

Amnesties, Pardons And Complementarity: Does The International Criminal Court Have The Tools To End Impunity?

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Abstract

The goals of the International Criminal Court as outlined in the Preamble are the prosecution of the most serious international crimes and the ending of impunity for the perpetrators thereof. This article aims at providing an introduction to the complementarity regime, provided for under the Rome Statute. The author looks at the issue of amnesties and pardons, and addresses the question of whether the Court is likely to succeed in its goals. The author concludes that, while there may be a simple solution to the problem of amnesties and pardons, whether or not the Court will succeed in its goals will depend upon the Court's interpretation of the complementarity provisions. More generally, the author points out the problem inherent to the complementarity system: it is reliant upon unwilling States co-operating with no real means (failing a Security Council referral) of compelling them so to do.

The Rome Statute of the International Criminal Court¹ (Rome Statute) was adopted on 17 July 1998 and entered into force on 1 July 2002. The International Criminal Court (ICC) aims at prosecuting the most serious crimes of international concern² and at ending impunity for individuals who commit these crimes.³ The crimes that come under the jurisdiction of the Court are genocide, crimes against humanity, war crimes and the crime of aggression,⁴ although the latter will not come into force until State Parties have agreed on a definition of aggression.

The principle of complementarity governs whether a case is admissible before the Court. It is affirmed by paragraph 10 of the Preamble and in Article 1 of the Statute. Both these provisions state that the ICC 'shall be complementary to national criminal jurisdictions.'

The purpose of this article is to introduce the complementarity regime under the Rome Statute and to examine how, if at all, the Statute's silence on the issue of amnesties and pardons is reconcilable with the ICC's ambitious goals as contained in the Preamble. The author shall then conclude by looking at whether the ICC has the necessary tools to fulfil its ambitious goal of ending impunity for those who commit the gravest international crimes.

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¹ Rome Statute of the International Criminal Court 1998, 37 ILM 999, 6 IHRR 232 1999.

² Preambular paragraph 4.

³ Preambular paragraph 5.

⁴ Article 5, Rome Statute, supra n. 1.

The main provision outlining the principle of complementarity is Article 17, which outlines criteria for a situation to be admissible before the court. The Court is to declare a case inadmissible where it has been, or is being ‘investigated or prosecuted by a State that has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.’⁵ A case will also be inadmissible where it has been investigated by a State with jurisdiction over it and the State has decided not to prosecute ‘unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.’⁶ Finally, a case will be inadmissible where the person concerned has already been tried for the conduct and a retrial is not permitted under Article 20(3) (exceptions to the *ne bis in idem* principle) or ‘the case is not of sufficient gravity to justify further action by the Court.’⁷

The Court does not have primacy over national criminal jurisdictions and must defer to them unless they are unwilling or unable to investigate or prosecute the conduct complained of. The Statute develops the meaning of these two broad concepts in Article 17(2) for unwillingness, and Article 17(3) for inability.

Article 17(2) sets out three criteria that the Court may consider in order to establish whether a State is unwilling to investigate or prosecute, ‘having regard to the principles of due process recognised by international law.’ Article 17(2)(a) provides that a State would be unwilling if the proceedings were, or are being undertaken, or the national decision was made with a view to shielding the person from criminal responsibility for crimes within the jurisdiction of the Court. Article 17(2)(b) provides that an unjustified delay in proceedings inconsistent with an intent to bring the person to justice would constitute unwillingness. Finally, Article 17(2)(c) states that if proceedings are not being conducted in an impartial or independent manner, or in any other manner inconsistent with intent to bring the person to justice, this too is evidence of the State’s unwillingness.

These criteria were intended to give an air of objectivity to the test for unwillingness. However, it is argued here that there is an inherent subjective element to all these criteria; they all rely on establishing some form of State intent. This is notoriously difficult to establish, as a State is an abstract entity and not a natural person. This argument is reinforced by Kleffner, who points out that ‘[unwillingness] refers to the “purpose” for which the proceedings are undertaken and the “intent” of a State, which underlines that determining “unwillingness” involves an assessment of a State’s subjective motives behind such proceedings.’⁸

John Holmes⁹ provides assistance in respect of these criteria. Although the criteria have been criticised for creating too high a standard for the Prosecutor to reach in his attempts to get a case declared admissible,¹⁰ Holmes maintains that part of the principle of complementarity is that the Court would not interfere except in blatant cases of State unwillingness, so a high threshold is required. In addition, the Office of the Prosecutor

⁵ Article 17(1)(a), Rome Statute.

⁶ Article 17(1)(b), Rome Statute.

⁷ Article 17(1)(c) and (d), Rome Statute.

⁸ Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal law’, (2003) 1 *Journal of International Criminal Justice* 86 at 86.

⁹ Holmes, ‘Complementarity: National Courts Versus the ICC’, in Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Volume I (Oxford: Oxford University Press, 2002), Chapter 18.1 at 667.

¹⁰ See Arbour and Bergsmo, ‘Conspicuous Absence of Jurisdictional Overreach’, (1999) 1 *International Law Forum du droit international* 13.

Policy Paper¹¹ states that initially, only cases where there has been a clear failure to investigate/prosecute will be investigated. The shielding concept in Article 17(2)(a) is possible to prove because Article 5 crimes necessarily involve a number of perpetrators. Therefore, a number of prosecutions will be required to demonstrate willingness. However, war crimes do not necessarily involve many people so shielding may well be harder to prove in such cases. Holmes argues that investigations and prosecutions leading to ‘sham trials’ and obvious departures from the usual criminal proceedings in a State would be good evidence of shielding.¹² Also, the proviso in Article 17(2) that the Court must have regard to internationally recognised standards of due process, according to Holmes, could mean that a departure from the recognised criminal procedure of a State would not be in conformity with international standards of due process and would, therefore, be evidence of a *mala fide* intent to shield.

Such comparative analysis is also the tool advocated by Holmes with respect to Article 17(2)(b). He argues that the Court will have to use objective factors in assessing whether or not there has been an unjustified delay in proceedings inconsistent with an intent to bring the person to justice.¹³ The length of time taken in the national jurisdiction to investigate and prosecute similarly serious domestic crimes will have to be the benchmark. A longer period without good reason may indicate unwillingness under Article 17(2)(b). Furthermore, Article 17(2)(c) overlaps with (a). Holmes argues that certain aspects of a *bona fide* trial can remove impartiality or independence when compared to usual proceedings, for example, the use of a politically motivated special adjudicator in otherwise normal proceedings would remove impartiality and independence.¹⁴

Rule 51 of the Rules of Procedure and Evidence (RPE), which covers information provided under Article 17, reinforces the importance of comparative analysis. It states that a State can provide the Court with evidence that its criminal procedures have previously complied with internationally recognised standards of due process in cases of a similar nature. Holmes argues that although States are not obliged to provide such evidence to the Court, a failure to do so will not make a good impression and will make the Prosecutor’s task of establishing unwillingness far easier.¹⁵

This author would argue that although comparative analysis will prove to be a useful tool, it would by no means solve all the problems of establishing the intent of a State of shielding someone from prosecution. The majority of cases that will come before the ICC will arise from a State’s unwillingness to prosecute. Holmes himself argues elsewhere that, ‘If such inaction or sham steps by States are obvious, the Prosecutor will have little difficulty convincing the Court the case should be found admissible. However, a State looking to avoid an admissibility decision is likely to be more subtle in the steps that it takes.’¹⁶

This author would argue that the risk of unwilling States evading the ICC under a veil of verisimilitude is far greater. Comparative analysis may not help in detecting the

¹¹ Paper on Some Policy Issues Before the Office of the Prosecutor, September 2003. Available at: www.icc-cpi.int/otp/otp_policy.html.

¹² *Supra* n. 9 at 675.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ Holmes, ‘Jurisdiction and Admissibility’, in Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Ardsley: Transnational Publishers, 2001) 336.

¹⁶ *Ibid.*

'subtle steps' that an unwilling State is likely to take. For example, a State in which genocide occurs is unlikely to have evidence of previous prosecutions for genocide, as it is unlikely to occur twice in the same State. Previous cases on multiple murders are unlikely to be of help to the Court in establishing willingness to investigate and prosecute genocide, as they probably would not have entailed the 'special' or 'specific' intent in their *mens rea* that genocide does.¹⁷ In such cases, how will the Court determine that 'subtle steps' taken by an unwilling State are not genuine when they *prima facie* appear to be genuine? An unwilling State is highly unlikely to be obviously unwilling and will nearly always strive to appear willing with a view to preventing the ICC from declaring the case admissible. Distinguished international lawyer Antonio Cassese has himself pointed out that '[complementarity] might amount to a shield used by states to thwart international justice.'¹⁸

This author would argue that the criteria for establishing unwillingness may work too much in favour of unwilling States (especially when seen in conjunction with Article 18 and 19 procedures that can be used to slow down or even halt the process altogether)¹⁹ and may prove too difficult for the Prosecutor to satisfy. Obviously, this is mere speculation until we have a case of an unwilling State before the Court and see how Article 17 is interpreted. However, it should not be long until we find out when we consider what is going on in the Sudan at the moment. The Security Council under Resolution 1593 has referred the situation in the Darfur region of the Sudan to the ICC.²⁰ However, the Sudanese Government has asserted that it will not extradite any of its nationals to the ICC²¹ and is creating a special court to try war criminals itself.²² This is all well and good, but doubts have been raised as to the *bona fides* of this initiative. Kolawole Olaniyan, director of Amnesty International's Africa Programme said 'the special court may just be a tactic by the Sudanese Government to avoid prosecution by the ICC.'²³

Inability for the purposes of Article 17(3) is far less problematic and far more objective. It provides that a State is unable to investigate or prosecute when there has been a total or substantial collapse of its national judicial system, rendering it unable to obtain the accused, relevant evidence or witness testimony. Obviously, how broadly the term 'substantial' is interpreted is a matter for the Prosecutor and the Pre-Trial Chamber, but this author does not envisage too many problems. A judicial system is either able to function in its totality or it is not. Holmes asks the question (indicate the relevant page in the footnote) of what would happen when the police and prosecutorial personnel are able to investigate the conduct and even bring charges, but the courts and the judiciary have been destroyed following an armed conflict.²⁴ Would the Court be barred from declaring the situation admissible simply because it had been investigated?

¹⁷ Article 6, Rome Statute states that a person committing genocide must have 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such'.

¹⁸ Cassese, 'The Statute of the International Criminal Court: Some Preliminary Reflections', (1999) 10 *European Journal of International Law* 144 at 159.

¹⁹ Holmes, *supra* n. 9.

²⁰ SC Res. 1593, 31 March 2005, S/RES/1593 (2005).

²¹ 'African Union Says Darfur Rebel Groups Have Ceased Fire Ahead of Peace Talks in Nigeria', *Associated Press*, 8 June 2005.

²² Osman, 'Sudan Aims to Try Darfur Suspects at Home', *Associated Press*, 14 June 2005.

²³ Amnesty International Press Release, 'Sudan: National court for crimes in Darfur lacks credibility', 13 June 2005.

²⁴ *Supra* n. 9 at 673.

This author would point out that Article 17(1)(a) states that a case is admissible if a State is 'unable genuinely to carry out the investigation or prosecution'. On a strictly literal interpretation, this implies that only an investigation or a prosecution need to be carried out, not both. Therefore, the answer to Holmes' question would be affirmative. However, the author sincerely doubts that the Court will interpret this provision so narrowly and would argue that a teleological interpretation will mean that an investigation and prosecution are required. Had the word 'and' been used instead of 'or' it would be even less problematic because the requirements would be cumulative. However, it is argued here that this provision is unlikely to create many difficulties for the Court. Indeed, the Democratic Republic of the Congo,²⁵ Uganda²⁶ and the Central African Republic²⁷ have referred their own situations to the Prosecutor because they consider their own judiciaries unable to effectively investigate or prosecute, and waived their right to primary jurisdiction altogether.

Kleffner argues further that a State may be deemed unable to investigate or prosecute if they have not adequately implemented the Rome Statute.²⁸ He points out that paragraph six of the Preamble requires all States to exercise their jurisdiction over the crimes contained in Article five (although this is non-binding). He also points to overwhelming State-practice in implementation to point to an implied obligation upon States to implement the Statute. Kleffner argues from a teleological perspective that there must be a duty to implement because otherwise the whole idea of having a complementary ICC would be undermined; the ICC would be a 'first (and only) instance' court, not a complementary one.²⁹

Probably the single greatest lacuna in the Rome Statute is that it is silent on the question of the legitimacy of pardons and amnesties. Blanket amnesties granted prior to investigation or prosecution do not *prima facie* seem to pose a problem for the Court, as they would constitute a clear case of a State being unwilling to carry out the investigation or prosecution for the purposes of Article 17(1)(a). Should a State enact a blanket immunity law so that no investigation of, prosecution of, or remedy for serious international crimes is available, this would clearly show unwillingness on the part of that State. Mohamed M. El Zeidy³⁰ suggests that if the Court adopted a literal reading of Article 17, then amnesties would prevent the Court from declaring a case admissible because the criteria for establishing unwillingness under Article 17(2) are limited to when an investigation or prosecution has already begun. An amnesty granted before investigation would not, therefore, constitute unwillingness. However, such a purely literal reading is highly unlikely to be adopted by the Court. A brief teleological perusal of the Preamble,³¹ such as Kleffner's in the above paragraph, will reveal that such an interpretation would undermine the entire Statute and the Court itself.

²⁵ ICC Press Release, 'Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo', 19 April 2004.

²⁶ ICC Press Release, 'President of Uganda Refers Situation Concerning the Lord's Resistance Army to the International Criminal Court', 29 January 2004.

²⁷ ICC Press Release, 'Prosecutor Receives Referral Concerning Central African Republic', 7 January 2005.

²⁸ *Supra* n. 8 at 87.

²⁹ *Ibid.* at 89.

³⁰ El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Law', (2002) 23 *Michigan Journal of International Law* 869 at 940.

³¹ *Supra* n. 2 and n. 3.

However, Dugard raises concern over potential conflicts between the ICC and Truth and Reconciliation Commissions (TRC's), such as the one in South Africa, which themselves hand out amnesties in return for truth-telling.³² He argues that such conflicts are likely to happen and that the ICC will be called upon to recognise such amnesties either as a bar on prosecution or as a mitigating factor at the sentencing stage. Dugard points out that although TRC's and prosecutions are compatible in theory, in practice TRC's are usually set up because the option of prosecution is not available.³³ He argues that, although silent on the issue, the Rome Statute does not generally allow amnesties. Amnesties, he says, are not compatible with paragraph six of the Preamble, although this is not binding. Dugard states that had the Rome Statute intended to allow amnesties, special provision would have been made for them. Only the ICC, therefore, should allow amnesties in exceptional circumstances and when created through a legitimate TRC, but never in cases involving crimes where there is a clear obligation upon States to prosecute or extradite.³⁴

Of major concern, however, is the apparent loophole the Statute's silence on the issue of pardons leaves. Delegations at the Rome Conference were loath to include an express prohibition on the matter for fear of creating a court with intrusive powers that could interfere with the administrative (i.e. granting parole) or political (i.e. amnesties, pardons) decision-making processes. A cursory glance at the Statute would suggest that a State could investigate, prosecute, convict and sentence a person for an Article 5 crime and subsequently pardon them without the Court being able to act. El Zeidy³⁵ points out that this is not 'merely hypothetical' and cites the example of William Calley in the USA.³⁶ What could the Court do about this? A State may not be branded unwilling or unable to investigate or prosecute because it did so genuinely for the purposes of Article 17 and then pardoned the person after an insignificant period in prison. 'This is a serious lacuna.'³⁷

The principle of *ne bis in idem* in Article 20 is also of importance in that a person duly tried and convicted by a national court for conduct falling within the jurisdiction of the ICC may not be retried by the Court for the same conduct. This is subject to two exceptions. First, the case may be retried if the proceedings in the other court were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.³⁸ Second, if the proceedings were not impartial or independent in accordance with internationally recognised standards of due process and in a manner inconsistent with an intention to bring the person to justice.³⁹ Hence, it would appear that the ICC would be prevented from retrying a person if they were pardoned after a genuine trial and conviction.

³² Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions', in Cassese *et al* (eds), *supra* n. 9, 693.

³³ *Ibid.* at 694 and 695.

³⁴ See *infra* n. 42.

³⁵ *Supra* n. 30 at 944.

³⁶ Calley was convicted of war crimes in the USA for the massacre of hundreds of civilians at My Lai during the Vietnam conflict. He was sentenced to life imprisonment but was subsequently pardoned by President Nixon and served only three years under house arrest. See Eckhardt, 'My Lai: An American Tragedy', (2000) 68 *University of Missouri at Kansas City Law Review* 671.

³⁷ Van den Wyngaert and Ongena, '*Ne bis in idem* Principle, Including the Issue of Amnesty', in Cassese *et al* (eds), *supra* n. 9, 705 at 727.

³⁸ Article 20(3)(a).

³⁹ Article 20(3)(b).

Van den Wyngaert and Ongena⁴⁰ and Dugard⁴¹ give one possible solution to this problem. They argue that there may be a rule under customary international law against amnesties and pardons following convictions for crimes under the jurisdiction of the ICC, nullifying such pardons so that they are effectively non-binding upon the Court. It has been argued convincingly that crimes under the Rome Statute carry with them universal jurisdiction with a customary *erga omnes* obligation upon States *aut dedere aut judicare* (to prosecute or extradite).⁴² Therefore, for a State to grant an amnesty prior to, or a pardon subsequent to an investigation and prosecution, would render that State in breach of their obligation to prosecute or extradite, making the amnesty or pardon null and void. Such reasoning is convincing with regards to amnesties granted prior to prosecution because this is a clear occasion of a failure to prosecute the alleged conduct. As we have seen, the ICC can declare such cases admissible under Article 17 anyway. The argument is less convincing when applied to pardons granted after a genuine investigation and prosecution. For example, in the case of Calley in the US, could the US have been seen to have failed in its customary duty to prosecute Calley for the war crimes that were committed in My Lai?⁴³ It would appear not.

Bassiouni argues that the prohibitions of genocide, crimes against humanity and war crimes are *jus cogens* norms of international law.⁴⁴ He argues that a number of duties arise from this classification including the obligation *aut dedere aut judicare* and the elimination of statutes of limitations and immunities up to and including heads of states. He goes on to state that ‘The crimes establish inderogable protections and the mandatory duty to prosecute or extradite accused perpetrators, and to punish those found guilty, irrespective of locus since universal jurisdiction presumably applies.’⁴⁵ It is, however, somewhat unconvincing to suggest that the customary requirement of *aut dedere aut judicare* stretches to include a duty to make sure a sentence is carried out to its full extent, or some kind of customary duty to punish to the full extent of the law. One would have to find State practice and *opinio juris* to support such a claim, which unfortunately, Bassiouni does not provide.

El Zeidy⁴⁶ takes a similar approach to Bassiouni, but takes the argument further. He argues firstly that the prohibitions against genocide, crimes against humanity and war crimes have attained the hierarchically superior status of *jus cogens* norms of international law. Resulting from this is the universal jurisdiction of States and the *erga omnes* obligation *aut dedere aut judicare*. He argues that amnesties and pardons are in breach of these obligations and therefore not binding. This view is reinforced by the decision of the Special Court for Sierra Leone in the *Lomé Amnesty* decision.⁴⁷ The arguments above apply to this reasoning as to why a pardon after a conviction may not

⁴⁰ Supra n. 37.

⁴¹ Supra n. 32.

⁴² See O’Shea, *Amnesty for Crime in International Law and Practice* (The Hague: Kluwer Law International, 2002), 228 at 228; Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, (1991) 100 *Yale Law Journal* 2537; Bassiouni, ‘Searching for Peace and Achieving Justice: The Need for Accountability’, (1996) 59 *Law and Contemporary Problems* 9; and, Roht-Arriaza, ‘State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law’, (1990) 78 *California Law Review* 449.

⁴³ Supra n. 36.

⁴⁴ Supra n. 42 at 16.

⁴⁵ Ibid. at 17.

⁴⁶ Supra n. 30.

⁴⁷ *Kallon, Kamara*, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Case No. SCSL-2004-15-AR72(E) at para. 66.

constitute a breach of these obligations. However, El Zeidy further argues that because the Rome Statute is silent on the issue of amnesty and pardons (and because the drafting history shows that a provision was left out on purpose), this means that the Statute permits as lawful all such amnesties/pardons. Because the prohibitions against the ICC crimes are *jus cogens* norms of customary international law which do not allow for derogation, the Rome Statute is in breach thereof and is therefore null and void under Article 53 of the Vienna Convention on the Law of Treaties 1969 (VCLT).⁴⁸

There are, however, serious problems with El Zeidy's reasoning. Firstly, he does not take account of Article 10 of the Statute which states that nothing contained in the Rome Statute 'shall be interpreted as limiting in any way existing or developing rules of international law...'. The Statute is very clear on this point: Part II thereof is not intended to alter or limit any existing rules on universal jurisdiction, nor any possible, emerging customary prohibition against amnesties or pardons for serious international crimes.

Secondly, just because a treaty does not explicitly provide that a certain act is unlawful, one cannot assume that the instrument is thereby implicitly providing that the act is lawful. Article 31 of the VCLT states that a treaty should be interpreted 'in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of their object and purpose', and moreover, Article 31(c) states that 'any relevant rules of international law applicable in the relations between parties' shall be taken into account along with context. Hence, even if a treaty is silent on existing customary international law relevant to it, one should not assume it is in breach thereof, but rather interpret the treaty in light of the customary rules. Article 32 of the Vienna Convention allows for supplementary means of interpretation, including the preparatory work of the treaty, when the meaning of the treaty is still not clear after applying Article 31. Zeidy argues that because the Statute is purposefully silent on the issue of amnesty/pardons, it therefore implies they are lawful. It is clear that the drafters at Rome intended to leave out a provision for fear of creating a Court with too much intrusive power into State sovereignty. This does not mean, however, that the States at Rome intended to legalise blanket amnesties and spurious pardons after prosecution in all cases. Such an interpretation would be inconsistent with Preambular paragraphs four, five and six which outline the objectives and motivations for the Court.

The final problem with Zeidy's work is the connection he makes with *jus cogens* norms and universal jurisdiction. Just because a norm is *jus cogens*, it does not necessarily follow that a breach thereof gives rise to universal jurisdiction with an *erga omnes* obligation *aut dedere aut judicare*. The ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 in Article 41, concerning consequences of a serious breach of a peremptory norm, states in paragraph 2 that, '[n]o State shall recognise as lawful a situation created by a serious breach ... nor render aid or assistance in maintaining that situation'. No mention is made of an *erga omnes* duty to prosecute or extradite or of compulsory universal jurisdiction. Therefore, it is unlikely that the entire Rome Statute will be declared null and void for being in breach of a peremptory norm for the purposes of Art 53 of the Vienna Convention.

A second solution suggested by Van den Wyngaert and Ongena,⁴⁹ and advocated by others,⁵⁰ is that the ICC should give a very broad interpretation to the term

⁴⁸ Vienna Convention on the Law of Treaties 1969, 1155 UNTS 311.

⁴⁹ *Supra* n. 37.

‘proceedings’ in Article 20(3). This would mean that a pardon granted after a conviction and sentencing would lead the ICC to presume that the whole proceedings were conducted for the purpose of shielding the individual for the purposes of Article 20(3)(a), therefore allowing a retrial before the ICC. This presumption would not have had to exist at the time of the proceedings. This author would argue that the term ‘were’ in Article 20(3) could be of crucial importance in this respect. Because this is in the past tense, it implies that a presumption can be made as to the nature of proceedings after the proceedings have finished. If so interpreted by the Court, this could solve the problem of pardons granted after conviction because, as Holmes *et al* argue, the Court could look back at proceedings that have already finished and make a judgement as to their nature: genuine or sham. On the other hand, should the Court give a narrow interpretation to Article 20(3), it could hold that the meaning of ‘proceedings’ does not stretch to pardons granted after conviction. So long as the proceedings themselves were genuine, a subsequent pardon by the administration does not alter the genuine nature of the proceedings meaning the case is inadmissible under both Article 17 and 20. Furthermore, the Court could hold that for it to rule on the administrative or political decisions of a State would be *ultra vires* and not part of its mandate.

Another possible solution to the problem could be that many of the crimes covered by Article 5 of the Rome Statute already have either an express or implied duty to punish under other conventions. Orentlicher gives Article 5 of the Genocide Convention 1948,⁵¹ which states that perpetrators of genocide ‘shall be punished’ as an example.⁵² This is clearly an express duty to punish which would imply that to pardon someone of genocide even after conviction is not lawful. In addition, Article 4 of the UN Convention Against Torture (UNCAT)⁵³ implies that there is a duty to punish because it requires that offences under the UNCAT be made ‘punishable by appropriate penalties which take into account their grave nature’. Similar duties are to be found in the four Geneva Conventions of 1949 also. Orentlicher therefore points out that ‘[w]hatever latitude the provisions allow, both [the Genocide Convention and the UNCAT] would be violated by pardons that spared torturers or persons responsible for genocide from serving any sentence or that rendered punishment patently inadequate.’⁵⁴ Therefore, with regard the crimes that have this express or implied duty to punish, the ICC would arguably not have to accept pardons made after conviction. Such pardons could, therefore, be evidence of unwillingness for the purposes of Article 17 of the Rome Statute. The Genocide Convention, UNCAT and the Geneva Conventions are all widely regarded as part of customary international law. However, Edelenbas has shown that State practice does not support a customary duty to prosecute gross human rights violators, and that even where there is a clear treaty based obligation to do so, ‘prosecutions have been the exception rather than the rule.’⁵⁵

⁵⁰ See Holmes, ‘The Principle of Complementarity’, in Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999); and, Scharf, ‘The Amnesty Exception to the Jurisdiction of the International Criminal Court’, (1999) 32 *Cornell International Law Journal* 507.

⁵¹ Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277.

⁵² *Supra* n. 42.

⁵³ Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment 1984, 1465 UNTS 85.

⁵⁴ Orentlicher, *supra* n. 42 at 2605, at n. 309.

⁵⁵ Edelenbas, ‘Human Rights Violations: A Duty to Prosecute?’, (1994) 7 *Leiden Journal of International Law* 5 at 20.

For the present author, a simple solution to the problem of pardons is found in Article 17(2)(a) of the Rome Statute. That Article provides explicitly that a State is unwilling if, '[t]he proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person'. Not only would it be far easier for the court to interpret 'national decision' as including pardons granted after a conviction, the past tense is used again to mean the court can review amnesties or pardons after they have been granted. The inclusion of this proviso suggests to this author that the drafters at Rome were not wholly successful in preventing an intrusive ICC with the power to review administrative and political decisions of the States. This can be interpreted in light of the ordinary meaning of its terms, its context and the intentions of its drafters as allowing the ICC to declare a case as admissible where a pardon has been granted after a conviction.

In conclusion, the answer to the question of whether the ICC will be able to end impunity for those who commit the gravest crimes of concern to the international community is, simply, we do not know yet. Undoubtedly much will depend on how the ICC interprets its mandate and customary international law if the situation in the Sudan unfolds as Amnesty International predicts.⁵⁶ If the ICC interprets Articles 17 and 20 broadly, then it will obviously be able to hear more cases. If they interpret them narrowly, however, it could end up being used rarely, if ever unless States refer their own situations to the ICC, or on the rare occasion where the Security Council refers a case. Of more concern generally is that the ICC, under the principle of complementarity, is going to be reliant upon unco-operative States co-operating. If it declares a State unwilling for the purposes of Article 17, then failing a Security Council referral it has no means of enforcing its jurisdiction; it is reliant upon the unwilling State to co-operate in all matters from the apprehension of the accused to the collection of evidence and testimony. There is no reason to suggest that unwilling States are going to be ready to do so and the ICC may not have the power to compel States to co-operate on its own. Although it is difficult to see any feasible alternative to complementarity that could have been agreed upon at Rome, the ICC could already be a 'dead duck'. However, we shall have to wait and see what happens when the ICC encounters its first genuinely unwilling State to find out.

⁵⁶ *Supra* n. 23.