

**DRAWING THE BORDERLINES: TRUTH JUSTICE AND RECONCILIATION
MECHANISMS/AMNESTIES AND THE ROME STATUTE**

**A RESEARCH PAPER SUBMITTED TO THE FACULTY OF LAW OF THE
UNIVERSITY OF THE WESTERN CAPE, IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF MASTERS OF LAW**

**BY
NELLY GACHERI KAMUNDE
2925491**

PREPARED UNDER THE SUPERVISION OF

PROF. LOVELL FERNANDEZ

UNIVERSITY of the

AT THE FACULTY OF LAW, THE UNIVERSITY OF THE WESTERN CAPE

28 OCTOBER 2009

3.2	Relevant Provisions	30
3.2.1	Article 16	31
3.2.2	Article 17	37
3.2.3	Article 20	46
3.2.4	Article 53	49
4.0	CHAPTER FOUR: Conclusions and Recommendations.	55
4.1	General Remarks	55
4.2	Application: The Republic of Kenya	56
4.3	Recommendations	59
	List of References	60



Declaration

I, Nelly Gacheri Kamunde declare that the work presented in this research is original. It has never been presented to any other University or Institution. Where other people's works have been used, reference has been provided. I therefore declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree.

Student.....

Signature.....

Date.....



Supervisor.....

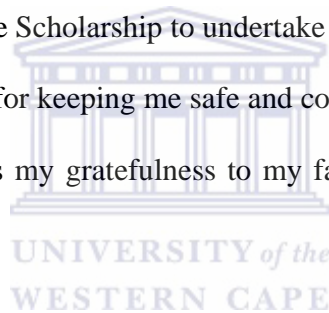
Signature.....

Date.....

Acknowledgement

This research paper would not have been completed without the support, encouragement and guidance of my Supervisor Professor Lovell Fernandez (Professor of Law, University of Western Cape, South Africa) and Professor Gerhard Werle (Professor of Law, Humboldt Universitat Zu Berlin) who equipped me with the necessary skills during my International Criminal Law course. I also extend my gratitude to Paul Christoph Bornkamm (Research Fellow, Humboldt-Universitat Zu Berlin) for his assistance in acquiring some of the very useful academic literature on my subject of research. I also acknowledge the German Academic Exchange Programme (DAAD) who provided me with the Scholarship to undertake my Masters Studies.

My deepest gratitude goes to God for keeping me safe and committed to this research. Lastly and especially, I would like to express my gratefulness to my family for their warmth and support throughout the research.



List of Abbreviations

AJM	Alternative Justice Mechanisms
CAH	Crimes Against Humanity
CIPEV	Commission of Inquiry into Post-Election Violence
DRC	Democratic Republic of Congo
G.A.	General Assembly
<i>Ibid.</i>	<i>Ibidem</i>
ICC	International Criminal Court
ICL	International Criminal Law
ICTR	International Criminal Tribunal For Rwanda
ICTY	International Criminal Tribunal For the Former Yugoslavia
IHL	International Humanitarian Law
ILC	International law Commission
NGO	Non-Governmental Organisation
Para.	Paragraph
Res.	Resolution
SC	Security Council
TJRC	Truth Justice and Reconciliation Commission
TJRM	Truth Justice and Reconciliation Mechanisms
U.N.T.S.	United Nations Treaty Series
UN	United Nations

US

United States

VCLT

Vienna Convention on the Law of Treaties



Chapter One

Introduction

1.1 Abstract

This research analyzes Truth Justice and Reconciliation Mechanisms and Amnesties in the light of the Rome Statute to the International Criminal Court (ICC). The research looks strictly into the legal terms of the Rome Statute in order to see if their interpretation indicates that the Court is meant to ‘complement’¹ such forms of justice mechanisms, especially when they are accompanied by amnesties.

1.2 Truth Justice and Reconciliation Mechanisms and Amnesties

Truth Justice and Reconciliation Mechanisms (hereafter TJRM)² is a phrase which refers to all the legal and socio-legal mechanisms that a country implements when it emerges from a period of gross human rights violations or armed conflict.³ These mechanisms are also referred to as Alternative Justice Mechanisms because, in many cases, especially when they are accompanied by amnesties, they replace traditional criminal prosecutions.

TJRM are a favorable response to violations because they are legally sanctioned to find facts, to establish an accurate record of a country’s past, to clarify uncertain events, and to lift the lid of silence and denial that covers a contentious and painful past.⁴ TJRM are also preferred to pure prosecutorial mechanisms because they are meant to respond to the

¹ This term is derived from the principle of Complementarity which recognises primacy of national jurisdictions.

² Alternative Justice Mechanisms (AJM) in the context of this research is used interchangeably with Truth Justice and Reconciliation Mechanisms (TJRM).

³ Roth-Arriaza, N. ‘The New Landscape of Transitional Justice’, in Roth-Arriaza/Mariezcurrena (eds.), (2006) *Transitional Justice in the twenty-First Century*. 2.

⁴ Hayner, P. B. (2001) *Unspeakable Truths: Facing the Challenge of Truth Commissions*. 24.

specific needs of victims, thus contributing to a broader concept of justice, accountability and reconciliation.⁵ TJRM may be seen as more viable when they complement criminal prosecutions⁶ because they offer more benefits and deal with a greater context of the root causes of a conflict than the highly formalized processes of determining culpability.⁷ They may even be more preferable to individualized criminal prosecutions in the case of African societies, whose social ethos emphasizes negotiation, reconciliation, cooperation, and eventual integration into the society.⁸

Amnesties in the course of transition may arise where the outgoing regime demands that they be applied as a condition precedent to the cessation of hostilities, or where they are used as a bargaining chip to encourage people to come forward and tell the truth. The former situations were experienced during the waves of democratization in Latin America in the 1980s,⁹ whereas the latter were experienced in South Africa in the early 1990s.¹⁰

Despite the viability of TJRM as forms of justice mechanisms they have not escaped criticism. The main problem with TJRM is that they have not been favorably considered by the international community in the advent of the universal fight against impunity.¹¹

⁵ *Ibi.*, 228-31.

⁶ Steven, R.R and Jason, S.A. (1997) *Accountability for Human Rights Atrocities in International law, Beyond the Nuremberg Legacy*. 5.

⁷ Minow, M. 'The Hope for Healing: What Can Truth Commissions Do?', in Rotberg, R. & Thompson, D. (eds.), (2000) *Truth v. Justice: The Morality of Truth Commissions*. 235.

⁸ Oyelade, O.S, 'Conflict Resolution and Human Rights in Traditional African Society' (2005) 45, 2 *Indian Journal of Human Rights*. 201.

⁹ Orentlicher, D. 'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency', (2007) 1 *The International Journal of Transitional Justice*. 11.

¹⁰ Werle, G. 'Without Truth, No Reconciliation. The South African *Rechtsstaat* and the Apartheid Past' Lecture delivered on 18th May 1995 at the Law Faculty of Humboldt University of Berlin.

¹¹ Huyse, L. 'Justice', in Bloomfield, D, Barnes, T, and Huyse, L (eds.), (2003) *Reconciliation after Violent Conflict: A Handbook*. 97-115.

The consequent conflict that may arise between the ICC and TJRM is that serious international crimes to go unpunished.¹²

In overcoming the tensions between impunity and TJRMs, and as this research will show, there are many academics who suggest that the ideal situation, would be to have a *mélange* of both retributive and restorative justice mechanisms. Others, while not prioritizing on either mechanism, suggest that there should be primacy for the societies' needs in coming to terms with their past, rebuilding their values and settling old disputes.¹³

This research will however observe that, calling for criminal prosecutions of alleged high-profile criminals so as to satisfy the ideals traditional criminal prosecution on the one hand, and supplementing this with the creation of TJRM which fulfil the needs of a society on the other hand, appears too romantic an idea to realise in practice. This is because in many cases, the same crimes and the same people for which prosecution is made obligatory, are the same ones for which an amnesty may be sought.

1.3 International Criminal Prosecutions and TJRM

The Rome Statute¹⁴ establishes the ICC. The setting up of the ICC was as a result of decades' old efforts to come up with an institution to fight impunity for the core crimes of

¹² Robinson, D. 'Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court' (2003)14 *European Journal of International Law*. 484.

¹³ Bore, L. 'International Justice Mechanisms: An analysis of Retributive versus Restorative mechanisms' (2006) (Unpublished), *Dissertation, University of Nairobi* (In file with Author). 18.

¹⁴ Rome Statute of the International Criminal Court, *adopted* Jul. 17 1998, U.N. Doc. A/CONF.183/9 (hereafter Rome Statute).

international law. The establishment of the ICC is the ultimate achievement of the endeavour to have an enforcement mechanism of International Criminal Law (hereafter ICL).

TJRM on the other hand focus on alternative ways of accountability which are primarily based on the broader concepts of justice such as restoration and reconciliation.

The two mechanisms of justice, that is TJRM and ICL, have developed more or less parallel to each other. However, in the course of the development of ICL, the concept of restorative justice has slowly begun to absorb itself into international criminal tribunals. This is evidenced by the Sierra Leonean Truth Commission which functions alongside the Special Court for Sierra Leone, and the *Gacaca* courts in Rwanda which try cases alongside the International Criminal Tribunal for Rwanda (ICTR). These courts have had the challenge of interpreting the place of TJRM in the general discipline of international criminal prosecution. In light of these developments, there is need to ensure unequivocal conclusion of whether or not the Rome Statute embraces TJRM.

This research hinges the discussions relating to the tensions between ICL and TJRM on the interpretation of the Rome Statute under the assumption that the ICC is most suitable and that it will form the motif of the enforcement of international criminal justice due to its non-limitation in terms of time, place and time.

1.4 The Research Question

This research looks at whether or not, and how the Rome Statute recognizes TJRM/Amnesties.¹⁵ In that course, the research will look at the boundaries of interpreting the relevant provisions of the statute.

1.5 Significance of the Research

This research hopes to give insight on the place of TJRM/Amnesties not just within the Rome Statute, but also under the general rubric of ICL. In the course of answering this question, inevitable outcomes of the usefulness of alternative justice mechanism will be addressed.

This research will also shed light to the contemporary issues relating to Kenya following the crimes committed in the 2007 post election violence.



1.6 Objectives

1. To analyse the International law delimitations of interpreting the Rome Statute;
2. To comb through the relevant provisions of the Rome Statute in an attempt to clarify whether or not the ICC complements TJRM/Amnesties; and
3. To make findings as to which provisions, if any, of the Rome Statute accommodate TJRM/Amnesties.

¹⁵ The term TJRM/Amnesties has been used throughout this research to indicate the general alternative justice mechanisms of truth, justice and reconciliation accompanied by amnesties. In some places, as will be indicated, the specific arguments will be divided to argue separately for or against amnesties.

1.7 Research Methodology

In conducting the research, focus is mostly on the Rome Statute and the preparatory work preceding its creation. This research will rely on International Conventions and published legal literature emanating from the hand of academics and experts in the fields of both ICL and TJRM. Online interviews on matters relevant to the topic are also carried out in order to obtain a practical insight on the issues at hand.

1.8 Structure

1. The subsequent chapter will look at the legal confines of interpreting the Rome Statute. This will involve looking at the Rome Statute, the Vienna Convention on the Law of Treaties (VCLT) and international law in general.
2. The major part of the paper will then ‘unveil the Rome Statute’, through a systematic analysis of each of the mentioned provisions (Articles 16, 17, 20 and 53) and see whether or not, and with specificity, whether TJRM/Amnesties are accommodated in the Rome Statute.
3. The conclusion will make a finding as to whether TJRM/Amnesties are accommodated in the Rome Statute.

2.0

Chapter Two

Legal Boundaries of Interpretation

2.1 The Rome Statute

Article 21 of the Rome Statute provides that the ICC shall apply the following as far interpretation is concerned:

- In the first place, the Rome Statute itself and its rules of Procedure and Evidence;¹⁶
- In the second place, applicable treaties, principles and rules of international law, including the established principles of international law and rules of armed conflict;¹⁷
- Failing this, the general principles of law derived from national laws of States that would normally exercise jurisdiction, international law and internationally recognized norms and standards;¹⁸ and
- The ICC's previous decisions, which shall be applied discretionally.¹⁹

2.2 The Vienna Convention on the Law of Treaties (VCLT)

The VCLT is invoked in interpreting the Rome Statute because it is an applicable treaty²⁰ due to the fact that the Rome Statute is a treaty among States.²¹

¹⁶ Rome Statute Article 21(1) (a).

¹⁷ Rome Statute Article 21(1) (b).

¹⁸ Rome Statute Article 21(1) (c).

¹⁹ Rome Statute Article 21 (2).

²⁰ Rome Statute Article 21(1)b.

²¹ Kourabas, M. 'A Vienna Convention Interpretation of the 'Interests of Justice' Provision of the Rome Statute, The Legality of Domestic Amnesty Agreement, and the Situation in Northern Uganda: A Great Qualitative Step Forward' or a Normative Retreat?' (2007) 14 *UC Davis Journal of International Law and Policy* at 69.

One golden rule of interpretation according to the VCLT is that a statute shall be interpreted in good faith and in accordance with the ordinary meaning of the treaty and its purpose.²² The interpretation of a treaty is said to involve three main elements²³: interpretation according to a provision's ordinary meaning; according to its objects and purposes; and according to the provision's context.

2.3 International law

The approach taken and the conclusion reached in making an interpretation must further be appreciative of international law. The relevant rules of international law that this chapter looks at are those specific ones relating to TJRM/Amnesties. This analysis will be useful in examining whether deferring prosecutions to local alternative justice mechanisms would be in violation of international law.

2.3.1 TJRM/Amnesties under International law

As there is no legally recognized definition of TJRM, the propriety of the mechanisms is judged according to the extent to which it fulfills its mandate.²⁴

There are however certain generally accepted standards of TJRM that have emerged from the previous TJRMs that have existed in the last ten years. These include; the requirement

²² Vienna Convention on the Law of Treaties, Article 31(1), 1155 U.N.T.S. 331, Entered into force on 27th January, 1980, *Adopted* on 22 May 1969. (hereafter VCLT).

²³ Kourabas, M. *Supra* note 20, 69.

²⁴ From 1997 to 2007, there have been at least 33 Truth Commissions in 28 different countries (Amnesty International, Transitional Justice and Reparation: Establishing an effective Commission, 11 June 2007, AI Index: POL 30/009/2007) available at <http://www.amnesty.org/en/library/asset/POL30/009/2007/en/7988f852-d38a-11dd-a329-2f46302a8cc6/pol300092007en.html> (accessed on 20th October 2009).

that the process has a victim-centered approach,²⁵ a fair procedure²⁶ and that it recommends prosecution for international crimes.²⁷

In as much as there are no specified international legal rules accepting or rejecting TJRM/Amnesties, the liberty of States to apply them ends where the obligation to prosecute under international law starts. This means that the determination of the suitability of a TJRM will depend largely on whether it is inclusive or exclusive of an amnesty. In other words, whether the TJRM violates the international legal obligation to prosecute.

2.3.2 Duty to prosecute under International law

For relevance and brevity purposes, the duty to prosecute is discussed here only in the light of the crimes under the material jurisdiction of the ICC. These are: genocide, crimes against humanity, war crimes and aggression²⁸. The discussion will however not delve into aggression as its prosecution will only take place when a viable definition for it has been agreed upon²⁹. Further, as far as the addressee of this duty is concerned, these discussions will focus on that state that would be seeking to apply TJRM/Amnesties.

²⁵ *Ibid.* 27.

²⁶ *Ibid.* 31.

²⁷ *Ibid.* 5-10.

²⁸ Article 5(1) Rome Statute.

²⁹ Politi, M. & Nesi.G. (eds.) (2005) *The International Criminal Court and the Crime of Aggression*. Editors' Preface.

As far genocide is concerned, the Genocide Convention places an obligation on the state of commission to prosecute.³⁰ In absence of a clear duty under customary international law, this duty only applies to state-parties to the Genocide convention.³¹ Some writers conclude that there is a customary law duty obligating ALL States to punish all persons who commit genocide in their territorial jurisdiction³², in light of, *inter alia*, advisory opinion of the International Court of Justice (hereafter ICJ),³³ and the fact that customary international law is said to establish universal jurisdiction over genocide.³⁴ Others contend that the establishment of this duty under customary law is contentious due to lack of consistent state practice.³⁵

War crimes are constituted by those International Humanitarian Law (hereafter IHL) violations which create direct criminal responsibility under International law.³⁶ There is a general obligation that States should suppress all IHL violations³⁷. However, the States have the liberty to decide the means of suppressing these violations. The specific obligation to prosecute war crimes only exists in light of grave breaches, which are war crimes³⁸, as is stipulated in the Geneva Conventions³⁹ and Additional Protocol I⁴⁰. These

³⁰ Article 3 Convention on the Prevention and Punishment of the Crime of Genocide, *Adopted* Dec. 9, 1948, 78 U.N.T.S. 227, Article 3, Entered into force Jan. 12, 1951).

³¹ Ambos, K. 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC', in Kai Ambos *et al.* (eds.), (2009) *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* 15.

³² Orentlicher, D. *Supra* note 9. 2566.

³³ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J 15, 23.

³⁴ Attorney Gen. of Isr. v. Eichmann, 36 I.L.R. 18, 39 (Isr. Dist. Ct.-Jerusalem 1961), 36 I.L.R. 277 (Isr. Sup. CL 1962).

³⁵ See for example Ambos, K. *Supra* note 9, 15-16.

³⁶ Werle, G. *Principles of International Criminal Law*, 2nd ed. (2009). 357.

³⁷ Articles 49(3), 50(3), 129(3) and 146(3) of Geneva Conventions I, II, III and IV Respectively *infra* note 38 and Article 85(1) of Additional Protocol I, *infra* note 38.

³⁸ Olson, M. L. 'Provoking the Dragon on the Patio, Matters of Transitional Justice: Penal Repression vs. Amnesties' (2006) 88, *International Review of the Red Cross*. 280.

provisions however only apply to war crimes committed in international armed conflicts. War crimes may also be committed in non-international armed conflicts⁴¹, but the duty to prosecute them is blurred as they are not categorized as grave breaches. That notwithstanding, it has however been stated, that customary international law should not be granted to those who commit war crimes.⁴² The duty to prosecute for war crimes also faces the challenge that it only applies to state parties to the Geneva Conventions and their Additional Protocols.⁴³

Crimes against humanity (hereafter CAH) are unique in that they are a pure creation of customary international law⁴⁴ and the law is less clear as far as the duty to prosecute them is concerned⁴⁵. It is noted that in fact, international law has tended to condone amnesties for CAH.⁴⁶ There is however, emerging customary law that States have a duty to punish CAH when the conduct occurs on that state's territory or with respect to its nationals.⁴⁷ This is also exemplified by the practice of the UN,⁴⁸ international organizations⁴⁹ and case law.⁵⁰ There is however no specific legal obligation to punish CAH.⁵¹

³⁹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *adopted* Aug. 12, 1949, Article. 50, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 3, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *adopted* Aug. 12, 1949, Article 51, 6 U.S.T. 3217, T.L.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, *adopted* Aug. 12, 1949, Article 130, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *adopted* Aug. 12, 1949, Article 147, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

⁴⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, *adopted* Jun. 8, 1977, Article 11(4), 84(3) & 85(4) 1125 U.N.T.S (1977).

⁴¹ Henckaerts, J. and Doswald-Beck, L. *Customary International law*, 1, (2005). 574-590.

⁴² *Ibid.* 612-613.

⁴³ Ambos, K. *Supra* note 30. 15.

⁴⁴ Scharf, M. Scharf M. P. 'The Amnesty exception to the Jurisdiction of the International Criminal Court.' (1999) 32 *Cornell International law Journal*.519.

⁴⁵ Robinson, D. *Supra* note 12, 491.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons guilty of war crimes and crimes against humanity. G.A. Res. 3074, 28 U.N.GAOR Supp. (No 30) at 79, U.N. Doc. AI 9030

The duty to prosecute for the crimes of genocide, war crimes and CAH humanity has also been asserted in view of comprehensive human rights conventions⁵². The general flow of this assertion starts where the commission of these crimes violates the rights enshrined in these conventions and concludes with the analogy that the protection of these rights entails a mandatory duty to prosecute, as has been explained in the triad of 'human rights-duty to protect-duty to prosecute'.⁵³ However, the emergent conclusion of States having a duty to prosecute is founded on interpretations⁵⁴ and not the substantive provisions of the conventions. Some writers have stated that the duty of imposing penal sanctions in the course of ensuring protection should only apply with respect to the state of commission.⁵⁵

It is further stated,⁵⁶ which statement is concurred with, that the duty to uphold the rights enshrined in the human rights conventions does not imply an obvious and automatic duty to prosecute for their violations, since the duty to protect can be ensured through other means and not just prosecution.

(1973); Convention on the Non-applicability of Statutory limitations to war crimes and crimes against humanity, opened for signature on Nov. 26, 1998, 754, U.N.T.S. 73, G.A. Res. 2391, 23 U.N. GAOR Supp. (No. 18), 40.

⁴⁹ Human Rights Watch, Special Issue: Accountability for past Human Rights Abuses 2 Dec. 1989.

⁵⁰ Barbie, 78 I.L.R. 132, 135 (1988) (Judgment of Jan. 26, 1984, Cass. Crim., Fr.).

⁵¹ Scharf, M. P. *Supra* note 43. 519.

⁵² International Convention on Civil and political Rights, *Adopted* Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967), European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 213 U.N.T.S. 221, European. T.S. No. 5 (*entered into force* Sept. 3, 1953), Inter-American Convention to Prevent and Punish Torture, *adopted* Dec. 9, 1985, OEA/ser.A./42 (1986), 67 O.A.S.T.S., *reprinted in* 25 I.L.M. 519 (1986) (*entered into force* 1987).

⁵³ Werle, G. *Supra* note 35. 72.

⁵⁴ *Velásquez-Rodríguez*, 29 July 1988, Judgement, para. 162 et seq., 1996 Annual Report of the Inter-American Court of Human Rights [209], OEA/Ser.L/V/III.35, doc. 4 (1997); *Almonacid Arellano et al. vs. Chile*, 26 September 200, Judgement, Series C No. 154. para. 110.

⁵⁵ Werle, G. *Supra* note 35. 72.

⁵⁶ Ambos, K. *Supra* note 30. 16.

Beside the duty to prosecute imposed by treaties, another compelling reason for States to comply, is seen in light of *jus cogen*⁵⁷ norms and the consequent obligations *erga omnes*⁵⁸ for which no derogation (such as failing to prosecute in light of an amnesty in place) is allowed.

Bassiouni⁵⁹ discusses whether the crimes in the ICC Statute have achieved the *jus cogen* status and whether the consequent obligations *erga omnes* include that of prosecuting.⁶⁰ Although there is vast literature indicating that crimes such as genocide, CAH and war crimes are among those considered to have attained the status of *jus cogens*⁶¹, he notes that it is uncertain whether the attainment of this status of *jus cogens* under international law attracts absolute and non-derogable obligations *erga omnes*.⁶² In narrowing the argument to the analysis at hand, he notes that there is no plausible stand as to whether a state's duty to prosecute is absolute in light of the fact that prosecution is vital in securing non-derogable rights.⁶³

The International Criminal Tribunal for the Former Yugoslavia (hereafter the ICTY) has stated that the duty to prosecute for the crimes of genocide, CAH and war crimes exists under customary international law.⁶⁴

⁵⁷ *Jus cogen* norms are norms which hold the highest hierarchical position among the norms of international law and are consequently non-derogable.

⁵⁸ Obligations *erga omnes* are the obligations that attach to a norm that has achieved the *jus cogen* status.

⁵⁹ Bassiouni, C. M. 'International Crimes, *Jus Cogen* and Obligatio *Erga Omnes*' (1996) 59 *Law & Contemporary Problems*, 65.

⁶⁰ *Ibid.*

⁶¹ *Ibid.* 68.

⁶² *Ibid.* 74.

⁶³ *Ibid.*

⁶⁴ *Prosecutor v. Anto Furundzija*, ICTY, Case No. IT-95-17/1-7 (10 December 1998), paras 137-148 and 155.

In as much as the generality and universality of this duty may be unclear, there is a clear and unequivocal duty on the state of commission to prosecute international crimes when they are committed in its territory.⁶⁵

With respect to third States, universal jurisdiction only grants States authority and not responsibility to prosecute international crimes.⁶⁶ The options for 3rd states are however limited to either prosecuting or extraditing (*aut dedere aut judicare*) when it comes to war crimes.⁶⁷ For the other two crimes, genocide and CAH, there is no clear duty for third States to prosecute although in most cases the argument is said to tilt towards there being no duty to prosecute.⁶⁸

Further and more specifically is the fact that when a state is a party to the Rome Statute, the obligation to prosecute these crimes is more direct since state parties to the Rome Statute have higher obligations than non-state parties with respect to the obligation to prosecute.⁶⁹

The existence of a customary international law duty for all States to prosecute international crimes may be blurred as the above discussions indicate. However, it must be conceded that the duty is more compelling upon the state of commission and even much more compelling when that state of commission is a party to the Rome Statute. The

⁶⁵ Werle, G. *Supra* note 35. 69.

⁶⁶ *Ibid.* 70.

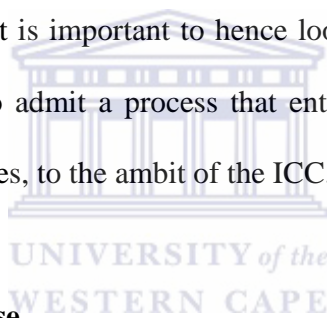
⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, 71.

⁶⁹ Stahn, C. 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice*. 707.

State of commission is most reasonably and practically the one that would be seeking to implement a TJRM/Amnesties. The level of justification needed for this State to implement TJRM/Amnesties for the State of commission will be higher than that of the State of nationality of the perpetrator, and even much higher and clearer when the State of commission is a party to the Rome Statute. Third States retain their authority to prosecute even in light of an amnesty in place and are not limited by such an amnesty.⁷⁰

Despite the growing consensus that amnesties and pardons are generally incompatible with the Rome Statute,⁷¹ they have been extensively applied in light of various challenges for societies in transition. It is important to hence look at the possible justifications that may be fronted in order to admit a process that entails amnesties, and especially with regard to international crimes, to the ambit of the ICC.



2.3.3 A sustainable Compromise

This section looks at a possible balance which would not offend the international legal obligation to prosecute, and at the same time, one which would not hinder the attempts of a nascent democracy emerging from either an armed conflict or a period of human rights violations.

Most suggestions on compromise render an outcome of partial accountability and partial impunity,⁷² either characterized by prosecuting some people (who bear the most

⁷⁰ *Prosecutor v. Kallon Kamara*, SCSL (Appeals Chamber) Decision of 13 March 2004, paras 67 et seq.

⁷¹ *Ibid.* 701; Orentlicher, D. *Supra* note 9. 2598.

⁷² Morris, H. M. 'International guidelines facilitating accountability' (1996) 59 *Law and Contemporary Problems* 33; Ambos, K. *Supra* note 30 at 52; Robinson, D. *Supra* note 12, 49.

responsibility for international crimes), or prosecuting for some of the crimes (those that carry the international legal obligation to prosecute) and not others.

Keller contributes very insightful comments to this debate⁷³. The special usefulness of her arguments is that they abandon the common arguments which conclude that amnesties are applicable so long as they are not granted in respect of international crimes that call for prosecution. Her departure from the common argument is based on the realisation that despite the duty of States to prosecute certain crimes, there are situations, where prosecution will not work.⁷⁴ In overcoming this, she suggests principled guidelines which should judge the suitability of an AJM.

These guidelines are characterised by three elements based on necessity, legitimacy and an assessment of whether the AJM meets the goals of international criminal justice.

On necessity, she argues that the AJM would be necessary if prosecution would end any real chance for establishing peace and if it is the last resort to secure peace.⁷⁵ She refers to other academic writers who agree on the point of necessity.⁷⁶

On legitimacy, she argues that the AJM must be created by a democratic government or international body, whose formation must represent the will of the people based on non-discrimination⁷⁷.

⁷³ Keller, M. L. 'Achieving Peace with Justice: The ICC and the Ugandan Alternative Justice Mechanisms' (2008) 23 *Connecticut Journal of International Law*. 209-279.

⁷⁴ Keller, M. L. *Ibid*, 261.

⁷⁵ Keller, M.L. *Ibid*, 262.

⁷⁶ Majzub, D. 'Peace or Justice? Amnesties and the International Criminal Court', (2002) 3 *Melbourne Journal of International Law* 276; Naqvi, Y. 'Amnesty for War Crimes: Defining the Limits of International Recognition', (2003) 85 *International Review of the Red Cross* 617; Scharf M.P. *Supra* note 23, 512.

⁷⁷ Keller, M. L. *Supra* note 72, 263.

On the third element, she states that the acceptability of an AJM must be judged according to the extent to which it meets the goals of criminal justice (retribution, deterrence, expressivism, restorative justice and reconciliation).⁷⁸

Balint⁷⁹ is another writer who states that the worth of criminal justice in post conflict situations must be assessed with reference to each particular situation.⁸⁰ She furthers her argument by stating that the usefulness of accountability must be weighed against its contribution to the protection, restoration and improvement of public order.⁸¹

Robinson, partly concurring with the views of Keller, states that where the alternative mechanisms, can be considered as 'genuine' and where they closely meet the goals of accountability, deference to a TJRM may be possible under the 'complementarity' regime⁸².

Ambos⁸³ offers a suggestion on how to balance the tensions through a sophisticated balancing of conflicting interests of peace and justice.⁸⁴ He highlights a threefold proportionality test which was developed by the German Constitutional Court and refined by a certain scholar called Alexis.

These three steps involve the following: Firstly, whether the amnesty is important in furthering the needs of peace. Secondly, whether the measure to be applied, in this case

⁷⁸ *Ibid.* 265-278.

⁷⁹ Balint, J.L. 'The Place of Law in Addressing Internal Regime Conflicts' (1996) *Law & Contemporary Problems*.

⁸⁰ *Ibid.* 110.

⁸¹ *Ibid.* 114.

⁸² Robinson, D. *Supra* note 12, 486.

⁸³ Ambos, K. *Supra* note 30.

⁸⁴ *Ibid* at 33-38.

the TJRM, is indispensable or necessary to achieve the said objective. The third element is what he refers to as proportionality *stricto sensu*, which calls for the balancing between the extent of departure from full prosecution and the severity of the measures necessitating such a deviation. Under this third element, that is proportionality *stricto sensu*, the measures that would necessitate deviation from full prosecution must be limited by the following factors:

- limitation *ratione materiae*, which regards the specific crimes that international law seeks to prosecute;
- limitation *ratione personae* with regard to those who are most responsible for the said commission of the crimes;
- the stage where the investigations have reached, where he suggests that the more advanced the stage of prosecution the more deserved the deferral since at that time, some of the truth about the case has been uncovered;
- the existence of some form of accountability and/or public procedure which results in a disclosure of the facts, identification of those responsible;
- a consideration of the overall political, social and economic effects of the measures.

Scharf⁸⁵ argues that amnesty is not equivalent to impunity and that there are other fundamentals of criminal justice which can still be satisfied when amnesties are accompanied by truth commissions, lustrations, and other reconciliatory mechanisms.⁸⁶

Scharf's determination of the suitability of an AJM is also based on considerations of whether the crimes committed are international crimes which carry an obligation to

⁸⁵ Scharf, M.P. *Supra* note 43. 512.

⁸⁶ *Ibid.*

prosecute, the indispensability of such alternative processes in the transition, whether a process to uncover the truth has been instituted, whether deterrent mechanism for IHL and Human Rights violations have been instituted and whether the state has taken steps to punish those who are guilty through non-criminal sanctions.⁸⁷

Werle, in somewhat concurring with the proposed arguments on necessity, states that an amnesty can only be considered as legitimate if it is absolutely necessary to end ongoing violence.⁸⁸ Prior to that, he however cautions that an across-the-board exemption from criminal responsibility is unacceptable because it is discordant with the international legal obligation to prosecute.⁸⁹

Goldstone and Fritz⁹⁰ depart from the general argument and subjects the acceptability of amnesty processes to their compliance with internationally accepted guidelines which are consistent with the interests of justice. In furthering this argument, they first concede that the objectives of criminal justice are mainly achieved through criminal prosecutions. However, they continue, prosecutions should not be insisted upon where they destabilise nascent democracies such as the case where the perpetrators are the ones that command state power, and insistence on prosecution may provoke the collapse of such a state.⁹¹

⁸⁷ *Ibid*, 526-527.

⁸⁸ Werle, G. *Supra* note 35. 77.

⁸⁹ *Ibid*.

⁹⁰ Goldstone, J.R. & Fritz, N. ‘‘In the Interests of Justice’ and the Independent Referral: The ICC Prosecutor’s Unprecedented Powers’ (2000) 13 *Leiden Journal of International law*, 655.

⁹¹ Goldstone, J.R. & Fritz, N. *Supra* note 89. 659.

A state which grants amnesties can also plead necessity⁹² and *force majeure*⁹³ in granting amnesties and consequently failing to meet its international legal obligation to prosecute.

However, for any of the two doctrines to be invoked, it must be shown that a state exercised due diligence in performing its international obligation. It is noted that there are certain situations where a transitional government may not be in a position to comply with even modest requirements of international law, such as where the military retains *de facto* power after relinquishing office.⁹⁴ However, despite the fact that the excuse for non-performance of duty under these two doctrines is arguable, international law does not offer satisfactory answers as to whether this situation excuses the state from performing its functions.⁹⁵

As far as these two doctrines are concerned, and drawing analogy from the fact that some human rights conventions allow for derogations in times of emergency,⁹⁶ this research observes that there are certain times when necessity and impossibility may indeed push a state to derogate from its international legal obligation to prosecute.

International law does have obligations for prosecution of international crimes, as seen above, but international law does not-yet-prohibit amnesties.⁹⁷ Further,

⁹²Necessity precludes the wrongfulness of an act of state, which wrongfulness is not in conformity with an international legal obligation if the act was the only means of safeguarding an essential interest of the state against a grave and imminent peril

⁹³ *Force Majeure* is a defence that a state may advance to excuse it from performing a duty due to impossibility.

⁹⁴ Orentlicher, D. *Supra* note 9. 2607.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Dugard, J. 'Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International law*, 1004.

prosecutorial discretion under the ICC gives opportunity for the consideration of amnesties.⁹⁸

In light of the foregoing suggestions, this research observes and concurs with the discussed measures for determining the acceptability of TJRM/Amnesties vis a vis the international legal obligation to prosecute. This research proposes the following as the basic minimum requirements to be met in determining whether the ICC should recognize a TJRM with the power to grant amnesties for crimes within its jurisdiction.

- firstly there has to be a situation which calls for the balancing of the needs public order (those which contribute to the protection, restoration and improvement of public order) on the one hand, and those of formal criminal justice on the other hand; and
- this balance must indicate a tilt or a threat of it against the public order of a State if formal prosecutions are instituted;
- the employing of an AJM with amnesties must be indispensable to the maintenance of this balance.
- the amnesty programme must also meet the requisite of legitimacy as described by Keller⁹⁹ above; and
- there has to be sufficient indication that the state in question is not condoning international crimes and is indeed diligent to see to their prosecution but due to prevailing circumstances at that time, the goals of criminal justice cannot coexist with those of public order.

⁹⁸ *Ibid.*

⁹⁹ Keller, M.L. *Supra* note 72. 263.

Interpreting the Provisions.**3.1 Background to the current situation of TJRM/Amnesties in the Rome Statute.**

During the drafting of the Rome Statute, the question of TJRM/Amnesties was overshadowed by the international community's grand ambition to fight impunity¹⁰⁰.

It is however clear that amnesties and its related issues were within the agenda of the Preparatory Committee to the ICC.¹⁰¹ As early as 1997, the United States (hereafter US) suggested the inclusion of amnesties in the interest of peace and national reconciliation.¹⁰² During the negotiations, some delegations (especially the South African one) sought explicit recognition of TJRM by the ICC.¹⁰³ No agreement was however reached as the drafters left the situation ambiguous, leaving its clarification to the ICC once it came to operation.¹⁰⁴ The drafting of the Statute was stated to reflect a 'creative ambiguity'.¹⁰⁵

¹⁰⁰ Robinson, D. *Supra* note 12; Paragraph 3-5 preamble, Rome Statute.

¹⁰¹ R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), 45.

¹⁰² See Generally U. S. Delegation Draft (Rev.) to the ICC Preparatory Committee (August 1997).

¹⁰³ Robinson, D. *Supra* note 12. 499.

¹⁰⁴ *Ibid.*

¹⁰⁵ This is the terminology used by Scharf *Supra* while referring to an interview he had with President Phillip Kirsch of the ICC (Strasbourg, France, 19 November 1998) on the issue of amnesties in the Rome Statute.

However, in as much as the issues were raised in the negotiations leading to the adoption of the Rome Statute, opinions were divided as to whether and how the question of TJRM/Amnesties should be treated.

Protagonists of the ICC emphasized that its role is to fight impunity. Another group contended that States should not be denied the right to adopt measures that they consider to be good for their transitional democracies¹⁰⁶. Others still, were of the view that abuse of discretion would result if States were given the choice of whether or not to grant amnesties.¹⁰⁷ The States also expressed their reservations based on the fact that it would be difficult to state conclusively which reconciliation measures would be acceptable and which ones would not.¹⁰⁸

The Rome Statute therefore has no specific provision on the relationship between prosecutions on the one hand and TJRMs/Amnesties on the other hand as no agreement was reached during the negotiation.¹⁰⁹

3.2 Relevant Provisions

Some academics who have written on the subject, submit that Articles 16, 17 and 53 are the avenues through which the subject of TJRM/amnesties could be most appropriately dealt with.¹¹⁰ Others have included Article 20 in the list of possible avenues.¹¹¹

¹⁰⁶ Clark, T.H. 'The Prosecutor of the International Criminal Court, Amnesties and the Interests of Justice: Striking a Delicate Balance' (2005) 4 *Washington University Global Studies Law Review*. 390.

¹⁰⁷ Robinson, D. *Supra* note 12. 483.

¹⁰⁸ Morris, M. 'Foreword', (1996) 59 *Law and Contemporary Problems*. 1.

¹⁰⁹ Werle, G. *Supra* note 35. 112.

¹¹⁰ Robinson, D. *Supra* note 12. 486 ; Stahn, C. *Supra* note 68. 699; Ambos, K. *Supra* note 30. 57-69.

¹¹¹ Scharf, M. P. *Supra* note 43. 525.

In line with the views of these academic writers, it is submitted that one has to look collectively at Articles 16, 17, 20 and 53 as the most suitable fulcrums for the debate on the applicability of TJRM/Amnesties within the framework of the Rome Statute.

3.2.1 Article 16

Article 16 gives the Security Council (hereafter SC) power to request the ICC not to commence with any investigations or proceed with any prosecutions for a renewable period of 12 months.¹¹² Practically, this provision allows the SC to request the ICC not to proceed with proceedings because they would be detrimental to the maintenance of peace and security.¹¹³ Article 16 is said to be a compromise between those who sought that the SC should exercise complete control over the ICC and those who thought that that would amount to political interference.¹¹⁴

The business of this chapter is to see whether a TJRM would be recognised by the ICC under Article 16.

The prerequisite for a SC action under Chapter VII is that there exists a threat to the peace, breach of the peace, or act of aggression.¹¹⁵ The basis of the power of the SC is to allow suspension of proceedings if they conflict with considerations

¹¹² Article 16. Rome Statute.

¹¹³ Triffterer, O. (2008) *Commentary on the Rome Statute of the International Criminal Court Observers' notes, Article by Article* 2nd ed. 603.

¹¹⁴ Holmes, 'The Principle of Complementarity', in R. S. Lee *Supra* note 14; Bergsmo and Peji, 'Article 16: Deferral of Investigation or Prosecution' in O. Triffterer *ibid*.

¹¹⁵ Stahn, C. *Supra* note 68. 717.

of peace and justice.¹¹⁶ Besides the fact that there has to be a compelling reason for such a deferral, the SC must find that the proceedings stand in the way of its efforts to give effect to peace and justice.¹¹⁷

Different views have been fronted as far as the applicability of TJRM/Amnesties under Article 16 is concerned. While some contend that this provision would be an avenue for considering TJRM/Amnesties,¹¹⁸ others state that there would be a challenge because of the temporary nature of the request for a deferral.¹¹⁹ Another view posits that Article 16 would be an uncommon avenue for TJRM/Amnesties because a situation has to be serious enough, such as where there is an ongoing armed conflict, to warrant a request for deferral based on an amnesty in place.¹²⁰ Other writers subject the propriety of the argument on whether the SC's request includes non-prosecution for crimes that carry the international legal obligation to prosecute.¹²¹

It has also been asserted that the purpose of the deferral is to facilitate the brokering of peace and not validate an alternative justice model.¹²² In this regard therefore, the priority of the ICC is the brokering of peace and not the TJRM/Amnesties.

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ Keller, M.L. 'The False Dichotomy of Peace versus Justice and the International Criminal Court' (2008) 3, 1 *Hague Justice Journal*. 18.

¹¹⁹ Ambos, K. *Supra* note 30. 68; Gavron, J. 'Amnesties in the light of Developments in International law and the Establishment of the International Criminal Court' (2002) 51 *International and Comparative Law Quarterly*. 109; Stahn, C. *Supra* note 68. 717.

¹²⁰ Gavron, J. *Ibid.* 109.

¹²¹ Scharf, M.P. *supra* note 43. 524; Keller, M.L. *Supra* note 117. 19; Ambos, K. *Supra* note 30. 68.

¹²² Stahn, C. *Supra* note 68. 717.

Another line of argument departs from the general issues of TJRM/Amnesties and states that in any case, the ICC is not a creature of the UN and SC decisions should not be imposed on the ICC.¹²³ This means that even if the SC indeed recognizes an AJM and makes a specific request to the ICC not to proceed on the basis that the ICC proceedings would interfere with the SC's peace efforts, the ICC would not be bound by such a decision. The resolution of such an issue would fall back on the principle of *competenz kompetenz* upon which the ICC would determine its right of jurisdiction as stated by the ICTY.¹²⁴

This research, guided by the existing literature summarised above, proposes two possible arguments for invoking TJRM/Amnesties under Article 16. These are:

- 'For reasons of peace and security' argument; and
- 'The meaning of justice' argument.

On the first argument, ('for reasons of peace and security') this research submits a further dichotomy where either the SC's decision for suspension of proceedings from the ICC validates a TJRM/Amnesties by default, and where it validates the TJRM/Amnesties process purposefully and intentionally.

Validation by default would occur where the SC has made a request for deferral to the ICC for reasons of peace and security. The state then proceeds to establish a TJRM in the absence of an ICC prosecution. This argument however does not

¹²³ Ambos, K. *Supra* note 30. 68.

¹²⁴ *Prosecutor v. Tadic*, ICTY, (Jurisdiction) (1996) 35 ILM 35.

make a direct link between Article 16 and the SC mandate because the SC is oblivious to the existence of the TJRM. Its mention is, however useful because it is the suspension of proceedings that enables the TJRM to take effect. Further, the TJRM proceedings exist, without interference to the ICC, for a limited period of 12 months. The TJRM could be inclusive of exclusive of amnesties as would be deemed fit by the State effecting them.

The second part of the dichotomy of the 'for reasons of peace argument' is where the SC specifically and purposefully instructs the ICC not to prosecute due to a TJRM/Amnesty which is in place and upon which the peace and security of a state hinges. In this way, the SC will call for a deferral specifically because there is a delicate non-prosecutorial truth and reconciliation process underway.¹²⁵ This is the most likely avenue for a TJRM to be invoked under Article 16. As far as this assertion goes, it is submitted that not only is this possible but would be legally acceptable, in accordance with the mandate of the SC since it would in any case be an effort to achieve peace. The only challenge here would be that once the 12-month period has expired and the threshold meriting SC intervention is over, nothing would prevent the ICC from commencing criminal proceedings. However, until now, there has been no real, practical situation where the argument suggested here has been applied.

¹²⁵Robinson, D. *Supra* note 12. 484.

As some of the experts above have stated,¹²⁶ the SC must also honour a State's duty to prosecute for international crimes. However, there are times when the SC has specifically recognised and even endorsed processes which included an amnesty. For instance, the SC recognised an amnesty in Haiti stating that that was the only viable solution at the time.¹²⁷ Once again, with regard to the Democratic Republic of Congo (hereafter DRC), the SC supported the Lusaka ceasefire agreement, stating that it represented the most viable basis for the resolution of conflict in the DRC.¹²⁸

The second argument submitted by this research with regard to Article 16 is called the 'the meaning of justice' argument. This argument would hold if two assumptions are made. The first is that peace and justice are strongly interconnected,¹²⁹ and that in order to have peace, justice is imperative. The second assumption is that justice in this regard, refers to the broader concept including non-prosecutorial justice mechanisms.

As far as the first assumption goes, it has been submitted that indeed, the SC plays a decisive role when the requirements of peace and justice seem to be in

¹²⁶ Scharf, M. *Supra* note 43. 77.

¹²⁷ Statement of the President of the Security Council of 15 July 1993, Resolutions and Decisions of the Security Council 1993, 48 SCOR, at 126, UN Doc.S/26633(1993).

¹²⁸ Stahn, C, *Supra* note 68. 195.

¹²⁹ Jallow, B.H. 'Prosecutorial Discretion and International Criminal Justice' (2005) 3 *Journal of International Criminal Justice*. 154.

conflict¹³⁰. The Security Council has previously reinforced the point of peace being realized through judicial action¹³¹.

Regarding the second assumption, of justice being construed in broader terms, SC has previously acknowledged that the establishment of the ICTR would contribute to national reconciliation and the restoration and maintenance of peace and security.¹³²

This study primarily endorses the general consensus, as affirmed by Keller,¹³³ that the basic consideration for the SC's deferral power is when prosecution fatally threatens a peace deal affecting international peace and security. The existence of a TJRM is a secondary concern to the SC.

Failing SC practice, and taking into account the above-mentioned considerations, it has to be conceded here that Article 16 is a very unlikely avenue for dealing with TJRM/Amnesties.

However, this provision tells us something that is germane to the discussion inherent in the research paper. The fact that the duty to prosecute can be abrogated from, even for a limited period, indicates that this duty is not as sacrosanct as it appears, and that certain concessions can be made when, as this provision alludes to, peace and security concerns are at stake. This is indeed true because the ability

¹³⁰ Triffterer, O. *Commentary on the Rome Statute of the International Criminal Court Observers' notes, Article by Article 2nd Edition*, (2008). 598.

¹³¹ UN Security Council Resolution 808 (1993) of 22 Feb 1993 para 9 preamble; Security Council Resolution 827(1993) of 25 May 1993 Preamble para 6.

¹³² Resolution 955(1994) S/RES/955(1994) 8 November 1994.

¹³³ Keller, L.M. *Supra* note 117. 20.

to request for deferral by the SC indicates that there are times when peace efforts need to be given priority over international criminal justice.¹³⁴

3.3 Article 17

Article 17 is particularly important in this research because the issues of how to deal with amnesties were specifically raised during its drafting.¹³⁵

This provision starts by noting Paragraph 10 of the preamble and Article 1, both of which state in part that the ICC shall be complementary to national criminal jurisdictions. This means that the ICC will proceed with prosecutions if the state is unwilling to carry out the proceedings effectively.

The court has read an additional test of admissibility where the state has remained 'inactive'.¹³⁶ This additional test leads this research to conclude that the considerations of willingness and genuineness will only be made if there is 'something' being done by the state.

The different situations which would render a case inadmissible are discussed next, with a note of how the provision would be construed as inclusive of TJRM processes.

Situation 1: Where a case is being investigated or prosecuted by a state which has jurisdiction over it, unless that state is unwilling or genuinely unable to carry out the investigation or prosecution¹³⁷

¹³⁴ Triffterer, O. *Supra* 129. 599.

¹³⁵ Robinson, D. *Supra* note 12.

¹³⁶ Triffterer, O. *Supra* note 129. 16; Schabas *infra* note 154. 174; *Prosecutor V Lubanga*, Case No. ICC-01/04-01/06-8. Decision on the Prosecutor's Application for a Warrant of Arrest, 10 Feb. 2006, para. 29.

¹³⁷ Article 17(1) a Rome Statute.

The leeway for TJRM:

A TJRM would be considered as a barring admissibility before the ICC if the term investigation is construed to be inclusive of TJRM processes. If the conclusion is that a TJRM process can be construed as an investigation process, hence barring admissibility before the ICC, the next consideration would be whether the investigations were conducted willingly, genuinely and ably by the state. The analysis as far as this is concerned shall be on the meaning of ‘investigations’, ‘willingness’ and ‘genuine’.

Situation 2: Where a case has already been investigated by a state with jurisdiction over it, and that state has decided not to prosecute unless the decision resulted from the unwillingness or inability of the state to genuinely prosecute.¹³⁸

Leeway for TJRM: The analysis here will look at the kind of ‘decisions not to prosecute’ that this section refers to. If such include those made by a TJRM (that is after investigations, the TJRM makes a decision not to prosecute by granting amnesty), then indeed this provision can be construed as addressing TJRM/Amnesties.

Situation 3: The person has already been tried for conduct which is the subject of the complaint, and a trial against him is not permitted under Article 20 (3) of the

¹³⁸ Article 17(1) b Rome Statute.

ICC Statute. This situation is discussed elsewhere in this research¹³⁹ and therefore will not be repeated here.

Interpretation

i. Meaning of investigations

There is general consensus from the sum of academic writers consulted in the course of this research, that the term ‘investigations’ in Article 17 is to be interpreted liberally.

These liberal interpretations range from broad constructions such as ‘some form of inquiry’ into the facts¹⁴⁰ to other processes which are acceptable despite being non-judicial,¹⁴¹ non-criminal¹⁴² and non-prosecutorial.¹⁴³

The term investigation is elsewhere delimited by excluding historical fact-finding processes.¹⁴⁴

Other interpretations specify the quality of the process by stating that it must include a systematic,¹⁴⁵ and methodological¹⁴⁶ inquiry into the facts. These facts must establish evidence,¹⁴⁷ and individualize criminal responsibility.¹⁴⁸

¹³⁹ See 3:2:3. *Infra*.

¹⁴⁰ Stahn, C. *Supra* note 68. 710.

¹⁴¹ Ambos, K. *Supra* note 30. 61.

¹⁴² Scharf, M.P. *Supra* note 43. 525.

¹⁴³ Keller, L.M. *Supra* note 117. 23.

¹⁴⁴ Stahn, C. *Supra* note 68. 710.

¹⁴⁵ Aravena, C. C. ‘The admissibility test before the International Criminal Court under Special Consideration of Amnesties and Truth Commissions’ in Kleffner, J. K & Kor, G. (eds) *Complementary Views on Complementarity, Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court*, (2004). 144.

¹⁴⁶ Robinson, D. *Supra* note 12. 500.

¹⁴⁷ Stahn, C. *Supra* note 68. 710; *Ibid*.

¹⁴⁸ Ambos, K. *Supra* note 30. 60; Stahn, C. *Supra* note 68. 710-711.

As regards the outcome, the process must be purposed at making an objective determination in accordance with important criteria¹⁴⁹ with a possibility of criminal proceeding.¹⁵⁰

This research adopts the position that indeed the term investigation under Article 17 is to be construed liberally, to also include the investigations carried out by a TJRM.

ii. Willingness/Unwillingness to investigate

According to the statute, this research observes that willingness or unwillingness is determined in two ways:

- Whether the proceedings (whether or ongoing or completed) are **purposed** at shielding the person from criminal responsibility¹⁵¹.
- Inconsistency to bring a person to justice which can be indicated by unjustified delay or lack of independence/impartiality in the proceedings.¹⁵²

Although this provision does not mention it, the list of hints given in determining unwillingness are not closed and the court is at liberty to include other considerations such as 'the intent to shield'.¹⁵³ This research firstly concurs that

¹⁴⁹ Robinson, D. *Supra* note 12. 500.

¹⁵⁰ Aravena, C.C. *Supra* note 144.

¹⁵¹ Article 17 (2) (a).

¹⁵² Article 17 (2) (b) & (c).

¹⁵³ Robinson, D. *Supra* note 12. 500.

the term ‘proceedings’, that is referred to above is inclusive of both prosecutorial and non-prosecutorial processes.¹⁵⁴

It has been noted that unwillingness would arise where a national justice system is undertaking some steps to disguise and make it look like it is investigating or prosecuting¹⁵⁵. Delay is usually characterized by a prolonged period which is unjustified in the relevant circumstances. Impartiality on the other hand would be indicated by the possibility of bias and influence of the parties in the process. In assessing delays, it has been stated, that such is shown when the proceedings (both formal and informal) seem to take longer than other similar proceedings in the state concerned¹⁵⁶.

iii. *Meaning of ‘shielding the person from criminal responsibility’ and ‘steps inconsistent with bringing the person to justice’*

Aravena notes that the element of ‘shielding from criminal prosecution’ must be manifested by the ongoing prosecutions, the motive and the overall intent of the state and not just that of an implementing organ¹⁵⁷.

Scharf brings in a differing opinion and states that the phrase ‘bringing the person to justice’ is likely to require criminal proceedings.¹⁵⁸ Ambos is of the opinion that “purpose” in ‘purpose of shielding a person from criminal responsibility’

¹⁵⁴ Aravena, C.C. *Supra* note 144. 123.

¹⁵⁵ Schabas, W. *An Introduction to the International Criminal Court* (2001). 67.

¹⁵⁶ *Ibid.*

¹⁵⁷ Aravena, C.C. *Supra* note 144. 123.

¹⁵⁸ Scharf, M.P. *Supra* note 43, 525.

indicates a subjective interpretation which is aimed at protecting the person concerned from criminal justice.¹⁵⁹ According to him therefore shielding one from criminal responsibility is an element of protecting a person from criminal justice.

Stahn suggests that proceedings are intended to shield someone from criminal responsibility if they exempt certain groups of perpetrators or members of governmental forces from prosecution.¹⁶⁰ It has been suggested, a suggestion that this research paper agrees with, that an effective TJRM process cannot be said to be aimed at shielding persons from criminal prosecution since its primary purpose is reconciliation and not to bend the rules of criminal justice for the sake of impunity.¹⁶¹ It has, however, been suggested that if the notion ‘for the purpose of shielding ...’ is interpreted in light of both the aim and effect, then there is less flexibility as to whether TJRM/Amnesties are intended to shield one from criminal responsibility.¹⁶² This means that whatever the original intent was, the eventual effect is that the person will not be prosecuted.

As far as ‘intent to bring the person concerned to justice’ is concerned, Stahn remarks that the interpretation depends on the meaning of the term ‘justice’. If the term is strictly defined as criminal justice, then there is very little leeway for the recognition of quasi-judicial proceedings which do not provide for criminal

¹⁵⁹ Ambos, K. *Supra* note 30. 62.

¹⁶⁰ Stahn, C. *Supra* note 68. 714.

¹⁶¹ Stahn, C. *Supra* note 68. 715.

¹⁶² Stahn, C. *Supra* note 68. 725.

sanctions.¹⁶³ Another view states that a State is said to be shielding one from justice if the state is fulfilling the letter but not the spirit of the statute, by instituting sham proceedings to shield the person from criminal responsibility.¹⁶⁴

This research submits that proceedings would be purposed at shielding one from criminal responsibility, if there are indications that indeed that was the *raison d'être* of the proceedings. Further, the TJRM's actual objective must come out to be secondary as indicated by, for instance, laxity in fulfilling its restorative justice aspect.



iv. Decision not to proceed with prosecution

Just like many other points under consideration, there is not yet any case law regarding this aspect of Article 17.¹⁶⁵ The acceptability of a decision not to proceed with prosecution as a bar to prosecution is hinged on whether the decision was a deliberate attempt to shield a person from criminal responsibility, which phrase has been analyzed above.

The decision not to prosecute must not be as a result of where a state omitted to prosecute and consequently granted a *de facto* blanket amnesty¹⁶⁶. The decisions must be made on a case by case basis meeting any conditions set forth by Article

¹⁶³ Stahn, C. *Supra* note 68. 716.

¹⁶⁴ Trifterer, O. *Supra* note 129. 623.

¹⁶⁵ Trifterer, O. *Supra* note 129. 617.

¹⁶⁶ Ambos, K. *Supra* note 30. 39.

17(2) (3)¹⁶⁷. Further, a consideration must be made on whether the decision was made as a result of the merits of a case or whether other factors played a role.¹⁶⁸

v. *Meaning of genuinely*

According to the Oxford Dictionary (which was consulted during its drafting), the word genuinely means ‘having the supposed character, not sham or feigned’. The term “genuinely” replaced the previous term ‘ineffective’ as had been suggested by the International Law Commission.¹⁶⁹ The word genuinely was taken so as to include situations where the Court would take into account actions taken by the state in good faith but which proved insufficient for lack of resources, or weakness, or structures, or personnel.¹⁷⁰

Some writers have stated that genuinely means that the investigations and prosecutions are conducted in a manner consistent with the aims of the Rome Statute.¹⁷¹ In the context of investigations or prosecutions, lack of genuineness connotes a mock proceeding.¹⁷²

Ambos comments that the term “genuineness” connotes good faith and seriousness on the part of the state concerned with regard to investigations and prosecution. He

¹⁶⁷ Aravena, C.C. *Supra* note 144. 136.

¹⁶⁸ *Ibid.*

¹⁶⁹ Greppi, E. ‘Inability to Investigate and Prosecute under Article 17’ in Mauro Politi & Federica Gioia (eds.). (2008) *The International Criminal Court and National jurisdictions*. 65.

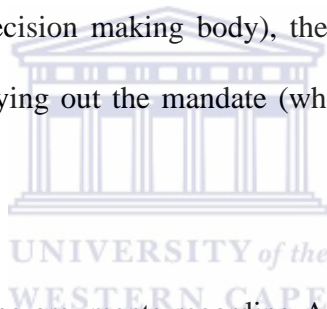
¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.* 160.

¹⁷² Aravena, C.C. *Supra* note 144. 121.

argues that a state which sets up a TJRM with the ultimate goal of peace in mind would be considered to be genuinely unwilling to prosecute¹⁷³.

Robinson also gives some guidelines on what constitutes genuineness. He states that the circumstances that must be taken into consideration include the nature and credibility of the Commission and the extent to which any departures from prosecution is justified by necessity. Some of the hall marks that the ICC would look at in making this determination include: The quasi-judicial character of the proceedings (such as whether the TJRM body requires the person concerned to appear before the decision making body), the independence of the body and its effectiveness in carrying out the mandate (whether it has the requisite resources, and powers).¹⁷⁴



Having made all these arguments regarding Article 17, this research submits that TJRM are indeed addressed under this provision but only qualify as barring admissibility before the ICC if the preconditions discussed above are met. This research further concurs with the tripartite test suggested by Stahn, who suggests that in order that TJRM be recognized as a bar to admissibility before the ICC, there must have been an investigation carried out, the state concerned must have adopted a decision not to prosecute and the decision must not have resulted from the state's unwillingness or inability to prosecute.¹⁷⁵ It has been suggested, which suggestion this study endorses, that the statutory language of Article 17 is

¹⁷³ Ambos, K. *Supra* note 30. 63.

¹⁷⁴ Robinson, D. *Supra* note 12. 500.

¹⁷⁵ Stahn, C. *Supra* note 68. 710.

sufficiently ambiguous to allow a determination allowing deferral of the case to the domestic justice authorities.¹⁷⁶

Further, this research observes, that once States have started a process that can qualify as ‘investigations’ according to the analysis above, then the ICC ought to give that state a chance to pursue it, because in any case, the ICC still has a chance to intervene based on its power to carry out periodic reviews of the investigations.¹⁷⁷

Article 20 (*ne bis in idem*).

The principle of *ne bis in idem* precludes persons from being tried or punished twice for the same crime.¹⁷⁸ This provision states that no person who has been tried by another court for conduct proscribed under the Rome Statute shall be tried by the ICC for the same conduct unless the proceedings in the other court:

- were for the purpose of shielding him/her from criminal responsibility; or
 - were not conducted independently or impartially in accordance with the principles of due process recognized by international law; or
 - were conducted in a manner which, in the circumstances, was inconsistent with bringing the person concerned to justice.

The leeway for TJRM: This provision would be said to include TJRM if the term ‘trial’ also refers to TJRM/Amnesties.

If the answer be in the affirmative, the subsequent questions will be:

¹⁷⁶ Keller, L.M. *Supra* note 117. 21.

¹⁷⁷ Article 18(5) Rome Statute.

¹⁷⁸ Bassiouni, C.M. *The Legislative History of the International Criminal Court* 1, (2005). 160.

- a. what is the definitive criteria for determining whether or not the process of a TJRM/amnesties was or was not for the purpose of shielding the person concerned from criminal responsibility; and
- b. whether that process was conducted according to international standards.

Scharf states that an accused person can rely on this article and argue that his or her confession before a truth commission amounts to having been tried and convicted for the same offence s/he is charged with under the ICC Statute. He however notes that this is likely to give rise to two problems: Firstly, the Statute refers to 'trial by another court' and the term court is not inclusive of a truth commission; and the fact that Article 20 is not applicable to proceedings inconsistent with an intent to bring the person concerned to justice.¹⁷⁹

Keller also disputes the applicability of Article 20, stating that it is unlikely that the Court will regard truth commissions and such similar procedures as qualifying to be courts according to the Rome Statute.¹⁸⁰ She further maintains that even if the interpretation would be liberal enough to include TJRM within the meaning of the term 'court', there would still be a second hurdle to clear in which an analysis will have to be made of whether the investigations were conducted impartially or

¹⁷⁹ Scharf, M.P. *Supra* note 43. 526.

¹⁸⁰ Keller, M.L. *Supra* note 117. 26.

independently¹⁸¹. Keller also asserts that the TJRM may not have the shielding effect as its priority, but that this it could be its eventual consequence¹⁸². She continues her argument by contending that the TJRM will be challenged to meet the requirements of ‘due process’ and of ‘bringing the person to justice’¹⁸³. She, however, concludes that the language of Article 20 is malleable and that the Court can still apply it to a TJRM.¹⁸⁴

The concept of *ne bis in idem* from comparative, European and International law indicates a specific reference to criminal proceedings.¹⁸⁵ With respect to article 20, article 57 of the International law Commission (hereafter ILC) draft and the discussions during the Prepcom indicated a reference to actual prosecutions.¹⁸⁶ The International Criminal Tribunal for the former Yugoslavia (hereafter ICTY) has ruled that there can be no violation of *ne bis in idem*, under any known formulation of the principle, unless the accused has already been tried.¹⁸⁷ The language of the Provision refers to a situation where a person has either been ‘convicted or acquitted’ by the ‘court’.¹⁸⁸ Truth and Reconciliation Commissions, even if organised as quasi judicial bodies, do not qualify as courts in the sense of Article 20.¹⁸⁹

¹⁸¹ *Ibid*, 27.

¹⁸² *Ibid*.

¹⁸³ *Ibid*, 28.

¹⁸⁴ *Ibid*.

¹⁸⁵ Triffterer, O. *Supra* note 129. 673.

¹⁸⁶ Lee, S.R. *Supra* note 100. 57-8.

¹⁸⁷ *Prosecutor v Tadic*, Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of *Non bis in idem*, Trial Chamber, 14 Nov. 1995, para. 24.

¹⁸⁸ Article 20(1) Rome Statute.

¹⁸⁹ Triffterer, O. *Supra* note 129. 685.

This research makes a conclusion that non-prosecutorial mechanisms do not qualify to be called ‘trials’¹⁹⁰ and further that this provision only refers to judicial decisions.¹⁹¹

Article 53

Article 53 speaks of two levels of prosecutorial discretion:

Level one: The discretion to commence an investigation once the Prosecutor has received all the relevant information – Article (53) (1). When making this decision, Prosecutor must consider, *inter alia*, the following:

- The admissibility of the case under Article 17;
- Whether, taking into account of the gravity of the crime and the interests of the victims, there are grounds to believe that the investigation would not serve the interests of justice.

Level two: The discretion to proceed with the prosecution, having carried out the investigation (53(2)). When making this decision, the Prosecutor must make the following considerations in part:

- The admissibility of the case under Article 17; and
- Based on all the circumstances of the case, including the gravity of the crime and the age or infirmity of the perpetrator, a prosecution would not serve the interests of justice.

¹⁹⁰Robinson, D. *Supra* note 12. 484.

¹⁹¹Aravena, C.C. *Supra* note 144. 134.

These considerations include only those that most closely pertain to the main subject matter of our discussion.

The ambiguity:

The use of the terms ‘taking into account’ under Article 53(1) and ‘all circumstances’ including ...’ under Article 53(2) indicate a lack of fullness and exhaustiveness in the list of the considerations that inform the exercise of Prosecutorial discretion. This means that other similar elements may be applied so long as they bear general resemblance to those in those in the non-exhaustive list.

The other ambiguity crops up when one looks at the rest of Statute in so far as it concerns the term ‘interests of justice.’ The Preamble and Article 1 seem to preach different gospels compared to that of Article 53. The Preamble and Article 1 state that the primary priority of the ICC is criminal prosecutions, while Article 53 on the other hand, implies that there are other considerations that may feed into the decision of whether or not to undertake investigations and to institute prosecutions subsequently.

In as much as the overall philosophy of criminal prosecutions is clear in many parts of the Statute, it is submitted that there is lack of clarity as far as other articles contemplate considerations that may lower criminal prosecutions from being a first priority. Indeed, this appearance of mixed intentions has been labelled as schizophrenic in that the Rome Statute Preamble espouses an obligation to

prosecute while other articles indicate permissiveness in the applicability of the amnesty provision.¹⁹²

In a move indicative of the lack of clarity of the term 'interests of justice' under article 53, the ICC's Office of the Prosecutor, in the period between December 2004 and April 2005, asked a group of leading non-governmental organizations (NGOs) to submit interpretations of the "interests of justice" provision.¹⁹³ The purpose of this so that the ICC could hear from the NGOs on what they thought of the issues of security and stability in relation to the prosecutorial discretion of the ICC Prosecutor.¹⁹⁴

The discussion on Article 53 can be narrowed down to considering whether the phrase '**interests of justice**' can be construed to be inclusive of TJRM/Amnesties. The question that is posed is whether 'interests' are retributive criminal justice interests or whether they also include broader concepts of justice, including those of restorative justice.¹⁹⁵

Authors have expressed various thoughts, which will be analyzed prior to drawing some conclusions.

¹⁹² Scharf, M.P. *Supra* note 43, 522.

¹⁹³ <http://www.iccnw.org/?mod=interestofjustice&idudctp=21&show=all#21> accessed on 15th August 2009

¹⁹⁴ *Ibid*

¹⁹⁵ *Ibid.*

Firstly, it should be noted that out of all the four provisions that this research has looked at, there is general concurrence that Article 53 is the proper avenue for addressing TJRM/Amnesties.¹⁹⁶

Ambos makes an argument, stating that there could be processes which would be admissible under Article 17 but which would only be saved from the ICC jurisdiction by the grace of Article 53. He gives an example where it is obvious from the start that the investigations of a TJRM will not lead to prosecutions since they are precluded by an amnesty. These investigations would obviously not correspond to the requirement under Article 17(1) b, which is discussed above, as there is no option of considering prosecutions anyway¹⁹⁷. He states that both Article 53(1) c and 53(2) c require the Prosecutor to consider legal criteria mentioned ‘intrinsically and extrinsically’ in the provisions. These criteria are the gravity of the crime, the interests of the victims, the age or infirmity of the alleged offender, and his role in the perpetration of the crime. In addition, the Prosecutor has to take into consideration the legality of amnesties under international law.¹⁹⁸

Robinson, concludes that the consideration of ‘interests of justice’ were meant to be inclusive of broader concepts of justice, beyond the traditional retributive mechanism, in that Article 53 exemplifies the considerations upon which the Prosecutor exercises his discretion, such as the interests of the victims and the gravity of the crime.¹⁹⁹

¹⁹⁶ Kourabas, M. *Supra* note 20. 61; Scharf, M.P. *Supra* note 43. 524.

¹⁹⁷ Ambos, K. *Supra* note 30. 70.

¹⁹⁸ Ambos, K. *Supra* note 40. 71.

¹⁹⁹ Robinson D. *Supra* note 12. 488.

Abigail is of the view that the Prosecutor's discretion to regard TJRM/Amnesties under Article 53 is legally acceptable and is in fact warranted by the state of international law as far as CAH and war crimes are concerned whose obligation to prosecute is vague.²⁰⁰ She thereafter concludes that Article 53 is the most suitable provision to consider the applicability of TJRM/Amnesties.²⁰¹ According to this writer therefore, TJRM are applicable under Article 53, as long as they relate to the crimes that do not carry an international obligation to prosecute²⁰².

As far as an interpretation in line with the VCLT is concerned, this research fully agrees with the analysis of Koroubas and Ambos.

Koroubas starts by looking at the ordinary meaning of the phrase 'interests of justice'. According to Webster's Dictionary 'justice' means "the administration of law; especially: the establishment or determination of rights according to the rules of law or equity."²⁰³ Koroubas then analyses the meaning of 'interests of justice' in accordance with the objects and purposes of the Statute as is mandated by international law.²⁰⁴ He makes an argument that indeed the object that is expressed in the Preamble is one of ensuring criminal prosecution.

²⁰⁰ Moy, A. 'The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity' (2006) 19 *Harvard Human Rights Journal*. 272.

²⁰¹ *Ibid.*

²⁰² *Ibid.*

²⁰³ Kourabas, M. *Supra* note 20. 71.

²⁰⁴ *Ibid.*

Ambos states that 'justice' is not limited to criminal justice but encompasses alternative forms of justice as well. He continues to state that justice entails an overall assessment of the situation, taking into account peace and reconciliation as the ultimate goals of every process of transition. In arriving at this assessment, he refers to the approaches adopted by several writers who maintain that the considerations must be made on a case by case basis in deciding whether the formal initiation of an investigation would jeopardize higher interests in the broad sense.²⁰⁵

From the outset, this research paper mentions the granting of a rather 'extra' determinative criterion to the Prosecutor when deciding whether or not to undertake investigations or Prosecutions (over and above the one in Article 17). This is shown in that Article 17 is included in Article 53 as 'one of the bases' upon which the Prosecutor may determine the admissibility of a case.²⁰⁶ Ambos is also of the same understanding, and sees this as the granting of additional discretion to the Prosecutor.²⁰⁷

In view of the generality of the views from the hand of academic writers above, this research finds Article 53 to be the most suitable avenue for considering TJRM/Amnesties.

²⁰⁵ *Ibid.*

²⁰⁶ Article 53(1) b Rome Statute.

²⁰⁷ Ambos, K. *Supra* note 30. 69.

b.

Chapter Four

Conclusion and Recommendations

a. General Remarks

It is observed, which observation is agreed with here, that International law does indeed embrace a dichotomy which on the one hand, recognizes that war crimes, CAH and genocide invoke a duty to prosecute and that perpetrators must not escape with impunity, and on the other hand recognizes the plight of societies in transition.²⁰⁸ ICL cannot completely dismiss amnesties, as they are sometimes essential to facilitate national reconciliation.²⁰⁹ An example of such a situation is where a civil war will only be ended if no prosecutions are carried out.²¹⁰

As far as amnesties are concerned, the Rome Statute allows for their application where they are consistent with justice.²¹¹ The existence of prosecutorial discretion gives a practical doorway for the appreciation of this dichotomy.²¹²

This research submits that there are two clear avenues through which TJRM can be considered under the Rome Statute. These are Articles 17 and 53, with Article 53 being the more preferred option. A conclusion one may draw, even though it might be potentially risky one, is that the body of the Rome Statute *does* allow for TJRM which have met certain qualifications, as the discussed above.

²⁰⁸ Goldstone, J.R. & Fritz, N. *Supra* note 89. 655.

²⁰⁹ Werle, G. *Supra* note 35. 77.

²¹⁰ *Ibid.*

²¹¹ Goldstone, J.R. & Fritz, N. *Supra* note 89. 655.

²¹² *Ibid.* 656.

b. Application: The Republic of Kenya

i. Background

The Kenyan situation got attention from the International Community following the 2007 post election violence that left over 1,100 dead and over 650,000 internally displaced.²¹³ The Commission of inquiry into the Post Election Violence (hereafter CIPEV) was established among other measures to investigate the causes and the nature of the violence. The report of the commission was released on October 15th 2008.²¹⁴

According to the report, only minor offenders would be granted amnesty while the rest (the most responsible for Genocide and Crimes against Humanity) would be prosecuted under a Special Tribunal that was recommended to be set up within 60 days of submitting the report or else a list containing names of alleged perpetrators would be handed to the ICC.

On December 17th 2008 the Agreement to establish the tribunal was signed, but on February 2009, the Constitutional amendment bill that would have established the Tribunal was defeated. A deadline of September 30th 2009 for the creation of the tribunal was given by the ICC Prosecutor. At the time of completing this paper (20th October 2009) no such tribunal has been established.

²¹³ Report of the Commission of Inquiry into the Post-Election Violence in Kenya, 6, available at http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf. (accessed 20th October, 2009).

²¹⁴ *Ibid*

After Kenya missed the 30th September deadline to set up a national tribunal to address the post-election violence, the Prosecutor announced that the ICC would prosecute those who are most responsible while national mechanisms would take care of other perpetrators²¹⁵.

Previously, the ICC Prosecutor had noted that the Kenyan government was committed to making a state referral by June 2010²¹⁶. However in a meeting held, the President and the Prime Minister reportedly stated that they will not formally write to the ICC Prosecutor referring the Kenyan situation to the ICC for investigation and possible prosecution²¹⁷.

The steps that Kenya has taken so far, besides CIPEV, include the Truth, Justice and Reconciliation Commission which has been established under the Truth Justice and Reconciliation Act No. 84 of 2008²¹⁸. The TJRC has investigative powers²¹⁹, powers to recommend prosecutions after the investigations have been carried out,²²⁰ and the power to recommend amnesties²²¹ with the exception of genocide, crimes against

²¹⁵ <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/kenya/pr456?lan=en-GB>; <http://edition.cnn.com/2009/WORLD/africa/09/30/kenya.election.icc/index.html>. (accessed on 20th October 2009).

²¹⁶ <http://www.icc-cpi.int/NR/exeres/2E58546F-0337-479F-9EC5-DE2F489EBFDC.htm>(accessed on 20th October 2009).

²¹⁷ Godfrey Musila, 'Why Ocampo will have to act on his own'. The Standard Published on available on 14/10/2009 <http://www.standardmedia.co.ke/commentaries/InsidePage.php?id=1144026328&cid=15>

²¹⁸ http://www.kenyalaw.org/kenyalaw/klr_app/frames.php

²¹⁹ Art 7 Truth Justice and Reconciliation Act No. 84 of 2008, Laws of Kenya.

²²⁰ Art 5(d) Truth Justice and Reconciliation Act No. 84 of 2008 Laws of Kenya.

²²¹ Art 5(f) Truth Justice and Reconciliation Act No. 84 of 2008 Laws of Kenya.

humanity or grave violation of human rights.²²² The TJRC has however not started carrying out its functions.

Besides, the steps that have been taken, certain elements cast doubt on the government's willingness to genuinely prosecute as would be required under Art. 17 of the Rome Statute. Some of these include the delay of establishing the Tribunal since the signing of the Agreement, over and above the failure to meet the proposed 30th September deadline, the allegations that a number of those named as suspects to face prosecution are prominent persons and cabinet ministers in the current government, the defeat of the bill that was to establish the tribunal and the fact that despite Kenya ratifying the ICC statute in 2005 it only entered into force on 1st January 2009.

However, as stated in the discussions under Article 17, in order to make a determination of unwillingness, an assessment of the overall 'purpose' and 'motive' of the government must be made. The admissibility criteria must consider whether there are ongoing effective proceedings which would make the case inadmissible. One clear conclusion can however be made, that Kenya is far from being considered 'inactive' as far as the post-election violence is concerned.

As far as the Kenyan TJRC is concerned, an analysis must be made on whether this is a deliberate move intended to 'shield' the perpetrators (in accordance with the requirement of genuineness discussed under article 17).

²²² Art 34 Truth Justice and Reconciliation Act No. 84 of 2008 Laws of Kenya.

Due to the timing of this paper and the limited available information, any conclusions as to whether a clear situation of admissibility or inadmissibility has been made would be premature. It is however hoped that any steps taken, either by the international community or by the national authorities will be both responsive to the need to fight impunity as well the need for national reconciliation for age old conflicts.

2.1 Recommendations

This research suggests that the Prosecutor must develop a Prosecutorial strategy in exercising his discretion under Article 53. His discretion, this research humbly submits, should be guided by applying a contextual approach, addressing each particular case by reference to all relevant factors, including political and social factors.

With specific reference to TJRM, the ICC must consider giving guidelines on what must be borne in mind when considering whether a specific TJRM will be considered in place of criminal prosecutions before the ICC.

List of References

1. Primary Sources

a. International Conventions

Convention on the Non-applicability of Statutory limitations to war crimes and crimes against humanity, opened for signature on Nov. 26, 1998, 754, U.N.T.S. 73, G.A. Res. 2391, 23 U.N. GAOR Supp. (No. 18).

Convention on the Prevention and Punishment of the Crime of Genocide, Adopted by Resolution 260 (III) A of the U.N. GA, 9.12.1948, <www.preventgenocide.org/> (accessed on 20th October 2009).



Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *adopted* Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 3.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, *adopted* Aug. 12, 1949, 6 U.S.T. 3217, T.L.A.S. No. 3363, 75 U.N.T.S. 85.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *adopted* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

Geneva Convention Relative to the Treatment of Prisoners of War, *adopted* Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.

Rome Statute of the International Criminal Court, *adopted* Jul. 17 1998, U.N. Doc. A/CONF.183/.

Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (hereafter VCLT).

International Convention on Civil and political Rights, *Adopted* Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368 (1967).

European Convention for the Protection of Human Rights and Fundamental Freedoms, *adopted* Nov. 4, 1950, 213 U.N.T.S. 221, European. T.S. No. 5 (*entered into force* Sept. 3, 1953).

Inter-American Convention to Prevent and Punish Torture, *adopted* Dec. 9, 1985, OEA/ser.A./42 (1986), 67 O.A.S.T.S., *reprinted in* 25 I.L.M. 519 (1986) (*entered into force* 1987).

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, *adopted* Jun. 8, 1977, 1125 U.N.T.S (1977).

Rome Statute of the International Criminal Court, *adopted* Jul. 17 1998, U.N. Doc. A/CONF.183/9 (hereafter Rome Statute).

b. National Legislation

Truth Justice and Reconciliation Act No. 84 of 2008, Laws of Kenya.

c. National Reports

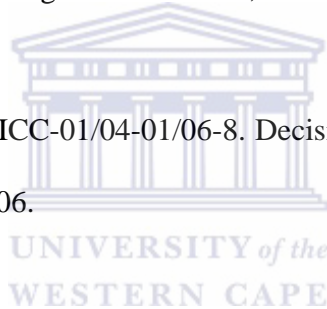
Report of the Commission of Inquiry into the Post-Election Violence in Kenya.

d. International Case-Law

Almonacid Arellano et al. vs. Chile, 26 September 2000, Judgement, Series C No. 154. para. 110.

Barbie, 78 I.L.R. 132, 135 (1988) (Judgment of Jan. 26, 1984, Cass. Crim., Fr.).

Prosecutor V Lubanga, Case No. ICC-01/04-01/06-8. Decision on the Prosecutor's Application for a Warrant of Arrest, 10 Feb. 2006.



Prosecutor v Tadic, Case No. IT-94-1-T, Decision on the Defence Motion on the Principle of *non bis in idem*, Trial Chamber, 14 Nov. 1995.

Prosecutor v. Anto Furundzija, ICTY, Case No. IT-95-17/1-7 (10 December 1998).

Prosecutor v. Kallon Kamara, SCSL (Appeals Chamber) Decision of 13 March 2004, paras 67 et seq.

Prosecutor v. Tadic, ICTY, (Jurisdiction) (1996) 35 ILM 35.

Velásquez-Rodríguez, 29 July 1988, Judgement, para. 162 et seq., 1996 Annual Report of the Inter-American Court of Human Rights [209], OEA/Ser.L/V/III.35, doc. 4 (1997).

2. Secondary Sources

a. Books

Aravena, C. C. 'The admissibility test before the International Criminal Court under Special Consideration of Amnesties and Truth Commissions' in Kleffner, J. K & Kor, G. (eds.) *Complementary Views on Complementarity, Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court*, Amsterdam, T.M.C Asser Press. (2004).

Bassiouni, C.M. *The Legislative History of the International Criminal Court*, 1, New York, International Publishers, (2005).



Greppi, E. 'Inability to Investigate and Prosecute under Article 17' in Mauro Politi & Federica Gioia (eds.). *The International Criminal Court and National jurisdictions*, (2008).

Hayner, P. B. *Unspeakable Truths: Facing the Challenge of Truth Commissions* London, Routledge, (2001).

Henckaerts, J. and Doswald-Beck, L. *Customary International Law*, 1, Cambridge University Press, Cambridge, (2005).

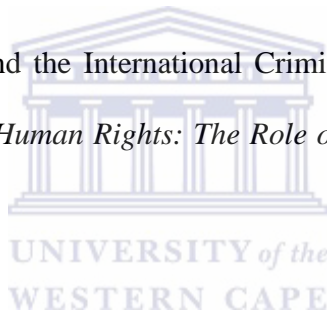
Holmes, 'The Principle of Complementarity', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, (The Hague, London, Boston), Kluwer, (1999).

Huyse L., "Justice", in *Reconciliation after Violent Conflict: A Handbook*, Bloomfield, D, Barnes, T, and Huyse, L (eds), Stockholm, International Idea. (2003).

Kleffner, J. K & Kor, G. (eds.) *Complementary Views on Complementarity, Proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court*, (2004).

Minow, Martha. "The Hope for Healing: What Can Truth Commissions Do?" In *Truth V. Justice: The Morality of Truth Commissions*, edited by Robert I. Rotberg and Dennis Thompson, Princeton and Oxford: Princeton University Press, 2000.

Naomi Roht-Arriaza, 'Amnesty and the International Criminal Court', in Dinah Shelton (ed.), *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*. Transnational Publishers, (2009).



Politi, M. & Nesi.G. (eds.) *The International Criminal Court and the Crime of Aggression*, Ashgate, England. (2005).

Politi, M. & Nesi.G. (eds.) *The International Criminal Court and the Crime of Aggression*, England, Ashgate. (2005).

Robert I. Rotberg and Dennis Thompson (eds.) *Truth V. Justice: The Morality of Truth Commissions*, Oxford: Princeton University Press, (2000).

Roth-Arriaza, N. 'The New Landscape of Transitional Justice', in Roth-Arriaza/Mariezcurrena (eds.), *Transitional Justice in the twenty-First Century*. Cambridge, Cambridge University Press, (2006).

Schabas, W. *An Introduction to the International Criminal Court*, Cambridge, Cambridge University Press. (2001).

Steven, R.R and Jason, S.A. 'Accountability for Human Rights Atrocities in International law, beyond the Nuremberg Legacy' New York, Oxford University Press, (1997).

Triffterer, O. *Commentary on the Rome Statute of the International Criminal Court Observers' notes, Article by Article 2nd Edition*, C.H.Beck.Hart.Nomos, (2008).

Werle, G. *Principles of International Criminal Law*, T.M.C Asser Press, (The Netherlands). (2009)

b. Articles

Balint, J.L. 'The Place of Law in Addressing Internal Regime Conflicts' (1996) *Law & Contemporary Problems*.103.

Bassiouni, C. M. 'International Crimes, *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 *Law & Contemporary Problems*. 63.

Clark, T.H. 'The Prosecutor of the International Criminal Court, Amnesties and the Interests of Justice: Striking a Delicate Balance' (2005) 4 *Washington University Global Studies Law Review*. 389.

Dugard, J. 'Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International law*.

Gavron, J. 'Amnesties in the light of Developments in International law and the Establishment of the International Criminal Court' (2002) 51 *International and Comparative Law Quarterly*. 91.

Goldstone, J.R. & Fritz, N. "'In the Interests of Justice' and the Independent Referral: The ICC Prosecutor's Unprecedented Powers' (2000) 13 *Leiden Journal of International law*. 655.

Jallow, B.H. 'Prosecutorial Discretion and International Criminal Justice' (2005) 3 *Journal of International Criminal Justice*. 145.

Keller, M. L. 'Achieving Peace with Justice: The ICC and the Ugandan Alternative Justice Mechanisms' (2008) 23 *Connecticut Journal of International law*. 209.

Keller, M.L. 'The False Dichotomy of Peace versus Justice and the International Criminal Court' (2008) 3 1 *Hague Justice Journal*. 12.

Kourabas, M. 'A Vienna Convention Interpretation of the 'Interests of Justice' Provision of the Rome Statute, The Legality of Domestic Amnesty Agreement, and the Situation in Northern Uganda: A great qualitative step forward' or a Normative Retreat?' (2007) 14 *UC Davis Journal of International Law and Policy*. 59.

Majzub, D. 'Peace or Justice? Amnesties and the International Criminal Court', (2002) 3 *Melbourne Journal of International law*. 247.

Morris, H. M. 'International guidelines facilitating accountability' (1996) 59 *Law and Contemporary Problems*. 33.

Moy, A. 'The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity' (2006) 19 *Havard Human Rights Journal*. 267.

Naqvi, Y. 'Amnesty for War Crimes: Defining the Limits of International Recognition', (2003) 85 *International Review of the Red Cross*. 583.

Olson, M. L. 'Provoking the dragon on the patio, matters of transitional justice: Penal Repression vs. Amnesties' (2006) 88, *International Review of the Red Cross*. 275.

Orentlicher D. "'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency', (2007) 1 *The International Journal of Transitional Justice*. 10.

Orentlicher, D.F. 'Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime' (1990-199) 100 *Yale Law Journal*. 2537.

Oyelade, O.S, 'Conflict Resolution and Human Rights in Traditional African Society' (2005) 45 *2 Indian Journal of Human Rights*. 201.

Dugard, J. 'Dealing with Crimes of a Past Regime. Is Amnesty Still an Option?' (1999) 12 *Leiden Journal of International Law*.

Scharf M. P. 'The Amnesty exception to the Jurisdiction of the International Criminal Court.' (1999) 32 *Cornell International law Journal*. 507.

Stahn, C. 'Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative guidelines for the International Criminal Court' (2005) 3 *Journal of International Criminal Justice*. 695.

c. United Nations Documents

Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons guilty of war crimes and crimes against humanity. G.A. Res. 3074, 28 U.N.GAOR Supp. (No 30) at 79, U.N. Doc. AI 9030 (1973).

Security Council Resolution 827(1993) of 25 May 1993 Preamble para 6. Resolution 955(1994) S/RES/955(1994) 8 November 1994.

Statement of the President of the Security Council of 15 July 1993, Resolutions and Decisions of the Security Council 1993, 48 SCOR, at 126, UN Doc.S/26633(1993).

UN Security Council Resolution 808 (1993) of 22 Feb 1993 para 9 preamble; Security Council Resolution 827(1993) of 25 May 1993.

UN Security Council Resolution 808 (1993) of 22 Feb 1993.

d. Official Papers

Amnesty International, Transitional Justice and Reparation: Establishing an effective Commission, 11 June 2007, AI Index: POL 30/009/2007).

Human Rights Watch, Special Issue: Accountability for past Human Rights Abuses 2 Dec. 1989.

U. S. Delegation Draft (Rev.) to the ICC Preparatory Committee (August 1997).

e. Interviews

Scharf, M. interview with President Phillip Kirsch of the ICC in Strasbourg, France, 19 November 1998) on the issue of amnesties in the Rome Statute.

f. Lecture

Werle, G. 'Without Truth, No Reconciliation. The South African *Rechtsstaat* and the Apartheid Past' Lecture delivered on 18th May 1995 at the Law Faculty of Humboldt University of Berlin.

g. Internet Resources

<http://www.iccnw.org/?mod=interestofjustice&idudctp=21&show=all#21>.

<http://www.icc->

[cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/kenya/pr456?lan=en-](http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/kenya/pr456?lan=en-)

[GB;http://edition.cnn.com/2009/WORLD/africa/09/30/kenya.election.icc/index.html](http://edition.cnn.com/2009/WORLD/africa/09/30/kenya.election.icc/index.html).

<http://www.amnesty.org/en/library/asset/POL30/009/2007/en/7988f852-d38a-11dd-a329-2f46302a8cc6/pol300092007en.html>.

<http://www.icc-cpi.int/NR/exeres/2E58546F-0337-479F-9EC5-DE2F489EBFDC.htm>

http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf.

2009<http://www.standardmedia.co.ke/commentaries/InsidePage.php?id=1144026328&cid=15>

h. Newspapers

Standard Newspaper, Kenya, 14/10/2009.

i. Unpublished Dissertation

Bore, L. 'International Justice Mechanisms: An analysis of Retributive versus Restorative mechanisms' (2006) (Unpublished), *Dissertation, University of Nairobi* (In file with Author).

