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Accountability for War Crimes -
Does a National Investigation Leading to an
Amnesty Bar a Prosecution by the Interna-
tional Criminal Court?

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Summary

This thesis investigates whether national amnesties for war crimes constitute an inadmissibility ground for a case in the International Criminal Court (hereinafter the ICC). The essence of this problem lies in the conflict between State sovereignty and international cooperation in the fight against impunity for war crimes and consequently between bilateral obligations and obligations *erga omnes*. My intention with the thesis is to find the balance between these standards.

I find it important to resolve the problems of the current topic for several reasons. The granting of amnesties is a far from uncommon method of coming to terms with past conflicts. However, the Rome Statute of the ICC (hereinafter the Rome Statute) is silent regarding amnesties. Consequently the ICC will eventually have to make a decision whether a case is admissible before the court when an amnesty will be or has been granted to an alleged perpetrator. The lack of certainty in this case could result in negative effects for the ICC, such as arbitrary and politicised decisions and non-equality between States. Also nationally in the State that has admitted amnesties problems such as difficulties in the reconciliation process and in the establishment of the rule of law could occur.

I have come to a conclusion to the current problem mainly through a theoretical discussion. However, to gain a complete picture of the problem I find it important to understand and recognise the practical consequences of different reconciliation methods. The practical difficulties of an absolute prohibition of amnesties are demonstrated in this thesis by case studies from South-Africa, Rwanda and Sierra Leone.

In the more theoretical part of my investigation of the compatibility of war crimes' amnesties with international law I look to general international law and the Rome Statute. In general international law there are mainly three possible obstacles for the granting of amnesties for war crimes. They are found in international humanitarian law, in international customary rules of a peremptory character and in international human rights law. States have decided, through treaties and international customary law, upon an obligation to prosecute serious breaches of international humanitarian law. This obligation to prosecute would naturally constitute an obstacle for amnesties for the crimes in question. The progress made in international criminal law relating to a stronger international cooperation is directly linked with the special character of serious war crimes. This leads us to another possible obstacle, which could be the legal consequence that the special character of these crimes attaches. Many international legal scholars would argue that a peremptory character of war crimes logically leads to an obligation upon all States as against to all other States to ensure the prosecution of the alleged perpetrators of these crimes. This comprehension is however far from undisputed. A third bar from accepting amnesties for war crimes could be that

this would violate international human rights law, more precisely the victims' right to justice. My investigation of problems related to the granting of amnesties for serious war crimes suggests that the point of departure is that amnesties are not allowed for such crimes.

An investigation of the principle of complementarity in the Rome Statute seems to lead us to the same conclusion. Although the actual wording of the article is rather ambiguous, an extended interpretation of the meaning of the article seems to refrain from using amnesties for war crimes. The main purpose of the ICC is to fight impunity. Considering the creation of the court the initiators of the tribunal seem to believe that prosecution would best fulfil this purpose. Further, the court shall, according to article 21 of the Rome Statute, apply treaties and principles or rules of international law if the statute is not guidance enough when deciding on a case. Therefore, the conclusion of the investigation of the principle of complementarity of the Rome Statute is reached in conjunction with the conclusion of general international law made above. It essentially declines that amnesties is an inadmissibility ground for the ICC.

As a conclusion I have tried to find a compromise between the different interests at stake with the expectation to show respect for both sides of the problem. I have included a definition of the exceptions to prosecution in certain particular occasions, which should be explicitly and thoroughly defined. The definition describes the type of amnesty that should be applied and in what situation such application would be relevant. Hopefully by employing such limits a balance could be struck between State sovereignty and the fight against impunity.

Preface

I have had the fortune not to personally experience war crimes. I believe that this luck of mine does not alleviate me, as a member of the international community, from having a certain responsibility to deal with the crimes that are being committed, if not personally then through State representation. This is where international law comes into the picture. If we learn to use it right I believe that it could be a valuable tool in the work against international crimes.¹ This possibility is what I find most fascinating with international law and what has led me to write my master thesis in this field of study. I am aware that this personal belief influences the approach taken in this thesis, although I hope I have succeeded in accounting for all relevant aspects of the problem at hand.

I had just returned from the international rounds of the *Philip C. Jessup Moot Court Competition* when I started the work on this thesis. I was at the time recuperating from several months of arguing against all amnesties for serious war crimes. Everything I had read and written was coloured with this opinion. From my point of view prosecution was essential in the “fight against impunity”. In the course of the work I had to rethink that idea and I have since then changed my opinion several times. I have come to appreciate the importance of respecting different methods of recovering from a national crisis but also the importance of a common set of rules to avoid arbitrary exploitation of world opinion and politics.

The topic of this thesis is inspired of the fictional case of the competition mentioned above and the experiences from it have been a point of departure in this work. Therefore I would like to thank my fellow teammates Caroline Fransson, Leah Hoxtor and Anja Gusch for valuable insights and discussions on this subject. I also want to thank our coaches Ineta Ziemele and Gudmundur Alfredsson for providing me with support and knowledge. Further I would like to thank my supervisor Ulf Linderfalk for suggestions in the course of the writing.

¹ Serious international crimes include war crimes, genocide, crimes against humanity and grave breaches of international humanitarian law according to the definitions in the report, *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)* E/CN.4/Sub.2/1997/20/Rev.12 October 1997 Revised final report prepared by Mr Joinet. pursuant to Sub-Commission decision 1996/119, Annex 2 (B).

Abbreviations

IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ILC	International Law Commission
NGO	Non-Governmental Organisation
PRIDE	Post-Conflict Reintegration Initiative for Development and Empowerment
TRC	Truth and Reconciliation Commission
UN	United Nations

1 Introduction

1.1 Background to the ICC and Amnesties

The idea of creating an international criminal court has been developed over a long period of time; the International Criminal Court (ICC) itself dates the first progress back to 1474. Great advancement was made after the Second World War with the Nuremberg trials but it was not until 1995 that the negotiations of the ICC, as it presently stands, were introduced. The Rome Statute of the Court was adopted in July 1998. It came into force in July 2002 after 60 ratifications. In February 2003, 85 States had ratified the Rome Statute.²

The history of amnesties is also extensive but the last 4 decades have been revolutionary in this regard. In the 1970's the movement for amnesties for political prisoners was mobilised. The activists were Non-Governmental Organisations (hereinafter NGO's), political opposition and human rights advocates. Amnesty was a symbol for freedom.³ In the 1980's the use of amnesties changed to become a technique for impunity. The persistent amnesty supporters were now dictators and their likes. People started to get organised to protest against this type of amnesties. In the 1990's the situation changed again. The cold war ended and new democracies tried to find a way to reconcile with its past and at the same time impose the rule of law.⁴ Today, we are going through a fourth ambivalent stage where the international cooperation against impunity for certain crimes is strengthened, something that the creation of the ICC is an extraordinary example of. The challenge of the first decade of the 21st century is to strike a balance between national reconciliation and international prevention of international crimes.

1.2 Complementarity of the ICC and the Granting of Amnesties

The principle of complementarity is enshrined in non-operative paragraph ten and article 17 of the Rome Statute; it gives national authorities the pri-

² <www.icc-cpi.int/basicdocs/romestatute.html> Last accessed 7 September 2004.

³ Definition of Amnesties: the formal act of liberating someone, a warrant granting release from punishment for an offence, a period during which offenders are exempt from punishment, grant a pardon to (a group of people). Ed. R.W. Burchfield, *The Oxford English Dictionary*, 2nd Edition (Clarendon Press, Oxford, 1989) Vol. I, p. 103.

⁴ *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)* E/CN.4/Sub.2/1997/20/Rev.12 October 1997, Revised final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, paras. 2-6.

mary possibility and responsibility to prosecute the crimes within the jurisdiction of the ICC. A case is only admissible to the court if a case is not being or has not been investigated by a State that has jurisdiction to try it. The exceptions to this essential rule are if the State in question is deemed unwilling or unable to try the case.

The principle of complementarity is important for the functioning of the ICC for several reasons. It is a safeguard for the sovereignty of States since it gives the primary opportunity of prosecution to national authorities. It is further essential for the practical functioning of the court considering issues of efficiency and economy. There are a number of advantages that favour a national prosecution before a prosecution by the ICC; applicable law is more developed, evidence and witnesses are more easily available, language problems are avoided to mention a few.⁵ But how far does the principle of complementarity extend?

It was noted during the negotiations of the Rome Statute that the article enshrining complementarity should possibly, directly or indirectly, address amnesties.⁶ Although the question was raised at the Rome Conference, no decision about amnesties was taken⁷ and the final version of the Rome Statute does not mention amnesties.⁸

The granting of amnesties is a complex matter; its character, purpose and reception can vary immensely.⁹ Today amnesties are a relatively common instrument in the process of national reconciliation after a conflict. Thus, a situation when the ICC must assess whether to respect a nationally settled amnesty for a crime within its jurisdiction is in my opinion to be expected.

1.3 Problems and Purpose

Today it is no longer controversial, but stating the obvious when claiming that the position of State sovereignty in international law is changing. The focus on the individual and the protection of her rights has been favoured in relation to sovereignty issues. This development has led to a progress in the protection of human rights and respect for humanitarian law. But how far has this change of focus reached? Are all serious violations of humanitarian law the concern of all States, not limited to one? If it is, who should have the possibility to hold the offenders accountable? And lastly, who should decide how to hold the perpetrators accountable? The underlying conflict for these questions are the balance between bilateral obligations

⁵ Some were brought up by States at the preparatory conferences, Bassiouni, *supra*, p. 620

⁶ Article 35 at that time, Bassiouni, *ibid* fn 5 p. 354 fn 21.

⁷ Bassiouni, *ibid* fn 5 pp. 385 and 441.

⁸ John Dugard, *Possible Conflicts of Jurisdiction with Truth Commissions* (p. 700) Ed Cassese, Gaeta and Jones, *The Rome Statute of the International Criminal Court* (Oxford University Press, New York, 2002).

⁹ In chapter 3 I have provided for a more thorough assessment of the issue.

between States and obligations *erga omnes*, between State sovereignty and the fight against impunity for international crimes and between restorative and retributive justice.

In my opinion the lack of certainty regarding the relationship of amnesties and the ICC is a problem. It may put all the advantages of amnesties at stake by not allowing processes leading to reconciliation to take place. Furthermore, it could defy the credibility of the ICC as an institution if not meeting its main challenge that is to avoid impunity for serious international crimes. The risk of disrespect for the equality between States is also increased if one State's amnesties are accepted but another State's are not. My final serious concern is related to the very purpose of the rule of law in general. Every shortage of predictability in international law about the status of amnesties for the ICC makes an arbitrary use of powers possible.

This thesis is intended to approach the relation between the principle of complementarity of the ICC and the granting of national amnesties. My main question is if this principle prevents the ICC from prosecuting a suspected war criminal to which a national investigation leading to an amnesty has been commenced. Is it possible to grant amnesties for serious war crimes?

1.4 Method and Materials

As the question of issue considers the statute of a court that has not yet held any trial this thesis consequently discusses possible future decisions by the ICC. The point of departure is the important precedence of investigating serious international crimes as those the ICC deals with. I find it helpful to crystallise the *opinio juris* of the international community, concerning the view on these crimes and on amnesties, by investigating past experiences by *ad hoc* tribunals and national commissions. Also, for the purpose of balancing national peace and reconciliation with the international strive against impunity it is interesting to investigate achievements and flaws of precedent solutions. However, it is important to note that these examples can be no more than guidelines to the general opinion about amnesties as the crimes concerned are generally not war crimes, and most importantly as they all lack the inclusion of a principle of complementarity in their regulations.

Further, the work by international legal scholars and other international actors will provide a basis for examining the international opinion concerning amnesties. Though a useful tool, also these sources must be viewed with caution considering how controversial issues concerning the ICC are.

1.5 Disposition

My intention with this thesis is to explain the problem with amnesties in international law in general and the Rome Statute in particular and suggest some solutions to this problem. To be able to do this in a meaningful way I judge it necessary to explain some key concepts for the understanding of the topical issues.

In chapter two I will demonstrate the difficulties with the balancing act between reconciliation and prevention in practice by making a presentation of the reconciliation processes in South Africa, Rwanda and Sierra Leone. The purpose is mainly to gain a more profound understanding of the problem at stake by showing the practical consequences of certain policies. In the following chapter three, I make a presentation of different types of amnesties with the intention to clarify and emphasise the variance of motives and models and consequently legitimacy of different amnesties. Chapter four moves on to examine the recognition of amnesties in international law. This analysis is composed to demonstrate three possible legal hindrances for amnesties in international law; a duty to prosecute war crimes, the effects of a peremptory character of war crimes and the incompatibility of amnesties with certain human rights norms. As this thesis seeks to distinguish the limits of the principle of complementarity in relation to the granting of municipal amnesties it includes an investigation of that principle as enshrined in the Rome Statute. Chapter five is logically closely linked to chapter four, as the Rome Statute constitutes part of international law. I have interpreted article 17 of the Rome Statute in search of the views of the Member States relating to amnesties for war crimes as a possible obstacle for prosecution by the International Criminal Court. Chapter five is followed by a general conclusion where I have summoned my observations and presented my resultant theory.

The discussion about national reconciliation after a conflict and prevention of international crimes has several interesting dimensions where the legal is one. The sociological, psychological, political, philosophical and moral aspects of the discussion are intriguing and important however, I have in this thesis chosen to focus on the judicial questions.

2 Learning from the past and present

2.1 Advantages and Disadvantages with International Prosecution

When making an interpretation of the relation between the principle of complementarity and amnesties I find it important to consider the consequences a certain reading would have. Such reflection will, in my opinion, most probably affect the interpretation made by the ICC. Therefore, it is interesting to take a look at different methods of accountability and reconciliation methods throughout the world.

The prosecution of war crimes has the advantages to be a discouragement for future abuses and a deterioration of private revenge. Other important consequences include the reinforcement of the respect for the rule of law in a State and the guarantee of due process for suspects. For an authority to gain legitimacy and reinstall peace and the rule of law after the commission of serious international crimes it must not only bring to justice those responsible of atrocities. It is also intrinsic in this process that the alleged perpetrators are all treated according to general principles of due process. Further, the prosecution facilitates a historic record by securing firm proofs.

However, a strict imposition of prosecution as the only valid accountability measure and particularly prosecution conducted by the ICC in spite of national amnesties attaches certain problems. The criticism of neo colonialist behaviour by some States to solemnly implement a traditional western approach towards accountability is one such problem. The elimination of alternatives to prosecution is argued to be a somewhat narrow-minded view. Linked to this critique is the risk of selectivity in the case of an international prosecution. The few persons that are being prosecuted could be seen as 'martyrs' in the eyes of the public. The selectivity also refers to certain conflicts, the conflicts not dealt with in international prosecutions are indirectly being granted 'amnesties'.¹⁰ Another possible disadvantage is the deterioration of the possibilities for a smooth transition for new governments in troubled areas. A final visible problem may include certain practical disadvantages of a single-handed rejection of amnesties as an alternative for prosecution.

¹⁰ Martha Minow, *Between Vengeance and Forgiveness*, (Beacon Press, Boston, Massachusetts, 1998) p. 30.

2.2 National Reconciliation vs. International Prevention

An important point of departure when approaching accountability for serious international crimes is that the interest of the affected State and the international community as a whole may not always be the same although they do overlap.

After a national trauma the two main objectives for a country is generally to create stability for the future and to reconcile with the past. Many different opinions have been raised on how to most successfully accomplish these goals and several methods have been tried. The various manners have not always included prosecution, but at times actively excluded it.

The goal of the international community after the commission of serious international crimes is somewhat different. The main interests are the maintenance of peace and security and the prevention of the reoccurrence of such crimes in the future in any part of the world, a concern that transcends the interest of any State as articulated by the Yugoslavian tribunal.¹¹ The most important tool we know for international prevention is probably prosecution.¹²

I will in the following sections present three national systems that represent different views and problems. The South African Truth and Reconciliation Commission (hereinafter TRC) was a groundbreaking enterprise. It was a refined version and a significant progress in the development of TRCs and of criteria for the granting of amnesties. Nonetheless, it was not created without controversies and it may have resulted to be a setback for prosecutions for international crimes. The second system presented is the Rwandan that represents some of the great difficulties a justice and reconciliation venture attaches. However, the presentation also demonstrates the current Rwandese solution to practical problems with bringing *genocidaires* to justice. The third example is Sierra Leone where the present solution chosen is a combination with a TRC and a hybrid court. The arrangement is not unproblematic although it represents a great progress and pioneering regarding international criminal law and solutions for reconciliation.

¹¹ *Prosecutor v. Tadic*, 10 August 1995, ICTY (Trial Chamber, Decision on Defence Motion on Jurisdiction) Case No. IT-94-1, para. 42.

¹² I choose not to develop other mechanisms such as education etc that I find to have little to do with the legal question I intend to provide an answer to.

2.3 South Africa

When the appalling apartheid rule of South Africa ended in the early 1990's many wanted to set up a tribunal to punish the perpetrators of serious crimes during the apartheid era. However, the prime minister at the time Nelson Mandela decided to adhere to the compromise negotiated before the change of powers and decided to establish a TRC. The transitional process towards democracy in the country, when the leaving government cooperated with the new, was the immediate reason why the decision to create a TRC and grant amnesties for these crimes was decided upon. Such political decision was deemed necessary at the time and the decision was further legitimised since the decision maker Nelson Mandela himself was a victim of apartheid.

2.3.1 The Nature of the South African TRC

The South African TRC started its work in 1996; the objective was to come to terms with the nature, causes and extent of the gross human rights abuses under apartheid.¹³ It was based on the *Promotion on National Unity and Reconciliation Act* from 1995.¹⁴ The Commission was based on three committees: the Amnesty Committee, the Reparation and Rehabilitation Committee and the Human Rights Violations Committee. Amnesties were granted if certain criteria were fulfilled:

- The incident for which the applicant requests an amnesty should be associated with a political motive,
- The incident must have taken place within the time-limit; 1 March 1960- 5 December 1993 (Later extended to 10 May 1994),
- The applicant should fall within a number of prescribed categories, principally supporters, members or employees of the parties involved in the political conflict of South Africa,
- The incident should comply with criteria for an act associated with a political motive,
- The applicant should give a full disclosure of the incidents for which he was seeking amnesty.¹⁵

The commissioners should be impartial and without a high political profile, not more than two were allowed to be non South African citizens.¹⁶

¹³ *Promotion on National Unity and Reconciliation Act No. 34*, No. 1111, 26 July 1995

¹⁴ <www.gov.za/reports/2003/trc>Last accessed 27 July 2004.

¹⁵ *Promotion on National Unity and Reconciliation Act No. 34*, No. 1111, 26 July 1995, Sections 16-22.

¹⁶ *Promotion on National Unity and Reconciliation Act No. 34*, No. 1111, 26 July 1995, Article 7 (2) b.

2.3.2 Response to the South African TRC

The situation in South Africa differs from the other examples in two important aspects. The apartheid era covers a period of approximately 50 years, which makes more traditional accountability measures such as prosecution difficult and even arbitrary as to who is indicted. Another difference is the legal status of the crime of apartheid at the time; it lacked judicial precedents and it was codified in the course of the crimes being committed.¹⁷ Even though the creation of the Convention on the Suppression and Punishment of the Crime of Apartheid did make apartheid an international crime that appends an obligation to prosecute¹⁸, the United Nations (hereinafter the UN) choose not to persuade prosecutions for perpetrators of crimes of apartheid at the time. Instead, it allowed South Africa to determine how to comprehend the past atrocities without considerable foreign intervention.¹⁹ Although several NGOs made reservations to the South African amnesty process, the international community has generally welcomed this decision, many have called it the one successful truth commission and it has served as a model for other commissions.²⁰ It has not been as well received internally in South Africa but victims and their families have *inter alia* questioned the granting of amnesties in national courts.²¹ Reasons for the disapproval of the amnesty laws derive from the injustice the granting of an amnesty provokes, as it withholds responsible for serious crimes from justice.

2.4 Rwanda

More than 800.000 Rwandans were murdered during those 100 sinister days of the spring of 1994.²² The amount of persons lost is so high it is impossible to grasp and, consequently the number of perpetrators is considerable. The crime of genocide has a peremptory character and there is a global duty

¹⁷ *International Convention on the Suppression and Punishment of the Crime of Apartheid*, United Nations General Assembly Resolution 3068 on 23 November 1973.

¹⁸ *ibid*, Article 4(2).

¹⁹ *Elimination of Apartheid and Establishment of a united, democratic and non-racial South Africa*, United Nations General Assembly Res/48/159 20 Dec 1993.

²⁰ John Dugard, *Reconciliation and Justice: the South African Experience*, Vol. 277, 1998 Transnational Law and Contemporary Problems, Symposium: International Human Rights at Fifty, <web.amnesty.org/library/Index/ENGAFR530012003?open&of=ENG-ZAF>, Last accessed 8 September 2004. Ghana is an example of a State with a TRC modelled after the South African, <<http://www.worldpress.org/Africa/1827.cfm>> Last accessed 8 September 2004.

²¹ *Azanian People's Organization (AZAPO) v. President of the Republic of South Africa*, 25 July 1996, Constitutional Court of South Africa, SALR at 687, para. 25 <www.concourt.gov.za/judgment.php?case_id=11939> Last accessed 4 November 2004.

²² *Report of the independent inquiry into the actions of the United Nations during the genocide in Rwanda*, S/1999/1257.

to prosecute or extradite for prosecution perpetrators of this crime.²³ Hence, bringing *genocidaires* to justice is the responsibility of the whole international community. Accordingly, in 1994 the UN established the International Criminal Tribunal for Rwanda (hereinafter the Rwanda Tribunal)²⁴. Today 9 cases have been completed and 11 are on appeal.²⁵ In the national Rwandan courts, 2500 persons have been tried and sentenced for genocide during this period according to the official website of the government of Rwanda.²⁶ However the system has proven too slow as more than 110.000 persons are detained in the overcrowded prisons.²⁷ The unsustainable situation has led to the creation of a new form of courts, *Gacaca* tribunals, which aim at speeding up the pace.

2.4.1 The Rwanda Tribunal

The UN Security Council created the Rwanda Tribunal in November 1994, The tribunal is located in Arusha in Tanzania.²⁸ All judges are international, 7 of the 20 judges origin from Africa. The convicted include the former Prime Minister Jean Kambanda, several high-profile politicians and persons involved in the media.²⁹ The Rwanda Tribunal has jurisdictional primacy in relation to national courts.³⁰

Main critics of the tribunal relate to its costly and slow procedure and to the fact that it is not sufficiently linked to Rwanda to be able to provide for reconciliation in that country. There has been extensive critique about that the Tribunal, unlike the national Rwandese courts, one, does not provide for death penalty and two, that the prisons provided for after sentence are of a higher standard than national prisons since the consequence of this is that the suspects and perpetrators of the most serious crimes have advantages that suspects and perpetrators of less serious crimes lack.

²³ See *inter alia*; *Convention on the Prevention and Punishment for the Crime of Genocide*, 9 December 1948, *Reservations to the Convention on the Prevention and Punishment on the Crime of Genocide*, 28 May 1951, International Court of Justice (Advisory Opinion) *I.C.J. Reports 1951, Application of the Convention on the Prevention and Punishment of the crime of Genocide (Bosnia and Hercegovina v. Serbia and Montenegro)* 11 July 1996, International Court of Justice, Judgment,, *I.C.J. Reports 1996*.

²⁴ Security Council, S/Res/955 (1994) of 6 November 1994.

²⁵ <www.ictj.org/default.htm>, Last accessed 8 September 2004.

²⁶ <www.rwanda1.com>, Last accessed 8 September 2004.

²⁷ <www.amnestyusa.org/countries/rwanda/document.do?id=80256AB9000584F680256C8C005E4CC6> Last accessed 8 September 2004.

²⁸ Security Council Resolution 955, 3453rd Meeting, 8 November 1994.

²⁹ <www.ictj.org/default.htm> Last accessed 8 September 2004.

³⁰ *Statute of the International Criminal Tribunal of Rwanda*, as amended by Resolution 955 (1994), 977 (1995), 978 (1995), 1165 (1998), 1166 (1998), 1329 (2000), 1411 (2002) and 1431 (2002), Article 8 (2).

2.4.2 *Gacaca* Courts

The Rwandan government has divided the *genocidaires* into four different categories. The suspected planners, organizers, instigators and leaders belong to category 1 and will be tried in national courts. The alleged perpetrators of slightly less serious crimes, belonging to categories 2-4, will be tried in *Gacaca* courts. The *Gacaca* Courts are based on a participatory justice system that is modelled after a traditional Rwandese method of resolving conflicts. The perpetrators give a full confession of the incident; give apologies and some sort of reparation to victims and/or their families. The non-professional community-elected ‘judges’ can impose prison penalties, but not death penalty.³¹

2.4.3 Response to the *Gacaca* courts

Advantages of *Gacaca* trials include, reviving the traditional Rwandan nature of the prosecution and emphasising the local capacity to deal with these crimes. Further possible positive consequences would be the facilitation of reconciliation by revealing the truth of the conditions of the genocide and to avoid an environment of impunity.³²

Critics to the *Gacaca* system emphasise the possible failure of due process and, being set up by the government, the risk of bias.³³

In my opinion the establishment of *Gacaca* courts demonstrates some important issues relating to the current problem. The difficulties with holding a large number of perpetrators accountable could result in a process that does not live up to human rights standards of a fair trial. Another issue is the national versus the international system. A domestic process can more easily involve the Rwandese people and thus be an effective tool in the reconciliation process. Then again, in an international process the fear of biased judges and victor’s justice is avoided and the international fight against impunity is better served, as the international community tend to demonstrate more acceptance to and confidence in international justice. I avoid making a statement of the validity and sustainability of the *Gacaca* courts because I think it would be premature to pass any judgement.

³¹ Website of Penal Reform International

<www.penalreform.org/english/theme_gacaca.htm#top>, Last accessed 4 November 2004.

³² Website of the Republic of Rwanda

<www.rwanda1.com/government/justice.htm> Last accessed 4 November 2004.

³³ *inter alia* Rachel Rinaldo, *Can the Gacaca Courts Deliver Justice?*, 8 April 2004

<<http://www.globalpolicy.org/intljustice/tribunals/rwanda/2004/0408justice.htm>> Last accessed 9 September 2004.

2.5 Sierra Leone

Civil war raged Sierra Leone for 11 years, from 1991 to 2002. The conflict was principally fought between government forces and the Revolutionary United Front (RUF). Approximately 60,000 people were killed in the conflict³⁴ and massive violations of human rights and humanitarian law have been reported.³⁵ In June 1999 the Lomé Peace Agreement was signed between the government of Sierra Leone and RUF under the auspices of the UN.³⁶ An amnesty provision was included for all crimes committed during the conflict.³⁷ In accordance with this provision a TRC was created and its functions parallel with a Special Court that the UN and the government of Sierra Leone jointly set up in 2002.³⁸

The attorney general and minister of justice of Sierra Leone, Solomon Berewa, stated that the main reason for why there was no provision on judicial accountability included in the peace agreement was for fear of hindering the peace negotiations. Mr. Berewa continued saying that “The view that truth is as good as justice also implies that knowledge of the truth is the most important part of a process of healing and uniting the country.”³⁹

When signing the peace agreement the UN Special Representative of the Secretary General for Sierra Leone attached to his signature a condition that the amnesty provision was not to apply to genocide, crimes against humanity and serious violations of international humanitarian law. As a consequence of this opinion, in the course of the establishment of the Special Court the Sierra Leone government and the UN agreed on the current article 10 of the statute of the court which gives the court the possibility to try crimes against humanity and serious violations of humanitarian law to which an amnesty previously has been granted.⁴⁰ According to UN Under-Secretary General Hans Corell this provision is a consistent effect since amnesties for the current crimes are incompatible with international law.⁴¹

³⁴ William Reno, *Sierra Leone*, <unpan1.un.org/intradoc/groups/public/documents/nispacee/unpan016206.pdf>, Last accessed 8 September 2004.

³⁵ See *inter alia*; Human Rights Watch Report, <www.hrw.org/english/docs/2003/12/31/rwanda7009.htm> Last revised 9 September 2004.

³⁶ *Peace agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone* <www.sierra-leone.org/lomeaccord.html> Last accessed 8 September 2004.

³⁷ *Ibid* part 3, article IX.

³⁸ <www.sc-sl.org> Last accessed 8 September 2004.

³⁹ Solomon Berewa, *Addressing impunity using divergent approaches; the Truth and Reconciliation Commission and the Special Court*. <www.sierra-leone.org/trcbook-solomonberewa.html > Last accessed 8 September 2004.

⁴⁰ *Report of the Secretary-General on the Establishment of the Special Court for Sierra Leone*, (S-2000-915) para. 24.

⁴¹ *Report of the Secretary-General on the Establishment of the Special Court for Sierra Leone*, (S-2000-915) para. 24.

2.5.1 The Relationship between the Special Court and the TRC

As the name reveals the purpose of the TRC is to bring out the truth of the past, as a way to reconcile with the past for victims but also for the perpetrators. A further purpose is to prevent future atrocities by demonstrating the will of Sierra Leone to hold perpetrators accountable. The subject at target is a great part of the people of Sierra Leone. Although the commission has international representatives it is a domestic forum.⁴² The functioning of the Commission is constructed on the idea that perpetrators and victims want to tell their stories and that the telling fulfils a purpose on its own.

The purpose of the Special Court on the other hand is punitive and the subjects are “those who bear the greatest responsibility or are most responsible for the commission of serious violations of international humanitarian law in Sierra Leone”.⁴³ The objective is to implement accountability for international crimes to prevent the former leaders of the country from repeating the atrocities committed and thus bring instability back into the country. Another purpose aims at the national reconciliation and restoration since the war; it seeks to strengthen the belief in the rule of law but is also a way for the international community as a whole to find a way to prevent such crimes.⁴⁴

The TRC and the Special Court act separately although their goals and purposes correspond.⁴⁵ According to Sierra Leonean law the TRC is, as an institution created under national law, under a duty to cooperate with the Special Court.⁴⁶ I believe there is a risk that such subsidiary position could undermine the work of the TRC, as people would fear to step forward and tell their stories if this could lead to a later information sharing to the Court and consequently possibly to prosecution or other use by the Court.

⁴² <www.sierra-leone.org/trc-trcforsierreone.html> Last accessed 8 September 2004.

⁴³ Statute of Special Court for Sierra Leone, <<http://www.sc-sl.org/scsl-statute.html>> Last accessed 8 September 2004.

⁴⁴ Website of the Special Court for Sierra Leone
<www.sc-sl.org> Last accessed 4 November 2004.

⁴⁵ Website of the Special Court for Sierra Leone
<www.sc-sl.org> Last accessed 4 November 2004.

⁴⁶ *Human Rights Watch Policy Paper on the Interrelationship Between the Special court of Sierra Leone and Truth and Reconciliation Commission.*
<www.hrw.org/press/2002/04/sierraleoneTRC0418.htm> Last accessed 8 September 2004.

2.5.2 Responses to the Relationship Between the Special Court and the TRC

An investigation made by the Sierra Leonean NGO PRIDE (Post-Conflict Reintegration Initiative for Development and Empowerment)⁴⁷ shows that there is generally a lack of support by ex-combatants for the information sharing between the TRC and the Special Court. The reason asserted by PRIDE is that the questioned want to witness before the TRC because they believe it could help promote reconciliation, but they fear the negative consequences that could come from the Special Court.⁴⁸ This apprehension has been rejected by William Schabas, who is a commissioner of the Sierra Leone TRC. He suggests that people's desire to air past experiences prevails over their fear of prosecution.⁴⁹

2.6 Conclusion Case Studies

Would the South African apartheid regime have continued committing atrocities if it would not have been for the decision to grant amnesties? Could further atrocities in Sierra Leone have been avoided if the Lomé peace Agreement had not provided for amnesties? It is not possible to find answers to such questions. Nor is it easy to know what will be the proper solution in the future when a choice has to be made whether to prosecute or to grant amnesties.

Nevertheless, we can observe and learn from the decisions above and we can perceive the main problems. Past experiences show that the main reasons for the choice not to prosecute are political (like in South Africa or Sierra Leone) or practical (like in Rwanda). The choices are individualised; they are based on the prerequisites for the country in question. As such the decisions are thus highly of a political character, something which the ICC seeks to avoid.

In his inauguration speech the Chairman of the Sierra Leone TRC Rev. Dr. Joseph Humper reflected upon the TRC in relation to it being modelled after the South African TRC and he stated that the Sierra Leonean TRC is "uniquely Sierra Leonean, at all times guided by what is in the best interest

⁴⁷ A Sierra Leone NGO working for lasting peace by restructuring the socio-economic realities for ex-combatants and other war-affected parties.

<www.ictj.org/downloads/PRIDE%20report.pdf> Last accessed 8 September 2004.

⁴⁸ A study by PRIDE in partnership with the International Center for Transitional Justice *Ex-Combatant Views on the Truth Commission and the Special Court in Sierra Leone*, <www.ictj.org/downloads/PRIDE%20report.pdf> p.25, Last accessed 8 September 2004.

⁴⁹ ASIL conference Washington DC, 1 April 2004, personal note.

of the people of Sierra Leone”.⁵⁰ This is a fundamental observation regarding the reconciliation labour after any conflict. It also emphasises where national labour differs from international work against impunity. While reconciliation is the main objective with a TRC it is one of several objectives with a prosecution in a court.

This observation is important to acknowledge when analysing the principle of complementarity of the Rome Statute. The result of different accountability methods will indirectly affect the determination whether a State is unwilling in its investigation of alleged war crimes and thus consequently, the decision of admissibility of a case before the ICC. Past experiences can provide for information about the flaws and benefits of different methods and consequently whether alternative accountability measures meet the legal standards of an investigation according to article 17 of the Rome Statute. This leads us into the next chapter that accounts for different types of amnesties and what standards the various kinds meet.

⁵⁰ Address by Rt Rev. Dr. Joseph Humper, chairman, Truth and Reconciliation Commission, on the occasion of the inauguration of the commission on Friday 5th July 2002 <www.sierra-leone.org/josephhumper070502.html> Last accessed 9 September 2004.

3 Amnesty

3.1 Introductory Remarks

When investigating if a national amnesty bars an ICC prosecution, according to the principle of complementarity, it is necessary to recognize that, due to the terms of its set-up; the conformity of an amnesty with international law can vary. Consequently, the answer to the question put above could be different depending on the character of the amnesty. In this chapter I present different kinds of amnesties with the intention to crystallise which elements influence the determination of its consistency with international law and consequently the Rome Statute.

The international community has been increasingly reluctant to accept the use of amnesties for war crimes. The reasons are principally dictators' misuse of amnesties and the internationalization of crimes. The extent of the development to prohibit amnesties for international crimes is however unclear. In the course of this discussion it is important to distinguish between certain types of amnesties.

3.2 Blanket Amnesties

The granting of blanket amnesties and self-proclaimed amnesties for crimes under the ICC's jurisdiction is incompatible with international law and the Rome Statute as it provides for impunity for war criminals; something that counteracts a general international obligation⁵¹ and a duty upon all Member States of the Rome Statute to prosecute war crimes.⁵² An amnesty that is not the result of a thorough investigation is intrinsically incompatible with such an obligation. Blanket amnesties may have considerable negative consequences as they may well fail to protect the rights of the victims and could jeopardise a lasting peace or a meaningful reconciliation of a country.⁵³

⁵¹ *Infra* section 4.1.

⁵² Non-operative paragraph 4, Rome Statute.

⁵³ Bruce Broomhall, *International Justice and the International Criminal Court* (Oxford University Press, Great Britain, 2003) pp. 94-95 (hereinafter Broomhall).

3.3 Conditional Amnesties

Viewed generally, the process, often led by a TRC, leading up to the granting of amnesties should fulfil certain criteria to gain any acceptance in the international community:

1. The investigation should have a quasi-judicial character; public hearings should be held and victims should have the right to testify.
2. The commission should be established by a democratically elected regime.
3. The commission should be an independent body and commissioners should be independent from government. It should also be seen to be of such a character; that is the commissioners should ethnically and politically represent the population.
4. The commission should have a broad mandate and be adequately financed and resourced to enable it to make a full and effective investigation of all forms of *inter alia* gross human rights violations.
5. The investigation should be aimed at providing for justice; the perpetrators of the abuses should be named, provided adequate opportunity is given to them to challenge their accusers. There should also be a possibility for the commission to recommend compensation to victims.
6. The commission should, within a reasonable time, submit a comprehensive report aimed at preventing the abuses.
7. There should be a possibility to refuse amnesties; no amnesty should be allowed to perpetrators of human rights violations who refuse to co-operate with the commission in providing a comprehensive picture of the wrongs of the past.⁵⁴
8. The aim should be to provide for international peace and security and the process of transition would be jeopardised without the amnesty.⁵⁵
9. There should be safeguards for victims and witnesses.⁵⁶

⁵⁴ 1-5 are included in John Dugard and Darryl Robinson, *Serving the Interest of Justice: Amnesties, Truth Commissions and the International Criminal Court* p. 497-498, European Journal of International Law Vol. 14 No 3 criteria lists while 6-7 exclusively appear in John Dugard, "Reconciliation and Justice: The South African Experience", *Transnational Law and Contemporary Problems*, fall 1998, p. 289.

⁵⁵ 1, 2, 5, 7 and 8 are included in Andreas O'Shea's *Draft Protocol to the Statute of the International Criminal Court on the Proper Limitations to Municipal Amnesties Promulgated in Times of Transition* in Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (Kluwer Law International, Leiden, The Netherlands, 2004) pp. 330-336 (hereinafter O'Shea).

⁵⁶ 1, 3, 6 and 9 are mentioned in *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*, E/CN.4/Sub.2/1997/20/Rev.12 October 1997, the Revised final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, paras. 19-24.

I will in chapter 6 of this thesis present the criteria I prefer for the granting of amnesties. My conclusion corresponds in general with the present list; however I would like to make a reservation relating to point 2 as I find it to have an unfortunate phrasing. The rationale of this provision is to gain a strong support for the amnesty within the population at large. This could be satisfied by point 3 of the list and by ensuring that all parties of a conflict are represented at the negotiations. I think the focus on a ‘*democratically elected regime*’ could be unfortunate, as it tends to exclude certain States from the ‘legitimate sphere’ of international law. Another regrettable effect with this provision could be that the commission and its composition could become a political rather than a legal issue.

3.4 Article 6 (5) Amnesties

Article 6 (5) of the Additional Protocol (II) to the Geneva Conventions reads; “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”⁵⁷

Although article 6 (5) of Additional Protocol II to the 1949 Geneva Conventions does not explicitly refer to a certain type of amnesties I believe it to be useful to reflect upon the article in this context as the article is repeatedly used as a means to defend the granting of amnesties. Article 6(5) encourages authorities to, by the end of the (non-international) conflict, grant amnesties for combatants.

The validity of applying this argument to defend amnesties for war crimes can however be seriously questioned. The interpretation by the International Committee of the Red Cross demonstrates that the amnesties referred to in the Protocol are amnesties for acts that violate national, not international, law. Thus, the amnesty contemplated upon in article 6 (5) is not intended to lead to impunity for serious offences against humanitarian law. The subjects of the 6 (5) amnesties are those detained only because they participated in the hostilities not those suspected of having violated international law.⁵⁸

⁵⁷ Article 6 (5), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977.

⁵⁸ Frits Karlshoven and Liesbeth Zegveld, *Constraints on the Waging of War* (International Committee of the Red Cross, Geneva, 3rd Ed, 2001) p. 150.

3.5 Conclusion amnesty

The outcome of an assessment of the relation between the principle of complementarity and amnesties could vary regarding whether the amnesty in question is a blanket amnesty or a conditional amnesty. Thus, it is important to understand and recognize the structures and characteristics of a particular amnesty when investigating the admissibility of a case, where an amnesty has been granted, before the ICC.

4 Obstacles for the Granting of Amnesties in International Law

4.1 Introductory remarks

The Rome Statute does not mention amnesties. Accordingly, we must look elsewhere for guidance when investigating amnesties and the principle of complementarity. As a part of international law it is essential that the Rome Statute is in harmony with relevant rules in this system. Consequently, the court when making its decisions shall apply relevant treaties and the principles and rules of international law.⁵⁹

I will in the following chapter present three possible theories to explain why amnesties could be incompatible with international law. The first is the obligation to prosecute certain crimes. Following this I will demonstrate how the special character of a rule could have a fundamental importance for the recognition of amnesties for acts contrary to such a rule. Finally, I will elaborate on whether amnesties for war crimes are reconcilable with certain human rights norms.

4.2 An Absolute *Aut Dedere Aut Judicare* in Treaty and/or Customary Law?

A potential obstacle for the granting of amnesties would be an absolute international obligation to prosecute war criminals. Such a duty would be incompatible with any granting of a national amnesty.

There is a duty to prosecute or extradite grave breaches of the 1949 Geneva Conventions enshrined in articles 49, 50, 129 and 146 of the four conventions respectively.⁶⁰ The Geneva Conventions have 191 parties; all member States of the UN are included. This high number indicates that the *opinio juris* of States is favourable for the existence of a parallel customary rule. In the *Nicaragua Case* the International Court of Justice (ICJ) described the obligation to respect and ensure the respect for the Geneva Conventions as

⁵⁹ Article 21, Rome Statute of the International Criminal Court.

⁶⁰ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Convention (III) relative to the Treatment of Prisoners of War. Convention (IV) relative to the Protection of Civilian Persons In Time of War.* Geneva 12 August 1949.

international customary law.⁶¹ Further, the obligation to prosecute or extradite war criminals has been reiterated in a number of UN General Assembly resolutions.⁶² Though these resolutions are not binding on the member States they “may have a normative value [...] they are considered evidence for an existing rule or *opinio juris* for the emergence of a new one”.⁶³ Another indication of the customary status for this obligation is its inclusion by the International Law Commission (ILC) in the Draft Code on Crimes against the Peace and Security of Mankind.⁶⁴ The Rome Statute of the ICC also points in the same direction as it enshrines the duty in question.⁶⁵

The Rome Statute differs from the Geneva Conventions as it attaches the duty to prosecute or extradite also to other war crimes than grave breaches of the conventions, that is to serious war crimes committed in non-international conflicts as well as those committed in international conflicts. States have traditionally been reluctant to extend obligations concerning internal conflicts, and the Rome Statute was not a codification of existing customary rules in this matter. However, there has been a development in international law towards a blurring of the rules for international and non-international conflicts. In the *Tadic Case* the Yugoslavian tribunal stated that the commission of serious war crimes attach criminal responsibility also when the crimes were perpetrated in non-international armed conflicts. The court admitted the development towards an obligation but noted that this rule was still emerging. Also in the statute of the Rwanda tribunal war crimes committed in the internal conflict of the country are included as appending responsibility. Further, the growing practice by States to prosecute perpetrators in internal conflicts is further evidence. Also, national legislations, such as the Spanish and German, extending the possibility to prosecute internal conflicts’ war crimes committed outside the country in question indicate the disappearance of a legal distinction between these two concepts.⁶⁶

However, international customary law is still unclear in whether to attach an obligation to prosecute or extradite non-international conflicts’ war criminals. Such confusion is, as mentioned, avoided in the Rome Statute.

⁶¹ *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)* 27 June 1986, International Court of Justice, *I.C.J. Reports 1986*, para. 220.

⁶² See *inter alia* General Assembly Resolution 3074 (1973) and General Assembly Resolution 41/160 (1986).

⁶³ *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, International Court of Justice (Advisory Opinion) *I.C.J. Reports 1996*.

⁶⁴ International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind*, 48th Session, 1996, (A/48/10), articles 8-9.

⁶⁵ Preamble and article 1 of the Rome Statute of the International Criminal Court.

⁶⁶ *Gesetz zur Einführung des Völkerstrafgesetzbuches*, Bundesgesetzblatt 2002, Teil I., No. 42, 29 June 2002, Chapter 2, Section 8 and *De los delitos contra las personas y bienes protegidos en caso de Ley Orgánica del Código Penal de 23 de noviembre, 10/1995*, Boletín Oficial del Estado, No. 281, 24 November 1995, Articles 608-614. All available at: <www.icrc.org/ihl-nat.nsf/WebLAW?OpenView> Last accessed 9 September 2004.

The argument could be made that even if an obligation to prosecute or extradite suspected war criminals could be established it is possible with exceptions to such. Consequently, it could be argued that an internationally accepted amnesty could constitute such an exception.

4.3 Does the Legal Character of the Crime Prevent Amnesties?

A further obstacle for the granting of amnesties for war crimes in international law could be the consequences of the characterisation of war crimes as *jus cogens* crimes in international customary law.

4.3.1 The Legal Character of War Crimes

The legal character of war crimes has been a matter of dispute; the reason is that such categorization would attach certain consequences. The Vienna Convention on the Law of Treaties⁶⁷ states that a treaty contrary to a “peremptory norm of general international law (*jus cogens*)” is void.⁶⁸ Another opinion was expressed by the Yugoslavian tribunal in the *Furundzija* case; that one of the consequences of a norm having the character of *jus cogens* is that an amnesty cannot be given for such a crime.⁶⁹ I will return to this last consequence but first I will investigate if war crimes have this special status.

Certain fundamental rules are considered as overriding principles of *jus cogens*. They are the concern of all States or the international community as a whole. These rules cannot be derogated from and they take precedence when colliding with more ordinary rules of international law.⁷⁰ Unlike the creation of ordinary customary rules *jus cogens* rules require, apart from state practice and *opinio juris*, an additional *opinio juris* that the rule in question constitutes *jus cogens*.

The ICJ has avoided this term in connection with war crimes, although the court touched upon it when it noted that the prohibition of such crimes constitute “intransgressible principles of international law”.⁷¹ However, war

⁶⁷ *Vienna Convention on the Law of Treaties*, 22 May 1969, article 53.

⁶⁸ Unfortunately the International Law Commission preferred not to define the term in the commentary to the convention “Commentary on the Vienna Convention on the Law of Treaties”, p. 11, *Yearbook of the ILC* (1966).

⁶⁹ *Prosecutor v. Furundzija*, 10 December 1998, ICTY (Trial Chamber, II Judgement) Case No. IT-95-17/1, para 155.

⁷⁰ Ian Brownlie, *Principles of Public International Law* (Oxford University Press Inc., Oxford-New York, 2003) pp. 597-598.

⁷¹ *Legality of the Threat or Use of Nuclear Weapons Case*, 8 July 1996, International Court of Justice (Advisory Opinion) §79 “Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”

crimes have explicitly been considered to constitute *jus cogens* by the Yugoslavian tribunal.⁷² This has also been stated by national courts⁷³ and by many international legal scholars.⁷⁴

In my opinion it is not premature to include grave breaches of the Geneva Conventions to the list of *jus cogens* crimes. The history of abolishing war crimes goes far back in time and there has been a general consensus within the international community to bring to an end the worst atrocities of war.⁷⁵ However, considering the rapid but more recent development in international criminal law concerning war crimes committed in non-international conflicts I would hesitate to define such war crimes as part of the peremptory norms.⁷⁶

The point is that there is possibly a distinct legal character between war crimes committed in international conflicts and those committed in non-international conflicts where the former constitute *jus cogens* but the latter do not.⁷⁷ Consequently, the effects presented below in section 4.2.2-4.2.4 would relate only to the war crimes committed in international, but not non-international, armed conflicts that is; the war crimes defined in articles 8 (2) a and b but not to those defined in articles 8 (2) c and e of the Rome Statute. However strange this distinction may seem it is a reality deriving from the sovereignty of States. The acts committed can be identical and the victims and even the perpetrators the same persons but depending on the legal definition of the conflict the character of the crime vary and so do the consequences, on State and individual level, of the commission of such a crime.

At the 1966 conference on international law Professor Katz accurately stated, in connection with the concept of *jus cogens*, that there was a general agreement that law did not exist regardless of its application. He continued “[i]f we could identify the principles we still had to find out how they

⁷² *Prosecutor v. Kuprescic et al*, 14 January 2000, ICTY, (Trial Chamber) § 520 “*most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or jus cogens, i.e. of a non-derogable and overriding character*”.

⁷³ *Haas and Prieke case*, 7 March 1998/ 16 November 1998, Military Court of Appeal of Rome/ Supreme Court of cassation, “*non-applicability of statutory limitations of war crimes as a principle of jus cogens character*” <www.icrc.org/ihl-nat.nsf/0/0370fc2730b3776c1256c8c0055e44d?OpenDocument> Last accessed 8 September 2004.

⁷⁴ *Inter alia* Conference on International Law Lagonissi (Greece) April 3-8 1966, *The Concept of Jus Cogens in International Law*, (Carnegie Endowment for International Peace, Geneva, 1967) p. 13, 82.

⁷⁵ *Inter alia* the “Lieber Code“ dating from 1864 and the American Civil War or the “Martens Clause” from the conference in the Hague in 1899; Frits Karlshoven and Liesbeth Zegveld, *Constraints on the Waging of War* (International Committee of the Red Cross, Geneva, 3rd Ed, 2001) pp. 19-26.

⁷⁶ See *inter alia* *Prosecutor v. Tadic*, 10 August 1995, ICTY (Trial Chamber, Decision on Defence Motion on Jurisdiction) Case No. IT-94-1.

⁷⁷ Articles 8 (2) a and b and 8 (2) c, d, and e respectively, Rome Statute of the International Criminal Court.

could be applied.”⁷⁸ Hence, I will in the following investigate possible legal consequences of labelling a norm *jus cogens*.

4.3.2 *Erga Omnes* Effects of the *Jus Cogens* Character- the ‘*Furundzija* Theory’

The Yugoslavian Tribunal states in the *Furundzija* case that: “The fact that torture is prohibited by a peremptory norm of international law has other effects at inter- state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition.”⁷⁹

While the *Furundzija* case in the Yugoslavian tribunal concerned the crime of torture the analysis about *jus cogens* made by the court in that case is also relevant for the case of war crimes as it is a crime with the same legal character. In the *Furundzija* judgement the Yugoslavian tribunal stated that to avoid making the *jus cogens* prohibition meaningless, the granting of an amnesty for a *jus cogens* crime is not possible. The tribunal presupposed that the character of the crimes attaches certain consequences. It seems to have been the opinion of the court that the granting of amnesties encouraged prohibited behaviour and thus conflicted with the prohibition. Consequently, as a rule conflicting with *jus cogens*, the amnesty provision would be void according to the Vienna Convention on the Law on Treaties.⁸⁰

However, as the Yugoslavian Tribunal neither makes a decision upon amnesties nor specifies the type of amnesty in the relevant case the decision does not necessarily give an answer to the relation of amnesties as a bar to admitting a case before the ICC.

The contention made in the *Furundzija* case is far from uncontested. Many international legal scholars argue that there is nothing in the concept of *jus cogens* that presupposes *erga omnes* obligations, that the *jus cogens* charac-

⁷⁸ Conference on International Law Lagonissi (Greece) April 3-8 1966, *The Concept of Jus Cogens in International Law*, (Carnegie Endowment for International Peace, Geneva, 1967) p. 114.

⁷⁹ *Prosecutor v. Furundzija*, 10 December 1998, ICTY (Trial Chamber, II Judgement) Case No. IT-95-17/1, para. 155.

⁸⁰ Article 53, Vienna Convention on the Law on Treaties of 22 May 1969.

ter relates to the prohibition and cannot be extended without further State consent. Defenders of this theory point the State consent out as something exceptional and fundamental in international law. They claim that no common organization can exist that can sanction acts contrary to international law without a prior agreement of such. This line of argumentation asserts that only an exhortation to commit a crime against a *jus cogens* norm would conflict with such a norm, since this is a consequence agreed upon through the Vienna Convention on the Law on Treaties.⁸¹

However, some authors have instead based the theory of the expansion of the concept of *erga omnes* on the lack of a central authority, as referred to above, that controls and sanctions breaches of *jus cogens* norms.⁸² Without such, States have assumed the right to take action against breaches against *jus cogens* norms.

Other authors have reached similar conclusions; one of the firmest international criminal law promoters Professor Cherif Bassiouni has stated that “the establishment of a permanent international criminal court having inherent jurisdiction over these crimes is a convincing argument for the proposition that crimes such as [...] war crimes [...] are part of *jus cogens* and that obligations *erga omnes* flow from them”.⁸³ He affirms that the non-applicability of amnesties is one of the legal obligations, which arise from *jus cogens* crimes.⁸⁴ The defenders of this link between *jus cogens* and *erga omnes* tend to use this rather vague language that the duty in question “follows”, “follows logically” upon the prohibition or that the concepts are two sides of one coin.⁸⁵

The effect of the interpretations made by these distinguished scholars and, according to me, by the Yugoslavian tribunal relating to the principle of complementarity would be that only a national investigation leading to prosecution, thus not an amnesty, could bar an ICC prosecution for war crimes committed in an international conflict. Any other interpretation

⁸¹ *Inter alia* Gennady M. Danilenko, *International Jus cogens: Issues of Law-making*, 1991, European Journal of International Law, Vol. 2 No.1
<www.ejil.org/journal/Vol2/No1/art3-01.html#TopOfPage> Last accessed 8 November. See especially the discussion on positivist theory and law making.

⁸² Kerstin Barsch and Björn Elberling, *Jus Cogens vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the Kalogeropoulou et al. v. Greece and Germany Decision*, German Law Journal, Vol. 04 No. 05, p.486.

⁸³ Cherif Bassiouni, *Jus Cogens and Obligatio Erga Omnes*, 1996 Vol. 59 Law and Contemporary Problems
<<http://www.law.duke.edu/journals/lcp/articles/lcp59dFall1996p63.htm>> Last accessed 8 November 2004, p. 272.

⁸⁴ *supra*, p. 266, see also Broomhall, *ibid* fn 53, p. 56.

⁸⁵ See Dissenting Opinion of judge Ferrari-Bravo in *Al-Adsani v. the U.K.*, ECHR, 21 November 2001, (Judgement) Application no 00035763/97, para. 61, Lyal S. Sunga, *The Emerging System of International Criminal Law*, (Kluwer Law International, The Netherlands, 1997) and Michael Byers, “Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules”, *Nordic Journal of International Law*, 1997, vol. 66, no. 2-3, pp. 211-239(29), respectively.

would be impossible as it would be contrary to a *jus cogens* norm and thus void.

Critics of the ‘Furundzija theory’ would on the other hand claim that the character of a crime as *jus cogens* does not have any other ‘logical’ effects than those agreed upon in the Vienna Convention on the Law on Treaties.⁸⁶

Essentially this conflict concerns State sovereignty. If the character of a rule affects its implementation irrespectively of if the States concerned have consented to this it is an infringement of a State’s sovereignty as it cuts back on that State’s judicial discretion. In my personal view this is neither a legal nor a practical problem. States have consented to the creation of the norm in question; they have further consented to its special character and have thus noticed the severity of the crimes in question and the importance of their eradication.

Further, I cannot accept that practical difficulties would hinder *erga omnes* obligations to be imposed in this system. When arguing on the level of principles I find this argument out of place, as it is important to define the goals to have any possibility to accomplish them. Additionally, there are few norms that have the status of *jus cogens* and consequently the obligations arising from those existing would not be overwhelming.

4.3.3 The Obligation to Prosecute as *Jus Cogens*- ‘the AZAPO Theory’

The Azanian People’s Organization (AZAPO) brought, as discussed below, an application before the South African Courts against the President of South Africa and others. The applicants supported their case partly on an article by Professor Ziyad Motala. In the article he states that the rule providing for rights to individual victims of war crimes is a peremptory norm. Professor Motala further means that the granting of amnesties for war crimes, by the South African National Unity and Reconciliation Act (the Act), “violates a cardinal rule of international humanitarian law, namely that there can be no amnesty for war crimes”.⁸⁷ This characterisation made by Professor Motala of the prohibition of amnesties as a peremptory norm of international law was also reflected in the judgement.⁸⁸ Although the case in question concerned a civil action the argumentation is relevant also for a crimi-

⁸⁶ See *supra* fn 81.

⁸⁷ Ziyad Motala, *The Promotion of National Unity and Reconciliation Act, the Constitution and International Law*, 1995 Vol. 28, Comparative and International Law Journal of Southern Africa p. 338-362.

⁸⁸ *Azanian Peoples Organization (AZAPO) and others v. President of the Republic of South Africa et al*, 25 July 1996, the Constitutional Court of South Africa (CCT17/96) <www.concourt.gov.za> or www.worldlii.org/za/cases/ZACC/> Last accessed 8 November 2004.

nal case as it discusses the constitutionality of parts of the Act in relation to amnesties generally.

Apart from being utterly bold I find the argumentation accounted for above to have a considerable flaw. It is in the very nature of a peremptory norm of international law that the international community as a whole explicitly accepts it. Thus it is not possible to 'create' such rules through deduction. If Professor Motala's theory was applicable, that the obligation to prosecute war criminals would constitute *jus cogens* no amnesty for these crimes could ever be possible. The response by the international community has many times been less enthusiastic about amnesties than in the case of South Africa. However, it is far from abolishing all amnesties at all times. This is an indication of the international community's lack of *opinio juris* for the prohibition of amnesties to be part of *jus cogens*. I think imposing a peremptory character on the prosecution of war crimes would be a mistake that could jeopardize a fragile peace negotiation. It could also be negative for the authority of the concept of *jus cogens* as it would render impossible a strict concordance with article 53 of the Vienna Convention on the Law on treaties.

4.3.4 Short Endnote on *Jus Cogens*

The whole concept of *jus cogens* evidently reduces the sovereignty of States as it imposes obligations upon States from which they cannot derogate. The possible strengthening of the protection of certain *jus cogens* norms is coherent with the present development away from a prevailing focus on State sovereignty in international law. However, we must not forget that the very foundation of international law is still State consent and that international law is not what we want it to be but what States have agreed upon. An emerging law is just that- emerging and not yet quite established.

Based on the theories presented above I personally believe the '*Furundzija* theory' to be the most coherent. By attaching certain obligations to a peremptory norm of international the system of laws can be strengthened and developed without transgressing the fundamental principles of the creation of international law.

4.4 Are Amnesties for War Crimes Incompatible with International Human Rights Law?

The granting of amnesties could also be seen as contrary to several international human rights norms of the victims. I will in the following present some of the available case law that supports this argumentation.

4.4.1 The Azapo Case

The Azanian People's Organisation (Azapo) brought in 1996 an appeal to the Constitutional Court in South Africa against the President of South Africa and others.⁸⁹ The organisation was active in the liberation movement of the country and members of Azapo and their families had been victims during the apartheid era. The aim with the claim was to challenge the constitutionality of parts of the National Unity and Reconciliation Act (the Act). Azapo claimed that the possibility to grant amnesties according to the Act conflicts with those provisions in the constitution that empowers the function of the judiciary and the powers of the courts to deal with disputes. One provision of possible conflict was the right for every person to have his or her disputes settled by a court of law.

Although the court agreed that the right to access to a court was infringed by the act it held that this was a necessary measure to promote reconciliation in the country. It established that the issue for the court to determine was whether the act was in accordance with the constitution and not if it was in concord with international treaties and international customary law.⁹⁰ The court continued by stating that an act of the parliament takes precedence if conflicting with an international rule.⁹¹ It concluded that the act was in accordance with the constitution. The language of the court focused on national reconciliation based on forgiveness and it thus avoids determining whether the Act contravenes international human rights treaties.

The judgement may be applicable nationally in South Africa as it is in accordance with its constitution although it is not a valid decision in the international sphere. As the ICJ has stated it is a fundamental principle of international law that international law prevails over domestic law.⁹² This is a necessary rule for the operation of international law, without it any State could refer to its national regulations to avoid fulfilling its international obligations. In the current case the question if the South African amnesty law was legal according to international standards, whether the infringement of the individual's human rights could be justified as a measure to maintain national peace, thus remains unanswered. However, there is one conclusion to be drawn from the decision that is of our interest; according to the South

⁸⁹ *Azanian Peoples Organization (AZAPO) and others v. President of the Republic of South Africa et al*, 25 July 1996, the Constitutional Court of South Africa (CCT17/96) <www.concourt.gov.za> or <www.worldlii.org/za/cases/ZACC/> Last accessed 8 November 2004.

(hereinafter *Azapo v. President of the Republic of South Africa et al*).

⁹⁰ *Azapo v. President of the Republic of South Africa et al*, *supra* fn 89, para. 26.

⁹¹ *Azapo v. President of the Republic of South Africa et al*, *ibid* fn 89, para. 27.

⁹² *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, 26 April 1988, International Court of Justice, Advisory Opinion, *I.C.J Reports 1988* pp. 12, 34.

African court, the granting of amnesties was contrary to certain human rights norms.

4.4.2 Latin American Case Law

In Latin America, which has a vast history of amnesties, the Inter-American Court of Human Rights (the Inter-American Court) and the Inter-American Commission on Human Rights (the IACHR) have been firm in their non-acceptance of (self-proclaimed) amnesties for serious human rights crimes.

In Argentina, the IACHR concluded that laws enacted to withdraw from prosecution persons responsible for atrocities committed during the 'dirty war' were incompatible with the right to a fair trial.⁹³ Similar decisions were made in the cases of *inter alia* Uruguay, Chile and Peru.⁹⁴ The Inter-American Court on Human Rights has also reached this conclusion in a well-known case that I will account for below.⁹⁵

4.4.2.1 Barrios Altos Case

In 1991, 15 persons were killed and 4 were injured in Barrios Altos in Lima, Peru. Judicial investigations and newspaper reports stated that the perpetrators were members of the special military who were on an anti-terrorist mission, carrying out reprisals on members of the *Sendero Luminoso* (Shining Path). No serious investigations were carried out of the events until 1995 when five army officials were accused as responsible for the events. Shortly after this the congress of Peru adopted an amnesty law, granted an amnesty for all those members of the security forces or civilians who were accused of having committed human rights offences between 1980 and 1995.⁹⁶

The IACHR submitted the case to the Inter-American Court in June 2000.⁹⁷ It requested the Inter-American Court to determine whether the State of Peru had violated amongst others the right to a fair trial (article 8 of the American Convention on Human Rights) and the right to judicial protection (article 25 of the American Convention on Human Rights) as a consequence of the creation and application of the relevant amnesty law.

⁹³ No 28/92 (Argentina) < <http://www1.umn.edu/humanrts/cases/28%5E92arg.pdf>>.

⁹⁴ No 28/92 (Argentina) < <http://www1.umn.edu/humanrts/cases/28%5E92arg.pdf>>, 29/92 (Uruguay) <<http://www1.umn.edu/humanrts/cases/29%5E92urg.pdf>> 36/96 (Chile) <<http://www.cidh.oas.org/annualrep/96port/Caso10843.htm>> and 43/97 (Peru) <<http://www1.umn.edu/humanrts/cases/1997/peru43-97.html>>. All last accessed 8 November 2004.

⁹⁵ *Barrios Altos* (Chumbipuma Aguirre et al v. Peru) 14 March 2001, Inter-American Court on Human Rights, Serie C No. 75 <www.corteidh.or.cr/seriec> (hereinafter *Barrios Altos*).

⁹⁶ Amnesty Law 26479.

⁹⁷ *Barrios Altos*, *ibid* fn 95.

The court stated in its judgement that all amnesty provisions for violations of non-derogable human rights are inadmissible as they prevent the investigation and punishment of those responsible for such crimes. The Inter-American Court agreed in its judgement with the IACHR's plea relating to the lack of a fair trial and judicial protection.

Interestingly enough, the court then moves on to specify the amnesty in question. It states that self-amnesty laws lead to an environment of impunity for the perpetrators, an argument that is also applicable to other types of amnesties. However, it moves on by emphasising that the self proclaimed amnesties are contrary to the victims and their families' right to an investigation and to know the truth about past events. The court could in this case have done a deliberate distinction between self-proclaimed amnesties and amnesties which attach an investigation and hearing of the suspects and witnesses conducted by *inter alia* a TRC. The judgement suggests the abolishment of certain amnesties but does not shut the door on all.

The case law in Latin America suggests a general non-acceptance of amnesties for serious crimes such as war crimes. The underlying reason for this is that such amnesties are contrary to the human right of access to court deriving from the right to a fair trial.

4.4.3 The UN, Amnesties and Human rights

The UN has done extensive research on impunity and human rights and several reports have been produced. The rights supposedly violated by impunity for serious international crimes are the victim's right to know, right to justice and right to reparations.⁹⁸ The right to justice is the relevant right in this case as the other rights would not necessarily be violated by the granting of amnesties but could be respected by the work by *inter alia* truth commissions.

A relevant UN report states that the right to justice imposes an obligation upon States to investigate the events, to prosecute and, if the suspect is found guilty, to punish the individual in question.⁹⁹ The report goes on to confirm that amnesties cannot be granted "before the victims have obtained justice by means of an effective remedy".¹⁰⁰ An effect of this is that the treaty-based and customary human rights rule of a right to justice obliges all States to prosecute certain serious crimes. The focus on prosecution that is demonstrated in this report takes the point of departure in that the granting of amnesties is not possible for the crimes in question.

⁹⁸ *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)* E/CN.4/Sub.2/1997/20/Rev.12 October 1997 Revised final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, para. 16.

⁹⁹ *ibid*, para. 27.

¹⁰⁰ *ibid*, para. 32.

A possible further effect could be a conflict between rules of international human rights law giving a right to justice and domestic law granting amnesties. Regarding the international perspective of this conflict international law would prevail before the national.¹⁰¹

4.4.4 Short Endnote on Amnesties and International Human Rights Law

Experiences from *inter alia* Sierra Leone and Latin America demonstrate the international communities opinion that self-proclaimed amnesties are incompatible with the individual's right to justice. It is however unclear if this conclusion can be extended to include also other types of amnesties.

In my opinion the investigating and processing part of the accountability procedure, i.e. revealing the truth, could be satisfied by a TRC granting amnesties. The element a TRC lacks is the prosecution leading to a legal punishment. However, the requirement of 'bringing to justice' could be satisfied in the case of a quasi-judicial investigation by a TRC that would result in an amnesty if some accountability measures are attached to the truth telling.

¹⁰¹ See section 4.3.1 for further discussion in this subject.

5 The Principle of Complementarity

5.1 Article 17

“Article 17

Issues of admissibility

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

(a) The case is being investigated or prosecuted by a State, which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

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

(c) The person concerned has already been tried for conduct, which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court” (own emphasis added).¹⁰²

5.2 Negotiating the Principle of Complementarity

A case is admissible to the ICC where it is not deemed inadmissible according to the Rome Statute; in this case more particularly article 17 of that statute.¹⁰³ I have in the following interpreted article 17 in accordance with the customary rules that are embodied in the Vienna Convention on the Law on Treaties (VCLT). My intention is to understand the State Parties’ intentions when dealing with the problem of amnesties and complementarity.¹⁰⁴ The point of departure is the ‘ordinary meaning’ of the terms of the treaty. When unsuccessful in finding a clear answer I turn to ‘any relevant rules of international law applicable between the parties’.¹⁰⁵ This investigation is accounted for largely in chapter four above. The interpretation is further made

¹⁰² Article 17, Rome Statute of the International Criminal Court.

¹⁰³ Broomhall, *supra* fn 53, p. 100.

¹⁰⁴ Articles 31 and 32, Vienna Convention on the Law on Treaties of 22 May 1969.

¹⁰⁵ Article 31 (3) c Vienna Convention on the Law on Treaties of May 1969.

in the light of the principles and purposes of the statute and finally by using supplementary means of interpretation.¹⁰⁶

Through the course of the negotiations of the Rome Statute an alternative approach to the principle of complementarity was suggested. It proposed that the Court should not have the power to intervene when a national decision had been taken in a particular case.¹⁰⁷ As we know, the decision to include the wider discretion of the Court relating to the issue of complementarity was later included in the statute. This could give the ICC an opportunity to start an investigation although an amnesty has been granted nationally in a particular case. The States' discretion on how to fulfil its duties to fight impunity under the Rome Statute is thus limited in the final version of the statute. Unfortunately it is not clear by the phrasing of article 17 of the Rome Statute how far this limitation reaches.

5.3 'Investigation' or 'Prosecution'

The definition of the word 'investigation' according to the Oxford English dictionary is "the action of investigating; the making of a search or inquiry; systematic examination; careful and minute research".¹⁰⁸ This interpretation is not necessarily linked to a prosecution, but appends a certain standard to be fulfilled by the responsible authorities in the process of granting an amnesty.

The Oxford English dictionary has defined 'prosecution' to be "in strict technical language: a proceeding either by way of indictment or information in criminal courts, in order to put an offender upon his trial; the exhibition of a criminal charge against a person before a court of justice".¹⁰⁹ This definition tends to exclude the possibility of equalising a hearing with no other possible outcome than an amnesty by a truth commission with a prosecution.

The word 'or' could indicate that the link between the investigation and the prosecution is not mandatory. This would make it possible to have an investigation that does not lead to a prosecution, hence the interpretation renders

¹⁰⁶ Ulf Linderfalk, *Om tolkningen av traktater*, (Lunds Universitet, Lund, 2001) p. 321 (hereinafter Linderfalk).

¹⁰⁷ In connection to Article 15, Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Draft Statute & Draft Final Act* (A/Conf.183/2/Add.1, 1998), *The Statute of the International Criminal Court*, Compiled by M. Cherif Bassiouni, p. 137 (Transnational Publishers, Inc. Ardsley, New York, 1998) (hereinafter Bassiouni) "*The Court has no jurisdiction when a question is being investigated or prosecuted, or has been investigated or prosecuted, by a State which has jurisdiction over it*".

¹⁰⁸ Ed. R.W. Burchfield, *The Oxford English Dictionary*, 2nd Edition (Clarendon Press, Oxford, 1989) Vol. VIII, p. 47.

¹⁰⁹ Ed. R.W. Burchfield, *The Oxford English Dictionary*, 2nd Edition (Clarendon Press, Oxford, 1989) Vol XII, p. 663.

possible for an investigation leading up to an amnesty to be an obstacle for ICC prosecution.

However, ‘or’ could also be a mere inclusion of the cases where an investigation has been started but has still not proceeded long enough for a prosecution to be held.

Thus, the interpretation of the words ‘investigation or prosecution’ does not give any definite answer whether the inclusion of amnesties is a bar to prosecution by the ICC according to the principle of complementarity. Therefore I find it necessary to continue the interpretation by using other available tools as presented in the VCLT.

During the negotiations of the Rome Statute ‘proceedings’ was defined to cover both investigations and prosecutions.¹¹⁰ This could reflect the view that an investigation cannot be viewed independently from a prosecution. The effect would thus be that an investigation in the words of the Rome Statute logically is an investigation leading up to a prosecution. Some authors argue that ‘investigation’ is to be interpreted as criminal investigation.¹¹¹ This theory is based on the assumption that the court would expect a national investigation to be in accordance with the State in question’s normal investigations or prosecutions for similar conduct and that these proceedings are in accordance with international standards. The result is the same in both interpretations; that an investigation leading to an amnesty would not be in the scope of article 17, since it lacks the element of prosecution, and would thus not bar an ICC prosecution.

The result of the use of other means of interpretation seems to point in the same direction. The principles and purposes of the Rome Statute are expressed in the preamble of the statute. Non-operative paragraph 4 states that the “effective prosecution” must be ensured to combat the serious crimes under the jurisdiction of the Court.¹¹² This clearly indicates the States Parties’ aspiration to impose obligations to prosecute the crimes in question. However, it is also possible to focus on non-operative paragraph 8 and 10 of the Rome Statute that emphasise the prohibition to intervene in a State’s internal affairs and the court’s complementarity to national authorities. Thus, these principles tend to collide when interpreting the intentions of the States Parties relating to amnesties and the principle of complementarity.

¹¹⁰ Bassiouni, *supra* fn 104, p. 240, fn 60.

¹¹¹ John T. Holmes, *The Principle of Complementarity* in Roy S. Lee *The International Criminal Court: The making of the Rome Statute* (1999) pp. 677 and 681 (hereinafter Holmes).

¹¹² Non-operative paras. 4-5 of the Rome Statute of the International Criminal Court Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.

Underlying the abovementioned principles is the fundamental purpose of the Rome Statute that is the eradication of the crimes at hand, which is articulated in non-operative paragraphs 1, 2 and 3. According to paragraph 4 mentioned above, but also to non-operative paragraphs 5 and 6 and the choice to create a court the negotiators seem to believe that the prosecution of alleged criminals best serves this purpose. Thus, one possible, and in my opinion reasonable, interpretation of the States' opinions relating to the principle of complementarity and the principles and purposes of the Rome Statute is that the prosecution can be implied as an obligation that the Member States accept when ratifying the Rome Statute. This interpretation is also in accordance with the 'principle of effectiveness' as its application gives the fullest weight and effect to the purposes to abolish war crimes and avoid impunity for these crimes.¹¹³ A final support of this interpretation could be indicated by the limited jurisdiction of the ICC, an incitement that where the ICC has jurisdiction it also has a duty to prosecute.¹¹⁴

Chapter four of this thesis concerns, as mentioned above, the interpretation of the principle of complementarity in relation to conventions and practice outside the Rome Statute. The conclusion of that investigation seems to be indicating an obligation to prosecute serious war crimes in international conflicts, but an unwillingness of States to extend this obligation implicitly.

The interpretation of the words 'investigation' and 'prosecution' fails to provide any easy answers. As noted above, there is an *erga omnes partes* obligation to ensure the prosecution of war criminals in the Rome Statute. Is article 17 of the Rome Statute incompatible with the duty in question and thus unlawful if it allows amnesties? Is the principle of complementarity created to limit such a duty (the duty seizes to exist and the State discretion is extended) or is it a mean to implement the obligation? Perhaps the vagueness of the Rome Statute drafters was deliberate, not because there was a need for a political consensus but because there is no good, nor just alternative path.

5.4 'Decided'

The word 'decided' in article 17(1) b of the Rome Statute suggests that there should be another possibility than non-prosecution, that the national authorities shall have the possibility to make a decision to prosecute.¹¹⁵ If prosecution is prevented by legislation or if some other measure makes it impossible for the authorities to prosecute, no decision has been made and the investigation performed would not block an investigation by the ICC.

¹¹³ Linderfalk, *supra* fn 106, p. 326.

¹¹⁴ Article 12, Rome Statute of the International Criminal Court. Universal jurisdiction is not a jurisdictional ground for the ICC.

¹¹⁵ Darryl Robinson, "Serving the Interest of Justice: Amnesties, Truth Commissions and the International Criminal Court", 2003, *European Journal of International Law*, Vol. 14, No. 3 p. 501.

Thus, a blanket amnesty without any investigation does not fulfil this criterion but an investigating authority should have the possibility to deny amnesties. However, according to this theory; it seems as a conditional amnesty, allowing for a prosecution if certain criteria are not fulfilled, could block an ICC prosecution. The interpretation of ‘decided’ does thus not provide for a given answer to the problem.

5.5 ‘Unwilling’

“Article 17 [...]

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

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

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

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is **inconsistent with an intent to bring the person concerned to justice**” (own emphasis added).¹¹⁶

When the court is determining the unwillingness of a State to prosecute it shall consider certain criteria enshrined in article 17(2) of the Rome Statute. In deciding if the granting of an amnesty by a State derives from unwillingness to prosecute it will be necessary to determine the type of amnesty granted and to whom the amnesties in question were given. The paragraph refers to ‘the principles of due process recognized by international law’. If the case in question concerns blanket amnesties or amnesties that are given to all but very few of the most responsible the ICC may find the State in question to be ‘unwilling’ to prosecute. Already performed investigations of co-perpetrators will be of guidance to the ICC when determining a State’s unwillingness.¹¹⁷

By using the term ‘unwillingness’ the court is left with a wide measure of discretion in each individual case when deciding upon the admissibility of a case. It does not provide for any further understanding of the relation between the perception of unwillingness and the granting of amnesties although the requirements for a due process suggests that the investigation in question should have a judicial or at least a quasi-judicial character. Self

¹¹⁶ Article 17, Rome Statute of the International Criminal Court.

¹¹⁷ Holmes, *supra* fn 112, s. 675.

proclaimed and blanket amnesty not related to any investigation would be difficult to interpret as anything but that the State is ‘unwilling’.

5.6 Article 17 and Amnesties

Though vague in formulation it is clear that article 17 rules out blanket amnesties as a bar to prosecution. This type of amnesties fails to provide for an investigation, it does not leave a possibility for a decision to prosecute for the national authorities and the State thus fails to demonstrate a willingness to prosecute. The situation is not as clear concerning conditional amnesties.

According to the wording of the preamble of the Rome Statute and the purpose of the ICC- to fight impunity- and the obligation upon States to ensure the prosecution of war criminals, the point of departure would consequently not make the granting of a national amnesty an inadmissibility ground. However, if the reading is made in the light of the purpose to fight impunity for war crimes in a more general manner the outcome may be different. Accountability is not necessarily equal to prosecution. Further, the most important purpose of the principle of complementarity is the preservation of State sovereignty. In spite of this and after the interpretation of the principle of complementarity as formulated in article 17 made in this chapter I believe that the States Parties of the Rome Statute did not contemplate a national amnesty to be an inadmissibility ground for a case according to the article in question.

5.7 Other Relevant Articles in the Rome Statute Concerning Obstacles for Prosecution

The following articles are included to demonstrate principally two things. Articles 16 and 53 are solutions for the above mentioned practical problems with an absolute obligation to prosecute. Article 20 is an example of a provision which has excluded the granting of amnesties in its functioning; it could be possible to make an analogy with that provision and article 17.

5.7.1 Article 16

There may be a situation where a criminal prosecution and a peace agreement cannot be pursued parallel; a common scenario is that the alleged perpetrators take part in the peace negotiations. To insist on a prosecution could at such time put the peace venture at risk. The drafters of the Rome Statute have foreseen this situation and consequently they have included article 16 in the Rome Statute. The provision gives peace temporary priority over prosecution but does not necessarily exclude prosecution in the future.

The article in question allows the Security Council to provide for a temporary amnesty by deferring a prosecution of the ICC when such an investigation would negatively affect a peace process. As this safeguard exists in the Rome Statute the argument of amnesties in order to create peace as a bar to prosecution according to the principle of complementarity must be partly dismissed. The situation when a decision is not feasible in the Security Council remains, thereof the partial and not entire dismissal. I will come back to this situation in chapter 6.

The opponents of amnesties as a measure to create peace often state that there can be no lasting peace without justice. In the resolutions establishing the international criminal tribunals for Yugoslavia and Rwanda the UN Security Council expressed this view.¹¹⁸ The UN has in other contexts acted consistently with the Security Council decisions, *inter alia* in the case of Sierra Leone¹¹⁹ and when the UN Under-Secretary-General for Peacekeeping Operations stated that the Security Council should work to ensure that amnesties for war crimes are not granted in peace-agreements.¹²⁰ Many international legal scholars agree with this position.¹²¹ In this line of argumentation one fear often expressed is that the stabilisation process is endangered if amnesties are granted since perpetrators may repeat the commission of the crimes in question. Another is that the reinstallation of the rule of law is made more difficult without a judicial encounter with past atrocities.

5.7.2 Article 20

“Article 20

Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been **convicted or acquitted** by the Court.

2. No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.

¹¹⁸ Security Council Resolution 808, 3175th Meeting, on 22 February 1993, Security Council Resolution 827, 217th Meeting, on 25 May 1993 and Security Council Resolution 955, 3453rd Meeting, on 8 November 1994, Security Council Resolution 977, 3502nd Meeting, on 22 February 1995.

¹¹⁹ *supra* and Security Council Resolution 1315, adopted at the 4186th meeting at 14 August 2000.

¹²⁰ *Restoring the rule of law absolutely essential for resolving conflict; Rebuilding secure, humane societies, Security Council told*, Security Council 4835th meeting, Press Release SC/7884, 30 September 2003.

¹²¹ *inter alia* *Written Submission on Behalf of the Redress Trust, the Lawyers for Human Rights and the International Commission of Jurists in relation to Prosecutor v. Morris Kallon*, 16 March 2004, Special Court for Sierra Leone (Appeals Chamber) Case No. SCSL-2004-15-AR72(E) <<http://www.redress.org/casework/SLSC-FurtherSubmissions.pdf>> Last accessed 8 November 2004. paras. 5 and 12.

3.No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice” (own emphasis added).¹²²

Article 20 of the Rome Statute enshrines the principle of *ne bis in idem* for cases when the person in question has been “tried in a court”.¹²³ The article explicitly states that a court procedure is necessary and excludes the mentioning of amnesties, which imply that amnesties would not hinder the ICC to try a case if the individual in question has been granted an amnesty.

My personal reflection in this regard is that for the Rome Statute to be in harmony this should apply also to cases where an amnesty has not been granted but is expected, something that would lead to an exclusion of amnesties as a bar to an ICC prosecution.

5.7.3 Article 53

“Article 53

Initiation of an investigation

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

- (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is or would be admissible under article 17; and
- (c) Taking into account the gravity of the crime and the interests of victims, there are none the less substantial reasons to believe that an investigation would not serve the interests of justice.”

Article 53 of the Rome Statute allows the prosecutor to omit to prosecute an individual when he finds that it would not be in the interest of justice to do so.¹²⁴ Thus, the Statute leaves the prosecutor certain measure of discretion that could be necessary when a situation occurs that *inter alia* would burden

¹²² Article 20, Rome Statute of the International Criminal Court.

¹²³ *ibid*

¹²⁴ Article 53, Rome Statute of the International Criminal Court.

the organization in an indefensible manner or that could jeopardize the entire judicial system.¹²⁵ The prosecutor could according to this article refrain from prosecuting an alleged perpetrator which has previously been granted an amnesty if he or she finds it to be in the interest of justice to abstain.

The existence of this article in the Rome Statute could be an indication that if a case occurs where an amnesty would be or had been granted, and the prosecutor has taken the decision to prosecute in spite of the amnesty, the presumption for the court would be that the amnesty would not be an inadmissibility ground.

5.8 Codifying the Limits of Amnesties

For the reasons accounted for above I believe that the prosecutor of the ICC would apply article 53 if she or he would find that a national amnesty would constitute a bar to the prosecution of alleged perpetrators of war crimes. In doing so he or she must be flexible when regulating this issue to concord with reality but the prosecutor must also set firm limits to preserve the legitimacy and credibility of the ICC.

I believe it is of great importance that these limits are clearly defined and agreed upon. There are several motives for this. The protection of the general rule of law of predictability is one important reason. The safeguard against the arbitration and politicisation of the prosecutor that could lead to a destabilisation of the sovereign equality between the Member States is another.

An intention to define the limits of amnesties has been made by Andreas O'Shea in a draft protocol to the Rome Statute.¹²⁶ The provisions of the draft convention suggest that no amnesties are given for war crimes.¹²⁷ It does nonetheless provide for exceptions to prosecution. The essence of the exceptions is that the UN has agreed to the amnesty, that the amnesty in question fulfils certain criteria and that the amnesty law is made public.¹²⁸ It is thus not in discord with the general opinion of 'accepted' amnesties, which is accounted for in part 3.2 of this thesis.

The draft convention is not applicable to amnesties passed in the implementation of a peace treaty concluded between two or more States, which has as its main purpose the resolution of an armed conflict and the maintenance of

¹²⁵ Robinson, *supra* fn 116.

¹²⁶ O'Shea, *supra* 55 *Draft Protocol to the Statute of the International Criminal Court on the Proper Limitations to Municipal Amnesties Promulgated in Times of Transition*' (hereinafter *Draft Protocol...*).

¹²⁷ *Ibid*, Article 3, also includes genocide, crimes against humanity, the crime of aggression, torture, slavery, piracy, apartheid, summary executions and enforced disappearances.

¹²⁸ *Ibid*, Article 6 for the criteria for an amnesty see section 3.2 above.

peace between those States.¹²⁹ I do not agree completely with this view. That maintenance of international peace and security has the highest priority in international law is in itself not controversial, giving *inter alia* UN Security Council competence under chapter seven of the UN Charter. However, the rationale behind the provision does not require a permanent amnesty. It would be in greater accordance with article 16 of the Rome Statute that provides for a UN Security Council deferral with the purpose of maintenance of international peace and security, if there was a time limit attached to the amnesty. A temporary granting of amnesties could ensure the peace negotiations to succeed and at the same time avoid compromising the fight against impunity.

¹²⁹ *Ibid*, Article 2.

6 Conclusion

6.1 Variance of amnesties

In assessing whether a particular amnesty bars prosecution by the ICC, it is crucial to recognise the variance of amnesties. An unconditional, self-proclaimed amnesty cannot prevent a prosecution as it qualifies as a sham trial in accordance with article 17 (1) a or b of the Rome Statute. Therefore, the amnesties referred to below are those admitted following investigations and hearings held by TRCs and comparable mechanisms.

6.2 Justice

This thesis has illustrated the difficulty in finding an adequate balance between different readings of the principle of complementarity. Essentially, the conclusion is that an amnesty is not an obstacle for the admittance of a case before the ICC. However, the Rome Statute leaves one possibility to allow amnesties for war crimes in particular cases.

The prosecutor may decide, ‘in the interest of justice’, not to prosecute a case according to article 53 of the Statute. However, the Pre-Trial Chamber may review such decision, therefore the prosecutor’s decision cannot diverge from the court’s general policy.¹³⁰

In the course of the prosecutor’s consideration some important questions of justice become relevant. Is it an injustice to grant war criminals amnesties? Such an assertion is motivated by the fact that the perpetrator “deserves” punishment, that criminals who have committed minor crimes which are excluded from the amnesty exception obtain tougher punishment and finally that a war criminal’s victims along with their relatives are entitled to a right of justice.

“The ends do not justify the means” many people would argue, implying that it is impossible to create justice by committing injustice. Proponents would argue that amnesties are justified in certain situations, although they may be unjust. Although this very interesting but fundamentally moral discussion influences a decision by the prosecutor there is no room in for the current legal investigation to further examine these questions.¹³¹

¹³⁰ Article 53 (3) b, Rome Statute of the International Criminal Court.

¹³¹ See instead *inter alia* Kent Greenawalt, “Amnesty’s Justice” in R.I Rotberg and D. Thompson (eds.) *Truth v. Justice* (New Jersey, Princeton University Press, 2000) p. 191.

6.3 Main Problems with an Absolute Obligation to Prosecute War Criminals

In my opinion, there are mainly two problems in the imposition of an absolute prohibition of granting amnesties to war criminals following a conflict. Firstly; prosecution requires considerable financial resources as large numbers of perpetrators and victims are usually involved, particularly if a conflict was internal. At the same time, a newly war ridden country has a number of more urgent matters to attend to. In a situation where authorities with limited resources are struggling to reconstruct a country, prosecution of war criminals is not likely to be an immediate priority. The establishment of a TRC with the power to grant amnesties could be the only realistic solution to avoid impunity.

A further problem relates to State sovereignty. I believe that there is an important distinction to be made between fighting impunity and prosecution. The international legal system may, and in my opinion, in the interest of preserving its legitimacy, should be required to, impose obligations on States to hold accountable perpetrators of serious war crimes. The rationale here is to reveal the truth about past incidents, to pay reparations to victims and to punish the perpetrators. A further underlying objective would be of preventative nature to avoid such crimes in the future. In my opinion such purposes must clearly prevail over State sovereignty.

However, to dictate *how* to accomplish these goals is perhaps to transcend beyond the limits of interference. Yet, by signing the Rome Statute a State has delegated its right to prosecute when failing to do so itself. By enshrining the principle of complementarity in the Rome Statute the international community could succeed in avoiding impunity whilst at the same time protecting State sovereignty. This is achieved by supervising the fulfilment of the objectives and limiting intervention to State malfunction. Within the set limits, each society must try to find its own balancing act of retributive and restorative justice.

6.4 Practical Advantages of Defining Legal Amnesties

As noticed in chapter 4, an amnesty may be valid as a bar to national prosecution according to national legislation. Whether that same amnesty is accepted internationally is a different issue. If a State adopts amnesties that are contrary to international requirements that same State would consequently act in violation of international law.

Appropriate guidelines concerning amnesties could cause other States and institutions representing the international community to challenge unlawful

amnesties.¹³² It may well, for political reasons, be less difficult for another State to challenge an amnesty than it is for the ICC, especially if the amnesty in question was brokered by the UN. Another State's challenge could be particularly important in practice if the challenged State is outside the jurisdiction of the ICC.

International recognition is important for a State when deciding whether to challenge an amnesty granted by another State but it is also important for the investigation of the principle of complementarity.

6.5 The Applicability of the Principle of Complementarity in Relation to Amnesties

As an international law student I am a firm believer in the importance of invoking the rule of law to create stability and to avoid arbitrary decisions and corruption. The ICC constitutes a great progress in this regard, thus it would be unfortunate to leave any *lacunae* of law that would disavow its work in favour of politics and self-interest.

The wording of the principle of complementarity is ambiguous regarding amnesties; it leaves room for interpretations. However, through the interpretation made in this thesis some conclusions regarding the principle of complementarity and amnesties can be presented.

- ⇒ The point of departure should be prosecution whereas amnesty is an **exception**. The granting of amnesties should be especially restrictive when granted the most responsible for war crimes.
- ⇒ Should an amnesty be granted the objective ought to be that it is granted on a **temporary** basis. Article 17 is thereby in accordance with article 16 of the statute and may be applied for a temporary amnesty when a Security Council deferral is not conceivable.
- ⇒ If an amnesty is granted it should be brokered by the **UN**. This provision functions as a further safeguard against self proclaimed amnesties and would grant the amnesty in question international credibility.
- ⇒ The **public** should have free access to the process of granting an amnesty. The rationale is here to respect the individual's right to access of justice.
- ⇒ Lawful amnesties should be adequately **defined**. The process should fulfil certain conditions to ensure that the perpetrators are held accountable and that the truth is known.¹³³

If the criteria for an amnesty are defined and thus the exceptions to prosecution are fully recognised there would be no contradiction between all war crimes having the character of *jus cogens* and that these norms would attach

¹³² Broomhall, *supra* fn 53, p. 96.

¹³³ In accordance with points 1-10 listed in section 3.2.

an *erga omnes* obligation to prosecute them on the one hand and the granting of amnesties for such crimes on the other. An example of a similar situation could be the legal status for the prohibition of the use of force and the legal exceptions to it. By defining internationally lawful amnesties, a parallel strengthening of the legal character of holding perpetrators of war crimes accountable does appear possible. In my opinion, it would thus be constructive for the Member States of the ICC to define and consolidate limits for granting amnesties. If the requirements for a successful process of accountability are realistic and based on common ground we can increase the hope for diminishing war crimes in the future. By mending its flaws the ICC would become the successful guardian of humanitarian law it has the potential to be.

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