The International Criminal Court and Conflict mediation

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1. Introduction

This paper addresses the possible impact of the International Criminal Court (ICC) on conflict mediation and on political stability in fragile environments. It looks at the following five issues:

- the role of criminal accountability for massive abuses in the context of political transitions, reflecting on recent trends and developments in international law and relations;
- a brief overview of the most relevant parts of the ICC Statute, explaining how the ICC may become involved in situations, as well as examining the structure of the ICC's prosecutor's office;
- the notion in the ICC statute that the prosecutor may forego an investigation if he believes it does not "serve the interests of justice", and how this might be applied in practice;
- practical issues that conflict mediators may face as a result of ICC investigations; and
- the possible positive role the ICC may play in the context of conflict mediation.

[1] The authors are Senior Associates at The International Center For Transitional Justice (ICTJ). The paper is a contribution to the Mediators' retreat and is not for wider circulation. It remains the property of the ICTJ. A fuller version of the paper will be published in due course.

2. Developments in Criminal Accountability

Is there a trade-off between achieving peace and ensuring justice for the crimes of war?

Numerous tensions exist concerning the best tactical, strategic and political means of securing peace and security during conflict mediation. One of these—which tends to become over-simplified and polarized —concerns prosecuting perpetrators of past human rights abuses. Put simply, this is presented as a disagreement between those who say, on the one hand, that there can be no peace without justice and that there exists in international law a positive duty to prosecute certain kinds of violations; and those, on the other hand, who say that such views are naïve, ignore the realities of power distribution and politics on the ground, and generally serve to obstruct or inhibit the possibilities of bringing conflict to an end.

Many developments point to a consistent trend that, at the very least, has created a much higher presumption against impunity than existed ten or fifteen years ago.[2] Most important among these is the creation of the International Criminal Court (ICC), and the duties it imposes on State Parties to criminalize in their domestic laws the crimes encompassed in the Statute. In addition, the Secretary-General of the United Nations has maintained an unambiguous position insisting on taking the question of accountability for serious abuses extremely seriously.[3] It is notable also that all 15 members of the Security Council went to some lengths to express their commitment to accountability in the Security Council during the United Kingdom's presidency on justice and the rule of law.[4] This considerably changes the political and legal landscape in which the accountability discourse is framed.

The ICC Statute simplifies the debate in two ways. First, the preamble to the treaty recalls "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". This is a much more nuanced approach than saying that every state has a "duty to prosecute", as has been argued by some international legal scholars. This formulation recognizes that cases have to be dealt with on an individual basis as well as recognizing that each state might have variations in the way it exercises criminal jurisdiction, in terms of the limits of discretion, the role of plea bargaining, and the availability of appropriate alternatives in place of prosecution. Second, the Statute provides the Prosecutor with a degree of discretion in deciding whether to investigate or prosecute matters that are within the ICC's jurisdiction[5], subject to the approval of the

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[2] These include the creation and continued backing of the Ad Hoc tribunals for Former Yugoslavia and Rwanda; the exercise and expansion of the concept of extraterritorial jurisdiction, including universal jurisdiction; the establishment of the Special Court for Sierra Leone and other mixed tribunals in respect of Cambodia, Kosovo and Timor Leste, all with the direct participation (albeit in varying degrees) of the United Nations.

[3] The Secretary-General's guidelines for SRSGs makes clear the policy of the UN against endorsing amnesties in respect war crimes, genocide or crimes against humanity. The same position was reiterated by the SG in his briefing to the Security Council in September 2003 on justice and the Rule of Law.

[4] UN. Doc. S/PV.4833.

[5] Articles 15.1, 53.1.C, 53.2.C and Rule 48 of the Rules of Evidence and Procedure

Pre- Trial Chamber.[6] This makes it clear that the prosecutor does not have an absolute obligation to prosecute. The crucial question, of course, relates to the extent of the discretion afforded by the Statute. This question, and the implications for the duties of States to prosecute, will be dealt with in more detail below.

Perhaps the best way to view the developments of the last ten years would be to say that there is now a much clearer and stronger presumption in favor of accountability and against impunity in respect of massive abuses than existed 15 years ago. The debate now revolves around the issues of timing, strategy and tactics more than stark "either / or" choices. It is true that this makes the prospect of offering perpetrators of heinous crimes complete impunity in exchange for an end to conflict an unlikely option from the ICC's point of view. A full understanding of this, however, depends on a much closer study of the concept of discretion afforded to the Prosecutor. One implication is that those involved in the difficult business of peace negotiations should be familiar with the more complex array of options that now exist in the field of transitional justice.

What is the purpose of prosecuting crimes against humanity and war crimes?

One of the principal objectives of the ICC is to put an end to impunity and thus contribute to the prevention of crimes such as genocide, war crimes and crimes against humanity.[7] The debate on international justice has tended to focus on somewhat narrow justifications of deterrence and retribution, ignoring developments in criminal punishment theory and practice. It is now well understood that prosecution might contribute meaningfully to a range of issues that cannot be best or fully described in terms of retribution or deterrence alone. These include the reconstruction of trust and confidence in the institutions of the State; restoring dignity to victims as rights-bearing citizens; and the rehabilitation of offenders. It may also be more appropriate, especially in the context of systematic and massive abuses, to see prosecutions playing a positive role of persuasion, encouraging a commitment to democratic values, rather than the more negative idea of deterrence motivating obedience through fear of being caught and punished.[8] Prosecutions should be understood as addressing these multiple goals.

3. An Overview of the International Criminal Court

This section will give a brief overview of the Rome Statute but not a comprehensive analysis of the Court. The ICC regime is essentially based on a concept of *complementarity* between the jurisdiction of the ICC and that of domestic courts of State

[6] Article 53.3
[7] See paragraph 5 of the Preamble to the ICC Statute
[8] The effect of the prosecutions program in Argentina from 1984 to 1987 significantly contributed to the reintegration of the armed forces within the democratic framework and could be seen as an example of such positive persuasion. A similar case could be made in respect of the prosecution of Greek military officers in 1974..

Parties. In short, the ICC is a court of last resort, to operate in those circumstances where States Parties are "unwilling or unable genuinely to carry out the investigation or prosecution."[9] The determination of whether a state is willing or able to carry out prosecutions is politically and technically complex, and it forms the lens through which advancing the proceedings is to be viewed at different stages. Other important issues include the various checks and balances that exist on the Prosecutor, and the ICC's relationship with the Security Council, which can both refer situations and seek to defer investigations.

When does the ICC have jurisdiction?

The ICC has jurisdiction over persons who commit genocide,[10] crimes against humanity,[11] or war crimes.[12] The crime of aggression will also be included once it is defined, but it is not anticipated that this will be in the foreseeable future. The Court may exercise jurisdiction if these crimes (1) occurred in the territory of a State Party; or (2) were perpetrated by a national of a State Party; or (3) the Security Council may refer the matter to the Court even if it occurred in a State not a party to the treaty or was allegedly carried out by nationals of a non-State Party.[13] A non-State Party may make a declaration accepting the exercise of the jurisdiction of the Court over a crime that occurred on its territory after 1 July 2002.[14] The temporal jurisdiction of the Court is over crimes that occurred after the Statute came into force on 1 July 2002, or in the case of new State Parties, 60 days after depositing an instrument of ratification (although it may be anticipated that States Parties can also backdate jurisdiction to 1 July 2002).[15]

How is an investigation before the Court triggered?

There are three ways to trigger an investigation. First, a State Party to the ICC Statute may refer the case to the Prosecutor; second, the Prosecutor may begin an investigation on his own initiative; third, the Security Council may refer a situation to the Prosecutor,

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[9] Article 17 of the Rome Statute.

[10] Article 6. The definition of genocide in the Rome Statute is drawn from the Genocide Convention of 1951. All the crimes of the Rome Statute are further defined in a document on the "Elements of the Crimes."

[11] Article 7. The definition of crimes against humanity has been expanded from earlier definitions found in the Statutes of ICTY and ICTR.

[12] Article 8. The definition of war crimes includes grave breaches of the Geneva Conventions as well as other serious violations of the laws or customs of war, including article 3 common to the Geneva Conventions, both of which do not require an international armed conflict. The ICC will have jurisdiction particularly over war crimes if they form "part of a plan or policy or as part of a large-scale commission of such crimes."

[13] Article 12.

[14] Article 12 (3).

[15] Article 27 (1): It is important to note that immunity or official capacity, including the procedural rules that govern these matters, represents no bar to prosecutions before the ICC. The Statute states clearly that it will apply equally to all persons without any distinction based on official capacity, including Heads of State or Government, members of Government or Parliament, elected representatives and other government officials

acting under its Chapter VII powers (even where it concerns crimes committed in the territory of a non-State Party).[16]

Of these, the power of the Prosecutor to initiate investigations on his own accord is most strictly reviewed by the Court. The initial period prior to an investigation where information comes to the attention of the Prosecutor and may draw his interest is called a "preliminary examination".[17] Unlike with other international criminal courts, the decision to proceed from this phase into launching an investigation must be authorized by the Pre-Trial Chamber.

A referral from a state party obviously carries with it risks of possible political manipulation. One party to a conflict (usually the government) may seek to use a referral to de-legitimize an opponent. It is therefore important to recognize that the Prosecutor is not bound to act automatically on any such referral, but will only do so if he is satisfied that there is a reasonable basis for investigation.

What must the Prosecutor consider when opening an investigation?[18]

The opening of an investigation will not be entered into lightly. After a preliminary examination, the Prosecutor must consider the following:

- whether the information available provides a reasonable basis to believe a war crime, crime against humanity or genocide has been committed
- whether the case is admissible, and that in particular, the relevant state party is either unwilling or unable to prosecute
- whether, considering the gravity of the alleged crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If he decides to investigate, he must obtain the authorization of the Pre-Trial Chamber. If he decides not to proceed with an investigation, he must likewise inform the Pre-Trial Chamber.[19] In situations where the Prosecutor has decided not to proceed due to the "interests of justice", the Pre-Trial Chamber may review that decision on its own initiative and the decision shall be effective only if it is confirmed by the Pre-Trial Chamber.

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[16] Article 13.

[17] Sources available during a preliminary examination may include: received information, additional information supplied by States, organs of the UN, intergovernmental and non-governmental organizations or other reliable sources and "written or oral testimony" received at the seat of the Court. Informal expert paper on *Fact-finding and investigative functions of the Office of the Prosecutor, including international co-operation,* para. 21.

[18] See Rule 48 of the Rules of Procedure and Evidence and Article 53 of the Statute

[19] Should he be granted the authorization to proceed with an investigation, similar considerations must inform the work of the Prosecutor throughout his investigation up to the final decision to proceed to prosecute. If the Prosecutor decides not to prosecute, he shall inform the Pre-Trial Chamber, and if necessary, the State Party or Security Council (depending on who made the referral). The State Party or Security Council may request the Pre-Trial Chamber to review the decision in order to request the Prosecutor to reconsider.

What is the relationship between Office of the Prosecutor and State Parties on initiating investigations?

If the Prosecutor decides to open an investigation either as a result of a State referral or on his own initiative, he must notify all relevant States Parties. These may include not only the State on whose territory the alleged crimes occurred but also the States that may have nationals involved in the alleged perpetration of the crimes. Those States will have one month to notify the Prosecutor whether they have investigated these matters or intend to investigate them, and may request the Prosecutor to defer his own investigation. The Pre-Trial Chamber has the power to overrule such a deferral. However, if it does not, the Prosecutor is required to review the matter after six months or whenever any significant development comes to his attention in respect of the State's ability or willingness to deal with the matter.[20] This procedure is called a "preliminary ruling regarding admissibility."

Under the spirit of the complementarity regime, the Prosecutor will want to encourage any initiatives by States themselves to investigate, while being prepared to intervene if the investigation is in bad faith. While the Prosecutor's principal concern is the appropriate exercise of legal judgment, it is also obvious that the system will be more effective if there is an atmosphere of trust and a presumption of balanced judgment. Although the test of "unwilling or genuinely unable to investigate" in Article 17 of the Statute is legal, his assessments of the efforts made to prosecute and the pressure that should be brought to bear will have to include analysis of factors beyond the legal. For this, his office includes a section on Jurisdiction, Complementarity, and Cooperation, which seeks to promote a climate where national investigations or prosecutions could succeed through a degree of cooperation, but which simultaneously seeks to assess whether such an investigation is genuine, or whether the domestic capacity exists for it.[21]

In terms of vigilance, the Prosecutor will have to distinguish between different scenarios, e.g. cases of inaction (which would be admissible), or cases of action, but where that action is not effective (inability) or genuine (unwillingness). In general, indications of unwillingness may include direct or indirect proof of political interference or deliberate obstruction and delay (such as proceedings which seek intentionally to shield a person from criminal responsibility), general institutional deficiencies, procedural irregularities, and so forth.[22] Inability may refer to collapse of the national judicial system, or to situations where the State is unable to obtain the accused or the necessary evidence and testimony.

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[20] Article 18. The Statute establishes the requirement of States to cooperate with the Prosecutor and to keep him informed of developments. In exceptional situations, even where a national investigation is ongoing, the Prosecutor may seek authorization from the Pre-Trial Chamber to carry out investigative steps if important evidence may be obtained or might not be available subsequently.

[21] Ways in which the Office of the Prosecutor may seek to bolster domestic processes include through encouraging strong domestic legislation, exchange of information and evidence, providing technical advice, arranging for training, and brokering other types of assistance. See the *Informal expert paper: The principle of complementarity in practice*, paras. 7-15.

[22] *Informal expert paper: The principle of complementarity in practice*, para. 47.

What are States' duties to cooperate with the ICC?

The commencement of an investigation by the Prosecutor triggers certain duties on behalf of States Parties to cooperate with requests from the ICC, found in Part 9 of the Rome Statute.[23] Although the Statute states that State Parties *shall* cooperate fully with the Court, the process operates through a system of requests (rather than through binding orders, which are a common feature of the ICTY and ICTR). Naturally, State Parties and non-State Parties alike may voluntarily assume obligations vis-à-vis the Court beyond the requirements of the Rome Statute.

Consultation with States in the exercise of requests should be on-going but noncompliance may result in a Court finding to that effect and the matter may be referred to the Assembly of State Parties or the Security Council (if it was referred by the Council). However, there is a provision which allows States to deny requests for assistance on national security grounds.[24] Without state cooperation the staff of the ICC will rarely be in a position to carry out effective investigations. It is for this reason that so much early effort has been placed on the development of diplomatic resources within the Prosecutor's office. Without enforcement mechanisms, diplomacy is in effect the principal route to enhance the prospects of meaningful cooperation. Efficacy is, as with any justice system, the primary goal and neither the Prosecutor nor the Court will be keen to take risks in the early years that expose the ICC as a paper tiger.

There are two sub-questions about state cooperation that may particularly concern mediators:

- *Will the ICC employ a policy of secret indictments?*

It may be that the ICC Prosecutor will use secret indictments, as have been used by both the International Criminal Tribunal for Former Yugoslavia and the Special Court for Sierra Leone (in the case of Charles Taylor). However, before the Prosecutor reaches the stage of preparing an indictment various determinations will have been reached and made known to the State Party concerned. These may include intimations that preliminary examinations prior to a decision to open an investigation are under way; they will certainly include at least a confidential intimation to relevant States Parties on a decision to open an investigation.[25] . It will therefore already be known which conflict the indictments pertain to (e.g. Uganda, DRC). However, a "situation" can be broad and can refer to the territory of an entire State Party rather than a localized conflict.

- *Is a State under a duty to arrest an accused in its territory if requested by the ICC?*

[23] There is a question of interpretation arising from the Statute as to whether Part 9 applies to a preliminary examination, but the preferred view of an informal group of experts was that it does not.
[24] Article 93 (4).
[25] Article 18(1)

Situations in which the Prosecutor would approach a State other than the State whose national has committed the crime, or the State where the crimes were committed, with an arrest warrant will be rare. Any such action would probably only occur in cases where investigations had reached an advanced stage or an indictment had been issued, since States would have to be satisfied of nature of the case against the suspect (as with any extradition proceeding). In cases where individuals were required to attend peace negotiations, the Prosecutor would be unlikely to jeopardize the success of negotiations asking for a hosting State to arrest participants.[26]

What is the relationship between the ICC and the Security Council?

The Security Council may trigger an investigation through a referral, or request the halt or deferral of an investigation or prosecution. Both require a Chapter VII resolution; the use of each is therefore restricted to circumstances of a threat to or breach of peace or an act of aggression.

Experts have noted that the complementarity regime probably applies to Security Council referrals,[27] so that the test of a State's willingness or ability to initiate a prosecution remains. Some would argue that the Security Council, acting pursuant to Chapter VII, could order a State to yield to the Court in terms of declining to exercise its own jurisdiction.

The Security Council also has the power to request that the ICC defer an investigation or prosecution for a period of one year, renewable. Some have referred to this as a likely route for amnesties, but in practice any such amnesty would function more as a temporary immunity, since it has to be renewed annually by positive resolution. The power to defer again requires a Chapter VII situation. To date, the Security Council has relied on Art. 16 to request a generic deferral on behalf of all UN-mandated peacekeepers in Security Council Resolutions 1422 (2002),[28] 1458 (2003), and Resolution 1497 (2003) (in the context of the establishment of a peacekeeping mission in Liberia). These resolutions were initiated by the United States, and carried the threat to veto all future UN peacekeeping missions if they were not approved. There is much debate among international legal experts about whether these resolutions are in keeping with the powers of the Security Council according to the UN Charter or consistent with the Rome Statute, but even if they are not, these are political decisions which have thus far not been subject

[26] There are for example material differences in the character of the ICC and the Sierra Leone Special Court. The ICC is a treaty based organization. It has no enforcement mechansisms. Its efficacy will depend ultimately on the willingness of States to fulfil their obligations of cooperation in good faith. The short term gain of a high profile arrest may be off-set by considerations of damage not only to the peace negotiations themselves, but also to the political relations between the Court and the requested State.

[27] *Informal expert paper: The principle of complementarity in practice*, para. 21.

[28] In Resolution 1422 (2002), the Security Council "*Requests,* consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise." The Resolution also "*Expresses* the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary."

to the review of the Court. The Court may have the power to review a Security Council decision to defer under its "*competence de la competence*" (similar to the review by the International Criminal Tribunal for the former Yugoslavia of the legality of the Security Council Resolution establishing it in the case of *Tadic*.[29])

Can mediators request Security Council referrals and deferrals?

There is nothing in principle that precludes mediators from making strong recommendations in their normal reporting functions asking for the Security Council to make a referral. As a result of the US's position on the ICC, it is widely accepted that the prospect of Security Council referrals are very unlikely in the foreseeable future. Whether this situation would change under a different administration is not clear. The role of mediators might therefore be limited to little more than a moral stance, formally bringing attention to the issue of accountability.

The issue of deferrals is different. The Security Council can require a deferral, regardless of the way in which an investigation was opened. Should mediators strongly feel that an investigation was likely to have serious negative consequences, it may be appropriate for them to make their concerns known to the Security Council and suggest to it that a deferral be ordered.

What cases are currently being considered by the ICC?

The Prosecutor has so far received a referral from the Democratic Republic of Congo (DRC) and from Uganda. In respect of the Ugandan referral, a decision has been taken to open an investigation. In the case of the DRC, preliminary examinations are ongoing and a decision on whether to open an investigation has not yet been made.

In the case of DRC, the Prosecutor had received a large amount of information from victims and human rights organizations especially concerning events in the Ituri region near the Ugandan border. In September 2003 he made it known to the Assembly of States Parties that he was inclined to consider an investigation on his own initiative. However, efforts were made to elicit a referral from the DRC Government, since the Prosecutor realized this would greatly increase the prospects of serious investigations and appropriate guarantees for ICC staff. The referral was made public in May 2004.

The DRC example is interesting in that it demonstrates how the suggestion of an investigation did seem to focus the mind of the Kinshasa government and pave the way for a referral. It is also worth noting that the Prosecutor was prepared to wait a considerable length of time for the referral. It gives an indication of how important the office considers this step. It also shows that the concerns expressed during the Rome negotiations for the ICC statute that the Prosecutor's power to investigate on his own initiative might be imprudently exercised appears to have been ill-founded. The reality is that, especially in the absence of Security Council referrals, State referrals will generally

[29] Tadic, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995.

be sought. Given the recent upsurge in violence in DRC it is clear that there are now more matters to be investigated. It is less clear when conditions will pertain to allow such investigations to be carried out.

The Ugandan referral came as much more of a surprise than the DRC case. There had not been the same level of interest from human rights groups in the Ugandan conflict and much less had been received by way of victim complaints than in the case of DRC. In some ways, the relatively unexpected nature of the referral, which came in December 2003, led to some concerns about the way in which it was handled. First, it was not initially clear if the referral dealt only with alleged crimes of the Lord's Resistance Army. The Prosecutor has clarified that it is not limited in this way and allows for investigation into allegations against government forces too. He has also indicated that he would not accept a referral that attempted to exclude any party from possible investigation.[30] Second, some human rights organizations suggested it was unwise for the Prosecutor to hold a joint press conference with President Museveni when the referral was declared. They felt it could look like manipulation on the part of government and indirectly give the impression of support or approval of Museveni. It is notable that the DRC referral, which came after the Ugandan one, was made public without any similar press conference. Finally, some intergovernmental agencies have indicated that they felt there was insufficient consultation on the possible repercussions the referral could have for those people detained by the Lord's Resistance Army. It would appear that some lessons have already been learned in how the Prosecutor's office will deal with referrals in the future in the light of the Ugandan experience.

4. The Interests of Justice

What factors will guide the discretion of the ICC Prosecutor?

The ICC Statute allows the Prosecutor to choose not to investigate or proceed to trial, where he determines that it would not be in the interests of justice to do so. This element of discretion is potentially controversial but also probably of the most direct significance to mediators as they consider the possible impact of the court in conflict resolution contexts. The Statute mentions four specific areas that fall to be considered under the question of whether the Prosecutor should proceed to trial. These are: the gravity of the crime; the interests of the victims; the age or infirmity of the alleged perpetrator; and the role of the suspect in the alleged crime.

However, the most crucial aspect of the discretion question relates to what other non-specified circumstances might be regarded as relevant for a decision not to take any (or further) action. The four grounds specifically mentioned for consideration indicate that the idea of the interests of justice is close to that of the "public interest". In most jurisdictions not of the civil law tradition it is the consideration of whether a prosecution

[30] The ICC website notification of the referral still refers only to investigations of the LRA.

is in the public interest that determines the decision to proceed.[31] Besides the considerations of the gravity of the crime and the circumstances of the victim and the accused, two other key categories of consideration frequently emerge in the published guidelines as to the exercise of this kind of discretion. These include the question of the impact proceedings would have on national security, and whether or not there exist appropriate alternatives to prosecution.

How will the Prosecutor seek to avoid contributing to political instability?

The threat of instability has forever been the specter that has haunted efforts to ensure accountability for human rights abuses. The main argument usually brought against criminal action is that those in power will simply not agree to give power over or that criminal prosecutions will provoke a crisis of instability threatening the life of the nation. One can look at the transition to democratic Government in Chile in 1990 as an example of the former and the crisis in Argentina in 1987, after successful trials of senior military leaders, as an example of the latter.

While it is true that there exists in certain quarters the view that justice must be done, whatever the price, it is not a view that the ICC was designed to support. The concept of the interests of justice would appear to easily include the notion that trials which threaten the life of the nation at the very least ought to be deferred until such times as the risk has significantly receded. If it is clear that the investigation and prosecution of individuals creates a substantial risk of provoking circumstances likely to lead to precisely the same kinds of dreadful acts that may be the subject of investigations, the ICC will not take that risk. This is so for both practical and ethical reasons. Without any enforcement mechanisms, investigations rely on the cooperation of the State where they occur. The security of staff and witnesses is unlikely to be provided for in circumstances of such real or threatened instability. It also ought to be obvious that the objectives of the Court in terms set out earlier are extremely unlikely to be met if the immediate consequence of prosecution is significant upheaval.

However, it is important to recognize that the Court is in a different position from domestic governments, who may in the past have been willing to give in to such threats, because they in fact lacked a serious inclination to see justice done. The Prosecutor should evaluate the threat of instability through detailed discussion with well-placed sources on the ground with expertise on relevant social, military and political aspects. Even if the ICC is, by definition, more objectively placed to evaluate such threats, it goes without saying that such issues are extremely delicate, and one should always err on the side of caution. The great benefit is that by doing so, the Prosecutor does not close the door on returning to the issue at a later stage.

What may be appropriate alternatives to prosecution within the "interests of justice"?

[31] The public interest consideration is paramount not only in common law jurisdictions, but also in Roman Dutch systems such as The Netherlands, South Africa, Scotland and Sri Lanka. Nowadays some civil law jurisdictions are increasingly moving away from the idea of mandatory jurisdiction in certain circumstances.

One of the common aspects of the concept of the public interest is that a prosecutor may choose not to prosecute if he believes there are appropriate alternatives. The field of transitional justice has developed over the last twenty years looking precisely at the question of what mechanisms, along with or instead of criminal justice, might be invoked to achieve some form of accountability for serious human rights abuses of the past. A complicated question is whether the Prosecutor would ever take the view that it would be in the interests of justice not to prosecute but accept accountability through other mechanisms such as truth commissions, vetting programs and reparation.

The conditions for such a decision would have to take into account two key aspects of the objects of the Statute: the regime established by the treaty emphasizes the duty of states to exercise their criminal jurisdiction in respect of those responsible for international crimes; likewise, as has been noted, the Statute seeks to end impunity by contributing to prevention of such crimes in the future.

The less meaningful a role the prosecution authorities in a State have in a proposed mechanism or set of mechanisms, the more difficult it will be to reconcile it with the objects and purposes of the treaty. Such schemes may involve a targeted prosecutions policy,[32] the creative use of plea-bargaining, reduced or suspended sentences, or alternative sanctions.[33]

However, any alternative to prosecutions, whether it involved the prosecutions authorities or not, would have to meet certain substantive goals for it to be considered in the context of the goal of contributing to the goal of prevention:

- an unambiguous declaration from offenders of their role in past crimes and the context of their participation, including nature of the group or organization, leadership structures and operational issues
- a proportional and direct link between the nature of the confession from an offender and penalties to be applied. The mere act of confession, even with the expression of remorse, would be insufficient. In the absence of incarceration, proportional penalties might include the prohibition from public office, forfeiture of assets or other financial measures, other restrictions on freedom of movement

Whether or not such measures would be appropriate would depend on all the circumstances. It has to be remembered that the treaty is entered into in good faith and

[32] Although they approached matters in different ways, both the prosecution policies in Argentina in 1984 and in Germany after unification could be said to be targeted. In Argentina the main criteria was the leadership role per se and prosecutions began with those bearing the greatest responsibility. In Germany, the focus was on the border killings of those trying to flee to the west, and included both low-level and high-level defendants.

[33] Relevant examples may include the Community Reconciliation Procedures before the Timor Leste Commission for Reception, Truth and Reconciliation; plea bargaining arrangements in Chilean and Peruvian law in respect of serious human rights violations; and proposals for a specialized court in Colombia to investigate paramilitary crimes and impose suspended sentences under a variety of more or less onerous conditions.

that the clear and very strong presumption is that the kinds of crimes under the Court's jurisdiction require effective criminal punishment. If a scheme of alternative mechanisms was devised it would have to be able to show that there were truly exceptional circumstances that indicated the interests of justice would be best served by these means and not prosecution. Bearing in mind the importance the place of the victim has in the ICC regime, the ICC Prosecutor may well be justified in seeking assurances that effective efforts had been made to discuss such alternative mechanisms with victims and that their views had been adequately taken into account in the design of the measures to be taken. The Prosecutor would of course be entitled to review the impact of the mechanisms in question. If it appeared that they were not sufficiently able to meet the goals of the treaty, he may decide to take further action.

Are amnesties permissible under the ICC?

The first thing to recall is that not all amnesties are illegal and that Protocol II to the Geneva Conventions of 1949 specifically requires that efforts are made to grant the most far –reaching amnesty possible on the conclusion of hostilities in relation to civil war. It should be understood that the principal goal of that amnesty is to facilitate the reintegration of insurgents into society and reduce the likelihood for prosecution for crimes such as treason. The Protocol did not seek to provide protection for serious abuses of human rights.

It is broadly accepted nowadays that the prospect for a blanket amnesty in exchange for an end to conflict is simply not acceptable. When most people talk about amnesty they accept that it should be accompanied by some kinds of accountability mechanisms, such as those described in the previous section. It should be understood that to the extent that such alternative mechanisms involved the meaningful exercise of the criminal jurisdiction in terms of plea bargaining and suspended sentence mechanisms, these should not be seen as examples of amnesty, but an exercise of discretion within the powers of those with responsibility for exercising criminal jurisdiction. On the other hand, if the alternative mechanisms entirely by-passed those responsible for exercising criminal jurisdiction, it would indeed be an amnesty. The ICC's main concern in such circumstances would not be whether or not an amnesty had been granted but to what extent the alternatives proposed were capable of meeting the goals of the treaty. Since the ICC would not be precluded from acting if it deemed in due course that the alternative mechanism had either been conceived in bad faith or had failed in practice, the decision of the State to grant an amnesty would, in effect, be relatively immaterial to the considerations of the Court. Naturally, if an amnesty was granted without any proposed alternative accountability measures, it would be unacceptable.

5. Practical Issues Affecting Negotiators

How might negotiators communicate with the ICC?

In considering whether to open an investigation the Prosecutor may seek information from the States, UN organs, intergovernmental organizations, NGOs, and other reliable sources that he deems appropriate. The opinions of those involved in mediation efforts will no doubt figure among such reliable sources. The communication between the Prosecutor and mediators would be on the same terms as that involving other sources. It should not be expected that the Prosecutor will enter into discussion on his plans or strategies, but simply that he takes information into account. The circumstances under which information is received are likely to vary according to each case. On the face of it, there is nothing to prevent direct communications to the Prosecutor: whether mediators can take this route will of course depend on their own mandate and the procedures which govern it.

Can mediators seek to influence the decision on proceeding with an investigation? (Should they?)

The possible impacts of investigations or trials on security and stability issues will of course be of great significance to the Prosecutor. Similarly, assessments of the good faith and capacity of any proposed alternatives to prosecutions would be of value. It may be, therefore, that mediators concerned about the negative consequences of ICC activity should raise these concerns directly with the Prosecutor, provided doing so did not call into question their own impartiality. One tactic they need to keep in mind is to suggest deferral rather than outright opposition to an investigation, as the Statute allows the Prosecutor never to close the door on a future investigation.

What are some of the considerations if a mediator chooses to provide information to the ICC or to testify?

Information that mediators are able to provide, either concerning their face-to-face contacts with persons later accused before international courts, or in terms of the general historical and political background, may be of great interest to international prosecutors. It can be particularly crucial to demonstrating what knowledge senior political or military leaders had that crimes were being committed. Whether a peace mediator should testify in a particular trial is a politically fraught question and has often required a complex process of negotiations, involving not just the particular individual but also the State or organization that mandated him. Several senior mediators have agreed to testify before the ICTY, most notably in the *Milosevic* trial, including Wesley Clark, Carl Bildt, Lord Owen, as well as members of their teams. If a mediator does not want to appear as a witness for either the prosecution or the defence, the option always exists to appear as a witness of the court.[34]

[34] ICTY Rule 98. Although the Statute and Rules of the ICC are not clear on the issue of court witnesses, it may be anticipated that the Court will have a power to call its own witnesses pursuant to its powers to "order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties." ICC Statute Art. 64 (6) (d).

It may be that a mediator prefers to provide information purely for the purposes of investigations rather than to testify. At ICTY, this is anticipated by Rule 70 (B), which states:

> If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.[35]

This Rule is intended to facilitate the provision of information from sensitive sources to the investigative process while shielding the source from the usual disclosure proceedings at trial. Under this Rule, if the Prosecutor elects to call a witness to introduce the information into evidence at trial, the Trial Chamber may not compel the witness to answer any questions relating to the information or its origin if the witness declines to answer on grounds of confidentiality. However, the Rule governing this before the ICC is phrased somewhat differently and is not as helpful,[36] but it may be that the ICC will end up adopting similar procedures.

If a mediator opts to testify, an extensive range of protective measures may apply to protect confidentiality. For instance, in the recent testimony of Wesley Clark in the Milosevic trial, protections included attendance of US representatives in court; closed sessions for certain parts of the testimony; closing the public gallery; delayed broadcasting so as to allow the US government to review the transcript before its release; and reduced scope of examination and cross-examination based on the text of a previously disclosed summary:[37]:

Can mediators be compelled to testify?

The Prosecutor of the ICTY has not resorted to applying to the Court to compel mediators to testify, in spite of the Tribunal's inherent power to compel individuals to do so. In essence such a subpoena would amount to ordering a State to disclose information that it is not willing to disclose, with all the political fall-out that may result, and the Tribunal has generally been reluctant to issue such orders to States other than those of the former Yugoslavia (not least because they risk being disrespected). An argument could still apply that such a person would testify as an individual rather than in their official

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[35] The ICC Statute contains no exact equivalent but Rule 81 (2) states:

> Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an *ex parte* basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

[36] ICTY Rule 70 (D).

[37] Milosevic, Decision on Prosecution's Application for a Witness Pursuant to Rule 70 (B), 30 Oct. 2003.

capacity, but the circumstances in which a negotiator acts in his private capacity may be limited.[38] The State (or organization) therefore most often should be given an opportunity to take a position on the matter.

It is even less likely that the ICC would seek to compel mediators to testify. The powers of the ICC to compel individual witnesses are not explicit, but requests for witnesses to appear must be directed through States Parties, through the regime of cooperation addressed above. Furthermore, under the Rome Statute a State may altogether deny a request for assistance on grounds of national security, although the jurisprudence of the Tribunals has denied a blanket privilege for national security information.[39]

What if a mediator represents the United Nations?

If that witness is an employee or representative of a specific organization such as the United Nations, that organization may have its own arrangements with the ICC. For instance, the Draft Agreement between the Court and the United Nations includes a general commitment by the United Nations to cooperate with the ICC, including allowing its officials to testify and responding to requests for information. Specifically, it currently states in Article 16 that "If the Court requests the testimony of an official of the United Nations or one of its programs, funds, or agencies, the United Nations undertakes to cooperate with the Court and, if necessary and with due regard to its responsibilities and competence under the Charter and subject to its rules, shall waive that person's obligation of confidentiality." .[40]

Can a mediator benefit from a privilege?

If a mediator appears as a witness, a remaining question is whether any of his communications may benefit from a privilege, due to the inherently confidential nature of his work. The ICC Rules take a generic approach to privilege, stating in Rule 73 that "communications made in the context of a class of professional or other confidential relationships shall be regarded as privileged, and consequently not subject to disclosure [. . .] if a Chamber decides in respect of that class that:

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[38] On the distinction of official or private capacity, the ICTY has held that: "It is acknowledged that a distinction should be drawn between information gathered in an official capacity and information gathered in a private capacity. If the information was obtained in the course of performing official functions, it can be considered as belonging to the entity on whose behalf the individual was working." *Simic et al,* Order Releasing *Ex Parte* Confidential Decision of the Trial Chamber, 1 Oct. 1999.

[39] *Blaskic,* Appeals Chamber Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II, 29 Oct. 1997 at para. 64: "[T]o allow national security considerations to prevent the International Tribunal from obtaining documents that might prove of decisive importance to the conduct of trials would be tantamount to undermining the very essence of the International Tribunal's functions."

[40] Similar arrangements have been made by the UN before the ad hoc Tribunals. For instance, a representative from the UN Office of Legal Affairs appeared before the ICTR to relay that the Secretary-General would lift General Dallaire's immunity under certain conditions. The Chamber then issued a subpoena for him to appear, and he testified in closed session, on a list of predetermined issues *Akayesu*, Decision on the Motion to Subpoena a Witness, 19 Nov. 1997.

(a) Communication occurring within that class of relationship are made in the course of a confidential relationship producing a reasonable expectation of privacy and non-disclosure;
(b) Confidentiality is essential to the nature and type of relationship between the person and the confidant; and
(c) Recognition of the privilege would further the objectives of the Statute and the Rules.

The rule mentions a number of categories that may fall into this, including relationships with medical doctors, psychiatrists or psychologists, religious clergy, etc. These examples all tend to suggest that the primary intention of the rule is to guard relationships that are of a strictly private, one-on-one nature, but the concept may also extend to situations where there is a public interest in extending a privilege, and this may encompass mediators.

However, if it is found that communications with mediators are not encompassed in Rule 73, the matter may be resolved by the Courts jurisprudence. A similar (but not identical) case before ICTY concerned a war correspondent for the *Washington Post*, and whether could be compelled to testify on the contents of an interview with the accused (that had been published). The Appeals Chamber of the ICTY decided that war correspondents could be compelled provided that:

(1) Their evidence is of direct and important value in determining a core issue in the case;

(2) The evidence cannot reasonably be obtained elsewhere.[41]

It could be anticipated that a similar test may apply to a particular piece of potential evidence held by negotiators.

6. Positive Implications for Mediation Efforts

For many years the prospect of impunity has been used by those who have committed atrocities as a key condition to their surrendering all or some of their power. Some negotiators may find the creation of the ICC an unwelcome intrusion of albeit laudable ideals on a terrain that requires some very hard and unpalatable bargains to be driven. It is clear the ICC presents a significant new complexity for negotiators, but it is not so clear that its presence in necessarily always an inhibiting factor.

Internationalization of the negotiating context

Whereas previously negotiators could only generally deal in the confines of domestic realities, the ICC internationalizes the context of negotiations. States Parties who are negotiating conflict resolution agreements can expect those agreements to be the subject of scrutiny of the Assembly of States Parties. Such scrutiny, which may at times carry

[41] Ibid., para. 50.

with it implications of economic aid for reconstruction, represents a material change for the context in which negotiators might approach the question of accountability. The existence of a body with both the will and the means to achieve accountability means that negotiators are no longer a hostage only to domestic realities. It may be that in some situations this will allow for greater clarity in persuading parties to conflicts that some degree of meaningful accountability in respect of serious crimes will have to form part of the solution.

Possible deterrent effects

It is also sometimes suggested that an expression of ICC interest in a situation may contribute to short or medium term deterrence in respect of ongoing abuses. Such a claim has been made by some parties in relation to the DRC. It is always very difficult to assess the accuracy of such claims, but it seems likely that the more successful the ICC, the more likely expressions of interest are to have such an effect.

Positive exclusionary effects

The ICC's presence in the frame, as it were, may also assist in allowing negotiators a stronger hand in deciding which parties can sit at the table. If ICC investigations have reached a stage where individuals have been identified as suspects, negotiators may be able to point to this as a factor that might dissuade those individuals from participating, at least directly, in negotiations. While this will of course only have a limited effect on the content of discussions, it may help to foster more confidence in the public generally in the agreements reached, and allow for the beginning of a broadening of the personalities involved in political discourse.

Limiting the issues for mediation

The obligations assumed by States under the ICC Statute reinforce the position that certain kinds of amnesties are simply not negotiable. While this matter has been made clear by the Secretary-General in a number of different ways in respect of mediators representing his office, the ICC obligations now make the prospect of amnesties for war crimes, crimes against humanity and genocide effectively inoperable. The ICC will simply not be bound by them. While this is unlikely to stop parties to negotiations seeking assurances of immunity from prosecution, it at least allows all negotiators to make clear that the matter is essentially out of their control and allows them to concentrate not so much on the issue of amnesty but on the question of what, if any, alternative mechanisms may be appropriate.

7. Conclusions

This paper has tried to set out the political and legal context of the ICC, emphasizing how its creation represents the culmination of a material shift in the way in which states consider the issue of accountability for war crimes, genocide and crimes against

humanity. The creation of the court moves the issue from one of rhetoric to one of practical consequences. While States parties may suggest alternatives to prosecutions, ratification of the Statute creates an extremely strong presumption that criminal prosecution will be the most effective means of achieving the objects and purposes of the treaty and it will be the Court rather than the State that determines whether any such alternatives are acceptable. As such, it has been shown that the issue of amnesty is now of much less significance than it once was. The ICC will not be bound by any amnesty in respect of war crimes, genocide or crimes against humanity. Its determination to act will depend above all on the acceptability of alternative mechanisms. It is the effectiveness of those mechanisms rather than the concession of amnesty that will interest the ICC.

Besides the question of amnesty, the paper has addressed a number of practical considerations of interest to negotiators, including the issues of communications with the Prosecutor and compellability as a witness. Since we are in the infancy of the Court's operations, most of these reflections of course can be nothing more than informed speculation. What seems obvious is that the arrival of the ICC on the international scene presents a new set of very real challenges for negotiators. It is hoped that the attempt to identify positive aspects of this arrival is not merely an act of optimism but something which through an informed and frequent exchange of ideas among all the relevant parties will become a reality.