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# THE INTERNATIONAL CRIMINAL COURT AND CONFLICT MEDIATION

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June 2005

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JUNE 2005

## I. 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;
- The notion in the ICC Statute that the Prosecutor shall forego an investigation if he or she believes it does not serve “the interests of justice,”<sup>2</sup> 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.<sup>3</sup>

## II. DEVELOPMENTS IN CRIMINAL ACCOUNTABILITY

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

Numerous tensions exist over the best tactical, strategic, and political means of securing peace and security during conflict mediation. One of these—which tends to become oversimplified and polarized—concerns prosecuting perpetrators of past human rights abuses. Put simply, the disagreement lies between those who say 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 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 possibility 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 10 or 15 years ago.<sup>4</sup> Most important among these is

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<sup>1</sup> This paper was first presented at a retreat of senior mediators hosted by the Centre for Humanitarian Dialogue in June 2004. Both authors were Senior Associates at the ICTJ at the time of writing. Marieke Wierda has since updated the paper. Paul Seils is now a Senior Analyst in the Jurisdiction, Complementarity, and Cooperation Division of the Office of the Prosecutor of the ICC.

<sup>2</sup> As will be explained below, this decision is subject to review by the Pre-Trial Chamber.

<sup>3</sup> The paper will focus on the positive role of the ICC in conflict mediation because those aspects may not be immediately obvious.

the creation of the ICC and the duties it imposes on State Parties to criminalize in their domestic laws the crimes encompassed by the ICC Statute. In addition, the Secretary-General of the United Nations has maintained an unambiguous position on the issue, taking the question of accountability for grave abuses extremely seriously and including it in his August 3, 2004 report, which gives much prominence to developments in international criminal justice.<sup>5</sup> It is notable that, in the debates that preceded the release of the report, all 15 members of the Security Council went to some lengths to express their commitment to accountability, thus giving an indication of the perception by states of their own obligations in this regard.<sup>6</sup>

The Secretary-General of the United Nations has taken the view that United Nations-endorsed peace agreements can never grant amnesties for genocide, war crimes, crimes against humanity, or gross violations of human rights and that such amnesties do not constitute a bar before UN-created or -assisted courts.<sup>7</sup> International jurisprudence has supported the non-recognition of amnesties, including in cases before the International Criminal Tribunal for the former Yugoslavia (ICTY), the Inter-American Court on Human Rights, and the Special Court for Sierra Leone.<sup>8</sup> Recently, amnesties have been successfully challenged in a number of national courts, including in Chile and Argentina.

This considerably changes the political and legal landscape of the accountability discourse. 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” certain international crimes. The ICC’s formulation recognizes that cases have to be dealt with on an individual basis and 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,<sup>9</sup> subject to the approval of the Pre-Trial Chamber.<sup>10</sup> This makes it clear that the Prosecutor of the ICC does not have an absolute obligation to prosecute. The crucial question, of course, concerns 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 10 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. The debate now revolves around the issues of timing, strategy, and

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<sup>4</sup> Developments include: the creation and continued backing of the ad hoc tribunals for the former Yugoslavia and Rwanda; the exercise and expansion of the concept of extraterritorial jurisdiction, including universal jurisdiction; and the establishment of the Special Court for Sierra Leone and other mixed tribunals for Cambodia, Kosovo, and Timor-Leste, all with the direct participation (albeit in varying degrees) of the United Nations.

<sup>5</sup> Report of the Secretary-General, “The rule of law and transitional justice in conflict and post-conflict societies,” UN Doc. S/2004/616, Aug. 3, 2004, para. 21. Hereafter referred to as the Secretary-General’s report.

<sup>6</sup> See, for instance, UN. Doc. S/PV. 4833.

<sup>7</sup> See the Conclusions and Recommendations section of the Secretary-General’s report.

<sup>8</sup> See the ICTY case of *Furundzija*, Trial Chamber, Dec. 10, 1998, the Inter-American case of *Barrios Altos*, Inter-American Court on Human Rights, Vol. 75 (Series C), paras. 39–41, Nov. 27, 1998, and the Special Court for Sierra Leone case of *Kallon and Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, March 13, 2004.

<sup>9</sup> Articles 15.1, 53.1.C, and 53.2.C and Rule 48 of the Rules of Evidence and Procedure.

<sup>10</sup> Article 53.3.

tactics more than around 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 the issue, 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 to contribute to the prevention of genocide, war crimes, and crimes against humanity.<sup>11</sup> The debate on international justice has tended to focus on the somewhat narrow justifications of deterrence and retribution, ignoring developments in criminal punishment theory and practice. Such narrow justifications lead policy-makers to argue that peace and justice are often competing choices, and they may lead them to equate criminal justice with a form of vengeance, thus casting doubt on the morality of its pursuit over that of forward-looking ideals.

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 also may be more appropriate, especially in the context of systematic and massive abuses, to see prosecutions as playing a positive role of persuasion, encouraging a commitment to democratic values, instead of the more negative view of deterrence as motivating obedience through fear of being caught and punished.<sup>12</sup> Prosecutions should be understood as addressing these multiple goals.

This broader justification has implications for when the ICC should act in the place of national authorities that have assumed obligations under the Rome Statute. The ICC should be seen as a court of last resort and, in many instances, it may act as a catalyst to national proceedings. In other words, the ICC was not formed to compete with states but rather to assist them in ensuring that certain crimes do not go unpunished.

### **III. 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 based on the concept of "complementarity" between the jurisdiction of the ICC and that of the domestic courts of State Parties. In short, the ICC should reserve its operations for those circumstances where State Parties are "unwilling or unable genuinely to carry out the investigation or prosecution."<sup>13</sup> 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.

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<sup>11</sup> See paragraph 5 of the preamble to the ICC Statute.

<sup>12</sup> 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.

<sup>13</sup> Article 17 of the Rome Statute.

### *When does the ICC have jurisdiction?*

The ICC has jurisdiction over persons who commit genocide,<sup>14</sup> crimes against humanity,<sup>15</sup> or war crimes.<sup>16</sup> The crime of aggression also will be included once it is defined, but, as a result of continued disagreement about the term's scope, it is not anticipated that this will be done 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 that is not a party to the treaty or allegedly was carried out by nationals of a non-State Party.<sup>17</sup> A non-State Party may make a declaration accepting the exercise of the jurisdiction of the Court over a crime committed by its nationals or that occurred on its territory after July 1, 2002.<sup>18</sup> The temporal jurisdiction of the Court is over crimes that occurred after the Statute came into force on July 1, 2002, or, in the case of a new State Party, 60 days after it deposits an instrument of ratification (although it may be anticipated that States Parties can also backdate jurisdiction to July 1, 2002).<sup>19</sup>

### *How is an investigation before the ICC 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 or her own initiative; third, the Security Council may refer a situation to the Prosecutor, acting under its Chapter VII powers (even where it concerns crimes committed in the territory of a non-State Party).<sup>20</sup>

Of these, the power of the Prosecutor to initiate investigations on his or her own accord is the most strictly reviewed by the Court. The initial period prior to an investigation, when information comes to the attention of the Prosecutor and may draw his or her interest, is called a "preliminary examination."<sup>21</sup> Unlike with other international criminal courts, if an investigation was initiated *proprio motu*, the decision to proceed from this phase into launching an investigation must be authorized by the Pre-Trial Chamber.

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<sup>14</sup> 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 defined further in a document approved by the Assembly of State Parties on the "Elements of Crimes," U.N. Doc. PCNICC/2000/1/Add.2 (2000).

<sup>15</sup> Article 7. The definition of crimes against humanity reflects the growth in customary international law since earlier definitions contained in the Statutes of ICTY and ICTR.

<sup>16</sup> 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 are committed as "part of a plan or policy or as part of a large-scale commission of such crimes."

<sup>17</sup> Article 12.

<sup>18</sup> Article 12 (2) and (3).

<sup>19</sup> 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. Article 27 (1).

<sup>20</sup> Article 13.

<sup>21</sup> 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, "Fact-finding and investigative functions of the Office of the Prosecutor, including international co-operation," para. 21, to be found at [http://www.icc-cpi.int/library/organs/otp/state\\_cooperation.pdf](http://www.icc-cpi.int/library/organs/otp/state_cooperation.pdf).

A referral from a State Party obviously carries with it the risk of 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 ICC Prosecutor is not bound to act on any such referral, but will only do so if he or she is satisfied that there is a reasonable basis for investigation. Similarly, referrals trigger jurisdiction, and the terms cannot be used to delimit what the Prosecutor may encompass within the preliminary examination and eventual investigations in terms of possible suspects and crimes (although there may be some flexibility to delimit a situation geographically, for instance, as was done in the case of Northern Uganda).

*What must the ICC Prosecutor consider when opening an investigation?*<sup>22</sup>

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 for believing a war crime, crime against humanity, or genocide has been committed;
- Whether the case is admissible and, in particular, whether the relevant State Party is either unwilling or unable to prosecute; and
- 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 the Prosecutor decides to investigate, he or she must obtain the authorization of the Pre-Trial Chamber. If the Prosecutor decides not to proceed with an investigation, he or she must likewise inform the Pre-Trial Chamber.<sup>23</sup> In situations where the Prosecutor has decided not to proceed in the “interests of justice,” the Pre-Trial Chamber may review that decision on its own initiative and the decision shall be effective only if the Pre-Trial Chamber confirms it.

*What is the relationship between the 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 State 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 the matters or intend to investigate them, and they may request that the Prosecutor defer his own investigation. The Pre-Trial Chamber has the power to overrule such a deferral. If it does not, however, 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

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<sup>22</sup> See Article 53 of the Statute.

<sup>23</sup> Should he or she be granted the authorization to proceed with an investigation, similar considerations must inform the work of the Prosecutor throughout the investigation, up to the final decision to prosecute. If the Prosecutor decides not to prosecute, he or she 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 ask the Prosecutor to reconsider.

ability or willingness to deal with the matter.<sup>24</sup> This procedure is called a “preliminary ruling regarding admissibility.”

Under the spirit of the complementarity regime, the Prosecutor generally 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, the Prosecutor’s 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, the Office of the Prosecutor includes a division for the analysis of issues of Jurisdiction, Complementarity, and Cooperation, which seeks to promote a climate in which national investigations or prosecutions could succeed through a degree of cooperation, but which simultaneously seeks to assess whether such an investigation is genuine or the domestic capacity exists for it.<sup>25</sup>

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 in which the 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 that seek intentionally to shield a person from criminal responsibility), general institutional deficiencies, procedural irregularities, and so forth.<sup>26</sup> Inability may refer to a collapse of the national judicial system or to situations in which the state is unable to obtain the accused or the necessary evidence and testimony.

#### *What are State Parties’ 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 on International Cooperation and Judicial Assistance (hereafter “Part 9 obligations”). 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 ICTY and ICTR). Naturally, State Parties and non-State Parties alike may assume obligations voluntarily vis-à-vis the Court beyond the requirements of the Rome Statute.

Consultation with states in the exercise of requests should be ongoing, but noncompliance may result in a Court finding to that effect and the matter may be referred to the Assembly of States Parties or the Security Council (if it was referred by the Council). However, a provision allows states to deny requests for assistance on national security grounds.<sup>27</sup> Without state cooperation, effective investigations will be rendered more difficult (although not necessarily impossible). It is

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<sup>24</sup> Article 18. The Statute establishes the requirement of states to cooperate with the Prosecutor and to keep him or her informed of developments. In exceptional situations, even when 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.

<sup>25</sup> Ways in which the Office of the Prosecutor may seek to bolster domestic processes include by encouraging strong domestic legislation, exchanging information and evidence, providing technical advice, arranging for training, and brokering other types of assistance. See informal expert paper: “The principle of complementarity in practice,” paras. 7-15, <http://www.icc-cpi.int/library/organs/otp/complementarity.pdf>.

<sup>26</sup> Ibid, note 25 in para. 47.

<sup>27</sup> Article 93 (4).

for this reason that so much early effort has been put into 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. As with any justice system, efficacy is 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 three sub-questions about state cooperation that may particularly concern mediators:

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

It may well be that the ICC Prosecutor will use secret indictments, as have been used by ICTY and the Special Court for Sierra Leone (in the case of Charles Taylor). Before the Prosecutor reaches the stage of preparing an indictment, however, various determinations will have been reached and made known to the State Party concerned, including probable contact with the state concerned during the preliminary examination phase and, under Article 18, notification of the intention to investigate. In practical terms, the framing of an indictment will be preceded by multiple interactions with the state concerned. States, the media, and civil society will be able to deduce the broad lines of investigations in some circumstances and may even guess at probable suspects. Nevertheless, the use of secret indictments is likely to be a useful instrument for the Prosecutor in maintaining control of sensitive information, especially in a context where negotiations may be ongoing.

- *Does a state have a duty to arrest an accused in its territory if so requested by the ICC?*

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 probably would occur only in cases where investigations had reached an advanced stage or an indictment had been issued, as states would have to be satisfied about the nature of the case against the suspect (as with any extradition proceeding). In cases where individuals are required to attend peace negotiations, the Prosecutor would consider very carefully whether he or she would jeopardize the success of negotiations by asking for a host state to arrest participants.<sup>28</sup>

- *Does the triggering of Part 9 obligations of the Statute mean that states can no longer actively support a simultaneous peace process for fear of acting in contradiction to their legal obligations?*

The question has been asked whether states are within their legal obligations under the Statute if they simultaneously support a particular peace process and face potential requests for assistance

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<sup>28</sup> In this respect, there are material differences in the character of the ICC and the Sierra Leone Special Court, which unveiled an indictment against then-President of Liberia, Charles Taylor, while he was attending peace negotiations in Ghana. The ICC is a treaty-based organization. It has no enforcement mechanisms. Its efficacy will depend ultimately on the willingness of states to fulfill their obligations of cooperation in good faith. The short-term gain of a high profile arrest may be offset by considerations of damage not only to the peace negotiations themselves but also to the political relations between the Court and the state. The ability of State Parties to guarantee safe passage to such persons to partake in negotiations will be regulated by Article 98 (1), which states that "the Court may not proceed with a request for surrender or assistance which would require the requested state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the cooperation of that third state for the waiver of the immunity."



from the ICC pursuant to Part 9 of the Statute. It may not be possible to make a categorical pronouncement on this. Much depends on the circumstances in which this may occur. Requests for information often will be confidential and much can probably be resolved through dialogue and a spirit of cooperation between the Office of the Prosecutor and State Parties on the timing of requests.

*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.

Before the situation of Darfur came before the Security Council, it was generally presumed that the United States position on the ICC meant that a Security Council referral would be very difficult to achieve in the current political climate. But this changed with the passage of Res/1593 (2005), in which the Security Council decided to “refer the situation in Darfur since July 1, 2002, to the Prosecutor of the ICC.” The referral on Darfur, which occurred fairly early in the life of the Court, was facilitated by the Security Council’s decision to establish an International Commission of Inquiry (ICI) with powers to recommend a course of action on justice issues. The ICI essentially concluded that a Security Council referral to the ICC was the only viable option for criminal justice for crimes committed in the context of Darfur. It remains to be seen whether this first referral will pave the way for future referrals by the Security Council.

Experts have noted that the complementarity regime applies to Security Council referrals,<sup>29</sup> so that an assessment of whether proceedings have taken place or are taking place and of the nature of any such proceedings is still required. 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. This is unclear and is not the view that has been taken by the Office of the Prosecutor. What is clear is that Sudan is obliged to cooperate with the ICC under the Chapter VII powers of the Council. The referral has created a reporting relationship between the ICC and the Security Council that can be used to apply political pressure in the case of lack of cooperation. The first such report of the ICC Prosecutor to the Security Council will occur at the end of June 2005. Resolution 1593 said that while the Security Council recognized that states not party to the Rome Statute have no obligation under the Statute, it urged all states and concerned regional and other international organizations to cooperate fully with the Court.<sup>30</sup>

It is also important to note that the Resolution that referred Darfur to the ICC was one of a series of resolutions that form part of an integrated approach to ongoing atrocities in that region, including: Resolution 1590 (2005), which expressed support for the Abudja peace talks between the government of Sudan and rebel groups and which increased the number of human rights monitors in the region; and Resolution 1591 (2005), which, among other measures, promoted a monitored ceasefire, imposed a regime of targeted sanctions against individuals, and ordered the Sudanese government to cease offensive flights over Darfur.

The Security Council also has the power to request that the ICC defer an investigation or prosecution for a period of one year, which is renewable. Some have referred to this as a likely route for *de facto* amnesties, but in practice any deferral would function more as a stay of

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<sup>29</sup> Informal expert paper: “The principle of complementarity in practice,” para. 21.

<sup>30</sup> The Resolution included a clause, at the insistence of the United States, that exempted nationals from contributing States that are not Parties to the Rome Statute from the jurisdiction of the ICC.

proceedings because it has to be renewed annually by positive resolution. The requirement for a positive resolution also means that none of the P5 members can exercise their veto powers to defer an investigation. (The power to defer again requires a Chapter VII situation.) To date, the Security Council has relied on Article 16 to request a generic deferral in respect of all UN-mandated peacekeepers in Security Council Resolutions 1422 (2002),<sup>31</sup> 1458 (2003), and 1497 (2003) (the last of these was in the context of the establishment of a peacekeeping mission in Liberia). These resolutions were initiated by the United States under a threat of veto of all future UN peacekeeping missions if they were not approved. However, an attempt to renew the generic deferral on behalf of UN-mandated peacekeepers in 2004 failed and the Resolution has not been renewed.<sup>32</sup>

The Court may have the power to review a Security Council decision to defer under its *compétence de la compétence* (similar to the review by ICTY of the legality of the Security Council Resolution establishing it in the case of *Tadic*).<sup>33</sup>

#### *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 that the Security Council make a referral.

The issue of deferrals is slightly different in that 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 Council and to suggest a deferral.

#### *What is the experience of the ICC in terms of its current cases?*

The early developments in terms of cases before the ICC indicate that referrals from under Article 14 of the Statute by State Parties themselves will play a prominent role. The Prosecutor has so far received referrals from three countries: Uganda (January 29, 2004), the Democratic Republic of Congo (April 19, 2004), and the Central African Republic (January 6, 2005). The Prosecutor has also received an Article 12(3) declaration in respect of Côte d'Ivoire that provides the ICC with jurisdiction over events on that territory since September 19, 2002, even though it is not a State Party. In the cases of CAR and Côte d'Ivoire, the Prosecutor has yet to respond with a decision about whether to open an investigation. The Prosecutor announced that he was opening an investigation on Darfur on June 6, 2005. As the Sudan referral by the Security Council has been described above, this section will concentrate on the cases of DRC and Northern Uganda.

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<sup>31</sup> 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 12-month period starting July 1, 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 July 1 for further 12-month periods for as long as may be necessary.”

<sup>32</sup> Instead, the United States has focused on obtaining bilateral agreements with states under Article 98 (2) of the Statute to seek assurances that its citizens or agents will not be surrendered to the ICC.

<sup>33</sup> *Tadic*, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995.

- *The referral on the Democratic Republic of the Congo*

In the case of DRC, soon after taking office, the Prosecutor received a large amount of information from victims and human rights organizations about the conflict in that state, 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, as the Prosecutor realized this would greatly increase the prospects of serious investigations and appropriate guarantees for ICC staff.

The efforts that went into securing a referral in the case of DRC indicate how important the Prosecutor considers referrals. In this respect, the concerns expressed during the Rome negotiations that the Prosecutor's power to investigate on his or her own initiative might be imprudently exercised may appear unwarranted. It is likely that, where possible, state referrals will be sought, as they are desirable in terms of assuring state cooperation.

A potentially challenging factor in the context of DRC is that much of the conflict is beyond the temporal jurisdiction of the ICC. Furthermore, the ICC has had to consider the delicate power-sharing arrangement that underpins the transitional government in DRC. Although the referral made no specific reference to Ituri, the Prosecutor has decided initially to focus his efforts on that region, as that is where the most serious violations within the temporal jurisdiction of the Court have been perpetrated. The militias currently active in Ituri are not part of the national transitional government, and so the potential for derailing the peace process is generally regarded as unlikely compared with the possible impact of investigations in other regions of the country.

- *The referral on Northern Uganda*

The Ugandan referral came as much more of a surprise than the DRC case. There had not been the same level of international attention in terms of the Ugandan conflict (although this is now changing, in part as a result of the referral and ICC activities). In some ways, the relatively unexpected nature of the referral led to some concerns about the way in which it was handled.

First, the terms of the referral concerned only the alleged crimes of the Lord's Resistance Army (LRA). The Prosecutor has since clarified that the referral is not limited in this way and allows for investigation into allegations against government forces as well. He also has indicated that he would not accept a referral that attempted to exclude any party from possible investigation.

Another issue was the impact of the announcement of the referral by means of a joint press conference by the Office of the Prosecutor and President Yoweri Museveni. This caused the perception that the Prosecutor was being manipulated by the government, which is itself party to the conflict. It is notable that the DRC referral, which came after the Ugandan one, was made public without any such press conference.

A third prominent issue that has arisen from this referral is whether the decision by the Prosecutor to investigate and eventually to indict will interfere with Uganda's peace process. Negotiations with LRA have been attempted at various stages during the last decade, with the most prominent attempts by government negotiator Betty Bigombe taking place in 1994 and late 2004 to early 2005. On one recent occasion, Ms. Bigombe even threatened to resign if the Prosecutor decided to indict. Local traditional and religious leaders as well as international humanitarian organizations have indicated that they felt there was insufficient consultation on the possible

negative repercussions the referral could have on ongoing peace initiatives and on their own attempts to entice LRA out of the bush without fear of retaliation, including the Amnesty Act of 2000 and traditional justice mechanisms. This crisis has been responded to mostly with efforts on behalf of the Office of the Prosecutor (and the Registry) to reach out to the parties concerned and to seek their views more proactively through a series of meetings held in The Hague in March through May 2005.

Another issue that has been raised in the context of Northern Uganda is whether, once made, a referral can be withdrawn unilaterally by the state that made it. This arose in the context of the renewed peace negotiations in late 2004, when President Museveni announced that if LRA leaders would surrender, he would withdraw the referral from the ICC and the two parties could instead engage in internal reconciliation mechanisms. However, it is clear that a government cannot unilaterally reverse a referral. The Prosecutor always can choose to proceed *proprio motu* pursuant to Article 15, and he or she is not reliant on the state in this regard. Of course, under Article 53(2)(b), the issue of admissibility has to be assessed before proceeding to trial. A state could argue that it was investigating a matter in this respect and the matter would have to be assessed in terms of the quality of any such proceedings.

- *Current investigations*

For DRC and Northern Uganda, decisions were made to open investigations on June 23 and July 29, 2004, respectively. As mentioned, an investigation on Darfur was opened on June 6, 2005. No decision has been made yet in terms of the initiation of an investigation in relation to CAR or Côte d'Ivoire.

In both DRC and Northern Uganda, the Prosecutor faces the challenges of conducting investigations in the middle of an ongoing conflict. The threat that this poses to witnesses has led the Prosecutor to develop a policy of focused investigations. The Office is conducting as much preliminary work on investigations from outside the country and limiting its in-country missions and contacts to a small number of potential witnesses.

The Prosecutor has stated on several occasions that indictments in Northern Uganda are possible in the near future and that indictments in DRC should follow before year-end. Again, the ICC relies on national authorities for the enforcement of these indictments.

The resources at the disposal of the Office are finite, and the Prosecutor has made it clear that he will target only a small number of people who bear the greatest responsibility. Investigations are driven by analysis and the Office of the Prosecutor employs as many analysts as investigators.<sup>34</sup> The Office also contains a Victims Unit to deal with issues of trauma and witness security assessments.

It is crucial to bear in mind that the ICC Statute gives rise to rights of participation (through legal representation) and of pursuing reparations to victims. The Victims Participation and Reparations Unit of the Registry of the Court is still determining what this will mean in practice. Naturally there will be enormous challenges in terms of the management of expectations in this regard.

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<sup>34</sup> The heavy emphasis on analysis stems from the fact that the Prosecutor is required to investigate “system crimes”. The level of organization of such crimes requires investigations that go beyond the crime-base, to uncover the links between the crimes and those who either ordered these or allowed them to happen.

#### IV. PROSECUTORIAL DISCRETION AND THE INTERESTS OF JUSTICE

*What factors will guide the discretion of the ICC Prosecutor?*

The ICC Statute in Article 53 allows the Prosecutor to choose not to investigate or proceed to trial when he or she determines that it would not be “in the interests of justice” to do so. This element of discretion is potentially controversial, but it is 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 to be considered when deciding whether to proceed to trial: 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 bears some similarities to that of the “public interest.” In most jurisdictions not of the civil law tradition it is the consideration of whether a prosecution is in the public interest that determines the decision to proceed.<sup>35</sup> 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 in national jurisdictions on the exercise of this kind of discretion. These include the question of the impact the proceedings would have, including on stability, and whether there are appropriate alternatives to prosecution.

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

The threat of instability has forever 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 and that insistence on prosecutions therefore will prolong a conflict or subvert a peaceful settlement, or more generally that criminal prosecutions will provoke a crisis of instability.

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 include the notion that trials that directly contribute to an increase in or prolongation of political instability can be deferred until such time as the risk has significantly receded. If it is highly probable that the investigation and prosecution of individuals creates a substantial risk of provoking the same kinds of widespread and dreadful acts that may be the subject of investigations, the ICC naturally would be hesitant to proceed. 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 unlikely to be met if the immediate consequence of prosecution is significant upheaval.

On the other hand, it is important to recognize that the Court is in a different position from domestic governments, which in the past may have been willing to give in to such threats because

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<sup>35</sup> 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 prosecutions in certain circumstances.

they in fact lacked a serious inclination to see justice done. The Court cannot be seen to be a hostage to threats to abandon a peace process (from either side). The current increasing trend of requiring accountability for human rights violations has led the Secretary-General of the United Nations to say that “justice and peace are not contradictory forces. Rather, properly pursued, they promote and sustain one another. The question, then, can never be whether to pursue justice and accountability, but rather when and how.”<sup>36</sup> The relevant issue is therefore the interplay between negotiation efforts and the activities of the ICC, which may be proceeding on parallel tracks. Indeed, these matters increasingly may form part of an integrated strategy that responds to ongoing atrocities, as exemplified in the series of Security Council Resolutions on Darfur.

From the early experiences of the ICC, it is clear that the Prosecutor will seek to evaluate the threat of instability or of prolongation of the conflict through detailed discussion with well-placed sources on the ground who have expertise in relevant social, military, and political aspects. As mentioned, this has happened already in the context of Northern Uganda, where a frequent argument put forth has been that ICC activity and indictments will deter the LRA from participating in the peace process and availing itself of the amnesty, therefore serving to prolong the conflict. Also, by virtue of the ICC being a permanent institution, even if there is a decision to defer an investigation or prosecution “in the interests of justice,” the Prosecutor does not close the door on returning to the case at a later stage.<sup>37</sup> Another useful tool in such situations may be sealed indictments.

It should be noted that the particular nature of the considerations the Prosecutor has in this regard prompted the creation of a separate specialized division that had no parallel in ICTY or ICTR. Part of the Jurisdiction, Complementarity, and Cooperation division’s function is to assess and advise the Office on these issues.

*Would the Prosecutor accept other mechanisms in the place of domestic prosecutions?*

One of the common aspects of the concept of the public interest is that a prosecutor may choose not to prosecute if he or she believes there are appropriate alternatives. The field of transitional justice has developed over the last 20 years, looking precisely at the question of what mechanisms, along with 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 to accept accountability through other mechanisms, such as traditional justice systems, truth commissions, vetting mechanisms, schemes for demobilization, and reparations (to name a few). Although this issue was discussed briefly in the context of the negotiations on the Rome Statute, the Statute is silent on the matter. Decisive guidance also cannot be gleaned about the drafters’ intent from the *travaux préparatoires*, which are commonly resorted to in treaty interpretation.

The conditions for such a decision would have to take into account two key aspects of the object and purpose of the Statute. First, the regime established by the treaty emphasizes the duty of states to exercise their *criminal jurisdiction* in respect of those responsible for international crimes. Second, as has been noted, the Statute seeks to end impunity by contributing to the prevention of such crimes in the future. Whether or not such measures would be appropriate would depend on all the circumstances. But it has to be remembered that the treaty is entered into

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<sup>36</sup> See the Secretary-General’s report, para. 21.

<sup>37</sup> Article 53 (4) states that “the Prosecutor may, at any time, reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.”

in good faith and that the clear and very strong presumption is that the kinds of crimes under the Court's jurisdiction require effective criminal punishment.

In discussing alternatives to prosecution, two additional issues have to be borne in mind. First, some schemes should not be seen as alternatives to prosecution but as amendments of normal prosecution procedures. Therefore, for example, proposals to create a special unit for investigation and prosecution with special provision for plea bargaining and sentencing should be considered under Article 17 on the basis of whether they are genuine attempts to bring the persons concerned to justice. Second, it is important to remember that the Prosecutor has stated that he will in principle target only those with the greatest degree of responsibility. Therefore, there will often, if not always, be a large number of people who will not be the focus of ICC operations. This has sometimes been referred to as the impunity gap. While in broad terms the matter of how a State Party may deal with this is not strictly a matter for the ICC, the Court has indicated that it is concerned about contributing as meaningfully as possible to that debate. This is partly on practical grounds, as measures that address impunity may have significant implications for evidence collection, and partly as a matter of principle, as the ICC is part of a larger process for accountability and is not a stand-alone option.

It is therefore quite likely that the issue of alternatives to prosecutions will figure much more in the context of helping to address the impunity gap than of replacing the work of the ICC in the event that the state concerned is not prepared or able to prosecute those with the greatest degree of responsibility. This does not mean that the Prosecutor will never find himself or herself in circumstances where he or she has to evaluate whether an alternative to prosecutions might be acceptable, but these circumstances are likely to be rare.

Any decisions dealing with the interests of justice will depend on the facts and circumstances of each case, although one can expect an evolution of the factors deemed to be of relevance as the Court encounters more situations. It should also be borne in mind that the decision of the Prosecutor under these provisions is always open for review in the light of new facts or information. Bearing in mind the ultimate objective to overcome impunity, it is likely that the invocation of these powers will be with a view to deferring action until such time as circumstances have sufficiently changed to make prosecutions possible rather than to explicitly recognizing an alternative as acceptable.

#### *Are amnesties permissible under the ICC?*

Not all amnesties are illegal. Indeed, Article 6(5) of Protocol II to the Geneva Conventions of 1949 specifically requires that efforts be made to grant the most far-reaching amnesty possible on the conclusion of hostilities in relation to civil war. It should be understood, however, that the principal goal of that amnesty is to facilitate the reintegration of insurgents into society and to reduce the likelihood of prosecution for crimes such as treason, rebellion, or sedition. In other words, international humanitarian law requires amnesties for the offence of rising in arms against the state and for comparable violations committed by counterinsurgency forces. Article 6(5) of Protocol II does not refer to war crimes or grave breaches of the Geneva Conventions committed by either side.

It is broadly accepted nowadays that the prospect for blanket amnesty in exchange for an end to conflict is simply unacceptable. 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 involve the meaningful exercise of criminal jurisdiction in terms of plea-bargaining and

suspended sentence mechanisms, these should not be seen as examples of amnesty. They are an exercise of discretion within the powers of those with responsibility for exercising criminal jurisdiction. On the other hand, if the alternative mechanisms entirely bypass those responsible for exercising criminal jurisdiction, their application may result in a *de facto* amnesty. The ICC's main concern in such situations would not be whether amnesty had been granted but to what extent the alternatives proposed were capable of meeting the goals of the treaty. In any case, the ICC will not be bound by any such arrangement formulated under a domestic jurisdiction and may still decide to investigate or prosecute.

## V. PRACTICAL ISSUES THAT AFFECT 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 or she deems appropriate. The opinions of those involved in mediation efforts no doubt will figure among such reliable sources. It should not be expected that the Prosecutor will enter into detailed discussion of plans or strategies, but simply that he or she will take information into account. For instance, in recent discussions with Acholi traditional and religious leaders, the Prosecutor publicly stated that he is "mindful of" their traditional justice and reconciliation processes and that he is "sensitive to" their efforts to encourage dialogue between the different actors to promote peace. 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 communication with the Prosecutor. Whether mediators can take this route will depend on their own mandate and the procedures that govern it.

*Can and should mediators seek to influence the decision about proceeding with an investigation?*

The possible impact of investigations or trials on security and stability issues will be of great significance to the Prosecutor. Similarly, assessments of the good faith and capacity of any proposed alternatives to prosecution 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 (as was done by the Acholi leadership and by official negotiator Betty Bigombe), provided that doing so does not call into question their own impartiality. One tactic mediators need to keep in mind is to suggest deferral rather than the outright closing of an investigation, as the Statute does not support the Prosecutor closing the door on a future investigation.

*Can mediators be called to testify?*

This question can be broken down into several aspects:

- What are some of the considerations if a mediator volunteers to provide information to the ICC or to testify?
- Will mediators benefit from a privilege?
- Can mediators be compelled to testify?

But first, it may be relevant to consider the impact of the Relationship Agreement between the ICC and the United Nations. If a potential witness is an employee or representative of the United Nations, the issue of whether he or she will be called to testify will be regulated by the



Relationship Agreement. This Agreement 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 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.”<sup>38</sup> This provision is potentially far-reaching and its implications remain to be seen. Some of the considerations that may arise that are particular to mediators are laid out below.

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

Information that mediators are able to provide, either concerning their face-to-face contact with persons later accused before international courts or the general historical and political background, may be of great interest to international prosecutors. It can be particularly important to demonstrating what knowledge senior political or military leaders had that crimes were being committed, which is a crucial element of command responsibility.

Whether a peace mediator should testify in a particular trial is a politically fraught question and it has often required a complex process of negotiations that involved not just the particular individual but also the state or organization that mandated him or her. It may be instructive to look at the practice of the ad hoc tribunals in this regard. Several senior mediators have agreed to testify before ICTY, most notably in the *Milosevic* trial, including Wesley Clark, Carl Bildt, and 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 defense, the option exists to appear as a witness of the court.<sup>39</sup>

It may be that a mediator prefers to provide information purely for the purposes of investigations rather than to testify. At ICTY, which has more developed rules on witness testimony than the ICC, 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.<sup>40</sup>

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<sup>38</sup> Similar arrangements were made by the UN before the ad hoc tribunals. For instance, a representative from the UN Office of Legal Affairs appeared before ICTR to relay that the Secretary-General would lift General Romeo 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, Nov. 19, 1997.

<sup>39</sup> 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).

<sup>40</sup> 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

This Rule is intended to facilitate the provision of information from sensitive sources, such as governments or humanitarian organizations, 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 (as the witness is acting purely as the representative of the source of the information). No such Rule currently exists before the ICC,<sup>41</sup> but it may be that the ICC will end up adopting similar procedures.

If a mediator or political representative opts to testify, an extensive range of protective measures may apply to protect confidentiality. For instance, in the testimony of Wesley Clark in the Milosevic trial, protections included attendance of U.S. representatives in court, closed sessions for certain parts of the testimony, closing the public gallery, delayed broadcasting so as to allow the U.S. 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.<sup>42</sup> Similar measures may be available before the ICC.

*May a mediator appear but invoke a privilege in response to certain questions?*

If a mediator appears as a witness, a related question is whether his or her communications may benefit from a privilege because of the inherently confidential nature of the work. This would mean that the mediator could not be forced to testify on issues regarding those communications. 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:

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

The Rule mentions a number of categories that may fall under this, including relationships with medical doctors, psychiatrists or psychologists, religious clergy, and so forth. These examples 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 extend to situations where there is a public interest in extending a privilege, and this may encompass mediators.

However, if it is found that Rule 73 does not encompass communications with mediators, the matter may be resolved by the Court’s jurisprudence. An instructive case before ICTY in this regard concerned a war correspondent from the *Washington Post*, and whether he could be compelled to testify on the contents of an interview with the accused (that had been published).

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may not introduce such material or information into evidence during the confirmation hearing or the trial without adequate prior disclosure to the accused.

<sup>41</sup> ICTY Rule 70 (D).

<sup>42</sup> *Milosevic*, Decision on Prosecution’s Application for a Witness Pursuant to Rule 70 (B), Oct. 30, 2003.

The Appeals Chamber of ICTY decided that war correspondents could be compelled to testify provided that:

1. Their evidence is of direct and important value in determining a core issue in the case; and
2. The evidence cannot reasonably be obtained elsewhere.<sup>43</sup>

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

*Can mediators be compelled to testify by the ICC?*

If past experience is anything to go by, the Prosecutor of ICTY generally has not resorted to seeking to compel mediators to testify, despite the Tribunal's inherent powers to compel individuals to testify. Since the mediator in question is a representative of a state or organization, a subpoena in the case of that individual would amount to ordering a state or organization to disclose information that it is not willing to disclose, with all the political fall-out that may result. The Tribunal has been reluctant to issue such orders not least because it risks being disrespected. An argument could still be made that such a person would testify as an individual rather than in his or her official capacity, but the circumstances in which a negotiator acts in a private capacity may be limited.<sup>44</sup> The state or organization in question therefore 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. Requests for witnesses to appear must be directed through State Parties, through the regime of cooperation addressed above. The powers of the ICC to compel witnesses to testify are unclear. Furthermore, under the Rome Statute, a state may deny a request for assistance on grounds of national security. All these factors would indicate that it is unlikely that the ICC would compel testimony from senior negotiators.

## **VI. 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 is necessarily always an inhibiting factor. In fact, the establishment of the ICC may be said to have the following positive implications.

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<sup>43</sup> Ibid., para. 50.

<sup>44</sup> On the distinction of official or private capacity, ICTY has asserted: "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, Oct. 1, 1999.

### *Internationalization of the negotiating context*

Whereas previously negotiators could only generally deal in the confines of domestic realities, the ICC further internationalizes the context of negotiations. Such scrutiny, which at times may carry 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 an external body with both the will and the means to achieve accountability means that negotiators are no longer 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 has been suggested that an expression of ICC interest in a situation or the opening of an investigation 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 DRC. It is always very difficult to measure deterrence, but it seems likely that the more successful the ICC, the more likely it is to have such an effect.

### *Positive exclusionary effects*

The ICC's presence in the frame, as it were, may 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 would have only a limited effect on the content of discussions, it may help to foster more confidence in the public in the agreements reached and allow for the beginning of a broadening of the personalities involved in political discourse. In the longer term, it also may affect the perception of the public or a particular faction of the political viability of a particular leader and may lead to his eventually being sidelined.

### *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 of the United Nations in respect of mediators representing his office, ICC obligations now make the prospect of amnesties for war crimes, crimes against humanity, and genocide unlikely even where the UN is not leading the mediation. The ICC itself will not be bound by them and they may contravene the legal obligations of State Parties to investigate or prosecute under the Statute. While this is unlikely to stop parties to negotiations from 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 to concentrate less on the issue of amnesty and more on the question of what other measures that address past abuses may be appropriate.

## **VII. 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 State 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 that it will be the Court and not 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, not least because of the decisive pronouncements by the United Nations in this regard. The ICC will not be bound by any amnesty granted in respect of war crimes, genocide, or crimes against humanity. 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 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 that, through an informed and frequent exchange of ideas among all the relevant parties, will become a reality.



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