules on Amnesty

The next avenue of analysis lies in considering how treaties and customary international law view the practice of granting national amnesty for the perpetrators of international crimes in internal conflicts. Article 6(5) of Protocol II Additional to the Geneva Conventions (Protocol II)[31] states that the national authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in or are deprived of liberty by the armed conflict. This is the only reference to amnesty in a major international instrument,[32] and the effect of this provision is hotly debated.

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[25] O'Shea, supra note 3, 317.

[26] Vohrah (ed), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (2003) 136.

[27] Young, supra note 4, 471.

[28] Rome Statute, supra note 14, Preamble.

[29] Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331, Art 31(1) (entered into force 27 January 1980) ["Vienna Convention"].

[30] Scharf, supra note 5, 522.

[31] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) ["Protocol II"].

[32] Gallagher "No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone" (2001) 23 Thomas Jefferson LR 149, 176.

On one hand, the South African Constitutional Court in *Azanian Peoples Organisation (AZAPO) v The President of the Republic of South Africa*[33] held that amnesty can be granted for internal armed conflicts and the human rights abuses committed during apartheid. The Court referred to article 6(5) to support this view.[34] Accordingly, since the granting of amnesty is expressly allowed for by law, ICC prosecution would naturally be prohibited by a declaration of amnesty after the end of an internal armed conflict. However, the International Committee of the Red Cross argues that article 6(5) only applies to "combatant immunity": immunity for enemy combatants from detainment or punishment, granted at the end of a conflict as long as he or she was not involved in violations of international humanitarian law. Under this interpretation, article 6(5) does not apply to amnesty for international crimes.[35] Gavron claims that otherwise the law would be "out of step with the recent extension of international humanitarian law into the arena of internal conflicts"[36]. Some others even suggest that "the broadest possible amnesty", which article 6(5) would allow, only refers to acts that the national criminal law would prosecute, not the acts that would incur individual responsibility under international law.[37]

The "combatant immunity" argument seems to be far-fetched. There is evidence that at the plenary meeting for Protocol II, the Soviet Union proposed rules for punishment of crimes against humanity, which were rejected by other State parties.[38] This suggests that the parties still wanted to give governments power to grant amnesty, even if crimes against humanity were committed during the conflict.

Furthermore, according to article 31.1 of the Vienna Convention on the Law of Treaties, the purpose of the treaty is important. The purpose of article 6(5) is to regard any decision about a State's internal conflicts as being the domain of the particular State. It would be controversial if the pro-prosecution side sought to apply the (disputed) purpose, of ending of impunity at all cost, mechanically without any sound discussion and consensus. Implying a term, such as "combatant immunity", into the provision must be done with the utmost caution, and the wording does not seem to support such an implication.

The most that the pro-prosecution side can argue is that Protocol II, by including words such as "shall endeavour", is not a strict mandatory provision but more flexible.[39] While article 6(5) aims to enable States to have the final say whether to grant amnesty or not,[40] the provision also shows that amnesty is not an exclusively domestic matter but is subject to international regulation.[41] Overall, while article 6(5)

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[33] [1996] ICHRL 53 (25 July 1996) [30]

[34] Sadat, "Universal Jurisdiction, National Amnesties, and Truth Commission: Reconciling the Irreconcilable" in Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (2004) 202-203.

[35] Burke-White, "Protecting the Minority: A Place for Impunity? An Illustrated Survey of Amnesty Legislation, Its Conformity with International Legal Obligations, and Its Potential as a Tool for Minority-Majority Reconciliation" (2000) JEMIE 1, 46.

[36] Gavron, supra note 9, 101-103.

[37] Broomhall, supra note 6, 96. See additionally Voort and Zwanenburg, "Amnesty and the Implementation of the ICC" in Haveman et al (eds), *Supranational Criminal Law: a System Sui Generis* (2003) 310-311.

[38] Gallagher, supra note 32, 178.

[39] Roht-Arriaza, "Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitation, and Superior Orders" in Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (1995) 59 ["Special Problems of a Duty to Prosecute"]; Gallagher supra note 32, 177.

[40] Gallagher, supra note 32, 177.

[41] Roht-Arriaza, Special Problems of a Duty to Prosecute, supra note 39, 59.

of the Protocol II seems to encourage the granting of amnesty at the end of internal armed conflicts, there is lingering doubt as to its status as a mandatory rule, due to its rather inflexible wording, the changing nature of internal armed conflict and the erosion of national sovereignty. Also, the ICC may not be bound by such a rule, especially when the Rome Statute is silent on the issue. Nevertheless, article 6(5) will be an important factor to consider when deciding whether to prosecute.

The position on prosecution notwithstanding amnesty at customary international law is more ambiguous. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in *Prosecutor v Furundzija,*[42] although obiter, expressly rejected the recognition of national amnesty for torture.[43] The Inter-American Commission on Human Rights also rejected a Uruguayan amnesty as a defence to human rights violations.[44] The less extreme pro-prosecution view is reflected in the *UN Draft Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*[45]. Principle 25 states that national amnesty does not cover international crimes, unless the State investigated, prosecuted and punished the offenders, and provided an effective remedy to the victims.[46] The UN Human Rights Committee also recommended that the Uruguayan amnesty law change, in order to ensure that victims of past abuses receive an effective remedy.[47]

While there are ample examples of customary international law supporting prosecution notwithstanding amnesty, there are also many examples that support the converse view. Notably, there have been many situations where international bodies supported amnesty as a means to end an internal conflict and restore peace and democratic government. Such examples include the UN endorsing the granting of amnesty in South Africa, Cambodia, El Salvador, and Haiti.[48] In addition, higher courts of Chile, El Salvador, Guatemala, Peru, and South Africa have confirmed that there is no express duty to investigate and prosecute in light of an amnesty,[49] and the silence of the Rome Statute on this issue also tends to support the view that there is no rule requiring prosecution in customary international law. Hence, the state practice has been too ambiguous to extract any clear and consistent rule of customary international law.[50]

Duty to Prosecute International Crimes

A duty to prosecute certain international crimes exists in international law. Such a duty has been assumed by States through treaties, and so this duty is not automatically

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[42] *Prosecutor v Furundzija* (1999) 38 LLM 317, [155].
[43] O'Shea, supra note 3, 314.
[44] Roht-Arriaza, Special Problems of a Duty to Prosecute, supra note 39, 61. See ibid 62-63 for analysis of whether a doctrine of derogability and defence of necessity are applicable to obligations under the International Covenant, the European Convention, and the American Convention.
[45] Joinet *Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political), annexed to a decision of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* UN Doc E/CN/4/Sub.2/1997/20/Rev 1 (1997).
[46] O'Shea, supra note 3, 321.
[47] Roht-Arriaza, Special Problems of a Duty to Prosecute, supra note 39, 60.
[48] Roht-Arriaza, "Conclusion: Combating Impunity" in Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (1995) 299; Sadat, supra note 34, 203; Scharf, supra note 5, 507.
[49] Sadat, supra note 34, n97.
[50] See also Voort, supra note 37, 313-314.

imposed on the ICC.[51] However, it would be inappropriate for the ICC to decide not to prosecute the alleged offenders of international crimes, citing a national amnesty, when international conventions confer a duty to prosecute on State parties.[52] Also, when the ICC acts in accordance with the duty imposed on the State actors, it will contribute to the uniformity of law, and serve the ICC's purpose in providing a reliable forum for prosecution of alleged offenders of international crimes.

1 Duty to prosecute under the Geneva and Genocide Conventions

The Geneva Conventions 1949 and the Genocide Convention 1951[53] create a positive duty on States to prosecute persons charged with acts prohibited therein.[54] Article 49 of the first,[55] article 129 of the third,[56] and article 146 of the fourth[57] Geneva Convention provide that any State party "shall search for...and shall bring [perpetrators]...before its own courts." The Commentary to the Geneva Conventions states that the duty to prosecute is absolute.[58] Articles 50, 130, and 147 of the respective Conventions also specify a list of prohibited acts, which are reproduced in article 8.2(a) of the Rome Statute.

However, it is to be noted that only Common Article 3 of the Geneva Conventions addresses internal conflicts and its language does not impose on States a duty to prosecute alleged offenders in internal conflicts. Thus the relevance of the Geneva Conventions is limited, as the issue of amnesty occurs primarily in internal conflicts. However, the Conventions at least provide an indication of a particular international legal trend that the ICC ought to be aware of. Article 6 of the Genocide Convention also imposes a duty on the State parties to prosecute perpetrators of genocide.[59] Article 6 expressly mentions that such an offender shall be tried either in a national or an international penal tribunal.[60]

The Rome Statute codifies only the substantive provisions of these Conventions like the abovementioned articles 50, 130, and 147 without incorporating procedural aspects that require prosecution, such as articles 49, 129, and 146. Hence, these Conventions do not impose a duty on the ICC to prosecute those who violate their provisions,[61] reinforcing that the ICC has the discretionary power to prosecute. When faced with a national amnesty for international crimes that breach the Geneva or Genocide Conventions, such as genocide or war crimes, the ICC does not have a legal duty to prosecute, but it will face strong pressure to do so.

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[51] Roht-Arriaza, supra note 10, 78.

[52] Scharf, supra note 5, 515.

[53] Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) ["Genocide Convention"].

[54] Gallagher, supra note 32, 171-2; Scharf, supra note 5, 515-7.

[55] 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).

[56] Geneva Convention relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).

[57] 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).

[58] Scharf, supra note 5, 516.

[59] On the drawbacks of the Genocide Convention in terms of strict and narrow definition of genocide, see Scharf, supra note 5, 517.

[60] No person has ever been prosecuted in accordance with the terms of the Genocide Convention: 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 Int'l LJ 297, 319.

[61] Scharf, supra note 5, 524.

2 Duty to prosecute for crimes against humanity

Article 7 of the Rome Statute states that the ICC's jurisdiction covers crimes against humanity. Unlike genocide and war crimes, there is no concrete, widely-ratified international convention imposing a duty on State Parties to prosecute. There are various human rights conventions, such as the International Covenant on Civil and Political Rights,[62] the European Convention for the Protection of Human Rights and Fundamental Freedoms,[63] and the American Convention on Human Rights,[64] that impose a duty on States to "ensure" these human rights, but none of them expressly impose a duty to prosecute for crimes against humanity.[65] The Inter-American Court of Human Rights in the *Velasquez Rodriguez Case*[66] held that article 1.1 of the American Convention on Human Rights, requiring States to ensure the rights set forth in the Convention, obligates states to investigate and punish any violation of the rights recognised.[67] However, it is merely a non-binding judgment of an international court that does not enjoy particularly high status and popularity.

The crime of torture, which forms a part of crimes against humanity under the Rome Statute, is a notable exception from the above analysis, because article 7 of the Torture Convention[68] requires a case to be submitted for prosecution.[69] The Torture Convention does not impose a duty as clearly as the Geneva and Genocide Conventions, however, the use of mandatory language is at least an indication favouring the imposition of a duty on State parties to prosecute perpetrators.

Supporters of a duty to prosecute crimes against humanity usually base their arguments on non-binding General Assembly resolutions, declarations of international conferences, and international conventions that are not widely ratified.[70] On the other hand, there is a body of State practice which supports amnesty for crimes against humanity, thereby implying that there is no customary international law rule imposing a duty to prosecute for crimes against humanity. Examples of such state practice include amnesties in Argentina, Chile, El Salvador, Zimbabwe, Uruguay, Mozambique, South Africa, Haiti, Uganda, and the Democratic Republic of Congo.[71]

While treaty law provides a useful starting point, customary international law does not seem to further the debate regarding amnesty. As to a duty to prosecute, the Rome Statute is silent on the issue of amnesty. The treaties canvassed above impose on State actors a duty to prosecute genocide and war crimes (in international conflicts) and possibly for torture, but impose no such duty for crimes against

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[62] International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171, Art 15 (entered into force 23 March 1976) ["International Covenant"].

[63] European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ["European Convention"].

[64] American Convention on Human Rights, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) ["American Convention"].

[65] Scharf, supra note 5, 517-518.

[66] *Velasquez Rodriguez Case (Forced Disappearance and Death of Individual in Honduras)* (1989) 28 ILM 291, [166] and [174].

[67] Chigara, *Amnesty in International Law: the Legality under International Law of National Amnesty Laws* (2002), 33.

[68] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 23 ILM 1027 (entered into force 26 June 1987) ["Convention against Torture"].

[69] Voort, supra note 37, 308.

[70] Scharf, supra note 5, 520.

[71] Gallagher, supra note 32, 181.

humanity. It is necessary to engage in a broader analysis that goes beyond the mere mechanics of international law and treaties.[72]

III THOERETICAL FOUNDATION

International Law v. National Sovereignty

A fundamental dilemma in international law is to what extent international law constrains national sovereignty. The pro-amnesty side usually relies on the stronghold of national sovereignty as a root of their arguments. Correspondingly, the pro-prosecution view stems from the idea of enhanced status and impact of international law on national governance. This article will attempt only a cursory investigation of the points involved. There are different considerations involved on every front where international law and national sovereignty meet, thus the interaction requires an individual issue-by-issue analysis, and the amnesty issue also needs to be considered within such a framework.

The pro-amnesty side relies on the traditional but strong principle that amnesty is a fundamental sovereign right. Some academics suggest that it is uncertain whether the ICC can review the lawfulness of amnesty legislation passed by sovereign parliaments.[73] The ICC's jurisdictional authority is based on a principle of complementarity, not primacy, over the national judiciary.[74] Some argue that for an international treaty, like the Rome Statute, to override traditionally supreme sovereignty it needs to do so expressly. In other words, the Rome Statute needs to expressly exclude amnesty as a defence to prosecution by the ICC.[75]

The most common pro-prosecution argument is based on the rule that national law cannot be used as a defence to breach of international law.[76] This is especially so when the law involves norms of jus cogens, which is in the same vein as article 53 of the Vienna Convention on the Law of Treaties.[77] The pro-prosecution side argues that prohibition of some international crimes like genocide has obtained jus cogens status, and therefore amnesty under the guise of national sovereignty cannot be an effective defence to such charges. Some on the pro-prosecution side also argue that the sovereign will of the State ought to be under the supervision of international law.[78] The ICC must formulate an answer that strikes a balance between both international humanitarian law and national sovereignty. In this context, a flexible guideline with discretion may be best.

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[72] Arsanjani, "The International Criminal Court and National Amnesty Laws" (1999) 93 Am Soc'y Int'l L Proc 65, 66.

[73] Ibid 67.

[74] Gavron, supra note 9, 107.

[75] Rubin, *Ethics and Authority in International Law* (1997) 206 [*"Ethics and Authority in International Law"*].

[76] Chigara, supra note 67, 103.

[77] Vienna Convention, supra note 29, Art 53. "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[78] Chigara, supra note 67, 34.

Theories of Criminal Law

Criminal law is "the most coercive form of power generally available to a society to regulate social behaviour".[79] The fact that the international community has resorted to this blunt instrument shows the increasing frequency and gravity of atrocities and the desire to curb such a trend.

Questions as to the suitability of the use of criminal prosecution for international crimes committed in internal conflicts arise from the fact that, from a societal point of view, it is difficult to distinguish between the blameworthy and blameless. Often the selection of the defendants to face charges may seem arbitrary,[80] given that in internal civil conflicts, especially where a large scale massacre is committed, so many people are involved in so many ways. The pro-amnesty side may claim that the prosecution of the alleged offenders, which will be a limited number given the Court's capacity, is unjustifiable compared with an amnesty scheme, because "[b]y pinning blame on a limited sector of society, human rights trials 're-invent history'" and misguide people into believing that they themselves are morally blameless.[81] Conversely, a trial may eliminate the notion of collective guilt, which is good for society because collective guilt would no longer act as an obstacle to reconciliation and participation in democratic governance.[82]

The above analysis pits a moral idea against a political idea, but the two are not necessarily mutually exclusive. The particular moral problem associated with the prosecution may be mitigated through public education about how criminal prosecution of a few people does not necessarily exonerate the society, and the need for the society to be forward-looking.[83] It is also useful to examine whether criminal prosecution for international crimes would achieve the general rationales behind criminal law.

1 Deterrence

The UN Commission on Human Rights and its Sub-Commission on the Prevention of Discrimination and Protection of Minorities in the Report on the Consequences of Impunity[84] stated that impunity is a major reason for continuing human rights violations throughout the world.[85] Thus the pro-prosecution side argues that the ICC needs to prosecute, notwithstanding national amnesty, to deter future offenders.

However, the effectiveness of deterrence in the context of international criminal law does not withstand close scrutiny. First, there is a risk that a trial would deter current dictators and officials from surrendering their power to a democratic successor,[86] thereby retaining immunity and continuing abuses. Secondly, for a trial to

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[79] Sadat, supra note 34, 196.

[80] Osiel, "Why Prosecute? Critics of Punishment for Mass Atrocity" (2000) 22 Hum Rts Q 118, 125.

[81] Ibid 126; Osiel, *Mass Atrocity, Collective Memory, and the Law* (1997) 158-160["*Mass Atrocity*"]. Some pro-amnesty commentators also doubt whether these atrocities are capable of being classified as legal crimes under criminal law or whether they are simply moral wrongs, in which case the court should not deal with: Rubin, supra note 24, 432-433.

[82] Moghalu, "Reconciling Fractured Societies: an African Perspective on the Role of Judicial Prosecutions" in Thakur and Malcontent (eds), *From Sovereign Impunity to International Accountability: the Search for Justice in a World of States* (2004) 216.

[83] Osiel, supra note 80, 127.

[84] UN Doc E/CN 4/1990/13.

[85] Scharf, supra note 5, 512.

[86] Nino, *Radical Evil on Trial* (1996) 144.

deter the future offenders, they must be aware of what the protected norms are and from what they are deterred. In state-sponsored mass perpetration of international crimes, the potential future offenders may not believe that their actions violate the protected norms. They may deem their actions are justified by reasons of national security or the right to self-determination. Hence, they may not perceive their actions and offences as crimes that ought to be deterred.[87] Even if they perceive their actions as a violation of the protected norms they may believe that their political status and organisations would protect them,[88] or that the immediate benefits of committing crimes, such as praise by their comrades and superiors, outweigh the seemingly remote chance of a prosecution.[89] When the potential future offenders do not find the threat of punishment credible, the deterrence effect of ICC prosecution is minimal, particularly for low-ranking soldiers.

2 Incapacitation

The pro-prosecution side claims that incapacitation would be achieved through ICC criminal prosecution - dangerous criminals would be removed from society. For example, there is a suggestion that the ICTY's failure to prosecute Milosevic for crimes in Bosnia emboldened him to commit more crimes in Kosovo.[90] However, as mentioned, fear of ICC prosecution and trial may actually deter the existing authorities from stepping down.[91]

3 Retribution

The rationale of retribution means that punishment of the offender ought to be proportional to the harm caused to the victim.[92] The pro-prosecution side claims that an ICC prosecution would result in the punishment that these offenders deserve. However, it would be almost impossible for a Western legal system to impose a punishment proportional to the harm caused by the offender through international crimes, given the level of horror and destruction.[93] Another problem with the retribution theory is that it is often easy to focus only on the offenders, thereby ignoring the needs of the victims. The theory is problematic in that each victim requires a different level of punishment and compensation for him or her to be satisfied that retribution has been exacted.[94] Therefore, the retribution theory of criminal prosecution does not seem to provide a suitable theoretical basis for ICC prosecution.

4 Reformation and rehabilitation

This theory focuses on the ability of criminal prosecution and punishment to reform and rehabilitate the offenders so that they can better reintegrate into society later.

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[87] Roht-Arriaza, "Punishment, Redress, and Pardon: Theoretical and Psychological Approaches" in Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (1995) ["Punishment, Redress and Pardon"] 14.
[88] Ibid.
[89] Nino, supra note 86, 144-145.
[90] Sadat, supra note 34, 205.
[91] Nino, supra note 86, 144.
[92] Roht-Arriaza, Punishment, Redress, and Pardon, supra note 87, 16.
[93] Nino, supra note 86, 141.
[94] Roht-Arriaza, Punishment, Redress, and Pardon, supra note 87, 17.

However, the theory is not usually applicable to international crimes that are motivated by political beliefs such as a desire to gain independence or national security, because such political views are strongly entrenched in individuals, and a judicial punishment may even reinforce such beliefs rather than "reforming" those views.[95] Also, rehabilitation is difficult to achieve, because the offender's attitudes and perspectives are not personal or aberrational in this context – rather, "they are deliberately inculcated in an institutional setting...Rehabilitation in this context [needs to be] institutional reformation", not individual rehabilitation.[96]

5 Denunciation

The denunciation theory provides the most fitting theoretical basis for the prosecution of international crimes. The theory is based on an expression of moral criticism, aimed at having the offenders acknowledge their crimes and change their behaviour, and providing general moral guidance for society. By doing so, it focuses both on the offender and the public or victim.[97] Under the denunciation theory, ICC prosecution would focus on reformulating the common values of the relevant society by decrying, heavily criticising and shaming its offenders.[98] Therefore, the denunciation theory seems to provide a sufficient justification for arguing that ICC prosecution would help society and thereby presents a more useful option than a national amnesty. Denunciation may seem unnecessary as international crimes would be morally unacceptable to most people. The fact that it is unacceptable is also highlighted by the fact that the perpetrators seek amnesty for these crimes. However, legally marking out what is unacceptable constitutes an important part of the collective memory of the society, and society would prefer and have more faith in rights that are legally enforceable.[99]

Human Rights: Freedom from International Crimes v. Democratic Governance

The argument based on human rights is usually a strong pro-prosecution one: the abusers of human rights should not go unpunished because respecting the human rights of victims, which are among the most important basic norms,[100] require the punishment of the offenders. This analysis seems to reinforce the view that a government cannot sacrifice the abused individuals' rights in order to pursue societal peace and reconciliation through an amnesty. Assuming that one can "own" rights, Chigara explains that victims are deemed to have property rights in their basic human rights. Those rights were never transferred to the government, so the government cannot legitimately exchange those victims' rights for another social good by

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[95] O'Shea, supra note 3, 77.
[96] Roht-Arriaza, Punishment, Redress, and Pardon, supra note 87, 15.
[97] Ibid 16-17.
[98] Ibid 17.
[99] Chigara, supra note 67, 44.
[100] On the development of global concern for human rights in the 1970s, including the formation of the human rights legislation in the U.S. Congress and human rights organisations such as Amnesty International and Americas Watch, see Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (1991), 212. On the shift away from Cold War dimension of how authoritarian officials killed constitutional democracy to how they killed individual people, see Huntington, supra note 100, 213. On the basis of the paramount status of human rights, see Matwijkiw, "A Philosophical Perspective on Rights, Accountability and Post-Conflict Justice: Setting up the Premises" in Bassiouni (ed), *Post-Conflict Justice* (2001) 170-171.

declaring amnesty.[101] This analysis appears to be sound under the Western concept of property, but it would be interesting to see whether this analysis is still applicable in other systems, such as collective property rights as envisaged by New Zealand Maori or African tribal societies.

However, even on the human rights front, there are arguments for the pro-amnesty side. First, the pro-amnesty side claims that for human rights to grow and develop in the society, one cannot blindly pursue prosecution at the cost of community and nation-building.[102] The existence of a stable society is a prerequisite for the growth of human rights. Secondly, and more importantly, human rights are not only about being free from abuses and crimes, but also include the right to democratic governance.[103] Hence, the ICC would be advancing another form of human right when it foregoes prosecution to respect a national amnesty. Third, one must ask the question whether the sweeping dominance of human rights is not a predominantly Western-driven concept, and whether such a concept is applicable to other parts of the world without careful examination of their values and traditions.[104] It would be helpful if the ICC considers the legal culture and tradition of the relevant State and accommodate them in its decision-making process. One should be careful not to blindly adopt rhetoric regarding the supremacy of rights. Instead we need to analyse and weigh the right with other relevant factors (including other human rights) in coming to the most suitable solution to the amnesty issue.

Justice

Justice is another fluid concept that can be invoked by both sides in support of their respective positions. The debate over which position serves justice best comes down to the perceived meaning of justice. The pro-prosecution side in essence relies on a relatively narrow conception of legal justice. They invoke Rawle's theory of justice, which envisages justice as fairness. In Rawle's theory, people choose what is fair or unfair, and just or unjust at the initial stage of the system. A person's choice is based on a consideration of what is rational for him or her to pursue. Once the choice is made, this rational choice must be followed.[105] For Rawle, justice is served by respecting a predetermined path of how to punish when this particular rational choice is breached.[106] In correlation, a national constitution or rule of recognition predetermines citizens' basic rights and how they would be compensated or punished in cases of their violation, and a national amnesty precisely breaches this constitution.[107] Hence, unless one can infer an implied term, which allows a declaration of amnesty for the perpetrators of international crimes, from the initial social contract (or a national constitution), it would be unjust for the offenders to walk free, while the victims and their families still suffer from the crimes committed.

The pro-prosecution side further explains that justice and democratic reconciliation are not mutually exclusive.[108] Prosecuting and seeking justice in court

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[101] Chigara, supra note 67, 13.
[102] Klug, "Amnesty, Amnesia and Remembrance: International Obligations and the Need to Prevent the Repetition of Gross Violations of Human Rights" (1998) 92 Am Soc'y Int'l L Proc 316, 317.
[103] Morris, "Lacking a Leviathan: the Quandaries of Peace and Accountability" in Bassiouni (ed), *Post-Conflict Justice* (2001) 140-141.
[104] For example, while the West values human rights, the East and Africa treasures harmony.
[105] Chigara, supra note 67, 3.
[106] Ibid 4.
[107] Ibid 5.
[108] Ibid 1-2.

may also promote democratic reconciliation of the society, and the former does not have to be sacrificed in the pursuit of the latter. Many pro-amnesty supporters also believe that they are not mutually exclusive, but they take a broader view of justice, taking account of social and political, as well as legal factors. They believe that the conception of justice in a transitional period of society is contingent and informed by prior injustice.[109] Hence, for its people, it may be more just to forego the prosecution, which may heal past injustice and bring peace, democracy, and reconciliation to a war-torn and struggling society. A pro-prosecution commentator Chigara is strongly against this notion of a changing concept of justice.[110] He claims that the notion would transform the content of what justice entails, and jeopardise its legitimacy.[111] The standards of fairness (justice) that are "context specific" as opposed to "context unspecific" lose iterability – ability to signify repeatedly in a number of different contexts: "[j]ustice means justice only if it does not have to be modified to suit contexts that add on to it superlatives or any other form of qualifier."[112]

However, it is suggested that Chigara's argument takes an overly simplistic view of the meaning of justice. People share the conceptual ability to recognise likeness as a part of human nature, and thereby they are able to mark out a "context unspecific" open class of the general term. But, people's conceptual ability and the concept of justice are far from being certain and sharp. It may be very difficult to agree on the boundaries of a "context unspecific" open class of a nebulous term such as justice, given widely different opinions and values. One ought to look at the context, which will constrain discretionary views on what the concept of justice entails and provide the objective framework for different views and values to be reconciled. Being context-dependent does not necessarily lead to subjective interpretation. The context gives decision-makers objective reasons for applying or not applying an expression of the concept to the particular case. The relative uncertainty about the content of the concept of justice is simply due to the nebulous nature of the concept itself.

As a result, the persuasiveness of the argument based on justice in the amnesty issue depends on the context. A situation where authorities declare a blanket self-amnesty, solely for their personal safety, can be contrasted with a situation where a declaration of conditional amnesty is absolutely necessary for a fragile peace deal to hold after the decades of mutual distrust. The question of which form of justice ought to be served in the particular context is left to the decision-makers. The ICC ought to formulate some objective guidelines so as to indicate the extent of the influence of legal and broader justice in different contexts and situations.

Rule of Law

Notwithstanding the controversy surrounding the precise meaning of the term the "rule of law", it is reasonably clear that a grant of amnesty for the alleged offenders of international crimes is inconsistent with the rule of law.[113] As a result of amnesty, victims usually receive no protection, while the offenders receive the full protection of the law.[114] This different treatment sets victims apart from other people, and

[109] Ibid 98.
[110] Ibid.
[111] Ibid.
[112] Ibid 99.
[113] Ibid 15.
[114] Ibid 61.

amnesty thereby "attacks the very commonality that States claim to be their main link."[115] A democratic society must show that everyone is equal before the law[116] and needs to encourage public trust in the supremacy of these democratic norms and values,[117] by ensuring that crimes are prosecuted and punished. If some perpetrators of gross crimes go unpunished, public cynicism and distrust in the rule of law would grow, and attack the basis of democracy.[118] This argument, based on the healthy maintenance of democracy, is especially notable because it is an idea usually invoked by the pro-amnesty side to justify amnesty as an inevitable necessity.

The pro-prosecution side argues that the status of the rule of law in the relevant society will be enhanced through ICC trials, because the ICC provides an impartial court and adheres to fair procedures and respect for the accused's rights. "[T]he value of the rule of law is further highlighted when the meticulous procedures of the court are juxtaposed...with the lawless conduct of the defendants."[119] This is especially necessary because a prolonged armed conflict would have diminished the public's respect for law, in particular criminal law.[120] Nevertheless, to be effective the ICC and the government would need to ensure that the public does not view the ICC as an imperial foreign institution, and that the public understand the fair procedure and process of the trial. However, the existence of a safe and stable society is a prerequisite for the operation of the rule of law. The blind pursuit of the rule of law would be a risky proposition in some cases, and a compromising guideline needs to be formulated to achieve a workable balance.

International Criminal Justice

Perhaps one of the most straight-forward arguments is the one based on the sanctity of international criminal justice. The argument that the ICC needs to press ahead with prosecution, in order to preserve and promote the status and effective operation of the international criminal justice system, is difficult to dispute. For the ICC to be utilised to its full potential, it needs to ensure that international criminal jurisdiction is not easily ousted at the domestic level.[121] Although the future deterrent effect is dubious, the ICC's ability to denounce these crimes, and help a society to reformulate its core values would serve the affected society well. To fulfill this purpose most effectively, and to gain respect from international society the ICC ought to eschew politics and press ahead for trial.[122]

Effectiveness of ICC Prosecution

For the pro-prosecution arguments to be persuasive, the effectiveness of ICC prosecution in achieving its purpose must be demonstrated. There are three particular ideas that require discussion. First, an ICC trial would educate people about what really happened - stimulate public interest and deliberation about their society's past

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[115] Ibid 71.
[116] Huntington, supra note 100, 213.
[117] Ibid.
[118] Scharf, supra note 5, 513.
[119] Nino, supra note 86, 146.
[120] O'Shea, supra note 3, 83.
[121] Ibid 84.
[122] Maogoto, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century* (2004) 221.

and present. Public education about the scope and nature of atrocities is especially necessary because authoritarian forces usually mislead and confuse the public about facts.[123] It is important that the process and ruling of the ICC are made known to all citizens of the State for this purpose to be achieved.

Secondly, ICC trial would be effective in restoring the self-respect of victims.[124] Foregoing trial would be equivalent to that society trivialising the issue of what is right or wrong, which is at the heart of victims' concerns.[125] A trial would also enable them to move on.[126] ICC prosecution would be more effective than some national or international judicial bodies, because the Rome Statute provides for restorative justice. Article 75 provides for reparation to victims, and article 79 establishes "a trust fund" for victims.[127] Harper suggests that reparation could take the forms of building materials, education scholarships, or financial reparations.[128]

Thirdly, there are a variety of differences in legal cultures. The societies may have different views or concepts of what constitutes guilt and justice. For example, Harper explains that the East Timorese legal culture is more familiar with group-based and leader-driven decision making. For the East Timorese, guilt is determined by "a shared sense of knowing [such as vengeance, fear, or domination] rather than an objectively applied process."[129] As a result, there is a real risk that ICC prosecution and trial, no matter how just and fair it appears to the Western viewer, may be unsatisfactory to local people. In such a case, ICC prosecution would not aid justice and reconciliation in that society. Again, this problem does not affect the necessity of ICC trial. Rather, it illustrates the care and flexibility needed for a trial to achieve its purposes. It is outside the scope of this article to discuss how the ICC could exercise flexibility to deliver justice. The above discussion also suggests that possible obstacles can be overcome by a careful and prudent approach, coupled with the education of, and consultation with, the relevant State's citizens. These problems do not vitiate the advantages of ICC prosecution in the context of the amnesty issue.

IV SOCIAL, POLITICAL, AND MORAL FACTORS

Analysis of the Rome Statute, international treaties, customary international law, and other legal theories, factors, and concepts involved has not rendered an outright advantage in favour of either side. The following analysis of the relevant political and moral factors reveals an interesting fundamental disagreement between the two sides as to their belief regarding the identity of law. The pro-prosecution side tends to view law as the fundamental bedrock of social norms.[130] As a result, social, political, and moral factors may assist the cause but cannot override legal considerations. On the other hand, the pro-amnesty side tends to view law as a channel or a reflection of social norms and morality. For them, social, political, and moral factors are as significant as legal factors in resolving the dilemma.

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[123] Nino, supra note 86, 146.
[124] Ibid 147.
[125] Roht-Arriaza, Punishment, Redress, and Pardon, supra note 87, 20.
[126] Scharf, supra note 5, 513.
[127] Moghalu, supra note 82, 216.
[128] Harper, "Delivering Justice in the Wake of Mass Violence: New approaches to Transitional Justice" (2005) 10 Journal of Conflict & Security Law 149, 159.
[129] Ibid 164-165.
[130] Chigara, supra note 67, 24.

Peace, Stability, Reconciliation, and Democracy

Perhaps the strongest argument to sustain the pro-amnesty side is that amnesty is necessary to achieve peace and democratic governance in a country that has emerged from an internal conflict through a fragile peace deal. Without a promise of amnesty, the perpetrators may never surrender and may continue the destruction. Indeed, the perpetrators may assume a pivotal position or role in a newly emerging parliament and government. The need for peace and democratic governance cannot be sacrificed to satisfy the need to seek out and prosecute the alleged offenders of international crimes, but between amnesty and ICC prosecution, which option has the best chance of satisfying the State's need for peace, stability, reconciliation, and democracy?

There are many examples in modern history where a declaration of amnesty, not trial, after an internal conflict resulted in peace, including the Mozambique amnesty in 1992 that ended 16 years of civil war. After amnesty was declared, rebels were able to participate in democratic elections, achieving a relatively peaceful transition.[131] Haiti and South Africa are other notable examples.[132] As well as empirical examples, the theoretical connection between amnesty and peaceful democracy is evident. A proposal of amnesty would provide an incentive for each side to bring the conflict to an end and cooperate in the transition process.[133] The prospect of ICC prosecution is likely to hurt negotiations towards peace, whereas amnesty is likely to help. Also, given that the society emerging from such a conflict is often polarised and unstable,[134] ICC prosecution may lead to a resurgence in antagonistic feeling. "While there is a need to empty wounds of all the old infection before healing can start, in some cases there would be nothing left if the infection were cleaned out."[135]

On the other hand, the pro-prosecution side points out that ICC prosecution can contribute to peace and democracy while promoting legal justice. First, there is no guarantee that amnesty will bring future peace,[136] and a practice of submitting too easily to political pressure may present a negative precedent for, and undermine the credibility of, the next government.[137] Secondly, they argue that ICC prosecution will actually assist a newly emerging democracy by equipping it with new legitimacy, cleansing its past of human rights abuses.[138]

Thirdly, they argue that prosecution may assist democracy by changing public belief in the superiority of a particular group. ICC trial would change the status quo where institutional, economic, and social power are concentrated on a particular group, such as the military or a particular race.[139] In effect, the trial could change the very structure that made human rights abuses possible.[140] An ICC criminal prosecution has wide-ranging implications and the ICC ought to take legal and some social responsibility, and be aware of social and political implications in making a choice between prosecution and deferring to amnesty.

While pursuit of peace and democracy appear to favour the pro-amnesty side

[131] Gallagher, supra note 32, 188.
[132] Scharf, supra note 5, 509-510.
[133] O'Shea, supra note 3, 26.
[134] Chigara, supra note 67, 18.
[135] Ibid 48.
[136] Ibid 112.
[137] Nino, supra note 86, 111.
[138] Scharf, supra note 5, 513.
[139] Nino, supra note 86, 131.
[140] Ibid 112.

empirically, there are also many theoretical arguments supporting ICC prosecution. Both options are capable of bringing peaceful democracy in different situations and having both options available would be prudent, rather than discarding one in favour of the other. One of the notable suggestions to resolve this dilemma is to develop "the right to democratic governance": if the State leader is not democratically elected, the particular State will not receive international recognition but sanction and isolation. In that way groups that were involved in the peace deal may be deterred from disobeying post-conflict agreements and disrupting the peaceful transition to democracy.[141] However, the idea is not feasible. Reliance on international recognition as a key to legitimacy of the domestic government is likely to lead to, or breed fear of, more foreign intervention in internal matters, which may be resented by local people as unwarranted intervention by neocolonial powers. [142]

Another goal that amnesty and prosecution share is social solidarity, national unity, and reconciliation. The pro-amnesty side argues that prosecution will upset the groups that the offenders belong to, and leads to antagonism. A pro-prosecution commentator, Osiel, counters this by claiming that the pro-amnesty side only concentrates on mechanical (people agreeing to the result of a trial) or organic solidarity (people agreeing through the means of reasoned public discussion).

Osiel focuses on discursive solidarity – recognising the different views of justice, but nevertheless settling on a common scheme of association and co-operation.[143] For discursive solidarity, there is no need to agree on the content of shared moral values. Rather, it is sufficient to have a key symbolic code where agreement can be reached and attachment formed.[144] The criminal prosecution provides this symbolic code, where disagreements can be expressed and addressed.[145] Hence, even though people may disagree as to the result of a trial, and priority of values expressed by a trial, public discussion stimulated by trial testimony and process would "foster the liberal virtues of toleration, moderation, and civil respect",[146] thereby achieving social discursive solidarity. The fact that the ICC trial procedure is carefully drafted to ensure fairness will also assist public trust and discussion stemming from a trial, continuing the process of "solidarity through dissensus [that] happens routinely in democratic politics."[147] Furthermore, there are examples where the grant of amnesty did not necessarily lead to reconciliation. In Uruguay, a substantial part of the population disagreed over the decision to grant amnesty. In Zimbabwe, after amnesty left the military and security forces intact and unrepentant, they came back to abuse the civilian population through the repression of political opponents and brutal repression of street crime.[148] Lastly, it is doubtful whether amnesty leads to the healing of a nation, because in a long and bitter conflict, amnesty usually only temporarily suppresses anger and hatred.[149]

The above analysis suggests that the standard rhetoric employed by the pro-amnesty side is not always true. Rather than trying to unduly discount opposing

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[141] Roht-Arriaza, "Conclusion: Combating Impunity" in Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (1995) 299; Sadat, supra note 34, 203; Scharf, supra note 5, 296.

[142] Osiel, *Mass Atrocity*, supra note 81, 297.

[143] Ibid 50.

[144] Ibid.

[145] Ibid 283.

[146] Ibid 2.

[147] Ibid 44.

[148] Roht-Arriaza, Conclusion: Combating Impunity, supra note 141, 281-282.

[149] Cassese, *International Criminal Law* (2003) 313.

arguments the formulation of a compromise option that accommodates both sides' interests would be the most useful approach.

The Right to Self-Determination

The right to self-determination assumes that the particular State itself is in the best place to judge what is necessary for its well-being.[150] What is better for a State is a matter of interpretation.[151] Proponents of the right to self-determination claim that the effected society itself must make a choice in these matters, otherwise "[t]he interposition of strangers [such as the ICC Prosecutor] with their own strong ethical commitments is unlikely to lead to either justice or peace in the contemplation of those most directly affected by the struggle"[152]. Also, having the ICC Prosecutor make that choice may have negative implications for the democratic governance of that society.[153]

However the right ought to be subjected to reasonable constraints in light of other rights and goals. There are examples of the public having supported an amnesty declared by their own government, such as Sierra Leone, Uruguay, and Algeria but there are also counter-examples in Argentina and El Salvador.[154] Also, sometimes the public does not actively support amnesty, but merely accept it.[155] An amnesty ought to receive sufficient public support before the ICC defers to it.

History as Judge

The pro-amnesty side argues that given the extraordinary context, the State needs to move on, and let history, not the judiciary judge its past. However, history on its own is sometimes ill-equipped to judge the past, as it often only narrates facts and may fail to portray the true meaning of events.[156] History cannot really remain objective, because it is greatly influenced by the values and beliefs of historians. In that sense, the ICC, which is governed by rules of evidence and procedure, offers a more reliable forum to judge objectively. Also, ICC trial would provide a valuable public record for historians to refer to.

International Political Dimension

The politics behind ICC prosecution and amnesty cannot be ignored. Some pro-prosecution academics argue that because a declaration of amnesty harms the international community, in terms of impunity for the perpetrators, the relevant State should not be able to make that decision alone. However, this argument only

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[150] Chigara, supra note 67, 95.
[151] Ibid 49.
[152] Rubin, *Ethics and Authority*, supra note 75, 174-175.
[153] On the ICC's democratic deficit for its jurisdiction over non-party nationals – people of those States who have not consented to the Rome Statute, see Morris, supra note 103, 138. It is argued that such a democratic deficit problem is not a serious matter, because unlike the World Trade Organisation, the ICC does not so much make social law and policy but rather just apply jus cogens and higher norms of existing international law. Morris, supra note 103, 138. But applying the law is far more complex, involves a lot of values and factors considerations, and may influence social policy. Morris, supra note 103, 139.
[154] Gallagher, supra note 32, 165, 189-190.
[155] Ibid.
[156] Osiel, *Mass Atrocity*, supra note 81, 147.

concentrates on the law and needs to take account of the fact that the international community has largely done nothing to assist or provide alternatives to such a State.[157] It would be unfair for the international community to pressure the State with a theoretical legal argument, which may incur a serious risk of losing an initiative for peace and reconciliation, while failing to provide any material or institutional support. In reality many amnesties are brokered and supported by international organisations such as the UN. In such a case, it is highly unlikely that the ICC will interfere.[158] Hence, the compromise option for the ICC with regard to the amnesty issue ought to reflect international political considerations.[159]

Ecclesiastical Law

The amnesty side also invokes ecclesiastical law in support of its view. The most commonly invoked concept is religious forgiveness. For example, South Africa's amnesty law in 1995 incorporates God's law of forgiveness. A notion of forgiving others' (and our) sins through amnesty is in line with Christian, Islamic, and African religions' emphasis on forgiveness and reconciliation.[160] The ecclesiastical law equips the pro-amnesty side with moral impetus to forgive, reconcile, and move on.

This moral argument is problematic not so much for its nature, but for its logic. The rebuttal to the forgiveness argument is that the crimes and abuses were committed against individual victims, not the government, so forgiveness granted by the government through amnesty is not equivalent to forgiveness exercised by individual victims. The government may punish on behalf of the victims, but it cannot forgive on behalf of the victims.[161] Also, forgiveness is a private act, so in order to forgive the perpetrator, the victim must know who the perpetrator is, and why he has done it.[162] Overall, ecclesiastical arguments have no place in this debate.

V FUNDAMENTAL DILEMMAS OF INTERNATIONAL LAW

This is a fascinating issue, not only for the interplay between various legal, social, political, and moral considerations, but for its revelation of inherent fundamental dilemmas in international law. The issue leads to questions over the identity of the ICC, the ambit of international law, and the nature of international law. For the amnesty issue to be resolved in a certain and definite way, these three questions need to be resolved. The three questions converge on the fundamental issue of the identity of international law.

Identity of the ICC

The issue of amnesty finds its root in the confusion over the fundamental identity and role of the ICC. Is the ICC the enforcer of international criminal law, or a mere

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[157] Gallagher, supra note 32, 191-192.
[158] Gavron, supra note 9, 116.
[159] Osiel, *Mass Atrocity*, supra note 81,27, 29, 49.
[160] O'Shea, supra note 3, 27.
[161] Ibid.
[162] Gavron, supra note 9, 111.

international judicial tribunal complementary to national criminal jurisdiction?[163] What is the ultimate purpose of the ICC? Some focus on the ICC's commitment to individual responsibility under international criminal law and, it is argued that its ultimate purpose ought to be putting an end to impunity for perpetrators.[164] Others focus on the ICC dealing with mass crimes, which dislocate societies, and argue that its ultimate purpose ought to be assisting fractured societies towards peace and reconciliation.

While this matter is outside of the scope of this article, briefly, given the nature of ICC's work taking account of social and political factors, granting an exception from ICC prosecution in deference to some amnesties is especially necessary because there is a lack of an effective international system to make the final decision about the issue of amnesty. The UN and Security Council have been generally ineffective and uncaring with regard to post-conflict situations, because big powers' interests dominate their decisions and the concept of national sovereignty (and suspicion of neo-colonial intervention) deter them from analysing and making decisions for the affected society. While the ICC would also be influenced by politics, the extent will hopefully be lesser, and therefore better for deciding whether to grant an exception or not. The ideal identity for the ICC is as the enforcer of international criminal law with sensitivity for the society's social, political and legal well-being.

Ambit of International Law

The amnesty issue concerns the tension between international law and sovereignty. There is no consensus as to what extent the Rome Statute and international criminal law can infringe on national sovereignty. The ambit of international law, in relation to sovereignty, ought to be viewed specifically in the context of the Rome Statute. By ratifying the Rome Statute, the State parties cede some of their sovereignty, in exchange for the prosecution and punishment of the perpetrators of international crimes. In this light, the full deference by the ICC to national amnesty would defeat one of the main purposes of the Rome Statute.

Nature of International Law

The framework of international law may be viewed either as a positivist legal system, with incomplete rules of recognition and secondary rules, or as a natural law system, with a number of basic common values still being formulated, and which compete against each other. The pro-prosecution side is likely to view international human rights as positive law that pierces through the barrier of sovereignty and politics. The pro-amnesty side may believe that sovereignty, peace, and human rights are all basic common values of the international community, and a balance that respects all these values needs to be worked out in each case.

While this topic is too vast and complex to be captured by this article, it is submitted that international law is a system of natural law, premised on inter-subjective basic common values.[165] The interaction and conflict between these different values are evident in many international legal issues. For each issue, a formula and guideline that best accommodates the competing values and ideas needs

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[163] Roht-Arriaza, "Amnesty and the International Criminal Court" in Shelton (ed), *International Crimes, Peace, and Human Rights: the Role of the International Criminal Court* (2000) 79.
[164] Young, supra note 4, 459.
[165] See generally Finnis, *Natural Law and Natural Rights* (1980).

to be worked out. The three fundamental dilemmas discussed strike at the heart of the identity of international law, which is a dynamic and ever-evolving concept. Unless reasonable consensus as to identity is reached, it would be imprudent to identify one principle as supreme.

VI OPTIONS FOR THE ICC

The optimal resolution to the amnesty issue depends not only on the considerations discussed above, but also on the type of amnesty and the situation that the State faces. There is a need for guidelines for the exercise of discretion by the ICC Prosecutor,[166] and the guidelines need to be sufficiently flexible to accommodate all dynamic considerations and situations.[167] The guidelines may be provided in the form of an interpretative statement from the Prosecutor, or a provision in the Rules of Procedure and Evidence.[168] The ICC may consider several options when faced with a national amnesty.

Recognition of Conditional Amnesty with a Truth Commission

The first option for the ICC is to recognise amnesty only when it is conditional and is accompanied by the formation of a Truth Commission.[169] Often the grant of amnesty is conditional on co-operation by the alleged offenders with the Truth Commission, or conditional in that amnesty applies only to political crimes. The national Truth Commission may give victims the chance to tell their stories, without the procedures of a criminal trial, and retaining more focus on victims.[170] Since the 1970s, about 25 governments have chosen to establish a Truth Commission, coupled with amnesty, as a way to facilitate the transition to peace and stable governance.[171] The Truth Commission may be more similar to non-Western concepts of justice, where the focus is more on harmony,[172] and because of the availability of conditional amnesty, perpetrators are encouraged to cooperate with the Truth Commission in narrating what really happened.[173]

However, the use of the Truth Commission without a trial has been criticised for various reasons. First, there is a concern that the Truth Commission may be used as a mere "manipulative tool by the unrepentant government or as a tool to whitewash its past atrocities," for example in Uganda in 1974 and Chad in 1990.[174] Secondly, when the Truth Commission publishes a report containing the names of offenders, it is punishment in the form of denunciation and public shaming. Before punishing people, the Commission ought to ensure that procedural fairness is respected: that the offenders are questioned and given the opportunity to present their side of story with

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[166] O'Shea, supra note 3, 316.
[167] Ibid 322.
[168] Broomhall, *International Criminal Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2002) 102.
[169] On the Truth Commission generally, see Beigbeder, *Judging Criminal Leaders: the Slow Erosion of Impunity* (2002) 104-124.
[170] Sadat, supra note 34, 198.
[171] Moghalu, supra note 82, 199.
[172] Ibid 201.
[173] Ibid 202.
[174] Ibid.

appropriate evidence. The Commission's task then becomes similar to that of a judiciary, and the ICC may be able to handle the task more fairly and efficiently.[175]

Thirdly, there are certain doubts as to the effectiveness of Truth Commissions as people often lie in their own self-interest.[176] Also, the reports of some Truth Commissions merely narrate what happened - how many died and how - without precisely attributing blame to perpetrators or refuting their excuses or official stories.[177] Hence, the truth revealed by the Commission is often viewed as insufficient or partial. In many cases, criminal trials are effective in discovering the truth, which raises questions about the necessity of Truth Commissions.[178] Fourthly, a Truth Commission ultimately fails to give substantial justice to the victims,[179] because confession of the truth is not the same as assumption of accountability.[180]

The effectiveness of the Truth Commission may improve if the international community establishes an international permanent Truth Commission,[181] although foreigners on the panel of such Commissions are less likely to be familiar with local political nuances and needs, and their recommendations may be discounted by locals accordingly. Also, the State itself ought to be involved in this nation-healing process.[182] Another way to improve the Truth Commissions is to ensure participation of every group, implementation of the Commissions' recommendations, and the provision of reparations, compensation, and security for victims.[183]Conditional amnesty, which is granted only for political crimes, is problematic due to the difficulty in distinguishing between a political crime and a private act of violence.[184] The two are intertwined, and drawing an arbitrary distinction between the two, and granting amnesty for only one, ignores the real nature and context of that violence.[185]

This option may also entail a measure of lustration - removing or banning the alleged offenders from positions of public authority. In most cases, lustration should be confined to targeting only the alleged offenders, not their family members, otherwise lustration would be dealing with classes of people, rather than focusing on individual responsibility.[186] Overall, the use of a Truth Commission and conditional amnesty is not without significant problems. It needs a mechanism to complement and promote its effectiveness.

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[175] Osiel, supra note 80, 135.
[176] Chigara, supra note 67, 82.
[177] Osiel, supra note 80, 136.
[178] Moghalu, supra note 82, 201.
[179] Chigara, supra note 67, 83.
[180] Moghalu, supra note 82, 198.
[181] O'Shea, supra note 3, 327.
[182] Roht-Arriaza, "Conclusion: Combating Impunity" in Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (1995) 299; Sadat, supra note 34, 203; Scharf, supra note 5, 283.
[183] Gallagher, supra note 32, 193-194.
[184] Nagy, "Violence, Amnesty and Transitional Law: 'Private' Acts and 'Public' Truth in South Africa" (2005) 1 Afr J Legal Stud 1, 3.
[185] Ibid 27. Drawing a distinction between the two in the context of South African apartheid was especially difficult. For example, black racial violence was viewed as political endemic while white racial violence was viewed as private crime. Ibid 12-22.
[186] Bassiouni, *Introduction to International Criminal Law* (2003) 714-715.

Prosecution – Optional Recognition of Conditional Amnesty and a Truth Commission

The second, and recommended option for the ICC would be to prosecute the most serious perpetrators, and retain the option for the government to establish a Truth Commission. The option of the ICC respecting national amnesty should also be preserved, on the condition that it is respected only where absolutely necessary and that the perpetrators fully cooperate with the Truth Commission. The establishment of the Truth Commission together with the ICC prosecution will assist in mitigating the weaknesses of Commissions. There is a concern that Truth Commissions and prosecution are not mutually supportive, because the Commission depends on the cooperation of the perpetrators and if they face prosecution, no real cooperation will follow.[187] The ICC is expected to prosecute only a handful of serious perpetrators, but given they usually would be high-ranked officials, it would be their testimony that would be most sought after. In such a case, the government may hold the Truth Commission after the trial, where convicted offenders would not have much to lose. The ICC may provide an incentive for the offenders to cooperate by offering mitigation in sentencing. Such a gesture would nicely complement the government's pursuit of reconciliation and fulfills the ICC's responsibility to the society. The government may also grant amnesty for relatively minor offenders who cooperate with the Commission.

Rather than formulating a strict rule in this dynamic and diverse area, the ICC Prosecutor or the State Parties should provide guidelines as to the relevant considerations that the Prosecutor needs to take into account when deciding whether to defer to amnesty. Such factors may include the gravity and frequency of the crimes, legal status of the transitional government, signs of coercion in the grant of amnesty, the chance of collapse of the peace deal in case prosecution, lapse of time since the crimes were committed, the strength of retributive feelings among the public and victims, and the degree to which responsibility is widely distributed throughout society.[188] The Prosecutor ought not to respect amnesties over the most serious offences, such as genocide,[189] and amnesty should be respected only when it is absolutely necessary. Some difficulties are recognised and anticipated in applying this test. There are some common factors, like the gravity and frequency of crimes, that may be taken into account when interpreting those two principles, and the Prosecutor needs to be as objective as possible and sensitive to local considerations.

Any amnesty ought to be codified rather than oral,[190] and needs to be passed by an elected parliament, rather than by presidential decree, although an elected parliament may not exist at the time amnesty needs to be given. If it is to be respected, the amnesty ought to receive broad support in society, and the process ought to have given effect to the right to self-determination.[191] Lastly, even after its recognition, any international crimes committed after the declaration of amnesty should be vigorously pursued by the ICC. This option, while failing to provide any concrete answer to the issue, will at least go some way to satisfying the needs and concerns of both the pro-prosecution and pro-amnesty sides. To ensure that this discretionary power does not

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[187] Chigara, supra note 67, 122.

[188] There are different guidelines proposed by each commentator. For an example, see generally O'Shea, supra note 3, 320-329.

[189] Ibid 322.

[190] Chigara, supra note 67, 117-118.

[191] Burke-White, supra note 35, 26.

become overly subject to political pressure, there is a need for clear guidelines, with a requirement that the ICC Prosecutor give detailed reasons.

ICC Prosecution in All Cases

The third option is to press ahead with prosecution in all cases and it is an attractive option. The Security Council has the power, under article 16 of the Rome Statute, to defer ICC prosecution, and thereby give time for the national government to restore its own judiciary so that it can prosecute perpetrators. Such an option will ensure that the ICC walks a primarily legal path, while entrusting the difficult political issues to the Security Council.

However, this option may be detrimental to the ICC's interests in the long run. In the short term, when the Security Council intervenes to defer prosecution, the ICC can say that it did the best it could to pursue the alleged offenders. However, in the long run when the ICC's work is officially stopped by the world's most powerful and exclusive international body, it would create great doubt in the international community as to the coherency and sincerity of international criminal law and justice. For the ICC to prosper in the long run, it needs to be a strong cornerstone of international criminal justice. When the ICC makes its own decision, the influence of politics will not be revealed as starkly as with a Security Council intervention, and the negative impact on the status and mandate of the ICC will be reduced.

VII CONCLUSION

International law is an arena of conflicts between legal, political, social, and moral factors. The outcome of the clash and interaction of these factors depends on the many different values and fundamental views on the identity of international law. The issue of national amnesty and the ICC is no different. An uncompromising principled approach would not be the best solution. The Rome Statute is silent on the issue of national amnesty for the perpetrators of international crimes. The only clear indication arguably comes from article 17, which reveals a tendency to oppose a blanket amnesty. Treaty law on amnesty is dominated by discussion regarding article 6(5) of Protocol II to the Geneva Conventions. While article 6(5) is clear in that it requires the national authorities to endeavour to grant the broadest possible amnesty, it is shrouded with controversy due to its implications. Customary international law fails to produce a clear rule. With regard to internal conflicts, there is a duty to prosecute the crime of genocide but seemingly none for other crimes. Even for genocide, the duty is not binding on the ICC.

There are many theoretical undercurrents in this debate as well. The shield of national sovereignty is squarely placed against the assertive influence of international law. The right to freedom from international crimes is pitted against the right to democratic governance. There are differing conceptions of justice - the importance and status of rule of law, which usually assumes fundamental significance in ordinary circumstances, is contested in the context of a fragile democracy. As well as conflicts of norms, there are questions over the criminal law: the rationale of denunciation justifies ICC prosecution of perpetrators under international criminal law, and the coherency of international criminal justice requires a determined effort from the ICC. The ICC needs to ensure the effectiveness of its prosecution. The goal of peace, reconciliation, and democracy may be achieved via many paths. The society's interest

in the formation of common values and the right to self-determination may pull the debate in either direction. The international political dimension may not be ignored, while contributions from historical and ecclesiastical perspectives are negligible. The contrasting views on the issue of amnesty stem from differences regarding the identity of the ICC and the ambit and nature of international law.

ICC prosecution and national amnesty would each be necessary in different contexts. The recommended option for the ICC is to pursue prosecution, except in a situation where national amnesty is absolutely necessary for the survival of the relevant State. An amnesty falling under the exception should be a conditional amnesty (which excludes amnesty for offences of the most serious nature) in order to minimise the ability of perpetrators to escape punishment. ICC prosecution of high-ranked perpetrators would provide a framework mechanism to complement the operation of the Truth Commission, by creating an atmosphere of accountability. At the same time, an exception, recognizing conditional amnesty where absolutely necessary would create flexibility in the operation of the ICC.

Without a central enforcement mechanism, the international judicial system relies on its perceived legitimacy, utility and acceptance by States. When the ICC deals with the issue of amnesty it needs to ensure that it serves the purpose of achieving accountability in international criminal law. At the same time, it also needs to ensure that it does not completely override a State's vital interests by ignoring an amnesty when it is absolutely necessary for the State's pursuit of peace and reconciliation.