TRANSITIONAL JUSTICE AND THE ICC

In The "Interests Of Justice"?

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Summary

Transitional justice aims at addressing past transgressions in circumstances of radical political change. The broad interpretation of transitional justice proffers a wide array of mechanisms devoted to this end whereas the concept's narrow reading employs solely truth commissions and other truth-seeking efforts. Although not intrinsically inimical, criminal justice and truth commissions, especially when the latter is applied in conjunction with amnesties, might collide in both interpretations of transitional justice. The establishment of the International Criminal Court embodies a colossal leap forward in the struggle against impunity but, simultaneously, criminal proceedings might not always square with the realities of ravaged, post-conflict societies. In certain circumstances, truth commissions may be better equipped to deal with enormous numbers of perpetrators, an annihilated institutional framework and, potentially, a looming outbreak of hostilities. Yet, it is uncertain whether the Rome Statute, envisaging a retributive response to certain odious crimes, leaves room for measures falling short of criminal repression. Article 53, allowing the Prosecutor to forgo an investigation or a prosecution if warranted by the "interests of justice", ostensibly, displays the potential to marry truth commissions and the ICC. However, this research will argue that, after closer scrutiny, it does not. As transitional justice remains cognizant of the prevailing political circumstances when applying its mechanisms, the Prosecutor, in "interests of justice" determinations, would necessarily have to appraise political factors in a State resorting to truth commissions in combination with amnesties. Although the scope of the "interests of justice" clauses remains ambiguous when interpreted in accordance with the rules on treaty interpretation and evaluated in light of relevant aspects of international law, the Rome Statute's approach to prosecutorial discretion militates strongly against a construction of article 53 allowing for the factoring in of political conditions in ascertaining the "interests of justice". Wary of prosecutorial overreach, the Rome Statute, namely, curbs the Prosecutor's discretion in order to reduce the risk of politically motivated prosecutions. Through an active, autonomous role for victims, extensive obligations incumbent upon the Prosecutor to motivate discretionary decisions and a development of the role of the international Prosecutor, the Prosecutor's possibilities to resort to political determinations are minimised. Although an assessment of wider considerations need not be to the detriment of victims or the international community as a whole, the line seems thin and the risk of auxiliary negative effects enormous. Other possibilities will, therefore, have to be explored.

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List of Abbreviations

AI	Amnesty International
AC	Appeals Chamber
AZAPO	Azanian Peoples Organization
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
GA	General Assembly
GCI	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GCII	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
GCIII	Geneva Convention relative to the Treatment of Prisoners of War
GCIV	Geneva Convention relative to the Protection of Civilian Persons in Time of War
HRW	Human Rights Watch
ICTJ	International Center for Transitional Justice
ICRC	International Committee of the Red Cross
ICJ	International Court of Justice
ICC	International Criminal Court

ICTR International Criminal Tribunal for Rwanda (The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994)

ICTY International Criminal Tribunal for the former Yugoslavia (The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991)

LRA Lordôs Resistance Army

OTP Office of the Prosecutor

PAI Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts

PAII Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts

SC Security Council

SCSL Special Court for Sierra Leone

TC Trial Chamber

UN United Nations

VCLT Vienna Convention on the Law of Treaties

Introduction

Post-colonial independence ushered in an age of intense turmoil in nowadays Uganda. Although an era of coups and counter-coups drew to a close when Yoweri Musevini, the head of the current administration, ascended to power in 1986, 14 different insurgencies continued to plague the country.[1] As is well known, the rebellion of the Lordôs Resistance Army (LRA), one of the longest running conflicts in Africa, continues to wreak havoc across the north of Uganda even today. The insurgents, led by the mysterious, spiritualist Joseph Kony, have been accused of horrendous crimes described by Jan Egeland of the United Nations (UN) as ñterrorism of the worst kind.ò[2] Nearly two million people have been displaced and many thousands have been maimed, massacred or raped in a conflict rivalled by few in its cruelty. The number of abducted and forcibly conscripted children, a particularly appalling facet of the rebelsô tactics, has been estimated to exceed 20.000.[3] Following an unsuccessful military campaign, the Kampala government enacted an Amnesty Act in 2000 guaranteeing freedom from prosecution and punishment to any Ugandan ñwho has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda.ò[4] ñAny crime committed in the cause of the war or armed rebellionò is encompassed by the amnesty which is contingent upon reporting to an Ugandan official, renouncing and abandoning involvement in the war or armed rebellion, surrendering any weapons and the issuance a Certificate of Amnesty.[5] The amnesty was broadly supported by the civilian population due to, *inter alia*, its compatibility with the local culture of rendering justice and the desperate desire to put an end to the devastating violence.[6] However, subsequent developments have cast doubt on the sincerity of the governmentôs offer. In

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[1] *Behind the Violence: Causes, Consequences and the Search for Solutions to the War in Northern Uganda,* Refugee Law Project Working Paper No.11, at p. 4. Available at: http://www.refugeelawproject.org/resources/papers/workingpapers/RLP.WP11.pdf, accessed on 31 August 2006.

[2] *Uganda Rebel 'Terror' Appals UN,* BBC News, 1 April 2006. Available at: http://news.bbc.co.uk/2/hi/africa/4868086.stm, accessed on 1 September 2006.

[3] *"When the Sun Sets We Start to Worry…", an Account of Life in Northern Uganda,* A United Nations OCHA/IRIN Publication, January 2004, at p. 3. Available at: http://www.irinnews.org/webspecials/NorthernUganda/When-the-sun-sets-Revised-Edition.pdf, accessed on 4 September 2006.

[4] *The Amnesty Act 2000,* art. 3(1). Available at: http://www.c-r.org/our-work/accord/northern-uganda/documents/2000_Jan_The_Amnesty_Act.doc, accessed on 4 September 2006.

[5] Idem, arts. 3(2) and 4(1).

[6] *Whose Justice? Perceptions of Uganda's Amnesty Act 2000: the Potential for Conflict Resolution and Long-Term Reconciliation*, Refugee law Project Working Paper No.15, at pp. 9-10. Available at: http://www.refugeelawproject.org/resources/papers/workingpapers/RLP.WP15.pdf, accessed on 4 September 2006. *LRA Victims Seek Peace with Past*, BBC News, 13 September 2006. Available at: http://news.bbc.co.uk/2/hi/africa/5341474.stm, accessed on 13 September 2006.

December 2003, President Museveni referred the situation concerning the LRA to the International Criminal Court (ICC) in accordance with articles 13(a) and 14 of the ICC Statute while indicating his intention to amend the scope of the Amnesty Act ñso as to exclude the leadership of the LRA, ensuring that those bearing the greatest responsibility for the crimes against humanity committed in Northern Uganda are brought to justice.ò[7] Nevertheless, the rebellion raged on ferociously and the government, in an attempt to end the cycle of violence, engaged in peace talks with the rebels. Contrary to Mr Musevenigs earlier intentions, senior LRA leaders were offered a blanket amnesty as part of a comprehensive peace plan.[8] A considerable segment of the civilian population seems to endorse the most recent amnesty offer too as exemplified by the attempt of a delegation of religious, cultural and district leaders from Northern Uganda to persuade the ICC Prosecutor not to issue arrest warrants against LRA leaders.[9] The endeavour, however, was of no avail as the ICC Prosecutor assessed that a reasonable basis existed to open an investigation into the situation which resulted eventually in the issuing of arrest warrants against Joseph Kony and four of his closest henchmen.[10] As the rebels are demanding the arrest warrants to be revoked and the ICC Prosecutor seems determined to pursue the prosecution of LRA leaders,[11] the Ugandan peace process is seemingly setting justice and peace on a collision course once more. Societies like these, emerging from periods of deep national rift, often struggle with the question how, if at all, grave crimes should be dealt with. In general, the process of addressing past wrongdoings in circumstances of political change has been described as transitional justice.[12] It comprises, in what this research will refer to as the broad definition of transitional justice,

> ñthe full range of processes and mechanisms associated with a societyôs attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of

[7] *President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC,* ICC Press Release, ICC-20040129-44-En ,29 January 2004. Available at: http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html, accessed on 4 September 2006.
[8] *Uganda and LRA Rebels Sign Truce,* BBC News, 26 August 2006. Available at: http://news.bbc.co.uk/2/hi/africa/5288776.stm, accessed on 4 September 2006.
[9] *Ugandans Ask ICC to Spare Rebels,* BBC News, 16 March 2005. Available at: http://news.bbc.co.uk/2/hi/africa/4352901.stm, accessed on 4 September 2006.
[10] *Warrant of Arrest Unsealed against Five LRA Commanders,* ICC Press Release, ICC-20051014-110-En, 14 October 2005. Available at: http://www.icc-cpi.int/pressrelease_details&id=114&l=en.html, accessed on 4 September 2006.
[11] *Ugandan Rebels in Amnesty Demand,* BBC News, 6 September 2006. Available at: http://news.bbc.co.uk/2/hi/africa/5320254.stm, accessed on 6 September 2006.
[12] TEITEL, R., ñTransitional Justice Genealogyò, *Harvard Human Rights Journal*, Vol. 16, 2003, at p. 69.

> international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.ò[13]

Yet, this research will also employ a narrow definition of transitional justice, entailing

> ñ...lôensemble des processus visant à la manifestation de la vérité à lôissue de périodes de crises ou troubléesé On utilise généralement les termes plus connus de *commissions vérité et réconciliation* pour expliquer le contenu de la justice transitionnelle.ò[14]

With the entry into force of the Rome Statute,[15] the compatibility of transitional justice mechanisms with the ICC has, and will increasingly so, become a very realistic and thorny matter. Although complex issues like these have been identified during the negotiations preceding the establishment of the ICC, the Rome Statute contains no explicit mention of truth commissions, amnesties or similar instruments of transitional justice. Indeed, Wedgwood contends that USô criticism of the ICC results, in part, from the omission to incorporate a specific amnesty provision into the Rome Statute.[16] Bolton, the current US permanent representative to the UN, elaborates on this point:

> ñé it is by no means clear that "justice" as defined by the Court and Prosecutor is always consistent with the attainable political resolution of serious political and military disputesé Accumulated experience strongly favors a case-by-case approach, politically and legally, rather than the inevitable resort to adjudicationé Atrocities, whether in international wars or in domestic contexts, are by definition uniquely horrible in their own times and places. For precisely that reason, so too are their resolutions unique. When the time arrives to consider the crimes, that time usually coincides with events of enormous social and political significance: negotiation of a peace treaty, restoration of a "legitimate" political regime, or a similar milestoneé The pivotal questions are clearly political, not legal: How shall the formerly warring parties live with each other in the future? What efforts shall be taken to expunge the causes of the previous inhumanity? One alternative to the ICC is the kind of Truth and Reconciliation Commission created in South Africaé In many former Communist countries, citizens are still wrestling with the handling of secret police activities of the now-defunct regimesé In effect, these societies have chosen "amnesia" because it is simply too difficult for them to sort out relative degrees of past wrongs, and because of their desire to move aheadé Invariably insisting on international

[13] *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,* Report of the Secretary-General, UN Doc. S/2004/616, 23 August 2004, at p. 4.
[14] PHILIPPE, X., ñLa Justice Transitionnelle: les Commissions Vérité et Réconciliation, Présentation Généraleò, at p. 1. (document on file with author)
[15] *Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9, 17 July 1998, entry into force 1 July 2002.
[16] WEDGWOOD, R., ñThe International Criminal Court: an American Viewò, *European Journal of International Law*, Vol. 10, 1999, at pp. 95-97.

> adjudication is not necessarily preferable to a course that the parties to a dispute might themselves agree upon.ò[17]

Even in the absence of a specific provision in this regard, three principal entry points for transitional justice mechanisms can be distinguished in the Rome Statute: firstly, the United Nations Security Council (SC) could request a deferral of the investigation or prosecution under article 16; secondly, a case could be declared inadmissible if the requirements of article 17 have been fulfilled; and finally, under article 53, a prosecutor could decide to refrain from initiating an investigation or a prosecution. Various commentators have submitted that, if transitional justice mechanisms are to be taken into consideration by the ICC, article 53 is most likely to be brought into play. This research will therefore seek to scrutinize arguments raised in this regard and to shed light on the suitability of applying article 53 in a potential clash between transitional justice mechanisms and the ICC. More specifically, an analysis of the articleôs ñinterests of justiceò clauses will be undertaken in an attempt to assess whether it permits the ICC Prosecutor to abstain from an investigation or prosecution when confronted with alternative accountability mechanisms. This analysis, based on the interpretation of the ñinterests of justiceò clauses in accordance with the relevant rules on treaty interpretation, Statesô obligations to prosecute certain crimes and the ICC Prosecutorôs discretionary prerogatives, will be conducted in the second chapter. Preceding this researchôs central theme, the first chapter will introduce the concept of broad and narrow transitional justice and assess which mechanisms are most likely to conflict with the ICC. Finally, the third chapter is reserved for the drawing of conclusions.

I Transitional Justice

I.A Broad Transitional Justice

I.A.1 The Characteristics

> ñSocieties shattered by the perpetration of atrocities need to adapt or design mechanisms to confront their demons, to reckon with these past abuses. Otherwise, for nations, as for individuals, the past will haunt and infect the present and future in unpredictable ways. The assumption that individuals or groups

[17] *The United States and the International Criminal Court*, Remarks to the Federalist Society by US Under Secretary for Arms Control and National Security, John Bolton, Washington, DC, 14 November 2002. Available at: http://www.state.gov/t/us/rm/15158.htm, accessed on 25 October 2006.

> who have been the victims of hideous atrocities will simply forget about them or expunge their feelings without some form of accounting, some semblance of justice, is to leave in place the seeds for future conflicts.ò[18]

Predicaments encountered in post-conflict settings, as illustrated by the preceding quote, are considered the subject-matter of transitional justice. In confronting these issues, the transitional justice approach places the rights and needs of victims and their families at the heart of its quest for accountability. In recent years, this model, depicted as ñthe new mantra of domestic and international politics since the end of the cold war,ò[19] has stepped into the limelight. Kritz contends that the pressure to tackle issues of accountability, as opposed to a *realpolitik* mentality of ignoring the past in the interests of peace, augmented due to: increased media reporting on mass atrocities; the ascent of the international human rights community and the evolving trend of renunciation of blanket amnesties in international law.[20] Furthermore, the shift from classical inter-state conflicts to intra-state conflicts and, as an outgrowth of this development, the deliberate targeting of civilians, fuels the need for reconciliation.[21] In general, namely, former belligerent factions in intra-state conflicts shall need to continue to co-exist within the framework of a viable state. Belligerents in conflicts involving two or more states, on the other hand, will usually remain separated by international boundaries after the cessation of hostilities. This is not to suggest that conflicts of this nature do not call for reconciliation but, in the context of intra-state conflicts, it seems a *conditio sine qua non* for the stateôs very survival. Although featuring prominently within the concept of transitional justice, producing a comprehensive definition of reconciliation seems tricky. Reconciliation is described by Hazan as ña process whereby former enemies manage to coexist without violence.ò[22] However, even in the absence of a standard definition of reconciliation, it is doubtful whether the mere absence of violence denotes true reconciliation. For instance, authoritarian rule might succeed in suppressing hostilities when confronted with lingering feelings of bitterness in the wake of massive atrocities between different communities. Nevertheless, whether such a state of affairs may be equated with reconciliation remains questionable as a resurgence of violence never seems far away. The New York based

[18] KRITZ, N., ñComing to Terms with Atrocities: a Review of Accountability Mechanisms for Mass Violations of Human Rightsò, *Law and Contemporary Problems,* Vol. 59, 1996, at p. 127.
[19] Idem., at p. 19.
[20] KRITZ, N., ñProgress and Humility: the Ongoing Search for Post-Conflict Justiceò, *in* BASSIOUNI, M. (ed.), *Post-Conflict Justice,* Ardsley, New York, Transnational Publishers Inc., 2002, at p. 56.
[21] Idem., at pp. 56-57.
[22] HAZAN, P., ñMeasuring the Impact of Punishment and Forgiveness: a Framework for Evaluating Transitional Justice,ò *International Review of the Red Cross,* Vol. 88, No. 861, 2006, at p. 26.

International Center for Transitional Justice (ICTJ) has, however, identified certain indicators which could be taken into account: reconciliation should occur in the civic or political sphere instead of the personal sphere; it should be distinguished from efforts of using it as a substitute for justice; its burdens should not be inequitably distributed through a transfer of responsibilities from perpetrators to victims; it should not focus unduly on wiping the slate clean; it can not be reduced to a state of mind and its terms must not depend entirely on a particular set of religious beliefs.[23] When turning to the content of transitional justice, the concept, in its very essence, coalesces the notions of justice and transition which, logically, leads to additional questions of interpretation. The meaning of ñjusticeò, firstly, raises complex philosophical problems: does it, generically, encompass somehow the upholding of moral rightness? Or does it refer to a more retributive perception of justice, namely meting out punishment to perpetrators of crimes? Secondly, the significance and scope of ñtransitionò elicits equally profound issues of interpretation. For instance, what should the transitional process result in and, once the desired outcome has been delineated, when will it have been achieved? This research will not endeavour to address these intricate issues exhaustively as they fall outside its scope but certain parameters, as encountered most commonly, will be set. Leaving aside its philosophical connotations, ñjusticeò, in the definition of the UN,

> ñis an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant.ò[24]

Yet, transitional justice, although drawing partially on certain obligations imposed by international law on states, such as the prosecution of perpetrators of certain crimes,[25] necessitates the interpretation of ñjusticeò in a particular context. This context, exemplifying the ñtransitionalò aspect of transitional justice, is commonly seen as that of societies, in the wake of repressive rule or mayhem, progressing towards a more legitimate form of

[23] *Reconciliation,* International Center for Transitional Justice. Available at: http://www.ictj.org/en/tj/784.html, accessed on 13 September 2006.
[24] *The Rule of Law and Transitional Justice…*, at p. 4.
[25] BICKFORD, L., ñTransitional Justiceò, *in* SHELTON, D. (ed.), *Encyclopedia of Genocide and Crimes against Humanity*, Detroit, Macmillan Reference USA, Vol. 3, 2004, at p. 1045.

governance and/or peace.[26] Nevertheless, as transitional justice remains cognizant of the context in which states are to effectuate the aforementioned obligations, the hurdles they may encounter, such as strongholds retained by an ousted regime or a decimated institutional framework, are not lost out of sight. Therefore, instead of relying solely on a classical, retributive notion of justice, transitional justice seeks a holistic sense of justice for fledgling, transitional societies. The Secretary-Generalôs report on the rule of law and transitional justice in conflict and post-conflict societies states that:

> ñThe international community must see transitional justice in a way that extends well beyond courts and tribunals. The challenges of post-conflict environments necessitate an approach that balances a variety of goals, including the pursuit of accountability, truth and reparation, the preservation of peace and the building of democracy and the rule of law.ò[27]

Hazan, furthermore, notes that transitional justice ñé shows the way to institutional and political reforms which will gradually contribute to the establishment and consolidation of peace and the rule of law.ò[28] So as to achieve these aspirations, the concept, according to Hazan, relies on two ñfundamental and complementary axioms.ò[29] It seeks, firstly, to institute a culture of respect for certain norms within the highest echelons of the state. Secondly, by generating a national consensus on the exact course of sensitive, historical incidents, transitional justice aims at fostering national reconciliation. Therefore, interpreted broadly, transitional justice submits a range of approaches for dealing with past transgressions in societies undergoing a political metamorphosis. In the words of Hazan, transitional justice, through òpolicies of forgiveness and/or punishment,ò seeks to provide ña means of restoring the dignity of victims, of contributing to national reconciliation through efforts to seek truth and justice, whether symbolic or criminal, of preventing new crimes, participating in the restoration and maintenance of peace, and establishing and strengthening the rule of law by introducing institutional and political reforms.ò[30]

I.A.2 The Mechanisms

[26] Idem, at p. 1045. It would, however, be interesting to consider how to marry transitional justice with transitions that are not received favourably in the West, such as the 1979 Islamic revolution in Iran.
[27] *The Rule of Law and Transitional Justice…*, at p. 9.
[28] HAZAN P., ñMeasuring the Impacté ò, at p. 21.
[29] Idem., at page 25.
[30] Ibid., at page 23.

In order to achieve the aims set out above, transitional justice employs various mechanisms, legal and non-legal, which can be categorized in different manners. Teitel, for instance, has identified five categories: i.e. criminal justice; historical justice; reparatory justice; administrative justice and constitutional justice.[31] Firstly, judicial proceedings may be held before domestic or international courts, which, according to their mandate, prosecute perpetrators of war crimes, crimes against humanity, genocide and/or human rights violations. Recently, internationalised tribunals, as in the aftermath of conflicts in Sierra-Leone and East-Timor, have also been established to punish the perpetrators of certain crimes. The retributive component of transitional justice will be addressed more precisely in the subsequent paragraph of this chapter. Secondly, an official historical account is usually established through the work of truth commissions although criminal justice may also contribute to the elucidation of the course of history. Truth commissions are described by the ICTJ as non-judicial, official inquiries into patterns of abuse seeking to establish an accurate historical record of events.[32] As will be explained in more detail below, a wholly different role is foreseen for truth commissions in the narrow interpretation of transitional justice. Reparatory justice for victims is another initiative employed by transitional justice which, according to Teitel, may manifest itself in many forms. Reparations may involve various forms of redress in kind but they may also be symbolic in nature, such as the construction of memorials or the conveying of apologies.[33] Hazan, conversely, sees reparations as ña relatively new phenomenon intended for the victims or the legal successors of persons who were persecuted because of their origin or allegianceò and describes them as ñvoluntary payments by a state for moral or political purposes to individuals or groups.ò[34] The aforementioned symbolic forms of reparations are excluded by Hazan as apologies are considered a separate transitional justice mechanism whereas the category of the development of a shared vision of history subsumes the construction of memorials.[35] An example of apologies in a transitional justice context may be found in the cautious words of regret expressed by the leaders of then Serbia-Montenegro and Croatia for actions of their citizens during the Yugoslav war of disintegration.[36] The ICTJ, in contrast, identifies the construction of memorials as a separate

[31] TEITEL, R., *Transitional Justice*, Oxford, Oxford University Press Inc., 2000, at pp. 27-211.
[32] *Truth-Seeking*, International Center of Transitional Justice. Available at: http://www.ictj.org/en/tj/138.html, accessed on 13 September 2006.
[33] TEITEL, R., ñ*Transitional Justice*é ò,at p. 146.
[34] HAZAN, P., ñMeasuring the Impactéò,at p. 24.
[35] Idem., at pp. 24-25.
[36] *Presidents Apologise over Croatian War*, BBC News, 10 September 2003. Available at: http://news.bbc.co.uk/2/hi/europe/3095774.stm, accessed on 13 September 2006.

category which serves to preserve memories of past misdeeds so as to educate future generations and prevent similar occurrences.[37] Fourthly, in Teitelôs view, administrative justice, in order to safeguard the political transition, determines the suitability of officials to be appointed to office on the basis of political criteria.[38] The ICTJ, on the other hand, seems to advocate a somewhat more limited degree of institutional reform in the context of transitional justice. Through so-called vetting procedures, public officialsô integrity is assessed in order to exclude those deemed incompetent and those implicated in the commission of crimes or corruption in an attempt to surmount past abuse, reform vital institutions and serve as a deterrent for the future.[39] In post-Dayton Bosnia and Herzegovina, for example, the United Nations Mission resorted to this process extensively with regard to the countryôs police forces and judicial sector. Between 1999 and 2004, approximately 24.000 police officers and 1000 judges and prosecutors were screened so as to establish whether they, respectively, had committed war-time violations and whether they possessed the required qualifications in view of the absence of an independent judiciary in the communist era, during the subsequent conflict and immediately hereafter.[40] This practice could, nevertheless, violate fundamental human rights such as non-discrimination and the right to a fair trial but, on account of brevity, these matters will not be discussed here.[41] Teitel, finally, perceives constitutional justice as a mechanism of transitional justice. It is submitted that, in times of political flux, constitutionalism manifests itself in a conventional manner, i.e. as a stateôs fundamental political arrangement, but also in a non-conventional manner, namely as constitutive of political change.[42] It is the latter aspect, namely facilitating the shift from oppression, that denotes its transitional character which is also reflected in its, at least partly, provisional instruments and the residual traits inherited from its predecessor.[43] Additionally, the ICTJ considers the promotion of reconciliation, even in the absence of an exact definition, as a separate mechanism of transitional justice. Working with victims on traditional justice

[37] *Memory and Memorials*, International Center for Transitional Justice. Available at http://www.ictj.org/en/tj/785.html, accessed on 14 September 2006.
[38] TEITEL, R., ñ*Transitional Justice*é ò,at p. 149.
[39] *Vetting*, International Center for Transitional Justice. Available at: http://www.ictj.org/en/tj/783.html, accessed on 13 September 2006.
[40] FREEMAN, M., ñBosnia and Herzegovina: Selected Developments in Transitional Justiceò, *International Center for Transitional Justice Case Study Series*, October 2004, at pp. 12-14. Available at: http://www.ictj.org/images/content/1/1/113.pdf, accessed on 15 September 2006.
[41] BOED, R., ñAn Evaluation of the Legality and Efficacy of Lustration as a Tool of Transitional Justiceò, *Columbia Journal of Transnational Law*, Vol. 37, 1998-1999, at pp. 385-398.
[42] TEITEL, R., ñ*Transitional Justice*é ò, at p. 191.
[43] Idem., at pp. 197-198.

mechanisms and forging social reconstruction are seen as examples of means to this end.[44] As indicated above, Hazan distinguishes an additional category of ñdeveloping a shared vision of historyò, which includes the aforementioned construction of memorials but also the opening of archives, the rewriting of history textbooks, the institution of days of national remembrance and the contributions of judicial proceedings, truth commissions, public apologies and reparations, in order to facilitate the raising of historical awareness.[45] The broad approach foresees the individual, parallel or subsequent application of these devices. It is thus possible for a transitional society, for instance, to rely exclusively on criminal proceedings or to apply criminal proceedings combined with a truth commission or to initiate criminal proceedings after a truth commission concludes its work. Nevertheless, this perception of the mechanisms of transitional justice discards a strategy employed by many war torn societies. In order to close the books and heal deep-rooted societal rifts, many crimes have been erased through the granting of unconditional amnesties. Etymologically, amnesty stems from the Greek word ñamnesiaò.[46] Blackôs Law Dictionary describes amnesties as ña sovereign act of forgiveness for past acts, granted by a government to all persons (or to certain classes of persons) who have been guilty of crime or delict, generally political offences, - treason, sedition, rebellion, draft evasion, - and often conditioned upon their return to obedience and duty within a prescribed time.ò[47] Olson indicates that amnesties could be a factor in the transitional justice debate: transitional societies, prior to turning to the question how to address past violations, could instead face the preceding conundrum of whether they should be addressed at all.[48] Evidently, the nature of amnesties may vary, ranging from self-serving measures enacted by outgoing regimes to sincere attempts to defeat post-conflict legacies. Due to the widespread use of this mechanism, certain commentators do consider amnesties part and parcel of transitional justice.[49] The principal perception of transitional justice as espoused *supra*, however, proceeds from the premise that past crimes have to be accounted for while not discarding relevant political and other circumstances.

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[44] *What is Transitional Justice?,* International Center for Transitional Justice. Available at: http://www.ictj.org/en/tj/780.html, accessed on 12 September 2006.
[45] HAZAN, P., ñMeasuring the Impacté ò, at p. 25.
[46] SCHARF, M., ñThe Amnesty Exception to the Jurisdiction of the International Criminal Courtò, *Cornell International Law Journal,* Vol. 32, 1999, at pp. 507-508.
[47] BLACK, H., *Black's Law Dictionary: Definition of the Terms and Phrases of American and English Jurisprudence*, Sixth Edition, St. Paul, Minn., West Publishing Co., 1990, at pp. 82-83.
[48] OLSON, L., ñMechanisms Complementing Jurisdictionò, *International Review of the Red Cross*, Vol. 84, No. 845, 2002, at p. 173.
[49] HUYSE, L., ñJustice after Transition: on the Choices Successor Elites Make in Dealing with the Pastò, *Law and Social Enquiry,* Vol. 20, 1995, at p. 52.

I.B Narrow transitional justice

I.B.1 The Characteristics

In lieu of construing transitional justice as a machinery for addressing crimes in a post-conflict setting, a different, yet similar, interpretation has been put forward as well. This view, a more narrow construction, equates the concept of transitional justice with truth commissions and other truth-seeking initiatives. Philippe indicates that ñLa justice de transition ou justice transitionnelle est utilisée aujourd'hui comme appellation générique pour désigner le phénomène des *Commissions Vérité et Réconciliation*, auquel s'ajoutent tous les processus para-judiciaires chargés d'établir la vérité et d'identifier les responsabilités de chacun des auteurs ou victime d'infractions ou/et de violations massives des droits de l'homme commises durant une période de conflit armé ou de troubles intérieurs violents.ò[50] Although every truth commission seems to be of a *sui generis* character, reflective of a countryôs specific experiences, certain common traits have been indicated. Hayner writes:

> ñFirst, a truth commission focuses on the past. Second, a truth commission is not focused on a specific event, but attempts to paint the overall picture of certain human rights abuses, or violations of international humanitarian law, over a period of time. Third, a truth commission usually exists temporarily and for a pre-defined period of time, ceasing to exist with the submission of a report of its findings. Finally, a truth commission is always vested with some sort of authority, by way of its sponsor, that allows it greater access to information, greater security or protection to dig into sensitive issues, and a greater impact with its report. Most truth commissions are created at a point of political transition within a country, used either to demonstrate or underscore a break with a past record of human rights abuses, to promote national reconciliation, and/or to obtain or sustain political legitimacy.ò[51]

When truth commissions are seen as the embodiment of transitional justice, additional features may be appended. Philippe recognizes the flexibility of truth commissions and their focus on the unearthing of key episodes of a countryôs past as well but adds the central role of victims, the right to reparations and underscores the process of initiating reconciliation.[52] In contrast to criminal proceedings against alleged perpetrators of crimes, the process of

[50] PHILIPPE, X., ñLa Justice Transitionnelle: Une Nouvelle Forme de Justice?ò, at p. 1. (document on file with author)
[51] HAYNER, P., ñFifteen Truth Commissions ï 1974 to 1994: A Comparative Studyò, *Human Rights Quarterly*, Vol. 16, 1994, at p. 604.
[52] PHILIPPE, X., ñLa Justice Transitionnelleé ò, at pp. 5-7.

unveiling the truth is largely victim-orientated. Victims, namely, participate directly in this process by divulging unknown or concealed experiences, addressing or rebutting, if necessary, the version as portrayed by the alleged perpetrator and confronting their tormentors in an entirely different setting. The latter aspect, as said by Philippe, ñillustre en tout état de cause l'originalité de la justice transitionnelle et laisse entrevoir de nouvelles perspectives que la menace de la sanction ne permet généralement pas d'atteindre.ò[53] The right to reparations may manifest itself in two ways: firstly, recognizing their disadvantageous situation, victims are provided with an opportunity to reintegrate into society and, secondly, through collective measures, such as the construction of memorials or the improving of essential infrastructural needs, society in general acknowledges the victimsô anguish.[54] According to Philippe, transitional justice attempts to balance various objectives: ñla justice transitionnelle vise à rechercher ou faciliter la recherche d'un équilibre entre la restauration des droits des victimes et la reconstruction de la société en intégrant ceux qui avaient ou ont contribué à la détruire ou la déstabiliser.ò[55] One of the modalities employed to this end is reducing or foregoing a sanction for the perpetrator, exemplifying transitional justiceôs restorative attitude contrary to the retributive stance of criminal justice. The sentencing phase, alongside other attributes, allows for the drawing of a distinction between narrow transitional justice and criminal justice. Criminal justice, is, as indicated above, a form of retributive justice. A trial before an international tribunal, once the evidence submitted warrants a finding of guilt, aims at punishing the perpetrator for his endeavours. The punishment usually consists of incarceration although article 77(2) of ICC statute also foresees the ordering of a fine and ña forfeiture of proceeds, property and assets derived directly or indirectly from that crime.ò The rationales for international sentencing are well known and will therefore be described only summarily. The Appeals Chamber (AC) of the International Criminal Tribunal for the former Yugoslavia (ICTY) has maintained, on various occasions, that retribution and deterrence are the main elements to be considered in international sentencing.[56] It understood retribution not as ñfulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes,ò[57] and the Todoroviĺ Trial Chamber (TC) added that retribution

[53] Idem., at p. 5.
[54] Ibid., at pp. 5-6.
[55] Ibid., at p. 6.
[56] *Prosecutor v. Zlatko Aleksovski*, ICTY Appeals Chamber, Judgement, Case No. IT-95-14/1-A, 24 March 2000, at para. 185; *Prosecutor v. Zejnil Delalić, Zdravko Mučić (aka "PAVO"), Hazim Delić and Esad Landžo (aka "ZENGA") ("Čelibići Case")*, ICTY Appeals Chamber, Judgement, Case No. IT-96-21-A, 20 February 2001, at para. 806.
[57] *Prosecutor v. Zlatko Aleksovski*, ICTY Appeals Chamber, Judgement, Case No. IT-95-14/1-A, 24 March 2000, at para. 185.

should reflect ña fair and balanced approach to the exaction of punishment for wrongdoingò or, in other words, ñthat the penalty imposed must be proportionate to the wrongdoing.ò[58] The same TC indicated that deterrence requires the penalties meted out by the ICTY, in general, to ñensure that those who would consider committing similar crimes will be dissuaded from doing so.ò[59] In addition, in ErdemoviĆ for example, the ICTY held that reprobation and stigmatisation by the international community, ñwhich would thereby express its indignation over heinous crimes and denounce the perpetrators,ò are valid functions of an international sentence as well.[60] Rehabilitation, as a subordinate purpose, and a contribution to appeasement have also been articulated by the Tribunal.[61] Supplementary purposes, as pointed out by Cassese, partly overlap, contribute to and/or emanate from those indicated by the ICTY: firstly, criminal justice establishes individual responsibility which should thwart attempts at collective attributions of guilt; secondly, the retributive aspect of criminal justice annuls the need for revenge; thirdly, it opens the door for reconciliation as the perpetrator will receive a punishment for his crimes; and, finally, documenting past events will prevent atrocities from being cast into oblivion.[62] Orentlicher accentuates criminal justiceôs function of deterrence and builds her case for prosecutions, in particular, on the consequences of failing to punish crimes. It is argued that ña complete failure of enforcement vitiates the authority of law itself,ò which ñmay be tolerable when the law or the crime is of marginal consequence, but there can be no scope for eviscerating wholesale laws that forbid violence and that have been violated on a massive scale.ò[63] Additionally, on the national level, successor regimes may have an interest in punishing the perpetrators of the old regime as it may advance the cause of building or restructuring a morally just order whereas the young democracy may be strengthened.[64] Yet, in addition to the dominant, retributive model, an alternative, restorative framework for dealing with crime has been proffered as well although its exact delimitations remain ambiguous. Restorative justice could, namely, be thought of ñas a matter of employing a variety of novel methods to accomplish purposes traditionally ascribed to the criminal justice systemò but also, more radically, as ñnew visions of the goals

[58] *Prosecutor v. Stevan Todorović*, ICTY Trial Chamber, Sentencing Judgement, Case No. IT-95-9/1, 31 July 2001, at para. 29.
[59] Idem., at para. 30.
[60] *The Prosecutor v. Dražen Erdemović*, ICTY Trial Chamber, Sentencing Judgement, Case No. IT-96-22, 29 November 1996, at para. 65.
[61] Idem., at paras. 65-66.
[62] CASSESE, A., ñReflections on International Criminal Justiceò, *The Modern Law Review*, Vol. 61, No. 1, 1998, at p. 6.
[63] ORENTLICHER, D., ñSettling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regimeò, *Yale Law Journal*, Vol. 100, 1990-1991, at p. 2542.
[64] HUYSE, L., ñJustice after Transitioné ò, at p. 499.

to pursue.ò[65] In the latter view, restorative justice fundamentally questions various assumptions underlying the retributive justice model. Firstly, instead of a classical definition of crime as a breach of a stateôs law as determined by a pre-established judicial machinery, crime is seen as a conflict between individuals resulting in injury for the victims, the wrongdoer and the community as a whole.[66] Secondly, querying the efficacy of the deterrence factor of punishment, restorative justice seeks to repair the harm caused by the crime by engaging all parties in a reparation effort to heal shattered bonds through entering into direct dialogue with each other. So as to achieve these ends, restorative justice seeks restitution for the victim in order to repair the relationship between the victim and the offender, to restore the victimôs status and to serve as an act of accountability.[67] Punishment is, consequently, conceived of in a different manner as it is contingent upon the agreement reached by the parties to the dispute.[68] Summarized well by Braithwaite:

> ñRestorative justice is a process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime. The purpose is to restore victims, restore offenders, and restore communities in a way that all stakeholders can agree is just. One value of restorative justice is that we should be reluctant to resort to punishment. Punishment adds to the amount of hurt in the world, but justice has more meaning if it is about healing rather than hurting.ò[69]

I.B.2 El Salvador and South Africa

Over the last decades, many states have established, or have considered establishing, truth commissions in the aftermath of periods of severe chaos. From 1974 to 1994, according to Hayner, at least 15 truth commissions have been established in entirely different settings with a varying degree of success.[70] An interesting example hereof is the UN brokered ñCommission on the truth for El Salvador.ò The 1980-1991 El Salvador conflict was another internal conflict fought in the greater context of the Cold War, opposing the US-backed El

[65] DOLINKO, D., ñRestorative Justice and the Justification of Punishmentò, *Utah Law Review*, Vol. 1, 2003, at p. 319.
[66] EISNAUGLE, C., ñAn International Truth Commission: Utilizing Restorative Justice as an Alternative to Retributionò, *Vanderbilt Journal of Transnational Law,* Vol. 36, 2003, at p. 213.
[67] Idem., at p. 215.
[68] Ibid., at pp. 216-217.
[69] BRAITHWAITE, J., ñA Future Where Punishment is Marginalized: Realistic or Utopian?ò, *UCLA Law Review*, Vol. 46, 1999, at p. 1743.
[70] HAYNER, P., ñFifteen Truth Commissionsé ò, at pp. 611-635.

Salvadoran government against an alliance of leftist groups sponsored by the Soviet bloc.[71] As the East-West antagonism drew to a close, and externally provided support relinquished, the parties resorted to a series of negotiations. This process, under the auspices of the UN, resulted in the signing of a peace agreement, including, *inter alia*, the establishment of a truth commission which had the task of ñinvestigating serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth.ò[72] As the agreement failed to clarify the appropriate legal framework to be applied, the commission held that it would rely on the rules of international human rights law and international humanitarian law binding upon the parties to the conflict.[73] Following a meticulous review of particular, individual situations and cases denoting systematic patterns of violence, the commission, in the face of the risk of imperilling witnesses, the survival of the new government, and the ongoing reconciliation process, identified and named those it deemed most responsible for the atrocious events it reviewed. In addition, the commission was charged with issuing legal, political and/or administrative recommendations which the parties agreed to carry out.[74] So as to prevent a return to the paralysing grip of the military on El Salvadoran state structures, the commission noted that ñit is essential that El Salvador establish and strengthen the proper balance of power among the executive, legislative and judicial branches and that it institute full and indisputable civilian control over all military, paramilitary, intelligence and security forcesò and that its measures are intended to ñoutline the basic prerequisites for this transition and to ensure that it leads to a democratic society in which the rule of law prevails and human rights are fully respected and guaranteed.ò[75] However, when considering one of these measures, i.e. penalties, the commission, not endowed with judicial prerogatives, saw itself confronted with a serious dilemma:

> ñThe question is not whether the guilty should be punished, but whether justice can be done. Public morality demands that those responsible for the crimes described here be punished. However, El Salvador has no system for the administration of justice which meets the minimum requirements of objectivity and impartiality so that justice can be rendered reliably.ò[76]

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[71] BUERGENTHAL, T., ñThe United Nations Truth Commission for El Salvadorò, *Vanderbilt Journal of Transnational Law*, Vol. 27, 1994, at pp. 502-504.
[72] *From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador*, Un Doc. S/25500 (Annex), 1993, at p. 11. Available at: http://www.derechos.org/nizkor/salvador/informes/truth.html, accessed on 27 September 2006.
[73] Idem., at p. 20.
[74] Ibid., at p. 18.
[75] Ibid., at p. 173.
[76] Ibid., at p. 178.

Buergenthal, one of the three members of the commission, writes that:

> ñTaking this reality into account, the Commission decided not to call for trials, nor for that matter to recommend amnesties. The former made no sense until the full implementation of the Peace Accords. The latter seemed worthwhile only, if at all, after a national consensus that an amnesty would promote the goal of reconciliation in El Salvador. Ultimately, the decision whether to grant amnesty was one for the people of El Salvador to make after an appropriate dialogue on the subject.ò[77]

Within a few days of the publication of the report, the El Salvadoran legislature, supported by the insurgents and the military, passed a sweeping amnesty for crimes that occurred before 1992.[78] Even though the truth commission for El Salvador was the first commission of its kind to conduct its work under full UN sponsorship, one of the most well known truth commissions was established in 1995. Following the systematic dismantlement of the apartheid system, the new South-African administration, after the adoption of a new constitution, established a truth and reconciliation commission. Based on the promotion of national unity and reconciliation act, the commission was ñto promote national unity and reconciliation in a spirit of understanding which transcends the conflictsò through the establishment of a picture as complete as possible of the causes, nature and extent of gross violations of human rights, the facilitation of amnesties and the restoring of the victimsô dignity by allowing them to relate their own accounts and by providing reparations.[79] So as to attain these aims the commission was divided up into committees: the committee on human rights violations, the committee on reparation and rehabilitation and the committee on amnesty.[80] The most pertinent for the purposes of this research is the latter which assumed the undertaking of applying the criteria regulating the granting of amnesty. Insofar the committee was satisfied that the act in question did not constitute a gross violation of human rights, that a political objective underlay its perpetration and that the person behind it had fully disclosed the relevant facts, it was empowered to sanction an amnesty request.[81] The possibility of rescinding the consequences for heinous acts led various individuals to appeal to South Africaôs Supreme Court to assess the legality of the proposed measure. Judge Mahomed,

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[77] BUERGENTHAL, T., ñThe United Nationsé ò, at p. 536.
[78] *Accountability and Human Rights: The Report of the United Nations Commission on the Truth for El Salvador*, Human Rights Watch: Americas Watch, Vol. V, No. 7, 10 August 1993, at p. 24. Available at: http://www.hrw.org/reports/pdfs/e/elsalvdr/elsalv938.pdf#search=%22el%20salvador%20amnesty%22, accessed on 27 September 2006.
[79] *Promotion of National Unity and Reconciliation Act*, No. 34 of 1995, article 3(1). Available at: http://www.doj.gov.za/trc/legal/act9534.htm, accessed on 28 September 2006.
[80] Idem., article 3(3).
[81] Ibid., arts. 19(3)(b)(iii), 20(1).

writing for the majority, defended the truth and reconciliation commission: ñthe families of those unlawfully tortured, maimed or traumatised become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the ñreconciliation and reconstructionò which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue.ò[82] Noting the logical call for prosecution of murder, torture and comparably horrendous crimes in a society as divided as South Africaôs, the Supreme Court deemed the impugned measure itself to be in line with national and international law exigencies.[83] Dugard criticised the judgmentôs succinct perusal of international law standards with regard to amnesties but noted that a more extensive scrutiny would, in all probability, not have led to a substantially different conclusion.[84] However, the commission, despite its enormous workload, did not guarantee and mechanically rubberstamp requests which resulted, in the end, in the issuance of a limited number of amnesties. It actually recommended that ñwhere amnesty has not been sought or has been denied, prosecution should be considered where evidence exists that an individual has committed a gross human rights violation.ò[85] Yet, notwithstanding the large quantity of evidence amassed by the commission, the South African prosecutorial authoritiesô reaction was virtually completely absent.[86]

I.C Conclusion

The foregoing impression of transitional justiceôs attributes commands for the drawing of several conclusions. It has become apparent that no standardized definition of transitional justice exists: commentators juxtapose an all-encompassing response to past offences to a generic term for truth commissions. Due to the divergence in both classificationsô array of

[82] *The Azanian Peoples Organization (AZAPO) versus the President of the Republic of South Africa*, Constitutional Court of South Africa, Case CCT/17/96, 25 July 1996, at para. 17.
[83] Idem., at paras. 32, 50.
[84] DUGARD, J., ñIs the Truth and Reconciliation Process Compatible with International Law? An Unanswered Questionò, *South African Journal of Human Rights*, Vol. 13, 1997, at p. 267.
[85] *Truth and Reconciliation Commission of South Africa Report*, Volume 5, 29 October 1998, at p. 309. (document on file with author)
[86] VAN ZYL, P., ñUnfinished Business: the Truth and Reconciliation Commissionôs Contribution to Justice in Post-Apartheid South Africaò, *in* BASSIOUNI, M. (ed.), *Post-Conflict Justice,* Ardsley, New York, Transnational Publishers Inc., 2002, at p. 754.

applicable mechanisms, the relationship between criminal justice and truth-seeking becomes relevant and may differ according to the preferred definition of transitional justice. In the conceptôs broad interpretation, truth commissions and criminal justice are separate methods applied conjunctively to reckon with ghastly offences while ensuring a smooth political transition. By analysing patterns of abuse, a truth commission seeks to reconstruct as truthfully as possible episodes of a countryôs recent history and may, in so doing, supplement instruments of criminal justice through the compiling of evidence. Nevertheless, notwithstanding the public exposure of perpetrators and the revealing of buried horrors, criminal trials after the conclusion of a truth commissionôs work have been all too rare. Surprisingly maybe, Hayner insists that explicit amnesty laws thwarted prosecutions merely in a few situations given that the majority of the amnesties were of a *de facto* nature due to prosecutorial reluctance.[87] Therefore, in the broad interpretation, truth-seeking, perhaps not deliberately, often amounts to a surrogate for criminal trials instead of an additional component of an overarching machinery committed to accountability. In its narrow construction, on the other hand, transitional justice is primarily conceived of as an alternative accountability mechanism although it does not seek to replace criminal justice. In addition to the divergence between the conceptsô retributive and restorative outlooks, as touched upon above, criminal justiceôs perceived inadequacies invigorate narrow transitional justiceôs claim as an instrument more in line with the realities of post-conflict settings. Firstly, criminal justice is necessarily selective and focuses by and large on high-profile cases. The ñsmall fryò is often exonerated from prosecution as a result of budgetary constraints, political barriers and similar predicaments which may leave entrenched, societal frustrations in place. Narrow transitional justice, therefore, seeks a more comprehensive response: ñLa justice transitionnelle part de cette idée qu'il est préférable d'obtenir un résultat globalement acceptable pour l'ensemble d'une société en transition plutôt que de se concentrer sur quelques événements médiatiques qui ne satisfont qu'un nombre limité d'individus ou de victimes, souvent oubliées dans ce processus.ò[88] Secondly, the inadaptability of a national system of criminal justice to a ravaged post-conflict society constitutes another argument in this regard. A decimated institutional framework, the enormous magnitude of the crimes, the influence retained by ousted regimes are only a few examples which may render the holding of criminal proceedings nigh impossible. Judge Mahomed relates eloquently on the difficulties faced by proponents of criminal trials in post-Apartheid South Africa:

[87] HAYNER, P., ñTruth Commissionsé ò, at p. 604.
[88] PHILIPPE, X., ñLa Justice Transitionnelleé ò, at p. 2.

ñMost of the acts of brutality and torture which have taken place have occurred during an era in which neither the laws which permitted the incarceration of persons or the investigation of crimes, nor the methods and the culture which informed such investigations, were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. Loved ones have disappeared, sometimes mysteriously and most of them no longer survive to tell their tales. Others have had their freedom invaded, their dignity assaulted or their reputations tarnished by grossly unfair imputations hurled in the fire and the cross-fire of a deep and wounding conflict. The wicked and the innocent have often both been victims. Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. All that often effectively remains is the truth of wounded memories of loved ones sharing instinctive suspicions, deep and traumatising to the survivors but otherwise incapable of translating themselves into objective and corroborative evidence which could survive the rigours of the law.ò[89]

Yet, narrow transitional justice, after closer examination, displays weaknesses of itself as well, quite inevitably. It suffices to mention a few. Firstly, is a truth commissionôs prime objective a realistic one? In other words, is it *überhaupt* possible to establish the objective truth or is a truth commissionôs reading of history yet another perception of reality? And, similarly, does a commissionôs account, alike one of the criticisms espoused against criminal trials, square with the entirety of the facts that occurred during the period it probed: i.e. is it complete?[90] Also, truth commissionsô focus on ñmacro-justiceò might not be in line with victimsô expectations, which, in turn, could lead to the surfacing of individual frustrations with all its potential hazards.[91] The final drawback to be mentioned here is truth commissionsô dependence on other organs for the realization of certain aims. Van Zyl, for instance, states that the South African Truth and Reconciliation Commissionôs reparation recommendations have gone largely unheeded by the South African government.[92] Nevertheless, in situations as described in the AZAPO judgment above, the creation of a truth commission, i.e. the initiation of a narrow transitional justice process, in response to atrocious, wide-spread acts seems the only viable avenue. Philippe describes the dilemma as follows:

ñOr, la justice rétributive est confrontée à un tel risque et ne pourra achever l'objectif de réconciliation que si elle est exercée de façon effective, indépendante, impartiale et qu'elle garantit à l'accusé un

[89] *The Azanian Peoples Organization (AZAPO) versus the President of the Republic of South Africa*, Constitutional Court of South Africa, Case CCT/17/96, 25 July 1996, at para. 17.
[90] PHILIPPE, X., ñLa Justice Transitionnelleé ò, at p. 7.
[91] Idem., at pp. 7-8.
[92] VAN ZYL, P., ñUnfinished Businessé ò, at p. 756.

> procès équitable. La justice pénale peut théoriquement remplir ces conditions mais les obstacles sont tels qu'il devient quasiment impossible de les réunir simultanément. Les périodes de transition démocratiques restent des période troublées et mettent le système judiciaire ordinaire dans l'incapacité de réaliser cet idéal de justice parce que les obstacles sont nombreux. Les commissions *vérité et réconciliation* permettent de combler les carences d'un système judiciaire déficient, désorganisé et la plupart du temps incapable de traiter l'intégralité des dossiers qui pourraient relever de l'époque troublée.ò[93]

Therefore, the efficacy of truth commissions, or the perception thereof, is also intimately intertwined with and contingent upon the context in which it operates. At least two scenarios emerge. If the basis of comparison is a robust judiciary capable of bringing all, or a substantial segment of, suspects to the dock, regardless of their political, military or other rank, the benefits of a truth commission will not be assessed favourably. On the other hand, if one uses a defunct legal system marred by ferocious conflict and the direct consequences thereof as a starting point, a truth commission will, most likely, be interpreted as a contribution to the thwarting of impunity and the promotion of accountability. Schiff writes on the South African Truth and Reconciliation Commission:

> ñIn comparison to a weak legal system, the SATRC showed that in the grey areas of what is possible and what promotes transparency, a truth commission, using the tool of amnesty, has a place in the struggle to promote humanitarian norms by exposing their violation and bringing into public view at least some of the perpetrators of crimes. In comparison to a system capable of bringing the most responsible perpetrators directly to account for their actions, however, the TRC was weak.ò[94]

Nonetheless, even though narrow transitional justice commonly comes into play as the sole possibility to respond to the demand for accountability, it does not rule out the coexistence of truth commissions and criminal trials. In certain situations narrow transitional justice may even be seen as a supplement to criminal justice in the form of a ñcarrot and stickò approach. Should the perpetrator namely decline to come forward and partake in the truth commissionôs procedures, the threat of prosecutions may materialize itself.[95] The South African Truth and Reconciliation Commissionôs recommendations, quoted *supra*, already indicated such a

[93] PHILIPPE, X., ñLa Justice Transitionnelleé ò, at pp. 8-9.
[94] SCHIFF, B., ñDo Truth Commissions Promote Accountability Or Impunity? The Case of the South African Truth and Reconciliation Commissionò, *in* BASSIOUNI, M. (ed.), *Post-Conflict Justice,* Ardsley, New York, Transnational Publishers Inc., 2002, at pp. 341-342.
[95] PHILIPPE, X., ñLa Justice Transitionnelleé ò, at p. 7.

preference and the AZAPO judgment points to a similar interpretation.[96] As indicated above, the El Salvadoran commission refrained from voicing a clear-cut estimation as to its favoured solution for the prosecution-amnesty debate. It, nevertheless, unmistakably indicated that those it had identified as having committed certain crimes could validly be brought before El Salvadoran courts. Consequently, an amnesty in the narrow interpretation is by no means an automatism but may be the fruit of a legislative decision or contingent upon certain conditions. Therefore, truth commissions and criminal trials, in both interpretations of transitional justice, are not intrinsically inimical nor are they mutually exclusive. Be that as it may, the looming potential for a clash between the two instruments seems apparent. Situations involving truth commissions followed by amnesties, conferred either by the commission itself provided that it is entitled to do so or by the legislative branch of government following the termination of a truth commissionôs activities, are most likely to set the instruments on a collision course. This potential conflict is not limited to a particular interpretation of transitional justice but may manifest itself in both varieties although the differences seem marginal. In the broad interpretation, the instruments are both components of the same overarching machinery committed to addressing past crimes. Were they to clash, transitional justiceôs purpose would be defeated from within as a result of, for instance, an ill-conceived strategy for a particular transitional context. Theoretically, this problem would not arise if broad transitional justice, as the predominant view seems to hold, is seen exclusively as an integrated response to past crimes. This opinion, namely, does not consider a possible preceding question of whether past crimes should be addressed at all or ignored in the interests of fostering national unity. Yet, in point of fact, many states do resort to amnesties and, even if this practice was to be overlooked for whatever reason, the existence of numerous *de facto* amnesties is an irrefutable reality. The narrow interpretation, in contrast, would see more of a classical clash between two different methods of dealing with crime: even if criminal proceedings against perpetrators of crimes were a practicable option in a given situation, the door would be shut by the amnesty granted by a truth commission due to its restorative predilections. In both situations, however, the effect would amount to precluding criminal trials for those suspected of having committed some of the most horrendous acts man is able to inflict upon man. The remaining pages of this research will proceed to address one feature of this possible conflict, i.e. the compatibility of the Rome Statute with truth commissions. While cognizant of possible clashes with other mechanisms employed by broad

[96] *The Azanian Peoples Organization (AZAPO) versus the President of the Republic of South Africa*, Constitutional Court of South Africa, Case CCT/17/96, 25 July 1996, at para. 20.

transitional justice, this research will exclusively deal with the aforementioned problem as it displays the most potential for a possible conflict.

II The "Interests of Justice"

II.A Introduction

Having entered into force on the first of July 2002, the Rome Statute aims at eradicating impunity for the most serious crimes of concern to the international community as a whole. It may assert jurisdiction over genocide, crimes against humanity, war crimes and, once a definition has been adopted, aggression as soon as a situation is referred to the Prosecutor either by a State Party or by the SC or in case of a *proprio motu* investigation initiated by the Prosecutor.[97] As the ICC is taking its first steps in an environment overflowing with pitfalls of various kinds, hitherto indistinct scenarios might soon seriously impinge on the ICCôs work. Its relationship with truth commissions is potentially such a scenario as this form of dealing with past crimes has been, and will be, applied extensively. Cassese, in describing the outlook for international criminal justice, contends that truth commissions could very well be resorted to in frail transitional societies and in situations involving immense numbers of perpetrators.[98] According to the same author, these commissions should be entrusted with the following tasks in order to be effective and to avoid the defects of some of their predecessors:

> ñ1. Deal with alleged war crimes, crimes against humanity, torture or terrorism committed by *low- or middle-level offenders*. As for genocide, the extreme gravity of this crime and the need to protect groups against their extermination seem always to impose a judicial responseé Similarly, those who have allegedly planned, instigated, masterminded, or ordered the commission of such crimes (i.e. the military and political leaders) should be prosecuted and tried either by a national criminal court or at the international level.
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> 4. If the Commissions are satisfied that full disclosure has been madeé they might grant individual *pardon* to the persons concernedé Pardon would entail exemptioné from the punishment the law inflicts for the crimeé *not obliteration of the crime*. Such obliteration could only follow from amnesty; however, the ICTY, in Furundġijaé , held in 1998 that amnesty for international crimes is contrary to *jus cogens*é

[97] *Rome Statute*é , arts. 5, 13.
[98] CASSESE, A., *International Criminal Law*, New York, Oxford University Press Inc., 2003, at pp. 450-451.

> 5. If the Commissions consider that the persons asking for pardon have not fully disclosed their own crimes or the crimes perpetrated by others with whom they were connectedé they might turn over the file to a criminal court of the relevant Stateé or, alternatively, an international tribunal. The same should hold true for cases where the Commissions find that the atrocities committed by the applicant are so extensive and appalling as to render pardon unwarrantedé ò[99]

Such an approach to truth commissions would not, or at least minimally, conflict with the ICC. As the ICC prepares itself to exercise its jurisdiction over those most responsible for the most serious crimes of international concern, the exclusion of military and political leaders and all culprits of genocide from the purview of truth commissions would, in all probability, guarantee the co-existence of the ICC and truth commissions. Yet, in reality, States resorting to this method are unlikely to rule out amnesties and confine truth commissionsô activities to a ñstick behind the doorò for certain classes of offenders guilty of certain categories of crimes. As the preceding chapter aimed to highlight, in times of instability, various circumstances may bring about the annulment of certain crimes through amnesties, across-the-board or conditional, once a truth commission concludes its assignment. However, as said in the introduction, the Rome Statute does not incorporate a specific provision on amnesties, in combination with truth commissions or not, due to the widely diverging opinions of negotiating delegations on this matter. Villa-Vicencio concludes that the establishment of the ICC is ña little frightening because it could be interpreted, albeit incorrectly, as foreclosing the use of truth commissions which could otherwise encourage political protagonists to turn away from ideologically fixed positions that make for genocide and instead to pursue peaceful coexistence and national reconciliation.ò[100] Yet, Scharf writes that in the opinion of Kirsch, the Chairman of the Preparatory Commission for the ICC and current President of the ICC,

> ñthe issue was not definitely resolved during the Diplomatic Conference. Rather, the provisions that were adopted reflect ñcreative ambiguityò which could potentially allow the prosecutor and judges of the International Criminal Court to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the court.ò[101]

While acknowledging that criticisms have been voiced in respect of the preceding perspectives, this research will proceed from the premise that, in certain circumstances, truth

[99] Idem., at pp. 451-452.
[100] VILLA-VICENCIO, C., ñWhy Perpetrators Should not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meetò, *Emory Law Journal*, Vol. 49, 2000, at p. 205.
[101] SCHARF, M., ñThe Amnesty Exceptioné ò, at pp. 521-522. (footnotes omitted)

commissions are apposite, and often the only available, accountability mechanisms which could be followed by sweeping or qualified amnesties due to, for example, precarious political circumstances or an incapacitated institutional framework. Kirschôs aforementioned comments would, *inter alia,* apply to article 53 and, more specifically, its ñinterests of justiceò clauses. The remainder of this research will, therefore, focus on these clauses and discuss three possible arguments in order to determine whether they may serve as a link between the ICC and truth commissions combined with amnesties.

II.B Interpreting the ñInterests of Justiceò

II.B.1 Introduction

When assessing article 53, the first logical matter to consider is the articleôs actual wording in order to determine which situations allow the prosecutor to invoke the discretionary right to forego an investigation or a prosecution. In the relevant part, the article reads:

> 1. é In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
> é
> (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve *the interests of justice.*
> ...
> 2. If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
> é
> (c) 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 crimeé [102]

As article 53 does not specifically indicate the possibility of deferral to non-prosecutorial truth-seeking efforts, the criterion leaving the prosecutor the most leeway in this regard seems to be the ñin the interests of justiceò yardstick. The phraseôs precise meaning is, at first sight, hardly evident and requires elucidation. The standard test for interpreting treaty rules is laid down in article 31 of the Vienna Convention on the Law of Treaties (VCLT).[103] As a

[102] *Rome Statute*é , art. 53. (emphasis added)
[103] *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, 23 May 1969, entry into force 27 January 1980, art. 31.

preliminary matter, the VCLT may be applied as, unquestionably, the Rome Statute constitutes a treaty between states which has been concluded after the entry into force of the VCLT.[104] Article 31 of the VCLT calls for the interpretation of a treaty ñin good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.ò As this formula shows, the emphasis is laid on the treaty termsô ordinary meaning in their context while the reference to the treatyôs object and purpose is relegated to a slightly less important role.[105] It is namely only ñin the light ofò a treatyôs object and purpose that ñthe initial and preliminary conclusion must be tested and either confirmed or modified.ò[106]

II.B.2 Possible Interpretations

The ordinary meaning of ñthe interests of justiceò in its context, similarly to interpretational matters in the context of ñtransitional justiceò, seems to revolve around the question whether the ñinterests of justiceò standard denotes a retributive notion of ñjusticeò or whether additional, wide-ranging deliberations of ñjusticeò may also be taken into account? In other words, when relying on the ñinterests of justiceò, should the prosecutor exclusively consider matters bearing directly on the criminal trial itself, such as the gravity of the crime as indicated in article 53, or are broader concerns, jeopardizing a fragile peace bargain by initiating an investigation or prosecution for instance, also valid? As has been explained, in transitional societies, truth commissions followed by amnesties are often applied as the only feasible accountability mechanism due to politically precarious circumstances. Therefore, if the scope of the ñinterests of justiceò could reasonably be interpreted to incorporate such concerns, a strong indication of the suitability of article 53 to marry the Rome Statute with truth commissions combined with amnesties would be provided. Article 53 seems to reserve a different role for the ñinterests of justiceò within the investigation phase and within the prosecution phase. In the decision whether to initiate an investigation, the ñinterests of justiceò appears to constitute a criterion which may defeat the other criteria mentioned, i.e. the gravity of the crime and the interests of victims. As suggested by its place at the end of the sentence, the ñinterests of justiceò are contrasted against the aforementioned traditional considerations and may be used by the prosecutor to reject commencing an investigation even

[104] Idem., arts. 1, 4.
[105] SINCLAIR, I., *The Vienna Convention of the Law of Treaties*, Second Edition, Manchester, Manchester University Press, 1984, at p. 130.
[106] Idem., at p. 130.

though the gravity of the crime and the interests of victims may warrant so. This could denote an intention to allow the ñinterests of justiceò to encompass wide-ranging considerations not relating directly to a criminal trial, such as the potentially eroding effect the initiation of criminal proceedings might have on societies balancing on the abyss of deadly conflict. In the prosecution phase, the ñinterests of justiceò provides one of the bases, as in the investigation phase, for not initiating a prosecution upon the completion of an investigation. The phrase is placed at the beginning of the sentence and calls upon the Prosecutor to take into account ñall the circumstancesò in determining whether an investigation would be ñin the interests of justice.ò[107] Yet, here, the structure of the sentence does not seem to allow the ñinterests of justiceò criterion to defeat other criteria but rather subsumes more traditional issues that could be raised in this matter ñincluding 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.ò[108] The disparity in structure with article 53(1)(c) and the examples of factors to be taken into account seem to indicate an exclusion of broader considerations. However, the door does not seem to be completely closed as the article speaks of ñall the circumstances, *including*é ò (emphasis added) which renders the list of factors illustrative instead of exhaustive. Authors have also voiced diverging interpretations on article 53. Robinson believes that article 53 is a relatively broad concept as, according to him, 53(2)(c) contemplates broad considerations such as the age and infirmity of the accused and 53(1)(c) allows the ñinterests of justiceò to trump the other criteria.[109] Stahn, while considering that the value of article 53 has been overestimated in this context, holds that the express distinction between specific criteria and the ñinterests of justiceò may suggest that the latter embodies a broader concept.[110] Gavron argues that article 53 could accommodate wider considerations although it could lead to speculation about future events and the deterrence argument would be turned on its head.[111] These reservations seem merited and raise several further questions. For example, how is the likelihood of a potential outburst of violence to be substantiated? Articles 53(1)(c), namely, requires ñ*substantial* reasons to believe thaté ò (emphasis added) implying that arbitrary grounds for not initiating an investigation are not acceptable. And, can the ICC credibly justify the deterring of criminal

[107] *Rome Statute*é , art. 53(2)(c).
[108] Idem., art. 53(2)(c).
[109] ROBINSON, D., ñServing the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Courtò, *European Journal of International Law*, Vol. 14, No. 3, 2003, at p. 488.
[110] STAHN, C., ñComplementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Courtò, *Journal of International Criminal Justice*, Vol. 3, 2005, at pp. 697-698.
[111] GAVRON, J., ñAmnesties in Light of Developments in International Law and the Establishment of the International Criminal Courtò, *International and Comparative Law Quarterly*, Vol. 51, 2002, at p. 110.

proceedings by possible violent eruptions instead of *vice versa*? The *raison d'être* of the ICC is, namely, to end impunity for some of the most abhorrent crimes. Amnesty International (AI) favours a restrictive interpretation of article 53. Its basic presumption, bearing the Rome Statuteôs preamble in mind, is that the interests of justice are always served by prosecuting the crimes within the ICCôs jurisdiction, absent a compelling justification.[112] Only a narrow reading of the exceptions mentioned in article 53(2)(c), i.e. the age and infirmity of the perpetrator, may, according to AI, be accepted as legitimate justifications.[113] It furthermore considers that ñnational amnesties, pardons and similar measures of impunity that prevent judicial determinations of guilt or innocence, the emergence of the truth and full reparations to victims are contrary to international law and it would not be in the interests of justice for the Prosecutor to decline to prosecute on the ground that the suspect had benefited from one of these measures.ò[114] Human Rights Watch (HRW) is also a strong proponent of a narrow construction of article 53 and it advances a three-pronged argument in this regard. It is said that a narrow construction is most consistent with the context and the object and purpose of the Rome Statute, international law requirements and a sound prosecutorial strategy free of political interference and manipulation.[115] Whereas the latter two will be examined more closely in subsequent paragraphs, the first point will require some elaboration. As the first of three sub-arguments, HRW puts forward that the Rome Statuteôs context, including preambular paragraphs,[116] reflects the ICCôs *raison d'être*, i.e. a safeguard against impunity for exceptionally grave crimes.[117] The preamble states, for instance, that ñthe most serious crimes of concern to the international community as a whole must not go unpunishedò and that it is ñdetermined to put an end to impunity for the perpetrators of these crimes.ò[118] As a treatyôs preamble, commonly, also contains proof of the treatyôs object and purpose, HRW concludes that ñif the phrase ñin the interests of justiceò is construed in light of the object and purpose of the Rome Statute, a construction that permits consideration of a domestic amnesty, domestic truth commission or peace process and results in permanently not initiating an

[112] HALL, C., ñSuggestions Concerning International Criminal Court Prosecutorial Policy and Strategy and External Relations, Contribution to an Expert Consultation Process on General Issues Relevant to the ICC Office of the Prosecutorò, 28 March 2003, at p. 28. Available at: http://www.icc-cpi.int/library/organs/otp/hall.pdf, accessed on 5 October 2006.
[113] Idem., at p. 28
[114] Ibid., at pp. 28-29.
[115] *Policy Paper: the Meaning of "the Interests of Justice" in Article 53 of the Rome Statute*, Human Rights Watch, June 2005, at pp. 4-15. Available at: http://hrw.org/campaigns/icc/docs/ij070505.pdf, accessed on 5 October 2006.
[116] *VCLT*é , art. 31(1).
[117] *Policy Paper: the Meaning*é , at pp. 5-6.
[118] *Rome Statute*é , Preamble, paras 4, 5.

investigation or proceeding from investigation to trial would be in principle at odds with the object and purpose of the Rome Statute, as set forth in its preamble.ò[119] As a second contextual argument, although separately, HRW indicates that the Rome Statute preserves the prerogative to deal with issues on the intersection between international peace and security and international justice for the SC. Acting under Chapter VII, the SC is entitled to halt the commencement or continuation of an investigation or prosecution for a renewable period of 12 months.[120] This, then, would preclude the ICC Prosecutor from engaging in political determinations as no such power has been allocated to him and, mindful of the irrefutable political impact of the Prosecutorôs activities, the Rome Statuteôs architects sought to eliminate any possibly negative political consequences by inserting article 16.[121] Interestingly, HRW seems to qualify its previous comments on the Rome Statuteôs context and object and purpose somewhat with the second sub-argument. Firstly, HRW denies the possibility of article 53 covering wider notions of justice by a review of the Rome Statuteôs preamble, the main purpose of which, it is concluded, is to eradicate impunity for the crimes the ICC has jurisdiction over. However, contradictorily to a certain extent, it is then held that wider notions of justice are also precluded by the fact that the framers of the Rome Statute already envisaged a possible collision with the work of the SC in article 16. Proof that the Rome Statute is aware hereof may, however, also be found in its preamble in the recognition that ñsuch grave crimes threaten the peace, security and well-being of the worldò and in the reaffirmation of ñthe Purposes and Principles of the Charter of the United Nations.ò[122] These expressions could therefore also signify that, when framing the Rome Statute, peace, security and well-being were seen as overarching aims the ICC is to contribute to through criminally repressing odious crimes. Admittedly, as noted by HRW, the main aim is to set up a judicial machinery but the Rome Statute certainly does not discount the wider context in which it is to function. According to Sinclair, conflicting interpretations of the object and purpose of a treaty are not rare ñgiven that most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes.ò[123] HRW finally points out that other instances of the use of ñthe interests of justiceò in the Rome Statute and in the Rules of Procedure and Evidence do not hint at a broad notion either.[124] For example, HRW refers to article 55, setting out the rights of persons during investigation, requiring, for certain

[119] *Policy Paper: the Meaning*é , at p. 6.
[120] *Rome Statute…*, art. 16.
[121] *Policy Paper: the Meaning…,* at p. 7.
[122] *Rome Statute…*, Preamble, paras. 3,7.
[123] SINCLAIR, I., *The Vienna Convention*é , at p. 130.
[124] *Policy Paper: the Meaning…,* at p. 6.

persons, the assigning of legal assistance if the person does not have such assistance or ñin any case where the interests of justice so require.ò[125] Whereas this certainly is true, the direct context of article 53 should not be overlooked. Although its exact contours remain ambiguous, it is clear that article 53 intends to formulate an exception to the initiation of an investigation or a prosecution. Where references to the ñinterests of justiceò are made in other articles in the Rome Statute, the intention seems to be to secure, as put by HRW, a ñgood administration of justice.ò[126] As the decision whether to initiate an investigation or an prosecution, theoretically at least, opens a possibility to embrace wider considerations of justice, a similar use of the phrase in articles seeking to ensure a ñgood administration of justiceò seems less likely. Except for far-fetched, imaginative scenarios, a nascent societyøs future will not hinge upon the assigning of legal representation in an individual case. As several interpretations seem to be defensible, the phraseøs exact meaning remains confusing. The *travaux préparatoires* of the Rome Statute, which in any case is a supplementary method of treaty interpretation utilized to confirm the meaning resulting from the application of article 31 VCLT or to determine the meaning when the first test leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable,[127] do not express an authoritative interpretation either. According to HRW, the phrase is used only twice in relation to prosecutorial powers.[128] Syria expressed reservations about ñallowing the Prosecutor to stop an investigation in the supposed interests of justice.ò[129] Denmark, on the other hand, preferred that ñthe Court might itself consider that suspending a case would serve the interests of justiceé ò instead of assigning the power to suspend proceedings in a particular case to the SC.[130] Whereas the latter comments do seem to allude to a broader dimension to be considered as, in the determination to whom to allot the authority to suspend proceedings, a choice is considered between the SC and the Court itself, the Syrian delegateøs remarks appear to be of a general nature. Yet, only two delegates pronounced themselves on

[125] *Rome Statute…*, art. 55(2)(c). According to HRW, the use of the phrase in articles 61, 65 and 67 of the Rome Statute and in rules 69, 73(6), 82(5), 100(1), 136(1), 165(3) of the Rules of Procedure and Evidence suggests a similar interpretation.
[126] *Policy Paper: the Meaning…,* at p. 6.
[127] *VCLT*é , art. 32.
[128] *Policy Paper: the Meaning*é , at p. 4.
[129] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Official Records, Volume II, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, UN Doc. A/CONF.183/13 (Vol. II), Rome, 15 June-17 July 1998, at p. 359. Available at: http://www.un.org/law/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf, accessed on 7 October 2006.
[130] Idem., at p. 302.

this issue and, in both situations, did they not elaborate on the exact scope of the ñinterests of justice.ò

II.B.3 Conclusion

In conclusion, an interpretation of the ñinterests of justiceò in conformity with the rules of the VCLT is unlikely to lead to a definite answer. Two principal interpretations, both with different nuances and emphases, have emerged and both contain a degree of validity. Therefore, whether article 53 is apt to serve as a tool for reconciling the Rome Statute with truth commissions accompanied by amnesties, will have to be assessed on the basis of additional criteria.

II.C The Obligation to Prosecute, the Legality of Amnesties and the ñInterests of Justiceò

II.C.1 Introduction

In the debate on the question whether article 53 may serve as a conduit between truth commissions and the ICC, the exigencies posed by international law form a second dimension. The VCLT indicates, namely, that the general rule on treaty interpretation requires that, together with the context, ñany relevant rules of international law applicable in the relations between the partiesò shall be taken into account.[131] Sinclair writes that this means that ñevery treaty provision must be read not only in its own context, but in the wider context of general international law, whether conventional or customary.ò[132] Additionally, the applicable law of the ICC includes, as a secondary source, and only where appropriate, ñapplicable treaties and the principles and rules of international lawé ò[133] With regard to this researchôs principal focus, the most relevant rules of international law are those governing the obligation to prosecute certain crimes and, closely connected thereto, the legality of amnesties. Therefore, this paragraph will seek to assess the appropriateness of utilizing the aforementioned rules of international law as a factor in the prosecutorôs appraisal whether the initiation of an investigation or prosecution, in the face of an amnesty granted by a truth commission, is in the ñinterests of justice.ò In other words, if a State is under an obligation to

[131] *VCLT*é , art. 31(3)(c).
[132] SINCLAIR, I., *The Vienna Convention*é at p. 139.
[133] *Rome Statute*é , art. 21(1)(b).

prosecute certain crimes, would the ñinterests of justiceò clauses of article 53 have to be interpreted as excluding the possibility of deferral to truth commissions accompanied by amnesties?

II.C.2 The Obligation to Prosecute

The plethora of conventional and customary rules, proclamations by various bodies and verdicts of national and international courts on the obligation to prosecute certain crimes will not be presented in its entirety. Rather, on account of conciseness, merely some comments on the scope of the obligation as regards crimes overlapping with the ICCôs jurisdiction *ratione materiae* will follow.[134] Overall, neither international customary rules nor international general principles oblige states to exercise jurisdiction, on any ground, over all international crimes.[135] Nonetheless, Cassese believes that it is possible to argue that ñin those areas where *treaties* provide for such an obligation, a corresponding customary rule may have emerged or be in the process of evolving.ò[136] A customary rule, requiring sufficient state practice and *opinio juris*, would oblige all states, regardless of correlating conventional obligations incumbent upon them, to prosecute certain crimes.

II.C.2.(a) Genocide

Genocide, firstly, is one of the crimes the ICC intends to prosecute pursuant to the Rome Statute,[137] but, at the same time, the crime also forms the subject-matter of a separate convention. The Genocide Convention of 1948, crafted in the wake of the Second World War, defines genocide and sets out several provisions relating to the punishment of the ñcrime of crimes.ò[138] It is stipulated, for instance, that all persons guilty of genocide, i.e. constitutionally responsible rulers, public officials or private persons, shall be punished and, so as to give effect to the provisions of the Genocide Convention, the State Parties undertake to enact the

[134] The crime of aggression will not be discussed as article 5(2) of the Rome Statute says that the ICC will only have jurisdiction over this crime once a provision defining the crime and setting out the conditions under which the court shall exercise jurisdiction with respect to this crime has been adopted.
[135] CASSESE, A., *International Criminal Law*é at pp. 301-302.
[136] Idem., at p. 302.
[137] *Rome Statute*é , art. 6.
[138] *The Prosecutor of the Tribunal against Jean-Paul Akayeshu*, ICTR Trial Chamber, Sentencing Judgment, ICTR-96-4-T, 2 October 1998, at para. 4.

necessary legislation and, especially, to provide for effective penalties.[139] An international penal tribunal, which never has been established, and domestic courts of the territorial state are envisaged as enforcement mechanisms.[140] On a normative level, according to the International Court of Justice (ICJ), ñthe principles underlying the Convention are principles which are recognized by the civilized nations as binding on states, even without any conventional obligations.ò[141] Orentlicher considers that ñalthough the opinion does not specify which provisions reflect customary norms, those requiring punishment pursuant to the territorial principle, which are the heart of the Convention, surely are included.ò[142] Therefore, an obligation to prosecute those guilty of genocide is apparently endorsed by conventional and customary rules and, even so, Cassese adds that at least ña general obligation of international *co-operation*ò for the prevention and punishment of genocide exists.[143]

II.C.2.(b) War Crimes

Furthermore, the ICC purports to exercise jurisdiction over four types of war crimes: grave breaches of the Geneva Conventions;[144] other serious violations of the laws and customs applicable in international armed conflict; serious violations of article three common to the four Geneva Conventions; and other serious violations of the laws and customs applicable in armed conflicts not of an international character.[145] Whereas the first and the third category, that is grave breaches and serious violations of common article three, are drawn directly from the Geneva Conventions, the other categories have largely been derived from the same source, together with its Additional Protocol I (PAI) and Additional Protocol II (PAII),[146] as well. For instance, article 8(2)(b)(i) of the Rome Statute, i.e. the prohibition of ñintentionally

[139] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, entry into force 9 December 1948, arts. 4-5.
[140] Idem., art. 6.
[141] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* International Court of Justice, Advisory Opinion, 28 May 1951, 1951 I.C.J. 15, at para. 24.
[142] ORENTLICHER, D., Settling Accountsé at p. 2565.
[143] CASSESE, A., *International Criminal Law*é at p. 302.
[144] *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (GCI), Geneva, 12 August 1949; *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (GCII), Geneva, 12 August 1949; *Convention relative to the Treatment of Prisoners of War* (GCIII), Geneva, 12 August 1949; *Convention relative to the Protection of Civilian Persons in Time of War* (GCIV), Geneva, 12 August 1949.
[145] *Rome Statute*é , art. 8.
[146] *Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts*, Geneva, 8 June 1977; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, Geneva, 8 June 1977.

directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities,ò blends together articles 51(2) and 85(3)(a) of PAI, specifying, respectively, that ñthe civilian population as such, as well as individual civilians, shall not be the object of attack,ò and that ñmaking the civilian population or individual civilians the object of attackò is a grave breach of PAI.[147] Yet, the war crimes within the jurisdiction of the ICC have not been derived exclusively from the Geneva Conventions and their Additional Protocols as the legal basis of several war crimes may be found in various other sources too. For example, article 8(2)(b)(xvii) of the Rome Statute, laying down the war crime of employing poison or poisoned weapons, has its origin in article 23(a) of the Hague Regulations of 1907.[148] The International Committee for the Red Crossôs (ICRC) Customary Law Study concludes that, as a matter of state practice, a customary norm has developed labelling all serious violations of international humanitarian law war crimes, regardless of the international or non-international character of the conflict they are linked to.[149] On the level of the obligation to prosecute, however, important distinctions between the different war crimes may be discerned. As regards treaty obligations, as imposed by the ICC war crimesô legal bases, the following becomes apparent. With respect to the Geneva Conventions, as the most important source, High Contracting Parties, based on article one common, are generally required to ñrespect and ensure respectò for the Conventions in all circumstances. So as to achieve these goals, one of the possible avenues for High Contracting Parties is, of course, to resort to penal measures in response to breaches of the Conventions. All four Geneva Conventions, however, explicitly define the breaches that are deemed ñgraveò[150] and detail the consequences attached to their special status. It is, namely, stipulated that High Contracting Parties ñundertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Conventionò while requiring them to ñsearch for persons alleged to have committed, or to have ordered to be committed, such grave breachesò and to ñbring such persons, regardless of their nationality, before its own courts.ò[151] The three obligations identified in this provision form the basis of what the commentary to the Geneva Conventions

[147] DÖRMANN K., *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, Cambridge, Cambridge University Press, 2003, at p. 131.
[148] *Hague Regulations Concerning the Laws and Customs of War on Land*, annexed to the Hague Convention No. IV Respecting the Laws and Customs of War on Land, the Hague, 18 October 1907, art. 23(a).
[149] HENCKAERTS, J-M., DOSWALD-BECK, L. (eds.), *Customary International Humanitarian Law*, Volume I: Rules, Geneva and Cambridge, ICRC and Cambridge University Press, 2005, at p. 568.
[150] GCI, art. 50; GCII, art. 51; GCIII, art. 130; GCIV, art. 147.
[151] GCI, art. 49; GCII, art. 50; GCIII, art. 129; GCIV, art. 146.

deems ñthe cornerstone of the system used for the repression of breaches of the Convention.ò[152] Article 85 PAI expands the list of grave breaches laid down in the Geneva Conventions. For the repression of its breaches and grave breaches, PAI relies on the relevant rules on repression included in the Geneva Conventions, as supplemented by its own provisions.[153] For breaches of the Geneva Conventions other than grave breaches, the common article on repression of grave breaches stipulates that each High Contracting Party shall take measures necessary for the suppression thereof.[154] Although the wording is imprecise, according to the commentary, ñthere is no doubt that what is primarily meant is the repression of breaches other than the grave breaches listed and only in the second place administrative measures to ensure respect for the provisions of the Conventionò and, therefore, ñall breaches of the Convention should be repressed by national legislation.ò[155] Meron concludes that ñ*mandatory* prosecution (or extradition) of perpetrators of grave breaches of the Geneva Conventions and *discretionary* prosecution for other (nongrave) breaches are left to the penal courts of the detaining poweré ò[156] Common article three of the Geneva Conventions, as well as PAII, which develops and supplements common article three without modifying its existing conditions of application,[157] apply to conflicts of a non-international character. Unlike provisions relating to grave breaches and other breaches of the Geneva Conventions, common article three and PAII are devoid of explicit references to measures to be taken in response to breaches of their provisions. Common article three arguably is covered by the third paragraph of the provision on grave breaches requiring measures for the suppression of ñnon-graveò breaches of the Conventions. In Meronôs opinion, criminal jurisdiction over these crimes could be of a non-compulsory nature since violations of common article three are not encompassed by the list of grave breaches of the Geneva Conventions.[158] Outside the Geneva Conventions and Additional Protocols, the Hague Regulations and its annex, for example, are silent on individual responsibility for violations as well as on any obligations incumbent upon states parties to prosecute the perpetrators of violations other than an article requiring a belligerent party having violated the

[152] PICTET, J. (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Volume II, Geneva, ICRC, 1960, at p. 590.
[153] PAI, art. 85(1).
[154] GCI, art 49(3); GCII, art 50(3); GCIII, art. 129(3); GCIV, art. 146(3).
[155] PICTET, J., ñCommentary on theé ò, at p. 594.
[156] MERON, T., ñInternational Criminalization of Internal Atrocitiesò, *The American Journal of International Law*, Vol. 89, 1995, at p. 564 (emphasis added).
[157] PAII, art. 1(1).
[158] MERON, T., ñInternational Criminalizationé ò, at p. 566.

regulations to pay compensation.[159] The ICRC says, generally, that ñstates must ensure compliance with all provisions of humanitarian law including those applicable to non-international armed conflict and those regulating the use of weapons.ò[160] It is recognized that a reaction to all violations of international humanitarian law may come in many forms, such as the adoption of military regulations, administrative orders and other regulatory measures, whereas criminal legislation is seen as the most effective and appropriate means as regards all serious violations of international humanitarian law.[161] As to the customary status of any treaty obligations, which would expand such an obligationôs scope to all states whether they possess corresponding treaty obligations or not, opinions diverge. Naqvi indicates that the obligation to prosecute or extradite those accused of grave breaches has attained customary status by virtue of ñthe almost universal ratification of the Geneva Conventions and the widespread occurrence of implementing legislation enacted by States around the world.ò[162] Yet the same author notes that it is debatable whether the same obligation appended to grave breaches of PAI has turned into a customary rule as the ICC negotiations, for example, brought diverging views on the customary nature of PAI provisions to light.[163] In respect of non-international conflicts, the ICJ confirmed that common article three evolved into a customary norm[164] and many PAII provisions, as maintained by the ICTY AP in TadiĆ, ñcan now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principlesò as well.[165] Furthermore, TadiĆ pointed out that ñcustomary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.ò[166] The International Criminal Tribunal for Rwanda (ICTR) accepted this reasoning in respect of individual criminal responsibility for common article three and the

[159] *The Hague Convention No. IV Respecting the Laws and Customs of War on Land*, the Hague, 18 October 1907, art. 3.
[160] *Penal Repression: Punishing War Crimes,* ICRC, Advisory Service on International Humanitarian Law, January 2004, at pp. 1-2. Available at: http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/57JNXQ/$FILE/Penal_Repression.pdf?OpenElement, accessed on 9 October 2006.
[161] Idem., at p. 2.
[162] NAQVI, Y., ñAmnesty for War Crimes: Defining the Limits of International Recognitionò, *International Review of the Red Cross*, Vol. 85, No. 851, 2003, at pp. 596-597.
[163] Idem., at p. 597.
[164] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, International Court of Justice, Merits, 1986 I.C.J 14, 27 June 1986, at para. 218.
[165] *Prosecutor v. Duško Tadić*, ICTY Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, 2 October 1995, at para. 117.
[166] Idem., at paras 128-136.

fundamental guarantees of article four of PAII.[167] Whether customary law requires permissive or obligatory prosecution of serious violations of common article three and PAII and of breaches of the Geneva Conventions falling short of grave breaches is, however, not obvious. The authors of the ICRC Customary Law Study believe that:

> ñstates must investigate war crimes allegedly committed by their national or armed forces, or on their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.ò[168]

This would imply that, in international and non-international armed conflicts, ñstates must exercise the criminal jurisdiction which their national legislation confers upon their courts, be it limited to territorial and personal jurisdictionò[169] whereas universal jurisdiction for war crimes, obligatory for grave breaches only, may be claimed as a right.[170] Whereas ñmustò seems to imply an obligation, the insertion of ñif appropriateò could be interpreted in at least two ways. Firstly, ñif appropriateò could relate to evidentiary issues requiring sufficient evidence to initiate criminal proceedings against an alleged offender. Secondly, keeping in mind that breaches of the Geneva Conventions falling short of grave breaches might not necessitate penal measures, it could be taken to mean that a criminal prosecution is merely one of the available alternatives. ñMustò also seems to emphasize the investigation of war crimes rather than the prosecution of these acts. Therefore, while it is outside the scope of this research to examine this matter in-depth, it is unclear whether the sources where the war crimes within the jurisdiction of the ICC stem from require the permissive or obligatory prosecution of these acts. Suffice it to say, for the purposes of this research, that solely grave breaches of the Geneva Conventions attract an unequivocal obligation, conventional and customary, of criminal prosecution.

II.C.2.(c) Crimes against Humanity

[167] *The Prosecutor v. Jean-Paul Akayeshu*, ICTR Trial Chamber, Judgement, Case No. ICTR-96-4-T, 2 September 1998, at para. 615.
[168] HENCKAERTS, J-M., DOSWALD-BECK, L. (eds.), *Customary International Humanitarian Law*é at p. 607.
[169] Idem., at p. 607.
[170] Ibid., at pp. 604-607.

Article seven of the Rome Statute, finally, indicates that the ICC shall exercise its jurisdiction over acts amounting to crimes against humanity. Cassese contends that, under general international law, crimes against humanity share a set of common features:

> ñ(1) They are *particularly odious offences*é (2) They *are not isolated or sporadic events*é (3) They are prohibited and may consequently be punished *regardless of whether they are perpetrated in time of war and peace*é (4) The victims of the crime may be *civilians* or, in the case of crimes committed during armed conflict, persons who do not take part (or no longer take part) in armed hostilities, as well as, under *customary* international law (but not under the Statute of the ICTY, ICTR and the ICC), *enemy combatants*.ò[171]

Yet, these crimes have not been made the subject of a specialized convention. As crimes against humanityôs underlying offences, to a large extent, coincide with human rights law, obligations to prosecute single acts might arise from other sources. Torture, for example, laid down in article 7(1)(f) of the Rome Statute, is also a war crime, provided certain conditions have been fulfilled, and a crime under the Convention against Torture (CAT). The CAT requires States Parties, among other things, to ñensure that all acts of torture are offences under its criminal lawò and once a State Party finds an alleged torturer on its territory it shall, if it does not extradite him, ñsubmit the case to its competent authorities for the purpose of prosecution.ò[172] However, for an act to rise to the level of a crime against humanity, it needs to have been perpetrated, among other things, as part of a widespread and systematic attack.[173] A clearly enunciated conventional obligation to prosecute crimes with the distinctive features of crimes against humanity is therefore non-existent. It could, on the other hand, be argued that if underlying offences of crimes against humanity attract a conventional or customary obligation to prosecute, perpetrators of the same crimes committed as part of a systematic or widespread attack should, *a fortiori,* be brought to trial. Should Casseseôs stipulation be accepted that customary rules on obligations to prosecute may only emerge in areas where treaties provide for such an obligation, it will be hard to defend that this has occurred with regard to crimes against humanity. Nonetheless, authors like Bassiouni have written that states are under an obligation to prosecute or to extradite perpetrators of crimes

[171] CASSESE, A., *International Criminal Law*é at p. 64.
[172] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, entry into force 26 June 1987, arts. 4(1), 7(1).
[173] *Rome Statute*é, art. 7(1).

against humanity as a matter of customary law.[174] Whereas the matter remains open for debate, Cassese considers that, as for genocide, at least a ñgeneral obligation of international *co-operation*ò aimed at preventing and punishing crimes against humanity must be acknowledged.[175]

II.C.2.(d) The Rome Statute

Those convinced of the existence of a customary obligation to prosecute genocide, crimes against humanity and, within the category of war crimes, at least grave breaches, also contend that, regarding States Parties, the Rome Statute itself recognizes such an obligation.[176] According to this line of reasoning, the Rome Statuteôs preambular paragraphs affirming that ñthe 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 cooperationò and recalling that ñit is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimesò correspond thereto.[177] Although framed ambiguously, it has been suggested that the latter is sort of a ñMartens Clauseò referring not directly to the core crimes within the jurisdiction of the ICC but to a broad class of crimes which States must prosecute.[178] In addition, it is said, article 17, setting out the ICCôs pivotal complementarity mechanism, indicates that States not only possess the first right to prosecute perpetrators of the crimes within the ICCôs jurisdictional reach but also a duty to do so.[179] This article, nor the remainder of the Rome Statuteôs operative part, does not explicitly espouse an obligation to prosecute emanating from the Statute but, mindful of concerns of state sovereignty, it effectively circumscribes the instances allowing the ICC to exercise its jurisdiction. A violation of an obligation to prosecute is not unambiguously foreseen as a jurisdictional trigger and a failure of an obligation to prosecute derived from other sources than the Rome Statute can not alter the envisaged triggering mechanisms either. Yet, a logical reading of article 17, and the Rome Statute as a whole, would certainly suggest that States Parties are under an obligation to

[174] BASSIOUNI, M., *Crimes against Humanity in International Criminal Law*, Second Revised Edition, The Hague, London, Boston, Kluwer Law International, 1999, at p. 219.
[175] CASSESE, A., *International Criminal Law*é at p. 302.
[176] *Policy Paper: the Meaning…,* at p. 11.
[177] *Rome Statute*é , Preamble, paras. 4 and 6.
[178] TRIFFTERER, O., BERGSMO, M., Preamble, *in* TRIFFTERER, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos Verlagsgesellschaft, 1999, at pp. 12-13.
[179] *Policy Paper: the Meaning…,* at p. 11.

prosecute the crimes within the jurisdiction of the ICC. The nature of the ICC as a safety net, ensuring that the perpetrators of the most serious crimes of concern to the international community as a whole will not escape punishment, indicates that, one way or the other, perpetrators of these crimes must be held accountable. So as to seal off any possible escape routes, the ICC will take penal measures against alleged perpetrators should States Parties be unwilling or unable to do so or should trials not be conducted ñindependently and impartiallyé ò or with an intent to render ICC prosecution impossible.[180] An important qualifier in the admissibility requirements of ICC cases is article 17(1)(d) excluding cases not of sufficient gravity, thus seemingly limiting States Partiesô obligation to prosecute crimes surpassing this, arguably hazy, threshold. Taking into account the characteristics of genocide and crimes against humanity and the fact that the Court intends to exercise its jurisdiction in respect of war crimes ñin particular when committed as part of a plan or policy or as part of a large-scale commission of war crimes,ò[181] it will be hard to imagine that these acts, as such, will be deemed of insufficient gravity. The ICC Office of the Prosecutor (OTP) considers, however, that, in determining who to prosecute, the criterion of the gravity of the crime also entails an assessment of the degree of participation.[182] Consequently, it is concluded that ñthe global character of the ICC, its statutory provisions and logistical constraints support a preliminary recommendation that, as a general rule, *the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.*ò[183] In respect of possible impunity ensuing for other offenders it is said that ñalternative means for resolving the situation may be necessary, whether by encouraging and facilitating national prosecutions by strengthening or rebuilding national justice systems, by providing international assistance to those systems or by some other means.ò[184] Whether the degree of responsibility of the offender, apart from the objective gravity of the crime, should also be taken into account in determining the extent of States Partiesô obligation to prosecute is not certain. Yet, it seems reasonable to translate the OTPôs comments into an understanding of the Rome Statute obliging States Parties to prosecute those most responsible for the crimes whereas other means might suffice in dealing with other offenders. The OTPôs statement, namely, does not necessarily require national prosecutions when speaking of ñalternative

[180] *Rome Statute…,* arts. 17(1)(a)-(b), 20(3)(a)-(b).
[181] Idem., art 8(1).
[182] *Paper on Some Policy Issues before the Office of the Prosecutor*, ICC OTP, September 2003, at p. 7. Available at: http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf, accessed on 12 October 2006.
[183] Idem., at p. 7.
[184] Ibid., at p. 7.

means for resolving the situationò as implied by the use of ñ*whether* by encouraging and facilitating national prosecutionsé or by some other means.ò As ñsome other meansò are juxtaposed against national prosecutions, possibly contemplating non-prosecutorial accountability mechanisms, the comment seems to infer that the obligation to prosecute does not cover perpetrators outside the category of those deemed most responsible for atrocious crimes. Additionally, it is submitted by Naqvi that ñthe attempt to reach a definite conclusion as to whether there is indeed a customary duty to prosecute international crimes on the basis of the complementarity principle infers too much from what is essentially a mechanism to establish which court is competent to try a case.ò[185] Support for this argument is found in the facts that States are reluctant to assume additional obligations under customary law as a result of the ratification of a new legal instrument and, with regard to the war crimes enumerated in the Rome Statute, negotiators restricted themselves to identifying the war crimes recognized in customary law implying that they, hence, did not pronounce themselves on the customary obligation to prosecute these acts.[186]

II.C.3 Amnesties and International Law

A close corollary of an obligation to prosecute certain crimes would be a ban on the granting of amnesties. Bases for amnesties certainly do exist in international law. In terms of state practice, history hosts many examples of states doing away with the consequences of certain punishable acts. Algerian authorities, in the aftermath of a bloody internal conflict in the last decade of the previous century, adopted a limited amnesty in 1999 followed by a blanket amnesty approved in a referendum in 2005.[187] In Argentina, the prosecution of crimes committed during the ñdirty warò was thwarted by the ñdue obedienceò law.[188] Amnesties have, on several occasions, met the approval of international organizations as shown, for instance, by the SC welcoming the Angolan amnesty arrangements[189] and the General Assembly (GA) calling upon the then Federal Republic of Yugoslavia to amnesty ethnic

[185] NAQVI, Y., ñAmnesty for War Crimesé ò, at p. 599.
[186] Idem., at p. 600.
[187] *Algeria: New Amnesty Law Will Ensure Atrocities Go Unpunished*, Joint Statement by Amnesty International, Human Rights Watch, the International Center for Transitional Justice, and the International Federation for Human Rights, Paris, 1 March 2006, Available at: http://hrw.org/english/docs/2006/03/01/algeri12743.htm, accessed on 12 October 2006.
[188] *HRW, Argentina: Amnesty Laws Struck Down*, Human Rights News, 14 June 2005. Available at: http://hrw.org/english/docs/2005/06/14/argent11119.htm, accessed on 12 October 2006.
[189] Security Council Resolution 1055 (1996), UN. Doc. S/Res/1055 (1996), 8 May 1996, at para. 9.

Albanians sentenced for criminal offences motivated by political aims.[190] Secondly, in non-international armed conflicts, PAII, provided it is applicable, says that ñat the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.ò[191] The commentary to PAII notes that ñamnesty is a matter within the competence of the authoritiesò and that ñthe objecté is to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided.ò[192] Although PAII does not specify which acts shall be eligible for an amnesty, commentators have suggested an exclusion of acts constituting war crimes as the object and purpose of PAII, in line with the VCLT rules on the interpretation of treaties, is greater protection for victims of non-international armed conflicts.[193] It is also held that the ICRC reads the article narrowly as its main rationale is seen as the encouragement of immunity for the mere participation in hostilities, a ñprivilegeò only foreseen for combatants in international armed conflicts, but not for violations of international humanitarian law.[194] At the same time, the ICRC notes that amnesties are not excluded by international humanitarian law ñas long as the principle that those having committed grave breaches have to be either prosecuted or extradited is not voided of its substance.ò[195] The ICRC Customary Law Study shares the assertion that war crimes may not be the object of an amnesty.[196] Recent developments also confirm such a position and indicate, more generally, a changing attitude towards amnesties in international law as attested to by the following two examples. Following the inclusion of an amnesty provision into a peace accord concluded between the Sierra-Leonean government and a rebellious faction,[197] the UN Special Representative appended a handwritten disclaimer to the agreement stating that the UN interprets the amnesty provision as not applying to international crimes of genocide, crimes against humanity, war crimes, and other serious

[190] Resolution Adopted by the General Assembly, Situation of Human Rights in Kosovo, UN Doc. A/RES/ 53/164, 25 February 1999, at para. 14(d).
[191] PAII, art. 6(5).
[192] SANDOZ, Y., SWINARSKI, C., ZIMMERMANN, B. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Dordrecht, ICRC, Martinus Nijhoff Publishers, 1987, at p. 1402.
[193] NAQVI, Y., ñAmnesty for War Crimesé ò, at p. 604.
[194] Idem., at pp. 604-605. CASSEL, D., ñLessons from the Americas: Guidelines for International Response to Amnesties for Atrocitiesò, *Law and Contemporary Problems*, Vol. 59, No. 4, 1996, at p. 218.
[195] CASSEL, D., ñLessons from the Americasé ò, at p. 218
[196] HENCKAERTS, J-M., DOSWALD-BECK, L., *Customary International Humanitarian Law*é at pp. 612-614.
[197] *Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone*, art. ix. Available at: http://www.sierra-leone.org/lomeaccord.html, accessed on: 12 October 2006.

violations of international humanitarian law.[198] Accordingly, Article 10 of the Statute of the Special Court for Sierra Leone (SCSL) provides that an amnesty for crimes falling under the Courtôs jurisdiction ñshall not be a bar to prosecutionò and the SCSLôs AP explicitly held that the Lomé agreement amnesty could not deprive it of its jurisdiction.[199] Secondly, Cassese notes that once general rules prohibiting specific international crimes attain the status of *jus cogens*, ñthat is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even "ordinary" customary rules,ò[200] an obligation not to annul these crimes surfaces.[201] An ICTY TC, with Cassese as a member of the bench, described the consequences appended to the *jus cogens* nature of torture as a war crime at the inter-state level:

> ñé it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the jus cogens value of the prohibition against torture, treaties or customary rules providing for torture would be null and void ab initio, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. ò[202]

Therefore, in recent times, a strong presumption in favour of the illegality of amnesties in international law has appeared. However, the state of international law as it stands today does not yet support a ñgeneral obligation for States to refrain from enacting amnesty lawsò with regard to international crimes.[203]

II.C.4 Conclusion

HRW claims that a narrow interpretation of the ñinterests of justiceò in article 53 tallies best with international law requirements.[204] The obligation to prosecute crimes falling under the

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[198] *World Report 2001*, Human Rights Watch. Available at: http://www.hrw.org/wr2k1/africa/sierraleone.html, accessed on 12 October 2006.
[199] *Prosecutor against Morris Kalon, Brima Bazzy Kamara*, Special Court for Sierra Leone Appeals Chamber, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Case No. SCSL-04-15-PT-060, 13 March 2004, at para 88.
[200] *Prosecutor v. Anto Furundžija*, ICTY Trial Chamber, Judgement, Case No. IT-95-17/1, 10 December 1998, at para. 153.
[201] CASSESE, A., *International Criminal Law*é at p. 316.
[202] *Prosecutor v. Anto Furundžija*, ICTY Trial Chamber, Judgement, Case No. IT-95-17/1, 10 December 1998, at para. 155. (footnotes omitted)
[203] CASSESE, A., *International Criminal Law*é at p. 315.
[204] *Policy Paper: the Meaning…,* at p. 9.

jurisdiction of the ICC emanates, namely, from customary law, the crimesô *jus cogens* status and, for States Parties, the Rome Statute.[205] What is more, according to HRW, the trend in international law is to consider amnesties for the most serious crimes void.[206] All these reasons would militate against a construction of article 53 allowing the ICC Prosecutor to defer to national measures falling short of criminal prosecutions. Nevertheless, as the previous paragraphs attempted to point out, the law on the obligation to prosecute certain crimes is still unsettled. A general duty obliging States to prosecute international crimes has not crystallized yet which, existing independently from the Rome Statute, would not trigger or alter the jurisdiction of the ICC at any rate. Closely connected thereto, loopholes through which amnesties could pass remain although there is an incontestable drift in international law towards the outlawing of amnesties. Even in respect of the accepted or least contested customary obligations to prosecute specific crimes, difficult problems would arise for the ICC Prosecutor when applied in the context of the ñinterests of justice.ò For example, in terms of overlapping crimes, the *actus reus* of genocide may coincide considerably with crimes underlying crimes against humanity, such as ñkilling members of the groupò in comparison with ñmurderò and ñextermination.ò[207] Especially in the initial stages of an investigation, it might still not be entirely clear which legal qualification fits the crimes under investigation best. Consequently, from a practical perspective, a complex analysis as to the role of potentially differing obligations to prosecute appended to distinct crimes might not be suitable at this stage of the process. States Parties to the Rome Statute arguably are under an obligation to prosecute the crimes enumerated therein although it seems too big of a stretch to extrapolate a customary duty to prosecute from the Statute. HRW contends that this obligation is reflected in article 17 relating to the Statuteôs admissibility requirements. Yet, relying on this obligation, not a specific feature of article 17 in any case, so as to determine whether the Prosecutor may invoke the ñinterests of justiceò provision to halt an investigation or a prosecution seems to constitute a misconstruction of the Rome Statuteôs structure. As said earlier, the Prosecutor must base his assessment as to the existence of a reasonable basis to proceed with an investigation or a prosecution under the Rome Statute on several factors. Besides having to consider whether the ñinterests of justiceò do not warrant an investigation or a prosecution, the Prosecutor has to determine whether, in the case of an investigation, ñthe case is or would be admissible under article 17ò and, in the case of a prosecution, whether

[205] Idem., at pp. 9-11.
[206] Ibid., at pp. 12-14.
[207] *Rome Statute*é , arts. 6(a), 7(1)(a), 7(1)(b).

ñthe case is inadmissible under article 17.ò[208] Although the formulations differ slightly, it is apparent that the admissibility requirements of article 17 must be appraised which, according to HRW, also contains States Partiesô obligation to prosecute. A certain amount of overlap between these factors may be detected as ñthe gravity of the crimeò is mentioned as an admissibility requirement in article 17 but it also has to be considered within the ñinterests of justiceò clauses. However, the obligation to prosecute, unlike the ñgravity of the crime,ò is not explicitly mentioned within the factor of the ñinterests of justiceò and a second determination of this aspect, or at least a *renvoi* thereto, seems therefore illogical. Admissibility requirements, including States Partiesô obligation to prosecute according to HRW, and the issue whether the ñinterests of justiceò would oppose an investigation or prosecution are thus separate determinations within the Prosecutorôs assessment as to the basis to proceed, leaving no room for a re-evaluation of article 17 within the latter aspect despite a certain overlap. Therefore, it is submitted here that the Prosecutorôs decision whether to decline to investigate or to prosecute based on the ñinterests of justiceò should not be weighed against a general or a specific obligation to prosecute ICC crimes and the legality of amnesty bargains. This conclusion, rather than an indication of a narrow interpretation of the ñinterests of justiceò clause as inferred from the duty to prosecute and the legality of amnesties, seems sustained by the rudimentary nature of the developments described *supra* and the Rome Statuteôs edifice. Yet, fully-fledged international rules relating to the obligation to prosecute certain crimes and the legality of amnesties would seem to possess the potential to become a relevant factor within ñinterests of justiceò assessments. If, or when, this occurs the issue whether a treaty rule is be interpreted in the light of the rules of international law in force at the time of the conclusion of the treaty or whether a development of international law should also be taken into account will have to be resolved first.[209]

II.D Prosecutorial Discretion and the ñInterests of Justiceò

II.D.1 Introduction

Blackôs Law Dictionary holds that: ñwhen applied to public functionaries, discretion means a power or right conferred upon them by law of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment

[208] *Rome Statute*é , arts. 53(1)(b), 53(2)(b).
[209] SINCLAIR, I., *The Vienna Convention*é at p. 139.

or conscience of others.ò[210] The concept serves, among other things, to secure the Prosecutorôs independence by removing extraneous factors in the prosecutorial decision-making process.[211] As the procedural law of the ICC may be expected to be an ñamalgamò of major national systems,[212] a concise description of prosecutorial discretion on the national level might prove useful. At least theoretically, most statesô legal systems are rooted either in Common Law or Civil Law which, respectively, employ an adversarial and non-adversarial structuring of criminal proceedings. Since most national systems contain influences from both notions, this dichotomy, instead of rigidly dividing legal systems, rather serves descriptive purposes. One of the discernable discrepancies is, as a result of the notionsô diverging philosophical underpinnings, the role of prosecutorial discretion. Common Law systemsô decentralised decision-making process bestows a substantial degree of discretion on prosecutors whereas civil law prosecutorsô discretion may be more constrained due to a strong centralization of authority.[213] Ma contrasts, for example, the virtually uncontrolled discretion of US prosecutors in matters pertaining to the decision whether to prosecute or not to the legal duty to prosecute incumbent on certain European prosecutors.[214] Yet, the specificity of international criminal proceedings, dealing with particularly dreadful crimes in a politically charged judicial arena, must not be ignored. Logically, the discharge of discretionary powers wielded by the international Prosecutor might therefore become a sensitive matter. With regard to article 53, Bourdon notes that:

> ñLe procureur doit respecter certaines conditions dont lôinterprétation, dans certains cas, lui conférera une véritable responsabilité politique. En effet, déterminer si une enquête sert ou non les intérêts de la justice, compte tenu des intérêts des victimes et/ou de la gravité des crimes, pourra le conduire à faire un choix entre la nécessité dôouvrir une enquête et celle de ne pas compromettre des négociations sur le point dôaboutir à la signature dôun accord de paix. En dôautres termes, il devra arbitrer entre lôimpératif de justice et lôimpératif de paix.ò[215]

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[210] BLACK, H., *Black's Law Dictionary*é , at p. 466.
[211] BRUBACHER, M., ñProsecutorial Discretion within the International Criminal Courtò, *Journal of International Criminal Justice*, Vol. 2, 2004, at pp. 75-77.
[212] ORIE, A., ñAccusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings before the ICCò, *in* CASSESE, A., GAETA, P., JONES, J., (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, Vol. II, New York, Oxford University Press, 2002, at p. 1442.
[213] DAMAĠKA, M., ñStructures of Authority and Comparative Criminal Procedureò, *Yale Law Journal*, Vol. 84, 1974-1975, at p. 483-523.
[214] MA, Y., ñProsecutorial Discretion and Plea-Bargaining in the United States, France, Germany and Italy: a Comparative Perspectiveò, *International Criminal Justice Review*, Vol. 12, 2002, at p. 24.
[215] BOURDON, W., *La Cour Pénale Internationale, Le Statut de Rome*, Paris, Éditions du Seuil, 2000, at p. 166.

As has been indicated already, transitional justice mechanisms are applied in a context of ñtransitionò which is usually interpreted as a shift from authoritarian rule to a more legitimate political arrangement or from violence to peace. Are political considerations of this kind, as suggested by Bourdon among others, to be taken into account by the Prosecutor in deciding whether to defer to truth commissions combined with amnesties? Should the Prosecutor disregard these mechanisms and insist on criminal prosecutions, the State in question might see the overthrow of a newly-installed government or a renewed outbreak of hostilities. The following paragraph will, therefore, seek to answer this question from the perspective of the Rome Statuteôs approach to prosecutorial discretion, of which the ñinterests of justiceò clauses of article 53 form part. Before turning to the Rome Statuteôs position, elements of the ICTY Prosecutorôs discretion will be discussed first so as to illustrate the development of international prosecutorial discretion.

II.D.2 The International Prosecutor's Discretion

II.D.2.(a) The ICTY Prosecutor

The ICTY has, in general, moved from a strong adversarial paradigm towards a mixed system permeated by aspects from Common Law as well as Civil Law.[216] The Tribunalôs Statute guarantees the Prosecutor a broad, though not unlimited, discretion in the discharge of her duties. It namely entrusts the Prosecutor, ñex-officio or on the basis of information obtained from any sourceé ,ò with the exclusive authority to initiate investigations as soon as she has decided there is a sufficient basis to proceed upon an assessment of the information received or obtained.[217] Once satisfied that a *prima facie* case exists, the Prosecutor shall prepare an indictment which a Trial Chamber Judge must confirm before trial proceedings may be commenced.[218] Another statutory restraint on prosecutorial discretion may be found in the requirement to ñact independently as a separate organ of the International Tribunalò and, therefore, not to ñseek or receive instructions from any Government or from any other source.ò[219] Therefore, apart from a review of the *prima facie* threshold, the ICTY Statute leaves the Prosecutorôs discretion virtually unchecked as preceding decisions as to the

[216] MUNDIS, D., ñFrom Common Law towards Civil Law: The Evolution of the ICTY Rules of Procedure and Evidenceò, *Leiden Journal of International Law*, Volume 14, 2001, at p. 368.
[217] Statute of the International Criminal Tribunal for the former Yugoslavia, 25 May 1993, art. 18(1).
[218] Idem., arts. 18(4), 19(1).
[219] Ibid., art. 16(2).

initiation of investigations, the persons being investigated and the conduct of investigations are not subject to judicial scrutiny. In the words of Judge Wald: ñnowhere in the Statute is any Chamber of the ICTY given authority to dismiss an indictment or any count therein because it disagrees with the wisdom of the Prosecutorôs decision to bring a case.ò[220] The jurisprudence, however, indicates that the nature of the Prosecutor as an official vested with specific duties imposed by the Statute of the Tribunal circumscribe her discretion in a more general way, requiring the discharge of her functions with full respect of the law and, as stressed in the Secretary-Generalôs Report, recognised principles of human rights.[221] In this regard, the evolution of the Prosecutorôs role, compared to historic international criminal tribunals, is of relevance too. According to May, a former judge at the ICTY, the ICTY Prosecutor is no longer limited to presenting the facts in a manner most favourable to her standpoints but a commitment towards the establishment of the truth and the interests of justice has arisen too.[222] The jurisprudence indicates that ñthe Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting.ò[223]

II.D.2.(b) The ICC Prosecutor

The Rome Statute, envisaging similarly to the ICTY an adversarial model infused with certain non-adversarial elements,[224] departs significantly from the ICTYôs approach to prosecutorial discretion. States in favour of broad prosecutorial discretion and those wary of an overzealous, politically inspired Prosecutor encroaching upon their sovereignty eventually comprised on additional checks on the Prosecutorôs discretion. Regarding the Prosecutorôs *proprio motu* powers, one of the major stumbling blocks during the negotiations, the Rome

[220] *Prosecutor v. Goran Jelisić*, ICTY Appeals Chamber, Judgement, Partial Dissenting Opinion of Judge Wald, Case No. IT-95-10, 5 July 2001, at para 4.
[221] *Prosecutor v. Zejnil Delalić, Zdravko Mučić (aka "PAVO"), Hazim Delić and Esad Landžo (aka "ZENGA") ("Čelibići Case")*, ICTY Appeals Chamber, Judgement, Case No. IT-96-21-A, 20 February 2001, at para. 604.
[222] MAY, R., WIERDA, M., *International Criminal Evidence*, Ardsley, NY, Transnational Publishers, 2002, at pp. 33-34.
[223] *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić, Vladimir Santić, also known as "Vlado",* ICTY, Trial Chamber, Decision on Communication between the Parties and their Witnesses, IT-95-16, 21 September 1998.
[224] CASSESE, A., *International Criminal Law*é , at p. 385.

Statute provides a complicated construction. Article 15 of the Rome Statute sets this power out in more detail and reads in the relevant part:

> ñ1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.
> 2. The Prosecutor shall analyse the seriousness of the information receivedé
> 3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigationé
> 4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigationé ò[225]
> é

A few additional comments may be necessary in order to elucidate the articleôs structure. After laying down the Prosecutorôs unconditional discretionary power in the first paragraph to initiate investigations, the second paragraph of article 15 contains an obligation as to the analysis of the seriousness of the information a *proprio motu* investigation is based on. Bergsmo and PejiĹ indicate that an evidentiary analysis pertaining to the informationôs seriousness is required, which may concern the nature of the alleged crimes and the informationôs incriminatory strength, as opposed to a test of appropriateness.[226] Although article 15(1) speaks of the initiation of investigations, article 15(6) refers to the steps to be taken in the first and second paragraph as a ñpreliminary investigation.ò This description seems more accurate since a full-blown investigation requires judicial approval pursuant to the third and fourth paragraph of article 15. As soon as the Prosecutor is convinced of the existence of a reasonable basis to proceed, on the basis of the criteria enumerated in article 53(1)(a) to (c),[227] article 15(3) imposes the obligation on the Prosecutor to submit a request for an investigation to the Pre-Trial Chamber. The Pre-Trial Chamber will review, together with a jurisdictional assessment, whether the information in the possession of the Prosecutor warrants the conclusion that there is a reasonable basis to proceed upon which it may authorize the Prosecutor to start a full investigation in conformity with articles 53 and 54. Article 53, applicable to all three jurisdictional triggers,[228] contains further judicial restraints

[225] *Rome Statute…*, art. 15(1)-(4).
[226] BERGSMO, M., PEJIĹ, J., Article 15, *in* TRIFFTERER, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos Verlagsgesellschaft, 1999, at p. 365.
[227] *Rules of Procedure and Evidence*, ICC-ASP/1/3, 3-10 September 2002, rule 48.
[228] BERGSMO, M., KRUGER, P., Article 53, *in* TRIFFTERER, O. (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, Nomos Verlagsgesellschaft, 1999, at p. 702.

in respect of prosecutorial discretion. Should the Prosecutor base his decision not to proceed with an investigation or prosecution solely on the ñinterests of justiceò clause, a requirement arises to ñinform the Pre-Trial Chamberò or to ñinform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion.ò[229] In any event, the Pre-Trial Chamber may review ñinterests of justiceò decisions on its own initiative and, should it decide to do so, the entry into force of the decision will be contingent upon the Chamberôs confirmation.[230] In addition, when requested by a State making a referral under article 14 or by the SC under article 13(b), the Pre-Trial Chamber may review decisions to forsake an investigation or a prosecution on any of the grounds enumerated in articles 15(1) and 15(2) and request the Prosecutor to reconsider.[231] With regard to the confirmation of charges, in contrast to the ICTY, the Rome Statute foresees the holding of a hearing, in the presence of the person charged, his or her counsel and the Prosecutor, to confirm the charges on which the Prosecutor intends to seek trial.[232] In certain circumstances, upon request of the Prosecutor or on motion of the Pre-Trial Chamber, the hearing may also be held in the absence of the person charged.[233] On the basis of this hearing, the Pre-Trial Chamber determines whether ñthere is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.ò[234] Besides Pre-Trial Chamber control, the Rome Statute also puts forward several additional constraints on the Prosecutor. For instance, article 18, pertaining to preliminary rulings regarding admissibility, is one of the manifestations of the Rome Statuteôs complementary character and requires the Prosecutor to notify all States Parties and those which normally would exercise jurisdiction over the crimes concerned when an investigation pursuant to State referral or *proprio motu* powers is commenced.[235] Unless the Pre-Trial Chamber authorizes an investigation on application of the Prosecutor, a national investigation will take precedence once a State has informed the Court it is investigating or that it has investigated the acts in question.[236] Also, as stated earlier, article 16 allows the SC, in case of intrusion into its domain, to halt the commencement or continuation of an investigation or prosecution under the Rome Statute. In addition, the expansion of the international

[229] *Rome Statute*é , arts. 15(1)(c), 15(2)(c).
[230] Idem., art. 15(3)(b).
[231] Ibid., art. 15(3)(a).
[232] Ibid., art. 61(1).
[233] Ibid., art. 61(2).
[234] Ibid., art. 61(7).
[235] Ibid., art. 18(1).
[236] Ibid., art. 18(2).

Prosecutorôs role has continued with the adoption of the Rome Statute. Where the ICTY Prosecutor was merely obliged to disclose exculpatory evidence, all facts and evidence must be covered by an ICC investigation and incriminating and exonerating circumstances must be investigated equally in order to establish the truth.[237] The Prosecutor thus assumes ña role more akin to that of an investigating judge in the civil law system.ò[238] The final example of an additional constraint to be mentioned here is the position of victims. Whereas the architects of the *ad hoc* Tribunals withheld victims the right to partake individually in proceedings and to obtain compensation,[239] the Rome Statute considerably expands their role in the judicial process of the ICC.[240] With regard to prosecutorial discretion, both ñinterests of justiceò clauses in article 53 specifically oblige the Prosecutor to take account of the interests of victims in deciding whether there is a reasonable basis to proceed with an investigation or a prosecution. Furthermore, the Prosecutor is under a duty to respect the interests and personal circumstances of victims when taking appropriate measures for his investigations and prosecutions.[241]

II.D.2.(c) Prosecutorial Discretion's Side Effects

Yet, prosecutorial discretion cuts both ways. Besides securing the Prosecutorôs independence, prosecutorial autonomy as to issues of investigation and prosecution may give rise to misgivings of various kinds. Two examples with regard to the ICTY may be helpful. Virtually all sides involved in the Yugoslav disintegration have accused the Prosecutor of, among other things, employing a politically motivated prosecutorial policy. Côté holds that the criteria on which discretionary decisions are based are ñnumerous, ill-sorted and sometimes hazyò and that, despite Prosecutorsô repudiation of the existence of a political dimension to the exercise of discretionary powers, it is hard to imagine that such considerations are always discarded in matters closely linked to vast political interests.[242] In addition, the same author rightly maintains that the exercise of discretionary power is inherently political and that the truly disturbing aspect is the secretive nature of discretionary decision-making casting doubt on the

[237] Ibid., art. 54(1)(a).
[238] MAY, R., WIERDA, M., *International Criminal Evidence*é , at p. 34.
[239] JORDA, C., DE HEMPTINNE, J., ñThe Status and Role of the Victimò, *in* CASSESE, A., GAETA, P., JONES, J., (eds.), *The Rome Statute of the International Criminal Court: a Commentary*, Vol. II, New York, Oxford University Press, 2002, at p. 1389.
[240] *Rome Statute*é , arts. 15(3), 19(3), 68(3).
[241] Idem., art. 54(1)(b).
[242] CÔTÉ, L., ñReflections on the Exercise of Prosecutorial Discretion in International Criminal Lawò, *Journal of International Criminal Justice*, Vol. 3, 2005, at pp. 169-171.

decisionsô legitimacy and impartiality.[243] Therefore, the ICTY Prosecutorôs decision to establish a committee to assess the allegations that NATO committed serious violations of international humanitarian law and to advise the ICTY whether there is a sufficient basis to proceed with an investigation into some or all the allegations[244] was initially hailed as an attempt to elucidate the process of discretionary decision-making. Interestingly, as explained above, the ICTY Prosecutor was not under an obligation to reveal the criteria guiding her decisions to investigate and, as has been pointed out, the report seems to resemble a preliminary examination as required for *proprio motu* investigations of the ICC Prosecutor.[245] Although a thorough discussion would be outside the scope of this research, the reportôs conclusion of not recommending the commencement of an investigation into the bombing campaign has met with considerable criticism. Côté writes that the reasoning behind this conclusion raises doubts as to double standards in respect of the FRY and NATO and that, consequently, the reaffirmation of the Prosecutorôs independence and impartiality, insofar this was the Prosecutorôs principal aim, has not been achieved.[246] Additionally, and closely connected to the previous issue, the ICTY Prosecutor has had to face allegations of ethnic bias. One of the accused in the aforementioned Ţelebiĺi case maintained that he had been the victim of selective prosecution as, in order to appear more even-handed, the Prosecutor allegedly singled him out as a young Bosnian Muslim camp guard to represent the group he belongs to while indictments ñagainst all other defendants without military rankò who were ñnon-Muslims of Serbian ethnicityò were withdrawn.[247] The AP, as indicated *supra*, described the limitation to prosecutorial discretion posed by the recognised principles of human rights and said, with regard to ICTY Statuteôs right to equality before the law, that it ñprohibits discrimination in the application of the law based on impermissible motives such as, *inter alia*, race, colour, religion, opinion, national or ethnic origin.ò[248] The AP went on to say that a presumption exists that the prosecutorial functions under the Statute are exercised regularly although evidence establishing that the discretion has in fact not been exercised in accordance with the ICTY Statute may rebut this presumption.[249] With regard to the right to equality

[243] Idem., at p. 171.
[244] *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia,* 13 June 2000, at para 3. Available at: http://www.un.org/icty/pressreal/nato061300.htm, accessed on 19 October 2006.
[245] CÔTÉ, L., ñReflections on theé ò, at p. 180.
[246] Idem., at p. 183.
[247] *Prosecutor v. Zejnil Delalić, Zdravko Mučić (aka "PAVO"), Hazim Delić and Esad Landžo (aka "ZENGA") ("Čelibići Case")*, ICTY Appeals Chamber, Judgement, Case No. IT-96-21-A, 20 February 2001, at para. 596.
[248] Idem., at para. 605.
[249] Ibid., at para. 611.

before the law, a two-pronged test must be satisfied: firstly, evidence must be brought ñfrom which a clear inference can be drawn that the Prosecutor was motivated in that case by a factor inconsistent with that principleò and, secondly, ñbecause the principle is one of *equality* of persons before the law, it involves a comparison with the legal treatment of other persons who must be similarly situated for such a comparison to be a meaningful one.ò[250]

II.D.3 Conclusion

As the previous sections attempted to illustrate, the ICTY Prosecutorôs discretion is judicially curbed only after an investigation by a judicial assessment as to the existence of a *prima facie* case whereas the ICC Prosecutorôs discretion is subject to more extensive judicial control in different stages of the investigation and the prosecution as well as to additional constraints. The rationale behind these safeguards is, among other things, to allay Statesô fears of, as is described often, ñfrivolous and politically motivatedò prosecutions. Respect for state sovereignty featured prominently in the negotiations preceding the adoption of the Rome Statute and States thus agreed on a carefully crafted system of checks and balances curbing the Prosecutorôs discretion. Nevertheless, based on a broad reading of the ñinterests of justiceò clauses of article 53 of the Rome Statute, Brubacher believes that:

> ñThe manner in which Mr Moreno-Ocampo exercises his discretion will be a pivotal factor in the success of the ICC. This success hinges on the ability of the Prosecutor to adopt a policy where his discretion to initiate investigations is determined not only on the criteria contained within the ICC Statute, but also on those factors necessary for the exercise of his prosecutorial functions. This latter set of considerations necessitate that the Prosecutor take into account the political factors pertaining to the maintenance of international peace and securityé ò[251]

Correctly, HRW indicates that such an interpretation would open the door for political pressure on the OTP which would adversely affect its activities.[252] For example, high-ranking officials might undermine the Prosecutorôs attempts to indict them as, due to the influence at their disposal, they might suggest or threat that such a course of action will have ramifications on the prospects for peace.[253] In addition, it is submitted here that the Rome Statute is inauspicious towards a prosecutorial appraisal of political factors. Certainly, the interplay

[250] Ibid., at para 611.
[251] BRUBACHER, M., ñProsecutorial Discretion withiné ò, at p. 94.
[252] *Policy Paper: the Meaning…,* at p. 14.
[253] Ibid., at p. 14.

between international politics and international criminal justice is not overlooked by the Rome Statute as, in the words of Zappalà, ñit appeared necessary to preserve the integrity of the proceedings without turning a blind eye to their political dimension.ò[254] This has been achieved by allowing the SC to request that investigations or prosecutions not be commenced or proceeded with in the interests of international peace and security and by ñentrusting the Pre-Trial Chamber with the duty to safeguard the interests of a correct administration of justice.ò[255] Thus, the latter aspect, as attested to by various provisions in the Rome Statute, seems to exclude, or at least to limit significantly, the Prosecutorôs possibilities to resort to political considerations within his discretionary powers. The Rome Statute namely goes to great lengths to reduce the obscure nature of discretionary decision-making by imposing obligations on the Prosecutor to provide reasons for decisions not to proceed with investigations or prosecutions. Firstly, should the Prosecutor decide not to initiate a *proprio motu* investigation once a preliminary investigation has been conducted in accordance with paragraphs one and two of article 15, a duty arises to inform those who provided the information.[256] For instance, the Prosecutorôs decisions on communications regarding Venezuela and Iraq were made public and, in both cases, the Prosecutor indicated that the first threshold had not been met, i.e. a reasonable basis to believe that a crime within the jurisdiction of the Court had been committed was absent.[257] Secondly, as explained above, the Pre-Trial Chamber has to be informed of the Prosecutorôs decisions not to proceed with an investigation based solely on a the ñinterests of justiceò and, in addition, the Prosecutor is obliged to notify the Pre-Trial Chamber, the SC and the referring State, depending on who referred the situation, of a determination, on any ground, that there is no reasonable basis for a prosecution. Furthermore, the extent of the Pre-Trial Chamberôs powers to review ñinterests of justiceò decisions on its own initiative are even greater than at first glance. Although article 53(3)(b) apparently lays down a discretionary power, the final sentence makes the validity of these decisions contingent upon Pre-Trial Chamber approval. Whereas it may be questioned whether the approval is required only if the Pre-Trial Chamber decides to exercise its right to review ñinterests of justiceò decisions on its own initiative, Bergsmo and Kruger write that:

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[254] ZAPPALÀ, S., *Human Rights in International Criminal Proceedings*, Oxford, Oxford University Press, 2003, at pp. 43-44.
[255] Idem., at p. 44.
[256] *Rome Statute*é , art 15(6).
[257] *Venezuela Response*, Letter of the Office of the Prosecutor, 9 February 2006. Available at: http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf, accessed on 21 October 2006. *Iraq Response,* Letter of the Office of the Prosecutor, 9 February 2006. Available at: http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf, accessed on 21 October 2006.

> ñIf the Prosecutorôs decision has no validity unless confirmed by the Pre-Trial Chamber, the Chamber is *necessarily* bound to review all such decisions of the Prosecutor. A different interpretation would result in the potential paralysis of the Court were the Pre-Trial Chamber to refrain from reviewing such a decision.ò[258]

Therefore, by obliging the Prosecutor to provide reasons for decisions based on discretionary powers and by allowing the Pre-Trial Chamber to review decisions based on delicate criteria on its own initiative, the Rome Statute seeks to avoid arbitrary decisions veiled by prosecutorial discretion. Logically, if the Prosecutor, in the exercise of his discretionary powers, was to take political factors into account in determining the ñinterests of justice,ò his decision would have to be corroborated by a reasoning and communicated to those providing the information, the Pre-Trial Chamber, the SC or a State referring the situation. This situation might give rise to auxiliary negative effects. The Pre-Trial Chamber would, for instance, become mired in political judgment having to express itself on the Prosecutorôs assessment of certain political circumstances on the basis of article 53(3)(b) of the Rome Statute. The appearance of the Court as an independent and impartial institution would be gravely impaired the moment it explicitly affixes a political dimension to the discharge of its judicial functions. In addition, States referring situations to the Prosecutor and those providing information, especially victimsô organizations and NGOôs, might become disinclined to continue their co-operation with the Prosecutor were political parameters to be applied by the OTP. Cumulatively, these and other consequences of an explicit political role of the Prosecutor might impact the Court as a whole and entail its marginalization on the international scene. Other considerations also militate against interpreting prosecutorial discretion as leaving room for political contemplations. The SC entrusted the Prosecutors of the *ad hoc* tribunals with the task of safeguarding the interests of the international community, including those of the victims of the conflicts, throughout the proceedings. However, after pointing out that the interests of the Prosecutor and the victims may diverge,[259] Jorda and de Hemptinne ask:

> ñWould it not have constituted an additional guarantee of fairness, justice, and legal certainty to have granted the victim or his representatives a right to scrutinize the exercise of the Prosecutorôs discretionary power, or even an actual right of appealé ? Such measures would guarantee fairness and

[258] BERGSMO, M., KRUGER, P., ñArticle 53é ò, at p. 713 (emphasis added).
[259] JORDA, C., DE HEMPTINNE, J., ñThe Status and Roleé ò, at p. 1392.

> justice. First of all, because persons whose most fundamental rights have been flouted would thus have not only the certainty of being heard but also the formal assurance that, if it were decided to take no action on their case, the reasons for such decision would be based on overriding public-interests considerations and not on purely political grounds.ò[260]

The situation at the ICC is different. As mentioned previously, the ICC Prosecutor is obliged to weigh his decision not to investigate or to prosecute against the interests of victims who, in addition, who may make presentations to the Pre-Trial Chamber when the Prosecutor submits a request for an investigation and, if they provided information, the Prosecutor must inform them of decisions not to pursue *proprio motu* investigations. While it is recognized that a political assessment may not necessarily be to the detriment of victims, the thrust of the victimsô role seems to be to reduce the risk of murky political interference with discretionary decision-making. Nevertheless, the line between Jorda and de Hemptinneôs ñoverriding public-interests considerationsò and ñpurely political groundsò in matters on the juncture between politics and law is thin and, above all, a matter of perception. Therefore, it appears that the expansion of the role of victims may plausibly be interpreted as another attempt of the Rome Statute to reduce the political dimension of discretional decision-making as far as possible. What is more, article 54(1)(c) explicitly binds the Prosecutor to respect the rights of persons arising under the Rome Statute. As recognized by the ICTY in Ļelebiĺi, the improper exercise of prosecutorial discretion could impair an accusedôs right to equality before the law, recognized in the Rome Statute in the requirement that ñthe application and interpretation of lawé must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.ò[261] The factoring in of political circumstances could bring about dissimilar treatment of perpetrators of similar crimes based on some of the aforementioned criteria, violating the requirement of equality before the law. However, the standard applied by the ICTY, were the ICC judges to follow it, seems exacting and not easy to prove. Also, Côté notes that, in selecting potential indictees, taking account of their belonging or affiliation to a certain group may seem legitimate in light of international tribunalsô mandate to contribute to national reconciliation and the maintenance and restoration of peace but, considered alone, these criteria may violate the right to equality.[262] If accepted,

[260] Idem., at pp. 1394-1395.
[261] *Rome Statute…*, 21(3).
[262] CÔTÉ, L., ñReflections on theé ò, at p. 176.

this element would additionally complicate proving an infringement of the right to equality. Finally, the development of the role of the international Prosecutor has led Zappalà to describe the ICC Prosecutor as an ñorgan of justiceò rather than a mere party to the proceedings.[263] Consequently, an overt political judgment of the Prosecutor within the ñinterests of justiceò clauses does not seem to square with this characterization. The perception of a Prosecutor sensitive to political circumstances, and perhaps political pressure, would namely irreparably harm the Prosecutorôs status as an independent party to international criminal proceedings. On the other hand, due to the inescapable political reverberation of international criminal proceedings, it is neither suggested that the Prosecutor will escape political pressure nor that political assessments by the Prosecutor are unavoidable. Despite the Rome Statuteôs safeguards, those hostile to the Court will relentlessly seek to politicise the Prosecutorôs acts. Moreover, as the Prosecutor ultimately retains the discretionary power to decide whether to initiate a *proprio motu* investigation despite the obligation to inform providers of information, political factors can not be discarded completely. In any event, even a decision not to take account of political factors would, somehow contradictorily, have a certain political dimension to it. However, as the preceding paragraphs endeavoured to demonstrate, allowing blatant political judgments through the backdoor of ñinterests of justiceò assessments would be uncongenial to the Rome Statuteôs strenuous attempts to curb prosecutorial discretion. Extensive obligations to motivate decisions taken pursuant to discretionary powers would produce additional negative effects impacting the Court as a whole.

III Conclusion

The preceding analysis commenced by introducing transitional justice. Although the concept essentially seeks to address past transgressions in times of radical political transformation, differing interpretations of transitional justice rely on different methodologies. Whereas broad transitional justice proffers a wide array of mechanisms which may be applied independently, concurrently or subsequently, narrow transitional justice, on the other hand, draws exclusively on truth commissions and other truth-seeking efforts. However, both the broad as well as the narrow reading of transitional justice are susceptible to a potential clash between truth commissions and criminal repression. While not mutually exclusive *per se*, the probability of

[263] ZAPPALÀ, S., *Human Rights in*é , at p. 42.

a conflict between these mechanisms increases considerably when a truth commission is combined with amnesties. In 2002, those elements of the international community dedicated to the criminal repression of certain heinous crimes witnessed decades-old efforts culminate in the entry into force of the Rome Statute setting up the first permanent international criminal court. As a result of this development, a possible confrontation between truth commissions and criminal justice takes on an additional dimension. This prospect begs the question whether the ICC should take account of truth commissions combined with amnesties as a mechanism of transitional justice or whether it should insist exclusively on penal measures bearing in mind its primary objective of punishing those most responsible for the most serious crimes of concern to the international community as a whole? This research believes it should. Amnesties may come in different shapes and sizes and need not amount to impunity. As the preceding quote indicates, amnesties granted by truth commissions in a context of transitional justice should be distinguished from self-serving measures enacted by outgoing regimes or their henchmen. Unlike the former, the latter would, *inter alia*, hardly constitute a restorative approach to crime nor a contribution to the fostering of national reconciliation. It would, furthermore, be hard to reconcile blanket amnesties with the recent drive in international law towards a presumption of illegality of amnesties and, in general, the eradication of impunity. Nevertheless, as recently as 2004, the Sierra Leonean Truth and Reconciliation Commission defended the Lomé agreementôs blanket amnesty and held that ñthere will be circumstances where a trade of peace for amnesty represents the least bad of the available alternatives.ò[264] In addition, unlike their self-serving, blanket counterparts, amnesties imposed by truth commissions as a mechanism of transitional justice are, or should, be motivated by wider societal concerns. The practical impossibility of holding criminal trials or the likeliness of an eruption of violence have already been mentioned on a few occasions in this research. Amnesties motivated by self-interest, alike the one passed by the outgoing Chilean regime, are the antithesis of these considerations. Cassese, discussing the legal entitlement of foreign States to prosecute perpetrators of international crimes who would benefit from an amnesty law in their national State, shares this view:

> ñé one may find much merit in the distinction suggested, at least for minor defendants, by a distinguished judge and commentator, between amnesties granted as a result of a process of national reconciliation, and blanket amnesties. The legal entitlement of foreign States not to take account of an

[264] *Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission*, Vol. II, 5 October 2004, at para. 586. Available at: http://www.trcsierraleone.org/pdf/FINAL%20VOLUME%20TWO/VOLUME%202.pdf, accessed on 28 October 2006.

> amnesty passed by the national State of the alleged perpetrator should apply to the second category. Instead, if the amnesty results from a specific individual decision of a court or a Truth and Reconciliation Commission, the exigencies of justice could be held to be fulfilled, and foreign courts should refrain from adjudicating those crimes.ò[265]

Yet, the spectrum of amnesties is not limited to the extremes described above. For instance, a blanket amnesty, as could be argued for the Ugandan amnesty described in this researchôs introduction, may aim at ending a deadly conflict and reintegrating perpetrators into society whereas a politicised truth commission may be set up to exonerate a guilty regime. Many other variants may also be thought of. Additionally, the scope of an amnesty imposed by a truth commission or by a Stateôs legislature once a commission concludes its work, in respect of the perpetrators or crimes to be covered, may also be debated. Yet, this research has not sought to answer these questions as it would have been outside its scope. It rather preceded from the premise that a clash between amnesties fulfilling the exigencies of justice, as said by Cassese, and the ICC, even with its complementary focus on a certain class of perpetrators allegedly guilty of certain crimes, is likely to occur or that, at least, the possibility hereof may not be discounted. For the preceding reasons, this research embarked upon a discussion of one of the possible entry points into the Rome Statute for amnesties of this nature. Although strongly convinced of the desirability of taking account of these measures, this research nevertheless concludes that applying article 53 in this regard, and more specifically its ñinterests of justiceò clauses, is not a proper solution. Whereas an interpretation of these clauses in accordance with the provisions of the VCLT and a consideration of rules of international law relevant to this matter did not lead to a definite answer, a discussion of the ICC Prosecutorôs discretion prompted the preceding conclusion. An appraisal of amnesties granted by truth commissions in a context of transitional justice would necessarily require an appraisal of political factors. However, as described *supra*, such an approach would not square with the Rome Statuteôs attempts to reduce the likeliness of politically motivated prosecutions by imposing obligations on the Prosecutor to motivate decisions taken pursuant to discretionary powers. The auxiliary effects of these measures might induce a wholesale politicisation of the Court and militate, therefore, strongly against such an approach. Although it could be argued that a decision that an investigation or a prosecution would not be in the ñinterests of justiceò after an appraisal of the political circumstances in a context of transitional justice could benefit a war-torn country and need not necessarily involve shady

[265] CASSESE, A., *International Criminal Law*é , at pp. 315-316. (footnote omitted)

political deals, the line seems thin and the risk of politicisation enormous. This is not to say that all the Rome Statuteôs possibilities to accommodate truth commissions empowered to grant amnesties have been exhausted. At first sight, article 16, stipulating that ñNo investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effectéò, and article 17, declaring a case inadmissible, unless resulting from unwillingness or inability, when ñThe case is being investigated or prosecuted by a State which has jurisdiction over itéò or when ñThe case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concernedéò, seem more promising. Yet, a closer examination of these articles would be a task which this research can not undertake. Be that as it may, the words of the Secretary-General of the UN Koffi Annan seem appropriate to end this research with:

> ñThe purpose of the clause in the statute [which allows the court to intervene where the state is ñunwilling or unableò to exercise jurisdiction] is to ensure that mass-murderers and other arch-criminals can not 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 Africaôs, 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 judgement for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future.*ò[266]

[266] *Speech at the Witwatersrand University Graduation Ceremony*, Annan K., 1 September 1998. Quoted in: VILLA-VICENCIO C., ñWhy Perpetrators shouldéò, at p. 222. (footnote omitted) (emphasis added)

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