

The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions¹

Anja Seibert-Fohr

- I. Introduction
- II. Are the States Parties Obligated to Prosecute Domestically under the Statute?
- III. Jurisdiction of the Court Despite an Amnesty?
 1. The Drafting of the Statute
 2. Amnesties under Article 17
 3. Truth Commissions under Article 17
 - a. Criminal versus Non-criminal Investigation
 - b. The Meaning of Unwillingness to Prosecute
 - c. The Relevance of State Obligations to Prosecute
 - d. The Competence of the ICC
 - e. The Effects of Inadmissibility on Third Party Jurisdiction
- IV. Alternative Options to Deal with Amnesties
 1. Denial of Investigation for Lacking Interest of Justice?
 2. Discretion Regarding *proprio motu* Investigations
 3. Deferral of Investigation due to a Security Council Resolution
- V. The Effect of the Rome Statute on National Amnesties
- VI. Concluding Remarks and Outlook

I. Introduction

The international community in the last decades has intensified its efforts to create international mechanisms for prosecuting and punishing

¹ This article forms part of an ongoing S.J.D. project by the author at the George Washington University Law School.

individuals accused of particularly grave human rights violations. The establishment of the Criminal Tribunals for the Former Yugoslavia and Rwanda was intended to ensure that perpetrators of the most serious crimes are being brought to justice.² The Security Council in establishing the tribunals explained that it was:

“Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances ... the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace...”³

More recently the Special Court for Sierra Leone was established to “contribute to the process of national reconciliation and to the restoration and maintenance of peace.”⁴ It has the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.⁵

A major landmark in the development to provide for international accountability is the Rome Statute of the International Criminal Court (ICC).⁶ The Statute in its Preamble affirms “that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by

² The Criminal Tribunal for the Former Yugoslavia was established by Resolution of the UN Security Council S/RES/827 (1993) of 25 May 1993 on the basis of Chapter VII of the UN Charter, and the one for Rwanda by S/RES/955 (1994) of 8 November 1994.

³ Ibid.

⁴ The Special Court for Sierra Leone was established on the basis of an Agreement between the UN and the Government of Sierra Leone pursuant to S/RES/1315 (2000) of 14 August 2000. See the Preamble. For the Agreement see Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, Doc. S/2000/915 of 4 October 2000. The Court made its first indictments in March 2003.

⁵ Article 1 of the Statute of the Special Court for Sierra Leone, at <http://www.sierra-leone.org/specialcourtstatute.html> – It is interesting to note that the Statute in article 10, contrary to the Rome Statute, explicitly provides that an amnesty granted for crimes falling under the Court’s jurisdiction shall not bar prosecution by the Special Court.

⁶ Doc. A/CONF.183/13 Vol. I. Entry into force 1 July 2002. Reprinted in this Volume, see Annex.

taking measures at the national level and by enhancing international co-operation". By creating the ICC the signatory states were "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".

Impunity for serious human rights violations is a worldwide phenomenon. It has many faces, from singular incidents to systematic grants of impunity. The last decades have witnessed a broad range of amnesties all over the world.⁷ The reasons for granting amnesties are manifold: authoritarian regimes provide for self-amnesties in order to escape future punishment. In such instances amnesty is used to hush up the truth of past crimes. Sometimes an amnesty is proclaimed for offences committed by political opponents in order to neutralize opposition.⁸ In other cases amnesties are seen as a valuable means for the transition from civil war to democracy. The renunciation of criminal prosecution is therefore occasionally used as a bargaining chip for peace and security.⁹ The UN brokered peace agreement for Haiti, for example, provided for an amnesty in order to end the Cedras regime.¹⁰ There are also conditional forms of amnesty, like the South African Truth and Reconciliation Commission process where individualized amnesty is granted for a complete disclosure of the crimes committed.¹¹ The purpose of such mechanisms is to enable a society which was torn apart

⁷ For a detailed analysis of different amnesty regimes, N. Roht-Arriaza, *Impunity and Human Rights in International Law and Practice*, 1995, 73 et seq.

⁸ L. Joinet, *Study on amnesty laws and their role in the safeguard and promotion of human rights*, Doc. E/CN.4/Sub.2/1985/16, paras 33-37. He gives a careful analysis of the various rationals for providing an amnesty.

⁹ For this issue see Anonymous, "Human Rights in Peace Negotiations", *HRQ* 18 (1996), 249 et seq.

¹⁰ Governors Island Agreement. See the Report of the UN Secretary General on Haiti reproducing the agreement, Doc. A/47/975-S/26063.

¹¹ The crimes must be proportional to the ends sought and deemed to be political acts. Promotion of National Unity and Reconciliation Act 34 of 1995. See also K. Asmal, "Truth, Reconciliation and Justice: The South African Experience in Perspective", *Modern Law Review* 63 (2000), 1 et seq.; G. Werle, "Without Truth, No Reconciliation, The South African Rechtsstaat and the Apartheid Past", *VRÜ* 29 (1996), 58 et seq. For further reflections on Truth Commissions, see e.g. S. Landsman, "Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions", *Law & Contemp. Probs* 59 (1996), 81 et seq.; J.D. Tepperman, "Truth and Consequences", *Foreign Aff.* 81 (2002), 128 et seq.

during a prolonged period of civil unrest to come to terms with their past and to make the transition to peace and democracy. Investigation and disclosure of past abuses are sought as an alternative to prosecution to satisfy the victim's interests and the quest for some form of accountability while at the same time providing for reconciliation by the decision not to prosecute.

It is not difficult to predict that such forms of amnesty will be put into question once an international tribunal exercises jurisdiction. A state's intent to keep certain offences from criminal punishment may be jeopardized by international prosecution. The need to allow for reconciliation is likely to conflict with the aim of the Rome Statute to fight impunity. One of the several reasons brought forward by the United States for its decision of 6 May 2002 to notify the UN Secretary General of its intent not to become a party to the treaty despite its earlier signature was that the Rome Statute did not take due account of the need for accepting amnesties under certain conditions.¹² It was argued that a democratic decision between prosecution and national reconciliation should be respected and not made by the ICC.¹³ But the Rome Statute according to the United States threatened the transition from oppression to democracy.¹⁴ This reading of the Statute has not been unchallenged. There are divergent views on how the Rome Statute should be read. Some commentators argue that the ICC does not have the right to review amnesty legislation¹⁵ while others hold that the States parties to the Statute are even prevented from granting an amnesty in the first place.¹⁶

¹² The notification is reprinted at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm> – The reasons given by the Under Secretary for Political Affairs in his remarks to the Center for Strategic and International Studies on 6 May 2002 can be found at <http://www.state.gov/p/9949.htm> – See also A. Seibert-Fohr, “The Fight against Impunity under the International Covenant on Civil and Political Rights”, *Max Planck UNYB* 6 (2002), 301 et seq. (303).

¹³ See reasons given by the Under Secretary for Political Affairs, *ibid.*

¹⁴ *Ibid.*

¹⁵ M.H. Arsanjani, “The International Criminal Court and National Amnesty Laws”, *PROC. of the 93rd ANN. Meeting*, 93 *ASILPROC* 65, 67 (1999).

¹⁶ A. Schlunck, *Amnesty versus Accountability: Third Party Intervention Dealing with Gross human rights Violations in International and non International Conflicts*, 2000, 28-29. Benvenuti argues that “[i]t is rational to think that the words “taking measures at the national level” include enacting any legislation necessary to provide effective penal sanctions for per-

Now that the Court has been established it can be expected that these questions will come up in a case where charges are brought for crimes which are covered by a domestic amnesty law. Whereas it is unlikely that a state which has proclaimed an amnesty will initiate prosecution by the ICC, the prosecutor may take up the matter *proprio motu*, the UN Security Council may refer it to the Court¹⁷ or a state, which did not proclaim the amnesty but whose national the accused offender is, may initiate proceedings.¹⁸ In such a case the Court will need to explore how amnesties need to be dealt with under the Rome Statute. This is why this article tries to elaborate the relationship of the Rome Statute to the proclamation of an amnesty and to the establishment of a truth commission process.

The first part will examine whether the Statute prevents States parties from proclaiming an amnesty. In the second part the question of whether the ICC has jurisdiction to deal with cases that are covered by a national amnesty will be analyzed. The possible options of the Court in dealing with amnesties and truth commissions will be evaluated as well as the effects of the Rome Statute on such amnesties. The analysis will show that the interpretation of the complementarity principle plays an important role in determining whether the Court may act despite the proclamation of a national amnesty. This principle provides that the ICC will not be seized of a case if a state exercises effective jurisdiction over the crimes concerned. It therefore determines the relationship between the ICC and domestic procedures.¹⁹ It will be argued that the Statute in pursuing the fight against impunity does not rule out entirely alternative forms of accountability. It leaves the Court with a limited leeway not to interfere with truth commission processes while blanket

sons committing or ordering to be committed serious crimes". See also P. Benvenuti, "Complementarity of the International Criminal Court to National Criminal Jurisdiction", in: F. Lattanzi/ William A. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court*, Vol. 1, 1999, 21 – 22.

¹⁷ This is not very likely because of political considerations. The same is true for referrals by states. See A. O'Shea, *Amnesty for Crimes in International Law and Practice*, 2002, 123-124.

¹⁸ For the question whether the Prosecutor may decline the *proprio motu* initiation of investigations on the basis of article 15, see below.

¹⁹ J.T. Holmes, "Complementarity: National Courts versus the ICC", in: A. Cassese/ P. Gaeta/ J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1, 2002, 667 et seq.

amnesties that do not provide for any investigatory mechanisms should be disregarded.

II. Are the States Parties Obligated to Prosecute Domestically under the Statute?

It has been argued that the recognition of the ICC's jurisdiction implies the obligation of the States parties to either prosecute domestically the crimes for which the Court has jurisdiction or to submit the relevant cases to the ICC.²⁰ Such an obligation would leave practically no room for amnesties or truth commission procedures for crimes covered by the Rome Statute. However, in contrast to the conventions based on the traditional concept of *aut dedere aut judicare*,²¹ the Rome Statute does not include an explicit provision on the obligation to either prosecute or extradite the accused offender.²² There is merely some reference in the Preamble which affirms that the "effective prosecution" of the most serious crimes of concern to the international community "must be ensured by taking measures at the national level and by enhancing international cooperation".²³ The States parties also recall in the Preamble that "it is the duty of every State to exercise its criminal jurisdiction

²⁰ Schlunck, see note 16. Benvenuti, see note 16.

²¹ International Convention for the Suppression of Terrorist Bombings, 1997, article 6, para. 4, *ILM* 37 (1998), 249 et seq.; Hague Convention for the Suppression of Unlawful Seizure of Aircraft, article 7, UNTS Vol. 860 No. 12325; Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971, article 7, UNTS Vol. 974 No. 14118; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973, arts 7-8, UNTS Vol. 1035 No. 15410, International Convention against the Taking of Hostages, 1979, article 8, UNTS Vol. 1316 No. 21931; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, article 10, *ILM* 27 (1998), 668 et seq.

²² This interpretation seems to be shared by Judges Higgins, Kooijmanns and Buergenthal of the ICJ who pointed out in their Joint Separate Opinion in the *Case Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* that jurisdiction "may be exercised [by states] on a voluntary basis" under the Rome Statute. Joint Separate Opinion, para. 51 (2002).

²³ Para. 4 of the Preamble.

over those responsible for international crimes".²⁴ But there is no provision on prosecuting duties by the States parties in the operative part of the Statute. To interpret article 29 which provides that "[t]he crimes within the jurisdiction of the Court shall not be subject to any statute of limitations" as a substantive obligation to prosecute would clearly go beyond the text of this provision.²⁵

Though the drafters acknowledged that there were preexisting responsibilities of the states to prosecute the crimes as defined in arts 6 to 8 of the Statute²⁶ the Statute does not incorporate these obligations.²⁷ They exist as part of international treaties and customary international law independent of the Statute. This reading is supported by article 25 para. 4 of the Statute which provides that "no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law". While this provision is primarily intended to explain that international prosecution of individual perpetrators does not exclude the States parties' international accountabil-

²⁴ Para. 6 of the Preamble.

²⁵ It is already questionable whether this provision may be read as prohibiting statutes of limitations or whether it merely operates as a rejection to a State party's denial to surrender on the basis of a statutory limitation in its domestic criminal legislation. See W. A. Schabas, "Article 29", in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 1999, 523 et seq. (525-526, para. 7).

²⁶ Some delegations in the Preparatory Committee expressed the "view that the establishment of the Court did not by any means diminish the responsibility of States to investigate and prosecute criminal cases. According to this view, the establishment of such a court was itself a manifestation of states exercising their obligations to prosecute vigorously perpetrators of serious crimes." Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1, Proceedings of the Preparatory Committee, GAOR, 51st Sess., Suppl. No. 22, Doc. A/51/22, page 36, para. 156.

²⁷ Most of the crimes covered by the Statute require domestic prosecution under other treaties, like the Genocide Convention, the Apartheid Convention, the Torture Convention and the Geneva Conventions, or under customary international law. This, however, does not render the question whether the Rome Statute prohibits the proclamation of an amnesty futile. If a duty to prosecute had been part of the Rome Statute and an amnesty could not be validly proclaimed by a State party it would have to be disregarded by the ICC automatically.

ity under the principles of state responsibility,²⁸ it also clarifies that the Statute leaves untouched State party obligations under customary international law and under other treaties, as the Genocide Convention. It neither excludes such obligations nor does it incorporate these. That the domestic prosecution is not interfered with is also evidenced in article 80. It provides that the Statute neither affects domestic penalties nor such domestic laws which do not provide for penalties prescribed in the Rome Statute. The State parties may choose the penalties in the process of domestic prosecution.²⁹ Under the Statute they are neither obliged to prosecute nor to impose a certain penalty.

Indeed, it is not the objective of the Rome Statute, which is concerned with international prosecution and not with the international enforcement of state obligations, to deal with prosecuting duties by the States parties. Though there is a duty to surrender perpetrators to the ICC³⁰ and though a State party may avoid surrender by instituting domestic prosecution,³¹ there is no genuine duty to prosecute in the Statute because it sets up an entirely different system distinct from the obligation of *aut dedere aut judicare*. The *aut dedere aut judicare* principle is based on the idea that the prosecution of perpetrators is ultimately secured by obliging all states to either try or extradite perpetrators. It provides for an interaction of the different domestic regimes in which one will ultimately have to prosecute the accused. Under the Statute, however, there is no need for a duty of states to prosecute because it is based on the idea that if domestic prosecution on which it primarily relies fails the ultimate safeguard is through international prosecution anyway.³² The ICC is therefore meant to supplement — not to enforce — domestic prosecution.

²⁸ K. Ambos, “Article 25”, in: Triffterer, see note 25, 475 et seq. (490, para. 37).

²⁹ This provision concerns in particular penalties other than those provided for in the Statute. See R.E. Fife, “Article 80”, in: Triffterer, see note 25, 1009 et seq. (1014).

³⁰ See article 89.

³¹ In this case the case would need to be declared inadmissible pursuant to article 17 para. 1, subpara. a.

³² There is an indispensable obligation to surrender perpetrators to the Court on request pursuant to article 89.

III. Jurisdiction of the Court Despite an Amnesty?

Though the Rome Statute does not oblige the States parties to prosecute crimes domestically there is still the question about the possible effects of an amnesty on the jurisdiction of the ICC. Has the Court jurisdiction despite an amnesty or is it binding upon the ICC?

1. The Drafting of the Statute

During the drafting of the Rome Statute no agreement could be reached on how amnesties should be treated. Some delegations felt that the Statute should address the issue of amnesties and provide guidelines on the matter, indicating the circumstances in which the ICC might ignore or intervene ahead of a national amnesty.³³ A provision was proposed which would have permitted the prosecution of a person by the ICC despite an earlier trial by a domestic court, if a “manifestly unfounded decision on the suspension of the enforcement of a sentence or on a pardon, a parole or a commutation of the sentence excludes the application of any appropriate form of penalty”.³⁴ The idea was to prevent perpetrators from going unpunished. A similar proposal tried to exclude the application of the *ne bis in idem* rule in case of an amnesty.³⁵

But there was also the proposal of a provision in the Preparatory Committee that would have prevented the Court from exercising its jurisdiction if the case at issue had been the subject of a national decision, for example if the case had been addressed in an official investigation, without giving the Court the ability to review the genuine nature of the proceedings.³⁶ This proposal was made to prevent the Court from in-

³³ GAOR, 50th Sess., Suppl. No. 22, Doc. A/50/22, 9, para. 46; GAOR, 51st Sess., Suppl. No. 22, Doc. A/51/22, 7, para. 160.

³⁴ Doc. A/CONF.183/2/Add.1, 46, article 19.

³⁵ The proponents of this proposal expressed the view that the exception of subpara. b of today's article 20 should extend to parole, pardon, amnesty etc. Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. 1, Proceedings of the Preparatory Committee during March-April and August 1996, GAOR, 51st Sess., Suppl. No. 22, Doc. A/51/22, 40, para. 174.

³⁶ This alternative proposal for complementarity read: “The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State which has jurisdiction over it”. Doc.

tervening when a national political decision is taken in a particular case.³⁷ The United States circulated a “non-paper” suggesting that the responsible proclamation of an amnesty by a democratic government was relevant for the admissibility of a case.³⁸ None of these contradictory proposals, however, entered the final text of the Statute so that there is no explicit provision on amnesties.³⁹ There is also no provision on amnesties in the finalized draft text of the Rules of Procedure and Evidence adopted by the Preparatory Commission for the International Criminal Court.⁴⁰

It has been argued that many delegations had sympathy with the South African model of amnesty in return for truthful confession.⁴¹ However, to elaborate a provision that would legitimize such amnesties while preventing amnesties such as the ones which had been accorded by South American dictators had proved elusive.⁴² The lack of a provision on amnesties in the Rome Statute has been criticized as giving rise to ambiguity and fear has been expressed that the matter may not be handled discreetly.⁴³ The fact that the issue was left sublingual would endanger democratic transitions.⁴⁴ Whether this is an accurate reading needs to be analyzed with a view to the generally applicable rules of the Statute.

A/CONF.183/2/Add.1, 42. See also Groupe de travail sur la complémentarité et le mécanisme d'enclenchement, Doc. A/AC.249/1997/WG.3/CRP.2.

³⁷ Doc. A/CONF.183/2/Add.1, 42.

³⁸ R. Wedgwood, “The International Criminal Court: An American View”, *EJIL* 10 (1999), 93 et seq. (96).

³⁹ It was too difficult to arrive at a compromise solution. Therefore the proposal on amnesties was dropped following to the coordinator’s recommendation. See J.T. Holmes, “The Principle of Complementarity”, in: R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, 1999, 41 et seq. (59). For further discussion of the drafting history regarding amnesties, see *ibid.*, 51-52; S.A. Williams, “Article 17”, in: Triffterer, see note 25, 383, 389 para. 13. According to Benvenuti the issue was merely postponed to be determined by the Prosecutor and the Court, see Benvenuti, see note 16, 46.

⁴⁰ Report of the Preparatory Commission of the International Criminal Court, Addendum, Part. I, Doc. PCNICC/2000/1/Add.1.

⁴¹ W.A. Schabas, *An Introduction to the International Criminal Court*, 2001, 68-69.

⁴² *Ibid.*

⁴³ Wedgwood, see note 38.

⁴⁴ *Ibid.*

2. Amnesties under Article 17

As laid down in the Preamble of the Statute, its States parties are determined to put an end to impunity for perpetrators of the most serious crimes which are of concern to the international community as a whole.⁴⁵ The ICC is intended to provide for punishment where domestic prosecution fails. This is a rather far-reaching aim that seems to cover any case of criminal impunity including amnesties.⁴⁶

Argument has been made that the Court does not have the right to review the acts of national legislatures, such as amnesties.⁴⁷ If the ICC, however, was generally barred from considering crimes falling under its jurisdiction in case of a national amnesty the system set up by the Rome Statute could be seriously undermined and evaded by the simple proclamation of a national amnesty.⁴⁸ Therefore, the effectiveness of the system requires at the very minimum certain barriers for the acceptance of national amnesties.

The central provision of the Rome Statute which determines whether national proceedings are sufficient to render a case inadmissible for the ICC is article 17. It provides in para. 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;

⁴⁵ See paras 4 and 5 of the Preamble.

⁴⁶ The Preamble lead Bruer-Schäfer to conclude that the Court generally has jurisdiction despite a national amnesty. A. Bruer-Schäfer, *Der Internationale Strafgerichtshof*, 2001, 349.

⁴⁷ Arsanjani, see note 15.

⁴⁸ According to Hafner, Boon, Rübesame and Huston there is, therefore, no obligation of the ICC to respect national amnesties. G. Hafner/ K. Boon/ A. Rübesame/ J. Huston, "A Response to the American View as Presented by Ruth Wedgwood", *EJIL* 10 (1999), 108 et seq. (111).

(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.

Returning to the question whether the ICC should evaluate national amnesties the following should be taken into account. The question to be addressed under article 17 is not about the legality of a national amnesty but about whether the Court has jurisdiction.⁴⁹ The ICC is explicitly required to determine whether a case is inadmissible. It has to do so by evaluating whether one of the grounds for inadmissibility is given. If it finds an unwillingness or inability of a state to prosecute an offender and that the case is of sufficient gravity, admissibility follows from this provision.

Admittedly, the international prosecution may undermine the effectiveness of a national amnesty law.⁵⁰ But in the absence of a specific provision on amnesties the Court has to determine the admissibility of a case on the basis of article 17. If the Court proceeds with the prosecution it is the result of the principles laid down in article 17. The power of the Court to determine that a national amnesty is irrelevant for the matter of international prosecution and to go forward despite the proclamation of an amnesty therefore follows from the Court's power to determine admissibility on the basis of complementarity.⁵¹

The Court is thus called upon to determine whether an amnesty qualifies as one of the situations described in article 17 resulting in inadmissibility. This provision distinguishes between four different factual settings. Pursuant to para. 1, subparas a and b, a case is inadmissible if a national investigation or prosecution is or has taken place unless there is a genuine unwillingness or inability to carry out the investigation or prosecution. The requirement that “[t]he case has been investigated [emphasis added]”⁵² indicates that a case by case study by the

⁴⁹ The Appeals Chamber of the Yugoslavia Tribunal in *Prosecutor v. Tadic* by evaluating its jurisdiction even went into the question of competence-competence, Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 1995, 6.

⁵⁰ For the effects of the Rome Statute on amnesties, see below.

⁵¹ The fact that article 17 refers to the particular case makes clear that this provision applies to all cases whether the failure to prosecute is based on a national amnesty law or an individualized decision of a court or prosecutor.

⁵² Article 17 para.1, subpara. b. See also subpara. a.

authorities is required. Therefore, if an amnesty precludes even an individual investigation of the cases, covered inadmissibility cannot be argued on the basis of these subparagraphs.⁵³

This also applies to article 17 para. 1, subpara. c which refers to the *ne bis in idem* rule. It provides that no person shall be tried by the ICC for conduct for which the person has been “tried by another Court”. Where an amnesty excludes *a priori* the performance of a trial the provision is clearly not applicable.⁵⁴ There seems to be more room to argue that a case is inadmissible if a person is amnestied after a conviction is pronounced because the requirement of a trial is met in these cases.⁵⁵ But taking the underlying idea of the *ne bis in idem* rule⁵⁶ there is reason to argue that a trial which is in fact nullified by a later amnesty does not trigger this rule and therefore cannot render a case inadmissible for the ICC.⁵⁷

The only basis on which inadmissibility could be argued with respect to amnesties which do not provide for an investigation is the last alternative of article 17 para. 1. Subpara. d provides that a case is inadmissible if it “is not of sufficient gravity to justify further action by the Court”. It is doubtful whether this provision is generally applicable to all cases covered by an amnesty.⁵⁸ The purpose of this provision is to

⁵³ See also R. Wolfrum, in: G. Dahm/ J. Delbrück/ R. Wolfrum, *Völkerrecht*, 2nd edition, 2002, 1156. He points out that the ICC requires at least an investigation regardless of whether a national amnesty violates international law.

⁵⁴ C. Van den Wyngaert/ T. Ongena, “Ne bis in idem Principle, Including the Issue of Amnesty”, in: Cassese et al., see note 19, 705, 726; N. Roht-Arriaza, “Amnesty and the International Criminal Court”, in: D. Shelton (ed.), *International Crimes, Peace, and Human Rights, The Role of the International Criminal Court*, 2000, 77, 80. Article 17 para. 1, subpara. c neither covers situations where conditional amnesty is granted in case of confession before a truth commission. It is already questionable whether such proceedings can be considered a trial as envisaged by article 20 para. 3. Since article 20 refers to “another court”, it seems to require that it is an institution similar to the ICC, hence a criminal court. See also M. Scharf, “The Amnesty Exception to the Jurisdiction of the International Criminal Court”, *Cornell Int’l L. J.* 32 (1999), 507 et seq. (525). A truth commission, at least, does not qualify as a court.

⁵⁵ Van den Wyngaert/ Ongena, see above.

⁵⁶ Article 20.

⁵⁷ But see Van den Wyngaert/ Ongena, see note 54.

⁵⁸ But see Schabas, see note 41.

exclude individual cases that, though constituting one of the crimes defined in arts 6 to 8, do not amount to a serious crime which is of concern to the international community. The case itself has to be of minor gravity to render it inadmissible under this provision. The gravity needs to be determined on the basis of the specifics of the alleged crime. It may be reduced due to the particular facts of the crime or due to less serious consequences. But taking into account that the Court's jurisdiction is limited to crimes which are deemed to be the most serious in nature, inadmissibility on the basis of the gravity of a case should be interpreted narrowly providing for an exception only in limited cases.

The proclamation of an amnesty does not alter the gravity of the individual cases covered. The character and seriousness of the crime does not change. The suffering by the victims is equally grave with or without the proclamation of an amnesty. Considerations that an amnesty facilitated the transition to peace seem out of place when it comes to the gravity of a case. After all, evaluating the gravity is not a question of appropriateness of prosecution. It is one which is informed by the seriousness of the alleged crime itself. The decision that a case is not of sufficient gravity is to be distinguished from the rules concerning the initiation of an investigation by the Prosecutor.⁵⁹ Article 53 provides that the Prosecutor shall among others consider whether an investigation would serve the interests of justice.⁶⁰ Contrary to this provision, article 17, which determines the admissibility of a case, is not the right place to deal with questions of appropriateness that is informed by circumstances outside the crime.

There is another argument against assuming inadmissibility on the basis of article 17 para. 1, subpara. d.⁶¹ If a national amnesty precludes every form of investigation, the very minimum requirement for dealing with the crimes for which the ICC has jurisdiction, there has not been any coming to terms with the past which might reduce the need for the Court's involvement. In such cases further action by the Court is in-

⁵⁹ See Chapter IV, 1.

⁶⁰ Article 53, para. 1, subpara. c and para. 2, subpara. c. Para. 1, subpara. c provides that the Prosecutor shall take into account the gravity of the crime and decide whether "there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice". The term "nonetheless" indicates that there may be circumstances that reduce the interest of justice despite an unchanged gravity of the crime.

⁶¹ This argument applies especially to those who argue that the gravity of a case needs to be evaluated on the basis of the exceptional circumstances that led to the proclamation of an amnesty.

deed justified. After all, subpara. d should not be applied in a way that renders the requirements of the other subparas, especially the conduct of an investigation, meaningless. Therefore, the application of subpara. d should be reserved to exceptional cases where the crime committed was of minor gravity in order not to undermine the jurisdiction of the ICC. A domestic amnesty, however, does not warrant the conclusion that a case is inadmissible due to insufficient gravity of the case.

The conclusion that cases covered by an amnesty without investigatory mechanism are admissible for the ICC leads to the question whether this also applies to amnesties which provide for an investigation by a truth commission.

3. Truth Commissions under Article 17

Taking into account that article 17 gives special attention to the conduct of an investigation there seems to be more room to argue that a truth and reconciliation process as a form of extrajudicial proceedings satisfies the requirements for complementarity therefore excluding a trial by the ICC. Whether this is accurate depends on the question whether procedures that rule out criminal prosecution but set up an alternative mechanism provide for the accountability envisaged by the Rome Statute.

a. Criminal versus Non-criminal Investigation

As indicated above, a case is inadmissible if it is being or has been investigated or prosecuted by a state unless the state is or was unwilling to carry out the investigation or prosecution.⁶² The first question to be addressed is whether a truth commission mechanism constitutes an investigation as envisaged by article 17. Since this provision requires that the *case* at issue is or has been investigated, an individualized case-by-case study is necessary. There has been discussion as to whether a criminal investigation is necessary.⁶³ If this was the case a truth commis-

⁶² During the process of inquiry article 17, para. 1, subpara. a is relevant while subpara. b is applicable after the completion of the inquiry.

⁶³ Scharf, see note 54, 525. Roht-Arriaza argues that criminal justice is the goal of the investigation envisaged by article 17. Roht-Arriaza, see note 54, 77, 79. See also Holmes, in: Lee, see note 39, 77. But according to Wolfrum

sion as an alternative to criminal prosecution would not satisfy the requirements of article 17 para. 1, subparas a and b with the result that a case that has been dealt with by such a mechanism would be admissible under this provision.

It has been argued that article 17 envisages cases in which investigation is conducted with intent to criminally prosecute and punish the offenders and where prosecution fails due to insufficient evidence.⁶⁴ But its text does not rule out non-criminal investigations. Instead it refers to investigation *or* prosecution.⁶⁵ It is not specified that the decision not to prosecute needs to be based on the factual outcome of the investigation.⁶⁶ Even if it is argued that the provision envisages investigations leading to a decision whether or not to prosecute, this would exclude only a truth commission mechanism that generally provides for criminal impunity independent of the outcome of the investigation. But it would still cover case-by-case investigations resulting in an individualized grant of criminal impunity which, like in the case of South Africa, depends on an admonition by the offender.

Another argument brought forward to require a criminal investigation is the provision of article 17 para. 2.⁶⁷ This provision gives guidance for the evaluation whether a state is unwilling to prosecute. Such unwillingness results in the admissibility of a case despite the conduct of an investigation or prosecution. Article 17 para. 2 provides:

a criminal investigation is not necessary under article 17. Wolfrum, see note 53, 1156.

⁶⁴ This is the position taken by O'Shea who concludes that a decision to grant amnesty to the accused never does affect the jurisdiction of the ICC. According to him the failure to prosecute based on amnesty amounts to an inability to prosecute. O'Shea, see note 17, 126.

⁶⁵ Article 17 para. 1, subpara. a.

⁶⁶ See subpara. b.

⁶⁷ Scharf, see note 54, 525; O'Shea, see note 17. See also J. Gavron, "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court", *ICLQ* 51 (2002), 91 et seq. (111). But see Broomhall who argues that "an amnesty granted in the context of a 'truth commission' process could be considered an 'investigation' followed by a *bona fide* decision not to proceed for purposes of article 17 (1)(b)". B. Broomhall, "The International Criminal Court: A Checklist for National Implementation", in: Association Internationale de Droit Pénal (ed.), *ICC Ratification and National Implementing Legislation*, 1999, 113 et seq. (144).

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.

The reference to an intent to bring the person concerned to justice in subparas b and c has been interpreted as indicating that a criminal investigation is necessary.⁶⁸ It is already questionable whether intent to bring a person to justice requires an investigation aiming at the prosecution of the accused or whether alternative forms of accountability are also permissible. Furthermore, there is reason to doubt that para. 2 limits *a priori* the possible avenues of investigation envisaged by para. 1 of article 17. It merely gives guidance as to the second element, namely whether there is an unwillingness to prosecute. Only if there is an unjustified delay or a lack of independence which is inconsistent with an intent to bring a person to justice can it be concluded that there was unwillingness. A lacking of intent to bring a person to justice alone does not suffice.⁶⁹ To conclude that a criminal investigation is required would therefore go beyond the scope of para. 2. It is, therefore, more appropriate to ask first whether an investigation has taken place without limiting it to criminal investigations and then to inquire whether the state is or was unwilling to prosecute. Under this reading a truth commission mechanism providing for individualized amnesty satisfies the requirement of an investigation so that the admissibility of a case depends on the question whether there was unwillingness of the state to prosecute.

⁶⁸ Ibid.

⁶⁹ Only if the proceedings were made for shielding the accused from criminal responsibility pursuant to article 17 para. 2, subpara. a or if subparas b or c are met, an unwillingness can be assumed.

b. The Meaning of Unwillingness to Prosecute

To determine unwillingness, the Court will have to consider whether there has been a shielding from criminal responsibility, an unjustified delay or any bias in the proceedings. In most cases truth commissions are not problematic for reason of delay or bias which would render a case admissible for prosecution by the Court.⁷⁰ Therefore, if the investigation by a truth commission is conducted independently, impartially and in a timely manner the unwillingness to prosecute rendering the case admissible depends on the question whether the proceedings by the truth commission or the national decision not to prosecute had the purpose of shielding persons from criminal responsibility.⁷¹

Some authors argue that the grant of criminal impunity is made clearly with such an intent.⁷² However, if criminal punishment is waived by a truth commission in the interest of re-establishing peace the purpose is not to shield individual persons but to serve a greater objective at the expense of criminal justice. The non-prosecution is merely a means to this end. This suggests that a state in such cases is not unwilling *genuinely* to carry out the prosecution as required by article 17.⁷³ The decision of the ICC, therefore, will ultimately depend on an evaluation whether the shielding of the perpetrators was the genuine purpose of the truth commission mechanism or whether non-prosecution was used as a means to achieve a legitimate higher purpose.

⁷⁰ According to subpara. c a case is admissible despite the conduct of an investigation if the proceedings were or are not conducted independently or impartially *and* in a manner inconsistent with an intent to bring the person concerned to justice. These are cumulative requirements so that unwillingness pursuant to this provision fails if there is either no intent to bring the offender to justice or if the proceedings are independent and impartial. Broomhall, see note 67, 145. Since both requirements stand side by side, impartiality cannot be derived from the mere lack of intent to criminally prosecute.

⁷¹ See article 17 para. 2, subpara. a.

⁷² According to Gavron the shielding is the intended consequence of an amnesty. Gavron, see note 67, 111. Dugard argues that an amnesty results from an unwillingness of the state to prosecute. J. Dugard, "Dealing with Crimes of a Past Regime. Is Amnesty still an Option", *LJIL* 12 (1999), 1014 et seq.

⁷³ See article 17 para. 1, subparas a and b. Schabas, see note 41, 69; Wolfrum, see note 53, 1156.

To be clear, it is not sufficient to maintain that the waiver of criminal responsibility was a means to an end. In determining a legitimate purpose for the waiver of criminal punishment special attention should be given to the purpose of the Rome Statute. Taking into account that it is intended to put an end to impunity for the most serious crimes, the exception for truth commissions should be narrowly interpreted.⁷⁴ However, if it is in the interest of peace and security and if prevention of future crimes is not put into question — the reasons given in the Preamble for the establishment of the ICC⁷⁵ — a truth commission mechanism should be more readily accepted.⁷⁶ Not to prosecute is sometimes the necessary means to achieve peace and security.⁷⁷ Especially in situations where transition to peace and security depends on the abandonment of prosecution, argument can be made against prosecution by the ICC.⁷⁸ The drafters of the Rome Statute were aware of this problem and wanted the complementarity regime to take account of national reconciliation initiatives entailing legitimate offers of amnesty or internationally structured peace.⁷⁹ Not to criminally prosecute in such instances where it is necessary to establish peace does not result in blank impunity because accountability may also be realized by non-judicial efforts even if they fall short of criminal prosecution.

For the ICC to accept a truth commission mechanism as sufficient it is therefore necessary that it was established to serve peace and security. This issue needs to be determined on the basis of the particular factual situation in a country.⁸⁰ If there is a responsible democratic decision

⁷⁴ Scharf, see note 54, 527.

⁷⁵ Paras 3 and 5 of the Preamble.

⁷⁶ This is the reason given in para. 5 of the Preamble for the fight against impunity.

⁷⁷ See C. Villa-Vicencio, "Why perpetrators should not always be prosecuted: Where the International Criminal Court and Truth Commissions meet", *Emory Law Journal* 49 (2000), 205 et seq. (221).

⁷⁸ Scharf, see note 54, 526.

⁷⁹ GAOR, 51st Sess., Supp. No. 22, Doc. A/51/22, 37, para. 160.

⁸⁰ Broomhall who maintains that the determination under article 17 para. 2, subpara. a needs to be made on the basis of all circumstances, including the reasons for the decision not to prosecute. Broomhall, see note 67, 145. For the scope of the ICC's evaluation, see J.E. Méndez, "National Reconciliation, Transnational Justice, and the International Criminal Court", *Ethics & Int'l Aff.* 15 (2001), 25 et seq. (43). He accords to the state a strong presumption in favour of deferring to its amnesty if efforts have been made to live up to international obligations.

that seeks to reconcile the demand for justice with a pressing need for reconciliation by establishing an alternative mechanism of inquiry dealing with the past and thereby providing for the prevention of future atrocities and if there is an alternative form of redress for the victims, argument can be made that the decision was not made for the purpose of shielding persons from criminal responsibility. The more provision is made for the attainment of justice, for example by a mechanism to discover the truth and attribute individual responsibility to the perpetrators of the crimes and by alternative sanctions, the more reluctant the ICC should be to interfere. In such instances the Court may conclude that the ultimate goal of the Rome Statute to provide for the most attainable peace and justice has already been served.⁸¹ After all, under the complementarity principle only such cases are admissible that have not been dealt with satisfactorily on the national level. Whether domestic procedures are satisfactory needs to be determined by taking due account of the purpose of the Rome Statute.⁸²

The more serious a crime is, however, the more likely peace and security will be affected and the more reluctant the ICC should be to refrain from international prosecution.⁸³ It is questionable whether an amnesty for acts of genocide paralleled by an investigatory procedure may render a case inadmissible at all. The fact that genocide is one of the most serious offences that affects humanity as a whole is an important factor to be taken into account when evaluating the indispensability of international prosecution for genocide.

c. The Relevance of State Obligations to Prosecute

The argument has been made that the Court should not defer to an amnesty (including conditional amnesties) if the state proclaiming the am-

⁸¹ See also Scharf who established a catalogue of several criteria to guide the ICC. Scharf argues that the ICC should be reluctant to defer to an amnesty in situations involving violations of international conventions that create obligations to prosecute. Scharf, see note 54, 526 et seq.

⁸² Consequently complementarity does not only apply to national criminal prosecution but also to other internal processes of accountability.

⁸³ Dugard argues that apart from genocide, grave breaches of the Geneva Conventions and war crimes were not appropriate for an amnesty. Dugard, see note 72, 1015. Scharf wants the ICC to consider whether the offences at issue constitute grave breaches of the Geneva Conventions or genocide, for which there is an international obligation to prosecute. Scharf, see note 54, 526.

nesty acted contrary to an obligation to prosecute under another international convention.⁸⁴ Such an obligation exists for most crimes for which the ICC has jurisdiction so that the Court would need to interfere with a broad range of truth and reconciliation processes.⁸⁵ While the Conventions on genocide, torture, apartheid and the Geneva Conventions are addressed to states and not to international institutions, it could be argued that states which are bound under these conventions to punish offenders of serious crimes were barred from raising objections against the jurisdiction of the ICC on the basis of the respective international norm. After all the purpose of the ICC is to come in where a State party fails to prosecute the most serious offenses. The Rome Statute in its Preamble affirms that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”.⁸⁶

However, the substantive duty of a state to prosecute domestically derived from another treaty should be distinguished from the question whether the ICC as an international tribunal has jurisdiction.⁸⁷ There is no automatism that triggers the jurisdiction of the Court as soon as a state proclaims an amnesty contrary to its obligation to prosecute. Jurisdiction cannot be derived from such substantive provisions. The Genocide Convention in its article VI, for example, provides that perpetrators of acts of genocide “shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal *tribunal as may have jurisdiction*” (emphasis added). Whether the international court has jurisdiction must be determined on the basis of the Rome Statute.

As pointed out earlier, the duty to prosecute domestically has not been incorporated into the Rome Statute. Furthermore, the jurisdiction of the ICC under the Rome Statute is a limited one, limited not only to

⁸⁴ J. Dugard, “Possible Conflicts of Jurisdiction with Truth Commissions”, in: Cassese et al., see note 19, 693 et seq. (703); Scharf, see note 54, 526; Roht-Arriaza, see note 54, 78.

⁸⁵ See note 27.

⁸⁶ Scharf argues that the Preamble suggest that deferring a prosecution because of a national amnesty would be incompatible with the purpose of the Court. Scharf, see note 54, 522.

⁸⁷ According to Wolfrum the ICC does not have the competence to probe an amnesty on the basis of public international law. Wolfrum, see note 53, 1156.

certain crimes, but also by the principle of complementarity. Article 17 explicitly provides for certain exceptions to the Court's jurisdiction. If article 17 excludes the ICC's jurisdiction for certain cases it does not matter whether a State party under a different international norm is obliged to prosecute certain crimes domestically.⁸⁸ As indicated above, in very limited circumstances the overall goal of the Statute to protect peace and security may better be served by not interfering with a domestic alternative mechanism of dealing with past crimes. In such cases, criminal prosecution by the ICC is no longer warranted despite the occurrence of grave crimes.⁸⁹ That the existence of a duty to prosecute does not *per se* determine the admissibility of a case is also evidenced by the fact that the ICC may exercise its jurisdiction even if the state where the crime occurred can justify the failure to prosecute with the lack of an international norm requiring domestic prosecution.

The assertion that a duty to prosecute does not render a case automatically admissible for the ICC, however, does not prevent the Court from considering the underlying idea of such international obligations.⁹⁰ The fact that an international treaty reflecting customary international law mandates domestic prosecution of certain crimes is an indication for the belief that the punishment of such crimes due to their gravity is within the interest of the international community and necessary for global peace and security which the ICC seeks to protect. As indicated above, the nature of the charges evaluated by other sources of international law should be taken into account when determining the admissibility of a case despite a national amnesty.⁹¹ This does not mean that all serious crimes which require domestic prosecution under international law need to be prosecuted by the ICC. Instead, the seriousness needs to be balanced against the interest in peace and reconciliation pursued by a truth commission. If international law in the interest of

⁸⁸ Similar G. Meintjes, "Domestic Amnesties and International Accountability", in: Shelton, see note 54, 83 et seq. (90).

⁸⁹ In such cases the concern of the international community warranting prosecution by the ICC is diminished. After all, para. 4 of the Preamble reserves its call for international cooperation to the most serious crimes of concern to the international community.

⁹⁰ Méndez argues that the ICC will have to judge each case on the basis of the principles of international human rights law. Méndez, see note 80, 42. See also article 21 para. 1, subpara. b which provides that the Court shall apply in the second place applicable treaties and principles and rules of international law.

⁹¹ Scharf, see note 54, 524.

establishing lasting peace and security provides for minimum requirements for the acceptance of an amnesty, for example the conduct of an investigation, such requirements should be taken into consideration by the ICC when determining whether a conditional amnesty may be accepted in the interest of reestablishing peace.

d. The Competence of the ICC

Under the above analysis, article 17 leaves the Court with a certain margin to argue that under limited and compelling circumstances a case that is subject to an individualized inquiry by a truth commission is inadmissible despite a waiver of criminal punishment.⁹² Doubts have been expressed as to whether the ICC is the most competent and appropriate institution to assess the necessity of an amnesty or truth commission process.⁹³ To counter this argument it is necessary to have a closer look to the functions of the ICC. The Court will have to evaluate the factual situation — a function which is not unusual for a court — and it will need to determine whether non-prosecution was used to be a means to achieve a purpose for which the Rome Statute stands. Since it is the ICC's mandate to ensure that the framework of the Rome Statute is not undermined and to enhance its lasting goals the Court seems to be the proper institution to deal with such issues.⁹⁴ What the Court does in

⁹² Inadmissibility can, however, not be argued on the basis of article 17 para. 1, subpara. c which requires that the person concerned has already been tried for the same conduct referring to the *ne bis in idem* rule of article 20. It is already questionable whether a truth commission process can be considered a trial as envisaged by arts 17 para. 1, subpara. c and article 20 para. 3. Trial by "another court" and the reference in article 20 to criminal responsibility seems to envisage a criminal trial. Van den Wyngaert/ Ongena, see note 54, 727. A truth commission, at least, does not qualify as a court which is the institution explicitly referred to in article 20. Gavron, see note 67, 109; Dugard, see note 84, 702; Scharf, see note 54, 525. But see G.K. Young, "Amnesty and Accountability", *U.C.D.L. Rev.* 35 (2002), 427 et seq. (469).

⁹³ Gavron, see note 67, 112.

⁹⁴ Hafner, Boon, Rübesome and Huston argue that the ICC represents the interest of the world community in the prosecution of international crimes for which it has jurisdiction and that it therefore is the competent institution to balance the interests for ensuring reconciliation with the interest in prosecution. Hafner/ Boon/ Rübesome/ Huston, see note 48, 113. But Ellis who proposes a Third Party Advisory Council to provide recommendations on whether a country is able to carry out proceedings envisaged by

these instances is not to arrive at a political decision but to determine its jurisdictional reach on the basis of the guidelines provided by article 17 and the Preamble of the Rome Statute.⁹⁵ As mentioned earlier, the power of the Court to monitor judicial processes of a state is inherent in the complementarity rule of article 17 which explicitly requires the Court to determine its jurisdictional reach.⁹⁶

e. The Effects of Inadmissibility on Third Party Jurisdiction

There has been discussion on whether the admissibility decision of the Court is binding on all States parties so that they are prevented from initiating domestic criminal procedures if the Court holds that a case is inadmissible.⁹⁷ If the ICC decides not to prosecute a case which is subject to a truth commission process on the basis of article 17, those states which do not agree with such procedures may be inclined to step in and take up criminal proceedings either on the basis of the nationality of the victim or of the accused or on the basis of universal jurisdiction. Well before the establishment of the ICC there were instances where criminal proceedings were initiated by the authorities of a state with regard to crimes which had been amnestied by the state where they had been committed. One example is Spain which started investigation of crimes against Spanish nationals despite the Chilean amnesty decree. These proceedings led Spanish authorities to issue an arrest warrant for Chile's former head of state General Augusto Pinochet who received medical treatment in the United Kingdom.⁹⁸ Taking these instances together

article 17. M.S. Ellis, "The International Criminal Court and its Implications for Domestic Law and National Capacity Building", *Fla. J. Int'l L.* 15 (2002), 215 et seq. (240).

⁹⁵ The state proclaiming the amnesty may be accorded a certain margin of appreciation in the evaluation of the factual circumstances provided it makes a good faith-effort to provide for accountability while re-establishing peace and security. Méndez, see note 80, 43.

⁹⁶ Méndez holds that the Rome Statute is clear in placing responsibility on the ICC for deciding whether a domestic amnesty should bar international prosecution. Méndez, see note 80, 39.

⁹⁷ For the discussion of this issue see Arsanjani, see note 15, 68.

⁹⁸ The immunity issue was dealt with by the House of Lords. N.S. Rodley, "Breaking the Cycle of Impunity for Gross Violations of Human Rights: The Pinochet Case in Perspective", *Nordic J. Int'l L.* 69 (2000), 11 et seq.; J. Bröhmer, "Immunity of a Former Head of State General Pinochet and the House of Lords: Part Three", *LJIL* 13 (2000), 229 et seq.

with the increased willingness of some states to assume universal jurisdiction, as evidenced for example in the Belgium legislation⁹⁹, the question will eventually arise whether the decision of the ICC not to prosecute certain cases covered by a truth commission process would bar national courts of other states from prosecuting these cases.

Argument has been made that the interest of the world community in the prosecution of the crimes enumerated by the Rome Statute rests with the ICC and therefore no longer with the States parties.¹⁰⁰ There is, however, nothing in the Rome Statute that supports this assumption. While the reasons given by the Court may convince a third state not to exercise jurisdiction the mere fact that the Court determines that a case is inadmissible under article 17 has no binding effect on the States parties to the Statute. The only provision that inhibits a State party from prosecution is article 20 para. 2. It provides that “[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.” A decision by the Court that a case is inadmissible on the basis of complementarity is neither a conviction nor an acquittal. Therefore, the Rome Statute does not provide that the decision is binding on other States parties. The question whether third states may go forward prosecuting crimes despite an amnesty proclaimed by the country where they were committed is one which has to be determined on the basis of the rules of jurisdiction. Arguably, the fact that the ICC concluded that it had no jurisdiction because a prosecution was not in the interest of peace and

⁹⁹ A 1993 Belgium law entrusted Belgium courts with jurisdiction over offences such as grave breaches of the Geneva Conventions, their Additional Protocols, and crimes against humanity, regardless of where the offence was committed. Law of 16 June 1993 “concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto”, as amended by the Law of 19 February 1999 “concerning the Punishment of Serious Violations of International Humanitarian Law”. An arrest warrant issued on the basis of this law was at issue before the ICJ in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002. The law was amended by the Belgian Parliament in 2003 restricting the scope of the law so that a link to Belgium-like the nationality of the victim or the alleged criminal-is now required.

¹⁰⁰ Hafner/ Boon/ Rübesome/ Huston, see note 48, 113.

security may inform the question whether there is a universal interest in the prosecution and thus whether a state has universal jurisdiction.¹⁰¹

IV. Alternative Options to Deal with Amnesties

Since the Court according to the above analysis has jurisdiction for a broad range of cases covered by an amnesty, especially those that have not been subject to an investigation, the question remains whether the Prosecutor and the Court in addition to article 17 are given the option or are even obliged not to prosecute such crimes on other grounds.

1. Denial of Investigation for Lacking Interest of Justice?

If a matter covered by an amnesty is referred to the Court pursuant to article 13, the Prosecutor may refrain from prosecution despite admissibility if it would not serve the interests of justice. Article 53 para. 1, subpara. c provides that the Prosecutor in the pre-investigatory stage may determine that there is no reasonable basis to proceed because “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”. Similarly, upon investigation, the Prosecutor may conclude that there is not a sufficient basis for prosecution because “[a] prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime”.¹⁰² The ultimate decision lies with the Pre-Trial Chamber of the Court.¹⁰³

A number of commentators cite this provision as providing the Court with the necessary flexibility to defer to an amnesty despite the admissibility of cases covered by an amnesty or alternative mecha-

¹⁰¹ Ibid. For the issue of universal jurisdiction, see also G. Meintjes/ J. E. Méndez, “Reconciling Amnesties with Universal Jurisdiction”, *International Law Forum* 2 (2000), 76 et seq.; R. Boed, “The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations”, *Cornell J. Int’l L.* 33 (2000), 297 et seq.

¹⁰² Article 53 para. 2, subpara. c.

¹⁰³ Article 53 para. 3, subpara. b.

nism.¹⁰⁴ There is, however, reason to doubt, whether article 53 is the appropriate legal basis for these issues. Though it lists a number of *case-specific factors* that indicate whether the prosecution is in the interest of justice, like the gravity of the crime, the age and the role of the alleged perpetrator, it does not refer to situations where an amnesty is granted for the purpose of reconciliation.¹⁰⁵ Instead it explicitly requires the consideration of the interests of the victims. Since unconditional amnesties without investigatory mechanism usually compromise the interests of the victims for the sake of reconciliation it is difficult to argue that international prosecution is not in the interest of justice taking due account of the victims' interests.

Apart from the interests of the victims, it is questionable whether justice itself is better served by deferring to a national amnesty. It is rather peace and security than justice that is served by the proclamation of an amnesty.¹⁰⁶ It has been argued that amnesty is a political act, in which the element of justice in a judicial sense does not figure.¹⁰⁷ To require justice in such a strict sense is probably not appropriate.¹⁰⁸ Justice may also be served by alternative means of establishing accountability.¹⁰⁹ Arguably, the inquiry process by a truth commission already serves the interest of justice¹¹⁰ and there is no additional need for international prosecution. However, if no investigation has taken place the interest of the victims in obtaining justice can hardly be served. These considerations are already part of the evaluation under article 17.¹¹¹ Ac-

¹⁰⁴ Dugard, see note 72, 1014; Gavron, see note 67, 110; Roht-Arriaza, see note 54, 81; R.J. Goldstone/ N. Fritz, "In the Interests of Justice' and Independent Referral: The ICC Prosecutor's Unprecedented Powers", *LJIL* 13 (2000), 655 et seq. (662).

¹⁰⁵ Roht-Arriaza, see note 54, 81.

¹⁰⁶ To my mind "justice" in this context is not a "fluid notion of the protection of the rights of man". See the different definitions of justice outlined by O'Shea. O'Shea, see note 17, 317. Considering the purpose of the Rome Statute as expressed in the Preamble it rather describes the necessity of holding someone accountable for crimes committed. O'Shea argues that article 53 is about the "justice of the case". *Ibid.*

¹⁰⁷ Arsanjani, see note 15, 67.

¹⁰⁸ Goldstone/ Fritz, see note 104, 662.

¹⁰⁹ The term restorative justice is used to distinguish such forms from retributive justice.

¹¹⁰ Gavron, see note 67, 110.

¹¹¹ It is interesting to note that the authors who favour a decision by the prosecutor on the basis of article 53 ultimately refer to factors that also in-

ording to the above given interpretation of article 17, a case covered by a conditional amnesty is inadmissible under certain circumstances. There does not seem to be additional room for the Court's discretion to defer to national amnesties for the interest of justice.¹¹² If the analysis under article 17 reveals that the Court has jurisdiction despite the conduct of an investigation in the interest of peace and security, it can hardly be argued that the prosecution is not in the interest of justice.¹¹³ Therefore, if a case is referred to the Court which is covered by an amnesty and if the case is admissible according to the above given interpretation of article 17 — for example due to a lack of investigation — the Prosecutor should not defer to the amnesty relying on article 53.

2. Discretion Regarding *proprio motu* Investigations

In cases where a matter, for political considerations, is not referred to the Court by a State party¹¹⁴ or by the Security Council, the Prosecutor is left with the decision whether to start investigations *proprio motu*. The Prosecutor may receive information from victims, their families, international organizations or non-governmental organizations. It has been argued that article 15 gives the Prosecutor the power to decline to

form the above given interpretation of article 17, namely the gravity of the crime concerned, the interests of the victims, whether a quasi-judicial inquiry has taken place and whether the amnesty was granted by the offenders themselves. Dugard, see note 84, 703; Goldstone/ Fritz, see note 104, 665.

¹¹² The Prosecutor would run counter to the general framework of the Statute that intends to end impunity (Preamble, para. 5.) and provides that the Court shall have jurisdiction under article 17 para. 1, subparas a and b if not even an investigation has taken place if he denied investigations of cases covered by a national unconditional amnesty where no such domestic investigation has taken place.

¹¹³ If, however, one follows a more rigid interpretation of article 17 not providing for any exception for truth commissions, article 53 is the only alternative for a discretionary power of the ICC not to prosecute crimes covered by an amnesties. Dugard, see note 72, 1014. According to Dugard the Court may also have regard to an amnesty in mitigating the sentence. *Ibid.*, 1014.

¹¹⁴ Such a referral depends on the requirements of article 14.

exercise her or his discretion to prosecute *proprio motu* with the argument that a domestic amnesty should not be interfered with.¹¹⁵

Article 15 para. 1 indicates that the Prosecutor is provided with a fairly wide discretion as to whether to initiate investigations *proprio motu*. There is, however, reason to doubt whether this discretion should be used by the Prosecutor to generally abstain from prosecuting crimes which have been amnesties without the conduct of a domestic investigation process. In exercising her or his discretionary powers the Prosecutor is well advised to take account of the framework set by article 17. As indicated above there may be cases which are inadmissible for the ICC to deal with because a truth and reconciliation is in process or has been conducted. If, however, no investigation has taken place, a case is admissible and an investigation by the Prosecutor should not be denied because of the national amnesty. The consideration that certain alternative mechanisms of accountability should not be interfered with in the interest of peace and security can be taken care of under article 17.¹¹⁶ To go beyond this provision would nullify the investigation requirement that is at least an emerging rule of international law¹¹⁷ and explicitly referred to in article 17.

In any case it is doubtful whether the decision to defer to an amnesty should be made by the Prosecutor. The Prosecutor's task is to "analyse the seriousness of the information received"¹¹⁸ and to submit to the Pre-Trial Chamber a request for authorization of an investigation if he concludes that "there is a reasonable basis to proceed with an investigation...".¹¹⁹ This is an evidentiary test, not one of appropriateness.¹²⁰ The seriousness is concerned with the nature of the alleged crime as well as the strength of the incrimination contained in the information.¹²¹ To determine the seriousness of the information and the reasonable basis for an investigation the Prosecutor needs to determine

¹¹⁵ Dugard, see note 72, 1014.

¹¹⁶ Dugard who argues that it is possible that a genuine amnesty may be protected by prosecutorial discretion, reads article 17 more narrowly and argues that it is difficult to argue that conditional amnesties do not result from an unwillingness to prosecute. This is why he tries to solve the problem by applying arts 15 and 53. Dugard, see note 84, 702.

¹¹⁷ Seibert-Fohr, see note 12, 328 seq.

¹¹⁸ Article 15 para. 2.

¹¹⁹ Article 15 para. 3.

¹²⁰ M. Bergsmo/ J. Pejic, "Article 15", in: Triffterer, see note 25, 365.

¹²¹ Ibid.

whether the facts before him justify the conclusion that there is reasonable ground that an investigation may lead to a conviction. This concerns primarily the questions whether the information is reliable, whether the matter can be qualified as a crime as defined in arts 6 to 8 of the Statute, how serious the alleged crime was and whether an investigation may provide the factual basis for prosecution.¹²² Article 15 therefore does not seem to be the right place to deal with political considerations on amnesties.¹²³

To sum up, the question whether crimes that fall under a national amnesty should be prosecuted by the ICC should preferably, be dealt with on the basis of article 17, rather than on arts 15 or 53.¹²⁴ Article 17 with the requirement of an investigation and the factors spelled out to determine a state's unwillingness to prosecute gives better guidance for the issues at stake than the provisions on the initiation of an investigation.¹²⁵ It thereby refutes the above cited criticism that the issue of amnesty was left to the unfettered discretion of the ICC or its Prosecutor.¹²⁶

¹²² According to Hoffmeister and Knoke questions about the Court's jurisdiction and the admissibility do not matter at this stage. F. Hoffmeister/ S. Knoke, "Das Vorermittlungsverfahren vor dem Internationalen Strafgerichtshof – Prüfstein für die Effektivität der neuen Gerichtsbarkeit im Völkerstrafrecht", *ZaöRV* 59 (1999), 785 et seq. (792). Bergsmo and Pejic while talking about an unconditional and discretionary initiation right of the Prosecutor point out that the exercise must be guided by the principle of the most serious crimes of international concern. Bergsmo/ Pejic, see note 120, 364-365, paras 9 and 13.

¹²³ The preference for a solution under article 17 may be especially appealing for lawyers with a civil law background where the evidence guides predominantly the decision of the prosecutor while public interests play an important rule in common law jurisdictions. For this difference, see Gavron, see note 67, 110.

¹²⁴ But see Roht-Arriaza, see note 54, 81; Goldstone/ Fritz, see note 104, 662.

¹²⁵ This is not to oblige the Prosecutor to investigate and prosecute any case for which the ICC has jurisdiction. But once a case is admissible the selection should not be guided by political considerations like the reasons to sustain the effectiveness of a national amnesty.

¹²⁶ See note 38.

3. Deferral of Investigation due to a Security Council Resolution

There is still one option which will prevent the ICC from considering a case covered by an amnesty even if the case is admissible under the Rome Statute. The Court will be barred from investigation and prosecution pursuant to article 16 if the Security Council adopts a resolution under Chapter VII of the UN Charter requesting the Court not to proceed with the proceedings for a period of 12 months.¹²⁷ The request may be renewed. The reference to Chapter VII indicates that a threat to peace pursuant to article 39 of the UN Charter is necessary for such a request. It has been argued that a situation in which refusal to recognize a national amnesty constitutes a threat to international peace was difficult to contemplate.¹²⁸ But if the ICC proceeded despite an amnesty which forms part of a UN brokered peace agreement and which is the only means to end a serious conflict, the transition to peace might be weakened due to massive protests in the respective country, or even earlier the parties to the conflict might be less willing to accept such an agreement. This provides ample argument for the power of the Security Council to request a stay of prosecution in order not to jeopardize a peace agreement that includes an amnesty provision.¹²⁹

This does not mean that the ICC is automatically bound by every such resolution of the Security Council. Article 16 of the Statute prevents the Court from investigation and prosecution only if a resolution was “adopted under Chapter VII of the Charter of the United Nations ...”. If the requirements of these Charter provisions are obviously not met a resolution cannot be considered as being adopted under them. One commentator has gone so far as to maintain that the ICC generally has a competence to assess whether the Security Council acted

¹²⁷ For details on the prerequisites for such a resolution and on its limits, Scharf, see note 67, 523. According to Gavron article 16 should not be invoked to secure permanent respect for an amnesty law because it was intended to be a temporary measure. Gavron, see note 67, 109.

¹²⁸ Dugard, see note 72, 1014. But later he said that a situation was not inconceivable in which the trial by the ICC of a former dictator who had been granted national amnesty threatened international peace. Dugard, see note 84, 702. Gavron who ignores that a situation may deteriorate without the deferral by the Security Council. Gavron, see note 67, 109.

¹²⁹ Roht-Arriaza argues that the breach of the peace requirement has been construed broadly in recent years. Roht-Arriaza, see note 54, 80.

in conformity with the requirements by the Charter.¹³⁰ But to accord to the Court a broad supervisory function seems to go too far. Though the Court has the power to determine the scope of its jurisdiction, the different functions of the two institutions should be kept in mind. The Security Council seems better placed to determine whether there is a threat to international peace. Therefore, it should be accorded a margin of appreciation regarding these factual determinations.¹³¹

V. The Effect of the Rome Statute on National Amnesties

If there is no request for deferral by the Security Council, the Court, once it adopts the above given analysis of the Rome Statute, will be able to prosecute a broad range of crimes covered by unconditional national amnesties. The effect will be that offenders who were promised not to be prosecuted by national authorities will be held accountable internationally. While the failure to prosecute itself does not conflict with the Rome Statute, the Statute sets up a number of cooperation duties which may run counter to the promise of impunity given by a government in connection with an amnesty. For example, article 86 requires the States parties to cooperate fully with the Court in its investigation and prosecution. The States parties shall comply with requests for arrest and surrender pursuant to article 89. A State party may not deny the surrender of an accused with reference to a national amnesty. Though article 89

¹³⁰ Scharf, see note 54, 523. He refers to the decision of the Appeals Chamber of the Yugoslavia Tribunal in the *Tadic* case. However, this case was somewhat different since the Tribunal was established by a Security Council resolution and by assessing this resolution the Appeal Chamber legitimized its jurisdiction in the first place. In the case of the ICC, however, jurisdiction is established by the Rome Statute. Only the exception of article 16 makes it necessary to make a finding on the Security Council's competence.

¹³¹ Roht-Arriaza doubts whether the Security Council can order the deferral if there is an international obligation to prosecute the crimes concerned because it is bound by the principles of the UN including human rights. The order of deferral does, however, not necessarily conflict with human rights law. Human rights law does not provide for an absolute prohibition of amnesties and the duty of states to prosecute certain crimes does not necessarily mean that these crimes must be prosecuted by the ICC. Roht-Arriaza, see note 54, 80.

takes account of the national procedures for surrender,¹³² this only concerns procedural rules but not substantive provisions on criminal responsibility like amnesty laws.¹³³

Other obligations under the Rome Statute which may conflict with an amnesty providing for a halt of investigation are the duties to cooperate under article 93. States parties are required under this provision to provide the identification and whereabouts of persons and to comply with requests for the taking of evidence, questioning, service of documents, examination of places, execution of searches and seizures, provision of documents and other types of assistance in relation to investigations or prosecutions. The request may not be refused with the argument that an amnesty law prohibits such cooperation. Similar to article 89 the reference to national procedures cannot be interpreted as making room for such argument. This also applies to other forms of assistance which is required unless prohibited by domestic law.¹³⁴ The reference to domestic law is to be understood as a clarification that other forms of assistance are only required if such forms are not generally prohibited under domestic law.¹³⁵ Otherwise, the whole mechanism of cooperation and surrender could be rendered meaningless by the proclamation of a domestic statute prohibiting assistance to the Court.

If the State party is reluctant to surrender the alleged perpetrators or to fulfill other cooperative obligations it will pose practical problems for the Court which depends to a certain degree on the cooperation of

¹³² It provides that the States parties “shall, in accordance with ... the procedure under their national law, comply with requests for arrest and surrender”.

¹³³ During the drafting of this provision the view was expressed in the Ad Hoc Committee on the Establishment of an International Criminal Court that “national authorities should not have the right to examine the warrant in relation to substantive law, while certain formal requirements might be made.” Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, GAOR, 50th Sess., Suppl. No. 22, Doc. A/50/22, 40, para. 212. See also C. Kreß/K. Prost, “Article 89”, in: Triffterer, see note 25, 1074, para 14.

¹³⁴ Article 93 para. 1, subpara. l.

¹³⁵ A similar provision is to be found in article 99 para. 1 according to which the procedure or executing requests of assistance shall be “in accordance with the relevant procedure under the law of the requested State”. This provision like the above mentioned article 89 para. 1 only refers to procedural rules but not to substantive provisions on criminal responsibility as in the case of amnesty legislation.

the state on whose territory the crimes were committed and where the accused is present to obtain evidence and secure the attendance of the accused and of the witnesses.¹³⁶ But such practical considerations have not prevented its predecessors from exercising jurisdiction anyhow.

In conclusion the following can be said. An amnesty is not *per se* in violation of the Rome Statute. But nor does it prevent the ICC automatically from exercising its jurisdiction under the Statute. Only under limited circumstances is a case which is subject to a truth commission process inadmissible. If this is not the case and if the Court has jurisdiction a State party has to abide by the Court's requests to surrender the accused or to execute cooperative functions in the prosecution.¹³⁷ The States parties will be obliged to provide assistance for the international prosecution even if this runs counter to the earlier promise not to prosecute and perhaps not to extradite the offenders. These obligations have the potential of rendering a domestic amnesty ineffective. Even if the grant of amnesty is limited to the promise that national authorities will refrain from prosecution, the underlying idea is to prevent prosecution entirely. Amnesty legislation may even include a provision on non-extradition for the crimes covered. Despite such potential conflicts, the State cannot justify noncompliance with the Rome Statute by referring to internal legal restraints.¹³⁸

Eventually the exercise of jurisdiction by the Court in cases of unjustifiable amnesties may have an impact on the future practice of states for the grant of amnesties.¹³⁹ The States parties to the Statute or those planning to become a party may out of political considerations be inclined to avoid international prosecution by the ICC by abstaining from amnesties or drafting mechanisms in line with the basis requirements set out above.¹⁴⁰ This underlines once more the importance of the Rome Statute for the future use of amnesties. It does not only render amnesties ineffective but may even influence future state practice. After all, the individual state is no longer the only sovereign body making final decisions over the prosecution of certain crimes. Though the Rome Statute does not mandate domestic prosecution the ICC has the power

¹³⁶ O'Shea, see note 17, 127.

¹³⁷ As spelled out in article 93.

¹³⁸ See also article 46 para. 1 of the Vienna Convention on the Law of Treaties.

¹³⁹ Méndez, see note 80, 39.

¹⁴⁰ For an analysis of the implications of the Rome Statute for domestic law, Ellis, see note 94, 215.

to take up certain cases even if the national authorities have decided against prosecution.¹⁴¹

VI. Concluding Remarks and Outlook

The analysis of the Rome Statute shows a complex picture of how amnesties and truth commissions processes need to be dealt with by the ICC. The underlying idea of the Statute that perpetrators of the most serious crimes should not go unpunished, makes clear that the ICC is not automatically bound to defer to national amnesties.¹⁴² This view was also taken by the French Conseil Constitutionnel when it was asked by the French President and Prime Minister to decide whether ratification of the Rome Statute required prior revision of the French Constitution.¹⁴³ The Court held that the ICC could be validly seized with a case covered by an amnesty. The jurisdictional power of the ICC to deal with such cases was derived from the complementarity principle.¹⁴⁴ The prosecution of such cases by the ICC would conflict with the French sovereign power to grant amnesties. The Court concluded that this power together with other judicial powers of the Court conflicted with the “essential conditions for the exercise of national sovereignty” which is protected by the French Constitution. The decision led to an amendment of the French Constitution permitting and therefore clearing the way for ratification of the Statute.¹⁴⁵ This amendment has been interpreted by a commentator as demonstrating France’s willingness to limit its national sovereignty and to make the exercise of sov-

¹⁴¹ It goes without saying that the requirements of article 17 have to be met and that the crime must be one for which the Court has jurisdiction.

¹⁴² The proposal that the Court shall not have the power to intervene when a national decision has been taken in a particular case (Doc. A/CONF.183/2/Add.1, 42) was finally not adopted.

¹⁴³ Decision of January 22, 1999, No. 98-408 DC, 1999 J.O. 1317, <<http://www.conseil-constitutionnel.fr/decision/1998/98408/98408dc.htm>> – See also B. Rudolf, “Statute of the International Criminal Court”, *AJIL* 94 (2000), 391 et seq.

¹⁴⁴ The Court explained its decision with the limited list of reasons for declaring a case inadmissible in article 17.

¹⁴⁵ See new article 53-2 inserted by Constitutional Law 99-568 of July 8, 1999.

ereignty consistent with the international standard that perpetrators of serious crimes should not go unpunished.¹⁴⁶

Whether the ICC has jurisdiction to deal with cases covered by an amnesty or truth commission mechanism needs to be determined on the basis of the delicate balance struck by article 17 of the Rome Statute. Since the conduct of a domestic investigation into past crimes is the very minimum requirement, cases which are subject to an unconditional amnesty are usually admissible under this provision. The picture is different when it comes to truth commission mechanisms which provide for an investigation. Article 17 leaves the Court with a limited leeway not to prosecute offenders when an individualized amnesty has been granted by a national truth commission in the interest of reestablishing peace and security.¹⁴⁷ While it is clear that an investigation is the minimum requirement, the Court will need to elaborate specific guidelines to determine whether the truth commission process shows a genuine unwillingness to bring alleged criminals to justice or whether it satisfies the demand for accountability under the Statute.¹⁴⁸ At least as long as the decision of a State party to grant conditional amnesty is in accordance with the international legal standards the Court should not interfere.¹⁴⁹ At the same time the Court should be guided by the overall purpose of the Rome Statute to protect peace and security. Account should be taken of the fact that the Rome Statute deals with the most serious human rights violations. In order not to undermine the general framework of the Rome Statute, the national decisions to provide for a truth commission instead of criminal prosecution should be followed only under limited circumstances.

The text of the Statute thus gives the ICC the necessary but at the same time limited latitude to deal with amnesties adequately. The above

¹⁴⁶ Rudolf, see note 143, 395. To understand the Rome Statute as providing for prosecution for all cases of amnesties for the crimes falling within the jurisdiction of the ICC, however, is not in accordance with the above given interpretation of article 17.

¹⁴⁷ According to Scharf the Statute reflects "creative ambiguity" permitting the Court a certain leeway to recognize an amnesty exception to the court. Scharf, see note 54, 522 with further reference.

¹⁴⁸ The drafters did not adopt the earlier proposal rendering a case inadmissible in case of domestic investigations without regard to the genuine nature of the proceedings. Instead, by adopting the final text of article 17 they indicated that the purpose will need to be scrutinized by the Court. For the rejected proposal (Doc. A/CONF.183/2/Add.1, 42), see note 36.

¹⁴⁹ Méndez, see note 80, 43.

given interpretation makes sure that democratic transition in a principled way is not precluded – a fear that has been expressed by some authors and the United States.¹⁵⁰ The decision between prosecution and reconciliation will not be made by the Court. But the democratic decision granting conditional amnesty will be respected if it is within the interest of the lasting goals the Statute seeks to attain. Even if a case covered by an amnesty is admissible there is still the option that the Security Council asks the Court not to proceed with the prosecution if there is a threat to peace. The legitimacy and credibility of the Court will, among other things, depend on how the Court will deal with the issue of amnesties. Article 17 with the emphasis on investigation and the factors spelled out to determine a state's unwillingness to prosecute read in context with the Preamble of the Rome Statute provides the Court with the necessary judicial guidelines in making these determinations.

A Protocol to the Rome Statute has been proposed in order to provide, among other things, for an exception to international prosecution by the ICC for situations covered by an amnesty. In the author's words the Protocol genuinely seeks to reestablish peace and security and tries to reconcile "necessary and human rights-sensitive amnesties with the developing framework for global justice".¹⁵¹ Taking into account that the drafters of the Rome Statute could not agree on a specific provision on amnesties, the chances for an additional protocol on this issue are quite limited. The law on amnesties is a very complex issue. The decision whether a national amnesty should be accepted by the international community requires a delicate balancing of interests which differ from case to case. A general abstract provision in the Statute providing for a general exception to the Court's jurisdiction in case of a national amnesty is hard to imagine and was probably not feasible.¹⁵² Even if a treaty spelling out international rules for the adoption of amnesties is deemed to be desirable, the need that the ICC accepts certain types of amnesties can be accommodated by an interpretation of article 17 which is informed by the purpose of the Statute as spelled out in the Pream-

¹⁵⁰ See note 12.

¹⁵¹ O'Shea, see note 17, 336. Young asks for a provision on amnesties in the Rules of Procedure and Evidence. Young, see note 92, 477.

¹⁵² This is also because the international law on amnesties is a developing one. Holmes argues that "some subjectivity had to be retained to give the Court latitude on which to base its decision of finding unwillingness". Holmes, in: Lee, see note 39, 50-51.

ble.¹⁵³ Article 17 gives sufficient breadth to deal adequately with this difficult issue.¹⁵⁴ It thereby reflects the intent of many drafting delegations to accept good faith amnesties granted in the context of a truth commission like the one in South Africa while rejecting bad faith amnesties as the ones granted by South American dictators.¹⁵⁵ The solution ultimately needs to be arrived at on a case by case analysis.

¹⁵³ O'Shea's need for a protocol is due to a very restrictive reading of article 17 leading to the Court's jurisdiction even in all cases covered by truth commission mechanisms. O'Shea, see note 17, 126.

¹⁵⁴ This was the view of some delegations who argued that an additional provision on amnesties was not necessary because the provisions on admissibility could give the Court sufficient breadth to examine such cases. Holmes, in: Lee, see note 39, 60.

¹⁵⁵ Schabas, see note 41, 68-69.