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Would it be an appropriate use of prosecutorial discretion if the prosecutor declined to initiate an investigation in the case of an alleged offender who has been given amnesty or asylum?

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INTERNATIONAL WAR CRIMES RESEARCH LAB

MEMORANDUM FOR THE
OFFICE OF THE PROSECUTOR
OF THE INTERNATIONAL CRIMINAL COURT

ISSUE: WOULD IT BE AN APPROPRIATE USE OF PROSECUTORIAL DISCRETION IF THE PROSECUTOR DECLINED TO INITIATE AN INVESTIGATION IN THE CASE OF AN ALLEGED OFFENDER WHO HAS BEEN GIVEN AMNESTY OR ASYLUM?

Prepared by Mark A. Pustay
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JUDGE PHILIPPE KIRSCH
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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

A. Issues

This memorandum of law will address issues regarding potential amnesty and asylum exceptions to the jurisdiction of the International Criminal Court ("ICC"). Specifically, this memorandum will analyze whether it would be an inappropriate use of prosecutorial discretion if the Prosecutor of the ICC declined to initiate an investigation in the case of an individual who has been granted amnesty or asylum. Part II of this memorandum sets the jurisdictional and procedural background of the ICC. Part III of this memorandum analyzes sources of international law external to the Rome Statute of the International Criminal Court ("Rome Statute") and considers the prosecutorial obligations imposed by those international sources of law. Part IV discusses the treatment by both the Rome Statute and external sources of law regarding of grants of amnesty and considers whether there is an amnesty exception to the ICC's jurisdiction. Part V applies an analysis similar to that undertaken in Part IV; Part V, however, analyzes a potential asylum exception to the ICC's jurisdiction.

B. Summary of Conclusions

1) There are very few obligations imposed on international judicial bodies to initiate investigations.

International law generally imposes no obligations to initiate investigations or prosecutoe cases on international bodies such as the ICC or the ICJ. There are certain conventions of international law, such as the Geneva Conventions, the Genocide Convention, and the Torture Convention, that impose absolute obligations to prosecute grave breaches or violations of said conventions. Those obligations, however, are only imposed on states, and may further be limited to parties to those treaties, depending on the specific convention. Since the ICC is not a state nor

is it a party to these conventions, there are very few obligations to investigate or prosecute violators of those conventions imposed upon the ICC.

2) There is no explicit amnesty exception to the jurisdiction of the ICC. There are, however, a number of provisions into which an amnesty exception may be read.

The Rome Statute does not explicitly recognize an amnesty exception to the ICC's jurisdiction. There are a number of provisions of the Rome Statute into which an amnesty exception may be implied, specifically Articles 15, 16, 17, 20, 53 and 119. Given the prosecutorial flexibility provided by Articles 15 and 53, the Prosecutor has the ability to recognize an amnesty exception to the ICC's jurisdiction at the Prosecutor's discretion.

3) There is no explicit asylum exception to the jurisdiction of the ICC, and the Rome Statute provides only a limited basis in which such an exception may be read. Sources of international law outside of the Rome Statute may provide scenarios in which a prosecutor may decline to initiate an investigation based on a grant of asylum.

Much like the Rome Statute's treatment of amnesty, the Rome Statute is silent on the explicit recognition of an asylum exception to the jurisdiction of the ICC. Furthermore, there are fewer provisions of the Rome Statute into which an exception may be read, and reading an exception into those provisions is attenuated at best. The Refugee Convention may, however, provide the prosecutor with the discretion to recognize an asylum exception in limited circumstances. That said, given the Prosecutor's wide discretion in deciding which cases to bring before the ICC's jurisdiction, the Prosecutor might be able read an asylum exception in limited circumstances.

II. ICC JURISDICTION AND PROCEDURES

A. ICC Jurisdiction

The ICC has been given jurisdiction over four types of international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. The crime of genocide is defined by the Rome Statute as committing any of the listed acts "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[1] Crimes against humanity includes the performance of any of the codified acts "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[2] War crimes include crimes listed under Article 8 committed "as part of a plan or policy or as part of a large-scale commission of such crimes."[3] The crime of aggression is not provided an explicit definition in the Rome Statute. Instead, the Rome Statute allows jurisdiction over the crime of aggression once a finding has been made in accordance with Articles 121 and 123 of the Rome Statute.[4]

B. ICC Procedures

1) Initiating Investigations

The general provisions regarding the course of conduct for the Office of the Prosecutor are contained in Article 15 of the Rome Statute. The Office of the Prosecutor, in making decisions regarding whether to initiate an investigation into a particular set of circumstance, is bound by the provisions of Articles 15 and 53 of the Rome Statute.

[1] Rome Statute of the International Criminal Court, Art 6. [Reproduced in the accompanying notebook at Tab 2].

[2] *Id*. at art. 7.

[3] *Id*. at art. 8.

[4] *Id*. at art. 5(2).

Potential cases are brought to the Office of the Prosecutor in three different ways. First, the Prosecutor may initiate an investigation at the Prosecutor's own discretion. Second, the Prosecutor may initiate an investigation at the request of a state that is a party to the Rome Statute.[5] Third, a case may be brought to the attention of the Office of the Prosecutor by the UN Security Council under the Security Council's powers enumerated in chapter VII of the UN Charter.[6] Any one of these procedures are acceptable ways to bring a case under the ICC's jurisdiction.

Once a case has been brought to the Office of the Prosecutor by a State Party or the Security Council, the Prosecutor must decide whether to initiate an investigation into the case. The Office of the Prosecutor is obligated to initiate an investigation under Article 53 of the Rome Statute unless the Office of the Prosecutor determines that there is "no reasonable basis to proceed" with such an investigation.[7] In determining whether there is a reasonable basis to proceed with the investigation, the Office of the Prosecutor must take three considerations into account.[8]

First, the Prosecutor must consider whether there is a reasonable basis to believe that a crime under the jurisdiction of the ICC has been committed.[9] The ICC's jurisdiction is limited to cases of alleged genocide, crimes against humanity, war crimes, and the crime of aggression.[10]

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[5] *Id.* at art.13(a).

[6] *Id.* at art.13(b).

[7] Rome Statute, supra 1, at art.53. [Reproduced in the accompanying notebook at Tab 2].

[8] Rome Statute, supra 1, at art. 53(1). [Reproduced in the accompanying notebook at Tab 2].

[9] Rome Statute, supra 1, at art. 53(1)(a). [Reproduced in the accompanying notebook at Tab 2].

[10] Rome Statute, supra 1, at art. 5(1). [Reproduced in the accompanying notebook at Tab 2].

Second, the Prosecutor must determine whether the case would be admissible under Article 17 of the Rome Statute.[11] Article 17 outlines the admissibility of cases before the ICC. There are four situations in which a case before the ICC is inadmissible. The first such situation is where the case at issue is being investigated or prosecuted by a state that has jurisdiction over the case at issue.[12] A second set of circumstances in which the a case may be determined inadmissible is if where the case has been investigated by the state that has jurisdiction over the case and the state declined to prosecute the defendant further.[13] Admissibility issues may also arise if the person being investigated has already been tried for activities that comprise the issue of the complaint before the ICC, or if a trial by the ICC is impermissible under Article 20 of the Rome Statute.[14] Finally, a case may be inadmissible before the ICC where the circumstances of the case are not of "sufficient gravity" to warrant further proceedings by the ICC.[15]

[11] Rome Statute, supra 1, at art.53(1)(b). [Reproduced in the accompanying notebook at Tab 2].

[12] Rome Statute, supra 1, at art.17(1)(a). A state's jurisdiction in this type of situation may be preempted if the State that has jurisdiction over the case is either "unwilling or unable genuinely" to conduct the proceedings. *Id.* [Reproduced in the accompanying notebook at Tab 2].

[13] Rome Statute, supra 1, at art. 17(1)(b). Again, the inadmissibility of these circumstances may also be preempted if there are issues concerning whether the state with jurisdiction was either unwilling or unable to conduct a genuine prosecution. *Id.* [Reproduced in the accompanying notebook at Tab 2].

[14] Rome Statute, supra 1, at art. 17(1)(c), Rome Statute of the International Criminal Court. Under Article 20, the ICC cannot conduct a trial of a person who was tried by another court for the same activities. The ICC may still subject a person to prosecution if the previous court's proceedings were either for the purpose of shielding the person from prosecution by the ICC or were not conducted in a manner that is consistent with the norms of due process and justice that are recognized by international law. [Article 20(3)] [Reproduced in the accompanying notebook at Tab 2].

[15] Rome Statute, supra 1, at art. 17(1)(d_. [Reproduced in the accompanying notebook at Tab 2].

Third, the Prosecutor must consider whether the initiation of an investigation would "serve the interests of justice."[16] This consideration relies heavily on the subjective judgment of the Prosecutor.

2) Proceeding with Prosecutions

Before the ICC can proceed with a prosecution, there are preliminary procedures that must be satisfied in order to ensure the legitimacy of the Prosecutor's decision. The investigation itself is subject to the provisions of Article 54, which establishes basic due process protections regarding the collection of evidence and formulation of the prosecution's case.[17]

If the Prosecutor decides that a particular case warrants an investigation, the Prosecutor must make a request to the Pre-Trial Chamber for authorization of an investigation.[18] The Pre-Trial Chamber will go through its own analysis of the case in determining whether the Prosecution's request for authorization should be granted.[19] If the prosecutor declines an investigation, the decision not to investigate may be reviewed by the Pre-Trial Chamber at the Chamber's discretion.[20] If the Pre-Trial Chamber decides that a review of the Prosecutor's decision not to initiate an investigation is necessary, the investigation may not proceed unless the

[16] Rome Statute, supra 1, at art. 53, cl.1(c). [Reproduced in the accompanying notebook at Tab 2].

[17] Rome Statute, supra 1, at art. 54. Article 54 allows the Prosecutor to take a number of different measures to collect information during an investigation such as the negotiation of agreements to ensure the cooperation of a State or an individual. Additionally, Article 54 requires the Prosecutor to ensure that the "necessary measures be taken" to protect the confidentiality of information. [Reproduced in the accompanying notebook at Tab 2]

[18] Rome Statute, supra 1, at art. 15, cl. 3. [Reproduced in the accompanying notebook at Tab 2].

[19] See Rome Statute, supra 1, at art. 15, cl. 4. The Pre-Trial Chamber's analysis is similar to the Prosecutor's analysis. The Pre-Trial Chamber must consider the factual basis of the case and the jurisdiction of the ICC in deciding whether there is a reasonable basis to proceed with the investigation. Id. [Reproduced in the accompanying notebook at Tab 2].

[20] Rome Statute, supra 1, at art. 53, cl.3 (b). [Reproduced in the accompanying notebook at Tab 2].

Pre-Trial Chamber has confirmed the initiation of the investigation.[21] Furthermore, if the Prosecutor declines to initiate an investigation, Article 53 allows the Prosecutor the discretion to reconsider a decision not to initiate an investigation on the presentation of new facts or information.[22]

3) Prosecutorial Timing

The timing of an investigation can have a significant effect on the political and legal effects of the decision to either request or decline to initiate an investigation. The Office of the Prosecutor is given wide latitude in determining when to bring investigations and when to delay the initiation of an investigation.

There are a few provisions of the Rome Statute that are particularly important in regards to the delaying the initiation of an investigation or prosecution. First, Article 16 allows the UN Security Council to order the Office of the Prosecutor to delay an investigation or a prosecution by invoking the Security Council's Chapter VII powers under the UN Charter.[23] Article 16 establishes that the Prosecutor may not institute proceedings against an individual for twelve months if the UN Security Council requests such a deferral.[24] This provision of the UN Charter allows the Security Council to give legal effect to the prosecutor's decision to delay an investigation. This is a particularly important provision, as Article 16 allows the Prosecutor to employ the authority of the UN Security Council in resolving political considerations that may arise in the decision whether to initiate an investigation. When the decision to initiate an

[21] *Id.* [Reproduced in the accompanying notebook at Tab 2]

[22] Rome Statute, supra 1, at art. 53, cl.4. [Reproduced in the accompanying notebook at Tab 2].

[23] Rome Statute, supra 1, at art. 16. [Reproduced in the accompanying notebook at Tab 2].

[24] *Id.* [Reproduced in the accompanying notebook at Tab 2].

investigation may not be politically advisable, the UN Security Council may request a twelve-month deferral, and then renew that request at the Security Council's discretion. The only limitation on the Security Council is that they may only invoke their Chapter VII powers if the Security Council feels that there is a "threat to the peace, breach of the peace, or act of aggression."[25]

Article 54 of the Rome Statute governs the initiation of investigations by the Prosecutor. In regards to the issue of delaying investigations, the Prosecutor is given the ability, under Article 17(1)(b), to "take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses."[26] This provision arguably allows the Prosecutor a great deal of latitude in considering extraneous circumstances in conducting investigations. Under Article 17(1)(b), it may be argued that if the Prosecutor feels that the initiation of an investigation at a particular time would be antithetical to the interests of all affected parties, the Prosecutor may "take all appropriate measures," which may include delaying an investigation. The Prosecutor's decision to delay an investigation may be given additional legal authority if the Prosecutor delays the initiation of an investigation at the behest of the UN Security Council pursuant to Article 16.

The only limitation on delaying the initiation of an investigation falls under Article 17 of the Rome Statute. Article 17 establishes the types of cases that would be considered inadmissible before the ICC. Article 17 also establishes when a state would be considered "unwilling" to bring an individual to justice. One such scenario is discussed in Article 17(2): a

[25] UN Charter, art. 39. [Reproduced in the accompanying notebook at Tab 1].

[26] Rome Statute, supra 1, at art. 17(1)(b). [Reproduced in the accompanying notebook at Tab 2].

party is considered "unwilling" when "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."[27] Whether this is binding on the Office of the Prosecutor is questionable at best; it is important to note that Article 17(2) only applies to state parties.[28]

[27] Rome Statute, supra 1, at art. 17(2). [Reproduced in the accompanying notebook at Tab 2].

[28] *Id*. [Reproduced in the accompanying notebook at Tab 2].

II. OBLIGATIONS TO INVESTIGATE

A. Obligations Rising out of International Law Conventions

The Prosecutor of the ICC has wide discretion as to whether to initiate an investigation into a particular case. The Prosecutor is obligated under Article 53 of the Rome Statute to request initiation of an investigation unless the Prosecutor finds that doing so would compromise justice.

The same discretion cannot be ascribed to state parties to international conventions. In international law, there are three types of crimes for which the international community has a general obligation to enforce: grave breaches of the Geneva Conventions,[29] violations of the Torture Convention,[30] and violations of the Genocide Convention.[31] The obligations to prosecute violations of these international treaties generally fall on the states who are parties to those international treaties. More specifically, it is often the obligation of either the host state or the state where the violations of international law occurred to ensure that these international conventions are enforced. Sometimes, the obligation is universal, meaning that the obligation is not limited to the host state or the state whether the violations of international law occurred. The obligation on state parties to enforce these conventions is generally absolute, meaning the state parties must initiate investigations or prosecutions into violations of these conventions regardless of whether amnesty or asylum has been granted.

These obligations are not extended to the ICC. The obligation to investigate or prosecute violations of the aforementioned conventions fall on state parties and not on the ICC. The

[29] Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537, 2566(1991). [Reproduced in accompanying notebook at Tab 33].

[30] *Id.*

[31] *Id.* at 2564.

reasons for not extending these obligations to the ICC vary depending on the particular convention.

1) Geneva Conventions

The "grave breaches" of the Geneva Conventions are specifically codified in Article 130 of the Geneva Convention Relative to the Treatment of Prisoners of War ("Geneva III").[32] Parties to the Geneva Conventions have an absolute obligation: if the host state cannot prosecute individuals accused of grave breaches of the Geneva Conventions, that state is obligated to turn those individuals over to other state parties that are willing to carry out the prosecutorial obligations.[33]

While there is an international obligation to prosecute grave breaches of the Geneva Conventions, that obligation is not extended to the ICC. This obligation is not extended to the ICC for several reasons. First, the Geneva Conventions only impose obligations only on state parties to the Conventions to prosecute grave breaches.[34] Second, even though the ICC uses the Conventions' definition of grave breaches,[35] the ICC does not incorporate the procedural provisions on the duty to prosecute grave breaches.[36] The ICC's jurisdiction is limited to the the

[32] Geneva Convention Relative to the Treatment of Prisoners of War (III). art. 130. The article provides that the following acts are considered "grave breaches" of the Geneva Conventions: "willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this convention." [Reproduced in accompanying notebook at Tab 3].

[33] *Id*. at art. 129. Note that this obligation to turn over an individual accused of grave breaches of the Geneva Conventions is subject to extradition laws, the scope of which are not examined by this memorandum.

[34] This is consistent with the Vienna Convention on the Law of Treaties.

[35] Rome Statute, *supra* 1, at art. 8(2). [Reproduced in accompanying notebook at Tab 2].

[36] Rome Statute, *supra* 1, at art. 8. Note that the Rome Statute only makes reference to the elements of crimes under the Geneva Conventions. There is no explicit language incorporating the procedural provisions of the Geneva Conventions. [Reproduced in accompanying notebook at Tab 2].

crimes enumerated in the Rome Statute; there is no language in the Rome Statute indicating an extension of the grave breaches provisions into the jurisdiction of the ICC. The Rome Statute left the obligation to enforce the Geneva Conventions to those states that are parties to the conventions.[37] Since the Rome Statute does not incorporate the grave breaches provisions of the Geneva Conventions into its jurisdiction, the obligation to prosecute grave breaches of the Geneva Conventions does not extend to the ICC.

2) Torture Convention

The Convention Against Torture was crafted to curb the use of torture by state bodies,[38] so it is instructive to read the Torture Convention in regards to the obligations it places on state bodies as opposed to multilateral international organizations. Much like the grave breaches provisions of the Geneva Conventions, the Torture Convention places explicit obligations on state parties to prosecute crimes violations of the Torture Convention.[39] Not only does the Torture Convention establish obligations on state parties to ensure freedom from torture, the Convention also provides for universal jurisdiction on all state parties to the convention over acts constituting violations of the Torture Convention.[40] Furthermore, like the grave breaches

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[37] The Rome Statute does incorporate the principle of complementarity. The jurisdiction of the ICC is expressly complementary to the jurisdiction of domestic courts. It may be argued that the ICC may have an obligation to invoke complementarity and assert jurisdiction where domestic courts have proven either unwilling to prosecute or ineffective in providing legitimate enforcement proceedings. If there is such an obligation on the ICC, it is not an absolute obligation. The decision to request initiation of an investigation still falls on the Office of the Prosecutor, and it is up to the Office of the Prosecutor to determine whether ICC intervention is necessary.

[38] Orentlicher, *supra* 30, at 2567. [Reproduced in accompanying notebook at Tab].

[39] Orentlicher, *supra* 30, at 2566. [Reproduced in accompanying notebook at Tab].

[40] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. _, G.A. Res. 39/46, U.N. Doc. A/39/51, Jun. 26, 1987. [Reproduced in accompanying notebook at Tab].

provisions, these obligations are imposed only on states that are parties to the Convention, not upon international organizations or states that are not parties to the Convention.[41]

This obligation to prosecute all violations of the Torture Convention does not extend to the ICC. There may be an obligation on the ICC, however, to request an investigation into acts of torture arising to the level of crimes against humanity. The ICC's jurisdiction extends to violations of the Torture Convention with respect to Crimes Against Humanity, which include systematic acts of torture. While there is no obligation to prosecute with respect to Crimes Against Humanity in general, systematic acts of torture are an exception to this general rule. Therefore, the ICC may have an obligation under the Torture Convention to at least request an investigation into systematic acts of torture.

3) Genocide Convention

The Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") establishes explicit obligations on state parties to prosecute crimes against the human rights provisions of the Convention:

- Article III: Various forms of participation in genocide that "shall be punishable;"[42]
- Article V: Parties to the Genocide Convention must enact legislation that ensures "effective" penalties for persons guilty of genocide;"
- Article VI: Establishing an international tribunal to try crimes of genocide.[43]

[41] Id. at art. _ .

[42] Convention on the Prevention and Punishment of the Crime of Genocide, at art. III. 78 UNTS 277, Jan. 12, 1951. [Reproduced in the accompanying notebook at Tab 5].

[43] Id. at art. IV.

Unlike the Geneva Conventions, which establish a universal obligation to prosecute on all parties to the Conventions, under Article IV of the Genocide Convention, the duty to prosecute is imposed only on the State where the acts of genocide occurred.[44] While the Genocide Convention also provides for an international tribunal established for the purpose of prosecuting such violations of the convention, the duty to prosecute these violations is imposed only upon the territorial state.[45] Where the territorial state which is a party to the Rome Statute provides inadequate judicial proceedings or is unable to produce genuine investigations or prosecutions, it may be argued that the ICC is obligated under Article 17(1)(a) to request the initiation of an investigation into the alleged acts.[46] In such a case, it can be argued that the authority to prosecute genocide and the duty to do so are both simultaneously delegated to the ICC. Therefore, under this analysis, the ICC would be obligated to consider a request to initiate an investigation into violations of the Genocide Convention where the territorial state cannot produce legitimate proceedings.

There are very few obligations on the ICC to prosecute certain crimes arising out of international conventions. The Geneva Conventions do not impose an obligation on the ICC to prosecute grave breaches of the Geneva Conventions; that obligation is only imposed on state parties to the Conventions. The ICC may be obligated to request an initiation of an investigation into systematic acts of torture under the Torture Convention. The ICC may also be obligated to

[44] Genocide Convention, *supra* 42, at art. IV. [Reproduced in the accompanying notebook at Tab 5].

[45] Genocide Convention, *supra* 42. at art. IV. [Reproduced in the accompanying notebook at Tab 5].

[46] Rome Statute, *supra* 1, at art. 17(1)(a). [Reproduced in the accompanying notebook at Tab 2]. Michael Scharf notes that it is significant that the article requires just an investigation and does not explicitly require a criminal investigation. Scharf theorizes that States could argue that Truth Commissions constitute the type of investigations required under Article 17, and thus that their proceedings were not inadequate. See Michael Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 Cornell Int'l L.J. 507, 525 (1999). [Reproduced in the accompanying notebook at Tab 37].

initate an investigation into violations of the Genocide Convention where the territorial state is either unable or unwilling to institute legitimate accountability proceedings.

B. Obligations Rising out of Customary International Law

Notwithstanding obligations that may be imposed on the ICC through international conventions, the ICC may be obligated to conduct certain proceedings pursuant to norms of customary international law.

If a practice is to be considered a norm of customary international law, the practice must satisfy two requirements. First, the practice must be extensive among states worldwide.[47] This does not mean that the practice need be universal, but it must be such that the state practice is general and fairly consistent throughout the world.[48] Second, in order to arise to the level of customary international law, the state practice arise out of a sense of legal obligation known as opinio juris. When a norm of international law is determined to have satisfied these two requirements, the norm will be considered customary international law, and thus will apply to all states.

Whether customary international actually imposes obligations on the ICC to investigate or prosecute certain cases is difficult to determine. The ICC is not a state, so it is questionable whehter customary obligations imposed upon states also apply to the ICC. It has been suggested that if an obligation to investigate or prosecute certain cases does exist, it arises out of a

[47] NAOMI ROHT-ARRIAZA, IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE, 39 (1995). [Reproduced in the accompanying notebook at Tab 26].

[48] *Id.*

combination of treaties whose provisions arise to the level of customary international law and international diplomatic practice.[49]

1) Treaties rising to the Status of Customary International Law

It may be argued that human rights treaties, such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, impose binding obligations on the ICC. These treaties may constitute binding customary international law on all states, but since the ICC is not a state, the ICC's customary international law obligations are unsettled.

There is little doubt that customary international law imposes binding obligations on states worldwide. It is questionable whether obligations of customary international law extend to multilateral international organizations like the United Nations or the ICC. It is noteworthy that in creating the ICTY, the Report of the UN Secretary-General stressed that the international tribunal would have to act in accordance with Article 14 of the International Covenany on Civil and Political Rights, which reflected customary international law.[50] It may be argued that the role of international authorities such as the United Nations or the ICC is obligatory when a state is either unable or unwilling to provide adequate proceedings. The Rome Statute incorporates the "complementarity" principle into the ICC's jurisdiction.[51] The principle of complementarity requires international jurisdiction to be secondary to domestic jurisdiction. Therefore, under complementarity, the ICC can only asserted jurisdiction over obligations left to state parties in a fashion complementary to the jurisdiction of a state bound by customary international law. If

[49] *See generally* ROHT-ARRIAZA, supra 47, at 40 (1995). [Reproduced in the accompanying notebook at Tab 26].

[50] VIRGINIA MORRIS AND MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995).

[51] Rome Statute, *supra* 1, at Preamble. [Reproduced in the accompanying notebook at Tab 2].

there is an obligation on the ICC to prosecute violations of human rights treaties constituting customary international law, it must be considered secondary to the obligations of states.

2) State Practice

Occasionally, states other than the host state step in and initiate proceedings against offenders where the host state is unable or unwilling to carry out its obligations under international law. This state practice, however, has not been consistent enough to constitute a norm of international law.[52] While host countries rarely proclaim that they do not recognize certain obligations to prosecute crimes of international humanitarian law, some countries may not be enthusiastic about carrying out their customary international law obligations in practice.[53]

Furthermore, many countries would like to preserve the option of negotiating amnesty-for-peace deals.[54] The practice of amnesty-for-peace deals is antithetical to the idea of state obligations to initiate investigations and prosecutions in that the obligations to prosecute are ignored in favor of more practical political measures. Either way, the argument that state practice imposes binding obligations on the ICC to prosecute certain crimes through customary international law is dubious.

[52] There may be a number of reasons for this resistance, particularly notions of state sovereignty and interests in preserving international comity.

[53] ROHT-ARRIAZA, supra 47, at 42. [Reproduced in the accompanying notebook at Tab 26].

[54] Amnesty-for-Peace deals have been executed in Haiti and South Africa, just to name a few.

III. ANALYSIS OF A POTENTIAL AMNESTY EXCEPTION TO THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

A. International Use of Amnesties

Amnesties are recognized as legitimate exercise of state discretion. As previously mentioned, the use of amnesties in resolving disputes has become an accepted practice in international affairs. Amnesties, however, are given for a variety of motivations. Amnesties will typically be given to promote peaceful relations between parties or states.[55] A state may decide to protect individual members of its administration from international prosecution by granting an amnesty. An international organization may grant amnesties as part of a negotiated agreement to facilitate a transfer of power or an end to hostilities.[56]

Amnesties may have the effect of precluding prosecution for certain crimes. This preclusion, however, does not effectively make amnesties substitutes for criminal prosecutions. Instead, the recent trend has been towards viewing amnesties as supplements to negotiated agreements rather than substitutions for criminal liability.[57]

1) Amnesty under International Law

International law documents are silent on the issue of amnesty; under most international law instruments, amnesties are neither expressly allowed nor are they expressly prohibited.[58]

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[55] BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT, 93 (2003). [Reproduced in the accompanying notebook at Tab 20].

[56] This practice has been employed by the United Nations, which has, in the past, pushed for amnesties in certain situations in order to preserve certain fundamental goals, such as the preservation of peace. This practice will be discussed in a later section of this memorandum.

[57] BROOMHALL, *Supra* 55, at 95. Mr. Broomhall cites Douglass Cassel, "Lesson from the United Nations Truth Commission on El Salvador," in CHRISTOPHER C. JOYNER, ED., REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS: PROCEEDINGS OF THE SIRACUSA CONFERENCE, 17-21 SEPTEMBER 1998 (1998) at 227-28. [Reproduced in the accompanying notebook at Tab 20].

[58] BROOMHALL, *Supra* 55, at 96. [Reproduced in the accompanying notebook at Tab 20].

Instead, there is a gap between what the law expressly provides and typical state practice. Even though nothing in international law expressly prohibits the granting of amnesties to individual parties, it seems clear that a state cannot grant amnesties for grave breaches of the Geneva Conventions, or violations of either the Genocide Convention or the Convention Against Torture if the state is a party to those conventions.[59] Granting amnesty to such violators would itself be a violation of the state's obligations under the those conventions.[60] The most recent trend of international institutions seems to be towards recognizing that certain types of amnesties are patently illegal under international law.[61]

A notable exception is Article 6(5) of Protocol II for the Geneva Conventions ("Geneva II"). Article 6(5) expressly provides that "at the end of hostilities, the authorities…shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict."[62] The legal authority to grant amnesties under even this provision has come under fire. It has been suggested that the authority to grant amnesties under Article 6(5) applies not to

[59] BROOMHALL, *Supra* 55, at 97 (2003). [Reproduced in the accompanying notebook at Tab 20].

[60] Id. It is important to note, however, that Broomhall expressly distinguishes between the granting of "blanket amnesties" and the granting of all other forms of amnesty. Broomhall notes that an absolute obligation to prosecute certain crimes cannot be reconciled with activities that attempt to protect individuals from prosecutions, but makes clear that this concept applies at least to "blanket amnesties," but does not say more. Clearly, the granting of "blanket amnesties" is antithetical to the concept of providing prosecutions for individuals accused of international crimes. Whether the prohibitions on "blanket amnesties" also apply to cases of all other amnesties is still up for debate.

[61] ROHT-ARRIAZA, *supra* 47, at 299. Again, however, Ms. Roht-Arriaza clearly indicates that the trend in international law applies to "blanket amnesties," and does not expressly indicate whether the recent trend against recognizing amnesties in international law would apply to other forms of amnesty. It would seem, however, that Ms. Arriaza might be willing to extend this same this same international trend to all other forms of amnesty: "Of course, consistency in application is crucial if an emerging rule is to crystallize as law. And if the primary purpose of such a rule is deterrence, consistency is essential to the efficacy of the deterrent threat." (299). [Reproduced in the accompanying notebook at Tab 26].

[62] Geneva Conventions (II), art. 6(5). It should be noted that none of the other Geneva Conventions provide a similar provision in which the grant of an amnesty is required or even recommended. [Reproduced in the accompanying notebook at Tab 3].

individual violations of international human rights law, but instead bears a closer resemblance to combatant immunity than individual criminal responsibility.[63]

Beyond this provision of Geneva II, most international law documents are silent on the use of amnesties.[64] The trend in international law seems to be towards recognizing a requirement to prosecute individuals accused of certain crimes, an idea that is antithetical to the concepts behind amnesties.[65] A distinction between blanket amnesties and individual pardons must be emphasized. Generally, blanket amnesties are not endorsed by international law because they are given without investigations into specific cases like individual pardons.

2) Granting Amnesties – Policy Concerns

State practice throughout the twentieth century has given rise to the amnesty for peace phenomenon. Under this practice, a grant of amnesty is given to civil and political leaders in the interests of ensuring peace or democratic transition.[66] The ability to grant amnesty to civil and political leaders has become collateral for international organizations negotiating for peace in

[63] BROOMHALL, *Supra* 55, at 97. Attributed to Letter from Dr, Toni Pfanner, Head of the Legal Division, ICRC Headquarters, Geneva to Douglass Cassel in Bassiouni and Morris eds., *Accountability for International Crimes and Serious Violations of Fundamental Human Rights* (1996) : "The 'travaux préparatoires' of [Article] 6(5) indicate that this provision aims at encouraging amnesty, i.e., a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international humanitarian law." [Reproduced in the accompanying notebook at Tab 20].

[64] This includes the Rome Statute of the International Criminal Court, which will be discussed later.

[65] ROHT-ARRIAZA, *supra* 47, at 70. Ms. Roht-Arriaza states: "it is possible to discern an emerging trend requiring investigation, prosecution, and redress for certain international crimes and grave human rights violations. [Reproduced in the accompanying notebook at Tab 26].

[66] ROHT-ARRIAZA, *supra* 47, at 299. Roht-Arriaza appropriately describes such amnesty offers as "incentive to settle a civil conflict or permit the exit of a dictator." (*Id*.). One does not need to look far to find recent examples of amnesty offers to settle a civil conflict (as in the El Salvadorean amnesty for peace deals of the early 1990's) or to permit the exit of a repressive regime (like those amnesties offered to South African Apartheid leaders in 1995). [Reproduced in the accompanying notebook at Tab 26].

armed conflicts.[67] To that end, it has become necessary to preserve of grants of amnesty for the purposes of being able to use such amnesties as collateral for peaceful settlements. To international negotiators, preemption through the prosecution of individuals who have been previously granted amnesties eliminates the viability of such amnesty for peace deals especially when the amnesties have no legal effect.[68] As such, amnesty for peace deals have become an essential element of international public policy.

Generally speaking, blanket amnesties are pardons given to a large number of people or to a particular class of people pursuant to their affiliation with that particular class. Blanket amnesties are given without regard to individual criminal or civil liability; instead, such amnesties are given to members of a group or class. Blanket amnesties may resemble El Salvador's National Reconciliation Act, which provides an amnesty for people involved in criminal activities related to political offenses.[69] El Salvador is hardly alone in its use of blanket amnesties; similar grants have also been implemented in Argentina, Cambodia, Chile,

[67] BROOMHALL, *Supra* 55, at 101. [Reproduced in the accompanying notebook at Tab 20].

[68] This issue gives rise to the continuing debate as to whether or not amnesty for a given offense means that the individual has been completely relieved of liability for those offenses. A number of academic analysts have given their thoughts on this issue. Naomi Roht-Arriaza distinguishes between amnesties and pardons: "…there are two salient differences. First, pardon or commutation is granted to individuals on the basis of individualized considerations, whereas amnesty is granted to groups on the basis of public policy concerns. Second, pardon generally does not vitiate guilt for the underlying offense, *whereas amnesty operates as an extinction of the offense itself*" (ROHT-ARRIAZA, *supra* 47, at 22) [Reproduced in the accompanying notebook at Tab 26] [italics added by author]. This view may be contrasted with that of Michael Scharf, who argues that amnesty does not give rise to impunity: "It is a common misconception that granting amnesty from prosecution is equivalent to foregoing accountability and redress. As the Haitian and South African situations indicate, amnesty is often tied to accountability mechanisms that are less invasive than domestic or international prosecution." [Scharf, *supra 46*, at 512 (1999)]. [Reproduced in the accompanying notebook at Tab 37].

[69] BROOMHALL, *Supra* 55, at 101. [Reproduced in the accompanying notebook at Tab 20].

Guatemala, Haiti, and Uruguay.[70] These blanket amnesties have been criticized for sacrificing justice and the interests of victims in favor of an unstable peace.[71]

Not all international parties have condemned the use of blanket amnesties. Some international organizations have advocated the negotiation of blanket amnesties in amnesty for peace deals. In particular, the United Nations has taken an active role in the negotiation of a number of blanket amnesties in the name of preserving peace and democratic government.[72]

Political considerations aside, the granting of blanket amnesties seems to directly contradict a state's obligation to prosecute certain violations of international humanitarian law. Blanket amnesties are particularly dubious in that they disregard the considerations of each individual case. Blanket amnesties are often granted to a number of people who may or may not all be accused of the same crimes. Some members of the amnestied class may be accused of crimes that constitute violations of the Geneva Conventions or the Genocide and Torture Conventions. The granting of amnesties to such persons would constitute a violation of the state's absolute obligations under these conventions to prosecute criminals accused of violating these international conventions. In such a case, while the grant of a blanket amnesty may be more politically feasible, it could leave the host state in a difficult situation; the state is giving amnesties that it cannot legally grant under the state's international obligations. This illustrates one of the many difficulties that blanket amnesties may present. Because these blanket amnesties are so legally deficient, the ICC may not be able to honor such blanket amnesties when they contradict an obligation on the ICC to investigate a particular crime.

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[70] BROOMHALL, *Supra* 55, at 94. [Reproduced in the accompanying notebook at Tab 20].

[71] *Id*. [Reproduced in the accompanying notebook at Tab 20].

[72] *Id*. [Reproduced in the accompanying notebook at Tab 20].

It is important to distinguish between "blanket amnesties" and individual amnesties, as the two practices are treated very differently in international law. Such amnesties may, like South Africa's Promotion of National Unity and Reconciliation Act, grant amnesties to human rights violators on the condition that they publicly admit to their crimes.[73]

Of interest to the present discussion are the amnesties given to Apartheid leaders in South Africa during the 1990's. These amnesties are particularly relevant because they addressed a number of the issues that arise in determining whether amnesty should be granted to particular individuals. In coming to a negotiated settlement, the parties to the dispute had to weigh their interests in justice against their interests in democracy. In the end, the parities to the South African dispute came to what could best be described as a negotiated amnesty-for-peace settlement. Pursuant to a negotiated agreement, the South African government created a Truth and Reconciliation Commission to evaluate the requests of individuals applying for amnesties from the government.

B. Treatment of Amnesty by Previous Tribunals

1) ICTY - Yugoslavia

The ICTY statute does not explicitly recognize nor does it foreclose the possibility of an amnesty exception to the ICTY's jurisdiction. There are, however, a few provisions of the ICTY statute into which an amnesty exception may be read. Articles 9 and 10 of the ICTY statute provide the closest language into which a potential amnesty exception may be read.

Article 9 establishes the concurrent jurisdiction of the ICTY over "serious violations of international humanitarian law" that were committed in the former Yugoslavia after January 1,

[73] Michael Scharf, *Swapping Amnesty for Peace: Was there a Duty to Prosecute International Crimes in Haiti?,* 31 Tex. Int'l L.J. 1, 7 (1996). [Reproduced in the accompanying notebook at Tab 36].

1991.[74] The ICTY may assert primary jurisdiction over national courts at its discretion.[75] If the ICTY so wishes, the ICTY may request that a domestic court defer to the ICTY in certain cases.[76] If the ICTY desired, the ICTY could request that a national court suspend their proceedings to allow the ICTY to take over the case. The primacy of the ICTY's jurisdiction is further affirmed in Article 10 of the ICTY Statute; a domestic court may not prosecute someone who has already been tried by the tribunal.[77] This may also mean that the ICTY could request jurisdiction over a case before a national authority grants certain individuals amnesty or asylum.

Article 10 of the ICTY Statute incorporates the international concept of "non-bis-in-idem." Although the ICTY may assert primary jurisdiction over acts committed in the former Yugoslavia after January 1, 1991, the ICTY must give deference to other courts in certain cases. The ICTY is precluded from prosecuting an individual who has been previously tried by a national court for "serious violations of international humanitarian law."[78] This does not apply to every situation before the court. The principle of non-bis-in-idem only applies under the ICTY when the accused individual has already been tried.[79]

This general rule is not without exception. The presumption against trying an individual before the ICTY after the individual has been tried by a national court can be overcome if the act for which the individual was tried was an ordinary crime or if the State proceedings were

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[74] ICTY Statute, art 9, cl.1. [Reproduced in the accompanying notebook at Tab 7].

[75] *Id*. at art. 9, cl. 2.

[76] *Id*.

[77] *Id.* at art. 10, cl. 1.: "No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she already has been tried by the International Tribunal."

[78] *Id.* at art. 10, cl.2.

[79] JOHN R.W.D. JONES, THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS FOR THE FORMER YUGOSLAVIA AND RWANDA, 152 (1999) [Reproduced in the accompanying notebook at Tab 22]

designed to shield the individual from international criminal liability.[80] The second exemption applies most directly to the issue of a potential amnesty exception to the ICTY's jurisdiction. If the proceedings at the domestic level were meant to shield an individual from being prosecuted by international authorities, the ICTY may override those proceedings by submitting the individual to proceedings before the ICTY.[81] This provision allows the ICTY to override amnesties or grants of asylum given in bad faith. The provision says nothing about allowing the ICTY to honor those amnesties at their discretion.

The ICTY has held that the grant of an amnesty does not preclude prosecution for torture by either the ICTY or other international tribunals. In convicting Anto Furundzija of committing acts of torture against a woman in 1993, the trial chamber theorized that acts of torture could not be absolved through domestic grants of amnesty.[82] The trial chamber held, "in spite of possible national authorization by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle."[83]

If the Prosecutor has been given the power to honor amnesties or grants of asylum at his or her discretion, such a grant of power may be read into Article 18 of the Rome Statute. Article 18 gives the Prosecutor the power to decide whether there is sufficient basis to initiate proceedings only after assessing all relevant information.[84] These provisions notwithstanding,

[80] ICTY Statute, *supra* 75, at art. 10, cl.2. [Reproduced in the accompanying notebook at Tab _]

[81] *Id.*

[82] Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, paragraph 155 (December 10, 1998). [Reproduced in accompanying textbook at 14].

[83] *Id.*

[84] ICTY Statute, supra 75, at art. 18, cl. 1. [Reproduced in the accompanying notebook at Tab 7].

the ICTY Statute gives very little guidance in determining whether there is an amnesty or asylum exception to the jurisdiction of the ICTY Statute.

2) SCSL - Sierra Leone

The Statute of the Special Court of Sierra Leone does not adopt the approach to amnesty and asylum treatment endorsed by the ICTY. Article 23 of the Special Court Statute recognizes pardons only if the President of the Special Court decides that granting the pardon would serve "the interests of justice and the general principles of law."[85] This does not mean that an amnesty automatically precludes prosecution before the Special Court. Instead, the Statute of the Special Court is very explicit in rejecting an amnesty exception to the Court's jurisdiction: "An amnesty granted to any person falling within the jurisdiction of the Special Court…shall not be a bar to prosecution."[86] The Special Court's rejection of an amnesty exception to the Special Court's jurisdiction is clear and unambiguous.

The Special Court had to address the issue of grants of amnesty early in the court's formation. Pursuant to an amnesty for peace deal negotiated by the Special Representative of the UN Secretary-General, members of the Revolutionary United Front (RUF) were granted amnesty and a truth commission was established.[87] There was an important distinction regarding the scope of the amnesty grants; the grants of amnesty were only to apply to Sierra Leone courts applying Sierra Leone law.[88] Since the amnesties applied only to domestic proceedings, the

[85] Statute of the Special Court for Sierra Leone, art. 23. [Reproduced in the accompanying notebook at Tab 8].

[86] *Id*. at art. 10.

[87] Michael Scharf, "The Special Court for Sierra Leone," ASIL Insight, (October 2000). [Reproduced in the accompanying notebook at Tab 42].

[88] *Id.*

amnesties were ineffective against the jurisdiction of the Special Court, because the Special Court was a hybrid court, not a domestic court.[89] The Appeals Chamber for the Special Court affirmed this distinction in their decision on a preliminary motion for lack of jurisdiction in the Special Court's case against Morris Kallon.[90] Despite the Lome Agreement's amnesty grants, the amnesty grants themselves do not preclude prosecution by the Special Court because the amnesty grants only applied to domestic prosecutions by domestic courts.[91]

But does this provision impose an obligation on the Special Court to prosecute individuals notwithstanding their grants of amnesty? It is evident that a grant of amnesty is not dispositive against prosecution by the Special Court, but does this mean that the Special Court is obligated to initiate investigations or prosecute violations when amnesty has been given? The Statute is not altogether clear on this issue. Article 1 of the Special Court Statute grants the tribunal the power to prosecute individuals with the greatest liability, but the Statute says nothing about an obligation to proceed with such prosecutions.[92] The Prosecutor has been given the power to prosecute at the Prosecutor's discretion; if the drafters of the Statute had intended for the Statute to impose an absolute obligation on the Prosecutor to prosecute certain crimes, the language of the statute might very well have been different. The drafters could have said that the Prosecutor shall prosecute all cases of violations of international humanitarian law in Sierra Leone, or that the Prosecutor is obligated to prosecute all violations whether or not the individuals have been given amnesty. The fact that the provision is creatively ambiguous is

[89] *Id.*

[90] Appeals Chamber, "Decision on Challenge to Jurisdiction: Lome Accord Amnesty," Special Court for Sierra Leone, SCSL-2004-15-AR72(E), (2004). [Reproduced in the accompanying notebook at Tab 15].

[91] *Id.*

[92] Statute of the Special Court of Sierra Leone, *supra* 86, at art. 1. [Reproduced in the accompanying notebook at Tab 8].

noteworthy; clearly the Court wanted to foreclose the potential for amnesty as an affirmative defense, but it is not altogether clear whether the Prosecution may honor such a grant of amnesty or whether the Prosecutor is bound to prosecute.

C. Statutory Analysis

The Rome Statute does not explicitly determine whether an amnesty exception to the ICC's jurisdiction exists. Indeed, it is acknowledged that no consensus could be reached among the drafters of the Rome Statute regarding amnesties under the ICC.[93] The rules of evidence and procedure for the ICC do not provide any further guidance.[94] The Rome Statute, however, is creatively ambiguous. There are a number of provisions of the Rome Statute into which an amnesty exception may be implied.

In order to understand the obligations on the Office of the Prosecutor regarding investigations and prosecutions, it is instructive to analyze Articles 15 and 53 of the Rome Statute. Article 15 establishes the procedures with which the OTP is required to comply. Of interest are the second and third clauses of Article 15, which establish the basis for prosecutorial discretion: the Prosecutor must "analyse the seriousness of the information received" under clause 2 and then must determine whether there is a "reasonable basis to proceed with an investigation."[95]

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[93] Anja Seibert-Fohr, *The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions*, 7 Max Plank Yearbook of United Nations Law 553, 561 (2003). [Reproduced in the accompanying notebook at Tab 30].

[94] *Id.* This passage refers indirectly to the Rules of Procedure and Evidence adopted by the ICC.

[95] Rome Statute of the International Criminal Court, *supra* 1, at art. 15, cl.2-3. [Reproduced in the accompanying notebook at Tab 2].

Article 53 governs the initiation of investigations. Article 53 establishes the obligation on the Prosecutor to request initiation of an investigation unless the Prosecutor determines that there is no reasonable basis to carry out further proceedings.[96] Under the first clause of Article 53, the Prosecutor must determine whether a reasonable basis exists by considering three factors: whether there is a reasonable basis to determine that a crime has been committed, whether the case would be inadmissible under Article 17, and whether the initiation of an investigation would not serve the interests of justice.[97] The second clause of Article 53 establishes similar requirements on the Prosecutor regarding the initiation of prosecutions. The Prosecutor must consider whether there is a sufficient legal or factual basis to proceed with a prosecution, whether the case is inadmissible under Article 17, and whether a prosecution would violate the interests of justice.[98] If the prosecutor determines that there is a "reasonable basis to proceed" under article 53 and finds that initiating such an investigation would not violate the issues of admissibility outlined in Article 17, the prosecutor may make a request to initiate an investigation.[99]

1) Article 17 - Admissibility

The Prosecutor's analysis under his or her Article 53 discretion will depend in large part on Article 17 of the Rome Statute. Under Article 17(1), a case is inadmissible if it is being

[96] *Id*. at art. 53, cl.1.

[97] *Id*. at art. 53, cl.1(a)-(c).

[98] *Id*. at art. 53, cl.2(a)-(c).

[99] *Id*. at art.15 & 17. The decision of the prosecutor to initiate an investigation is not the determinative factor in initiating an investigation under the ICC's jurisdiction. The prosecutor submits a request for investigation authorization to the Pre-Trial Chamber, which then determines whether such an investigation should be authorized. (*Id*. at art. 15, cl. 3-4).

investigated or has been investigated by a state that has jurisdiction over the case.[100] Therefore, for the purposes of analyzing amnesties under Article 17(1), it must be determined whether the grant of amnesty is equivalent to a domestic investigation.

To analyze the sufficiency of a grant of amnesty under Article 17(1), the distinction between blanket amnesties and individual amnesties that were granted pursuant to a truth and reconciliation commission's findings must be emphasized. Blanket amnesties are given without regard to individual case-by-case investigations. It seems clear that blanket amnesties, by their very nature, would not qualify as sufficient investigations under Article 17(1).

There is more room to argue that amnesties granted on the basis of individualized proceedings, such as those granted through truth and reconciliation commissions, qualify as sufficient investigations under Article 17. To determine whether truth and reconciliation commissions qualify as investigations under Article 17, a two-part analysis must be conducted.

First, it must be determined whether or not the process constitutes a sufficient investigation under Article 17(1). In making such a determination, it is necessary to consider whether or not a TRC must constitute a criminal investigation. There is some question over whether intent to conduct a criminal investigation with an intent to prosecute the individual is a requirement under Article 17(1). An analysis of the text, however, seems to indicate that non-criminal investigations are not precluded from inclusion under Article 17(1); there is no explicit requirement that the investigation must arise to the level of a preliminary criminal investigation. Article 17(1)(a) allows for either prosecutions or investigations by individual States.[101] The only requirement that the investigation may have to satisfy is an inherent genuineness standard; it has

[100] Rome Statute, *supra* 1, at art 17(1). [Reproduced in the accompanying notebook at Tab 2].

[101] This analysis is similar to the analysis argued by Seibert-Fohr, supra 94, at 568 [Reproduced in accompanying notebook at Tab 30].

been suggested that Article 17(1)(b) refers to investigations leading to "bona fide" decisions not to prosecute.[102]

A second level of analysis must be conducted. Article 17(1)(a) includes the provision that if "the State is unwilling or unable genuinely to carry out the investigation or prosecution," the domestic investigation is considered inadequate for admissibility purposes.[103] The analysis then turns to Article 17(2). Under Article 17(2), it is for the ICC to determine whether conducting a TRC indicates an intent to shield the individual from prosecution, an unjustified delay or an unwillingness on the part of the State to carry out a genuine prosecution of the individual. If it is determined that the State is unwilling to carry out a genuine investigation of the individual, the ICC may be obligated to assert jurisdiction in the case under the principle of complimentarity. [104]

To determine whether a State investigation is sufficiently genuine under Article 17(2), it is instructive to consider whether Article 17(2) requires a criminal investigation. There is no explicit requirement under Article 17(2) that the investigation be conducted with a basis to conduct criminal prosecutions. All Article 17(2) refers to is whether a state is "unwilling" to prosecute in a particular case. Article 17(2) could be read to define willingness in regards to the motives of the State conducting the investigation. If it is shown that the State's intent is to shield the individual from prosecution, to produce an unjustified delay or conduct general procedures

[102] See generally Bruce Broomhall, "The International Criminal Court: A Checklist for National Implementation," in Association Internationale de Droit Penal, ed., ICC Ratification and National Implementing Legislation (1999).

[103] Rome Statute, *supra* 1, at art. 17(1)(a) (italics added) [Reproduced in accompanying notebook at Tab 2].

[104] Note that this is not an absolute obligation. Only the territorial state is obligated to initiate an investigation or prosecute such a case. Obligations such as these generally don't apply to multinational judicial tribunals like the ICC.

inconsistent with an intent to effect justice, the State is "unwilling" to prosecute the case.[105] Therefore, to satisfy Article 17(2) inadmissibility, a case must be conducted with a genuine purpose indicating a willingness to bring the individual to justice.

In regards to reading grants of amnesty or asylum under Article 17(2) inadmissibility, the grant of amnesty or asylum must be evaluated in terms of whether there was a genuine intent to bring the individual to justice. It seems clear that amnesties granted pursuant to TRC proceedings indicates a genuine intent to effect justice. In a TRC, the State is conducting individualized proceedings that determine whether future action is necessary.

The amnesty analysis is unclear in regards to amnesty for peace deals. When a State negotiates an amnesty for peace agreement, is this negotiation a manifestation of a genuine intent to produce justice? It should follow that in order for an amnesty for peace deal to be considered an intent to bring an individual to justice, the agreement should be conducted with the intent to promote the purposes and principles of the UN Charter.[106] Furthermore, the preservation of amnesty for peace serves the interests of international policy. Amnesty for peace deals may promote the purposes and principles of the UN Charter by preserving international peace and security. Amnesty for peace deals, however, must be given on an individual basis to qualify as sufficient investigations under Article 17. If an amnesty for peace agreement is negotiated for a wide class or group of persons, such an agreement would amount to a blanket amnesty, which is not a sufficient investigation under Article 17.

[105] Rome Statute, supra 1, at art. 17(2). [Reproduced in accompanying notebook at Tab 2].

[106] The purposes and principles of the UN Charter are necessarily incorporated in the preamble to the Rome Statute. The preamble provides, in relevant part: "*Reaffirming* the principles and purposes of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." (Rome Statute, supra 1, at preamble). [Reproduced in accompanying notebook at Tab 2].

Therefore, an individual amnesty for peace agreement may be considered a manifestation of a genuine intent to produce justice, and the Office of the Prosecutor may decline an investigation on this basis.

In light of the foregoing analysis, an amnesty given pursuant to a truth and reconciliation commission proceeding may be considered a sufficient investigation arising to Article 17 inadmissibility. This would mean that the Office of the Prosecutor could decline an investigation so long as a truth and reconciliation proceeding is taking place or has already taken place. In regards to blanket amnesties, such widespread amnesties are inconsistent with the requirement that a state conduct genuine investigations or prosecutions. Therefore, a grant of blanket amnesty to a class or group of persons would not be considered a genuine investigation under Article 17.

2) Article 16 – Action by the Security Council

It has been suggested that in regards to the interpretation of an amnesty exception, Article 16 of the Rome Statute may be the most important provision in the Rome Statute.[107] Article 16 establishes that the OTP could not institute proceedings against an individual for twelve months if the UN Security Council requests the OTP to make such a deferral.[108] Furthermore, Article 16 allows the UN Security Council to renew that request for deferral at its discretion.[109] This provision allows the UN Security Council to introduce its Chapter VII powers in dealing with the ICC. This provision of the Rome Statute allows the UN Security Council to take action

[107] Scharf, *supra* 46,at 523 (1999). [Reproduced in the accompanying notebook at Tab 37].

[108] Rome Statute at art 16. [Reproduced in the accompanying notebook at Tab 2]

[109] *Id*.

regarding specific individual investigations, or even classes of investigations, limited only by Chapter VII of the UN Charter.

Under the UN Charter, the UN Security Council's Chapter VII powers in the event of a threat to international security.[110] The Security Council could justify actions ordering an amnesty to be honored under Article 39 of the UN Charter if the UN Security Council determines that such an order is an appropriate measure "to maintain or restore international peace and security."[111]

Other provisions of the UN Charter may be invoked. Furthermore, the UN Security Council could conceivably order the State parties to a particular dispute to respect a Security Council-mandated grant of amnesty to individual defendants under the Security Council's Article 40 powers.[112] This provision of the Rome Statute allows the Security Council to mandate that the State parties involved with a particular conflict "comply with such provisional measures as (the Security Council) deems necessary or desirable."[113] It could be read into Article 41 of the Rome Statute that the UN Security Council has been given the power to take measures

[110] UN Charter, *supra* 25, at chap. VII. [Reproduced in the accompanying notebook at Tab 1].

[111] UN Charter, *supra* 25, at art. 39. The only real limitation on the Security Council's activities under Article 39 is that the Security Council cannot violate the purposes of the UN Charter, specifically the goals to maintain international peace and security, to develop friendly relations, and to promote international cooperation explicitly provided under Article 1 of the UN Charter. This issue, however, is still up for debate. [Reproduced in the accompanying notebook at Tab 1]. See also Alexander Orakhelashvili, *The Legal Basis of the United Nations Peace-Keeping Operations*, 43 Va. J. Int'l L. 485, 493 (2003): "It has been suggested that the Council, 'acting solely under Article 39 of the Charter, may not take other actions that the enforcement measures provided for in the two legal provisions that the said legal rule specifically mentions.' However, the limitations imposed by the Charter on the Council through Article 39 are of a negative, rather than positive nature." (*Id*.) [Reproduced in the accompanying notebook at Tab 32].

[112] UN Charter, *supra* 25, at art. 40. A similar power could be read into Article 36 of the Rome Statute, which provides that the Security Council may, at its discretion, "recommend appropriate procedures or methods of adjustment" to help resolve a dispute. (UN Charter at art 36. [Reproduced in the accompanying notebook at Tab 1].

[113] *Id*. If a state fails to comply with a mandate ordered by the Security Council under its Article 40 powers, the Rome Statute requires the Security Council to "duly take account of failure to comply with such provisional measures." (*Id*.).

amounting to grants of amnesty under the Security Council's power to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures."[114] The Security Council's Article 41 powers may be read in conjunction with its Article 42 powers to ensure that its orders are enforced.[115]

These wide discretionary powers given to the Security Council may not necessarily be dispositive of a Security Council right to end an investigation or prosecution through Security Council resolution. It has been suggested that these powers given to the Security Council are not a blank check for the Security Council to order widespread compliance with their orders. Rather, the Security Council provisions of the UN Charter are "enumerated limited powers subject to the rule of law."[116] The legal effect of these provisions may be that the ICC would not have to submit to a Security Council ordering the ICC to honor a grant of amnesty if the grant of amnesty violates international law.[117]

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[114] *Id.* at art. 41. Article 41 explicitly lists a few powers that the UN Security Council has been given to effect compliance with Security Council decisions under Article 41. The activities may include, but it seems are not limited to, "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." While the power to grant an amnesty is not explicitly given to the Security Council under these provisions, a expansive reading of the Security Council's Article 41 powers may find a grant of amnesty included among these powers, as the Article's language indicates such powers "may include" those listed under Article 41. [Reproduced in the accompanying notebook at Tab 1]

[115] See Orakhelashvili, *supra* 112, at 492 for further discussion of the Security Council's powers under Articles 41 and 42 of the UN Charter. Orahelashvili notes: "According to Articles 41 and 42, the Council can exercise wide discretion in choosing the measures it will apply. There are no Charter-based limitations on the powers of the council as to the nature of measures under Chapter VII, and these measures are not strictly limited to the enforcement." (*Id*.). [Reproduced in the accompanying notebook at Tab 32]

[116] Jose E. Alvarez, *Nuremberg Revisited: The Tadic Case*, 7 Euro. J. Int'l L. 245, 249 (2996), quoted in Michael Scharf, *supra* 46, at 523. [Reproduced in the accompanying notebook at Tab 37].

[117] *Id*. at 523 (1999). Scharf argues: "It is possible, then, that the International Criminal Court would not necessarily be compelled by a Security council Resolution to terminate an investigation or prosecution were it to find that an amnesty contravenes international law." (Id.) [Reproduced in the accompanying notebook at Tab _]

It seems evident that although the UN Security Council has broad power to enforce the honoring of a grant of amnesty under its powers granted by the UN Charter, the exercise of those powers cannot violate international law.

3) Article 20 – Ne-Bis-In-Idem

The Rome Statute also recognizes the international law principle of "ne-bis-in-idem." Article 20 of the Rome Statute provides that an individual cannot be tried before the ICC if the individual has been previously convicted or acquitted by the ICC for the same conduct.[118] Article 20 also gives protection to individuals who have been previously tried by other courts for violations of Articles 6, 7, or 8 of the Rome Statute.[119] Under the third clause of Article 20, the ICC cannot prosecute individuals who have been previously tried by "another court."[120] The question arises as to what constitutes "another court." The inclusion of the word "court" would seem to indicate this provision applies strictly to actions of judicial bodies and not political bodies. Further issues arise, regarding truth commissions like those established in South Africa. Does a truth commission constitute "another court" under the definition provided by the Rome Statute? One commentator suggests that truth commissions do not constitute courts for the purposes of Article 20 interpretation.[121]

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[118] Rome Statute, *supra* 1, at art. 20, cl.1. Clause 2 extends these same protections to individuals facing trials in other courts when those individuals are accused of violations under Article 5 for which they have already been prosecuted by the ICC. Clause 2 provides: "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." (Article 5, Rome Statute, italics added by author). [Reproduced in the accompanying notebook at Tab 2].

[119] *Id*. at art. 20, cl.3. Article 6 provides ICC jurisdiction over crimes of genocide, article 7 provides ICC jurisdiction over crimes against humanity and article 8 provides ICC jurisdiction over war crimes.

[120] *Id.*, at art. 20.

[121] Scharf, *supra* 46, at 525. Scharf argues: "There are two problems with this argument, however. First, the provision speaks of trial by 'another court,' and a truth commission is not a court; second, as with Article 17, Article 20 is not applicable to proceedings 'inconsistent with an intent to bring the person concerned to justice.'" (Id.) [Reproduced in the accompanying notebook at Tab 37].

Article 20 does grant two exceptions to the ne-bis-in-idem principle under which the principle may be preempted. The third clause provides that the ne-bis-in-idem principle may be preempted if either the previous proceedings were conducted for the purpose of shielding the defendant from prosecution by the ICC or if the previous proceedings were not conducted in accordance with international norms of due process.[122] Under these provisions, if the ICC decides that the proceedings leading to a grant of amnesty, for example, were for the purpose of protecting a defendant from criminal liability or were otherwise violative of international norms of due process, the ICC could preempt the ne-bis-in-idem principle and assert jurisdiction over the individual at the Court's discretion.

The question remains whether the ICC has an obligation to assert jurisdiction over certain cases that may preempt the Ne Bis In Idem principle. One could argue that the only obligations to prosecute individuals who have been granted amnesty arises when the decision to honor such an amnesty would violate the expressed purposes of the UN Charter and the Rome Statute.[123] Under this theory, the ICC could not initiate investigations or proceed with prosecutions where doing so would violate the basic principles of UN and ICC organization. This determination would have to be made at the Prosecutor's and Pre-Trial Chamber's discretion, but it certainly provides the ICC with some flexibility under this Article of the Rome Statute.

[122] Rome Statute, *supra* 1, at art. 20, cl.3. [Reproduced in the accompanying notebook at Tab 2].

[123] It could be argued that since the International Criminal Court is an organ of the United Nations, the International Criminal Court is bound to respect the same purposes as those expressed in Article 1 of the UN Charter. Under this theory, the Court would be specifically bound by those express purposes to maintain international peace and security, to develop friendly relations, and to promote international cooperation. The argument could be made that the ICC cannot assert jurisdiction or take action that would serve to violate these core principles.

4) Article 119 – Settlement of Disputes

It could be argued that the question of whether an amnesty exception to the ICC exists, and further whether there is an obligation to override that amnesty, is a question for the Court itself to decide. Article 119 of the Rome Statute explicitly grants the Court the power to settle disputes "concerning the judicial functions of the Court."[124] It could be further argued that if the Court determines that this matter is not for the Court to decide, the matter should be referred to the Assembly of States Parties.[125] Upon receiving the matter, the Assembly may seek to settle the dispute on its own or may further refer the matter to the International Court of Justice.[126] Therefore, in the event that this matter regarding prosecutorial discretion and the amnesty exception is determined to require outside counsel, the ICC may seek the counsel of the Assembly of States Parties and, indirectly, the International Court of Justice.

[124] Rome Statute, *supra* 1, at art. 119, cl.1. [Reproduced in the accompanying notebook at Tab 2].

[125] *Id*. at art. 119, cl.2.

[126] *Id*.

IV. ANALYSIS OF A POTENTIAL ASYLUM EXCEPTION TO THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

A. Granting Asylum – policy concerns

The treatment of asylum under constructions of international law is considerably different than the treatment of grants of amnesty under international law. The most simple distinction between the two can be made on the grounds that amnesty is explicitly addressed far more often in the realm of international legal materials than are grants of asylum. This may be because grants of asylum implicate different issues that may or may not be of interest to the ICC. Furthermore, the Rome Statute does not address asylum with the same clarity as it addresses grants of amnesties.

The legacy of asylum is characterized by conceptions that political connections can somehow help international criminals escape liability.[127] In situations where international criminals commit crimes for professed political goals, there is the conception that the criminal may escape criminal liability by claiming status as a "political prisoner" of sorts.

International asylum law is generally treated under the analysis of international refugee law. The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention are the primary authorities on international asylum law. These instruments notwithstanding, the realm of international asylum law is generally unsettled. Grants of asylum are not specifically addressed in either the 1951 Convention Relating to the Status of Refugees or

[127] See Christine Cervasio, *Extradition and the International Criminal Court: The Future of the Political Offense Doctrine*, 11 Pace Int'l L. Rev. 419, 431 (1999). Cervasio writes: "It appears that where a terrorist can claim a political connection to his crime, he may then flee to a state that will grant him asylum. In modern times, criminals may know the exception exists and that they have easy access to nations that grant asylum for such acts. Granting asylum in such situations seems to advocate the policy of *refusing to punish a known criminal simply because he crossed international boundaries.* (Id., italics added by author). [Reproduced in the accompanying notebook at Tab 28].

the 1967 Protocol Relating to the Status of Refugees.[128] Therefore, determining the status of an asylum-seeking individual requires analysis of different conventions of international law.

The chief principle of international asylum is the notion of non-refoulement.[129] Under the theory of non-refoulement, no recognized refugee will be sent back to the country from which they came if doing so may expose the refugee to persecution, political, ethnic, or otherwise.[130] Article 33(1) of the UN Convention on the Status of Refugees ("Refugee Convention") codifies the non-refoulement principle as an accepted rule of international law.[131] Furthermore, the principle of non-refoulement has come to be recognized as a norm of customary international law. Domestic judicial bodies have recognized the non-refoulement principle as well. In late 2000, the United Kingdom's House of Lords affirmed the UK Secretary of State's refusal to extradite two asylum seekers on the principle that returning the individuals to their respective countries would subject them to a risk of persecution.[132]

The non-refoulement principle, however, is not afforded to all refugees without exception. Article 33(2) provides an exception to non-refoulement for refugees who present a

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[128] Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees [HCR/IP/4/Eng/REV.1, Reediated, Geneva, January 1992, UNHCR 1979]. [Reproduced in the accompanying notebook at Tab 12].

[129] GEERT-JAN ALEXANDER KNOOPS, SURRENDERING TO INTERNATIONAL CRIMINAL COURTS: CONTEMPORARY PRACTICE AND PROCEDURES, 189 (2002). [Reproduced in the accompanying notebook at Tab 23].

[130] *Id.*

[131] 1951 UN Convention on the Status of Refugees, at art. 33(1). Article 33(1) provides: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." [Reproduced in the accompanying notebook at Tab 9].

[132] *ex parte Adan, ex parte Aitseguer*, 1 All E.R. 593 (2000). The House of Lords adopted a definition of persecution that is even more expansive than the definition adopted by the 1951 Convention. The House of Lords held that the risk of persecution was not limited to acts by state agents; instead, acts by non-state agents could be considered under their decision. [Reproduced in the accompanying notebook at Tab 13]. This holding is not a universally held.

danger to either the national security or the community of the asylum state.[133] Furthermore, the benefits of the Refugee Convention do not extend to people whom there is reason to believe have committed war crimes, crimes against peace or crimes against humanity pursuant to Article 1F of the Refugee Convention.[134]

The ongoing debate over the appropriate legal treatment of deposed Liberian President Charles Taylor adequately illustrates the unsettled state of international asylum law. Charles Taylor stands accused of war crimes, crimes against humanity and grave breaches of the Geneva Conventions.[135] Taylor's regime dated back to the Liberian elections of 1997, but the Special Court's indictment was limited to acts committed since August 2000. Mr. Taylor stepped down from the Liberian Presidency in August 2003, and he subsequently accepted an offer of asylum from Nigerian President Olusegun Obsasnjo.[136] Counsel for Charles Taylor attempted to assert head-of-state immunity in making a motion to seta aside his arrest, to quash his indictment and to challenge the jurisdiction of the Special Court with regards to Mr. Taylor's case.[137] In

[133] Refugee Convention, *supra* 132, at art. 33(2). Article 33(2) provides: "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." [Reproduced in the accompanying notebook at Tab 9].

[134] *Id*. at art. 1F. This prohibition also extends to persons accused of committing serious non-political crimes or acting in ways that are in violation of the purposes and principles of the UN. Article 1F provides: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defiend in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

[135] "Indictment of Charles Ghankay Taylor," Special Court for Sierra Leone, Case No. SCSL – 03 – 1 (2003). [Reproduced in the accompanying notebook at Tab 16].

[136] Karl Vick, "Liberian Leader Sets Resignation: Taylor Says He Will Step Down Aug.11," WASHINGTON POST (August 3, 2003) at A01; and Karl Vick, "Taylor Resigns, Leaves Liberia; Ex-Warlord Flies Into Exile in Nigeria, Meets Bush's Condition for Peacekeepers," WASHINGTON POST (August 12, 2003) at A01. [Reproduced in the accompanying notebook at Tab 43].

[137] Appeals Chamber, "Decision on Immunity from Jurisdiction," Special Court for Sierra Leone, SCSL – 01 – I, 3014, paragraph 1 (May 31, 2004). [Reproduced in the accompanying notebook at Tab 17].

dismissing Mr. Taylor's motion, the Special Court asserted that Mr. Taylor's assertion of head of state immunity did not preclude the ICC from asserting jurisdiction over Mr. Taylor.[138]

B. Treatment of Asylum by Previous Tribunals

Unfortunately, the ICTY and the Special Court for Sierra Leone do not provide much guidance regarding the treatment of grants of asylum. Most case law on the subject has arisen out of decisions of the European Court of Human Rights. Furthermore, most of the issues regarding asylum law addressed cases that bear little resemblance to cases of present concern.[139] In this regard, any case addressing the treatment of asylum under international criminal jurisdiction will be a case of first impression.

The 1951 Refugee Convention and the 1967 Protocol provide some direction, but neither document addresses asylum explicitly. It is clear under the Convention and the Protocol, however, that an individual may be denied the protection of the Refugee Conventions where the individual would otherwise qualify as a refugee under the Convention. Article 1(F) of the 1951 Convention outlines some of the scenarios in which the protections of the Refugee Convention would no longer apply to an otherwise qualified refugee. Article 1(F) provides that the convention will not apply to individuals for whom there are "serious reasons" to believe that the individual has done one of three things. First, if there is reason to believe that the individual has committed a war crime, a crime against peace, or a crime against humanity.[140] Second, the

[138] *Id.* at paragraph 28.

[139] The ECHR case most relevant to the present discussion may be Thampibillai v. Netherlands, ECHR 61350/0, (2004). In that case, the ECHR held that the expulsion of a person seeking asylum in the particular case would not subject the individual to a risk of inhuman or degrading treatment. [Reproduced in the accompanying notebook at Tab 18].

[140] Refugee Convention, *supra* 132, at art. 1(F)(a). [Reproduced in the accompanying notebook at Tab 9].

Refugee Convention will not apply if there is reason to believe the individual has committed a "serious non-political crime" in a location outside the country of refuge.[141] Third, the Convention will not apply if the individual has been found guilty of activities that violate the purposes and principles of the United Nations.[142]

It seems clear that under Article 1(F) of the 1951 Refugee Convention, the protections of the Convention would not apply to an individual such as Charles Taylor. Mr. Taylor's protection under the Convention would be preempted by Article 1(F)(a) as Mr. Taylor has been indicted on charges of war crimes and crimes against humanity. These exclusion clauses of the 1951 Convention provide the Prosecutor of the ICC with the ability to preempt grants of amnesty in deciding whether to initiate an investigation.

C. Statutory Analysis

Much like amnesty, a grant of asylum is not an explicit exception to the ICC's jurisdiction under Article 17 of the Rome Statute. Furthermore, it would be difficult to argue that a grant of asylum qualifies under Article 17(1) as a legitimate investigation or judicial proceeding making the case inadmissible under subsections (b) and (c). Therefore, if there is to be a recognized asylum exception to ICC jurisdiction, it must be read into another provision of the Rome Statute. Finding such a provision that allows such an interpretation, however, is slightly attenuated.

[141] *Id*. at art. 1(F)(b). The Handbook on the 1951 Convention notes that in order for an act to be considered under this provision, the genuine motives of the action must be considered, particularly whether the motives of the activity were truly political or merely for personal gain. "Handbook to the 1951 Convention and the 1967 Protocol," [Reproduced in the accompanying notebook at Tab 12].

[142] *Id*. at art.1(F)(c).

If a grant of asylum is to be recognized as a basis for declining or delaying the initiation of an investigation, it will most likely have to be read into the grants of prosecutorial discretion under Article 53.

Although the Rome Statute is less than clear in its treatment of asylum in regards to ICC jurisdiction, the ICC may have a direct effect on grants of asylum to persons accused of international law violations. The Prosecutor of the ICC may be able to delay initiating an investigation against an individual if the status of that individual as a refugee is legally undetermined. If the ICC requests an individual to surrender him or herself to the jurisdiction of the court, the asylum laws of some countries would forbid the transfer of the individual to the jurisdiction of the court under the theory that the individual would be sent to a location where the individual risks persecution. As such, this finding may delay domestic procedures to determine whether a particular individual should be granted asylum. This delay in the determination of an individual's refugee status would have a freezing effect on ICC procedures; the ability of the ICC to initiate an investigation into such an individual would be delayed so long as the domestic asylum procedures have not been finished.[143]

[143] KNOOPS, supra 130, at 190. [Reproduced in the accompanying notebook at Tab 23].

V. CONCLUSION

Given the ICC's status as an multinational judicial body, there are very few obligations regarding ICC jurisdiction imposed by those international conventions. The Geneva Conventions, the Genocide Convention, and the Torture Convention all impose absolute obligations to prosecute violations of those conventions, but those obligations do not apply to multinational, non-party judicial bodies such as the ICC. The Rome Statute does not explicitly recognize an amnesty exception to the ICC's jurisdiction, but there are a number of provisions into which an implied amnesty exception may easily be read. In regards to grants of asylum, the Rome Statute does not explicitly recognize such an exception for asylum. Unlike grants of amnesty, there are very few provisions of the Rome Statute into which an asylum exception may be implied. The Refugee Convention may provide some flexibility, as might the ICC Prosecutor's wide powers of prosecutorial discretion, but reading a wide asylum exception into the ICC's jurisdiction is attenuated at best.