The historic immunities from legal process afforded to diplomats, other state officials and heads of state have eroded in the last few decades. What used to provide absolute protection to official actors under both domestic and international law now appears to provide little if any protection for violations of international criminal law. The Rome Statute of the International Criminal Court (ICC), the transnational prosecutions of Augusto Pinochet and Hissène Habré, the prosecution of Charles Taylor and recent decisions of the International Court of Justice all reflect the demise of official state immunity for certain international crimes.

In addition to limiting the applicability of traditional immunities to state officials responsible for international crimes, international law is also eroding another mechanism traditionally used to protect international criminals: amnesties.

The Rome Statute establishing the ICC has clear provisions with respect to immunities, some of which go further than any other international court in making clear that traditional immunities do not apply to those officials suspected of committing acts prohibited by the statute. As will be discussed below, these provisions are somewhat complicated by others that appear to recognise, and even defer to, those same immunities. By contrast, the Rome Statute is decidedly and deliberately silent with respect to amnesties, leaving open the question of whether, and in what circumstances, the Court will defer to an amnesty.

**IMMUNITIES**

<table>
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<th>The idea of immunity</th>
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<td>The ability for states to conduct international relations freely depends on the notion of sovereign equality. A necessary corollary of this is the principle that one state should not infringe upon the jurisdiction of other states. Also, since states are considered to be equal sovereigns, the national</td>
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Under international law there are two general types of immunity enjoyed by state officials: functional and personal. Functional immunity is also referred to as immunity *ratione materiae*, or subject-matter immunity. Functional immunity protects an individual from liability for conduct performed on behalf of the state. It is limited to those acts performed by an official that are on behalf of the state, also referred to as ‘official acts’. Thus, a state official who engages in an ordinary criminal act (for example, theft or murder) will not be protected from liability by functional immunity.

Personal immunity is also referred to as immunity *ratione personae*, or procedural immunity. Personal immunity attaches to the person and provides protection from legal process regardless of the nature of the act in question. Personal immunity has historically been limited to diplomats and heads of state, though as indicated above there are now some acts for which personal immunity no longer provides protection, at least at the international level.

To determine which immunities might apply to a state official, one must distinguish between proceedings before national courts and those before international courts. State officials still enjoy the benefit of strong immunity claims (both functional and personal) before national courts. Before international courts, however, state officials increasingly have little access to immunities. Thus, international criminal law today no longer supports either functional or personal immunity before an international criminal tribunal, nor does it support absolutely the defence of functional immunity before a national court.

Since the start of the modern development of international criminal law at Nuremberg and Tokyo, officials accused of the worst international crimes have been unable to claim functional immunity as a defence. While it is clear that a state official may not be held criminally liable for his official acts, it is also clear that, since Nuremberg, certain acts have become, per se, unofficial: torture, genocide, crimes against humanity, war crimes, and aggression.1

Thus, while such acts are often committed by individuals in their official capacity – and, in fact, for some of these crimes official action is required to trigger international liability – as a matter of law such acts are not considered official for purposes of immunity.2 As Lord Brown-Wilkinson succinctly stated in the Pinochet case in the English House of Lords: ‘[H]ow can it be for international law purposes an official act to do something which international law itself prohibits and criminalises?’ Functional immunity thus does not apply to acts that violate international criminal law.

Diplomats enjoy a strong form of personal immunity, codified internationally in the Vienna Convention on Diplomatic Relations of 1961. Diplomats enjoy absolute personal immunity from any civil or criminal process while in a host country, and even while transiting through a third country. This immunity applies to any act that committed either before or after they assumed office, and regardless of whether the act was committed as part of their official duties. Notwithstanding this, diplomats may still be subject to legal process for their activities. First, personal immunity may be waived by the diplomat’s state, as the immunity is a right of the state and not of the individual. If a state waives its immunity a diplomat may be prosecuted while still in office. Second, diplomats may be prosecuted after they no longer hold a diplomatic position for unofficial acts committed while they were diplomats; in other words, they enjoy functional immunity after they leave office but no longer have personal immunity.

Heads of state enjoy the same form of personal immunity as diplomats,3 although head-of-state immunity is not so clearly codified in international law. It is also clear that heads of government and certain ministers (such as ministers of foreign affairs) enjoy such personal immunity. Dapo Akande noted in 2004 that he could find no case ‘in which it was held that a state official possessing immunity *ratione personae* is subject to the criminal jurisdiction of a foreign state when it is alleged that he or she has committed an international crime’ (Akande 2004: 407, 411).

Some claim that the one exception to this assertion is the prosecution and conviction of the president of Panama, Manuel Noriega, by the US.4 In that prosecution, however, the US government took the position that Noriega was not, in fact, the legitimate head of state, having been replaced in a recent election by Guillermo Endara (an election that Noriega annulled to stay in power). Thus, the Noriega precedent, relying as it does on a claim that Noriega was not a current head of state, does not provide a clear exception to Akande’s observation.
While functional and personal immunities may provide protection to a state official from a criminal prosecution by another state, the weight of authority suggests that such immunities do not apply before an international tribunal. The lack of such immunity is primarily based on treaty (the statutes of the various international criminal tribunals), and some argue that it is premature to conclude that personal immunity does not apply before an international criminal tribunal as a matter of customary international law. The post-Second World War criminal tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and the ICC all include provisions asserting jurisdiction over state officials regardless of any conflicting doctrines of immunity.

**Immunity under the ICC Statute**

The ICC Statute has what, at first, appear to be conflicting provisions on immunity. Article 27(1) makes clear that functional immunity is inapplicable to any individual before the ICC, making specific reference to heads of state and government. In addition, article 27(2) makes clear that the traditional doctrine of personal immunity for sitting state officials also does not apply. This latter provision is not found in the statutes of any of the earlier international criminal tribunals, and thus is unique to the ICC. Article 98(1), however, provides that a state is not obligated to hand an individual over to the Court if doing so would be ‘inconsistent with its obligations under international law with respect to the state or diplomatic immunity of a person … of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity’. While some see these two provisions (articles 27 and 98(1)) as in conflict, the two provisions may, and should, be interpreted to complement each other. The two articles complement each other if article 27 is interpreted to constitute a waiver by a State Party of any immunity (both personal and functional) that may otherwise apply to their officials before the ICC, and article 98(1) is interpreted to apply only in the case of officials from a state that is not a party to the Rome Statute. Article 98(1) would thus apply with respect to officials whose state has not waived their immunity through article 27, thus requiring the ICC to seek a waiver with respect to such an official. 

<table>
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<th>The ICC’s two-tier immunity structure</th>
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<td>A two-tier immunity structure is created for state officials before the ICC: one for officials from states that are a party to the Rome Statute, and one for officials from states that are not parties. For officials</td>
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Article 98(2) provides a challenge similar to article 98(1) with respect to the anti-immunity provisions of article 27. It provides that a state is not required to hand over a suspect to the Court if to do so would conflict ‘with … obligations under international agreements’ that would require it to obtain the consent of the state of which the suspect is a national, ‘unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender’. It is generally accepted that this subsection is meant to apply to status of forces agreements. 

The US, however, has entered into a number of bilateral agreements by which the US and the other state agree not to surrender a national of the other party to the ICC. While there is debate about the effect of such agreements entered into with States Parties to the Rome Statute, it appears that such agreements probably are effective with respect to non-States Parties. In other words, a state that is not party to the Rome Statute (such as the US) could refuse to surrender to the ICC a national of Zimbabwe (which is also not a party to the Rome Statute) if such an agreement had been entered into by those two states. With respect to states that are parties to the Rome Statute, however, the better position appears to be that such agreements could not protect their citizens from being surrendered to the court.

**Immunity and customary international law**

It is thus clear that, as a matter of treaty law, personal and functional immunities may not shield an official from accountability for violations of international criminal law before the ICC. Can one, however, say that official immunities do not apply to such crimes as a matter of customary international law?

This is less clear, and at the moment the answer is probably no. Evidence in support of the existence of a rule of customary international law voiding such immunities includes the ICC Statute (and the fact that it has attracted over 100 States Parties), the statutes of the ICTY and ICTR created by the UN Security Council, and the prosecution of Charles Taylor before the SCSL. On the other hand, as a matter of domestic law, most states continue to provide some form of
immunity to their own government officials, as well as to officials of other states.\textsuperscript{14} In addition, as noted above, the ICC Statute expressly acknowledges the residual existence of such immunities through article 98.

Finally, in a significant and somewhat controversial opinion, the International Court of Justice found that customary international law provided personal immunity to certain government officials with respect to transnational prosecutions (in this case involving a Belgian attempt to prosecute the sitting foreign minister of Democratic Republic of the Congo), but in \textit{dicta} stated that such immunity would not apply in the case of a prosecution before ‘certain international criminal courts’, such as the ICTY, the ICTR and the ICC.\textsuperscript{9} Recall, however, that article 98 of the Rome Statute appears to preserve such immunity \textit{before the ICC} for officials from states that have not ratified the Rome Statute.

The Belgian arrest warrant case is significant because it extends personal immunity beyond the category of individuals to whom it traditionally applied, namely, heads of state, heads of government and diplomats. The International Court of Justice extended personal immunity to foreign ministers, reasoning that without such immunity foreign ministers would be hindered performing a crucial function of their position (that is, international travel and diplomacy).\textsuperscript{16} It would thus appear that before \textit{domestic} courts a wide variety of government officials may benefit from personal immunity, and such officials may benefit from the same immunity \textit{before the ICC} if they are officials from a state that is not a party to the Rome Statute.

The most significant development recently with respect to official immunities is probably the erosion of immunities traditionally afforded a sitting head of state under customary international law. Until recently it was generally accepted that sitting heads of state were absolutely immune while in office from any legal process. This is no longer the case. The first indictment against a sitting head of state by an international tribunal was issued by the ICTY against the president of Yugoslavia, Slobodan Milo\v{s}evi\v{c}. Milo\v{s}evi\v{c} challenged the indictment on a number of grounds, including the absolute immunity traditionally enjoyed by sitting heads of state. The ICTY dismissed Milo\v{s}evi\v{c}'s claims of immunity and upheld the indictment.\textsuperscript{17}

In Africa, the first international indictment of a sitting head of state was that of Charles Taylor of Liberia in June 2003 by the Special Court for Sierra Leone.\textsuperscript{18} The SCSL is a hybrid tribunal (that is, a court with a mix of domestic and international law attributes); thus the assertion in the Belgian arrest warrant case of the inapplicability of personal immunity before international tribunals, and the clear holding that such immunities continue to apply as a matter of international law before domestic courts, does not easily answer the question concerning immunities posed by the Taylor case. In the end the SCSL held that Taylor could not claim personal immunity, concluding that it qualifies as an international tribunal and thus, per the Belgian arrest warrant case, such immunities are inapplicable before it.\textsuperscript{19}

### AMNESTIES

In part in recognition of the limitations of the benefits of functional immunity, many officials suspected of international criminal law violations have resorted to the added protection of amnesty. Until recently state practice has been uncritical of the use of such amnesties. In fact, with a few notable exceptions every state court has upheld the legality of a challenged amnesty.\textsuperscript{20} International courts and other similar institutions have, by contrast, always declared amnesties challenged before them illegal.

The first international criminal tribunal to address directly the legality of an amnesty was the SCSL (though, as noted above, the SCSL is more accurately described as a mixed or hybrid (national/international) tribunal). In \textit{Prosecutor v Kallon and Kamara}, the SCSL held that the amnesty provision in the Lomé accord does not apply to those prosecuted before it.\textsuperscript{21} The court reasoned that the Lomé accord was in fact a creature of domestic law, and thus was subordinate to international law, and thus must give way to the jurisdiction and powers of the SCSL.\textsuperscript{22} The court in this first decision thus declined to address squarely the question of whether an amnesty could oust the jurisdiction of an international criminal tribunal, noting that a norm of international law prohibiting such amnesties was ‘crystallising’.

The court took up the issue more directly a short two months later in \textit{Prosecutor v Gbao}, asserting, first, that ‘there is a crystallised international norm to the effect that a government cannot grant amnesty for serious crimes under international law’\textsuperscript{23} and, second, that ‘[u]nder international law, states are under a duty to prosecute crimes whose prohibition has the status of \textit{jus cogens}’ (that is, the prohibition is absolute and may not be derogated from under any circumstances).\textsuperscript{24} Robert Cryer has correctly noted that both of these statements are controversial, and that the latter, concerning the duty to prosecute, ‘cries out for greater discussion’ (Cryer 2006: 60). Specifically, while there has been a good deal of discussion in the academic literature concerning a duty to prosecute criminally
violations of international criminal law, it is far from clear both whether such a duty exists and what, if anything, are its limits.

Treaty law concerning torture and genocide establishes a general obligation to either prosecute or extradite a suspect to a state that will prosecute, but it is not clear if such an obligation extends to other crimes (and certainly it is not clear that it applies to all *jus cogens* norms), nor that it applies to states as a matter of customary international law, and thus applies regardless of whether a state is a party to a particular treaty.

As some of the discussion below with respect to amnesties will make clear, there is a stronger argument that international law requires some form of justice with respect to violations of international criminal law, but it is less clear that such justice must take the form of traditional retribution-based criminal prosecutions.

African societies have developed traditional justice mechanisms that are less retributive in nature, and thus more than any other region Africa presents a specific challenge to the retribution-based model of justice embodied in the ICC.25 These alternative mechanisms challenge more traditional conceptions of justice developed in the West, and thus present a challenge to the dominant paradigm of justice adopted by the ICC. It is a friendly challenge, for the Rome Statute provides some room for addressing and even accommodating some of these mechanisms; in fact, there is a growing movement in the West to incorporate such alternative forms into their traditional justice system.

Africa, more than any other region, provides an opportunity to develop an international criminal law jurisprudence of alternative justice mechanisms, and thus an opportunity to develop globally our conception of justice in the context of gross atrocities. I will only be discussing amnesties here, but the approach and analysis can be adapted to evaluate many of the alternative justice mechanisms found in Africa and other regions.

**Amnesties and the ICC Statute**

The Rome Statute does not address amnesties expressly. This was a deliberate decision taken by the delegates to the Rome conference, clearly rejecting the arguments of the South African delegation, among others, that some amnesties should be given effect before the ICC. The Rome Statute’s silence with respect to amnesties means that we will have to wait for the development of the Court’s jurisprudence on this issue before we can say with any certainty which, if any, amnesties may provide protection before the ICC. There is no question, however, that the ICC Statute provides ample room for the Court and Prosecutor to defer to a specific amnesty in deciding not to prosecute an individual suspect.

There are four ways in which an amnesty may be given effect before the ICC. First, the Office of the Prosecutor may suspend an investigation ‘in the interests of justice’ (International Criminal Court 2002: article 53(2)(c)). Second, the UN Security Council may suspend an investigation or prosecution under its chapter VII powers (International Criminal Court 2002: article 16). Third, the Court may find that an amnesty satisfies the requirements of justice under the statute’s complementarity provisions (International Criminal Court 2002: article 17). Fourth, the Court may conclude that the amnesty is the equivalent of a conviction or acquittal and thus triggers its *ne bis in idem* (not twice for the same) provision (International Criminal Court 2002: article 20). We consider each in turn.

**Article 53: interests of justice**

Article 53 of the ICC Statute provides that the Prosecutor may decline to initiate an investigation if to so decline would ‘serve the interests of justice’. Such a decision is, however, reviewable by a Pre-trial Chamber on its own initiative, and the chamber may reverse the Prosecutor’s decision (International Criminal Court 2002: article 53(3)(b)). The question then is what would qualify as a basis for declining to initiate an investigation ‘in the interest of justice’. Certainly one could see an interpretation that would allow the Prosecutor to reach such a decision if the individual suspect is participating in a justice process other than a traditional criminal prosecution.

In other words, one could imagine the Prosecutor declining to prosecute (and the Pre-trial Chamber upholding that decision) if the suspect was subject to alternative accountability mechanisms, whether it be something like the South African amnesty process (which provided some level of accountability) or an alternative dispute-resolution mechanism like the *gacaca* (a system of community justice) process in Rwanda.27

While such an interpretation is certainly plausible, the ICC has not been operating long enough, and thus has not created enough of a jurisprudential track record, for us to predict with any accuracy whether such an interpretation would be adopted by the Prosecutor and approved by the Court.28 Central to this determination would be whether the alternative mechanism adopted by the country provides justice.

I would argue that justice requires some form of individual accountability, though others have argued that achieving ‘peace’ (meaning the immediate end of
an armed conflict) without anything else qualifies as justice. It appears that the ICC Prosecutor also adopts this position, making a distinction in a recent policy document between ‘justice’ and ‘peace’, and noting that while ‘interests of justice’ incorporates a broader notion of justice than criminal justice, it ‘should not be conceived of so broadly as to embrace all issues related to peace and security’ (International Criminal Court 2007: 8). The end of an armed conflict may be necessary to achieve justice, but in my view it is not sufficient.

A related question is whether the inquiry concerning interest of justice is focused on the justice of an individual case, or whether it encompasses the general justice policies of a society. In other words, does the inquiry concerning the interest of justice focus on the specific facts and circumstances of the individual suspect, or is it a more general inquiry concerning the general approach to justice of a particular society, that is, focusing on efforts of a country to provide some justice through a truth commission or other alternative justice mechanism? Stahn argues that the proper inquiry is on the individual case and not on the general approach of the state from which that individual comes. There is a good deal of textual support for this position in the language of the statute.

**Article 17: complementarity**

Article 17 concerning complementarity also provides a possible textual basis for the ICC to defer to a local amnesty. There are two possible avenues for this interpretation: article 17(1)(a) and article 17(1)(b):

- Under article 17(1)(a) the ICC will defer to a national mechanism if ‘[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution’
- Under article 17(1)(b) the ICC will defer to a national mechanism if ‘[t]he case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.’

There are three issues worth highlighting: the interpretation of the term investigation, the proper focus of an investigation, and the presumptions created by the provisions.

The first issue concerns the scope of an investigation. Is a general investigation into the causes, effects, and contours of a history of violations sufficient, or is a more focused and individualised investigation required? As with the case of ‘interest of justice’ under article 53, it appears clear that investigation refers to an individual investigation – that is, an investigation focused on the facts of a specific atrocity or perpetrator – and not a general investigation of the causes and contours of a history of violations that one often finds conducted by a truth commission.

The second question concerns the type of individualised investigation. Some have interpreted investigation to mean a criminal investigation that could result in a prosecution, and then concluded that an amnesty could never satisfy this requirement. A variation of this argument is that the granting of an amnesty after an investigation is prima facie evidence of an ‘unwillingness’ to investigate or ‘to bring the person concerned to justice’, and thus fails under article 17. This definition of investigation as a criminal one that precludes any form of amnesty is contrasted with a definition that involves gathering and publicising evidence with respect to the crimes in question (which describes some amnesties, like that adopted by South Africa in 1995) but may not result in a prosecution (Robinson 2006: 212, 226–7).

This distinction between criminal investigation and amnesty is misplaced. A conditional amnesty like that adopted in South Africa is consistent with a definition of ‘criminal investigation’ as the amnesty-process investigation in that case could have led (and in many cases did lead) to a denial of amnesty and thus the possibility of prosecution. The fact that such prosecutions have not been forthcoming in post-amnesty South Africa is an argument that South Africa’s amnesty process might not qualify under this interpretation of ‘investigation’, not that a similar amnesty could never qualify. Support for the position that some amnesties might qualify as an ‘investigation’ can be found in statements by some of the negotiators at Rome, though such statements are, of course, not authoritative interpretations of the statute.

The third issue under article 17 concerns the proper presumption created by the provision. Carsten Stahn (2005: at 709) rightly argues that the exceptions to article 17 should be interpreted narrowly ‘since it is drafted in a negative fashion’. In other words, the general presumption is admissibility unless some of the exceptions clearly apply (including, as Stahn notes, exceptions to the exceptions, that is, the exception to admissibility based upon an investigation or prosecution itself has an exception if it is shown that the state is unwilling or unable to ‘genuinely’ carry out such investigation or prosecution). Stahn (2005: at 709–10) thus argues that an amnesty must be accompanied by some form of investigation.
in order to qualify as a proceeding that would make a case inadmissible. In other words an amnesty without more would be insufficient, for it would not provide strong evidence of a state’s commitment to providing some form of individual justice.

All three of these interpretive points underscore the fact that an amnesty could qualify as an investigation under article 17, but that such an amnesty must meet a minimum threshold of accountability. Suggestions concerning what would constitute such a minimum threshold are discussed below.

Article 16: Security Council deferral

Article 16, under which the Security Council can use its chapter VII power to stop an investigation or prosecution for a year at a time, may also provide a mechanism for giving de facto effect to a domestic amnesty before the ICC. The legal question is whether deferral to an amnesty could ever be justified as triggering the Security Council’s chapter VII powers; in other words, whether not deferring to the amnesty could be characterised as a threat to the peace or a breach of the peace. There are clearly some circumstances in which the question of whether to defer to a domestic amnesty or not might affect international peace. An amnesty included as part of a peace deal to end a serious armed conflict could be easily characterised as part of an effort to address a breach of the peace or threat to the peace. As this example illustrates, however, not all amnesties would so qualify.

The Security Council thus could, and should, distinguish here among both different types of amnesties (self-amnesty versus a negotiated amnesty) and the different timing of an amnesty (in the midst of a conflict or during peacetime). A negotiated amnesty is more likely to garner the long-term support of the parties to a conflict, and thus its invalidation might endanger such a negotiated settlement. A self-amnesty, on the other hand, is likely to lack legitimacy or acceptance by other parties to a conflict, and thus its lack of enforcement before the ICC may be less likely to threaten international peace (either because such peace is still not achieved, or because conditioning peace upon the impunity of one side to a conflict is less likely to create a stable peace). The treatment of amnesties passed in peacetime, after the end of a conflict, is less likely to affect international peace than amnesties passed in the midst of a conflict as part of a peace process.

Security Council deferral may provide a means to implement a temporary amnesty, in other words, a temporary suspension from prosecution. Such a temporary amnesty could be conditional on a number of things, including a requirement that the beneficiaries not take up arms again, and that the beneficiaries actively support peace and reconciliation efforts (through revealing information and testifying before a truth commission, and by providing some form of reparation to their victims, whether monetary or through good works). One could thus imagine a state working with the Security Council to craft a period of deferral based upon conditions that further peace, justice and reconciliation. Such a scenario would only arise if the prosecutor refused to use his discretion to not initiate an investigation or prosecution under article 53 or article 17 as discussed above. In other words, it would only come into play if there was a strong difference of opinion between the Prosecutor and a suspect’s state and the Security Council.

There are at least two weaknesses of this approach to addressing domestic amnesties. First, this proposal is dependent upon an overtly political body, the Security Council, and thus dependent on the political interests of the five permanent members. This is, of course, a general structural concern with respect to any action by the Security Council and certainly not unique to article 16. Second, unless the Prosecutor agreed not to initiate an investigation or prosecution, this proposal would require the Security Council to renew the deferral each year. This administrative burden of renewing such a deferral is tempered by the fact that an annual renewal allows, and even forces, the Security Council to confront how well the suspect has conformed to the conditions placed on the deferral.

Article 20: ne bis in idem

Article 20 codifies the generally recognised principle of criminal law forbidding double jeopardy, also referred to as ne bis in idem. That provision provides that a suspect will not be prosecuted before the ICC if he has already been convicted or acquitted by a court, unless the proceedings were designed to shield the suspect from responsibility for crimes within the jurisdiction of the Court, or were not conducted independently or impartially, and were conducted in a manner inconsistent with bringing the person concerned to justice.

For this provision to apply to an amnesty two interpretive hurdles must be overcome. First, one would have to argue that the granting of an amnesty qualified as a conviction or acquittal. Second, one would have to argue that such conviction or acquittal was done by a court. On the first point, an amnesty cannot be characterised as an acquittal. An individual is acquitted when it is determined that
he is not responsible for an alleged crime – for either factual or legal reasons. An amnesty by definition assumes that the individual is guilty, and thus cannot be characterised as an acquittal. An amnesty may more easily be characterised as a conviction if one can establish that an individual is found to be responsible or guilty, and the individual is subject to some form of punishment.

The first part – a determination of guilt or responsibility – is an easier requirement, as most amnesties implicitly, and some explicitly, establish individual responsibility. The second part – imposition of some form of punishment – is less common with respect to an amnesty. For instance: the East Timorese amnesty did require some form of reparation from its beneficiaries; the South African amnesty did not.

On the second point, an amnesty administered by a court would clearly qualify. The question arises when the amnesty is administered by a quasi-judicial body like a truth commission. Some argue that such bodies cannot qualify as a court (Gavron 2002: 91, 109). I do not think the issue is so clear, and one could argue that a body like the South African amnesty committee, consisting solely of judges or attorneys and operating independently of the executive branch, could qualify as a court.

Uganda’s amnesty: a case study

The referral by Uganda to the ICC of the conflict with the Lords Resistance Army (LRA), coupled with the Ugandan government’s passage and implementation of an amnesty for members of the LRA, presents squarely before the ICC the issue of amnesties. The referral by Uganda to the ICC of the conflict with the LRA, coupled with the Ugandan government’s passage and implementation of an amnesty for members of the LRA, presents squarely before the ICC the issue of amnesties.

The Ugandan amnesty was passed in 2000 (National Assembly of Uganda 2000). More than three years later, in December 2003, President Museveni referred the situation to the ICC. On 6 May 2005 the Prosecutor of the ICC indicted five leaders of the Lord’s Resistance Army (Joseph Kony, Vincent Otti, Odot Odhimbo, Raska Lukwiyi and Dominic Ongwen), two of whom are no longer alive, alleging war crimes and crimes against humanity. Arrest warrants for all five of the original indictees were issued under seal on 8 July 2005, and made public on 13 October 2005. Interpol issued its first arrest warrants in June 2006. While the offer of amnesty was meant to be temporary (initially for six months), it continues to be in effect up to the time of this writing. According to the spokesperson for the amnesty commission, by the end of 2007 over 22 000 people have been granted amnesty under this process (Lubangakene 2007).

Substantively, the Ugandan amnesty covers both acts of rebellion against the government (acts for which international law clearly allows, and even encourages, amnesty), and ‘any other crime in the furtherance of the war or armed rebellion’ (acts for which international law requires accountability, and thus discourages most forms of amnesty).

While some argue that no amnesty should be taken into account by the ICC, such a position treats all amnesties alike when amnesties vary tremendously. A number of commentators have suggested criteria by which the ICC or another body should determine whether to give effect to a domestic amnesty. These commentators generally require the following:

- That the amnesty be granted through some form of process, and thus not a blanket amnesty
- That the amnesty be available to all parties to a conflict, and thus not designed to benefit only one party
- That the amnesty be the product of a democratic process, and thus not a self-amnesty
- That the amnesty provide some form of accountability

The first (process) and last (accountability) points are crucial to arguing that such an amnesty provides some form of justice, thus potentially meeting the requirements of article 20 of the ICC Statute (concerning conviction by a court), article 17 (concerning an investigation) or article 53 (an alternative justice process that should be encouraged ‘in the interest of justice’). The second point (available to all parties to a conflict) is essential in order to argue that the purpose of the amnesty is not designed to shield an individual (or group of individuals) from accountability. An amnesty that only benefits one group of people while not providing similar protection to others appears to be designed to protect its...
beneficiaries from accountability. Finally, the third point (democratic process) supports the argument that deferring to such an amnesty is in the interest of justice under article 53; in other words, that the amnesty process is one with a good deal of support within the society, and thus should be accepted as an alternative form of justice acceptable to that society.

At a general level, it is thus important for the AU and African states to adopt a set of criteria along the lines of that suggested above to distinguish between illegitimate and legitimate amnesties, and thus illegitimate and legitimate alternative justice mechanisms.

The case of Uganda poses a number of more specific issues, three of which are briefly addressed here. First, Uganda, more than most conflicts, involves individuals who would qualify both as perpetrators and victims: children who were coerced, often with drugs, to participate in violations of international criminal law. This dual perpetrator-victim characteristic is not unique to Uganda, nor is the use of child soldiers unique, but the conflict in Uganda incorporates both of these issues more than most other conflicts. The ICC may be inclined to give more deference to an amnesty granted to a child soldier than it may otherwise.46

Second, to date the leaders of the LRA have not sought, nor been granted, amnesty, though there is nothing in the legislation that would preclude them from being granted amnesty. At the moment, therefore, the Ugandan amnesty does not present squarely a conflict with the ICC, as it has not been used to immunise those most responsible for the atrocities, and thus those individuals that the Prosecutor of the ICC has generally indicated he will target for prosecution.

Third, concern has been raised by some people in Uganda that, if the ICC proceeds with its indictments, it will unlawfully interfere with the reasonable expectations of those individuals who were granted amnesty.47 First, as noted in the previous paragraph, at the moment those who have been indicted have not been granted amnesty, so such a reliance argument does not apply to them. Second, with respect to those who were granted amnesty, assuming that the Prosecutor wanted to indict them, such a reliance argument would not and should not be given any weight. The strongest response to the reliance argument is that domestic law, like an amnesty, cannot supersede international law. This proposition has been clear since the trials at Nuremberg and Tokyo after the Second World War, and thus it is unreasonable for an individual today to assume that a domestic law could shield him from international accountability.50

Finally, most discussions of how the ICC and other bodies should treat an amnesty presume a binary response: either the amnesty should be recognised and an individual not prosecuted, or the amnesty should be invalidated and the person prosecuted. There is no reason, of course, that the issue should be constrained in such a binary way. The granting of an amnesty could be used as a mitigating factor with respect to sentencing; in other words, participation in an amnesty process, a truth commission process, an expression of remorse or voluntary surrender in the context of a peace negotiation could each be used in mitigation of sentence.51

NOTES

1 Note, however, that while there is general consensus that an act of aggression is a violation of international law that may lead to criminal liability, there is as yet no consensus concerning the definition of this offence.

2 Akande (2004: 407, 414–5) rejects this rationale to explain the lack of functional immunity for international crimes, and also rejects the alternative argument that because rules prohibiting international crimes are jus cogens, they ‘trump’ the non-jus cogens rules concerning immunity. Instead, he argues that the policies underlying such immunities do not support their application to such acts.

3 R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte, [1999] 2 All ER 97, 114 (House of Lords). It should be noted, however, that only one of the lords, Lord Millet, held that immunity is always overridden by international criminal law; the others who found no immunity based their decision on the provisions of the Convention against Torture, and thus only narrowly found that official immunity would be inapplicable to charges of torture. For a brief discussion of the Pinochet decision setting forth the reasoning of the different lords, see Stern (2003: 99–102).


As suggested in the text above, this is not the only interpretation. Article 98 could be interpreted as applying only to officials of nonparties. See Akande (2004: 407, 426–429), discussing interpretation of article 98(2) and concluding that it should be interpreted to apply only to states that are not parties to the Rome Statute.

The SCSL declined to recognise any immunity enjoyed by Charles Taylor, then a sitting head of state, despite the fact that Liberia was not a party to the agreement creating the SCSL, and thus could not be said to have agreed to waive its official immunity.

See cases cited in note 4 above.

Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), (2002) ICJ Report 3, paragraphs 58–61. A similar case brought by the Republic of the Congo against France is currently pending before the International Court of Justice. It challenges the criminal prosecution in France of a number of officials of Republic of the Congo, including the president and minister of the interior, for torture and crimes against humanity. See Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France), Request for Provisional Measures (June 17, 2003), 42 ILM 852 (2003). For a critique of the Arrest Warrant decision, arguing that the court does not adequately or clearly address the question of immunities (by not, for example, making a clear distinction between functional and personal immunities, and by confusing the basis for lifting functional immunity for acts that constitute international crimes), see Miglin (2007: note 10, at 32–4).

For a critique of this extension of personal immunity, see Akande (2004: 407, 411–12), noting that, first, the International Court of Justice cited to no state practice to support this extension, and, second, that the reasoning of the court suggests that such immunity would apply to most, if not all, government ministers as well as a wide range of officials below the rank of minister who travel on official business.

In fact, Milosević himself did not raise the issue; it was raised on his behalf by amici who were effectively acting as his counsel. See Prosecutor v Milosević, case no. IT-02-54, Decision on Preliminary Motions (8 November 2001).

The ICTR had previously indicted, tried and convicted (via a guilty plea) the Rwanda prime minister, Jean Kambanda, though the indictment was issued after Kambanda was no longer in office. See Prosecutor v Kambanda, ICTR-97-23-S, judgment and sentence (4 September 1998).

Prosecutor v Taylor, case no. SCSL-2003-01-I, Decision on Immunity from Jurisdiction (31 May 2004). For a criticism of the basis for this decision (although not the eventual outcome), and an argument that there in fact is an ‘international court exception’ to personal immunity, see Cryer et al (2007: 442–4). Miglin (2007: note 10) also criticises the decision, arguing that the fact that the SCSL is international (which he accepts) is not sufficient to establish that Taylor does not enjoy immunity as a head of state before it.

See, for example, Azapo v President of South Africa, CCT 17/96, 1996 (4) SALR 671 (CC). The recent exceptions concern amnesties passed in Argentina and Chile that were recently overturned in their respective countries and not recognised by other states in the context of transnational criminal prosecutions (Spain with respect to the indictment of Pinochet).
The statute of the SCSL clearly states that amnesties will not be enforced with respect to any crime within its jurisdiction. SCSL statute, article 10.

Africa is not unique in developing such alternative mechanisms, but it is probably the continent with the longest tradition of such non-retributive mechanisms, and with the most variety of such mechanisms.

This is in contrast to a decision by the Prosecutor not to proceed on other grounds (for example, lack of legal or factual basis), which is only reviewable if a State Party so requests, or if the Security Council requests in a case initiated by its referral. See article 53(3)(a).

A September 2007 policy paper (International Criminal Court 2007) states that up until that time ‘[t]he Prosecutor has not yet made a decision not to investigate or not to proceed with a prosecution because it would not serve the interests of justice.’

See International Criminal Court (2007: 1). See also ibid. at 4, noting the difference between the interests of justice and peace, and that any efforts to secure peace must be undertaken consistent with the legal requirements of the Rome Statute to hold accountable those most responsible for violations of international criminal law.

Stahn (2005: at 717–8), noting that the discretion in article 53 is specifically tied to the gravity of the crime, the interests of victims, the age and infirmity of the suspect, and the role of the suspect in the crime, all criteria pointing to specific case-by-case determinations.

See, for example, International Criminal Court (2002: article 53(1)), not initiating an investigation in the interest of justice, ‘taking into account the gravity of the crime and the interests of the victims’; article 53(2), not initiating a prosecution in the interest 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 perpetrators, and his or her role in the alleged crime’. In other words, each of the elaborations on interest of justice focuses on factors specific to the individual suspect, and not the general approach to justice, though one could interpret the prosecution test (article 53(2)) to allow other factors, as its requirement is phrased in terms of ‘all the circumstances’ and ‘including’, thus allowing attention to circumstances other than those specifically listed.

The one other provision, article 17(1)(c), only applies if there has been a ‘trial’ by a ‘court’. Even the South African amnesty, which is the most ‘court-like’ amnesty ever adopted, would not qualify under any reasonable interpretation of ‘trial’ and ‘court’. See, for example, Van den Wyngaert and Ongena (2002: 727), a ‘trial’ by a truth and reconciliation commission can hardly be seen as a “trial” in the sense of article 20 [concerning ne bis in idem] of the Rome Statute).

There are two other situations in which deferral is allowed under article 17: if the suspect has already been tried by a state (article 17(1)(c)), or the case is not of sufficient gravity to justify the involvement of the Court (article 17(1)(d)). The former will be addressed in this chapter in connection with the discussion of article 20 concerning ne bis in idem; the latter does not raise the question of amnesties.

Dugard (2002: 702), citing the language of article 17(1)(b) of the Rome Statute. See also Gavron (2002: 91, 111): ‘any imposition of an amnesty could be construed as inconsistent with an intention to bring someone to justice, unless a broad definition of justice is taken.’

Stahn (2005) argues against the ‘criminal investigation’ argument by noting that the term ‘investigation’ in articles 17(1)(a) and 17(1)(b) is not qualified with the term ‘criminal’; and is contrasted with the prosecution. Stahn (2005: at 711): ‘An interpretation which limits inadmissibility to criminal proceedings is problematic because it adds a distinction … which the Statute does not make.’ Stahn also adopts the view I profess above: that an amnesty like South Africa’s that could result in an investigation that leads to a prosecution (after the denial of amnesty) could satisfy the inadmissibility test of article 17 (ibid., at 711–2).

Holmes (1999: 41, 77), who was involved in the Rome negotiations, asserts that the term ‘investigation’ in article 17 means ‘criminal investigation’, but implies that an amnesty might meet this requirement: ‘A truth commission and the amnesties it provides may not meet the test of a criminal investigation, since the simple telling of the truth to a non-judicial body may convey an individual immunity from national prosecution’ [emphasis added]. Majzub (2002: 247, 268–9) quotes this sentence and a few others to argue that the ICC Statute provides no tolerance for any form of amnesty (a debatable proposition with which I disagree), and that Holmes supports this interpretation (a position which the language italicised in the quotation above I think clearly undercuts.

Unwillingness and inability to prosecute are exceptions to the exception to admissibility by which a state decides not to prosecute an individual.

Dugard (2002: 701) takes the position that a Security Council deferral based on a domestic amnesty is unlikely to be authorised, as it would require a finding that the refusal to recognise such an amnesty constitutes a threat to international peace, a position Professor Dugard clearly thinks would be difficult, if not impossible, to defend. See also Gavron (2002: 91, 108–9): situations surrounding a domestic amnesty are ‘unlikely always to be serious enough to justify a Chapter VII determination’.

I have suggested such a temporary amnesty contingent on certain behaviour by beneficiaries elsewhere, arguing that it reflects a growing trend in state practice with respect to amnesties.
40 Greenawalt (2007: 583), in a particularly thoughtful treatment of the topic, has argued that whether to defer to an amnesty or truth commission should be made by a political body and not the Prosecutor or the Court.

41 This does not, of course, mean that the Ugandan government necessarily thought that the ICC could prosecute an individual who had been granted an amnesty. The government could have thought that prosecuting those most responsible for the atrocities – the then five leaders of the LRA – was not incompatible with providing to their subordinates protection from criminal prosecution. Given the time between the initiation of the amnesty process and the referral to the ICC – over three years – a more reasonable interpretation is that the government decided that the efforts to broker a peace deal with the LRA using amnesty were no longer viable.

42 Raska Lukwiya and Vincent Otti are no longer alive. Raska Lukwiya was killed on 12 August 2006 in a fire-fight with the Ugandan military. Vincent Otti was reportedly executed by the LRA on 2 October 2007.

43 Basic information on the indictments can be found on the Uganda page of the website of the International Criminal Court.

44 See Ssenyonjo (2005: 405, 421), noting that amnesty commenced on 21 January 2000 for an initial six-month period, and has been extended repeatedly ever since.

45 This encouragement of some amnesties is most clearly stated in article 6(5) of Additional Protocol II to the 1949 Geneva Conventions.

46 Hafner et al (1999: 108), for example, argue that under no circumstances can or should the ICC recognise an amnesty.

47 See, for example, Stahn (2005: 713-716), proposing that an amnesty with the following characteristics would meet the requirement of article 17(2): guarantees the basic due process rights of the suspects; administered by an independent and impartial body; applies to all ‘sides’ to a conflict, and not just privilege one group; and require some form of sanction. See also Robinson (2006: 212): the ICC should (1) never defer to a blanket amnesty; (2) ‘likely’ defer to a program of truth commissions and conditional amnesties for lower-level offenders, coupled with prosecution of the persons most responsible for such crimes; and (3) defer to a process that includes conditional amnesty for those most responsible only if ‘pressing circumstances of necessity’ existed, coupled with an impressive non-prosecutorial approach which advances the objectives of accountability. I have set out in more detail the criteria I would use, looking specifically at the South African amnesty process (see Slye 2002: 173).

48 This would be consistent with the decision of the prosecutor of the SCSL, for example, not to prosecute child soldiers who committed war crimes and other violations of international criminal law (see IRIN 2002).

49 Archbishop John Baptist Odama has raised this concern (see Ssenyonjo 2005: 405, 424).

50 This issue is, however, more complicated than I present here, as the question of the legitimacy of certain amnesties under international law, and the treatment of amnesties by the ICC, are both questions for which there are not clear answers, thus providing some support to those who would argue reliance on an amnesty that in effect provides justice through a mechanism different than the traditional retribution-based justice embodied in the ICC.

51 I am indebted to Stahn (2005: 695, 704)) for this idea, noting that, for example, public expressions of remorse have been accepted as a mitigating factor before the ICTR, citing to Prosecutor v Serushago, ICTR-98-39-S, sentencing judgment, 5 February 1999, § 38.

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