2. WHY AND WHERE SHOULD INTERNATIONAL CRIMES BE PROSECUTED?

2.1. INTRODUCTION

The Rome Statute builds on two main assumptions: the first is that international crimes must not go unpunished; the second is that the crimes should preferably be prosecuted at the national level. The two assumptions reflect the respective purposes of the Rome Statute and the complementarity principle. The Rome Statute shall ensure that the crimes are prosecuted, while the complementarity principle shall ensure that this primarily is done at the national level. The two purposes can also be seen as parts of superior purposes, including the preservation of international peace and security and the safeguarding of state sovereignty.

Identifying the purposes of the Rome Statute (2.2) and the purposes of the complementarity principle (2.3) is essential: First, because the purposes may influence the interpretation and application of the Statute’s provisions governing the complementarity principle. Second, because understanding the purposes might clarify the role that the ICC should play and thus indicate how the authority to interfere should be used. Third, because the purposes must form the basis for any evaluation of the complementarity principle, to which extent does the principle promote these purposes?

In addition to exploring the underlying purposes, this chapter will also critically assess whether national prosecutions really are preferable to international prosecutions (2.4).

2.2. THE PURPOSES OF THE ROME STATUTE

2.2.1. Avoiding impunity

The most obvious purpose of the Rome Statute is expressly reflected in the Statute’s Preamble. Preambular paragraph 4 expresses determination to “put an end to impunity for the perpetrators of these crimes”, and paragraph 5 affirms that “the most serious crimes of concern to the international community as a whole must not go unpunished”. The reference to “impunity” should be understood in light of article 17 on admissibility, which requires that states proceed “genuinely”. Through genuine criminal proceedings impunity will, by definition, be avoided. The Statute is

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24 Article 31(1) of the Vienna Convention.
25 The ECtHR has noted that “the Preamble is generally very useful for the determination of the “object” and “purpose” of the instrument to be construed”, see Golder v. The United Kingdom, para. 34.
intended to promote genuine justice directly by allocating certain cases to it, and indirectly by encouraging genuine national criminal proceedings.

2.2.2. Preventing crimes and promoting reconciliation

Punishment clearly is no purpose in itself. It can only be justified to the extent that it promotes some legitimate underlying purpose which outweighs the pain inflicted on the wrongdoer. The most commonly cited purpose underlying criminal justice is crime prevention. Indeed, preambular paragraph 5 expresses determination to put an end to impunity and “thus to contribute to the prevention of such crimes”. The preventive effect of combating impunity is, however, assumed without further analysis. The truth is that this effect of criminal justice is controversial and the support for it seems more based on logic than on convincing empirical studies. A thorough analysis of the preventive effect is far beyond the scope of this book, although certain aspects of it will be discussed in relation to the prosecutorial discretion. Simply to say that those who interpret and apply the Statute must adopt the assumption that criminal justice has a preventive effect would be an unfortunate simplification. Individual opinions as to the likelihood of such effect, and not least as to which perpetrators are most susceptible to it, are likely to influence the interpretation and application of the various provisions of the complementarity principle.

Another possible but controversial effect of criminal justice is that it promotes reconciliation. The Statute appears to build on the assumption that a society which has experienced massive human rights violations cannot reconcile unless the guilty are held accountable. The belief or disbelief in such effect in a given situation will have vast implications on the discretionary assessment as to where, i.e. in which conflict area, the ICC should exercise its jurisdiction.

2.2.3. Safeguarding peace and security and humanity’s conscience

The question remains as to why it is considered so important to prevent international crimes that an international criminal court is established. Clearly, underlying the establishment, there must be concerns extending beyond those of the direct victims of the crimes. Preambular paragraph 3 recognises that international crimes “threaten the peace, security and well-being of the world”. Indeed, this was the dominating reason why the Security Council established the two *ad hoc*