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THE ROME STATUTE, SOME RESERVATIONS CONCERNING AMNESTIES, AND A DISTRIBUTIVE PROBLEM

DWIGHT G. NEWMAN*

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INTRODUCTION

The architects of institutions must pay some attention to history, and democratic transitions in this century have generally occurred in circumstances that did not permit the criminal trial of outgoing leaders. It is a difficult task to persuade a military junta or putsch leader to leave power voluntarily.¹

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1. Ruth Wedgwood, *The International Criminal Court: An American View*, 10

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.²

None of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia.³

International criminal law is a philosophically conflicted area.⁴ These philosophical conflicts often seem to derive from international criminal law's dual origins in international humanitarian law and criminal law—two disciplines with competing philosophies—but we may perceive additional conflicts as well.⁵ International criminal law, not unlike domestic criminal law, raises other philosophical tensions,

EUR. J. INT'L L. 93, 95 (1999).

2. Rome Statute of the International Criminal Court, July 17, 1998, pmbl., 2187 U.N.T.S. 90, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute].

3. Rome Statute, *supra* note 2, Declaration of Colombia, para. 1 (Aug. 5, 2002).

4. See, e.g., GRAEME SIMPSON, 'Tell No Lies, Claim No Easy Victories: A Brief Evaluation of South Africa's Truth and Reconciliation Commission, in COMMISSIONING THE PAST: UNDERSTANDING SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION 220 (Deborah Posel & Graeme Simpson eds., 2002) [hereinafter COMMISSIONING THE PAST] (providing as an example of the difficult relationships between peace and justice, the efforts of the Truth and Reconciliation Commission to address the tensions between, on the one hand, discovering historical truth, obtaining national healing, and achieving peace and, on the other, prosecuting criminal offenders, punishing wrongs they perpetrated, and bringing justice to the victims). The author opines that "[t]here are undoubtedly times when countries may have to sacrifice legal principles in the name of political pragmatism, in order to end war or achieve peace." *Id.* at 247.

5. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 18-20 (2003) (explaining that the repressive aspects inherent in the punitive nature of criminal law compete with the normative features that appear in humanitarian law); see also WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 93-95 (2d ed. 2004) (noting the potential for conflict in rules of interpretation between judges with public international law backgrounds and those with criminal law experiences).

notably those between victims' interests and due process, restorative justice and criminal justice, and the potentially competing aims of peace and justice.⁶ Despite these conflicts, advocates of an international criminal legal system often assume that peace and justice are complementary values.⁷ Human rights groups typically demand that all perpetrators of human rights abuses be prosecuted, which implicitly excludes amnesty or, as human rights groups prefer to call it, "impunity."⁸ Such calls for action are generally based on allegedly emerging trends in international law and/or on claims that criminal prosecutions are vital to the establishment of peace.⁹ This

6. See DESMOND MPIOLO TUTU, *NO FUTURE WITHOUT FORGIVENESS* 34-35, 51-52, 58-59 (1999) (discussing the Truth and Reconciliation Commission's efforts to discover the truth behind human rights violations in South Africa and how the amnesties associated with those efforts seemed to conflict with victims' rights and notions of justice).

7. See, e.g., Human Rights Watch, *Human Rights Watch Testimony Before the Peace Commission of the Colombian Senate*, from Testimony of Jose Miguel Vivanco, Executive Director Americas Division, Human Rights Watch (Apr. 2, 2004) [hereinafter Vivanco Testimony] (stating—in a manner typical of many human rights NGOs—that "[j]ustice and the rule of law are the keystone of any peace agreement that lasts. Without justice, peace is fragile, fleeing, and constrained."), available at <http://www.hrw.org/english/docs/2004/04/02/colomb8388.htm> (last visited Feb. 21, 2005).

8. See Press Release, Amnesty International, *US Efforts to Obtain Impunity for Genocide, Crimes Against Humanity and War Crimes* (Sept. 2, 2002) (deriding U.S. attempts to prevent the International Criminal Court ("ICC") from prosecuting U.S. nationals, even if they commit crimes against humanity, via so-called "impunity agreements"), available at <http://web.amnesty.org/library/index/engior400252002> (last visited Feb. 21, 2005).

9. See, e.g., Vivanco Testimony, *supra* note 7 (declaring "[w]ithout any doubt, there is a growing international consensus that impunity—whether via amnesties, pardons, or the imposition of very light or merely symbolic punishment—must never be granted for crimes against humanity."); see also Leila Nadya Sadat, *Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable*, in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 194-201 (Stephen Macedo ed., 2003) (defending an "international accountability paradigm" and providing a normative and empirical argument generally supportive of human rights groups' claims in this regard); see also Press Release, Amnesty International et. al. (Jan. 16, 2004) (using claimed developments in international law to argue against certain grants of amnesty for international crimes), available at <http://web.amnesty.org/library/print/ENGIOR300042004> (last visited Feb. 21, 2005); Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 *YALE L.J.* 2619, 2634-36 (1991) (describing

latter demand makes clear that such groups' claims are of a complementarity between peace and retributive justice, as opposed to some other kind of justice.¹⁰ While it might be easier, in some respects, to claim that social justice encourages peace, the claim at issue is specifically concerned with retributive justice.

On a more balanced view, a complementarity may well exist between peace and retributive justice in many instances. But their relationship is at least complex, for it may be that justice must be sacrificed in some instances to enable negotiations to achieve a peaceful resolution.¹¹ The first prefatory quotation from Ruth Wedgwood forcefully asserts this *realpolitik*, and we cannot escape it with mere saccharine assumptions that peace and justice are conceptually compatible.

Consequently, it should be no surprise that there is serious debate regarding the permissibility of amnesties in various circumstances.¹² This Article discusses one particular challenge that arises in the context of the Rome statute, and that poses ongoing challenges for the International Criminal Court ("ICC") and its parties. Whether national amnesties immunize their recipients from prosecution by the ICC and/or in what circumstances, is in one respect a technical legal question of how to interpret the Rome Statute.¹³ In another respect, it

the "maximalist" demands of human rights groups in Argentina).

10. See Human Rights Watch, *Justice for Iraq: A Human Rights Watch Policy Paper*, part V (Dec. 2002) (noting it "knows of no single transition process that has collapsed due to demands for justice"). By contrast, transitions have collapsed where governments granted amnesties too broadly, as with the transition of Sierra Leone. *Id.*

11. See M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 409 (2000) (stating "policies and practices of accommodation in the pursuit of political settlement conflict with legal accountability in the pursuit of retributive and restorative justice"); see also RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 51-59 (2002) (discussing the dilemma between, on one hand, imposing criminal justice on perpetrators of state crimes and, on the other, granting amnesties to such criminals to encourage stable political transitions). See generally ANDREAS O'SHEA, *AMNESTY FOR CRIME IN INTERNATIONAL LAW AND PRACTICE* (2002) (providing a historical overview of the use of amnesties to facilitate peace processes).

12. See Wedgwood, *supra* note 1, at 94-97 (explaining that the issue of amnesty was so politically charged the parties at the Rome Conference evaded the question entirely).

13. See Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth*

is a profound policy question for a court whose credentials on the ground have yet to be established.¹⁴ It is also, as this Article will argue, a question that poses ongoing challenges to the present and future ratification and meaning of the Statute.

However, this Article endeavors to go beyond existing literature in two important ways. After situating the issue of amnesty programmes within a richer literature than that sometimes presumed on the record of amnesty programmes, this Article first brings to life the dramatic continuations of the debates around amnesties under the Rome Statute, revealing ways in which this discussion affects states' ratification of the Statute and the potential future meaning of the Statute. Second, the Article situates the issue of nationally determined amnesties in the beginnings of a new theoretical framework, drawing on the lessons of the ongoing contemporary debate, to work toward re-theorizing this area of international criminal law.¹⁵ In so doing, the Article will seek to demystify and begin to address some of the ongoing, under-theorized philosophical conflicts in international criminal law.

Thus, Part I surveys the existing literature regarding amnesty programmes in democratic transition, seeking both to offer an indication of the present state of the literature, and to expose contests

Commissions and the International Criminal Court, 14 EUR. J. INT'L L. 481 (2003) (highlighting the uncertainty in the interpretation of the Rome Statute and providing possible interpretations the ICC could adopt); see also Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 523 (1999) (noting the possibility "that the International Criminal Court would not necessarily be compelled . . . to terminate an investigation or prosecution were it to find that an amnesty contravenes international law"). The article asserts the ICC should defer prosecution "only in the most compelling cases." *Id.* at 527.

14. See Mahnoush H. Arsanjani, *The International Criminal Court and National Amnesty Laws*, 93 AM. SOC'Y INT'L L. PROC. 65, 65 (1999) (stating that a conflict between a national amnesty law and ICC jurisdiction "cannot be readily addressed by reference to black-letter law techniques of legal analysis because it involves fundamental questions of policy with far-reaching implications for the international human rights program and the maintenance of minimum public order").

15. See discussion *infra* Part VI (surveying some existing literature on "global public goods" and arguing that it can expose a particular distributive problem in the context of realistic relationships between peace and justice).

around amnesties in particular situations,¹⁶ especially that of South Africa, that are often neglected.¹⁷ In doing so, this Part tries to encapsulate several key lessons.¹⁸

Part II then juxtaposes this developing experience and literature with the developing law, which some argue indicates a trend towards the establishment of duties to prosecute perpetrators of international crimes.¹⁹ Part II argues that, although there are trends in that direction, there is an insufficient basis to conclude that there is any generalized duty to prosecute.²⁰

Part III brings these open debates into the text of the Rome Statute, arguing that the Statute contains competing indications as to whether there is scope for perpetrators to be immunized from ICC prosecution by national amnesties.²¹ Part IV then endeavors to examine an ongoing manifestation of the debates surrounding the meaning of the Rome Statute, a manifestation in the form of states' interpretive declarations on ratification, some of which have been explicitly concerned with amnesties, and some of which have seemed akin to reservations.²² Part IV examines the legal implications of such interpretive declarations, drawing in particular on the declarations of Colombia and Uruguay, arguing that they may indicate continuing uncertainties in the meaning of the Statute and

16. See discussion *infra* Part I (tracing the field of transitional justice since its inception in the 1980s through its greater application in modern transitional circumstances).

17. See *id.* (explaining the dearth of literature from outsiders to the South African transition has resulted in an incomplete, but growing, discussion of justice issues).

18. See *id.* (discussing various uses for amnesties in transitional contexts).

19. See discussion *infra* Part II (highlighting the incongruity of a duty to prosecute with other aspects of international jurisprudence).

20. See *id.* (arguing there is weak support for a general duty to prosecute, but if there is such a duty, it exists only in particular circumstances).

21. See discussion *infra* Part III (suggesting interpretive principles for understanding the meaning of the Rome Statute's provisions).

22. See discussion *infra* Part IV (predicting the future legal difficulties awaiting the ICC as parties to the Rome Statute respond to each other with different interpretive declarations).

open a realm for ongoing discussion as different states and agents endeavour to entrench their preferred meanings for the Statute.²³

Part V examines another ongoing realm of contestation in the early practice of the ICC Prosecutor, specifically in respect of the Prosecutor's investigative steps in Uganda, where amnesty issues similarly loom large.²⁴ Part V argues that Uganda's situation is one example of a kind of situation that will recur frequently in ICC practice.²⁵

Part VI makes a foray into a more developed theoretical model of amnesties, drawing on recent writing on global public goods to make manifest difficulties in traditional models of international criminal justice as a sort of public good²⁶ and to clarify to some extent the currently disparate theoretical musings of various commentators.²⁷ The model in Part VI makes clear that a restrictive rule on amnesties would have significant distributive effects and that these potential effects have significant empirical and normative significance in the ongoing project of international criminal justice.²⁸

I. DEMOCRATIC TRANSITION AND AMNESTY PROGRAMMES

The academic study of the complex mechanisms of democratic transition is relatively new, dating in its modern form only from the

23. See *id.* (concluding that the Rome Statute's interpretive declarations, particularly those of Colombia and Uruguay, could imply a different reading of the Statute's text, effectively altering its meaning).

24. See discussion *infra* Part V (discussing the conflict in Uganda between the need for justice and the use of amnesty programmes, such as the 2000 Amnesty Act, which has yielded internal political debates).

25. See *id.* (explaining ICC prosecutors will have to cope in the future with the trends that Uganda's internal political atmosphere and inconsistent history of amnesty programmes have established).

26. See discussion *infra* Part VI (highlighting the inadequacies of a global public goods approach to theorizing models for effective amnesty policy).

27. See *id.* (questioning predominant theories on the subject and concluding the field requires more extensive debate before the discussion can thoroughly address the challenges facing the ICC in the context of amnesty programmes).

28. See *id.* (explaining a restrictive rule would impose great risks on local populations). Current theories in the field of transitional justice fall short of addressing the risks that populations in conflict-ridden zones face. *Id.*

mid-1980s.²⁹ As this area developed, it yielded a subset field, transitional justice, seeking to address the numerous transitional situations demanding attention to justice issues.³⁰

The literature on transitional justice emerges as new challenges arise in the context of transitional governments.³¹ Some scholars branched off into areas related to re-establishing functional justice systems as a result of recent demands on the United Nations ("UN") to undertake civilian governance in particular regions.³² Other writers

29. See generally TRANSITIONS FROM AUTHORITARIAN RULE: COMPARATIVE PERSPECTIVES (Guillermo O'Donnell et al. eds., 1986) (providing the seminal work that inspired this field of academic study, which, while it mostly ignores studies of post-World War II transitions, is nevertheless the leading work on the modern aspects of the subject).

30. See, e.g., Sadat, *supra* note 9, at 193 (discussing the relationship between international justice and amnesties, with particular attention to the concept of accountability for international criminals); see also TEITEL, *supra* note 11, at 51-62 (discussing the "dilemma" that exists in the tension between peace and justice); see also POST-CONFLICT JUSTICE (M. Cherif Bassiouni ed., 2002) (providing an extensive collection of over forty essays discussing in the context of transitional justice the policy issues, accountability mechanisms, case studies, and peacekeeping issues that appear in post-conflict scenarios); TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995) (providing in a three volume set an understanding of transitional justice, including scholarly commentary, country studies, and primary source materials). See generally ANGELIKA SCHLUNCK, AMNESTY VERSUS ACCOUNTABILITY: THIRD PARTY INTERVENTION DEALING WITH GROSS HUMAN RIGHTS VIOLATIONS IN INTERNAL AND INTERNATIONAL CONFLICTS (2000) (attempting to provide guidance for third party intervention regarding how to respond to gross human rights abuse of the past).

31. See, e.g., TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES (A. James McAdams ed., 1997) [hereinafter TRANSITIONAL JUSTICE] (presenting nine essays concerning transitional justice issues from a variety of time periods and contexts from countries around the world, which depict the special challenges that different circumstances present).

32. See, e.g., Wendy S. Betts et. al., *The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law*, 22 MICH. J. INT'L L. 371, 382 (2001) (recounting the lessons officials learned when the United Nations faced the challenge of establishing a judicial system in Kosovo); see also Sarah Pritchard, *United Nations Involvement in Post-Conflict Reconstruction Efforts: New and Continuing Challenges in the Case of East Timor*, 24 U.N.S. WALES L.J. 183, 185-87 (2001) (surveying the challenges the United Nations faced in creating a judicial system in East Timor), available at <http://www.austlii.edu.au/au/journals/UNSWLJ/2001/17.html> (last visited Feb. 21, 2005); Matthias Ruffert, *The Administration of Kosovo and East Timor by the International Community*, 50

have remained more closely focused on providing justice to victims and punishment to perpetrators of international crimes, which has been a lively issue in a number of contexts, such as in the UN-mandated tribunals in Yugoslavia and Rwanda, the democratic transition in South Africa,³³ post-Communist transitions in Central and Eastern Europe,³⁴ and, more generally, a number of contexts around the world where authorities have considered or utilized approaches such as amnesties and truth commissions.³⁵

There is a need for further development in this recent field of study.³⁶ While the existing literature is an important background to any discussion of amnesty issues, we must bear in mind that we have yet to see the outcomes—for better or worse—of the particular

INT'L & COMP. L.Q. 613, 617-19 (2001) (discussing the United Nations efforts in Kosovo and East Timor to create functional civil institutions); *see also* Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AM. J. INT'L L. 64, 74-76 (2001) (explaining the means of sustaining in the African context democratic regimes during times of post-conflict transitions).

33. *See generally* ALEX BORAINÉ, *A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION* (2000) (discussing the history of South Africa's transition from the adoption of the Promotion of National Unity and Reconciliation Act to the accomplishments of the Truth and Reconciliation Commission ("TRC") from the perspective of the TRC's chairman); ANTJE KROG, *COUNTRY OF MY SKULL: GUILT, SORROW, AND THE LIMITS OF FORGIVENESS IN THE NEW SOUTH AFRICA* (1998) (providing a journalist's account of the transitional period in South Africa); LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000) [hereinafter *LOOKING BACK REACHING FORWARD*] (recounting through an anthology of scholars and the TRC Commissioners and their staff the details of the Truth and Reconciliation Commission's involvement in South Africa); *see* TUTU, *supra* note 6, at 61-65 (memorializing the struggles of the South African people during the transition).

34. *See* A. James McAdams, *Communism on Trial: The East German Past and the German Future*, in TRANSITIONAL JUSTICE, *supra* note 31, at 239 (discussing the trials of German border guards during German unification).

35. *See generally* PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* (2001) (providing a recent examination of truth commissions in various contexts around the world).

36. *See* discussion *infra* Part VI (examining the need for further study on the subject in order to address more precisely the myriad challenges transitional justice presents).

transitional justice processes that this field concerns.³⁷ Consider the case of South Africa's Truth and Reconciliation Commission ("TRC"),³⁸ which has thus far been regarded favorably partly because even many observers widely considered the relatively peaceful transition in South Africa as barely short of miraculous. There are, however, increasing criticisms of the South African approach,³⁹ which are just beginning to appear more fully to those outside South Africa, finally transmuting the South African experience from what has verged at times on simplified caricature into the historically complex example that it has always been. Notably, one recent set of papers, contained in Posel and Simpson's recent edited volume, *Commissioning the Past*, exposes well the deep divisions about the TRC's processes and legacy.⁴⁰ Specific

37. See generally TEITEL, *supra* note 11 (analyzing constitutional, legislative, and administrative responses to injustice following political upheaval in the twentieth century in an effort to propound a new normative conception of justice and, in so doing, demonstrating these recent events remain open to a wide variety of interpretation).

38. See The Promotion of National Unity and Reconciliation Act, No. 34 of 1995 (authorizing the establishment of the South African Truth and Reconciliation Commission), available at <http://www.doj.gov.za/trc/legal/act9534.htm> (last visited Feb. 21, 2005).

39. See, e.g., BEN CHIGARA, AMNESTY IN INTERNATIONAL LAW: THE LEGALITY UNDER INTERNATIONAL LAW OF NATIONAL AMNESTY LAWS 9, 11 (2002) (criticizing the inequalities in bargaining power leading up to the truth and reconciliation process and the international community's failure to become involved in prosecuting apartheid's criminals, going so far as to say "this negligence of the United Nations in not enforcing its own laws in the face of nations States' claims of the right to declare pardon for breaches of international law breeds confidence in would be criminals that they can get away with it"); see also LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 61 n. 68-69 (2002) (describing the Truth and Reconciliation Commission as more of a criminal trial because of the individualized nature of the amnesty process in South Africa); Ziyad Motala, *The Promotion of National Unity and Reconciliation Act, the Constitution and International Law*, 28 COMP. & INT'L L.J.S. AFR. 338, 338 (1995) (referring to early debates about the propriety of granting amnesties to those who had committed gross human rights violations); Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission*, 52 INT'L AFF. 647, 651 (1999) (providing criticisms from victims and their families); see also *infra* note 76 (discussing the legal challenges facing South Africa's Truth and Reconciliation Commission).

40. See generally COMMISSIONING THE PAST, *supra* note 4 (containing eleven discussions of the TRC including insider accounts, victims' stories, and outsider

criticisms of the TRC include concerns that the results of its processes reflected systemic biases that failed to identify human rights abuses in certain regions,⁴¹ worries about its lack of investigative capacity (which may have undermined its ability to grant amnesties exclusively within the terms of its mandate),⁴² suggestions that it was fundamentally unable to offer truth and reconciliation at a more local level,⁴³ and arguments that the legislatively constrained mandate of the TRC resulted in decisions that were arbitrary or that inappropriately sanitised an apartheid past.⁴⁴ Indeed, some commentators go so far as to argue that the amnesties that the TRC granted fuelled a sense of impunity that sustains an ongoing culture of violence in the new South Africa.⁴⁵ More criticisms might yet mount as more scholarship gradually

assessments of the commission's work).

41. See Piers Pigou, *False Promises and Wasted Opportunities? Inside South Africa's Truth and Reconciliation Commission*, in COMMISSIONING THE PAST, *supra* note 4, at 46 (explaining that the Human Rights Violation Committee's workload differed from province to province, affecting the quality of information each office could provide).

42. See *id.* at 49-59 (discussing the TRC's investigative unit and concluding that the sheer volume of its workload prevented it from performing effectively its important function to uncover the truth); see also Philip Bonner & Noor Nieftagodien, *The Truth and Reconciliation Commission and the Pursuit of 'Social Truth': The Case of Kathorus*, in COMMISSIONING THE PAST, *supra* note 4, at 173 (arguing the TRC's incapacities undermined its ability to find social truths about abuses that had occurred, thereby robbing it of the contribution to historical understanding it could otherwise have made).

43. See Hugo van der Merwe, *National Narrative Versus Local Truths: The Truth and Reconciliation Commission's Engagement with Duduza*, in COMMISSIONING THE PAST, *supra* note 4, at 211-12 (describing the misgivings of some victims toward the TRC's focus on the national struggle against human rights abuses and their feelings that the TRC lacked concern for victims' needs of exposing and clarifying local patterns of abuse). See generally Jonathan Klaaren & Howard Varney, *A Second Bite at the Amnesty Cherry? Constitutional and Policy Issues Around Legislation for a Second Amnesty*, 117 S. AFR. L.J. 572 (2000) (arguing that the TRC's failure to discover enough of the truth seriously undermined its attempts at national reconciliation).

44. See Graeme Simpson, *'Tell No Lies, Claim No Easy Victories: A Brief Evaluation of South Africa's Truth and Reconciliation Commission*, in COMMISSIONING THE PAST, *supra* note 4, at 220 (concluding that the amnesty process in some cases yielded a new subculture of violence).

45. See *id.* at 247 (asserting "when amnesty is granted with scant regard for its impact on the credibility of the criminal justice system and its processes, we breathe life into the sense of impunity at the heart of criminal behavior").

emerges from parties more external to the process, because one problem in understanding the South African experience thus far has been that much of the better-informed writing on the TRC has come from insiders to that process.⁴⁶ As the South African account illustrates, the field of transitional justice has significant room for growth.

This Article necessarily abstracts to a degree from these more specific discussions about the appropriate shape of amnesty programmes (and accompanying truth commissions) so as to discuss the general place of amnesties.⁴⁷ Despite the research agendas that remain and, indeed, that remain to be discovered, we can nonetheless note three substantial insights that emerge from transitional justice literature so as to apply to this Article's questions regarding the proper use of amnesties in transitional justice contexts:

First, some scholars explain amnesty programmes as offering an opportunity at reconciliation, arguing that criminal prosecutions are unlikely to further tasks of national forgiveness and, thus, future peace.⁴⁸ This basis depends on complex empirical assumptions, as well as normative assumptions about the value of forgiveness.⁴⁹ Although some might be ready to root national policy in this value,⁵⁰ it is unclear whether it provides a sufficiently persuasive basis for doing so.

46. See, e.g., BORAINÉ, *supra* note 33, 98-116 (recounting an insider's perspective on the significant challenges the TRC faced as it investigated decades of human rights abuses in a manner consistent with national reconciliation); see also TUTU, *supra* note 6, at 58-59 (providing through Desmond Tutu's personal memoirs his view of the TRC as the commission's chair); van Zyl, *supra* note 39, at 489 (explaining the implications on individuals in South Africa during the transition from the TRC executive secretary's perspective). See generally LOOKING BACK REACHING FORWARD, *supra* note 33 (providing an anthology of insiders' accounts of the TRC's experience).

47. See, e.g., discussion *infra* Part VI (hypothesizing a new analytical framework for examining amnesties in general).

48. See, e.g., TUTU, *supra* note 6, at 58 (stating "[t]he solution arrived at was not perfect but it was the best that could be had in the circumstances—the truth in exchange for the freedom of the perpetrators.").

49. See *id.* (explaining that many perpetrators of human rights abuses sought forgiveness from their victims and discussing the role of this willingness in the larger context of reconciliation, justice, and truth).

50. See generally *id.* (being a work where such themes permeate throughout).

Second, amnesty programmes may enable paths that ultimately permit a greater respect for human rights than alternative paths.⁵¹ This argument crops up in various forms, such as suggestions that dictators are unlikely to be willing to negotiate the end of their regimes if they are likely to face prosecution after their surrender of power.⁵² Others have offered other observations pertinent to the dynamics of power transfer, such as evidence that the security forces in South Africa would not have permitted democratic elections had they not been assured of amnesty rather than prosecution.⁵³ Those with power for these purposes need not be those with *de jure* power, or even claimed *de jure* power, but may be those with simply *de facto* power. For example, rebels contemplating negotiations to end hostilities have a sort of *de facto* power so long as they maintain hostilities and may not be willing to give this power up if they face prosecution.⁵⁴ The complexity of particular factual circumstances may mean that intricate causal chains may necessitate amnesty programmes as a means of strengthening a democratic transition. This is a powerful argument when we contemplate that a democratic transition is likely essential to having the choice between amnesties and prosecutions.⁵⁵

51. See TEITEL, *supra* note 11, at 54 (arguing “amnesties can advance the normative project of the political transition”).

52. See, e.g., Michael P. Scharf, *Swapping Amnesty for Peace? Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT’L L.J. 1, 4-9 (1996) (discussing the unwillingness of Haitian leaders to leave if they faced prosecution).

53. See Lynn Berat & Yossi Shain, *Retribution or Truth-Telling in South Africa? Legacies of the Transitional Phase*, 20 L. & SOC. INQUIRY 163, 182-83 (1995) (referring to evidence leaders in the South African security forces would guarantee the stability of the new order only if there was amnesty for past actions of the security forces); see also van Zyl, *supra* note 39, at 650.

54. Cf. Arsanjani, *supra* note 14, at 65 (noting rebels and various regime opponents have benefited from amnesties even though amnesties have primarily benefited government and military officials).

55. See CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* 187-89 (1996) (explaining the “limited” value of prosecutions and stating one must counterbalance that value with the aim of preserving the democratic system). He notes that “[t]his last caveat becomes all the more cogent once we realize that preserving the democratic system is a prerequisite for carrying out those very prosecutions and the loss of it is a necessary antecedent to massive human rights violations.” *Id.*

A third basis for amnesty programmes identifies the sheer impossibility of alternatives, for example, the incapacities in a fragile democratic order and the inability to carry out prosecutions against substantial numbers of perpetrators.⁵⁶ Perhaps we can make this language a bit more supple and subtle since the concern may not be precisely "impossibility," but rather the extreme costs of carrying out prosecutions for past human rights abuses when those same prosecutorial resources are in demand for other functions, including efforts that might deal more effectively with current crime.⁵⁷

These latter bases seem compelling in at least some circumstances and they are not as easily avoidable through international prosecutions as they might first appear.⁵⁸ International prosecutions may not be able to produce more substantial numbers, and international prosecutions, as national prosecutions, could interfere with a path toward a democratic transition. Thus, the most favourable interpretations of amnesties view amnesties as modalities to avoid future human rights abuses that may enable a potentially new and dynamic path as well as serve a restorative function in the context of complex societal situations.⁵⁹

II. LEGAL DUTIES TO PROSECUTE

In some respects, these evolving areas of literature reveal the limitations of the law in dealing with transitional justice and advert to the need for the law to step back from the role it might otherwise fulfill. In tandem with these evolving areas of literature, however, we can perceive the law's response, sometimes mediated through human rights theorists and activists, and the law's effort to work itself through so as to face up to the gaps otherwise perceived in its web. Many of the propelling legal developments in this area have been

56. Cf. Simpson, *supra* note 44, at 232-33 (arguing an impossibility point based on the state of South Africa's criminal justice system).

57. See van Zyl, *supra* note 39, at 651-53 (referring to problems of current crime and lack of prosecutorial resources).

58. See discussion *infra* Part I (maintaining amnesty programmes may produce new outcomes and may be the only option in some cases).

59. Cf. Nino, *supra* note 9, at 2639-40 (arguing democratic governments must support efforts to secure democracy, and thus, human rights for the future).

concerned with filling these gaps with a duty to prosecute.⁶⁰ Part II overviews the status of the law on duties to prosecute, identifying strong tendencies toward the development of obligations to prosecute, but arguing that the sources supporting the duties cannot fully establish their incorporation into the corpus of received law outside certain specific contexts.⁶¹

Certainly, there are some specific areas of international criminal law where a duty to prosecute, or else extradite, may exist, such as with grave breaches of the Geneva Conventions⁶² and violations of the Genocide Convention.⁶³ These specific duties to prosecute or extradite, however, derive from treaty obligations undertaken by certain states in certain circumstances (grave breaches of the Geneva Conventions arising only in international armed conflicts)⁶⁴ or for certain acts (very specific offences involving a *mens rea* of intent to destroy certain groups explained in the Genocide Convention).⁶⁵ This realization immediately makes apparent that any claim as to broader customary international law requires considerably more analysis.

60. See, e.g., Scharf, *supra* note 13, at 515 (supporting the notion of an international duty to prosecute).

61. See discussion *infra* Part II (addressing the issue of an international obligation to prosecute).

62. See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Armed Forces in the Field, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I] (delineating the repression of abuses and infractions constituting "grave breaches"). Each Geneva Convention includes a provision identical to Article 49 in Geneva Convention I mentioned above. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

63. See Convention on the Prevention and the Punishment of the Crime of Genocide, Dec. 9, 1948, art. V, 78 U.N.T.S. 277, 280 [hereinafter Genocide Convention] (describing the actions contracting parties must take to punish individuals guilty of genocide).

64. See, e.g., Geneva Convention II, *supra* note 62, art. 51 (delineating specific instances constituting grave breaches).

65. See Genocide Convention, *supra* note 63, art. II (defining genocide and naming specific acts that may be considered genocide).

The attempt to extend these duties beyond the specific circumstances in question gave rise, of course, to the famed Orentlicher-Nino debate.⁶⁶ Diane F. Orentlicher essentially argued that the cumulative set of obligations to prosecute in specific contexts could be further developed into a broader peremptory duty flowing from accepted state obligations not to condone or encourage human rights violations.⁶⁷ That this latter, basic principle of state responsibility provides the fundamental basis for the duty is clear from her discussion of possible variations on the duty for transitional states.⁶⁸

In setting out a nuanced position, Orentlicher argued that transitional states had a duty to prosecute only those most responsible for abuses, as this would be sufficient to discharge their obligation not to condone or encourage violations.⁶⁹ Nino responded, perhaps somewhat at cross-purposes, by demanding attention to context and, more powerfully, by emphasizing that use of an amnesty might actually be an attempt to avoid future human rights abuses that could result from insistence on a prosecution.⁷⁰ Although Orentlicher's position is open to some consideration of context,

66. Compare Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2599 (1991) (arguing generally for a duty to prosecute serious international crimes, though with some accommodations for transitional societies), with Nino, *supra* note 9, at 2619 (explaining that Orentlicher fails to address some significant circumstances that may be crucial in a government's decision to prosecute human rights violations). See generally Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 449 (1990) (providing a contemporaneous argument that yields some support to Orentlicher's perspective).

67. See Orentlicher, *supra* note 66, at 2609 (asserting that a duty to prosecute arises from peremptory norms and that states could rarely suspend prosecutions because of the high threshold established by the necessity doctrine and the derogation provisions of human rights treaties).

68. See *id.* at 2598 (discussing the possibility of exemplary trials to accomplish post-transition prosecutions).

69. See *id.* at 2599 (adding that the criteria used to select the individuals for prosecution could not seem to condone or tolerate previous abuses).

70. See Nino, *supra* note 9, at 2639 (stating "what may appear to the international community to be passivity on the part of a government may actually be the active safeguarding against future violations at the cost of foregoing prosecution of past crimes").

Nino's point concerning future human rights abuses may strike powerfully against Orentlicher's argument, which is founded fundamentally on an obligation not to condone or encourage human rights violations.⁷¹ Of course, some might respond by trading on the ambiguities in the notion of "not condoning or encouraging." If this obligation is taken in more deontological terms, it might lead to the conclusion that the state must not dirty its hands, even if by so doing the state avoids greater abuses. If taken in more consequentialist terms, the obligation would lead to a clear effort to avoid future abuses by the method most effective in specific circumstances.

Other writers, such as Ziyad Motala, have taken up and seemingly extended Orentlicher's argument.⁷² Motala essentially draws upon Orentlicher, along with very little analysis, to reach a conclusion that there is a "cardinal rule" of international humanitarian law that "there can be no amnesty for war crimes."⁷³ Later in the article, this idea eventually transmutes into a claim that "[i]nternational criminal law contains certain mandatory norms, such as the prosecution and punishment of individual perpetrators of serious international crimes."⁷⁴

This latter notion, however, is far from established when phrased in such general terms. Both commentators⁷⁵ and courts⁷⁶ dispute the

71. See generally Orentlicher, *supra* note 66 (arguing generally for a duty to prosecute).

72. See, e.g., Motala, *supra* note 39, at 338 (discussing the Promotion of National Unity and Reconciliation Act 1995).

73. See *id.* at 339 (stating that the Act violates international humanitarian law).

74. See *id.* at 362 (noting the Act violates these norms by providing amnesty for individuals engaged in crimes against war, humanity, and peace).

75. See John Dugard, *Possible Conflicts of Jurisdiction with Truth Commissions*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – A COMMENTARY* 693, 698 (Antonio Cassese, Paolo Gaeta & John R.W.D. Jones eds., 2002) (using examples of amnesties and decisions of national courts to show that no customary duty to prosecute exists in state practice, although admitting shifts in this direction); see also SADAT, *supra* note 39, at 65 (noting any evidence indicating a generalized customary international law obligating punishment is weak); TEITEL, *supra* note 11, at 55 (noting "international law's remedial scheme, which is structured in terms of individual rights, in no way constructs punishment as an enforceable right such that it would impose an obligation on states."); John Dugard, *Dealing with Crimes of a Past Regime: Is Amnesty Still An Option?*, 12 *LEIDEN J. INT'L L.* 1001, 1002 (2000) (commenting it is "doubtful" whether international law has reached the stage of prohibiting amnesties); Robinson, *supra*

claim that there is a state obligation to prosecute all individual perpetrators of human rights abuses. Judicial decisions that have exerted supervision over amnesties have been more moderate and based on specific treaty obligations rather than general customary law, as is notably the case with prominent rulings of the Inter-American Court of Human Rights.⁷⁷

note 13, at 490-91 (arguing the ICC must generally insist on prosecution but there may be special circumstances where prosecution interferes with the interests of justice); Scharf, *supra* note 13, at 514-15 (explaining that there is an international legal duty to prosecute irrespective of the practical considerations in only a few specific situations); Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173, 177 (2002) ("International law and the domestic legal practice of states at times permit, and even—in some cases—require, amnesties."). *But see* CASSESE, *supra* note 5, at 314-16 (seeing more potential for developing customary norms of prosecution, particularly of *jus cogens* crimes); *but cf.* O'SHEA, *supra* note 11, at 228-266 (arguing for the development of customary norms requiring prosecution or extradition in cases of serious and systematic violations of human rights and humanitarian law); *but cf.* M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE, AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* 20-25 (1995) (noting that the customary rules to prosecute must be considered norms because of their paramount importance for world public order). *See* Orentlicher, *supra* note 66, at 2599-2600 (raising the question of whether a state government must prosecute due to its ratification of a convention); *see also* Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 720-721 (1999) (examining the generalized duty of accountability for serious abuses); Roht-Arriaza, *supra* note 66, at 489-505 (analyzing evidence suggesting a customary law obligating governments to prosecute exists); Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence of Amnesty*, 20.4 HUM RTS. Q. 843, 861-62 (1998) (arguing for a generally prohibitive rule).

76. *See* Azanian Peoples' Organization ("AZAPO") v. Truth and Reconciliation Commission, 4 S.A. 562, 574-75 (C.C. 1996) (concluding that there is no peremptory rule of international law prohibiting the granting of broad amnesties); *see also* Roht-Arriaza & Gibson, *supra* note 75, at 863-84 (describing judicial decisions in Chile, El Salvador, Guatemala, and South Africa upholding amnesties). *But see* O'SHEA, *supra* note 11, at 47-55 (critiquing the AZAPO judgment, claiming the decision contains legal errors); John Dugard, *Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question: AZAPO v. President of the Republic of South Africa*, 13 S. AFR. J. HUM. RTS. 258, 261-62 (1997) (suggesting that the AZAPO Court's international legal reasoning leaves something to be desired); *see* Simpson, *supra* note 44, at 234-36 (criticizing the AZAPO Court's limited examination of international law).

77. *See* Velasquez Rodriguez, Inter-Am. C.H.R. (Ser. C) 4, OEA/ser. L/V/III.19, doc. 13 (1988) (discussing generally the effectiveness of amnesties); *see also* Advisory Op., Inter-Am. C.H.R., OC-13/93 (1993) (reiterating the Court's analysis regarding human rights); Case 10,843, Inter-Am. C.H.R. 156,

Any claim that there is a customary legal prohibition of amnesties must be inventive if it is to maintain that there is the necessary state practice and *opinio juris*, as current state practice obviously includes the granting of amnesties. Some commentators try to circumvent the requirements for customary international law by making assertions that prosecutorial obligations are of a *jus cogens* nature without necessarily providing evidence of custom.⁷⁸ Yet such an approach depends on the assumption that *jus cogens* norms are free-standing, natural law-type standards, and these commentators do not explore the nature of *jus cogens* in a thorough manner so as to support such claims.⁷⁹

In some instances, entities have acted as if there were duties to prosecute all who committed serious abuses of human rights, as seen, for example, when the United Nations insisted on attaching a specific disclaimer to its support of the Lomé Accord, the 1999 peace agreement in Sierra Leone.⁸⁰ The Lomé Accord provided for absolute pardon and amnesty for combatants and collaborators up to the signing of the agreement.⁸¹ The U.N. Special Representative added a reservation to his signature of the Accord, however, stating that the United Nations interpreted this provision as not applying to international crimes of genocide, crimes against humanity, war

OEA/ser./L./V./II.95, doc. 7 (1996) (supporting a broader argument against amnesties, although this judgment, as well as others like it, continue to be subject to the limitation of a specific convention and are not more generally applicable in customary international law).

78. See generally Motala, *supra* note 39 (being subject to this alternative reading).

79. See Christopher A. Ford, *Adjudicating Jus Cogens*, 13 WIS. INT'L L.J. 145, 146-51 (1994) (discussing the introduction of *jus cogens* norms and acknowledging the highly contested claim that they are free-standing and independent of custom). See generally LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS (Finnish Lawyers' Publ'g Co. 1988) (discussing *jus cogens* as a peremptory standard of international law that may not be overridden by treaty).

80. See Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé Accord), July 7, 1999, art. IX, U.N. Doc. S/1999/777 (providing protection of human rights and humanitarian law for the people of Sierra Leone), available at <http://www.sierra-leone.org/lomeaccord.html> (last visited Feb. 21, 2005).

81. See *id.* (noting that the absolute pardon was in respect to anything done by the combatants in pursuit of their objectives).

crimes, or other serious violations of international humanitarian law.⁸² Ultimately, this position won out in the Statute of the Special Court for Sierra Leone, although a U.N. Security Council Resolution adopted that Special Court so the position arguably does not reflect a minimal requirement at customary international law.⁸³

The same has been true in other contexts where the Security Council has been enthusiastic to condemn impunity, such as its recent resolution on Haiti, which demands “that all the parties to the conflict in Haiti cease using violent means, and reiterates that all parties must respect international law, including with respect to human rights and that there will be individual accountability and no impunity for violators.”⁸⁴ Again, however, we arguably take this as part of what the Security Council considers the best contribution contextually to international peace and security.⁸⁵ We are not necessarily authorized in taking it to be a general international legal requirement, other than insofar as the resolution itself creates legal obligations in the precise situation addressed.⁸⁶ Of course, the fact that the resolution is worded in this manner may provide some evidence of emerging custom, but we must be cautious in drawing any such conclusion. It is difficult to infer from such statements, which are not central to the particular resolutions, that the members of the Security Council intended to take a specific position on this area of customary international law.

Admittedly, these developments do suggest some trends in the progress of duties to prosecute, but in each case it is clear that the

82. See S.C. Res. 1315, U.N. SCOR, 4186th mtg., U.N. Doc. S/RES/1315 (2000) (recalling this reservation).

83. See Statute of the Special Court for Sierra Leone, pmbl. (explaining the agreement pursuant to Security Council Resolution 1315 established the Special Court for Sierra Leone), available at <http://www.sierra-leone.org/specialcourtstatute.html> (last visited Feb. 21, 2005).

84. See S.C. Res 1529, U.N. SCOR, 4919th mtg., § 7, U.N. Doc. S/RES/1529 (2004) (listing additional demands, such as respecting the constitutional succession and political process).

85. See *id.* § 1 (stating that the general purpose is to promote a peaceful and lasting solution in Haiti).

86. See *id.* (using language, such as “the current crisis,” to makes certain the general position that the resolution is applicable only to the exact situation addressed).

sources do not support the incorporation of a generalized duty into the corpus of international law.⁸⁷ Indeed, aside from the difficulties already mentioned in terms of accepted principles of international law not supporting a prosecutorial duty, the reading of such a duty into international criminal law would presently create additional contradictions.

First, in certain contexts, legal encouragement of amnesties exists. Specifically, Additional Protocol II to the Geneva Conventions actually encourages states to grant the “broadest possible amnesty” at the end of hostilities in non-international armed conflicts.⁸⁸ Although the International Committee of the Red Cross (“ICRC”) has subsequently engaged in an exercise of trying to narrow the reading of this clause, it is difficult to ignore the fact that this important instrument of international humanitarian law actually foresees and encourages the use of amnesties in certain contexts.⁸⁹

Second, some states currently continue to use amnesties as a policy instrument in various settings, without necessarily facing any objection for doing so, while other states, as discussed below, foresee their use in future circumstances, again without objection for doing so.⁹⁰ Any conclusion that a generalized duty to prosecute exists would thus fly in the face of current state practice.

Third, any generalized duty to prosecute claim would arguably be in tension with existing case law on several matters. For example, apart from the Rome Statute’s abandonment of head-of-state immunity,⁹¹ heads-of-state and other high government officials retain important immunities in international law, as the International Court of Justice in the Arrest Warrant Case between Belgium and the

87. See, e.g., *id.* § 7 (specifying the exact circumstances to which the resolution is applicable).

88. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of Non-International Armed Conflicts, June 8, 1977, art. 6(5), 1125 U.N.T.S. 609 (applying to those individuals participating in the armed conflict or those deprived of their liberty because of the armed conflict).

89. See Arsanjani, *supra* note 14, at 65 (noting that regardless of the International Committee of the Red Cross (“ICRC”)’s interpretation, the clause’s objective remains the creation of conditions for reconciliation in a divided state).

90. See discussion *infra* Part IV (focusing on Colombia and Uruguay).

91. See Rome Statute, *supra* note 2, art. 27(2) (explaining that immunities will not bar the Court from exercising jurisdiction over said individual).

Congo recently reaffirmed.⁹² Although the Pinochet case has concomitantly revealed limits on head-of-state immunity,⁹³ the doctrine itself remains valid in principle. Yet, if there were an unvariegated duty to prosecute perpetrators of international crimes, the principle of state immunity would seem to be normatively subject to this duty, which it evidently is not, based on the continuing strength of head-of-state immunity in international law. We must conclude that a generalized duty to prosecute is not sufficiently established.

A more balanced interpretation of this area of the law would conclude that: (1) treaty obligations create a duty to prosecute or extradite in certain areas covered by the relevant treaties;⁹⁴ (2) amnesties are subject to broader international judicial oversight under certain human rights treaty frameworks;⁹⁵ (3) states cannot lawfully use amnesty processes that exhibit a genuinely flagrant disregard for their treaty-based and customary human rights obligations, but any good faith application by states of amnesty processes as a policy instrument is unlikely to come into any conflict with this requirement;⁹⁶ and (4) those urging a broader obligation to prosecute should be taken to do so as advocates of a particular policy approach and not as accurate interpreters of international law, although the possibility that international law may shift cannot be denied if appropriate proof of such is actually forthcoming without substantial contradictions with other areas of international law.⁹⁷

92. See Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. 1 (Feb. 14) (finding no exception to immunity from criminal inviolability when suspected of crimes against humanity).

93. See *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No 3), 2 W.L.R. 827 (1999) (finding the applicant, the former head-of-state of Chile, did not have immunity from prosecution for acts of torture and conspiracy).

94. See *supra* notes 62-65 and accompanying text (stating that certain areas of international criminal law call for a duty to prosecute or extradite).

95. See *supra* notes 76-77 and accompanying text (noting that cases sometimes call for the use of amnesty).

96. See *supra* notes 66-68, 75-76, and 88-90 and accompanying text (commenting on the specific duties to prosecute or extradite in the context of the Orentlicher-Nino debate and the state's use of amnesty as a policy instrument).

97. See *supra* notes 81-93 and accompanying text (arguing despite some developments suggesting a trend toward duties to prosecute, the claim that there is

A complete end to amnesties would better fit a deontological interpretation of international criminal law, which views it as prohibiting crimes *mala in se* (wrong in themselves).⁹⁸ This interpretation contrasts with that of a consequentialist view. This latter ideology probes whether amnesties contribute to the betterment of human life and is less intent on “justice though the heavens may fall”, although there may also be consequentialist arguments against amnesties.⁹⁹ While international human rights groups, following human rights interpretations of international criminal law, have been enthusiastic about a complete end to amnesties,¹⁰⁰ there is room for substantial ongoing legal and philosophical analysis of the questions at stake. Such an analysis, however, must be the result of careful analysis and must avoid relying on the simple assertions of advocates from either side of this debate.

This Article now delves into an informed examination of the implications of the Rome Statute for national amnesties. Experiences of transitional states and literature analyzing these experiences show the possible usefulness of amnesties in certain contexts.¹⁰¹ At the same time, human rights advocates are trying to develop the law so as to impose a more generalized duty to prosecute those who have

a general duty to prosecute would conflict with current state practice and existing case law).

98. See CHIGARA, *supra* note 39, at 5 (stating “[d]eclaration of national amnesty laws that purport to expunge criminal and/or civil liability of agents of a prior regime alleged to have violated basic human rights of individuals appears to be unjust.”). Chigara also argues amnesty laws presume the state can waive human rights, which is inconsistent with the principle that individuals hold rights. *Id.* at 13. See also NINO, *supra* note 55, at 135-36 (noting that some advocates of widespread prosecution specifically referred to Kantian philosophy where a duty to punish exists even if society were at the verge of dissolution).

99. See CASSESE, *supra* note 5, at 312-13 (questioning the healing power of amnesty laws and noting questions about the consequentialist effect of amnesties arise); see also CHIGARA, *supra* note 39, at 11 (referring to the long-run deterrent effects on potential human rights abusers); SADAT, *supra* note 39, at 70-71 (referring to the protective effects of prosecution in removing dangerous individuals from society). But all of these depend on circumstances, and it is precisely the reference to circumstances that advocates of an unvarying duty to prosecute ultimately deny.

100. See *supra* notes 7-10 and accompanying text (discussing support from human rights groups for international accountability).

101. See *supra* notes 48-59 and accompanying text (explaining the use of amnesties in transitional justice contexts).

committed serious breaches of human rights.¹⁰² Thus, experience and law are, perhaps, evolving in different directions. But our understanding of the international legal framework on these matters is ultimately incomplete until we examine the Rome Statute. It is to that Statute that we now turn.

III. AMNESTIES AND THE ROME STATUTE

The preamble of the Rome Statute speaks eloquently of an end to impunity.¹⁰³ Thus, one interpretation of the preamble is the creation of a new order of international criminal responsibility.¹⁰⁴ Such an order would see the international legal order fill the gaps left by imperfect domestic orders, thus assuring an end to impunity for those who commit gross abuses of human rights.¹⁰⁵ This aspirational text, however, is unclear about whether this end to impunity is because of the nature of the crimes, implicitly prohibiting exceptions, or for the more consequentialist purpose of discouraging such crimes.¹⁰⁶ The latter potentially allows for some exceptions where impunity might be permitted as the lesser of evils. The signatories ambiguously declare themselves “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”¹⁰⁷

The text of the Statute beyond the preamble is even more nuanced. Several provisions conceivably provide the scope for an appropriate amnesty programme to exempt those given amnesties from criminal prosecution under the Rome Statute.¹⁰⁸ This divergence within the

102. See *supra* notes 60-102 and accompanying text (commenting on the legal duties to prosecute).

103. See Rome Statute, *supra* note 2, pmb. (asserting the Statute is determined to end impunity).

104. See *id.* (establishing an independent permanent International Criminal Court).

105. See *id.* (affirming that serious crimes threaten the well-being of the world and must be punished at a national level with international support).

106. See *id.* (giving dual reasons for this end to impunity).

107. *Id.* See also Arsanjani, *supra* note 14, at 67 (asserting that such language no doubt contributes to observations such as the proposition that “[o]n its face, the ICC Statute appears hostile to amnesties for crimes listed in the Statute.”).

108. See Arsanjani, *supra* note 14, at 67 (commenting on the fact the ICC does not hold the right to review acts of national legislatures and thus, national amnesty

Statute is not surprising, since the drafting involved a tight timeline, with separate groups working on different parts of the Statute with little discussion between them.¹⁰⁹ This Part thus examines briefly the conflict between the provisions providing a possible scope for recognition of amnesties and the preamble's reference to ending all impunity. This section also refers to suggested principles that might affect plausible interpretations of said provisions. The presumption is not that a formalistic textual reading of the Statute can resolve the debate about amnesties,¹¹⁰ but that the text is relevant to the question of what the ICC will, or can, do.¹¹¹

Prosecutions under the Rome Statute are restricted in a number of circumstances that could conceivably protect an amnesty. For instance, the Security Council has the power to defer an investigation or prosecution.¹¹² Moreover, the Prosecutor may choose not to initiate an investigation where "[a] prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime."¹¹³

laws); *see also* Robinson, *supra* note 13, at 453 (explaining that the Rome Statute did not explicitly deal with issues of national amnesties and national truth and reconciliation); Scharf, *supra* note 13, at 522 (discussing the conflict between the Preamble and its Articles).

109. *See* Luigi Condorelli, *War Crimes and Internal Conflicts in the Statute of the International Criminal Court*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY* 115 (Mauro Politi & Giuseppe Nesi eds., 2001) (noting various lapses and defects in the Rome Statute resulted from haste under pressure of international public opinion to finalize a text); *see also* Jonathan Charney, *Progress in International Criminal Law?*, 93 AM. J. INT'L L. 452, 462 (1999) (expressing concerns about whether the short negotiation process provided adequate time for full consideration of issues); Robinson, *supra* note 13, at 483 (indicating the amnesty issue was not explicitly dealt with despite debates on the issue); Scharf, *supra* note 13, at 521-22 (citing statements by Philippe Kirsch that the amnesty issue was left "creatively ambiguous").

110. *See* Arsanjani, *supra* note 14, at 65 (stating that questions regarding policy with "far and reaching implications for international human rights and public order" prevent resolution in this manner).

111. *See generally* Rome Statute, *supra* note 2 (setting forth the ICC and rules by which the body should abide).

112. *See* Rome Statute, *supra* note 2, art. 16 (stating that upon the Security Council's request an investigation or prosecution shall cease for a period of twelve months).

113. Rome Statute, *supra* note 2, art. 53(1)(c). Any such determination is subject

Lastly, the ICC shall find cases inadmissible under the complementarity principle if a state with appropriate criminal jurisdiction prosecutes that case or investigates it and decides not to prosecute.¹¹⁴ A decision not to prosecute stands so long as it does not flow from “unwillingness or inability to prosecute.”¹¹⁵

Each of these provisions has the potential to prevent prosecution in the context of some kinds of amnesty programmes. The Security Council may prevent a prosecution upon a determination that a particular amnesty programme promotes international peace and stability.¹¹⁶ However, its power is subject to time limits, which may or may not be adequate to the issues in a particular situation.¹¹⁷

The second provision—the power of the Prosecutor to refuse to initiate an investigation—provides scope for the Prosecutor to defer

to oversight by the Pre Trial Chamber. *Id.* at art. 53(3).

114. See Rome Statute, *supra* note 2, art. 17 (1)(a) & (b) (defining the circumstances where the ICC shall find a case inadmissible).

115. See *id.* (citing exceptions to the inadmissible provision). Some observers might also think there is an argument in the principle of *ne bis in idem*; however, Article 20's text makes clear that this principle blocks trial before the ICC only where there has been an actual trial by another court, which would not describe any typical case of amnesty. *Id.* Also, it is apparent that amnesties were explicitly excluded from the *ne bis in idem* principle. *Id.* See Christine Van den Wyngaert & Tom Ongena, *Ne bis in idem Principle, Including the Issue of Amnesty*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – A COMMENTARY 727 (Antonio Cassese et. al. eds. 2002) (affirming that Article 20's text does not allow for amnesties and they may properly be dealt with under the prosecutorial discretion in Article 53(1)(c)); see also Jennifer J. Lewellyn, *A Comment on the Complementary Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Contexts?*, 24 DALHOUSIE L.J. 192, 205-207 (2001) (affirming that truth commission proceedings would not qualify under Article 20). But see Johan D. van der Vyver, *Personal and Territorial Jurisdiction at the International Criminal Court*, 14 EMORY INT'L L. REV. 1, 81-82 (2000) (claiming “[i]t is difficult to predict whether amnesty hearings of truth commissions will qualify as proceedings of ‘another court’ for purposes of *ne bis in idem*.”).

116. See Dugard, *Possible Conflicts of Jurisdiction*, *supra* note 75, at 701 (stating “[i]t is hard, if not impossible, to contemplate a situation in which refusal to recognize a national amnesty could constitute a threat to international peace.”). Dugard's assertion presumes a narrow conception of international peace, and on the conception developing in recent UN practice, the interpretation of such a refusal as a threat might seem less difficult to envision. *Id.*

117. See Wedgwood, *supra* note 1, at 96 (noting that a temporary suspension may be inadequate for a transition situation that will be delicate for a substantial period of time).

to a national amnesty programme in specific circumstances, a power specifically envisioned by delegates of some states.¹¹⁸ Some commentators argue that the specific wording of this article precludes the Prosecutor from considering factors other than those listed, or at least limits the Prosecutor's discretion.¹¹⁹ The article's broad reference to the "interests of justice," however, surely suggests that the listed factors are an inclusive rather than exclusive list. Accordingly, some theorists attempt to develop criteria for the

118. See *Round Table: Prospects for the Functioning of the International Criminal Court* in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY* 300 (Mauro Politi & Giuseppe Nesi eds., 2001) (citing comments by Beatrice le Fraper du Hellen, a member of the French negotiating team on the Rome Statute, on the provision allowing the Prosecutor to not investigate). She stated,

I thought [Article 53] is [sic] a very important provision because it allows the Prosecutor to take into account the existence of a post-crisis situation; that is to say, like the South African situation today, the Guatemala, El Salvador situations a few years ago There were [sic] the Truth Commission in Guatemala, there is the Truth Commission in South Africa. And we have tried to give the Court the possibility to take into account the existence of such attempts at finding a solution. *Id.*

See also John T. Holmes, *The Principle of Complementarity, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 77 (Roy S. Lee ed., 1999) (referring to prosecutor's discretion on these matters); Dugard, *Possible Conflicts of Jurisdiction*, *supra* note 75, at 702 (referring to prosecutorial discretion as the most plausible means of accommodating amnesties in appropriate instances). *But see* Wedgwood, *supra* note 1, at 96 (indicating that perceptions that amnesty issues fit explicitly into the Statute are not necessarily shared). The United States also perceived the usefulness of amnesties in some situations and circulated a non-paper paper on amnesty issues at the August 1997 session of the Preparatory Committee. *Id.* The United States believes that this paper was ignored as evidenced by the lack of direct reference to the issue in the Rome Statute and believes that Article 53 is not an adequate solution. *Id.* "It is hard to see how the Rome Statute will accommodate the danger to democratic transitions in a principled way, when the issue was left sublingual. One may also question whether a judgment of high politics and prudence was best allocated to a prosecutor, rather than an international council of state." *Id.* at 97.

119. See Arsanjani, *supra* note 14, at 67 (discussing the language of the specific list given in the Rome Statute Article 53 (1)(c)).

circumstances when a Prosecutor defers to an amnesty programme.¹²⁰ These criteria remain a matter for development over time.

This scenario created some contention during negotiations on the Rome Statute. South Africa in particular urged that a specific provision should exist for a programme like its own Truth and Reconciliation Commission where amnesties could promote peace and national reconciliation.¹²¹ Other states and human rights groups opposed such a proposal, and essentially prevented serious discussion on this matter.¹²² A somewhat ambiguous provision resulted, which had room for argument as to whether an appropriate national amnesty programme can block ICC involvement.¹²³

120. See *id.* at 66-67 (attempting to establish criteria for the international validity of amnesties in general); see also Dugard, *Possible Conflicts of Jurisdiction*, *supra* note 75, at 703 (suggesting that amnesties granted by offenders to themselves or granted unconditionally be ignored, but that there might be appropriate grounds for the prosecutor's discretion where amnesty is subject to judicial or quasi-judicial approval and the society has subjected its past to examination by a truth commission); Dugard, *Dealing with Crimes of a Past Regime: Is Amnesty Still An Option?*, *supra* note 75, at 1005 (illustrating, by way of the Pinochet case, that an offender's grant of amnesty to himself will be ignored); Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 216-17 (2000) (discussing the criteria for situations permitting amnesties as: evidence of inability to prosecute, evidence of free endorsement of transitional justice policy, commitment to comply with international obligations in the future, commitments to reparations, and transparency around decisions not to prosecute).

121. See SCHABAS, *supra* note 5, at 67 (commenting on South Africa's push for provisions in the Statute, which followed their model where people received amnesty for a truthful confession). See generally *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Draft Statute and Draft Final Act (A/Conf.183/2/Add.1 1998 (14 April 1998) (discussing this issue in the context of the *non bis in idem* provisions), available at www.un.org/icc/prepcom.htm (last visited Feb. 21, 2005).

122. Compare SCHABAS, *supra* note 5, at 87 (noting "drafting a provision that would legitimize the South African experiment yet condemn the Chilean one proved elusive"), with Arsanjani, *supra* note 14, at 67 (noting the pressure from human rights groups not to discuss any clause making explicit reference to amnesties). See generally Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 383 (2000) (commenting on the influence of human rights groups in the negotiations process and stating that 250 NGOs "closely watched" the 160 states present).

123. See SADAT, *supra* note 39, at 67 (noting lack of clear consensus among delegates and referring to statements by the Chairman of the Conference that the

However, this ambiguity need not mean an end to analysis; on this question, the drafters left, in the words of Philippe Kirsch, chair of the drafting committee, “creatively ambiguous” provisions.¹²⁴

question was intentionally left open). Sadat also discussed that when and where amnesties are permitted is a contested topic. *Id.* at 112-13. *See also* Holmes, *supra* note 118, at 76-77 (referring to “lacunae” around pardons, parole, and amnesties, although the author then goes on to say that “[a] truth commission and the amnesties it provides may not meet the test of a criminal investigation, since the simple telling of the truth to a non-judicial body may convey an individual immunity from national prosecution.”); SCHABAS, *supra* note 5, at 87 (noting ambiguity of the terminology within the Statute). *But see* Dugard, *Possible Conflicts of Jurisdiction*, *supra* note 75, at 702 (arguing that a decision to grant amnesty instead of prosecuting clearly falls within the “unwillingness to prosecute” criterion). Kofi Annan has stated,

The purpose of the clause in the statute is to ensure that mass-murderers and other arch-criminals cannot shelter behind a State run by themselves or their cronies, or take advantage of a general breakdown of law and order. No one should imagine that it would apply to a case like South Africa’s, where the regime and the conflict which caused the crimes have come to an end, and the victims have inherited power. It is inconceivable that, in such a case, the Court would seek to substitute its judgment for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.

Villa-Vicencio, *supra* note 120, at 222. *See generally* Kader Asmal, *Truth, Reconciliation and Justice: The South African Experience in Perspective*, 63 MOD. L. REV. 1, 22 (2000) (using Annan’s statement as his only evidence in support of a claim that “[s]tates can validly put themselves beyond the jurisdiction of the ICC either through *bona fide* prosecution at [the] national level, or through *bona fide* truth commission processes.”). Needless to say, the matter requires more careful analysis, and Asmal’s claim is better described as political posturing than scholarship; other analysts have specifically concluded that Annan’s statement does not predict likely outcomes. Llewellyn, *supra* note 115, at 215.

124. *See* Scharf, *supra* note 13, at 522 (finding the conflicting style of the provisions reflects the haste of the original drafting groups and the negotiations at Rome); *see also* Rome Statute, *supra* note 2 (conveying cumulatively one further qualification that none of these provisions blocks other states from exercising universal criminal jurisdiction in lieu of the ICC process in an appropriate case); CASSESE, *supra* note 5, at 315-16 (referring to the appropriateness under customary international law of other states prosecuting offenders despite amnesty laws). *See generally supra* Part I (indicating that other states may also exercise restraint, as illustrated by the fact that no state has even tried to prosecute apartheid offenders from South Africa despite the increasing critiques of the South African amnesty process). *But see* Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), ICJ General List No. 121, Feb. 14, 2002 (illustrating that the scope of universal criminal jurisdiction may be narrower than some think, as indicated by separate opinions like those of President Guillaume and Judge Rezek in this case), available at <http://www.icj-cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (last visited Feb. 21, 2005).

Thus, there remains scope for ongoing debate on the meaning of the Rome Statute provisions. In the context of a complex experience and literature, an international law shifting in some ways but not solidified on any definitive rule against amnesties, and a “creatively ambiguous” statutory provision, we enter into a realm of contestation.¹²⁵ Here, states and other interested parties endeavor to capture the provisions for their own favored interpretations.¹²⁶ Part IV illustrates this phenomenon, argues that there are ongoing maneuvers concerned with capturing particular interpretations of the Rome Statute on this issue, and recommends that interested parties stay on the field.¹²⁷ Thereafter, we can seek to theorize further about these phenomena and to clarify some of the philosophical debate.

IV. INTERPRETIVE DECLARATIONS ON RATIFICATION OF THE ROME STATUTE

Given the controversy over whether the Rome Statute should make explicit provisions for amnesty policies, it should come as no surprise that some states are enthusiastic about amnesties as an appropriate measure in at least some circumstances. This belief that amnesties are appropriate has even affected the ratification of the Rome Statute by some states, as apparent from their interpretive declarations.¹²⁸ This Part examines the interpretive declarations on ratification by Uruguay and Colombia, the responses to these declarations by other states, and the ongoing legal difficulties perceived for the Rome Statute in light of these declarations or similar future declarations.

The explicit decision in the Rome Statute to prohibit reservations arguably conditioned, in part, the course of these states in adopting

125. See generally *supra* Part III (setting forth the background on amnesties in the context of the Rome Statute to prepare the reader for a discussion on how states then interpret the provisions for themselves).

126. See generally *infra* Part IV (summarizing this issue and arguing that some states ratify this Statute only when using interpretive declarations that resemble reservations).

127. See *id.* (citing the ongoing ratification process in conjunction with numerous interpretations that continue to affect the Statute’s power as reasons to stay involved).

128. See *infra* notes 129-140 and accompanying text (discussing interpretive measures taken by states in ratifying the Statute).

interpretive declarations.¹²⁹ As provided by Article 120 of the Statute, “[n]o reservations may be made to this Statute.”¹³⁰ This decision fits a pattern of some other major multilateral agreements that also enacted compulsory dispute resolution procedures and prohibited reservations from these procedures. Two examples are the compulsory dispute resolution mechanisms under the Convention on the Law of the Sea¹³¹ and the World Trade Organization (“WTO”) Agreement.¹³² This recent pattern arises in response to the dramatically poor record of the International Court of Justice (“ICJ”) in receiving jurisdiction over disputes under the “optional clause” jurisdiction. Under this clause, states can consent to the resolution of their disputes by the ICJ, but very few have chosen to do so. The trouble surrounding reservations from human rights treaties is arguably a further factor behind the Rome Statute’s prohibition of reservations.¹³³

129. See *infra* notes 141-163 and accompanying text (analyzing the interpretive declarations of Colombia and Uruguay).

130. Rome Statute, *supra* note 2, art. 120. The Article provides for no qualifications on this outright statement, though there are provisions elsewhere for such matters as transitional delay of the entry into force of certain provisions (notably, Article 124’s provision concerning Article 8 crimes). *But see* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (Advisory Op. of May 28) (describing the importance of widespread participation, including to multilateral human rights agreements with provisions based on majority voting rather than consensus); *but cf.* Wedgwood, *supra* note 1, at 106-107 (criticizing the stance against reservations based on traditional reasoning about the desirability of wider participation in multilateral treaties, and concluding in the context of an article about the American perspective on the ICC that “[a]ll-or-nothing packages will predictably make it harder to gain ratification in countries that would like nothing better than to be the treaty regime’s strongest supporters.”).

131. United Nations Convention on the Law of the Sea, Dec. 10, 1982, arts. 287-88, 21 I.L.M. 1261, U.N. Doc. A/CONF.62/122 (providing for compulsory agreement to dispute resolution procedures); *see also id.* at art. 309 (prohibiting reservations unless explicitly permitted elsewhere in the Convention).

132. See Uruguay Round Agreements Establishing the World Trade Organization, Apr. 15, 1994, Annex 2 (providing Understanding on Rules and Procedures Governing the Settlement of Disputes), *available at* http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Feb. 21, 2005).

133. See Catherine Redgwell, *Reservations to Treaties and Human Rights Committee General Comment No. 24(52)*, 46 INT’L & COMP. L.Q. 390, 391 (1997) (summarizing some of the effects of reservations from treaties); *see also* Gerhard

The compulsory jurisdiction of the ICC, subject to the relevant temporal¹³⁴ and geopolitical¹³⁵ limits, ensures that it cannot be sidelined by signatory states unless they conduct their own prosecutions.¹³⁶ This excludes the ICC under the complementarity principle. However, states carrying out their own prosecutions nonetheless promote the fulfillment of the aims of the ICC, and their prosecutions are subject to its oversight.¹³⁷ Arguably, then, the ICC would welcome such “sidelining” rather than dread it. The ICC’s compulsory jurisdiction serves two purposes: overcoming the nest of reservations that can otherwise beset human rights treaties and helping ensure the effectiveness of the ICC.¹³⁸ The Statute however, provides exemptions for states disagreeing on later amendments, thus creating the possibility of future variations.¹³⁹ But such a possibility does not interfere with the pursuit of these aims for the present. No

Hafner, *Article 120: Reservations*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 1253-54 (Otto Triffterer ed., 1999) (discussing the implementation of the no reservation provision of the Statute and revealing discussion of the past experience with human rights treaties during the drafting).

134. See Rome Statute, *supra* note 2, art. 11(1) (stating “[t]he Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.”).

135. See *id.* at art. 12(2) (relaying that the Court holds jurisdiction under Article 12(2)(a) and (b) where one of the following is a party to the Rome Statute: “[t]he State or the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; The State of which the person accused of the crime is a national.”).

136. See *id.* at art. 17(1) (stating in regard

to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute).

137. See *id.* at art. 17 (embodying the complementarity provisions within the Statute).

138. See *supra* note 133 and accompanying text (discussing reservations and their effect on a treaty).

139. See Rome Statute, *supra* note 2, art. 121(5) (establishing a provision that may eventually beset the Statute with variations).

reservation route exists for states concerned about aspects of the Rome Statute if they choose to ratify the Statute.¹⁴⁰

Nonetheless, some states have endeavored to temper their ratifications of the Statute through interpretive declarations that are arguably, in some ways, similar to reservations. The standard distinction between an interpretive declaration and a reservation, of course, is not based on the form of what states call their declaration but on the substance of whether acceptance of the interpretation in the declaration is a condition precedent to their consent to the treaty.¹⁴¹ Colombia and Uruguay, in particular, have both enunciated “interpretive declarations” on issues related to amnesties that arguably amounted effectively to reservations.

Colombia ratified the Statute with six interpretive declarations, including the following explicit reference to amnesties:

None of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent the Colombian State from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia.¹⁴²

140. See *id.* at art. 119 (disallowing reservations for states ratifying the Rome Statute).

141. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 2(d), 1155 U.N.T.S. 331, 333 (defining a reservation as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”); see also *Belilos v. Switzerland*, 10 Eur. Ct. H.R. (ser. A) para. 49 (1988) (recognizing the distinction as a matter of substance rather than form, and adjudicating on purported interpretive declarations as actually amounting to illegal reservations); *H.K. v. France*, U.N. Human Rights Committee, Communication No. 222/1987, para. 8.6, U.N. Doc. CCPR/C/37/D/222/1987 (1989) (declaring “[i]f the statement displays a clear intent . . . to exclude or modify the legal effect of a specific provision of a treaty, it must be regarded as a binding reservation, even if the statement is phrased as a declaration.”); *Delimitation of the Continental Shelf (U.K. v. Fr.)*, 54 I.L.R. 6, para. 59 (Ct. Arb. 1977) (specifying that when a state, in this case France, formulates reservations, it intends for its consent “to be bound by the provisions of that Article subject to the conditions embodied in the reservations”).

142. Rome Statute, *supra* note 2, Declaration of Colombia, para. 1 (Aug. 5,

No member states objected to Colombia's interpretive declarations.¹⁴³

Colombia's interpretive declaration on the granting of amnesties relates to very real contemporary issues within Colombia. Colombia's government has seriously contemplated using pardons and amnesties to procure an end to decades of armed resistance.¹⁴⁴ Colombia's President, Alvaro Uribe, on a trip to the United States in August 2003, argued for the viability of amnesty policies as a means for ensuring his country's peaceful transition.¹⁴⁵ More recent political debates in Colombia seem to be leaning against the use of outright amnesties. A plan under discussion in mid-April 2004, for a Truth, Justice, and Reparation Tribunal recommends using reduced sentences as a means of encouraging rebels to the table, as opposed to amnesty, with some groups continuing to urge that those connected to the drug trade be extradited to the United States.¹⁴⁶

Colombia obviously faces very difficult issues, which explains its decision to include an interpretive declaration that would preserve at least one possible means of peacefully resolving some of its problems. Colombia's ratification of the Rome Statute, absent its interpretive declaration, might have foreclosed the government's

2002).

143. See *id.* at Objections (containing individual countries' objections to other countries' declarations, of which none reference Colombia's declarations).

144. See *Forgiving and Forgetting*, ECONOMIST, Nov. 29, 2003, at 35 (stating Colombian President Alvaro Uribe proposed a solution where some rebels could avoid prison terms by paying reparations to their victims); see also *Punish or Pardon?*, ECONOMIST, July 26, 2003 (suggesting Colombian citizens would accept an amnesty program provided it also included a "truth commission").

145. See *All Things Considered: Uribe Defends Colombia's Amnesty Program* (NPR radio broadcast, Oct. 1, 2003) (documenting President Uribe's attempt to convince U.S. lawmakers that only amnesty programs could bring definitive peace to Colombia despite the desire to incarcerate the rebels), available at <http://www.npr.org/templates/story/story.php?storyId=1452227> (last visited Feb. 21, 2005).

146. See *Truth, Justice, and Forgiveness?*, ECONOMIST, Apr. 15, 2004 (stating the Tribunal would decide whether those people who have committed crimes against humanity are "eligible for reduced tariffs"), available at http://www.economist.com/displaystory.cfm?story_id=2598906 (last visited Feb. 21, 2005).

ability to offer immunity in exchange for peace, thereby removing any incentive for armed rebels to negotiate a truce.

Colombia's declaration has awakened some concerns in organizations like Human Rights Watch. Within a month of Colombia's filing of its declaration with the UN, Human Rights Watch indicated some concerns, particularly, Colombia's decision to exclude temporarily the ICC's jurisdiction over war crimes.¹⁴⁷ The Executive Director of the Americas Division, José Miguel Vivanco, described Colombia's decision:

This step looks like a prelude to impunity, via some kind of amnesty law. At the moment, peace has never seemed further off, and this dispensation will only encourage more horrific abuses against civilians to occur. President Uribe can reverse the declaration at any time, and he should do so now.¹⁴⁸

Human Rights Watch thus recognized the potential policies inherent in Colombia's ratification and tried to sound some discouraging notes against them at the outset. Mr. Vivanco further appeared before the Peace Commission of the Colombian Senate in April 2004,¹⁴⁹ arguing against Colombia's intended use of amnesties as part of its more recent policies for encouraging negotiations. One element of his argument was that the policy under consideration would amount to an "unwillingness" to prosecute, thereby bringing the policy outside the terms of the complementarity principle in Article 17 of the Rome Statute¹⁵⁰ and rendering those supposedly

147. See Press Release, Human Rights Watch, Colombia's ICC Declaration a "Prelude to Impunity" (Sept. 5, 2002) [hereinafter Human Rights Watch Press Release] (arguing Colombia's decision to deny the ICC jurisdiction indicates a plan to clear the way for amnesty programs that will allegedly provide the government with more leverage in negotiations but only encourage more crimes), available at <http://www.iccnw.org/pressroom/membermediastatements/2002/09.05.2002HRW.pdf> (last visited Feb. 21, 2005); see also Rome Statute, *supra* note 2, art. 124 (permitting parties to reject ICC jurisdiction over Article 8 war crimes for a transitional period of seven years).

148. Human Rights Watch Press Release, *supra* note 147.

149. See *Vivanco Testimony*, *supra* note 7 (sharing Human Rights Watch's views on Colombia's proposed amnesty legislation).

150. See *id.* (arguing cases may still be admissible to the ICC, despite Colombia's amnesty legislation, if the ICC finds that Colombia is "unwilling or unable" to carry out prosecution); see also Rome Statute, *supra* note 2, art. 17 (providing the ICC can find unwillingness in a particular case when laws have

amnestied under it subject to ICC prosecution. In so arguing, Human Rights Watch effectively sought to subvert the Colombian interpretive declaration preserving Colombia's right to make use of amnesty policies. However, there seems to have been no objection at any stage to the actual legality of Colombia's declarations on ratification, and the objections have simply advocated alternative policies. Uruguay, however, faced more opposition than Colombia.

Uruguay ratified the Statute with the following interpretive declaration attached by its Executive:

As a state party to the Rome Statute, the Eastern Republic of Uruguay shall ensure its application to the full extent of the powers of the State insofar as it is competent in that respect and in strict accordance with the Constitutional provisions of the Republic.

Pursuant to the provisions of Part 9 of the Statute entitled "International cooperation and judicial assistance," the Executive shall within six months refer to the Legislature a bill establishing the procedures for ensuring the application of the Statute.¹⁵¹

What motivated the Uruguayan interpretive declaration is not entirely clear. Several Latin American states have become involved in legal difficulties on ratification of the Rome Statute due to such issues as traditional bans on life imprisonment, now not in conformity with the Rome Statute, and immunities of certain state officials, now no longer to be effective under the Rome Statute. But the Uruguayan interpretive declaration is more broadly based, and we may take it as a general attempt to preserve policy decisions taken within its national jurisdiction from interference by the ICC. Such an interpretation is sustained by Uruguay's July 21, 2003, statement, following objections made by several other states:

The Eastern Republic of Uruguay, by Act. No. 17.510 of 27 June 2002 ratified by the legislative branch, gave its approval to the Rome Statute in terms fully compatible with Uruguay's constitutional order. While the Constitution is a law of higher rank to which all other laws are subject, this does not in any way constitute a reservation to any of the provisions of that international instrument.

been passed for the purpose of shielding persons from liability for crimes against humanity).

151. Rome Statute, *supra* note 2, Declaration of Uruguay (June 28, 2002).

It is noted for all necessary effects that the Rome Statute has unequivocally preserved the normal functioning of national jurisdictions and that the jurisdiction of the International Criminal Court is exercised only in the absence of the exercise of national jurisdiction.

Accordingly, it is very clear that the above-mentioned Act imposes no limits or conditions on the application of the Statute, fully authorizing the functioning of the national legal system without detriment to the Statute.

The interpretive declaration made by Uruguay upon ratifying the Statute does not, therefore, constitute a reservation of any kind. Lastly, mention should be made of the significance that Uruguay attaches to the Rome Statute as a notable expression of the progressive development of international law on a highly sensitive issue.¹⁵²

Uruguay thus sought to ensure the continued functioning of its national jurisdiction and decisions taken therein on matters otherwise within the remit of the ICC, in an attempt to maintain a strong reading of the complementarity principle. Although the full reasons for this decision would require further examination for a complete historical analysis, we may nonetheless conjecture that Uruguay's history conditioned its response to the ICC.

Uruguay experienced years of extrajudicial violence during the dictatorship of 1973-85. A negotiated process brought a return to democracy but at the cost of providing amnesty to the military and police officials responsible for human rights abuses perpetrated prior to 1985, eventually in the form of the *Ley de Caducidad de la Pretensión Punitiva del Estado* (Expiry Law of the Punitive Powers of the State). Ley N° 15.848 thus imposed a limitation on prosecution of conduct by military and police officers acting in their official capacity or pursuant to orders in the period of non-democratic rule up to 1985,¹⁵³ although it did not block prosecutions already underway or prosecutions relating to human rights abuses committed

152. *Id.* at Supplementary Statement of Uruguay (July 21, 2003).

153. *See* Law N° 15.848, art. 1 [translated by author] (stating the "punitive pretension of the State" with respect to crimes committed by military and police civil employees before March 1, 1985 has expired), *available at* <http://www.parlamento.gub.uy/Leyes/Ley15848.htm> (last visited Feb. 21, 2005).

for personal economic interests.¹⁵⁴ In 1989, Uruguay subjected its amnesty legislation to a national referendum, in which fifty-three percent voted to retain the amnesty law.¹⁵⁵ Although some human rights groups expressed concerns about the fairness of the referendum process,¹⁵⁶ it is nonetheless the case that a majority of voters in the state did choose to support the continuation of the amnesty as a means of putting the past aside and trying to preserve the stability of peace and democracy.¹⁵⁷ Efforts simply to investigate the historical record of this period have, at the same time, been limited.¹⁵⁸

In Uruguay, as in Colombia, the lived experience of the state thus raised the potential of amnesties being perceived as a relevant and effective means of seeking peace and thereby conditioned the likely approach of the state to ratification of the Rome Statute. Uruguay's interpretive declaration, however, elicited protests from other states. In particular, Finland, Germany, the Netherlands, and Sweden all objected to Uruguay's interpretive declarations as amounting to what they perceived as an illegal reservation from the treaty.¹⁵⁹ These four objections came in a flurry on July 7 and 8, 2003. Uruguay then took steps to respond to these objections in its statement on July 21, 2003, cited in full above. Thereafter, additional states also communicated

154. See *id.* at art. 2 (providing Article One does not include crimes already indicted or committed for personal economic gain).

155. See Terence S. Coonan, *Rescuing History: Legal and Theological Reflections on the Task of Making Former Tortures Accountable*, 20 FORDHAM INT'L L.J. 512, 535 (1996) (indicating that eighty percent of eligible voters participated in the referendum).

156. See *id.* at 533-34 (recounting a grassroots effort, spearheaded by human rights advocates, that attempted to have the amnesty legislation overturned).

157. See TEITEL, *supra* note 11, at 58 (arguing the referendum provided for political accountability and broad deliberation on the amnesty).

158. See Priscilla B. Hayner, *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597, 616 (1994) (revealing the governmental commission only conducted a limited investigation because its terms of reference dealt only with disappearances and not with the more common issues of illegal imprisonment and torture).

159. See Rome Statute, *supra* note 2, Objections (July 2003) (providing the aforementioned countries' concerns over Uruguay's statement that the Statute will be limited by its national legislation). Finland, Germany, the Netherlands and Sweden all considered Uruguay's statement, in substance, to constitute a reservation. *Id.*

their objections to the Uruguayan interpretive declarations: Ireland on July 28, 2003, the United Kingdom on July 31, 2003, Denmark on August 21, 2003, and Norway on August 29, 2003.¹⁶⁰ Ironically, it appears that these latter objections would have been submitted too late had Uruguay actually had the possibility of reserving from the Statute, since the Vienna Convention on the Law of Treaties provides that reservations are considered to have been accepted if there is no objection within twelve months of notification of the ratification,¹⁶¹ and Uruguay had ratified the Rome Statute on June 28, 2002, with a notification date of July 19, 2002.¹⁶² One might endeavor to argue that the second Uruguayan statement reawakened the space for such objections, but there is no basis in the Vienna Convention on the Law of Treaties for a reservation after ratification,¹⁶³ so this interpretation is unsustainable, meaning that these latter statements may be little more than political rhetoric.

In principle, and in terms of black-letter law, there seems to have been no legal need for these objections in any case. Given that the Rome Statute explicitly prohibits reservations, any reservations to the Rome Statute are automatically invalid.¹⁶⁴ Although the validity of a reservation is normally subject to a two-stage test¹⁶⁵ wherein we look first to whether it conflicts with the object and purpose of the

160. *Id.*

161. See Vienna Convention on the Law of Treaties, *supra* note 141, art. 20(5) (providing “unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later”).

162. Rome Statute, *supra* note 2.

163. See Vienna Convention on the Law of Treaties, *supra* note 141, art. 19 (stating “[a] State may, *when signing, ratifying, accepting, approving or acceding to a treaty*, formulate a reservation.”) (emphasis added).

164. See Rome Statute, *supra* note 2, art. 120 (declaring “[n]o reservations may be made to this Statute.”); see also Vienna Convention on the Law of Treaties, *supra* note 141, art. 19(a) (providing a State may not formulate a reservation if prohibited by treaty).

165. See Redgwell, *supra* note 133, at 404-05 (characterizing the first stage as one strictly concerned with the permissibility of reservations, and the second stage concerned with the opposability of permissible reservations). Regardless of whether a State is found not to be a party under either stage, “[t]he result is apparently the same, but achieved by quite different routes.” *Id.* at 405.

treaty¹⁶⁶ and then to the more complicated rules that follow concerning its application against objecting and non-objecting states,¹⁶⁷ there is no need to proceed to this test in the case of a reservation explicitly prohibited by a treaty.¹⁶⁸ The reservation would simply have been legally ineffective. Even if it were a mere interpretive declaration, it still would not have the legal effects of a reservation in any case.¹⁶⁹

However, matters are obviously more complicated, engaging both a more nuanced legal doctrine and a concomitant corpus of political factors. An accumulation of interpretive declarations could subtly promote certain interpretations of the Rome Statute differing from

166. See Vienna Convention on the Law of Treaties, *supra* note 141, art. 19(c) (providing in cases where the specific reservation in question is prohibited by the treaty's terms, "the reservation is incompatible with the object and purpose of the treaty").

167. See *id.* at arts. 20-23 (outlining various procedures for dealing with State objections to reservations).

168. See *id.* at art. 19(a) (providing a State cannot formulate a reservation when a treaty strictly prohibits them); see also Redgwell, *supra* note 133, at 405 (stating if a treaty prohibits reservations, States do not possess the authority to accept an impermissible reservation).

169. See Hafner, *supra* note 133, at 1259-60 (making this point specifically in regard to interpretive declarations to the Rome Statute); see also *Report of the International Law Commission on the Work of its Fifty-First Session*, U.N. GAOR, 54th Sess., ch. VI, s. 1.2.1, U.N. Doc. A/54/10 (1999) (defining one other type of interpretive declaration, the conditional interpretive declaration, as

A unilateral statement formulated by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, or by a State when making a notification of succession to a treaty, whereby the State or international organization subjects its consent to be bound by the treaty to a specific interpretation of the treaty or of certain provisions thereof, shall constitute a conditional interpretative declaration.),

available at <http://www.un.org/law/ilc/reports/1999/english/99repfra.htm> (last visited Feb. 21, 2005); Alain Pellet, *Entry into Force and Amendment of the Statute*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – A COMMENTARY* 145, 160 (Antonio Cassese, Paolo Gaeta & John R.W.D. Jones eds., 2002) (suggesting in the context of the Rome Statute,

conditional interpretative declarations are so close to reservations that it is highly doubtful that a State could make expression of its agreement to be bound by a treaty that prohibits reservations depend on acceptance by the other Parties or by the body set up by the treaty of its interpretation of its provisions.).

those one might otherwise expect.¹⁷⁰ Some already expressed concerns that the processes underway whereby the American government is seeking bilateral agreements to protect its nationals from ICC jurisdiction, as implicitly possible under Article 98, may amount to alterations of the intended application of the Rome Statute.¹⁷¹ On standard principles of treaty interpretation, subsequent practice by parties to a treaty can affect the appropriate interpretation of treaty provisions.¹⁷² Consequently, the possibility of shifts in meaning must be presumed very real, simply under a slightly more nuanced legal doctrine. Of course, there are also political maneuvers underway simultaneously, as states attempt politically to capture favored interpretations.

States sometimes object to reservations that conflict with the object and purpose of a human rights treaty, even though such a reservation can have no effect on legal relations between the objecting state and the reserving state.¹⁷³ They do so simply in an effort to preserve their preferred interpretations of the relevant treaties, or, as they might put it, to preserve the integrity of the treaty instruments.¹⁷⁴ That being said, there have been concerns that they do

170. See Rome Statute, *supra* note 2, Declarations and Reservations (documenting the interpretive declarations of nearly twenty nations and showing that each of these nations chose to clarify its interpretation of the Statute).

171. See Anup Shah, *United States and the ICC*, GLOBAL ISSUES, June 26, 2004 (arguing U.S. bilateral agreements are contrary to the intention of the Rome Statute as delegates who drafted Article 98 of the Statute claim that it was not intended to allow new agreements, but rather “to prevent legal conflicts which might arise because of existing agreements”), available at <http://www.globalissues.org/Geopolitics/icc/us.asp> (last visited Feb. 21, 2005). Furthermore, the Article 98 agreements, designed for providing Americans with immunity from the ICC, are contrary to the overall goal of the ICC to ensure that genocide, crimes against humanity, and/or war crimes are addressed. *Id.*

172. See Vienna Convention on the Law of Treaties, *supra* note 141, art. 31(3)(b) (mandating “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”).

173. See Catherine Redgwell, *The Law of Reservations in Respect of Multilateral Conventions*, in HUMAN RIGHTS AS GENERAL NORMS AND A STATE’S RIGHT TO OPT OUT 5 (J.P. Gardner ed., 1997) (citing examples that include Norway and Sweden’s objections to reservations made on the Convention on the Elimination of Discrimination Against Women (“CEDAW”) where that Convention does not permit reservations incompatible with its object and purpose).

174. See *id.* (providing a historical rationale for the increased frequency of reservations since more widespread participation is sought amongst “States with

so too rarely, perhaps due to internal structural constraints on states' objection processes, whether in budgetary terms or simple bureaucratic organization terms, meaning that they will monitor reservations only where their objection or non-objection can have legal effects.¹⁷⁵ This concern is part of what led the UN Human Rights Committee to attempt to seize jurisdiction on those adjudications concerning reservations to the International Covenant on Civil and Political Rights.¹⁷⁶ Perhaps the decision of these states to object to Uruguay's interpretive declarations was an early attempt to indicate that they will act in defense of the Rome Statute to ensure that its work will not be undermined by an array of interpretive declarations that might gradually work against the purposes (as they see them) of the Statute.

However, if so, there might be questions as to why these same states have been silent on the interpretive declarations of other states that might as easily be interpreted as amounting to reservations as the declarations of Uruguay. Some such declarations, of course, are of only limited significance. But other declarations have arguably been as far-reaching as Uruguay's. As an example of the latter, consider the interpretive declaration of Jordan: "[t]he Government of the Hashemite Kingdom of Jordan hereby declares that nothing under its national law including the Constitution, is inconsistent with the Rome Statute of the International Criminal Court. As such, it interprets such national law as giving effect to the full application of the Rome Statute and the exercise of relevant jurisdiction

diverse political, social and economic systems"). Accompanying the increased number of reservations is "tension between the degree of participation required for effectiveness and for the preservation of the integrity of the treaty." *Id.* at 3.

175. See Christine Chinkin, *Reservations and Objections to the Convention on the Elimination of All Forms of Discrimination Against Women*, in HUMAN RIGHTS AS GENERAL NORMS AND A STATE'S RIGHT TO OPT OUT 75-77 (J.P. Gardner ed., 1997) (highlighting that the low frequency with which states make objections is self-perpetuating since the infrequency leads to more hostility when the objection is made and referring to issues around whether human rights has a significant structural part in states' foreign affairs departments).

176. See Redgwell, *supra* note 133, at 390-93 (noting 46 of the 127 nations party to the International Covenant on Civil and Political Rights collectively made 150 reservations to it). Consequently, the Human Rights Committee adopted General Comment No. 24(52) indicating the manner in which it will address reservations to Covenant guarantees. *Id.*

thereunder.”¹⁷⁷ Again, we see a blanket preservation of domestic law, yet this interpretive declaration attracted no objections. Other interpretive declarations also arguably seem geared at immunizing portions of domestic law, including one of Australia’s declarations that “declares its understanding that the offences in Article 6, 7 and 8 will be interpreted and applied in a way that accords with the way they are implemented in Australian domestic law.”¹⁷⁸ And Colombia’s declaration, explicitly on amnesties, obviously contradicted the views of some states in the negotiation process.¹⁷⁹ Various interpretive declarations could gradually have effects on the meaning of the Rome Statute.¹⁸⁰

This conclusion leads to a corollary that the work of states supporting a strict interpretation of the Rome Statute was not finished upon signing the Statute or even upon ratifying the Statute, but must carry forward in the monitoring of the interpretive declarations of other states to ensure that an accrual of interpretive declarations does not subtly alter the meaning of provisions in unexpected, and undesired, ways. Those countries seeking the effective Rome Statute they imagine must continue their efforts not just in Washington and Moscow but also in capitals like Bogota and Montevideo and others yet to come. Human rights organizations, of course, may have a role here as well if they seek a more deontological interpretation of the Rome Statute. In their efforts to congratulate states on their readiness to sign the Rome Statute, human rights groups have sometimes congratulated states that have gone on to ratify the Statute with substantial interpretive declarations that may not correspond with the human rights groups’ preferred

177. Rome Statute, *supra* note 2, Declaration of Jordan (Apr. 11, 2002).

178. *Id.* at Declaration of Australia (July 1, 2002).

179. *See id.* at Declaration of Colombia (Aug. 5, 2002) (providing that none of the provisions of the Rome Statute concerning the exercise of jurisdiction by the International Criminal Court prevent the Colombian state from granting amnesties, reprieves or judicial pardons for political crimes, provided that they are granted in conformity with the Constitution and with the principles and norms of international law accepted by Colombia.).

180. *See supra* notes 177-179 and accompanying text (citing Jordan, Australia, and Colombia’s differing interpretive declarations to illustrate that nations differ on their understanding and potential implementation of the Rome Statute).

meaning for it.¹⁸¹ They may be content with this discrepancy as part of effective advocacy trying to show momentum behind accession to the Rome Statute, but they might also wish to remain more watchful of the ratification stage for these more precise legal technicalities. Conversely, states and others who see the need for flexibility in the Rome Statute and who see amnesties as potentially appropriate may wish to utilize or support interpretive declarations that grant the scope for amnesty programmes.¹⁸² The Rome Statute, although signed and in force, is not yet set in stone.

Amnesties thus remain a live issue for some states, and it is to be expected that their ratifications of the Rome Statute may be premised on assumptions that amnesties remain permissible in at least some circumstances. In some instances, this assumption may lead states to implement interpretive declarations, so those on different sides of amnesty issues have an ongoing interest in the conduct of states during the continuing ratification processes.¹⁸³ This conclusion is particularly poignant in light of the possibility that an accumulation of interpretive declarations on this matter, as on any other, could subtly shift the meaning of the Rome Statute. Ratification processes remain an important area for monitoring and study for those engaged in issues around the ICC.

V. EARLY ICC PRACTICE ON AMNESTIES

It is, of course, too early to speak of ICC practice in any strong sense.¹⁸⁴ However, it is perhaps noteworthy that the very first investigation the ICC has undertaken raises amnesty issues of the

181. See Human Rights Watch Press Release, *supra* note 147 (claiming the concerns raised about Colombia's ratification came only after it had earlier praised Colombia for its ratification).

182. See Rome Statute, *supra* note 2, Declaration of Colombia (Aug. 5, 2002) (providing an example of a nation which chose to voice its right to grant amnesty in its declarative interpretation of the Rome Statute).

183. See *id.* (documenting the declarations and reservations each nation made upon ratification, acceptance, approval, or accession of the Rome Statute).

184. See International Criminal Court, *Historical Introduction*, (noting "it will take some time before the Court begins its operations," as the Rome Statute establishing the ICC was only entered into force in July 2002), *available at* <http://www.icc-cpi.int/ata glance/whatistheicc/history.html> (last visited Feb. 21, 2005).

very sort we have been discussing. In a January 29, 2004 press release, the Prosecutor of the ICC indicated that it was planning its first ICC investigation into the situation concerning the Lord's Resistance Army ("LRA") in northern Uganda.¹⁸⁵ After a further massacre at Barlonya camp in February 2004, in which as many as 200 civilians were killed by the LRA,¹⁸⁶ the ICC Prosecutor indicated an intention to investigate this incident as well.¹⁸⁷ Although the label of "first formal investigation" accrued to an investigation in the Congo, the ICC Prosecutor's first-announced investigative steps were in the context of the situation in Uganda.¹⁸⁸ This Part deploys this ICC investigation into international crimes in Uganda as a case study of how amnesty issues may arise in ICC practice and of how

185. See Press Release, International Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army ("LRA") to the ICC (Jan. 29, 2004) [hereinafter ICC Press Release 1/29/04] (reporting that after Ugandan President Yoweri Museveni presented the dilemma of the LRA to the ICC, the Prosecutor found a sufficient basis to plan for the ICC's first investigation and that the Prosecutor will work together with Ugandan authorities, other states, and international organizations to gather information in determining whether there is a reasonable basis to proceed with the investigation), *available at* http://www.icc-cpi.int/pressrelease_details&id=16.html (last visited Feb. 21, 2005).

186. See *No Respite: A Massacre in Uganda*, *ECONOMIST*, Feb. 28, 2004, at 46 (reporting the rebels of the LRA attacked the refugee camp near Lira and that local sources estimate that more than 200 people were "shot, hacked or burned to death").

187. See Press Release, International Criminal Court, Statement by the Prosecutor Related to Crimes Committed in Barlonya Camp in Uganda (Feb. 23, 2004) (stating the crimes committed at Barlonya could fall under the jurisdiction of the ICC, which is responsible for the prosecution of genocide, war crimes, and crimes against humanity), *available at* <http://www.icc-cpi.int/library/organs/otp/PIDS.OTP.002.2004-EN2.pdf> (last visited Feb. 21, 2005). See also Press Release, International Criminal Court, Prosecutor of the International Criminal Court Opens an Investigation into Northern [sic] Uganda (July 29, 2004) (announcing the Prosecutor had found a reasonable basis for an investigation of the Barlonya crimes), *available at* <http://www.icc-cpi.int/press/pressreleases/33.html> (last visited Feb. 21, 2005).

188. See Press Release, International Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation (June 23, 2004) (announcing the Prosecutor's "first investigation of the ICC" involved crimes committed in the Democratic Republic of Congo since July 1, 2002), *available at* <http://www.icc-cpi.int/press/pressreleases/26.html> (last visited Feb. 21, 2005). See also ICC Press Release 1/29/04, *supra* note 185 (describing the first investigative steps in Uganda).

the ICC has initially and tentatively responded to the issues raised by amnesties.¹⁸⁹

It is noteworthy that the ICC Prosecutor has referred specifically to the presence or absence of an amnesty in the very press release announcing the planning of the investigation in the case.¹⁹⁰ This press release shows that the Prosecutor will not operate in ignorance of national amnesty laws.¹⁹¹ Indeed, the tone of the press release in this instance seems to be that the Prosecutor might actually take account of the law.¹⁹² To understand further why the Prosecutor might pay heed to an amnesty in such a manner, however, we need to look further into the Ugandan context that gave rise to these investigative initiatives.

Uganda passed an Amnesty Act, entering into force in January 2000, which had offered a blanket immunity and resettlement for rebels who would cease fighting.¹⁹³ However, this legislation's expiration on January 17, 2004 (with the law, on its initial terms, due to be renewed every six months)¹⁹⁴ gave the Ugandan government an opportunity to amend the amnesty offer, and it announced in December 2003 its intention to exclude the LRA's leader and senior commanders from the amnesty offer embodied in the legislation,

189. See *infra* notes 190-209 (exploring the dilemma in Uganda and the involvement of the ICC as a potential indicator of the influence of amnesty issues on future ICC practice).

190. See ICC Press Release 1/29/04, *supra* note 185 (noting the Ugandan authorities, in an effort to encourage LRA members to put down their weapons, enacted an amnesty law).

191. See *id.* (indicating the Prosecutor considers national amnesty laws at the very onset of determining whether to investigate a situation).

192. See *id.* (relying on the press release's reference to and acknowledgement of Uganda's enactment of amnesty law, along with its references to many LRA members as victims, as possible indicators that the Prosecutor will take the national law into account).

193. See The Amnesty Act (2000) (Uganda) (granting immunity to those seeking it, provided that they immediately report to one of a designated group of individuals, renounce and abandon involvement in the war, and surrender any weapons), available at http://www.c-r.org/accord/uganda/accord11/downloads/2000_Jan_The_Amnesty_Act.doc (last visited Feb. 21, 2005).

194. See *id.* § 17 (providing for the Act's expiration every six months, with extension by statutory instrument by the Minister responsible for internal affairs).

thereby clearing the way for an ICC investigation.¹⁹⁵ The legislation, as of January 2004, now must be renewed every three months, perhaps in an effort to create additional pressure.¹⁹⁶ Such an interpretation would be consistent with other moves away from the full amnesty offered in recent years, such as through efforts to bring some rebels under anti-terrorism legislation, which have met with criticism from those supportive of the principles of the amnesty.¹⁹⁷

The amnesty legislation in 2000 was based on what its preamble termed “the expressed desire of the people of Uganda to end armed hostilities, reconcile with those who have caused suffering and rebuild their communities” and “the desire and determination of the Government to genuinely implement its policy of reconciliation in order to establish peace, security and tranquility throughout the whole country.”¹⁹⁸ The Act then provided for amnesty applications by those renouncing their warfare activities against Uganda, an Amnesty Commission to promote the granting of amnesty under the legislation, and a Demobilization and Resettlement Team (“DRT”) to carry out disarmament and encourage reintegration into the community of those who sought amnesty under the legislation.¹⁹⁹

195. See Int’l Crisis Group, *NORTHERN UGANDA: UNDERSTANDING AND SOLVING THE CONFLICT* 19 (2004) (noting government indications of an intention “to modify the terms to exclude, for the first time, Joseph Kony and otherwise unspecified leadership elements”), available at http://www.icg.org/library/documents/africa/central_africa/077_uganda_conflict.pdf (last visited Feb. 21, 2005).

196. See Amnesty Act, *supra* note 193 (providing together with Ugandan statutory instruments, that the Amnesty Act must be renewed every three months).

197. See *Acholi Religious Leaders’ Peace Initiative*, KACIKE MADIT NEWSLETTER, Feb. 11, 2004 (urging the Ugandan government to extend the offer of amnesty for a longer mandate than three months and emphasizing the conflicts that have arisen since the LRA was labeled a terrorist organization on account of the irreconcilable differences between the Ugandan Anti-Terrorism Act of 2002 and the earlier Amnesty Act of 2000), available at http://www.acholipeace.org/feb_40.html (last visited Feb. 21, 2005).

198. See Amnesty Act, *supra* note 193, pmbl. (providing the rationale for implementing the Amnesty Act rather than prosecuting all individuals involved in acts of war-like nature). Ugandans strongly desire peace after decades of suffering. See O’SHEA, *supra* note 11, at 39-40 (reviewing Uganda’s history of suffering at the hands of brutal dictatorships).

199. See Amnesty Act, *supra* note 193, § 3-16 (outlining measures taken by Uganda from the initial stages of offering amnesty to the final stages of resettling former rebels in order to create nationwide standards throughout the process of

The impact of any amnesty programme in Uganda is inherently complex. The amnesty legislation appears to have had some successes, having been part of negotiation processes persuading some armed groups to put down their weapons.²⁰⁰ As a result, some conflict resolution and religious groups remain supportive of amnesties in Uganda as a plausible route to peace. For example, a body called the Reform Agenda has spoken out against the Ugandan government's recent limitations of the amnesty, suggesting that these limitations will make it more difficult to achieve peace.²⁰¹ The Acholi Religious Leaders' Peace Initiative similarly warned of the dangers inherent in effectively telling rebel leaders that they could not negotiate without facing the risk of being killed or prosecuted.²⁰² The International Crisis Group, in an extended discussion of routes to peace in Uganda in April 2004, urged officials to continue to make amnesties available to most of the rebel leaders but not to the top leader, "in order to encourage potential divisions within the leadership," and to use simultaneously the threat of ICC prosecution to encourage the rebels to the negotiating table.²⁰³ At the same time, concerns have been expressed about the amnesty. For example, Amnesty International (somewhat inaptly named in this context) issued a public statement welcoming steps by the ICC Prosecutor toward investigating the situation in Uganda but calling for a

granting amnesty).

200. See UN Office for the Coordination of Humanitarian Affairs, *Affected Populations in the Great Lakes Region* 42 (Mar. 15, 2004) (highlighting that approximately 6,000 LRA rebels have surrendered their weapons under the Ugandan Amnesty Act), available at <http://www.reliefweb.int/library/documents/2004/ocha-gl-r-15mar04.pdf> (last visited Feb. 21, 2005).

201. See Richard Komakech, *Reform Speaks Against Amnesty Act Changes*, NEW VISION (Kampala), Apr. 22, 2004 (reporting the Reform Agenda's leader, Geoffrey Ekanya, declared, "[w]e urge Parliament to resist the changes and offer amnesty to all classes of people."), at <http://www.newvision.co.ug/D/8/13/355444> (last visited Feb. 21, 2005).

202. See Integrated Regional Information Network News, *Uganda: Government Curtails Amnesty Extension*, Sept. 29, 2004 (suggesting that such a process would make a peaceful resolution of the conflict impossible), available at <http://www.irinnews.org/print.asp?ReportID=39092> (last visited Feb. 21, 2005).

203. See INTERNATIONAL CRISIS GROUP, *supra* note 195 (arguing the creation of exit strategies for LRA commanders and fighters, the potential for infighting on account of denying amnesty to the top leaders, and the potential for trial for war crimes before the ICC could bring the LRA to the negotiating table).

complete end to impunity and going on to assert that amnesties for anyone who had committed international crimes were internationally unlawful.²⁰⁴ Human Rights Watch also welcomed the Prosecutor's initial steps but urged a complete investigation of all parties on all sides.²⁰⁵ However, in a manifestation of the complexity of the situation, this latter NGO in particular has been drawn into apparent contradictions. Human Rights Watch, despite its usual stance against amnesties and impunity, wrote a letter to the Ugandan Minister of Justice in February 2003 seeking the release of two young LRA soldiers in which it invoked both the amnesty legislation and the principle of granting broad amnesties to those who have participated in armed conflict.²⁰⁶ Again, the most effective approach in this context is complex and contested.

The exclusion of top leaders from the amnesty, as in the Ugandan government's recent amendments, would match with some accounts of the appropriate approach to amnesties both in general and in international criminal law in particular.²⁰⁷ But complex questions

204. See Press Release, Amnesty International, Uganda: First Steps to Investigate Must Be Part of Comprehensive Plan to End Impunity (Jan. 30, 2004) (suggesting any Court investigation "must be part of a comprehensive plan to end impunity for all such crimes, regardless of which side committed them and of the level of the perpetrator" and referring to Article 42(1) of the Rome Statute to highlight that the Prosecutor is not to seek instruction from external sources when conducting an investigation), *available at* <http://web.amnesty.org/library/Index/ENGAFR590012004?open&of=ENG-UGA> (last visited Feb. 21, 2005).

205. See Press Release, Human Rights Watch, ICC: Investigate All Sides in Uganda (Feb. 4, 2004) (pointing out unlawful acts and crimes of war have been committed not only by the LRA, but also by the Ugandan government troops), *available at* <http://www.hrw.org/english/docs/2004/02/04/uganda7264.htm> (last visited Feb. 21, 2005).

206. See Letter from Lois Whitman, Executive Director, Human Rights Watch, to Janet Mukwaya, Minister of Justice, Government of Uganda (Feb. 19, 2003) (arguing, in an attempt to remove treason charges against two minor boys, that not only are the boys qualified for amnesty under the Amnesty Act of 2000, but also that the principles of international humanitarian law suggest that authorities provide the "broadest possible amnesty" to those participants of the armed conflict), *available at* <http://www.hrw.org/press/2003/02/uganda021903-ltr.htm> (last visited Feb. 21, 2005).

207. See SADAT, *supra* note 39, at 67-69 (arguing for distinctions between blanket amnesties and conditional amnesties as well as between leaders and lower-level perpetrators); see also Slye, *supra* note 75, at 240-247 (examining whether amnesties fulfill the need for "accountability, truth, reparations, and participation")

remain on what approach is most effective and corresponds best to the demands of justice. Moreover, in terms of the lessons of this experience, the key question is how the ICC Prosecutor will deal with the amnesty in continuing work on the investigation. Such issues are bound to occur on a frequent basis in ICC practice. Amnesties are frequently contemplated as part of peace negotiations, as one way of lessening the cost for human rights abusers who currently have power and are being asked to give up that power.²⁰⁸ And such negotiations will arise frequently in contexts where the ICC has potential application to abuses. The ICC Prosecutor, thus far in this investigation, appears to have approached matters at least somewhat pragmatically, apparently not seeking to undermine the amnesty to which the press release referred but working alongside the determinations made by the national government.²⁰⁹

and concluding that they can be analyzed only when divided into four main categories: compromise amnesties, corrective amnesties, amnesic amnesties, and accountable amnesties). Accountable amnesties, in particular, cannot apply to those held responsible for serious violations of international criminal law. *Id.* at 245.

208. See TEITEL, *supra* note 11, at 51-59 (arguing “amnesties can advance the normative project of the political transition”); *but see* CHIGARA, *supra* note 39, at 9 (arguing that national amnesty laws are “contractual in that often the outgoing government makes them a fundamental condition of its surrender of public office” and that “they are sometimes peddled as ‘negotiated amnesties’ though the incoming government has neither the bargaining power to prevent declaration of such amnesty laws, nor sufficient control of the determining political, social milieu to prevent them”). Note that such negotiations need not, however, be in transitional contexts. In contexts like Colombia or Uganda, the government does have substantial power, thus differing from Chigara’s envisioned scenarios, but has simply been unable to amass sufficient power to overcome rebel opposition. See generally Arsanjani, *supra* note 14, at 65 (noting the power of rebel groups in some situations).

209. See ICC Press Release 1/29/04, *supra* note 185 (reporting the enactment of the Amnesty Act in Uganda and announcing the Prosecutor’s plan to work together with Ugandan authorities in order to investigate the situation and find a reasonable basis to issue an arrest warrant). *But see Govt Can Withdraw ICC Case, Says Army*, NEW VISION (Kampala), Jan. 5, 2005 (indicating army commanders spoke of withdrawing the case against the LRA’s top leader if he were willing to negotiate), available at <http://allafrica.com/stories/200501050252.html> (last visited Feb. 21, 2005); *Kony Trial Starts in Six Months*, THE MONITOR (Kampala), Jan. 31, 2005 (indicating the ICC Prosecutor spoke of starting the trials in Uganda within six months, and that the ICC “aims to bring to justice the masterminds of atrocities”), available at <http://allafrica.com/stories/200501310034.html> (last visited Feb. 21, 2005).

Here, too, those who have a stake in the amnesty issue ought to be watchful. The early decisions of the ICC Prosecutor may well set a pattern for years to come, though future practice may also develop and evolve. Those who have strong views on the amnesty issue may wish to seek to influence the Prosecutor's approach to investigations through advocacy work and through writings in academic forums on an appropriate interpretation of the amnesty issue for the Prosecutor. ICC practice, too, may affect the shape of the actual workings of the Rome Statute, so a great deal is at stake. Again, the Rome Statute may be in force, but it remains malleable and open to ongoing policy or philosophical discussion.

VI. TOWARD A NEW THEORETICAL FRAMEWORK

The assertions that commentators make about the interests at stake in a question like that of the ICC and amnesties are overwhelmingly analytically undeveloped. This Part draws together some of the varied comments about the national and international interests suggested to be at play. It begins with a "public good" analysis partially developed by Antonio Cassese. However, more recent writing on global public goods can help us to see that this analysis breaks down and is subject to a substantial distributive challenge. This Part builds upon such an analysis to try to offer a more analytically developed theoretical approach to some of the issues around amnesties. In particular, this Part endeavors to clarify the real benefits and costs of different rules, partly through a dialogue with different commentators' assertions, which the commentators have often set forth without any substantial theoretical framework, resulting in their sometimes having an arbitrary ring. The theoretical analysis developed in this Part will help to expose the substantial distributive implications of the Rome Statute, which raise ongoing challenges to its normative and empirical success, while also offering some possible inspiration in a larger project of re-theorizing international criminal law.

Some commentators, notably Antonio Cassese, do seem to offer at least partially theorized frameworks that can help us understand why we would have an ICC with substantial reluctance to recognize amnesties. The analysis at play is a sort of public good analysis. This

analysis depends ultimately on two components. First, Cassese presumes a certain model of state behavior. He writes:

The sovereign State tends to follow its own short-term interests, too often to the detriment of the general interests of the international community. It also tends to protect its nationals even when they have infringed fundamental values of the international community. It does so especially where the person has acted as a State agent (Head of State, member of cabinet, military official, etc.).²¹⁰

This model of the state then makes it possible to have a traditional sort of public goods problem, since states will act in their own interests rather than in those of the community of states. Cassese may be suggesting that amnesty situations pose this sort of traditional public goods problem: "as international crimes constitute attacks on universal values, no single State should arrogate to itself the right to decide to cancel such crimes, or to set aside their legal consequences The requirement to dispense justice should trump the need to respect State sovereignty."²¹¹ Cassese's assumption as to the behavior of states thus provides a theoretical explanation for why amnesty decisions by one state should not be accepted because, as he reasons, they amount to the imposition of costs by one state on the community of states.²¹² This explanation, of course, is still subject to different interpretations.

One might take his latter statement as a deontological moral conclusion—one objecting simply to the decision of one state alone to make a decision that has effects against universal values. One might alternatively take it, as we have thus far been doing, as a claim that states will tend to become free riders and set aside international crimes for their own personal gain to a degree that is inefficient for the international community as a whole. The deontological interpretation would presumably imply that there could be no decision for amnesties at all, which might be one interpretation of the Rome Statute. But this interpretation coheres ultimately neither with the positive law nor with Cassese's statement. The prosecutorial

210. CASSESE, *supra* note 5, at 446.

211. *Id.* at 315.

212. *See id.* at 446 (inferring individual state amnesty decisions may undermine international efforts to deter human rights violators on a global scale).

discretion in the Rome Statute, as discussed above, does indicate some scope for an international decision not to prosecute, so the prosecution does not immediately follow from universal values *per se*. Moreover, Cassese's statement refers simply to a state "arrogat[ing] to itself the right"²¹³ to decide not to prosecute, implicitly retaining an international right based on circumstances. So we must take this model as a traditional sort of model of a public good with the risk of free riders resulting in an inefficiently low disposition of international justice.

One recent attempt to re-conceptualize the issue of amnesties may lead to a similar interpretation. William W. Burke-White, attempting to apply a liberal internationalist perspective in place of a realist perspective, writes:

Given the value judgment that individuals should be the source of authority of government, a test for legitimacy that looks to whether a law reconciles a society and reasserts the popular sovereignty, would seem appealing . . . even where the individuals in a state deem amnesty preferable on consequential grounds, the strong preferences of the transnational polity in favor of prosecuting certain heinous crimes may limit the freedom of the national polity to amnesty those crimes.²¹⁴

In other words, taking individuals' preferences as providing an ultimate grounding for legitimacy, Burke-White enunciates what seems to be a more deontologically-based framework that similarly reaches a conclusion that the preferences of the international community generally override domestic interests in amnesties.²¹⁵ Burke-White's model is more theoretically developed in many respects, but it ultimately yields something similar to Cassese's analysis, even if from a different starting point.²¹⁶ Phrasing the matter in terms of legitimacy of a particular policy, however, does not

213. *Id.* at 315.

214. William W. Burke-White, Article, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L.J. 467, 476-77 (2001).

215. *See id.* at 477 (explaining that the current international preference favoring prosecution prevails in the absence of any positive evidence demonstrating that amnesty leads to stable transitions).

216. *See id.* at 470 (approaching the analysis from the "bottom up" by focusing on individuals and organizations to predict and interpret state behavior).

fundamentally shift the analysis away from what we may consider a public goods/free rider type of analysis. Burke-White's argument, in essence, may be suggesting that the domestically legitimate policy may impose substantial costs on the international community, thereby failing to correspond with an internationally legitimate policy that reflects the correct provision of the public good of international justice.

One way in which to question Cassese's analysis, of course, is to question in some other way his model of state behavior: there are certainly various models present in international relations literature or implicit in writing about state compliance with international law.²¹⁷ Some analyses, unlike Burke-White's, might end up yielding a different theoretical analysis than that which Cassese attained. But we can undermine Cassese's analysis even without taking the more radical step of presuming its premises out of existence, thereby managing to maintain an agnostic stance on the controversial question of what motivates state behavior. Quite simply, we can question the too-rapid connection between a claim that international crimes constitute attacks on universal values and a conclusion that states thus must not be permitted to dispose of international crimes except in a manner dictated by the international community. In particular, the real difficulty is that international crimes are simultaneously local crimes, with local effects and with local costs in whatever course of action a state may undertake in response.²¹⁸ As a result, more recent writing on global public goods can enable us to understand some difficulties with a pure public goods analysis of international crimes.²¹⁹

217. See generally Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (using the compliance problem to provide insight more generally into models of state behavior).

218. See Orentlicher, *supra* note 66, at 2542-46 (setting forth the debate over post-transitional prosecutions of human rights violators). Proponents of prosecutions argue that the failure to enforce law will undermine the legitimacy of a new government and impede the transition to a stable society. *Id.* at 2542-43. On the other hand, opponents of prosecutions argue that efforts to prosecute in fragile democracies may provoke rebellions or other conflicts that may hinder stability and weaken the authority of a transitional government. *Id.* at 2544-46.

219. See generally Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276 (2004) (discussing whether international law should differentiate the responsibilities of rich and poor

Christopher Stone's very recent article on common but differentiated responsibilities provides a particularly helpful discussion of "global public goods."²²⁰ Stone's article is fundamentally concerned with the division of responsibilities in the pursuit of global public goods.²²¹ Underlying this discussion, of course, is the concept of a global public good, which we may understand in a sense akin to that of economists—as a global good from which particular states cannot be excluded.²²² Something which benefits the international community as a whole, such as reduced pollution or an environment of general economic free trade (to be distinguished from the free trade existing between particular states), is a global public good in this sense.²²³ The pursuit of such goods is generally not costless, but requires scarce resources of some form (which might be in a form such as pollution reduction efforts).²²⁴ Accordingly, there must be some agreed or tacit division of costs in their production.²²⁵ It is here that Stone's analysis begins.

Stone reveals that the responsibilities for many such goods are common but differentiated; that is, they are divided unequally in some manner, which will sometimes aim to be some equitable division that imposes lower costs on poor states.²²⁶ Perceiving the actual division of costs is not always simple, since there may be side

nations in the context of international environmental law).

220. *See id.* at 276 (noting "common but differentiated responsibilities" is receiving increasing recognition in international law).

221. *See id.* at 282 (observing differential obligations in international agreements remain the exception, not the rule).

222. *See id.* at 276 (referring also to common global risks that affect and are affected by all nations).

223. *See id.* at 276-77 (adding risk-related global public goods also include public health, terrorism, and peace).

224. *See id.* (recounting the Kyoto Protocol to the United Nations Framework Convention on Climate Change obligates developed countries to reduce collective emissions of greenhouse gases in order to protect the global climate system).

225. *See Stone, supra* note 219, at 278 (explaining the division of costs may also come in the form of an agreement to subject some nations to more favorable compliance timetables or to afford financial or technical contributions to help absorb costs of compliance with an international agreement).

226. *See id.* at 277-79 (describing how, under the Kyoto Protocol, developed countries are obligated to reduce greenhouse gas emissions by five percent, while developing countries are exempt).

payments such as “diplomatic credits” closely associated with any agreement on a particular division,²²⁷ and states may also be able to modify their particular agreement in special ways, such as through reservations.²²⁸

One further insight from Stone’s analysis concerns the coupling of objectives, such as protection of the environment and promotion of equitable redistribution of wealth.²²⁹ Such coupling may well lead to an outcome suboptimal on both objectives: there is no inherent reason why redistribution of wealth should be done through environmental policy, and any attempt to do so will often have unexpected effects on both efficiency and equity.²³⁰

This analysis can help reveal some features of the issues surrounding international criminal justice. The international community has an interest in international criminal justice, so we might consider that it represents a global public good, though we must be careful how we describe it. Commentators sometimes assert simply that the international community has an interest in human rights, so there is *ipso facto* an international interest in the prosecution of as many human rights abusers as possible in order to punish and deter human rights abuses.²³¹ But it is clear, as Arsanjani puts it, that “[t]he international community has an interest not only in the application of human rights but in the restoration and maintenance of public order and the ways in which aggregate human rights may be enhanced.”²³² That is, the global public good in

227. See *id.* at 283 (suggesting a nation may, for example, seek “diplomatic credits” toward gaining admission to the European Union).

228. See *id.* at 300 (mentioning reservations along with other means of developing differentiated responsibilities not included explicitly in the text of an agreement, which may include unilateral understandings, side payments, and informally differentiated commitments to agencies and funds).

229. See *id.* (arguing it is not wise to accomplish global wealth distribution under the umbrella of international agreements aimed at environmental or other substantive goals).

230. See *id.* at 294 (contending the coupling of objectives will also reduce transparency and accountability).

231. See Motala, *supra* note 39, at 345 (arguing South Africa cannot validly grant indemnity to individuals who engaged in apartheid-era human rights violations).

232. Arsanjani, *supra* note 14, at 66.

question is not prosecutions, but a more nebulous state of generalized human rights protection, which might allow for amnesties if they advance generalized human rights protection.²³³ If it were impossible to internationalize prosecutions, we would seek what would best advance the human rights situation in each state, whether this involved prosecutions or amnesties.²³⁴

Given that the ICC project does, however, offer the possibility of internationalized prosecutions where states themselves do not prosecute,²³⁵ we must seek to explain the implications of this alternative framework for the global public good. Much theoretical writing on the international criminal justice project considers that it represents a means by which individual states that would otherwise be responsible to prosecute heinous human rights offenders can be relieved of pressures not to prosecute.²³⁶ This is a subtler version of the simpler argument that the ICC will prosecute offenders who would not otherwise be prosecuted.²³⁷ It allows for the possibility that states may prosecute nationally on the basis that international prosecutions function as a background regime.²³⁸ But this again does not take account of other elements of the global public good. We under-describe it if we do not include other factors such as

233. *See id.* (noting there are situations where amnesties may be the only feasible option for ending bloodshed and enhancing aggregate human rights).

234. *See id.* (suggesting the lawfulness of an amnesty be determined in light of: (1) the crimes subject to amnesty; (2) other remedies provided in the absence of prosecution; (3) whether the amnesty had broad public support; (4) whether it will result in the emplacement of a democratic government; (5) whether the system supports human rights; and (6) the historical condition of human rights in the absence of amnesty). This Article's model simplifies from the real-life fact that many human rights abusers will operate transnationally and will cause human rights abuses in several states in a region. The model could account for these simply with a more elaborate discussion of externalities, but the essential conclusions would not change.

235. *See Rome Statute, supra* note 2, art. 17 (allowing for the admissibility of cases in the International Criminal Court pursuant to complementarity).

236. *See e.g.* Orentlicher, *supra* note 66, at 2549 (stating "[i]nternational law requiring punishment of atrocious crimes . . . can provide a counterweight to pressure from groups seeking impunity.").

237. *See id.* at 2547 (explaining governments may forego prosecution to avert perceived challenges to authority).

238. *See id.* at 2548 (suggesting international law may help "depoliticize" prosecutions of human rights violators).

international peace or, more importantly for our purposes, domestic stability and peace. In other words, there are important interactions with other public goods even at the global level. Internationalizing prosecutions does not mean that we can consider justice independently from peace.²³⁹ The precise linkages will, of course, be complex, but it is clear that prosecutions will sometimes negatively affect peace and stability, whether national or international, for all the reasons identified earlier.²⁴⁰ We might describe such factors as costs that various states bear for the purposes of furthering the international criminal justice project.²⁴¹ Under the Rome Statute, if we read it strictly against impunity so as to prohibit all amnesties, those reasons suggest that we generate increased costs for conflict-ridden states. In other words, Stone's model of common but differentiated responsibilities applies, but in reverse. The states bearing the greatest costs here become those already suffering the most from conflict and poverty.

This perspective, highlighting both efficiency and equity issues, helps to better inform our analysis of claims such as Orentlicher's that "[b]ecause trials secure preeminent rights and values, governments should be expected to assume reasonable risks associated with prosecutions, including a risk of military discontent."²⁴² Even if the risks associated with prosecutions are "reasonable" for the international community as a whole, in terms of its attainment of a global public good, a serious question remains as to who, more precisely, is to assume these reasonable risks.²⁴³ There are serious distributive implications if those who are to assume the risks are the people of Uganda and of similarly conflict-ridden zones.

239. See *id.* at 2546-47 (contending international law will assure a balance between the international demands of justice and domestic political stability).

240. See *supra* Part I (discussing democratic transitions and amnesty programs).

241. See Orentlicher, *supra* note 66, at 2596-97 (explaining post-transitional trials may provoke political instability and place impossible economic and logistical demands on the judiciary of nations recently emerging from a period of lawlessness).

242. *Id.* at 2548-49.

243. See *id.* at 2606-07 (questioning whether a government may be excused from a duty to prosecute crimes when the instituting of prosecutions would pose serious threats to vital domestic interests).

Responsibilities associated with achievement of some global public good may be distributed in various ways. There are some reasons to expect frameworks concerned with some global public goods to favor the rich and powerful.²⁴⁴ For example, realist models would predict that states bargaining in their own interests would come to agreements favoring states with greater bargaining power, even in the face of bargaining rules that might initially seem to favor other sorts of solutions, since those states with bargaining power will often be able to overcome these rules.²⁴⁵ So, for example, even an apparently equitable negotiation system as between states—and a substantial NGO presence—in the negotiation of the Rome Statute would not have prevented the imposition of substantial responsibilities on states with less bargaining power for the benefit of others better off.²⁴⁶ We need not, of course, adhere to realist models and might, for instance, believe that moral norms have power over time, as the likes of Neta Crawford have recently persuasively argued in certain contexts.²⁴⁷ But, whatever our view on this more foundational issue, we can agree that international agreements can be subjected to analysis for their distributive implications.

This conclusion makes clear that there are good reasons to prefer a more consequentialist analysis of the Rome Statute. The public good in question has significant private aspects.²⁴⁸ Local peace, aside from

244. See Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339, 342-68 (2002) (theorizing why the GATT/WTO framework results in asymmetrical outcomes despite sovereign equality decision-making rules).

245. See *id.* at 341 (suggesting states invisibly weigh the decision making process by bringing instruments of power, extrinsic to procedural decision making rules, to the bargaining table). See generally John F. Nash, Jr., *The Bargaining Problem*, 18 ECONOMETRICA 155 (Apr. 1950) (theorizing the factors determining a negotiator's bargaining power and factors that may enhance the likelihood that negotiators successfully reach agreement).

246. See Steinberg, *supra* note 244, at 365-66 (setting forth the negative distributive consequences of GATT/WTO negotiations on developing countries despite the equitable negotiating rules).

247. See NETA C. CRAWFORD, *ARGUMENT AND CHANGE IN WORLD POLITICS* (2002) (arguing throughout that the moral force of norms was critical in decolonization).

248. See Villa-Vicencio, *supra* note 120, at 212 (explaining competition between the public goal of society to demand prosecution, and the private need of people to live in peace and stability).

presumably being an important aim of the international community, is certainly an important aim of the local community.²⁴⁹ Any statute that prohibits the local community from pursuing this aim in the most effective way possible effectively imposes substantial distributive costs on some conflict-ridden zones for the gains of others.²⁵⁰ One key deontological argument, in general, is that a consequentialist approach “implies a holistic vision of society and ignores the issue of distributing burdens and benefits through its policy.”²⁵¹ In reality, however, it is a deontological approach that has significant unanalyzed distributive implications. Thus, we can question whether a deontological account can actually hold consistently, or whether it does not ultimately depend on the sacrifice of some for others, not a particularly deontological result. There are powerful reasons to consider all the consequences of whatever form of the rule on amnesties may come under contemplation.²⁵²

This distributive concern also helps rationalize commentators' arguments that may otherwise seem a bit scattered. Wedgwood takes it as an argument for amnesties that “[c]ountries that want to regain democracy are on their own most of the time,”²⁵³ without explaining

249. See Orentlicher, *supra* note 66, at 2545-46 (acknowledging the argument that the international community should not press transitional countries to prosecute because they would not survive the destabilizing effects of politically charged trials).

250. See Villa-Vicencio, *supra* note 120, at 220 (stating that “the duty to prosecute needs to be subjected to the immediate needs of a society, which are sometimes desperate needs simply to end bloodshed and war”); cf. CHIGARA, *supra* note 39, at 9 (arguing “but for the national amnesty laws that result from such agreements, the autocratic reign of terror accompanied by gross violation of basic human rights of individuals would continue for an indeterminable future”).

251. See NINO, *supra* note 55, at 143 (critiquing the use of criminals as a means of attaining an end). This claim, as a critique of utilitarianism, has a strong heritage in writers such as John Rawls and Robert Nozick. See JOHN RAWLS, A THEORY OF JUSTICE 27-29 (1972) (arguing utilitarianism ignores the separation of persons). See also ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 32-33 (1974) (making a similar argument).

252. See TEITEL, *supra* note 11, at 55 (providing a strong refutation of the position that there is some sort of moral right against application of such an analysis). Teitel contends that “international law’s remedial scheme, which is structured in terms of individual rights, in no way constructs punishment as an enforceable right such that it would impose an obligation on states.” *Id.*

253. Wedgwood, *supra* note 1, at 96.

fully why this would offer a rationale for allowing amnesties. Arsanjani once described amnesties as the price for getting rid of tyrants “in the face of the unwillingness of the international community to pay the price necessary for stopping serious domestic violence,”²⁵⁴ again without offering much further elaboration. Such statements, however, seem to offer powerful statements of a distributive critique of a strong rule against amnesties. Indeed, they then offer an important insight on any analysis of what the Rome Statute means on amnesty issues.

The choice about how to interpret the Statute on such an issue, to the extent that it is not subject to precise legal analysis, amounts to a choice with profound implications—more profound indeed for states affected by them. The ICC works major, transformative changes in jurisdictional rules.²⁵⁵ Those working with the Statute need to consider carefully what indications make it appropriate to impose a more stringent rule against amnesties, and thus greater distributive costs on conflict-ridden states for the possibility of a more substantial global public good, or a more permissive rule, which risks some of the gains, but is more sensitive to local circumstances of states in desperate need. The former, stringent rule may seem preferable to some, but they surely then need to face up to a moral imperative to find ways to counter the costs imposed on already needy states. The theoretical dilemmas are far more complex than they might have ever at first appeared.

These dilemmas may also have very real implications for the future of the ICC. If the Rome Statute’s design leads to distributive effects or states later interpret it to work in a manner unfavorable to a number of states, we may see those states endeavoring to recapture the interpretation of the Statute through interpretive declarations that verge on reservations, as the Stone model could predict, or other means of advocacy about contesting interpretations. In the extreme, these distributive issues may pose an ongoing challenge to ratification of the Statute. These are serious issues indeed.

254. Arsanjani, *supra* note 14, at 65.

255. See Sadat & Carden, *supra* note 122, at 389 (noting “the prescriptive jurisdiction of the international community and the adjudicative jurisdiction of the Court itself are premised on transformative redefinitions of those principles in current international law”).

We should, of course, be clear that these theoretical observations are not proffered with any intent of excluding important insights we can gain from ongoing empirical work on amnesties. Utopian claims for the ICC can be subjected simultaneously to both theoretical and empirical analysis. To make this point clear, consider the following example from a sort of response to an American position on the ICC: "the interests of the community of states are protected in that decisions to forego prosecution are no longer left to individual states, but rather rest with the ICC as an institution representing common interests."²⁵⁶ We have seen already that there are profound theoretical issues with such claims, notably that simple presumptions that there is a single global public good of international criminal justice rapidly yield to further complications. But we could also foresee important empirical perspectives, notably those that transitional justice literature on the relative effectiveness of prosecutions and amnesties might offer.

We can see potential empirical problems immediately in simple balances such as that described by Andreas O'Shea: "[o]n the premise that the listed objectives are indeed achieved by punishment, for amnesty to be a viable option, the need for retribution, denunciation, deterrence and reform must be outweighed by the need for transition, peace, reconciliation, forgiveness or truth."²⁵⁷ The luster of arguments about deterring future human rights abuses fades quickly if we contemplate the possibility, to which we alluded in the discussion of rationales in the literature for amnesties,²⁵⁸ that prosecutions will not be successful anyway,²⁵⁹ or, more subtly, will lead to a different path not offering the same results. Whether internationalization of prosecutions works any change in this equation is far from certain, since international prosecutorial resources may also remain limited, even in the ICC context, or there may be other sorts of bars to prosecution that the ICC cannot readily

256. Gerhard Hafner et al., *A Response to the American View as Presented by Ruth Wedgwood*, 10 EUR. J. INT'L L. 108, 113 (1999).

257. O'SHEA, *supra* note 11, at 82.

258. See *supra* Part I (surveying various transitional justice pieces of literature contemplating the use of amnesties in democratic transitions).

259. See van Zyl, *supra* note 39, at 658 (contending South Africa could have prosecuted only a small fraction of human rights violators even in the absence of an amnesty agreement during the South African transition).

overcome (e.g., availability of sufficient evidence, without very substantial governmental cooperation from states with a variety of interests). There are difficult empirical issues remaining on the effectiveness of international criminal trials,²⁶⁰ and on an array of empirical issues. We will gain important perspectives on the questions as we continue to learn empirically about such questions as the actual effects of amnesties, the challenges of international prosecutions, the effects of international prosecutions, and so on. In other words, our conclusions about the appropriate shape of the Rome Statute may also be subject to appropriate empirical insights over the course of time to come.

There is room for much probing theoretical analysis of the purposes of the ICC, and we cannot consider debate closed on the role of amnesty programmes in connection with the ICC. Much theoretical and empirical analysis is needed. As we saw in the earlier Parts, the Rome Statute remains malleable, and, as we now see, there is still room for much careful analysis and discussion on its appropriate interpretation.

CONCLUSIONS

This Article will not settle the debates upon which it has dwelt. The interests and values at stake are complex. But this Article will make an important contribution if it can help to reinvigorate a debate grown stale with a mold of unanalyzed assumptions. Amnesty issues actually pose a substantial ongoing challenge to the ICC project, in ways that have often been suppressed in insufficiently far-reaching analyses.

There is a powerful body of experience and literature that reveals the value of amnesty programmes, depending on the circumstances.²⁶¹ There is also a powerful body of law, propounded by human rights advocates, that has moved toward closing down

260. See David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT'L L.J.* 473, 488 (1999) (advocating the importance of conducting additional empirical research to understand better the uncertainties about deterrence rather than engaging in a single-minded pursuit of criminal prosecutions).

261. See *supra* notes 48-59 and accompanying text (discussing benefits of amnesty programs in transitional governments and suggesting that such programs serve a restorative function in the context of complex societal situations).

possibilities for amnesty programmes.²⁶² However, a more balanced analysis of the law than often conducted reveals ongoing scope for amnesty programmes, as there is no sufficiently established generalized duty to prosecute.²⁶³ As a result, there is an open, though not empty, debate as we enter into the text of the Rome Statute. That Statute does not resolve the issue of how the ICC will deal with amnesties, thus leaving space for ongoing policy and philosophical debate.²⁶⁴ This debate is manifest in some states' interpretive declarations on ratification, which in some instances have come to resemble reservations to the Rome Statute.²⁶⁵ Far from being legally meaningless, these declarations have the potential to affect the future shape of the Statute. Similarly, early ICC practice awakens complex difficulties around amnesties, revealing risks that certain states will face disproportionate hardships in the service of the ICC project.

Theorizing this latter point makes it clear that amnesty issues actually have significant normative and empirical implications for the ICC project. States that may face disproportionate hardships may choose either not to ratify or to ratify subject to interpretive declarations seeking to capture favored interpretations of the Statute. Other agents also will be seeking to capture preferred interpretations of the relevant provisions, thereby implying substantial ongoing debate and contestation around the Statute. At the same time, the imposition of disproportionate hardships on some states by the Statute raises normative dilemmas. Although there are powerful arguments that these dilemmas are not appropriately resolved by changing the terms of the Statute, this conclusion merely enhances the dilemma, meaning that the normatively preferable Statute will indeed impose disproportionate effects on some already conflict-

262. See *supra* notes 7-10 and accompanying text (describing the strong views of human rights organizations that human rights violators must be held accountable and their argument that justice is not served when such violators are granted amnesty).

263. See *supra* notes 75-93 and accompanying text (arguing current state practice and existing case law do not support the proposition that there is a generalized duty to prosecute in international law).

264. See *supra* notes 103-127 and accompanying text (examining the conflict presented in the Rome Statute between the Statute's stated claim to end all impunity and the provisions that provide a possible recognition of amnesties).

265. See *supra* notes 142-158 and accompanying text (analyzing the interpretive declarations of Colombia and Uruguay).

ridden states. This analysis thus results in a moral imperative (which may also be a strategic imperative, depending on actual ratification records) for states deriving the benefits of international justice to act in support of democratic transitions in conflict-ridden states. Any failure to do so may render the project of international criminal justice illusory, or, rather, opposed to a broader project of international justice.

The conceptual linkages and complex causal chains at play call for a renewed, more serious analysis of these issues. This Article is thus a call for less advocacy and more scholarship, for much is at stake. It is incumbent on those advancing an international criminal justice project to undertake the serious analysis to convince us that their project advances justice.