



# African Guide to International Criminal Justice

Edited by Max du Plessis



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# Abbreviations, acronyms and terms

## ABBREVIATIONS

AFRC	Armed Forces Revolutionary Council
AU	African Union
Dergue	Coordinating Committee of the Armed Forces, Police, and Territorial Army (Ethiopia)
DRC	Democratic Republic of the Congo / République démocratique du Congo (RDC)
ECCC	Extraordinary Chambers for the Courts of Cambodia
ESMA	Escuela Mecánica de la Armada / Naval Mechanics School
EU	European Union
FNI	Front national intégrationniste (National Integrationist Front / Front for National Integration)
FPLC	Forces patriotiques pour la libération du Congo
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
LRA	Lord's Resistance Army
OAU	Organisation of African Unity
RUF	Revolutionary United Front
SADC	Southern African Development Community
SCSL	Special Court for Sierra Leone
The Guide	African Guide to International Criminal Justice
UK	United Kingdom
UN	United Nations
US	United States of America

## TERMS

### Geneva Conventions

Also referred to as the 'law of Geneva', or 'Geneva law'. The Geneva Conventions consist of four treaties formulated in Geneva, Switzerland, that set the standards for international law for humanitarian concerns. They are:

1. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (first adopted in 1864, last revision in 1949)
2. Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (first adopted in 1906)
3. Convention relative to the Treatment of Prisoners of War (first adopted in 1929, last revision in 1949)
4. Convention relative to the Protection of Civilian Persons in Time of War (first adopted in 1949, based on parts of the 1907 Hague Convention IV)

In addition, there are three additional amendment protocols to the Geneva Conventions:

1. Protocol I (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
2. Protocol II (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
3. Protocol III (2005): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem

### Hague Conventions

These are also referred to as the 'law of the Hague', or 'Hague law'. The Hague Conventions consist of the conventions of 1868, 1899 and 1907.

### Interahamwe

A Kinyarwanda-language word meaning 'those who stand together' or 'those who work together' or 'those who fight together' or 'those who attack together'. The Interahamwe is a Hutu paramilitary organisation.

## FRENCH AND LATIN TITLES AND TERMS

Cour de cassation	Court of Cassation (the highest criminal court in Central African Republic)
Direction de la documentation et de la sécurité (DDS)	Habré's political police
Forces armées de la république démocratique du Congo	National Army of the Government of the Democratic Republic of the Congo
Mouvement de libération du Congo	Movement for the Liberation of Congo
Forces de résistance patriotique d'Ituri (FRPI)	Patriotic Forces of Resistance in Ituri
Union des patriots Congolais	Union of Congolese Patriots
<i>aut dedere aut iudicare</i>	to prosecute or extradite
<i>dolus specialis</i>	special intent
<i>hors de combat</i>	out of the fight; disabled
<i>hostis humani generis</i>	an enemy of all mankind
<i>indicia</i>	signs, indications
<i>in dubio pro reo</i>	when in doubt, in favour of the accused
<i>ius ad bellum</i>	justice to war; the law concerning acceptable justifications to use armed force
<i>ius in bello</i>	law concerning acceptable conduct in war
<i>jus cogens</i>	compelling law
<i>mens rea</i>	criminal intent; the knowledge of wrongdoing
<i>ne bis in idem</i>	not twice for the same
<i>nullum crimen sine lege</i>	no criminal offence without a (pre-existing) law
<i>nulla poena sine lege</i>	no punishment for a criminal offence without a (pre-existing) law
<i>obiter dictum</i>	an incidental remark
<i>opinio juris</i>	an opinion of law
<i>ratione materiae</i>	subject-matter immunity
<i>ratione personae</i>	personal immunity

# Preface

JUDGE NAVANETHEM PILLAY, INTERNATIONAL CRIMINAL COURT

I am honoured to write the preface to this, the first *African Guide to International Criminal Justice*. The Guide is published by the International Crime in Africa Programme at the Institute for Security Studies (ISS) and forms part of the ISS's important and ongoing work on international criminal justice issues in Africa. The Guide is part of a series of practical publications and training tools developed by the programme that are aimed at enhancing the capacity of African countries to end impunity.

The Guide arises out of a need identified at the symposia arranged by the ISS in August 2006 and March 2008 in Cape Town at which officials and lawyers from the ICC, the African Union (AU) and several African countries came together to take stock of African progress in relation to the ICC and the prosecution of international crimes. At those symposia it was decided that the continent needs its own scholars and practitioners – working with the support of an African-based organisation such as the ISS – to prepare a textbook for judges, prosecutors, defence lawyers and government officials that presents an African-focused guide to international criminal justice.

The International Criminal Court (ICC) was established as a response of the human family to gross human rights violations of such magnitude and barbarity as to shock human conscience and to warrant the response of the international community as a whole (Mugwanya 2006). The ICC symbolises the principle of individual criminal liability for those responsible for the most serious human rights violations and was established as a permanent institution to ensure the punishment of such individuals. Besides the moral condemnation of these crimes at the international level, and the knock-on deterrent effect the Court may have on the ground, the ICC will serve a second, and vital, purpose. That purpose will be to uphold the rule of law, at national and international levels.

From the standpoint of the rule of law and justice, the ICC is one of the greatest achievements of the twentieth century. It is a court that deserves to be taken seriously by African states. On paper this appears to be the case. Currently, 30

African states have ratified the Rome Statute. This is a good first step. But the real challenge is converting this expression of high-level political commitment into awareness and practical implementation on the ground. It is only through increased awareness, enhanced capacity and broad-based political support from practitioners and policy makers that Africa will be able to gain a reputation for being a continent seriously committed to ending impunity and non-adherence to the rule of law. It is telling that the majority of the cases currently before the ICC arise from Africa, a continent that is home to many of the international human rights atrocities, both past and continuing, that haunt humanity in what appears to be repeating cycles (Du Plessis 2003: 15).

It is precisely for this reason that the AU has such a central and critical responsibility to remind African states of the AU Constitutive Act's commitment to stamping out impunity. Indeed, the work of the ICC is entirely dependent on the support of international, regional and domestic institutions and actors. Only once there is synchronisation of the objectives and goals of the respective institutions and actors will substantive justice be realised. For it goes without saying that, without justice, there can be no lasting peace – and peace is the one thing so sorely lacking on the African continent.

Increasingly, images of war crimes, genocide and crimes against humanity, even in obscure corners of the world, are vividly transmitted to living rooms all around the world (Tan 2000). These images have contributed to a heightened international concern over such atrocities and given rise to expectations for states to comply with some generally accepted standards of conduct. It is encouraging to witness that the ICC has intervened with respect to four 'situations' in Africa, namely, in Democratic Republic of the Congo, Uganda, Sudan and Central African Republic.

The ICC's proactive stance can be interpreted as a denunciation of impunity and a commitment to the idea that even the most senior government officials are liable to be prosecuted for war crimes, crimes against humanity and genocide. Aside from the ICC, there are other international criminal justice developments taking place in Africa, such as the cases currently involving Hissène Habré, Colonel Mengistu Haile Mariam and Charles Taylor. Africa is thus where international criminal justice is gaining stride, and all of us should welcome that development, not fear it.

The ICC represents the will of all nations of the world towards the establishment of a universal framework to try perpetrators of gross human rights abuses. Indeed, African countries helped lead the way towards the Court's



creation. We therefore have a legitimate desire to see the ICC develop as a meaningful and useful institution. I can confidently state that it is once we see the independent prosecutors of the ICC putting tyrants and torturers in the dock before independent judges that we will finally realise the human rights aspiration of preventing and punishing egregious violations of human rights.

In addition – and possibly of as much importance – the Rome Statute is distinctive because of its provisions on the award of reparations for victims of crimes within its jurisdiction, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Such reparations are integral to achieving justice for the victims and assisting them to rebuild their lives.

The fulfilment of the aims and objectives of the ICC on the African continent is dependent on the support of African countries, the AU, regional organisations, the legal profession and, importantly, civil society. Meeting this need requires commitment to a collaborative relationship between these stakeholders and the ICC. It is also important to remember that questions of responsibility for the prosecution of core international crimes in Africa (and for raising awareness of these issues) are broader than the ICC alone.

Other structures such as the Commission on Human and Peoples' Rights, the African Court of Justice and Human Rights, and other pan-African institutions can play a meaningful role in this regard, which should be encouraged. An example of this is the work of the African Commission on Human and Peoples' Rights in its 2005 resolution on ending impunity in Africa and on the domestication and implementation of the Rome Statute of the ICC, in which the commission called on civil-society organisations in Africa to work collaboratively to develop partnerships to further respect for the rule of law internationally and strengthen the Rome Statute.

That these African structures and organisations should be at the forefront of awareness raising is important, not least of all because of the perception present in certain African countries that international criminal justice and the ICC is an 'outside' or Western priority and relatively less important than other political, social and developmental goals. This, to my mind, is both incorrect and unfortunate. After all, it is African states that drafted the aims of the AU, and that, in articles 4(m), 3(h) and 4(o) of its Constitutive Act, committed the AU to ensuring respect for the rule of law and human rights, and condemning and rejecting impunity.

The *African Guide to International Criminal Justice* is an attempt by the ISS – the leading human-security organisation in Africa – to ensure that the Court is

better understood and that African states are better equipped domestically to comply with their obligations under the Rome Statute. I think these are exciting times, and I think that Africa is poised to make a difference. The Guide will, if it is read and considered seriously by African practitioners and government officials, contribute to that difference.

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# The African Guide to International Criminal Justice: purpose and overview

MAX DU PLESSIS<sup>1</sup>

The purpose of the *African Guide to International Criminal Justice* is to provide a comprehensive yet accessible introduction for government legal and judicial officers, the police and practising lawyers in African states to the subject of international criminal law and recent developments in the field.

With the advent of the Rome Statute and the creation of the International Criminal Court (ICC), those involved in criminal justice and law enforcement in African states are increasingly expected to possess expertise in international criminal law. Africa is, of course, no stranger to international justice initiatives, the most obvious example being the creation of the International Criminal Tribunal for Rwanda (ICTR). And domestically some African states, most notably Ethiopia, have focused attention on prosecuting individuals guilty of international crimes. Three African states – Uganda, Democratic Republic of the Congo and Central African Republic – have referred situations within their territories to the ICC. In addition, the United Nations (UN) Security Council has referred the situation in Sudan to the ICC for investigation.

More than half of Africa's states (30 to date) are party to the Rome Statute creating the ICC. Under the Rome Statute, these states are obliged to adopt domestic law that implements the provisions of the Rome Statute in their national legal systems. This domestic legislation is a very important component of the ICC's vision of justice for those guilty of war crimes, crimes against humanity and genocide. That is because the Court is not expected to supersede national prosecutions of persons guilty of international crimes.

Investigations and prosecutions under the Rome Statute are premised on the principle of complementarity, whereby national judicial systems of States Parties will have the first opportunity in respect of any investigation that affects their territories or nationals. African states that have ratified the Rome Statute therefore retain the right and have accepted the onerous responsibility to investigate offences committed in Africa, or where African nationals stand accused of committing ICC crimes anywhere else in the world.

Accordingly, the principle of complementarity ensures that the Court operates as a buttress in support of the criminal justice systems of States Parties at a national level, and as part of a broader system of international criminal justice. The principle proceeds from the belief that national courts should be the first to act. It is only if a State Party is 'unwilling or unable' to investigate and prosecute international crimes committed by its nationals or on its territory that the ICC is seized with jurisdiction.

The Institute for Security Studies (ISS) has therefore chosen to prepare a guide that will serve as a useful, practical text to international criminal law from an African perspective. The Guide draws on existing African experience to highlight the important role that African states and the African Union (AU) can play in assisting the achievement of international criminal justice, whether that is through domestic prosecution of international crimes or through cooperation with the ICC in relation to an investigation or prosecution that is being undertaken by the Court.

The Guide was drafted by experts who work in the international criminal justice field in Africa or who are closely associated therewith. Their task has been to deliver a product that will assist all member states of the AU, legal professionals, universities, non-governmental organisations and government officials to more fully appreciate the practical realities and complexities of bringing to justice those who have committed the gravest crimes known to humankind. The chapters have been subjected to an independent review by two expert referees.

## THE RISE OF THE INTERNATIONAL CRIMINAL COURT

This Guide arises out of, and is a response to, the creation of the world's first permanent international criminal court. The statute of the ICC was adopted on 17 July 1998 by an overwhelming majority of the states attending the Rome conference. The conference was specifically aimed at attracting states and non-

governmental organisations so that they might debate and adopt a statute that would form the basis for a court – the International Criminal Court.<sup>2</sup>

It took much of the last century to generate the momentum for the Court's creation, and that momentum came in fits and starts. For example, after the First World War unsuccessful attempts were made to bring the German emperor to trial before an international tribunal<sup>3</sup> and, later, to try Turks responsible for the genocide of Armenians before a tribunal designated by the Allied powers.<sup>4</sup> In 1937, following the assassination in 1934 of King Alexander of Yugoslavia by Croatian nationalists in Marseilles, treaties were drafted to outlaw international terrorism and to provide for the trial of terrorists before an international tribunal (Hudson (1941), but states lost interest in this venture as war approached and no state ratified the treaty for an international criminal court and only one ratified the treaty outlawing international terrorism.

However, the sheer horror of the atrocities committed by Germany and its officials and soldiers during the Second World War provided the necessary impetus for the creation by the Allied powers of an *ad hoc* international military tribunal at Nuremberg (Taylor 1992); a sister tribunal was constituted in Tokyo (Brackman 1988) in respect of crimes committed by Japan's leaders. These tribunals tried the principal leaders of the Nazi and Japanese regimes after the Second World War for crimes against the peace, war crimes and crimes against humanity, but there was criticism of the fact that the tribunals were established by the victors to try the vanquished.<sup>5</sup>

The UN was nonetheless energised by the work of these tribunals to adopt, on 9 December 1948, a resolution mandating the International Law Commission to begin work on the draft statute of an international criminal court (Schabas 2004). The enthusiasm generated by Nuremberg and Tokyo for a permanent court in the immediate post-war period was, however, abandoned during the cold war. Not even the consensus between East and West over apartheid could generate sufficient consensus for states to produce the court proposed by the UN convention on apartheid to try apartheid's criminals in the late 1970s.<sup>6</sup>

In the 1980s, new events helped to build the case for an international criminal court. These included the increase in the number of international crimes in treaties outlawing hijacking, hostage-taking, torture, seizure of ships on the high seas and attacks on diplomats; the emergence of powerful drug cartels capable of subverting the judicial systems of weak states; and, above all, the conviction that international law had progressed sufficiently to enable it to condemn individuals before an international criminal court for violating international norms. The final

contributing factor was the end of the cold war – it was thereafter possible for a more unified UN to renew its interest in a permanent international criminal court.

The International Law Commission was thus directed by the UN General Assembly to consider the drafting of a statute for an international criminal court. The early 1990s saw the commission prepare a draft statute for such a court, and by 1994 a formal draft statute for an international criminal tribunal was adopted by the commission and forwarded to the General Assembly for consideration (see, generally, Crawford 1994: 140; 1995: 404).

During the time that the commission was preparing the draft statute, events compelled the creation of a court on an *ad hoc* basis to respond to the atrocities that were being committed in the former Yugoslavia (ICTY). That tribunal, the International Criminal Tribunal for the former Yugoslavia, was established by the Security Council in 1993 and mandated to prosecute persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991 (United Nations 1993a; 1993b).<sup>7</sup>

Then, in November 1994, Africa experienced the most horrific genocide while the world watched. The Security Council came under pressure to create a second *ad hoc* tribunal, charged with the prosecution of genocide and other serious violations of international humanitarian law committed in Rwanda and in neighbouring countries during 1994 (United Nations 1994).<sup>8</sup> These two tribunals are still in operation, and their jurisprudence is drawn on repeatedly in this Guide to provide examples and precedents of international criminal justice in action. At a symbolic level, the tribunals provided working evidence to those who believed that a permanent international criminal court was desirable and practical.

And so, in the summer of July 1998, a majority of the world's states, including a large proportion of African nations, came together in Rome to work on drafting a statute for a permanent international criminal tribunal. The Rome Statute was adopted on 17 July 1998 by an overwhelming majority of the states attending the Rome conference. After five weeks of intense negotiations, 120 countries, including a host of African nations, were in a position to agree on the principles of the treaty and voted in its favour. Only seven countries voted against it (including China, Israel, Iraq and the US) and 21 abstained. One hundred and thirty-nine states signed the treaty by the 31 December 2000 deadline. The treaty would come into force upon 60 ratifications. Sixty-six countries – six more than the threshold needed to establish the Court – ratified the treaty on 11 April 2002. To date, the Rome Statute has been signed by 139 states and 108 states have ratified it.<sup>9</sup> Of those 108 states a very significant proportion – 30 – are African.<sup>10</sup>

## A BRIEF OVERVIEW OF THE INTERNATIONAL CRIMINAL COURT

The ICC is situated in The Hague, in the Netherlands. The Judges of the Court were sworn in on 11 March 2003 at the Court's inaugural session. Of the 18 Judges, four are from Africa.<sup>11</sup> The Deputy President of the Court is an African, Akua Kuenyehia. The Prosecutor is the highly respected Argentinean lawyer, Luis Moreno-Ocampo, and his deputy is Fatou Bensouda, another African.

The ICC is divided into an Appeals Division, a Trial Division and a Pre-trial Chamber Division (International Criminal Court 2002b: articles 34 and 39). The Office of the Prosecutor is responsible for receiving and examining referrals and substantiated information on alleged crimes, conducting investigations and prosecutions before the Court (International Criminal Court 2002b: article 42(1)). The Office of the Prosecutor is headed by the Prosecutor, who has full authority over the management and administration of the Office (International Criminal Court 2002b: article 42(2)).

In the interests of efficiency and consistency, the Prosecutor relies extensively on the Registry for administrative services. The Registry is responsible for the non-judicial aspects of the administration and servicing of the Court, without prejudice to the functions and powers of the Prosecutor. The Registry is headed by the Registrar, who is elected by the Judges and who exercises his functions under the authority of the President of the Court (International Criminal Court 2002b: article 43). The work of the Court is overseen by an Assembly of States Parties, which provides management oversight, considers and decides the budget for the Court, conducts elections and performs other functions. The Assembly meets at least once a year (International Criminal Court 2002b: article 112).

## The International Criminal Court's current situations

Aside from the high complement of African staff members working at the ICC, the continent is firmly on the Court's agenda because of the situations that it has been asked to investigate.<sup>12</sup> Already the ICC Prosecutor has the crimes committed in three States Parties – Democratic Republic of the Congo, Uganda and Central African Republic – in his sights, and the Security Council referred the Sudan crisis to the ICC, even though Sudan is not a party to the ICC.

In respect of Uganda, four arrest warrants were issued by the Court: on 8 July 2005 for leaders of the Lord's Resistance Army; in relation to Sudan, arrest

warrants were issued on 27 April 2007 for Ahmad Muhammad Harun, former minister of state for the interior and currently minister of state for humanitarian affairs in the government of the Sudan, and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb), a leader of the militia/Janjaweed. In relation to Central African Republic, investigations are ongoing.

It is in respect of the situation in Democratic Republic of the Congo that the Court has made the most progress. The Prosecutor initiated investigations in June 2004 after the Congolese government referred the situation in the country to the Court. Three persons are already in the custody of the ICC. On 17 March 2006, Thomas Lubanga Dyilo, a Congolese national and alleged founder and leader of the Union of Congolese Patriots, was transferred to the ICC. On 17 October 2007, the Congolese authorities surrendered and transferred Germain Katanga, a Congolese national and alleged commander of the Patriotic Force of Resistance in Ituri, to the ICC. He is currently charged as a co-perpetrator of the crimes committed allegedly during the joint Front for National Integration–Patriotic Force of Resistance in Ituri attack on the village of Bogoro on or around 24 February 2003.<sup>13</sup>

Most recently, Mathieu Ngudjolo Chui became the third person in the custody of the ICC. Chui, a Congolese national and alleged former leader of the Front for National Integration and currently a colonel in the National Army of the Government of the Democratic Republic of the Congo, was arrested on 6 February 2008 by the Congolese authorities and transferred to the ICC. Chui is alleged to have committed crimes against humanity and war crimes as set out in articles 7 and 8 of the statute, committed in the territory of Democratic Republic of the Congo since July 2002.

## International Criminal Court crimes

The Court can take up only the most serious crimes of concern to the international community as a whole – genocide, crimes against humanity and war crimes – all of which are defined in the statute (International Criminal Court 2002b: articles 5–8). Each of these crimes is dealt with in detail in the Guide and the elements of the crimes are discussed by way of examples from the case law of the ICTR, ICTY and other relevant sources.

By way of introduction, it suffices to point out that genocide involves the intentional mass destruction of entire groups, or members of a group. Crimes against humanity are acts of murder, rape, torture and other acts of a similar

nature that are committed on a widespread or systematic basis against a civilian population. And war crimes are crimes committed in violation of international humanitarian law applicable during armed conflicts. The sources of international humanitarian law are vast, and are broadly divided into two categories of substantive rules – ‘the law of The Hague’<sup>14</sup> and ‘the law of Geneva’<sup>15</sup> – that constitute the rules concerning behaviour that is prohibited in the case of an armed conflict.

Aggression also falls within the competence of the ICC but an acceptable definition of this crime has still to be added to the statute (International Criminal Court 2002b: article 5(2)).<sup>16</sup> Treaty crimes (such as terrorism or drug trafficking) do not fall within the ICC’s jurisdiction but may be added later after consideration by a review conference (International Criminal Court 2002b: article 123(1)). For the purposes of interpreting and applying the definitions of crimes found in the Rome Statute, reference must also be made to the ‘Elements of Crimes’, a 50-page document adopted in June 2000 by the preparatory commission for the ICC (International Criminal Court 2002a).

## Jurisdiction and admissibility

The Rome Statute strictly defines the jurisdiction of the Court. Aside from only having jurisdiction over the most serious crimes of concern to the international community, the temporal jurisdiction of the Court is limited to crimes occurring after the entry into force of the statute on 1 July 2002 (International Criminal Court 2002b: article 11). For those states that become party to the statute after 1 July 2001, the ICC has jurisdiction only over crimes committed after the entry into force of the statute with respect to that state (International Criminal Court 2002b: article 11(2)). Thus the Court is not a remedy for crimes of the past, which must be addressed by national, or other international or hybrid initiatives.

The jurisdictional triggers for the Court to exercise its competence are set out in article 12 of the statute. The article provides that the Court may exercise jurisdiction if (a) the state where the alleged crime was committed is a party to the statute (*territoriality*), or (b) the state of which the accused is a national is a party to the statute (*nationality*). In terms of article 14 of the statute, any State Party may refer to the Court a ‘situation’ in which one or more crimes within the jurisdiction of the Court appear to have been committed, so long as the preconditions to the Court’s exercise of jurisdiction have been met, namely, that the alleged perpetrators of the crimes are nationals of a State Party or the crimes are

committed on the territory of a State Party (International Criminal Court 2003; Kirsch and Robinson 2002: 623–625).

The ICC Prosecutor is also authorised by the Rome Statute in article 15 to initiate independent investigations on the basis of information received from any reliable source. The granting to the Prosecutor of a *proprio motu* (by one's own motion) power to initiate investigations was one of the most debated issues during the negotiations of the Rome Statute. In the end, the drafters of the statute determined that, in order for the Prosecutor to exercise this power, the alleged crimes must have been committed by nationals of a State Party or have taken place on the territory of a State Party – the preconditions set out in terms of article 12 (International Criminal Court 2003; Kirsch and Robinson 2002: 661–663).

Proposals that the principle of universal jurisdiction should apply in respect of state referrals were rejected at the Rome conference. That being said, under the statute the UN Security Council is empowered to refer to the Court 'situations' in which crimes within the jurisdiction of the Court appear to have been committed (International Criminal Court 2002b: article 1(13)(b)). The referral power is a mechanism by which the Court may be accorded jurisdiction over an offender, regardless of where the offence took place and by whom it was committed, and regardless of whether the state concerned has ratified the statute or accepted the Court's jurisdiction (Kirsch and Robinson 2002: 634).

The statute provides that the Security Council may only make such a referral by acting under chapter VII of the UN Charter, which is to say that it must regard the events in a particular country as a threat to the peace, a breach of the peace or an act of aggression. In determining whether a threat to the peace exists, the Security Council will be guided by the gravity of the crimes committed, the impunity enjoyed by the crimes' perpetrators and the effectiveness or otherwise of the national jurisdiction in the prosecution of such crimes (see, in general, Kirsch and Robinson 2002: 630–631). As indicated earlier, and after having had regard to these factors, the Security Council in March 2005 referred the atrocities committed in the Darfur region of Sudan to the ICC for investigation.

## Complementarity

The ICC is not expected to supersede national prosecutions of persons guilty of international crimes. Investigations and prosecutions under the Rome Statute are premised on the principle of complementarity, whereby the Court is required to rule a case inadmissible when it is being appropriately dealt with by a national

justice system (International Criminal Court 2002b: preamble, paragraph 10, article 17). States Parties to the Court, therefore, retain their right and responsibility to investigate offences committed on their territory, or where their nationals stand accused of committing ICC crimes anywhere else in the world. The ICC will be able to step in only where a national judicial system is unwilling or unable genuinely to investigate (International Criminal Court 2002b: article 117). The principle of complementarity ensures that the ICC operates as a system of international criminal justice that buttresses the national justice systems of States Parties. The centrally important topic of complementarity will be dealt with in a separate chapter in the Guide.

## ABSTRACT OF THE GUIDE

The Guide is divided into seven parts, starting with this introductory chapter.

In chapter 2, the Deputy Prosecutor of the ICC, Fatou Bensouda, and the chief prosecutor of the ICTR, Hassan Jallow, provide an overall account of why international criminal justice is important and relevant to Africa. They do so by considering the limited examples of domestic prosecutions of international crimes and the difficulties associated with such prosecutions, before moving on to discuss the creation of international criminal tribunals, including the ICC. Their chapter highlights the important role that African states have played in the development of international criminal justice norms more generally, and in particular the essential input that African states provided in the drafting of the Rome Statute of the ICC.

Chapter 3 is by Salim Nakhjavani, formerly a legal adviser at the ICC and now teaching international criminal law at the University of Cape Town. His chapter provides an in-depth discussion of the three most important crimes in international criminal law and reflected in the Rome Statute: crimes against humanity, genocide and war crimes. In providing that discussion, the chapter intentionally draws on the emerging body of case law that is of assistance to the domestic prosecutor and defence attorney in understanding the material elements of these three core crimes.

In chapter 4, Lynn Gentile of the ICC provides an insider's account of the ICC, the Rome Statute's most important provisions as they relate to the work of the Court, and a discussion of the Court's current docket of cases. The Rome Statute contains innovative provisions that constitute the first tentative steps in the creation of an international criminal justice system. Chapter 4 also discusses those provisions that are intended to enhance cooperation between states in the



investigation of international crimes and in the apprehension and prosecution of offenders. While many national, regional and international law makers have already begun to address the issue of mutual cooperation and assistance in the fight against international terrorism, organised crime and drug trafficking, chapter 4 details the relevant ICC provisions that oblige mutual cooperation and assistance in relation to the ICC crimes: crimes against humanity, war crimes and genocide.

Then, in chapter 5, Max du Plessis discusses the principle of complementarity and its role in ensuring the potentially close relationship between international crimes and domestic courts. That is because the ICC Statute – under what is described as ‘the complementarity principle’ – is intended to encourage the prosecution of international crimes in domestic, not international, courts.

In chapter 6, Cathleen Powell and Adele Erasmus describe and explain two of the most important doctrines in international criminal law that potentially play an important role in the prosecution of international crimes committed by leaders, or by inferiors who assert they were acting under superior orders. The first doctrine discussed is that of command responsibility, which allows persons in command of subordinates who commit crimes or are about to commit crimes to be held liable for failing to prevent or punish the commission of those crimes. The second doctrine is the defence of superior orders, which allows subordinates who have committed war crimes in obedience to an order to escape liability in certain circumstances.

These legal doctrines are more or less peculiar to international criminal law, and have emerged from the jurisprudence of the international *ad hoc* tribunals, national courts and international legal instruments. These doctrines are often linked to the unique nature of the core crimes prosecuted in international tribunals. Command responsibility, for instance, is a concept that can only have emerged from a legal system that seeks to punish those who are responsible for crimes committed by soldiers during an armed conflict.

Lastly, in chapter 7, Ronald Slye focuses on the vexing questions of amnesties and immunities and how these two principles fit within the overall international criminal justice system.

Each of the chapters was written to provide a succinct and accessible introduction to the subject of international criminal justice and how it applies or should apply in Africa. The Guide as a whole is aimed at providing a practical, comprehensible guide to international law for everyday use in the offices, courts, police stations and chambers of Africa’s legal professionals and those concerned with the investigation and prosecution of the most serious international crimes on African soil.

International criminal law is a fast-moving field with developments occurring sometimes on a daily basis. In the circumstances, this Guide is up to date as at 31 May 2008. Every effort has been made to take account of and, where appropriate, reflect the most important developments that have taken place after 31 May 2008.

## NOTES

- 1 The author relied extensively on his chapter, ‘International criminal courts, the International Criminal Court, and South Africa’s implementation of the Rome Statute’, in Dugard (2005).
- 2 The statute was finalised at the Rome conference, attended by 160 states, from 15 June to 17 July 1998. For an account of the negotiating process at the conference, see Kirsch and Holmes (1999).
- 3 Article 227 of the Treaty of Versailles provided for the trial of the emperor for ‘a supreme offence against international morality and the sanctity of treaties’ before a special tribunal composed of five judges appointed by the UK, the US, France, Italy and Japan. The attempt to bring the emperor to trial was thwarted when he was granted asylum by the Netherlands.
- 4 The unratified Treaty of Sevres provided for the surrender by Turkey of persons ‘responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire’ (article 230), but in the Treaty of Lausanne, part VIII, granted amnesty to these persons. See Adrian (1989).
- 5 For an insightful overview of the criticisms of the Nuremberg trials, see Over (2003).
- 6 In 1979 the UN Human Rights Commission instructed Professor M Cherif Bassiouni to draft a statute for an international court to try offenders under the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. A statute was drafted but no action was taken on the project. See Bassiouni (1987: 10–11).
- 7 For detailed accounts of the creation of the ICTY, see Bassiouni and Manikas (1996: chapters I–III). See also Morris and Scharf (1995).
- 8 For detail, see Scheltema and Van der Wolf (1999).
- 9 For latest ratification status, see [www.iccnw.org](http://www.iccnw.org).
- 10 For status of African ratification, see [www.iccnw.org/countryinfo/RATIFICATIONSbyUNGroups.pdf](http://www.iccnw.org/countryinfo/RATIFICATIONSbyUNGroups.pdf).
- 11 Navanethem Pillay (South Africa), Akua Kuenyehia (Ghana), Fatoumata Dembele Diarra (Mali) and Daniel Nsereko (Uganda).
- 12 Only a brief overview is provided in this chapter. For further detail on these situations, see chapter 4, ‘Understanding the International Criminal Court’.
- 13 His trial was due to begin on 23 June 2008 but was halted on 13 June 2008 when the Court’s Pre-trial Chamber ruled that the Prosecutor’s refusal to disclose potentially exculpatory

material had breached Lubanga's right to a fair trial. The Prosecutor had obtained the evidence from the UN and other sources on the condition of confidentiality, but the Judges ruled that the Prosecutor had incorrectly applied the relevant provision of the Rome Statute and, as a consequence, 'the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial'. On 2 July 2008, the Court ordered Lubanga's release; however, at the time of writing he remains in custody pending the outcome of an appeal by the prosecution.

- 14 The 'law of The Hague' is made up of the Hague Conventions of 1868, 1899 and 1907, which generally speaking set out rules regarding the various categories of lawful combatants, and regulate the means and methods of warfare in respect of those combatants. The Hague Conventions also deal with the treatment of persons who do not take part in armed hostilities, or who no longer take part in them, but in this respect the Hague Conventions have been supplanted by the Geneva Conventions, which cover this aspect of humanitarian law in more detail.
- 15 The 'law of Geneva', so called because it comprises the four Geneva Conventions of 1949 plus the two additional protocols thereto of 1977, regulates the treatment of persons who do not take part in the armed hostilities (such as the civilians, the wounded and the sick) and those who used to take part but no longer do (such as prisoners of war). An exception here is the third Geneva Convention, which, in addition to the focus on treatment of persons no longer involved in the conflict, also regulates the various classes of lawful combatants, and thereby updates the Hague Conventions. The Hague Conventions have been further updated by the first additional protocol to the Geneva Convention of 1977, which deals with the means and methods of combat with a particular emphasis on sparing civilians as far as is possible in an armed conflict.
- 16 See further Schabas (2007: 133–135).

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# International criminal law in an African context

HASSAN JALLOW AND FATOU BENSOUDA<sup>1</sup>

This chapter provides an overview of international criminal law as applied in national, hybrid and international courts. It is meant to be a brief introduction to international criminal practice for government legal and judicial officers, the police and practising lawyers in African states. Among other things, the chapter highlights the challenges to be faced, as well as the resources that can be relied on as a starting point for government legal and judicial officers, the police and practising lawyers in African states, when setting up or developing national institutions for investigating, prosecuting and adjudicating international crimes.

## **WHY IS INTERNATIONAL CRIMINAL LAW IMPORTANT FOR AFRICA?**

The importance of international criminal law for the African continent is starkly highlighted by a statement made in the context of the International Criminal Court (ICC):

No other continent has paid more dearly than Africa for the absence of legitimate institutions of law and accountability, resulting in a culture of impunity. Events in Rwanda were a grim reminder that such atrocities could be repeated anytime. This served to strengthen Africa's determination and commitment to the creation of a permanent, impartial, effective and independent judicial mechanism to try and punish the perpetrators of these types of crimes whenever they occur (Mochochoko 2005: 249).

The ICC was not created specifically for the least developed and developing countries in Africa and Asia. Indeed, as a senior legal adviser in the ICC's Registry has said:

Contrary to the view that the ICC was shoved down the throats of unwilling Africans who were dragged screaming and shouting to Rome and who had no alternative but to follow their Western Masters under threat of withholding of economic aid if they did not follow, the historical developments leading up to the establishment of the court portray an international will of which Africa was a part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community (Mochochoko 2005: 243).

The extensive contribution of African states to the creation of the ICC is described in more detail below in the section on the negotiation of the Rome Statute that established the Court.

## INVESTIGATION AND PROSECUTION OF INTERNATIONAL CRIMES AT NATIONAL LEVEL

Prior to the creation of the ICC in 2002 and the advent of *ad hoc* criminal tribunals such as the Special Court of Sierra Leone (SCSL) and the International Criminal Tribunal for Rwanda (ICTR), it was left to the domestic criminal courts of states to investigate and prosecute international crimes.<sup>2</sup> On several occasions this has been done by relying wholly or partly on the principle of universal jurisdiction. Some conduct violates not only the domestic legal order of a state, but also the international legal order. That is why certain crimes are designated as international crimes. States may thus exert jurisdiction over the perpetrators of such crimes on the basis that the crime committed is a crime against all humankind and in respect of which an individual places himself beyond the protection of any state.

States have jurisdiction over certain offences recognised by the community of nations as of universal concern, even where none of the usual bases of jurisdiction exist. The state may assert jurisdiction over those offences that are so serious as to qualify as crimes under international law. This principle of universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the perpetrator, the nationality of the victim or any other connection to the state exercising such jurisdiction (Princeton University Program in Law and Public Affairs 2001: principle 1(1)).

The principle gained impetus largely due to the atrocities of the world wars, and today various crimes – for example, war crimes, crimes against peace, crimes

against humanity, genocide and torture – are understood to be the subject of universal jurisdiction, either under customary international law or under treaty law in the form of the *aut dedere aut judicare* (either extradite or prosecute) principle.

For this purpose we will, first, discuss examples of investigations and prosecutions of international crimes at national level; second, discuss other responses such as truth commissions; and, third, discuss *ad hoc* and hybrid tribunals and the ICC. In this first section we set out some of the more important examples of domestic prosecutions of international crimes, including that of Adolf Eichmann, Augusto Pinochet, the Afghan asylum seekers, the Butare Four, Adolfo Scilingo, the Italian investigation into Operation Condor, Hissène Habré and the case of Mengistu Hailemariam, and briefly discuss the lessons that can be derived from them.

## The case of Adolf Eichmann

### Background

The trial of Adolf Eichmann is a well-known example of domestic courts exercising universal jurisdiction over international crimes. Eichmann, a member of the Austrian Nazi party and of the security service of Heinrich Himmler, was appointed head of the so-called Office for Jewish Emigration in 1938. He was later accused of, among others, being responsible for killings, extermination, slavery and deportation of the Jewish population. Eichmann reportedly organised the deportation of Jews from areas occupied by the German state from 1939 to mid-1945.<sup>3</sup>

Eichmann was abducted from Argentina by Israeli secret police in 1960 and taken to Israel to be tried (Inazumi 2005: 63).

### Holdings of relevant courts and issues of interest

In 1961, Eichmann was brought to trial pursuant to the Israeli Nazis and Nazi Collaborators (Punishment) Law of 1950, a law modelled on the 1948 Genocide Convention. The district court<sup>4</sup> of Jerusalem stated that Israel had jurisdiction over atrocities allegedly committed by Eichmann on the grounds that the atrocities were not domestic crimes alone but crimes against the law of nations. In its

judgment, the court was the first to explicitly rely on the notion of ‘universal jurisdiction’, stating:

The abhorrent crimes defined in this Law [the Nazis and Nazi Collaborators (Punishment) Law] are crimes not under Israeli law alone. These crimes which offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself (“*delicta juris gentium*”). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, in the absence of an International Court, the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The jurisdiction to try crimes under international law is universal.<sup>5</sup>

Importantly, Israel exercised jurisdiction over Eichmann for crimes committed outside its territory and before the state of Israel came into being – a rather unusual example, therefore, of universal jurisdiction.

The district court opined that although the method of bringing Eichmann to Israel might be disputed as being a violation of international law, that issue would be resolved between the relevant states and would not affect proceedings against Eichmann in Israel (Israel issued an apology to Argentina for the abduction of Eichmann, which was accepted). Eichmann also objected to the retroactive application of the law, but this argument was rejected by both the district and supreme courts<sup>6</sup> on the basis that the crimes with which Eichmann was charged were prohibited under international law at the time of their commission. After the supreme court upheld the judgment of the district court of Jerusalem, in 1962, Eichmann received the death penalty.

While the Eichmann case is often cited as an example of ‘pure’ universal jurisdiction, it has been noted that passive personality jurisdiction and protective jurisdiction were also mentioned as bases of jurisdiction (Inazumi 2005: 65).

## The Demjanjuk case

### Background

John Demjanjuk was born in 1920 in Kiev in the Soviet Union. In 1951, Demjanjuk emigrated to the US and became a naturalised citizen in 1958. In 1986, he was extradited to Israel on suspicion of killing tens of thousands of people,

mostly Jews, by operating a gas chamber in a Nazi concentration camp in Poland during the Second World War (Inazumi 2005: 81). He was initially identified as Ivan the Terrible or Ivan Grozny, an infamous SS guard at the Treblinka camp.

### Holdings of relevant courts and issues of interest

In October 1983 Israel issued an extradition request for Demjanjuk in order for him to stand trial in Israel under the Nazis and Nazi Collaborators (Punishment) Law of 1950. Demjanjuk was extradited to Israel on 28 February 1986. He was put on trial between 16 February 1987 and 18 April 1988. On 25 April 1988 a Jerusalem district court convicted Demjanjuk and sentenced him to death by hanging.

In granting Israel’s extradition request, the US district court and US federal circuit court recognised that Israel had universal jurisdiction over the crime of genocide.<sup>7</sup> Unusually, the court recognised universal jurisdiction *in absentia* (that is, Israel did not have custody of the suspect but was still considered to be entitled to exercise universal jurisdiction).<sup>8</sup>

However, in 1993 the Israeli supreme court ruled that there was a reasonable doubt about Demjanjuk’s guilt due to the passage of time and the spoiling of evidence.<sup>9</sup> The supreme court overturned the guilty verdict and ordered Demjanjuk’s release. It noted that a further trial would violate the double-jeopardy principle; that Demjanjuk had been extradited to stand trial for Ivan the Terrible’s crimes and not any others; that on the evidence available it was unlikely that Demjanjuk would be convicted on alternative charges; and that risking a further acquittal was not in the public interest.<sup>10</sup>

The case thus highlights the difficulties faced in investigations and prosecutions carried out decades after the alleged crime took place.

## The Pinochet case

### Background

When the elected Chilean president, Dr Salvador Allende, was overthrown on 11 September 1973, General Augusto Pinochet participated in the coup as the commander-in-chief of the armed forces. He commanded his forces to overthrow the government and to kill its most prominent supporters (Robertson 2002: 393).

A report by the National Commission of Truth and Reconciliation (the Rettig Commission) estimated that 3 197 persons were killed and 967 disappeared during Pinochet's rule. In 1990 Pinochet transferred power to his successor but remained commander-in-chief of the army until March 1998. Upon leaving that post, Pinochet took a senatorial position for life.

Pinochet was alleged to have taken part in Operation Condor (Robertson 2002: 394),<sup>11</sup> a campaign involving assassination and intelligence gathering allegedly conducted jointly by the security services of several South American states in the mid-1970s (for a discussion of Operation Condor, see below). He was also allegedly involved in a military unit that was supposed to have been responsible for the execution of 75 political opponents in different cities of Chile between September and October 1973 (the case of the Caravan of Death). He is also suspected of having had knowledge of the operations undertaken in Chile and abroad by a secret police agency, the National Intelligence Directorate, and its role in the implementation of Operation Condor.

In 1996 the Association of Progressive Prosecutors of Spain began a private prosecution against Pinochet and members of the Argentinean junta for genocide, terrorism and crimes against humanity.<sup>12</sup> Their action was taken over by Madrid investigating magistrate Balthazar Garzón.

In 1998 Pinochet travelled to the UK to receive medical treatment. On 3 November 1998, Spanish magistrate Garzón requested his extradition under the European Convention on Extradition for the crimes of genocide, terrorism and torture that took place in Chile (Robertson 2002: 396). Following the Spanish request of 16 October 1998 for Pinochet's extradition (Pinochet had planned to leave England on 17 October) in respect of various charges introduced against him in 1996 before the Spanish courts, a British magistrate issued a warrant for his arrest.

Pinochet was arrested in London on 17 October 1998. As Geoffrey Robertson, former president of the SCSL, observed, prior to the Pinochet case no former head of state, visiting another friendly country, had been held legally amenable to its criminal process (Robertson 2002: 395). In this respect, it is a landmark case.

## Holdings of relevant courts and issues of interest

On 28 October 1998 the high court ruled that Pinochet was unlawfully arrested on the grounds that as a former head of state he was entitled to immunity.<sup>13</sup>

On 25 November 1998 Britain's highest court, the House of Lords, set aside the high court's judgment. The House of Lords reasoned that a former head of state

may only benefit from immunity for acts carried out in the exercise of legitimate state functions, which cannot include 'international crimes' such as torture (Robertson 2002: 397).<sup>14</sup> Following this judgment, France, Belgium and Switzerland also issued extradition requests for Pinochet. On 9 December 1998 home secretary Jack Straw granted permission to proceed with Pinochet's extradition to Spain.

On 15 January 1999 the House of Lords set aside its earlier decision, due to Pinochet's claim contesting the impartiality of Lord Hoffman, one of the judges, based on the Law Lord's relationship with Amnesty International, one of the interveners in the case.<sup>15</sup> A new panel of judges was set up, and on 24 March 1999 the House of Lords held that the international criminal law prohibition of crimes against humanity rendered ineffective the immunity that was traditionally accorded under customary international law for former state officials and heads of state.<sup>16</sup> Twenty-seven of the 30 charges in the Spanish warrant against Pinochet were excluded on the double-criminality principle. However, the judges held that Pinochet was not entitled to immunity in extradition proceedings from those charges of torture where the alleged acts took place after Chile, Spain and the UK had become parties to the 1984 UN Convention against Torture.

On 15 April 1999 the home secretary issued a new authorisation to proceed with the extradition request. On 8 October 1999, as a result of Pinochet's extradition hearings, it was held that the crimes alleged against Pinochet constitute crimes both under British and Spanish law and, hence, allowed for extradition. However, on 11 January 2000 the home secretary concluded, on the basis of medical examinations, that Pinochet was unfit to stand trial. Soon after, on 2 March 2000, the home secretary ruled that Pinochet was not to be extradited to Spain, and Pinochet returned to Chile. Pinochet died on 10 December 2006<sup>17</sup> without having been convicted of any crimes committed during his regime.

Although Pinochet himself was never tried for his crimes, the case demonstrates that immunity does not shield former heads of state in relation to international crimes that they may have committed.

## Afghan asylum-seekers case

### Background

On 14 October 2005 The Hague district court sentenced two Afghan asylum seekers for their role and participation in the torture of civilians during the Afghan

war of 1978–92 (Mettraux 2006: 362).<sup>18</sup> One was a former head of military security and vice-minister for state security, and the other a high-ranking officer in charge of the department of interrogation of the military intelligence department. They had taken part in the torture and mistreatment of Afghan civilians. The individuals had come to the Netherlands as asylum seekers, in 1992 and 1996 respectively, and had provided what later turned out to be incriminating evidence during questioning by the Dutch immigration authorities. The Dutch immigration authorities forwarded this information to the prosecuting authorities and the two men were charged under Dutch law with, among others, the war crime of torture (Mettraux: 364–365).

### Holdings of relevant courts and issues of interest

The court held in both cases that it had universal jurisdiction over violations of common article 3 of the Geneva Conventions and that the accused were guilty of torment ('flogging') and torture ('marteling') as a war crime (Mettraux 2006: 362). The two accused were sentenced to 12 and nine years' imprisonment respectively. In its judgment the court referred to the effect of international crimes on Dutch society, stating that the war crime of torture committed in Afghanistan affected the Dutch legal order not only because it is an international crime, but also because the suspect had stated on his asylum application that he intended to form part of Dutch society.

These decisions are part of a set of prosecutions of international crimes heard recently by The Hague district court.<sup>19</sup> There is increased prosecutorial attention to international crimes in the Netherlands, boosted by legislative reforms, including the coming into force of the International Crimes Act on 1 October 2003. Previously, the genocide and torture conventions were implemented in Dutch law by the (now-repealed) Genocide Convention and the torture convention implementation acts respectively. Both statutes provided for the criminalisation of the types of conduct as set out in these two conventions.

Crimes against humanity are now criminalised under Dutch law under section 4 of the International Crimes Act.<sup>20</sup> Section 2 of the Act provides that Dutch criminal law shall apply to (a) anyone who commits any of the crimes defined in the Act outside the Netherlands, if the suspect is present in the Netherlands; (b) anyone who commits any of the crimes defined in the Act outside the Netherlands, if the crime is committed against a Dutch national; and (c) a Dutch national who

commits any of the crimes defined in the Act outside the Netherlands. Interestingly, prosecution on the basis of (c) above may also take place if the suspect becomes a Dutch national only after committing the crime.

## The case of the Butare Four

### Background

In 1993 Belgium passed the Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (Reydams 2003: 429–430). The Act accorded Belgium's courts universal jurisdiction over suspects accused of international crimes, and permitted victims to file complaints in Belgium for atrocities committed abroad.

The accused in the Butare Four case – Vincent Ntezimana, Alphonse Higaniro, Consolata Mukangango and Julienne Mukabutera – were the first persons tried and convicted on the basis of this law (Reydams 2003: 428). The investigation and eventual prosecution were supported by Rwanda and several other countries by allowing Belgian investigators on their territories (Reydams 2003: 431).

The offences the four persons were accused of took place mostly in the Rwandan prefecture of Butare (Reydams 2003: 430).<sup>21</sup> Vincent Ntezimana, a physics professor, was described as one of the ideologues of the genocide that occurred in Rwanda. Alphonse Higaniro<sup>22</sup> was allegedly a member of the inner circle of the presidential family, at the level of cabinet minister. Consolata Mukangango (Sister Gertrude) and Julienne Mukabutera (Sister Maria Kisto) were Benedictine nuns at the Sovu monastery. During the conflict thousands of refugees sought refuge in the convent's compounds. According to the indictment, Mukangango discussed the fate of the refugees with the local Interahamwe leader and requested them to remove the Tutsi refugees from the compound. Many of the refugees were later killed in attacks on the compounds.<sup>23</sup>

Rwanda and Belgium are parties to the 1949 Geneva Conventions and their Additional Protocol II. Moreover, Belgium's Act Concerning the Punishment of Grave Breaches of International Humanitarian Law came into operation prior to the alleged offences taking place (Reydams 2003: 435–436). The trial, before the Brussels cour d'assises, began on 17 April 2001.<sup>24</sup> The four accused were convicted on the evening of 8 June 2001.<sup>25</sup>



## Holdings of relevant courts and issues of interest

At the time of the trial, precedent limited the class of potential perpetrators covered by the 1949 Geneva Conventions and additional protocols to *de jure* or *de facto* state agents. Interestingly, none of the accused was a member of an armed force, and none of the accused could be regarded as official agents of the state. While Ntezimana and Higaniro were arguably *de facto* state agents, the nuns were not. This innovation was echoed later by the Appeals Chamber of the International Criminal Tribunal for Rwanda, which ruled in *Akayesu* that, under common article 3 of the 1949 Geneva Conventions, punishment ‘must be applicable to everyone without discrimination’ (Reydams 2003: 436).

Notably, the accused were convicted of war crimes even though there was, strictly speaking, no combat in Butare at the time that the relevant crimes were committed. This approach, too, was later echoed by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić*, where it held that ‘the rules contained in [common] Article 3 [of the 1949 Geneva Conventions] also apply outside the narrow geographical context of the actual theatre of combat operations.’<sup>26</sup> Perhaps more importantly, it has been argued that some of the war crimes of which Higaniro was convicted took place when there was no armed conflict (in the sense envisioned by the 1949 Geneva Conventions and the Additional Protocol II) at all in Rwanda (Reydams 2003: 436).

It should be noted that, since the above case was decided, the law on universal jurisdiction in Belgium has been repealed and new legislation promulgated in its place.<sup>27</sup> Under the new law Belgian courts only have jurisdiction over international crimes if the accused is Belgian or has his primary residence in Belgium; if the victim is Belgian or has lived in Belgium for at least three years at the time the crimes were committed; or if Belgium is required by treaty to exercise jurisdiction over the case. The new law also considerably reduces victims’ ability to obtain direct access to the courts – unless the accused is Belgian or has his primary residence in Belgium, the decision whether or not to proceed with any complaint rests entirely with the state prosecutor.<sup>28</sup>

Belgium has thus restricted the reach of universal jurisdiction in its courts by adopting a law similar to or more restrictive than most European countries. The amended law did, however, preserve a limited number of cases that have already begun to move forward, including those concerning the Rwandan genocide and the killing of two Belgian priests in Guatemala, as well as the complaints filed against ex-Chadian dictator Hissène Habré. We discuss the Habré case further below.

## The case of Adolfo Scilingo

### Background

During the ‘dirty war’ in the period 1976–83 under the military dictatorship of Jorge Rafael Videla, between 13 000 and 30 000 people reportedly went missing in Argentina. In 1995 Adolfo Scilingo, a former Argentine naval officer, recounted on national television in Argentina his involvement in so-called ‘death flights’, in which the Navy would take live but drugged suspects into helicopters before throwing them, still alive, into the River Plate, which flows through Buenos Aires. He was also allegedly involved in the activities of the notorious Escuela Mecánica de la Armada, or Naval Mechanics School, known as the ESMA, a detention centre in Buenos Aires. In 1997 Scilingo voluntarily travelled to Madrid, Spain in order to give testimony. He provided details regarding the workings of the ESMA. Afterwards he was placed under arrest in Spain.<sup>29</sup> Although he has recanted his statement and been provided counsel through the Argentine government, he has remained in custody during several appeals (Wilson 2003).

## Holdings of relevant courts and issues of interest

On 3 October 2003 Adolfo Scilingo was referred for trial before a panel of judges in the Audiencia Nacional, Spain’s special court for serious international crimes. As stated, the case was referred after Baltazar Garzón, the same Spanish investigating judge who was involved in the Pinochet case, completed his examination of crimes committed during the ‘dirty war’ years in Chile and Argentina. Scilingo’s trial commenced on 14 January 2005 in Madrid. On 19 April 2005 he was sentenced to 640 years’ imprisonment.<sup>30</sup> After the case went on appeal, in early late 2007, the Spanish supreme court’s criminal chamber upheld Scilingo’s conviction for involvement in murders and illegal detentions in Argentina. The court held that Scilingo’s crimes amounted to crimes against humanity under international law. This decision was the first by a Spanish appellate court following a full trial based on universal jurisdiction (Wilson 2008).

## The Italian investigation into Operation Condor

After a seven-year investigation, Italian authorities are seeking to prosecute former top officials in seven South American countries for their roles in Operation

Condor, an operation in the 1970s and 1980s by the region's security forces to crush left-wing political dissent. Judge Luisianna Figliolia in Rome issued arrest warrants for 140 former officials from Argentina, Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay in late December 2007, seeking to prosecute them in connection with the disappearance of 25 Italian citizens. The acts investigated allegedly involve locating, transporting, torturing and ultimately 'making disappear' dissidents across borders, and collaboration on assassination operations. Italy reportedly bases its claim to jurisdiction on the belief that crimes occurred against its citizens (Barrionuevo 2008).

## The case of Hissène Habré

### Background

Hissène Habré ruled Chad from 1982 until he was deposed in 1990 by President Idriss Déby Itno (Human Rights Watch 2008). Habré's eight-year reign was marked by severe political repression. The truth commission appointed after Habré's fall to investigate his crimes estimated that he is responsible for the torture and death of 40 000 individuals. Some of these victims were reportedly massacred in their villages as a response to Habré's suspicion that a particular ethnic group opposed him; most allegedly died of torture or starvation in prisons (Sharp 2003: 167). Files of Habré's political police, the Direction de la documentation et de la sécurité, discovered in 2001, reportedly reveal the names of more than a thousand persons who died in detention. A total of more than 12 000 victims of human rights violations were reportedly mentioned in the files. After being deposed, Habré fled to Senegal (Human Rights Watch 2008).

### Holdings of relevant courts and issues of interest

The legal system in Senegal allows civil suits to be joined with a criminal investigation. Thus, documents collected by a torture victims' association were used to file a 'civil party complaint' against Habré in Senegal. Seven victims participated in this initial complaint. A problem faced by this group was that several of Habré's former high-ranking officers were still in power.

Pursuant to the initial complaint filed in Dakar, a Senegalese *juge d'instruction*, Demba Kandji, restricted Habré's movements and carried out further investigation. On 4 July 2000, after numerous postponements, the Senegalese *chambre d'accusation* (the criminal appeals court) responded to Habré's request for

dismissal of the complaint. At one point, President Wade of Senegal asked Habré to leave the country (Sharp 2003: 172). However, UN secretary-general Kofi Annan requested President Wade not to permit Habré to leave.

Following deposition of a complaint in Belgium, a Belgian judge, Daniel Franssen, went to Chad in February 2002 to conduct a criminal investigation. However, the possibility of an eventual trial in Belgium was placed in doubt by the Brussels court of appeals' restrictive interpretation of Belgium's universal jurisdiction statute, whereby the statute will not permit an investigation to be opened in Belgium for war crimes, crimes against humanity or genocide unless the suspect is found in the country (Sharp 2003: 173).

In 2005 a Senegalese court ruled that it did not have the power to decide whether Habré should be extradited to Belgium. In May 2006 the UN Committee against Torture held that Senegal had breached international human rights law by not dealing with Habré for 15 years.<sup>31</sup> Senegal then referred the case to the AU. In July 2006, Senegal agreed to an AU request to prosecute Habré 'on behalf of Africa' (Human Rights Watch 2008). The AU has named Robert Dossou, Benin's former foreign minister and justice minister, as an envoy to the trial. In February 2007 President Wade signed into law measures permitting Senegal to prosecute cases of genocide, crimes against humanity, war crimes and torture, even when they are committed outside Senegal, thus removing the primary legal obstacles to Habré's trial.

In November 2007 Senegalese justice officials promised lawyers for Habré's victims that an investigating magistrate would be named to carry out the probe of Habré 'within months' (Human Rights Watch 2008). In response to a request by President Wade for international assistance in preparing the trial, on 21 January 2008 an EU delegation headed by Bruno Cathala, the Registrar of the ICC, arrived in Dakar. The delegation was to evaluate Senegal's needs and propose technical and financial help (Human Rights Watch 2008). In April 2008 Senegal amended its constitution, thereby removing the last major obstacle to prosecuting Habré. This was a move warmly welcomed by the UN High Commissioner for Human Rights, Louise Arbour, who called it 'a very positive development in the struggle to strengthen accountability and an important step forward in the never-ending fight against impunity' (United Nations 2008).

Senegal has said that the investigation and trial would cost 28 million euro, and that it would spend over 1,5 million euro on the trial. In addition to the EU, a number of individual countries, including France and Switzerland, have publicly committed to helping Senegal.<sup>32</sup>



## The case of Mengistu Haile Mariam

### Background

Mengistu Haile Mariam was the most prominent officer of the Dergue, the military junta that governed Ethiopia from 1974 to 1987, and the president of the People's Democratic Republic of Ethiopia. The Dergue (Coordinating Committee of the Armed Forces, Police, and Territorial Army) was formed by junior officers of the Ethiopian army on the eve of the 1974 revolution. Once the monarchy had been brought down through a widespread popular uprising, the members of the Dergue seized power. Subsequently, they began targeting individuals and groups likely to pose a threat to military rule (Tiba 2007: 516). In 1991, shortly before his regime was toppled by a coalition of rebels, Mengistu fled to Zimbabwe. The following year, the transitional government decided to bring him and his associates to trial for crimes committed during his reign (Tiba 2007: 517).

### Holdings of relevant courts and issues of interest

The sentencing judgment was issued on 11 January 2007 by the Ethiopian federal high court in the case of Mengistu Haile Mariam and his co-accused who had been tried, among others, on charges of genocide and crimes against humanity. This was the first trial on the African continent where representatives of an entire regime were investigated and tried before a national court. Twenty-five of the 55 accused were found guilty, including Mengistu (who remains in exile in Zimbabwe). The trial took 12 years. In December 2006 Mengistu was convicted by majority vote of genocide and crimes against humanity pursuant to article 281 of the 1957 Ethiopian penal code, which includes 'political groups' among the groups protected against genocide (Tiba 2007: 517).

In a precedent useful for other states on the African continent, a special prosecutor's office that was mandated to prosecute those suspected of serious crimes committed during Mengistu's reign was established in 1992 by the transitional government of Ethiopia. Its first indictment was filed in 1994 (the suspects having been in custody since 1991). The special prosecutor reportedly indicted 5 198 suspects on charges of killing 8 752 persons, causing the disappearance of 2 611 people and torturing 1 837 others. Since 1994 Ethiopian courts have convicted more than a thousand people. The reported charging strategy was to divide the accused into three categories: (1) policy and decision makers, (2) officials who passed on orders or reached decisions on their own, and (3) those directly responsible for committing the alleged crimes.

The trials of those suspected of committing offences during Mengistu's regime took place at different locations throughout the country. This was done for purposes of convenience and also in order to try some of the accused at locations where the crimes had been committed. The case that included Mengistu and his senior collaborators was tried before the first division of the federal high court. The judgment will be discussed in this chapter.

Mengistu and his co-accused were charged with 211 counts of genocide and crimes against humanity. Twenty-five of the 55 accused who were found guilty, including Mengistu, were tried in absentia. The charges filed against Mengistu and his co-accused focused on genocide in violation of article 281 of the 1957 Ethiopian penal code, or, alternatively, on aggravated homicide in violation of article 522 of the penal code (Tiba 2007: 519).

As highlighted by the defence, article 281 treats genocide as a crime against humanity; so, too, acts designed to eliminate 'political groups' and 'population transfer or dispersion' are defined as amounting to genocide. This provision, consequently, goes beyond what is provided for in the Genocide Convention.<sup>33</sup> The court held, however, that Ethiopia could go beyond the minimum standards laid down in the convention, finding that article 281, which was enacted to give wider human rights protection, should not be viewed as contradicting the Genocide Convention. Put differently, the court held that so long as Ethiopia did not promulgate a law that minimised the protection of rights afforded by the convention, the fact that Ethiopia is a party to the convention was held not to prohibit the government from legislating a wider range of protection than the convention. In line with this, the majority decision rendered in December 2006 did not reconsider the issue of compatibility with the Genocide Convention (Tiba 2007: 519–520).

On 12 December 2006 the court issued its judgment on the merits. Fifty-five accused were convicted, by a majority vote of two to one, of genocide, homicide and bodily injury in violation of the Ethiopian penal code.

Judge Nuru Seid, dissenting, found that the accused should have been convicted of homicide and causing wilful bodily injury, not genocide. The dissenting judge accepted the argument of the accused that their actions at the time were lawful and the measures taken against political groups and their members did not amount to genocide in international law.

The trial, besides being overly lengthy, encountered several logistical problems. The availability of appropriate legal assistance for the defence was one significant

concern. Debebe Hailegabriel, one of the judges in the trial, expressed misgivings regarding this issue after resigning from the court.

## OTHER RESPONSES: TRUTH COMMISSIONS AND RESTORATIVE JUSTICE MODELS

Before discussing the prosecution of international crimes before international and so-called mixed (national and international) criminal tribunals, it is useful to consider truth commissions and other restorative models as responses to international crimes.

### Function

Truth commissions, in terms of function, 'stand half-way between international human rights bodies and international criminal tribunals' (Buergethal 2006–07: 221). That is because they generally deal with human rights violations committed by both governments and by individuals. However, they tend not to be judicial bodies. They are usually fact-finding bodies set up to investigate serious violations of human rights and international criminal law, often committed during an internal armed conflict or during the time that a repressive regime has been in power (Buergethal 2006–07: 221).

### Mandate

The mandates of truth commissions differ from situation to situation, depending on the nature of the conflict investigated. Some are empowered to attribute individual responsibility for serious crimes, for example, 'naming names'; others do not have such power. Generally, truth commissions are required to propose methods for the compensation of the victims of the crimes investigated, and to recommend measures for fostering national reconciliation. Occasionally truth commissions are empowered to recommend the prosecution of persons suspected of serious crimes. Some, such as the South African Truth and Reconciliation Commission, are empowered to offer immunity from prosecution if the offenders confess their guilt and ask for forgiveness (Buergethal 2006–07: 221–222).

### Types of truth commission

Three types of truth commissions, depending on their composition, could be identified: national truth commissions, mixed commissions and international

commissions. The South African Truth and Reconciliation Commission was a well-known national truth commission. National commissions were previously established in Argentina and Chile to investigate the massive violations of human rights that had been committed in these countries during rule by their respective military regimes. The Guatemalan Historical Clarification Commission, which consisted of a foreign chairman and two Guatemalan nationals, was a mixed truth commission. It was established pursuant to an agreement negotiated between the government of Guatemala and the insurgent forces under the auspices of the UN. International commissions – truth commissions composed entirely of foreign nationals – are rare. The UN Truth Commission for El Salvador is one example (Buergethal 2006–07: 222).

### Relative merits of the various types

The appropriateness of a particular type of commission will hinge on the characteristics, such as political climate, of the relevant country. Generally, a national commission set up through agreement among all major political groups tends to enjoy national legitimacy and receive broad support for its findings and recommendations. In the absence of such consensus, and where composition of the commission is controversial, the commission may suffer from insufficient credibility, which may hamper its ability to have an impact. This may happen, for example, in states where the regime investigated remains in power or remains in control of the security services.

An international commission may often be useful for a small country, where the population remains polarised along political lines, and where it is difficult to find a group of nationals of the country who would be considered by the population to be impartial. This is the case in El Salvador and explains why the parties to the Salvadoran peace agreement preferred to have a truth commission composed only by foreign nationals.

In mixed commissions the foreign members will be able to rely on their colleagues who are nationals of the relevant country to gain an understanding of the historical, political and social context of the conflict. However, mixed commissions may face disadvantages similar to those of national commissions. Unless their national members are viewed by the population as impartial, the commission will have difficulties gathering the information required to prepare a credible report because it will not be trusted and, indeed, any report it provides may not have much legitimacy or impact.

## Comparison between truth commissions and courts

Truth commissions have been described as exercising ‘macro-fact-finding’ functions, that is, they investigate entire conflicts that have resulted in the large-scale commission of international crimes. International criminal courts, on the other hand, carry out ‘micro-fact-finding’ functions and adjudication of specific criminal charges (Buergethal 2006–07: 222).

Depending upon the context, a truth commission can provide information regarding widespread occurrence of genocide, disappearances, extrajudicial executions, torture and rapes, conditions in detention camps, massacres, etc. It can establish and name the state military or non-state insurgent units responsible for such acts. It can also explore the social, political and other causes for the conflict, and set out a historical overview of these events. This function can promote national reconciliation. Commissions can also recommend and, hence, be a precursor to further steps, such as the payment of compensation to victims, prosecution of alleged perpetrators and the provision of amnesties (Buergethal 2006–07: 223).

Mixed or international criminal courts, whose activities are described below, have a more focused role. They establish individual criminal responsibility and mete out appropriate punishment. Their judgments have ‘practical and symbolic value’ since they exact retribution, attach a stigma to the conduct that resulted in the punishment, and act as deterrents by showing potential offenders the consequences of criminal activity. Decisions of such criminal courts also indicate publicly that the international community considers the acts committed to be criminal, politically unacceptable and morally reprehensible.

It is difficult for international or mixed criminal courts to provide a comprehensive historical overview of the events that transpired in a country, and of the causes that precipitated the crimes or violations they produced, in the same way that a truth commission can, due to the focused nature of its activities. Courts are also limited in terms of the number of offenders who can be investigated and tried. In Rwanda, for example, some 100 000 individuals allegedly took part in the genocide, but no international or mixed court could try that many defendants. Due to the person-specific focus of courts, their approach to the facts before them is necessarily narrower than that of truth commissions, whose mandates are broader. Courts are also generally not well equipped to make policy recommendations in the same way that truth commission are (Buergethal 2006–07: 223).

On the other hand, truth commissions are not judicial bodies and lack the ability to investigate, try and, if appropriate, convict and sentence persons accused of criminal offences. Only a court can do this (Buergethal 2006–07: 223–224).

On the basis of the above, it is accordingly better to understand that in many post-conflict situations the work of truth commissions is able to complement the work of criminal courts, and vice versa. Naturally, there are practical problems involving due process and evidentiary issues that arise when both a court and a truth commission deal with the same situation. But despite such challenges, in many situations a truth commission and a court, working in the same environment, can set out findings that will enable a country to ‘put the past behind it without sweeping the truth under the rug’ (Buergethal 2006–07: 224).

## THE ADVENT OF THE *AD HOC* AND MIXED TRIBUNALS

In our earlier discussion of domestic prosecution of international crimes we noted that certain states, including African states, have felt compelled to take action against individuals guilty of international crimes such as genocide, war crimes and crimes against humanity. However, as we have seen above, there are many practical, diplomatic and legal obstacles that can stand in the way of states seeking to prosecute international crimes on the basis of universal jurisdiction or on the basis of the active or passive personality principle. Partly as a result of this, in certain exceptional circumstances following large-scale atrocities, courts were created by the UN to try persons guilty of international crimes (for example, the Nuremberg and Tokyo tribunals and the Rwanda, Yugoslavia and Sierra Leone tribunals). The ICC itself has now been established on a permanent basis to prosecute those most guilty of serious international crimes.

The purpose of the following section is to consider the rise of these international criminal tribunals, and to identify the lessons they provide for Africans working in the field of international criminal justice. The tribunals discussed owe their creation in large measure to the legacy begun at Nuremberg. The war conducted by Germany and the crimes committed by its officials and soldiers during the Second World War prompted the creation by the Allied powers of an *ad hoc* international military tribunal at Nuremberg<sup>34</sup> (a similar tribunal was constituted in Tokyo (Brackman 1988) in respect of crimes committed by Japan’s leaders).

The establishment of the Nuremberg and Tokyo international military tribunals, which tried the principal leaders of the Nazi and Japanese regimes after

the Second World War for crimes against the peace, war crimes and crimes against humanity, marked an important turning point in the development of international criminal justice. The UN was energised by the work of these tribunals, and in 1948 adopted a resolution mandating the International Law Commission to begin work on the draft statute of an international criminal court (Schabas 2004: 8). The enthusiasm generated by Nuremberg and Tokyo for a permanent court in the immediate post-war period was, however, abandoned during the cold war.

However, at the end of the cold war, the world, for a variety of reasons, witnessed a steady proliferation of international and hybrid/mixed criminal courts, and Nuremberg's legacy was taken forward. The setting up and the practice of these courts are examined below. We will examine the ICTY, the ICTR, Panels with Exclusive Jurisdiction over Serious Offences in East Timor (the special panels of the Dili district court), the SCSL, Extraordinary Chambers in the Courts of Cambodia (ECCC), and, finally, the ICC. We do so in order to, firstly, highlight the challenges to be faced. But by considering the experience of these tribunals we also demonstrate the resources that can be relied on as a starting point for government legal and judicial officers, the police and practising lawyers in African states, when setting up or developing national institutions for investigating, prosecuting and adjudicating international crimes.

## The International Criminal Tribunal for the former Yugoslavia

The ICTY was established by the UN Security Council acting under chapter VII of the UN Charter. Its creation was in response to the international crimes (including grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide, and crimes against humanity) that had been committed on the territory of the former Yugoslavia since 1991 (United Nations 1993a).

The ICTY benefited from the Nuremberg legacy. Indeed, those who called for the tribunal relied on the precedent set by Nuremberg. In May 1991 Mirko Klarin, a Yugoslav reporter, called for 'a tribunal ... similar to the one at Nuremberg' (Futamura 2008: 27). Madeleine Albright, representing the US, said in the Security Council during the adoption of resolution 808 (1993) which provided for the ICTY's establishment, that there was '... an echo in the chamber today. The Nuremberg principles have been reaffirmed. We have preserved the long-

neglected compact made ... 48 years ago ... to create the United Nations and enforce the Nuremberg principles', and that 'the Nuremberg Principles on war crimes, crimes against peace, and crimes against humanity were adopted by the General Assembly in 1948. ... [W]ith resolution 808 (1993), the Security Council has shown that the will of this organisation can be exercised, even if it has taken nearly half a century for the wisdom of our earliest principles to take hold' (Futamura 2008: 27).

The rules of procedure and evidence of the ICTY were promulgated by the judges of the tribunal (United Nations 1993b: article 15). The judges themselves are elected by the General Assembly of the UN, from a list submitted by the Security Council (United Nations 1993c: article 13*bis*). The prosecutor of the ICTY is appointed by the Security Council on the basis of nomination made by the secretary-general (United Nations 1993b: article 16).

The stated mission of the ICTY is fourfold: (1) to bring to justice persons allegedly responsible for serious violations of international humanitarian law; (2) to render justice to the victims; (3) to deter further crimes; and (4) to contribute to the restoration of peace by holding accountable persons responsible for serious violations of international humanitarian law.

On its website, the ICTY summarises some of its 'core achievements': (1) strengthening the shift from impunity to accountability, (2) establishing the facts regarding the atrocities committed in the former Yugoslavia, (3) bringing justice to thousands of victims and giving them a voice, (4) accomplishments in international law, and (5) strengthening the rule of law.<sup>35</sup>

## The International Criminal Tribunal for Rwanda

The ICTR was established by the Security Council acting under chapter VII of the charter of the UN in light of offences committed in Rwanda during the mass-scale atrocities that took place in the months following 6 April 1994 (United Nations 1994). For security reasons, the Security Council decided to locate the seat of the tribunal in Arusha, Tanzania (Mose 2005: 2–3). The first accused arrived in Arusha in May 1996 and his trial commenced in January 1997 (Mose 2005: 3).

The crimes within its jurisdiction include genocide, crimes against humanity, violations of article 3 common to the Geneva Conventions and of Additional Protocol II. The jurisdiction of the court is limited to crimes committed between 1 January and 31 December 1994. In terms of personal and territorial jurisdiction, the crimes must be those committed by Rwandans in the territory of Rwanda and



in the territory of neighbouring states, or committed in Rwanda by non-Rwandan citizens.

The ICTR adopted the rule of procedure and evidence of the ICTY, with such changes as were necessary. The judges are elected by the UN General Assembly from a list submitted by the Security Council (United Nations 1993b: article 13*bis*).

In August 2003, the Security Council adopted a completion strategy and decided that both the ICTR and the ICTY shall complete all investigations by 2004, all trials by 2008, and all appeals by 2010. The statutes of the ICTR and ICTY originally provided for a common prosecutor, as well as a common Appeals Chamber. In August 2003, the Security Council decided to establish a separate prosecutor for the ICTR. For reasons of efficiency it was considered necessary to divide up the work performed by the prosecutor as the two tribunals entered into the stage of implementing the completion strategy (United Nations 1993b: 11).

The challenges faced by the ICTR in the early years may be especially relevant for investigators and prosecutors working on the African continent. These included limitations in general infrastructure. There was:

- A lack of sufficient tarred roads that hampered speedy work
- Unstable electricity and water supplies
- Problems with availability/reliability of telephone and fax lines
- A lack of availability of requisite information technology, resulting in delays

The investigation unit in Kigali had to function in an environment with limited infrastructure (United Nations 1993b: 3).

These impediments notwithstanding, the ICTR has set several significant legal precedents. By way of example:

- The judgment in *Prosecutor v Akayesu* was the first in which an international criminal tribunal interpreted the definition of genocide as set out in the Genocide Convention
- The *Akayesu* judgment was also innovative in its affirmation of rape as an international crime; this and subsequent judgments are notable for finding that rape may comprise a constituent act of genocide (United Nations 1993b: 5–6)
- Importantly, after Nuremberg, the ICTR was the first international criminal tribunal to convict a head of government – the court convicted Jean Kambanda, the prime minister of Rwanda from April to July 1994, of genocide (United Nations 1993b: 6)

- *Nahimana*, the ‘media case’, was the first post-Nuremberg case to examine the role of the media in the context of mass crimes, and the line between freedom of expression and incitement to international crimes.<sup>16</sup> This case was the first pronouncement by an international tribunal on such issues after the case of Julius Streicher at Nuremberg (United Nations 1993b: 6)

## Cooperation with African states

The ICTR also provides examples of cooperation on the African continent in international criminal investigation and prosecution. Alleged perpetrators of events in 1994 were arrested, among others, through cooperation with several West African countries in 1998 (United Nations 1993b: 4). Arrests have taken place in, among others, Cameroon, Kenya, Togo, Mali, Tanzania, Benin, Angola, Congo, Burkina Faso, South Africa, Zambia, Côte d’Ivoire, Uganda, Gabon, Senegal and Namibia.<sup>36</sup> This regional cooperation indicates the willingness and ability of African states to cooperate in international criminal investigations and prosecutions.

In the latest annual report of the ICTR to the General Assembly and the Security Council, it was reported that the prosecutor has handed 30 case files to the government of Rwanda for prosecution before the Rwandan national courts. At the time of reporting, the prosecutor, pursuant to rule 11*bis* of the rules of procedure and evidence,<sup>37</sup> also filed motions for the transfer of one case that was before the ICTR for prosecution by the national criminal courts in Rwanda (International Criminal Tribunal for Rwanda 2007).

## Panels with Exclusive Jurisdiction over Serious Offences in East Timor (the special panels of the Dili district court)

The special panels of the Dili district court is a hybrid tribunal (with Timorese and international staff) created in 2000 by the UN Transitional Administration in East Timor. The special panels functioned in the period 2000 to 2006.

The special panels were set up under the authority given to the special representative of the secretary-general under Security Council resolution 1272 (1999) of 25 October 1999 (United Nations 1999). The crimes within its jurisdiction included genocide, war crimes, crimes against humanity, murder, sexual offences and torture.

The rules of procedure and evidence that were applicable to the special panels were the transitional rules of criminal procedure promulgated by the UN special representative after consultation in the national consultation council.<sup>38</sup> The judges and the chief prosecutor were appointed by the transitional administrator, taking into consideration the recommendation of the transitional judicial service commission.

Each panel was composed of two international judges and one East Timorese judge. A serious crimes unit was also created by the transitional administration to investigate and prosecute the relevant offences. Indictments for almost 400 persons were issued. Some 55 trials involving 88 accused persons were held by the special panels. Four persons were acquitted and 84 were convicted.

## Special Court for Sierra Leone

The SCSL was established by agreement between the UN and the government of Sierra Leone pursuant to Security Council resolution 1315 of 14 August 2000 in order to try those who bear greatest responsibility for the war crimes and crimes against humanity committed in Sierra Leone after 30 November 1996 during the Sierra Leone civil war (United Nations 2000).

The crimes within its jurisdiction include crimes against humanity, violations of article 3 common to the Geneva Conventions and of Additional Protocol II, other serious violations of international humanitarian law, and certain crimes under Sierra Leonean law. Interestingly, with regard to the offences under Sierra Leonean law, individual criminal responsibility is to be established in accordance with Sierra Leone law (Special Court for Sierra Leone, article 6(5)).

The rules of the ICTR in existence at the time of the establishment of the SCSL are applicable *mutatis mutandis* to the SCSL. Where the applicable rules are inadequate, judges of the SCSL as a whole are empowered to amend/adopt the rules (Special Court for Sierra Leone: articles 14(1) and 14(2)).

True to its status as a mixed international/national tribunal, the judges of the SCSL are appointed as follows: to the Trial Chamber, one judge is appointed by the government of Sierra Leone and two judges by the UN secretary-general; and to the Appeals Chamber, two judges are appointed by the government of Sierra Leone and three judges by the UN secretary-general. The prosecutor is appointed by the secretary-general (Special Court for Sierra Leone: see article 12).

Like the ICTR, the SCSL has contributed in significant ways to the jurisprudence of international criminal law. For instance, on 31 May 2004, the

SCSL, in *Prosecutor v Sam Hinga Norman*,<sup>39</sup> handed down the first judgment regarding recruitment of child soldiers. The conflict in Sierra Leone has been marked by the use of children as soldiers. It is estimated that around 10 000 children under the age of 15 have served in the armies of the main warring factions.<sup>40</sup> Sam Hinga Norman was arrested and charged under the statute of the SCSL with the crime of '[c]onscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities'. The court found that the act of recruiting child soldiers was a war crime outlawed under international humanitarian law. The court concluded:

... the Government of Sierra Leone was well aware already in 1996 that children below the age of 15 should not be recruited. Citizens of Sierra Leone, and even less, persons in leadership roles, cannot possibly argue that they did not know that recruiting children was a criminal act in violation of international humanitarian law.<sup>41</sup>

The judgment also prefigures the work of the ICC and the prosecution of those who recruit child soldiers and use them to participate in hostilities under the Rome Statute of the ICC.<sup>42</sup>

## Extraordinary Chambers in the Courts of Cambodia

In 1997 the government of Cambodia requested the UN to assist in establishing a court to prosecute the senior leaders of the Khmer Rouge,<sup>43</sup> a regime that came to power on 17 April 1975 and was overthrown on 7 January 1979 and that was allegedly involved during that time in the large-scale perpetration of atrocities in Cambodia.<sup>44</sup> Subsequently, in 2001, the Cambodian national assembly passed a law to create a court to try serious crimes committed during the Khmer Rouge regime. The court was named the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (ECCC).<sup>45</sup>

An agreement between Cambodia and the UN was reached in June 2003 detailing how the international community will assist and participate in the functioning of the ECCC.<sup>46</sup>

The ECCC features several innovations:

- Importantly, the ECCC is the first hybrid tribunal to be established in a civil law system;<sup>47</sup> consequently, the practice emerging from the ECCC may be especially useful to states in Africa that possess civil law systems
- The ECCC is the first hybrid court to provide for victim participation as civil parties<sup>48</sup>

The crimes within the jurisdiction of the court include genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions and other crimes as defined in chapter II of the law on the establishment of the extraordinary chambers of 10 August 2001.

The rules of procedure and evidence are to be Cambodian law. Where the procedural rules are inadequate or ambiguous, the ECCC is empowered to seek guidance from international rules of procedure. International judges are appointed by the supreme council of the magistracy from a list proposed by the UN secretary-general (Extraordinary Chambers in the Courts of Cambodia 2004). The international co-prosecutors are appointed by the supreme council from a list of two nominees forwarded by the UN secretary-general (Extraordinary Chambers in the Courts of Cambodia 2004: see article 18(new)). The law requires that there will be one international prosecutor and one Cambodian prosecutor, as co-prosecutors.

On 18 July 2007 the first introductory submission was made by the co-prosecutors to the co-investigating judges. All the suspects named in the submission have subsequently been arrested, charged and detained by the judicial organs of the ECCC. With these arrests, the judicial activity of the court has increased considerably. Many hearings have taken place in the cases of these five suspects – Kaing Guek Eav (alias Duch), Nuon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan – including their initial appearances, detention hearings and ongoing interviews. Appellate hearings took place before the Pre-trial Chamber in November 2007 on an appeal by Duch against an order of provisional detention by the co-investigating judges (Extraordinary Chambers in the Courts of Cambodia 2007).

## THE INTERNATIONAL CRIMINAL COURT

The ICC was set up as a permanent institution to exercise its jurisdiction over persons for the ‘most serious crimes of international concern’ and is to be

‘complementary to national criminal jurisdictions’ (International Criminal Court 2002: see the preamble). The ICC was created via the Rome Statute of 17 July 1998, which entered into force on 1 July 2002.

Unlike the *ad hoc* tribunals discussed above, the ICC is intended as a court of last resort, investigating and, if necessary, prosecuting only where national courts are unwilling or unable to investigate or prosecute a case (International Criminal Court 2002: see article 17).

The crimes within its jurisdiction are genocide, crimes against humanity, war crimes and, potentially, aggression. The court’s jurisdiction over aggression will only become operative once the definition of the crime and the conditions under which the court may exercise jurisdiction over the crime have been agreed upon.

The judges of the court are elected by secret ballot at a meeting of the Assembly of States Parties. The Prosecutor is elected by secret ballot by an absolute majority of the assembly (International Criminal Court 2002: see article 36). It is significant that four Judges (Judge Diarra of Mali, Judge Kuenyehia of Ghana, Judge Nsereko of Uganda and Judge Pillay of South Africa) of the total of 18 Judges are drawn from African states. Moreover, one of the authors of this chapter, who serves as the Deputy Prosecutor of the Court, is also African.

## African involvement in the creation of the ICC

African states contributed extensively to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome Statute of the ICC was finalised. The Court enjoys continued support in the region, as evidenced by the growing number of ratifications of the statute. Already,<sup>49</sup> 30 African states have ratified the Rome Statute: Benin, Botswana, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Congo (Brazzaville), Democratic Republic of the Congo, Djibouti, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritius, Namibia, Niger, Nigeria, Senegal, Sierra Leone, South Africa, Tanzania, Uganda and Zambia.

In the period leading up to the Rome diplomatic conference, various ICC-related activities were organised throughout the continent. Regional approaches such as these were viewed not only as enhancing universal support, but also as fostering a better understanding of the substantive issues raised by the draft text of the statute (Mochochoko 2005: 246). Radio talk shows, interviews and seminars were conducted in countries such as Botswana and South Africa. Some 90 African



organisations based in, among others, Kenya, South Africa, Nigeria, Uganda, Rwanda and Ethiopia joined the NGO Coalition for an International Criminal Court. They lobbied in their respective countries for the early establishment of an independent and effective international criminal court (Mochochoko 2005: 248).

Fourteen nations of the Southern African Development Community (SADC) had been very active in ICC-related negotiations at the time that the International Law Commission presented a draft statute for an international criminal court to the General Assembly in 1993. Experts from the group met in Pretoria, South Africa in September 1997 to discuss their negotiation strategies and to agree on a common position in order to make a meaningful impact on the outcome of negotiations. This meeting provided impetus for a continent-wide consultation process on the creation of the court (Mochochoko 2005: 248).

The participants agreed on a set of principles that were later sent to their respective ministers of justice and attorneys-general for endorsement. The principles included the far-reaching suggestions that:

- The court should have automatic jurisdiction over genocide, crimes against humanity and war crimes
- The court should have an independent prosecutor with power to initiate proceedings *proprio motu*
- There should be full cooperation of all states with the court at all stages of the proceedings
- Stable and adequate financial resources should be provided for the court and that states should be prohibited from making reservations to the statute

On the basis of the principles submitted to them, SADC ministers of justice and attorneys-general issued a common statement that became a primary basis for the SADC's negotiations at Rome (Maqungo 2000). These principles also appeared in the Dakar declaration on the ICC and other declarations (Mochochoko 2005: 248–249). At a meeting on 27 February 1998, the council of ministers of the Organisation of African Unity (OAU, now the African Union) took note of the Dakar declaration and called on all OAU member states to support the creation of the ICC. This resolution was later adopted by the OAU summit of heads of state and government in Burkina Faso in June 1998.

During the Rome conference itself, several circumstances resulted in African states having a significant impact on the negotiations; for example, African

delegates participating in the Rome conference had two guiding documents: the SADC principles and the Dakar declarations. Both the SADC principles and the Dakar declaration were in line with the principles of the 'like-minded group', the members of which were committed to a court independent from Security Council control, staffed by an independent prosecutor, and with inherent jurisdiction over the core crimes of genocide, crimes against humanity and war crimes (Mochochoko 2005: 250).

Most of the work of the conference was carried out in working groups and informal working sessions. It is notable that Africans took the lead in either chairing or coordinating various issues. For instance:

- The Lesotho delegate was elected one of the vice-chairpersons of the conference and also coordinated the formulation of part 9 of the Rome Statute
- South Africa was a member of the drafting committee of the conference and coordinated the formulation of part 4 of the Rome Statute. As a consequence, South Africa was frequently invited to participate in the meetings of the bureau of the conference
- Zambia was a member of the credentials committee of the conference (Maqungo 2000)

It is thus beyond doubt that African states had the opportunity to ensure that the principles enshrined in the SADC and Dakar declarations were implemented to the extent possible. Regular African group meetings also contributed towards a coordinated effort.

After the statute was completed, in February 1999, Senegal became the first State Party to ratify the Rome Statute. Africa's commitment to the ICC, and to the cause of international justice, continues to this date. In this context it is important that the strategic partnership agreement signed at the EU-Africa summit in Lisbon in December 2007 says that 'crimes against humanity, war crimes and genocide should not go unpunished and their prosecution should be ensured'.<sup>50</sup>

## Comparison of *ad hoc* tribunals with the ICC

The *ad hoc* tribunals – the ICTR and the ICTY – are in some ways the older siblings of the ICC. This is due to the following:

- The *ad hoc* tribunals lacked contemporary models (Johnson 2004: 369)<sup>51</sup> to learn from. They had to look back to Nuremberg, which took place almost half

a century earlier (Johnson 2004: 369). Consequently, the creation and development of the *ad hoc* tribunals were, to some extent, a process of trial and error. In contrast, the drafters of the Rome Statute possessed the opportunity to observe the functioning of the *ad hoc* tribunals. Hence, the ICC, much like the younger child in a family, had the advantage of being able to identify pitfalls and gain ideas via its older siblings.

- Parents gain experience from bringing up their first child, and hence are more adept at dealing with the second. Similarly, the international community is now more prepared to deal with the ICC, having viewed firsthand the growing pains of its siblings. The innovations featured in the ICC may also serve as a useful starting point for government legal and judicial officers, the police and practising lawyers in African states when setting up or developing national institutions for investigating, prosecuting and adjudicating international crimes.

### A different and more comprehensive procedural system

The procedural regime of the ICC, composed of the statute, rules as well as the regulations, has also built on the basic documents and jurisprudence of the *ad hoc* tribunals. For example, the procedures regarding victims have been augmented and developed in the Rome Statute, most notably by the provision for representation of victims (Fernández de Gurmendi 2001: 256).

Moreover, it has been said that ‘the framers attempted to avoid an often criticised bias in favour of common law procedures, choosing instead to blend aspects of the adversarial and inquisitorial systems and innovate where neither system had a rule that fit the Court’s needs’ (Sadat 2002–03: 1076).

### A more comprehensive set of general principles/substantive laws

Part 3 of the Rome Statute is devoted to setting out general principles of criminal law applicable to trials before the ICC, and deals with, among others: (1) *nullum crimen sine lege* (no criminal offence without a [pre-existing] law), (2) *nulla poena sine lege* (no punishment for a criminal offence without a [pre-existing] law), (3) individual criminal responsibility, (4) irrelevance of official capacity, (5) responsibility of commanders and other superiors, (5) the mental requirements for the crimes within the jurisdiction of the court, (6) grounds for excluding criminal responsibility, and (7) the defence of mistake of fact or mistake of law.

These general principles, therefore, build on the basic documents and jurisprudence of the *ad hoc* tribunals and ensure that the statute lays down requirements for criminal liability that conform to the basic tenets of certainty and predictability.

### Duty to investigate both incriminating and exonerating circumstances

The prosecutors of the *ad hoc* tribunals do not have an explicit obligation to investigate both incriminating and exonerating circumstances equally (Tochilovsky 2002: 268–275 at 270). However, the Prosecutor of the ICC is required, in order to establish the truth, to extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility, and, in so doing, to investigate incriminating and exonerating circumstances equally (International Criminal Court 2002: article 54(1)(a)). This transforms the Prosecutor from a partisan actor often envisioned in common law litigation into a neutral seeker of the truth.

In practical terms, this may involve interviewing ‘exonerating’ witnesses, following specific avenues of investigation that may provide exonerating information, as well as developing processes to record actions taken in connection with exonerating information.

### Greater responsibility towards victims and a broader role for victims

The Rome Statute requires the Prosecutor to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses (International Criminal Court 2002: article 68(1)). This is so especially in the context of crimes that involve sexual or gender violence or violence against children.<sup>52</sup> For example, the Prosecutor can audio or video record the questioning of a person where, among others, the use of such procedures could assist in reducing any subsequent traumatising of a victim of sexual or gender violence or a child or a person with disabilities in providing their evidence (International Criminal Court 2000: rule 112). The rationale for such recording has been said to be that ‘the recorded testimonies of such persons might be later used at trial, if the court so allowed’.<sup>53</sup>

A significant departure from the practice of the *ad hoc* tribunals is the possibility for victims to have their own representatives in order for their views and concerns to be presented where their personal interests are affected (International Criminal Court 2002: article 68(3)). Interestingly, drafters of the ICTY statute considered provisions on the appointment of a counsel for victims, but the proposal was not accepted (Tochilovsky 2002: 273, citing Morris and Scharf 1995: 167). The inclusion of such a provision in the Rome Statute indicates an evolution in legal thinking, and the recognition of victims' rights as one of the rationales for international criminal law.

### Greater judicial participation in the pre-trial phase

Another Rome Statute innovation that differs from the *ad hoc* model is the Pre-trial Chamber. Among other functions, this chamber:

- Issues orders and warrants required for the purposes of an investigation, at the request of the Prosecutor (International Criminal Court 2002: article 57(3)(a)); this may include search warrants, arrest warrants, etc.
- Issues orders necessary to assist a person in the preparation of his or her defence, when a person who has been arrested or has appeared pursuant to a summons requests assistance (International Criminal Court 2002: article 57(3)(b))
- Provides for the protection and privacy of victims and witnesses (International Criminal Court 2002: article 57(3)(c))
- Provides for the preservation of evidence (International Criminal Court 2002: article 57(3)(c))
- Provides for the protection of persons who have been arrested or appeared in response to a summons (International Criminal Court 2002: article 57(3)(c))
- Provides for the protection of national security information (International Criminal Court 2002: article 57(3)(c))
- May authorise the Prosecutor to take specific investigative steps within the territory of a State Party without having secured the cooperation of that state (International Criminal Court 2002: article 57(3)(d))

The Pre-trial Chamber thus allows for greater supervision of the pre-trial phase than in the *ad hoc* model. This innovation appears to be based, among others, on a desire to provide judicial authority to the actions of the Prosecutor, and to have

a body to decide on requests for state cooperation (United Nations 1996: paragraph 228).

## BEST PRACTICES DERIVED FROM THE PRACTICE OF THE INTERNATIONAL AND HYBRID TRIBUNALS

Several tribunals are actively participating in the working group constituted by the ICC with representatives from other international criminal tribunals to create a best-practices manual for international prosecutors. Moreover, the ICTY, with the assistance of the UN Interregional Crime and Justice Research Institute, will draft a compilation of its best practices. The document will include all of the ICTY's expertise on its proceedings, from the investigation stage until the stage of enforcement of sentences, and draw from the work of all organs of the court.<sup>54</sup>

When available, the end products of these projects could serve as very useful resources for government legal and judicial officers, the police and practising lawyers in African states.

## CONCLUSION

To sum up briefly, as we stated at the beginning of this chapter, no other continent has suffered more than Africa due to the absence of legitimate institutions of law and accountability. There is a growing international will, of which the Africa continent is an integral part, to enforce humanitarian norms and to bring to justice those responsible for the most serious crimes of concern to the international community.

The struggle to fight impunity is not a neo-colonial exercise; it is one that has received support from, and has been shaped by, the people of the African continent. National, hybrid and international jurisdictions from the African continent have made a significant contribution to international criminal practice and jurisprudence. The continent has also played a major role in the creation of the permanent ICC.

As a result of the gradual transition from the age of impunity to the age of enforcement, there is a large reservoir of jurisprudence, practice and institutional knowledge from national, hybrid and international institutions now in existence. It is imperative that today's African professionals who work in the area of international criminal law make use of these resources – to learn from the

mistakes and the successes of the past, and to create innovative solutions for the future.

## NOTES

- 1 The authors would like to express their gratitude to Pubudu Sachithanandan, assistant trial lawyer of the ICC, for his assistance with the preparation of this chapter.
- 2 For a discussion of international crimes more generally, and the ICC's crimes in particular, see chapter 3, 'International crimes'.
- 3 A summary of Eichmann's background can be found at [http://www.trial-ch.org/en/trial-watch/profile/db/facts/adolf\\_eichmann\\_138.html](http://www.trial-ch.org/en/trial-watch/profile/db/facts/adolf_eichmann_138.html).
- 4 *Attorney General of the Government of Israel v Eichmann* [1961] 36 ILR 18, 50 (1968) (District Court of Jerusalem).
- 5 *Ibid.*, paragraph 12.
- 6 *Attorney General v Eichmann* [1962], 36 ILR 277, 282-83 (1968) (Supreme Court of Israel).
- 7 See *Demjanjuk v Petrovsky*, 612 F. Supp. 571 (N.D. Ohio 1985) and *Demjanjuk v Petrovsky*, 776 F.2d 771 (6th Cir. 1985) at paragraph 32 (<http://www.altlaw.org/v1/cases/498741>).
- 8 *Ibid.*, 80.
- 9 *Demjanjuk v Israel*, Crim. App No. 347/88 (Sup. Ct. July 29, 1993).
- 10 <http://www.nizkor.org/hweb/people/d/demjanjuk-john/israeli-data/demjanjuk-s4.html>.
- 11 The trial summary on Trial Watch provides a helpful summary of the facts of this case. Available at [http://www.trial-ch.org/en/trial-watch/profile/db/facts/augusto\\_pinochet-ugarte\\_50.html](http://www.trial-ch.org/en/trial-watch/profile/db/facts/augusto_pinochet-ugarte_50.html).
- 12 See Derochos Human Rights, 1998 for the full procedural history of these prosecutions.
- 13 *In the matter of an application for a writ of habeas corpus ad subjicendum, re: Augusto Pinochet Ugarte and in the matter of an application for leave to move for judicial review, R. v (1) Nicholas Evans (Metropolitan Stipendiary Magistrate); (2) Ronald Bartle (Metropolitan Stipendiary Magistrate); (3) The Secretary of State for the Home Department, Ex parte Augusto Pinochet Ugarte*, High Court of Justice for England and Wales, 28 October 1998. See Robertson (2002: 397) and [http://www.trial-ch.org/en/trial-watch/profile/db/facts/augusto\\_pinochet-ugarte\\_50.html](http://www.trial-ch.org/en/trial-watch/profile/db/facts/augusto_pinochet-ugarte_50.html) for a discussion of and introduction to this case.
- 14 See further [http://www.trial-ch.org/en/trial-watch/profile/db/facts/augusto\\_pinochet-ugarte\\_50.html](http://www.trial-ch.org/en/trial-watch/profile/db/facts/augusto_pinochet-ugarte_50.html).
- 15 *In re Pinochet* [1999] UKHL 1; [2000] 1 AC 119, 15 January 1999.
- 16 *R v Bartle and the Commissioner Of Police For The Metropolis And Others (Appellants) ex parte Pinochet (Respondent) and R v Evans and Another and The Commissioner Of Police for*

*the Metropolis and others (Appellants) ex parte Pinochet (Respondent) (On Appeal From A Divisional Court Of The Queen's Bench Division)*, UKHL, 24 March 1999.

- 17 [http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/augusto\\_pinochet-ugarte\\_50.html](http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/augusto_pinochet-ugarte_50.html).
- 18 See further [District Court of The Hague, 14 October 2005, LJN: AV1489 and LJN: AV1163].
- 19 Other examples include the prosecution of Guus Kouwenhoven, a supplier of mustard gas to Iraq who was acquitted on appeal [District Court of The Hague, 23 December 2005, LJN: AX6406] and the prosecution of Frans van Anraat, a Dutch businessman who sold raw materials for the production of chemical weapons during the regime of Saddam Hussein. [Court of Appeal, The Hague, 9 May 2007, LJN: BA4676].
- 20 An English version of the Act can be found at [http://www.nottingham.ac.uk/shared\\_hrlcicju/Netherlands/International\\_Crimes\\_Act\\_\\_English\\_.doc](http://www.nottingham.ac.uk/shared_hrlcicju/Netherlands/International_Crimes_Act__English_.doc).
- 21 For Tutsis and internally displaced persons, Butare was both a way station to Burundi and a refuge in itself since, initially, the violence had not reached the area. This changed with the removal of the Tutsi prefect on 17 April 1994; in the following weeks tens of thousands of people were massacred.
- 22 On 11 January 1996, the ICTR requested Belgium to transfer the criminal proceedings it had taken up against Higaniro and two other accused persons. But in a ruling dated 8 August 1996, the judges of the ICTR refused to ratify the indictment presented by the prosecutor. Consequently, the Belgian court of appeal entrusted the Brussels investigation judge to continue the inquiry into the Higaniro case. See [http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/alphonse\\_higaniro\\_163.html](http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/alphonse_higaniro_163.html).
- 23 [http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/vincent\\_ntezimana\\_162.html](http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/vincent_ntezimana_162.html).
- 24 [http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/vincent\\_ntezimana\\_162.html](http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/vincent_ntezimana_162.html).
- 25 [http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/alphonse\\_higaniro\\_163.html](http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/alphonse_higaniro_163.html).
- 26 *Prosecutor v Duško Tadić*, case no. IT-94-1-A, Appeals Chamber decision on the defence motion for interlocutory appeal on jurisdiction 2 October 1999 at paragraph 69. See Reydam (2003) for further discussion of this.
- 27 See, in this context, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, International Court of Justice, 14 February 2002. In this case the International Court of Justice found that the issuance of an arrest warrant on the basis of universal jurisdiction by Belgium for the serving minister of foreign affairs of Democratic Republic of the Congo was a breach of Belgium's legal obligation towards the Congo as it failed to respect the incumbent minister's immunity from prosecution. Although the court did not expressly address the issue of universal jurisdiction, it was feared that the case might deter states exercising such jurisdiction. Some time after the case, in August 2003, Belgium repealed its

- far-reaching universal jurisdiction laws in a move that provoked a strong response from human rights organisations. See Human Rights Watch (2003).
- 28 See Loi du 5 août 2003 relative à la répression des infractions graves au droit international humanitaire. Available at <http://www.ulb.ac.be/droit/cdi/Site/334F616D-37AB-47FB-B715-4722072B3AA4.html>, in particular articles 15 and 16.
- 29 [http://www.trial-ch.org/en/trial-watch/profile/db/facts/adolfo\\_scilingo\\_258.html](http://www.trial-ch.org/en/trial-watch/profile/db/facts/adolfo_scilingo_258.html).
- 30 [http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/adolfo\\_scilingo\\_258.html](http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/adolfo_scilingo_258.html).
- 31 *Suleymane Guengueng et al. v Senegal*, Communication No 181/2001, dated 19 May 2006, UN Doc CAT/C/36/D/181/2001.
- 32 <http://hrw.org/english/docs/2008/01/19/senega17778.htm>.
- 33 Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide states that genocide means any of the acts listed at (a)–(e) when ‘committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’ and does not include political groups. The acts listed at (a)–(e) do not include population transfer or dispersion.
- 34 See generally Taylor (1992). The judgment of the Nuremberg tribunal is published in Nuremberg International Military Tribunal 1947.
- 35 <http://www.un.org/icty/glance-e/index.htm>.
- 36 See the ICTR’s Web site at <http://69.94.11.53/ENGLISH/factsheets/detainee.htm>.
- 37 Under rule 11bis (A), ICTR indictees can only be transferred to states with territorial, personal or subject-matter jurisdiction for the crimes charged in the indictment.
- 38 See preamble of the transitional rules of criminal procedure at <http://www.un.org/peace/etimor/untactR/reg200030.pdf>.
- 39 *Prosecutor v Sam Hinga Norma*, decision on preliminary motion based on lack of jurisdiction (child recruitment), 31 May 2004, case no. SCSL-2004-14-AR72(E); see further the *amicus* brief of the UN Children’s Fund that was filed in the course of this case.
- 40 See the judgment (dissenting) of Judge Robertson in *Prosecutor v Sam Hinga Norman*, op. cit., paragraph 7.
- 41 Ibid., per the judgment of Justice Ayoola, paragraph 52, concurred in by Justice King (Justice Robertson dissenting).
- 42 See, for example, *Prosecutor v Thomas Lubanga Dyilo*. For further information, see Du Plessis (2004).
- 43 [http://www.eccc.gov.kh/english/about\\_eccc.aspx](http://www.eccc.gov.kh/english/about_eccc.aspx).
- 44 Ibid.

- 45 Ibid.
- 46 Ibid.
- 47 Speech by Kong Srim, president of the plenary session, 28 January 2008, Raffles Hotel Le Royal, Phnom Penh.
- 48 Ibid.
- 49 As of 24 April 2008.
- 50 <http://hrw.org/english/docs/2007/12/04/africa17466.htm>.
- 51 Johnson mentions the lack of contemporary models in the context of the report of the secretary-general regarding the establishment of an international tribunal for the territory of the former Yugoslavia.
- 52 Ibid.
- 53 See paragraph 30 of The Africa-EU Strategic Partnership: available at [http://ec.europa.eu/development/center/repository/EAS2007\\_joint\\_strategy\\_en.pdf#zoom=100](http://ec.europa.eu/development/center/repository/EAS2007_joint_strategy_en.pdf#zoom=100).
- 54 <http://www.un.org/icty/pressreal/2008/pr1242e.htm>.

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# International crimes

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This Guide is about crimes that are of an international character, that is, crimes that are different in scale and nature to the types of domestic crimes that prosecutors in national legal systems prosecute on a day-to-day basis. An international crime consists in wrongful conduct for which individuals may be held criminally responsible under international law.<sup>1</sup> In formal terms, the attribution of individual criminal responsibility under international law requires proof, beyond a reasonable doubt,<sup>2</sup> of the existence of all material,<sup>3</sup> mental<sup>4</sup> and contextual<sup>5</sup> elements of an underlying crime, and all subjective and objective legal requirements of an applicable mode of liability.<sup>6</sup>

As will be seen in this chapter, the three international crimes that are of central importance to modern-day international criminal law are genocide, crimes against humanity and war crimes. Each of these crimes has its own peculiar features and elements that will be discussed in detail.

## The ICC crimes

The importance of these crimes is demonstrated by the fact that they are the focus of the ICC. By way of overview, the Court can take up only the most serious crimes of concern to the international community as a whole – genocide, crimes against humanity and war crimes – all of which are defined in the Rome Statute (International Criminal Court 2002b: articles 5–8). Aggression also falls within the competence of the Court, but an acceptable definition of this crime has still to be added to the statute (International Criminal Court 2002b: article 5(2), Schabas 2004b: 123). Treaty crimes (such as terrorism or drug trafficking) do not fall within the ICC's jurisdiction but may be added later after consideration by a review conference (International Criminal Court 2002b: article 123(1)). For the purposes of interpreting and applying the definitions of crimes found in the Rome Statute, reference must also be made to the 'Elements of Crimes', a 50-page document adopted in June 2000 by the preparatory commission for the ICC (International Criminal Court 2002a).

The key distinguishing characteristic of an international crime as compared with an offence under domestic law – an 'ordinary crime' – is the context of mass



violence in which the acts of the accused take place.<sup>7</sup> That is why, for example, for crimes against humanity it must be proved by the prosecution that the accused's conduct (of killing, raping, torturing, etc.) formed part of a widespread or systematic attack directed against a civilian population,<sup>8</sup> or, for certain categories of war crimes, it must be shown that the conduct took place in, and was associated with, an international armed conflict.<sup>9</sup> In other words, the accused's actual conduct occurs within a broader context that has the effect of rendering his conduct an international crime. Each of these 'contextual elements' of crime focuses not on characteristics intrinsic to the accused, but on circumstances essentially independent of and beyond his thoughts and actions.

For these reasons, the consideration of international crimes in this chapter requires us to consider three elements: the accused's conduct (sometimes called the material element of the crime), the accused's thoughts in relation to that conduct (sometimes called the mental element of the crime), and the context within which the material and mental elements of the crime occurred. These three elements (material, mental and contextual) should be considered as intrinsic to the definition of the crime, and should form a distinctive component of the concept of individual criminal responsibility under international law, and a distinctive part of the prosecutor's burden of proof.

International crimes can be either customary in nature or treaty-based (in that they are defined under and made punishable by a treaty, such as the torture convention, or in terms of the Rome Statute). There is significant overlap between many of the treaty-based and customary crimes, and many crimes that may have started out as crimes under treaty law (such as genocide under the Genocide Convention) are now considered part of the corpus of customary international law.<sup>10</sup>

#### Torture as an example of an international crime

Torture, which is punishable as a crime against humanity under the Rome Statute, is a self-standing crime under the UN Torture Convention of 1984 (United Nations 1984). Article 1(1) of the convention defines torture as follows:

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Further elucidation is provided by the International Criminal Tribunal for the former Yugoslavia (ICTY), which has held, in *Prosecutor v Kunarac and Others*,<sup>11</sup> that torture, even as a single act committed in peacetime, may constitute an international crime, provided it is committed by a de facto or de jure state official.

The ICTY has, in *Delalic and Others*,<sup>12</sup> in *Furundzija*<sup>13</sup> and in *Kunarac and Others*,<sup>14</sup> confirmed that the elements set out in this definition can generally be considered customary in nature, and thus binding on all states of the world as customary international law. In *Filartiga v Pena-Irala*<sup>15</sup> an American court succinctly noted that 'the torturer has become, like the pirates or slave trader before him, *hostis humani generis*, an enemy of all mankind'.<sup>16</sup>

Treaty crimes are more readily identifiable and are criminalised through a wide array of international treaties in force, by which states typically agree a common definition of a crime, undertake international obligations to proscribe such conduct under their domestic law and to prosecute or extradite (*aut dedere aut iudicare*) those responsible for such crimes.<sup>17</sup> One scholar has identified some 28 unique international treaty crimes, ranging from hijacking of aircraft to unlawful interference with international submarine cables (Bassiouni 2003: 136–158).

However, the Rome Statute of the ICC is not concerned with prosecuting each and every one of these international treaty crimes; on the contrary, the statute is more limited in scope. By the end of the Rome conference at which the statute was drafted, the delegates had agreed on including in the Rome Statute only the so-called 'core crimes' comprising the 'most serious crimes of concern to the international community as a whole' (Bassiouni 2003: preamble, 4th recital). These crimes, many of which were already criminalised through treaty and customary international law, are now criminalised through the Rome Statute itself: genocide, crimes against humanity and war crimes.

However, it is important to appreciate that many of the serious treaty crimes, such as hijacking, terrorist bombings, corruption and drug-trafficking, were excluded from the jurisdiction of the ICC under the Rome Statute because States Parties could not agree on their inclusion in the limited time available (five weeks) at the Rome conference in 1998.<sup>18</sup> By way of example, the inclusion of 'crimes of terrorism' was considered in the preparatory stages of the Rome conference but left out of the statute at the conference itself, principally on the ground that no generally accepted definition of terrorism had yet emerged (Robinson 2002: 517).

Notwithstanding its focus on the 'core international crimes', it is also important to appreciate that the effect of the Rome Statute is not merely to codify the most important pre-existing crimes under treaty or customary international law. As noted by a Trial Chamber of the *ad hoc* tribunal for the former Yugoslavia:

In many areas the [Rome] Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States. ... Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.<sup>19</sup>

It is therefore clear that the Rome Statute is the clearest exposition under international law of the three most serious crimes of concern to the world community; at once the statute has codified, clarified and updated the elements that today constitute the crimes of genocide, crimes against humanity and war crimes.

Finally, it should be mentioned that amendment of the Rome Statute, to include new crimes within the jurisdiction of the Court, remains a possibility. The Rome Statute provides for a review conference to be convened by the UN secretary-general seven years after the entry into force of the statute (International Criminal Court 2002b: article 123). The Assembly of States Parties determined in December 2007 that the conference should be convened in 2009 and held in the first semester of 2010.<sup>20</sup>

According to article 123 of the Rome Statute, this review ‘may include, but is not limited to, the list of crimes contained in article 5’ – in other words, the crimes within the jurisdiction of the Court. This text is amplified by resolutions E and F appended to the final act of the Rome conference, which recommend that a review conference – not necessarily the first – shall consider ‘the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the court’ (United Nations 1998), as well as proposals ‘... for a provision on aggression ... and the conditions under which the International Criminal Court shall exercise jurisdiction with regard to this crime...’ (United Nations 1998: resolution F).

While there is impetus for the review conference to amend the Rome Statute to include a definition of the crime of aggression (International Criminal Court 2007: paragraph 59),<sup>21</sup> bringing this crime within the jurisdiction of the ICC, there are few concrete proposals by states for the inclusion of other crimes, except drug-trafficking, as mooted in October 2007 by a senior representative of Trinidad and Tobago to the UN.<sup>22</sup> Scholarly treatment evaluating the potential for including terrorist offences in the Rome Statute is scant (see, among others, Goldstone and Simpson 2003: 13–26; Banchik 2003).

A 2006 preliminary paper prepared by the focal point of the Assembly of States Parties on the issue of the review conference places priority on the adoption of a definition of the crime of aggression, noting that for ‘practical purposes’ other proposals would need to ‘command very broad support’ and be considered ‘almost by consensus as ... “ripe for inclusion”’ in the Rome Statute (Fife 2006: paragraph 10).

## SOURCES FOR ELEMENTS OF CRIMES

Before examining in greater detail some key material, mental and contextual elements of the crimes currently within the jurisdiction of the court, in this section of the chapter the sources from which such elements may be drawn by the Judges of the Court are briefly set out. These sources, it will be clear, would be of importance to any prosecutor involved in the prosecution of an international crime domestically under the principle of complementarity.

The Rome Statute itself, in articles 6–8, sets out definitions of crimes from which certain elements may be identified. Article 30 provides a general mental element of intent and knowledge. It provides that intent, in relation to particular conduct, is satisfied where the person ‘means to engage in the conduct’, and in relation to a consequence, where the person ‘means to cause that consequence or is aware that it will occur in the ordinary course of events’ (International Criminal Court 2002b: article 30(2)). And it tells us that knowledge is defined as ‘awareness that a circumstance exists or a consequence will occur in the ordinary course of events’ (International Criminal Court 2002b: article 30(3)).<sup>23</sup>

In practice, the treaty text is amplified by the ‘Elements of Crimes’ document adopted by the Assembly of States Parties in 2002, pursuant to article 9(1) of the Rome Statute.<sup>24</sup> This raises the question of the legal status of the ‘Elements’ text. Despite US efforts to adopt a binding text, article 9(1) of the Rome Statute provides that the ‘Elements’ ‘shall assist’ the Court in the interpretation of articles 6–8. Thus, the text is not binding on the Judges of the Court (see, for example, Dörmann 2003). Nonetheless, the ‘Elements’ document is recognised in article 21 of the Rome Statute as ‘applicable law’ that the Court ‘shall’ apply, and must be interpreted and applied without adverse distinction on certain enumerated, prohibited grounds, and in a manner consistent within internationally recognised human rights (International Criminal Court 2002b: article 21(3)).

### Consistency with the evolving corpus of international human rights law

The requirement of consistency with the evolving corpus of international human rights law, including the African Charter on Human and Peoples' Rights (to which the Court has previously referred),<sup>25</sup> may have significant implications. In at least one instance discussed below – that of genocide<sup>26</sup> – the 'Elements of Crimes' document provides for a contextual element of crime not expressed in the Rome Statute or found in customary international law;<sup>27</sup> the effect of which is to increase the Prosecutor's burden of proof in cases of genocide. Were the prosecution to raise this issue before the Court, the defence could, for instance, argue on the basis of article 21(3) of the Rome Statute that any interpretation of an element of crime that does not apply the more onerous requirements found in the 'Elements of Crimes' document violates the principle of legality (*nullum crimen sine lege*) in article 7(2) of the African charter, and its regional and international equivalents.

Recourse to the 'Elements of Crimes' document by the Court has thus far been straightforward. In its decision on the confirmation of charges in the *Dyilo* case, the Pre-trial Chamber referred to the 'Elements of Crimes' document (including its footnotes) to contextualise a definition of crime from the Rome Statute,<sup>28</sup> to provide a partial definition of the term 'international armed conflict' not found in the statute,<sup>29</sup> and to justify and strengthen its application of provisions of international humanitarian law to define the concept of non-international armed conflict.<sup>30</sup> The chamber refrained from explicit comment on legal status of the 'Elements' document, but certainly treated the document as persuasive.

## SOME KEY ELEMENTS OF GENOCIDE

Genocide involves the intentional mass destruction of entire groups, or members of a group. The crime of genocide has been committed throughout history and continues to plague humanity today. Examples of the crime include the Jews decimated by the Nazis, and the Cambodians destroyed by the Khmer Rouge. African examples include the genocide unfolding in Sudan, the genocide inflicted by the Hutus on the Tutsis in Rwanda, and the purges in Uganda under Idi Amin and in Ethiopia under Mengistu. The term 'genocide' is a combination of the Latin words *genus* (kind, type, race) and *cide* (to kill), and was coined first by Raphael Lemkin writing in response to the events of the Second World War (see Lemkin 1944: 79–95, cited in Cassese 2002a: 335; see further Lemkin 1947: 145).

The Rome Statute criminalises genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (United Nations 1949), a treaty with 133 ratifications at present, including by more than half of African states. This same definition is found in the statutes of the two *ad hoc* tribunals for

the former Yugoslavia and Rwanda, and the Special Court for Sierra Leone. The substance of the definition of the crime is widely accepted to reflect customary international law (Werle 2005: 191).

Article 6 of the Rome Statute provides:

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group

Thus, 'genocide' is an umbrella term for a closed list of six distinct subspecies of genocidal acts, committed with intent and knowledge, together with a specific intent to destroy a protected group, in whole or in part. Genocide is the most serious international crime, as evidenced in the high threshold set for the mental element required for proof of genocide.

As discussed below, while crimes against humanity require the intent to commit the underlying offence (murder, torture, rape, etc.), together with the knowledge that the offence is being committed as part of a broader context against a civilian population targeted as part of a widespread or systematic attack, genocide requires the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group of persons. It is this specific intent that gives genocide its particular status, and which sets it apart from crimes against humanity. Furthermore, while the modes of liability in the Rome Statute are not considered here, one specific mode of liability applies only to crimes of genocide – that of 'direct and public incitement' (International Criminal Court 2002b: article 25(3)(e)). This formed a basis for the criminal responsibility of high-ranking accused in both the *Akayesu*<sup>31</sup> and *Kambanda*<sup>32</sup> cases before the International Criminal Tribunal for Rwanda (ICTR).

Footnotes to the 'Elements' provide important definitions and illustrations, specifying:

- That the word ‘killed’ is interchangeable with the term ‘caused death’
- That serious bodily or mental harm may include, but is not restricted to, ‘acts of torture, rape, sexual violence or inhuman or degrading treatment’
- That ‘conditions of life’ may include, but are not restricted to, ‘deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsion from homes’
- That ‘forcibly’ includes not only physical force but ‘may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment’ (International Criminal Court 2002a: footnotes 2–5)

From the above it will be clear that genocide need not in fact result in the actual extermination of the group. It is enough that one of the defined acts is committed with the broader intention that the group be destroyed.

The ‘Elements of Crimes’ document indicates three elements common to all subspecies of genocide:

- A common *material element*: ‘such person or persons [that is, the victim(s)] belonged to a particular national, ethnical, racial or religious group’
- A common *mental element* in addition to mental elements applicable to the underlying genocidal act: ‘the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such’
- A common *contextual element* whose legal status is unclear: ‘the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction’

These are now considered in summary, with specific reference to the jurisprudence of the ICTR and, where more directly applicable, the ICTY.

## The meaning of ‘national, ethnical, racial or religious group’

Under the Rome Statute, following the Genocide Convention, only national, ethnic, racial or religious groups are protected against genocide. However, deeply rooted, innate or oppressed tribal groups, gender groups, political groups, economic groups and social groups do not benefit from protection against genocide *as such*,<sup>33</sup> although members may also form part of one of the protected groups.

Both *ad hoc* tribunals have held that a ‘protected group’ should be ‘stable and permanent’, where membership is normally acquired by birth and is continuous, irremediable and not usually challengeable by its members.<sup>34</sup> The existence of the group should be assessed on the basis of both objective and subjective criteria, on a case-by-case basis. Objectively, the ‘social or historical context’<sup>35</sup> will be relevant, referring to factors such as legal classification on identity documents – particularly relevant in the case of the Rwandan genocide<sup>36</sup> – as well as shared language, culture, traditions or forms of worship.

While the ICTY has referred to the ‘perilous exercise’<sup>37</sup> of recourse to ‘scientific’ determination of race and ethnicity, the ICTR has relied upon ‘physical hereditary traits’<sup>38</sup> to define ethnicity in the Rwandan context. Subjectively, the perception of the victim by the perpetrator is a predominant factor. A 2005 ICTY judgment summed up this line of jurisprudence as follows:

In accordance with the case-law of the Tribunal, a national, ethnical, racial or religious group is identified by using as a criterion the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics.<sup>39</sup>

The ICTR, in the seminal *Akayesu* case, defined a national group as ‘a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.’<sup>40</sup> In the same case, an ethnical group (or ‘ethnic group’, in contemporary usage) was defined as ‘a group whose members share a common language and culture’<sup>41</sup> A racial group is one that shares ‘hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.’<sup>42</sup> A religious group is one whose members ‘share the same religion, denomination or mode of worship.’<sup>43</sup> These definitions have been followed, broadly speaking, throughout the jurisprudence of both *ad hoc* tribunals.

### Proving that a person belongs to a protected group

In proving to a court that persons belong to a protected group, two approaches are discernible in the international criminal law jurisprudence. The first approach is objective, in that the court will be concerned with whether it has been shown that in fact the persons belong to one of the protected groups. This approach is clear from the decision of the ICTR Trial Chamber in *Rutaganda*,<sup>44</sup> where the chamber relied on a number of objective factual indicators to find that the Tutsi population at issue in the case was an ethnic group with a distinct identity. It was shown in that case that every Rwandan citizen was required to carry an identity card proving their ethnic identity as either Hutu,

Tutsi or Twa; the Rwandan constitution and laws in force at the relevant time identified Rwandans by reference to their ethnic group; and there was customary determination of membership of an ethnic group in Rwanda through patrilineal lines.<sup>45</sup>

The second approach is subjective, in that the court considers whether the victims concerned considered themselves as belonging to one of the protected groups, or whether the perpetrator concerned considered them as belonging to one of the protected groups.<sup>46</sup> For example, in *Akayesu*, the ICTR Trial Chamber, in finding that the Tutsi population constituted a protected ethnic group, commented that ‘all the Rwandan witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity’.<sup>47</sup>

In practice a combination of the objective and subjective approaches to determine the membership of the group is often relied on.<sup>48</sup>

**The meaning of ‘intended to destroy, in whole or in part, [that] group, as such’**

The perpetrator’s special intent (*dolus specialis*) – the intention to destroy the protected group (1) in whole or in part and (2) as such – is the mental element that distinguishes genocide from other core crimes, most notably the crime against humanity of persecution.

Persecution as an example to illustrate the difference between genocide and crimes against humanity

What distinguishes persecution from genocide is that the perpetrator of persecution selects his victims by reason of their belonging to a specific community, but he does not necessarily seek the destruction of that community as such. The mental element required for both persecution and genocide may involve discriminatory targeting of victims, but for this targeting to amount to genocide the perpetrator must hold the additional special intent of targeting the victims so as to destroy a group or community.<sup>49</sup>

While direct evidence of genocidal intent is rare, the *ad hoc* tribunals have held that such intent may be inferred from the facts and circumstances of each case.<sup>50</sup> It is clear that the prosecution bears the burden to prove beyond a reasonable doubt each distinct component of this mental element of genocide:<sup>51</sup> not only that the perpetrator intended to destroy the group in whole or in part (for example, in a particular locality), but also that the perpetrator intended to destroy the group as such (that is, that the ‘proscribed acts were committed against the victims because [or ‘on account’]<sup>52</sup> of their membership in the protected group’).<sup>53</sup> However, the genocidal intent does not have to be the perpetrator’s sole motive for carrying out the crime.<sup>54</sup> Indeed, motive is not an element of the crime.<sup>55</sup>

Inferring proof of genocidal intent

An important judgment in this regard is that of the ICTR Trial Chamber in *Akayesu*. There the tribunal found that the accused had the requisite mens rea (criminal intent; the knowledge of wrongdoing) to commit genocide, and had exhibited that aggravated criminal intention through, among others, the systematic rape of Tutsi women. According to the ICTR, the systematic rape of Tutsi women was part of the campaign to mobilise the Hutu against the Tutsi, and the sexual violence was aimed at destroying the spirit, will to live or will to procreate of the Tutsi group.<sup>56</sup>

The intention to destroy a group refers to their ‘material destruction ... either by physical or by biological means, not the destruction of the national, linguistic, religious, cultural or other identity of a particular group’.<sup>57</sup> This need not extend to the intention to kill each member of the group. For example, the ICTR held in *Akayesu* that acts of sexual violence perpetrated against Tutsi women ‘formed an integral part of the process of destruction’.<sup>58</sup>

According to the ICTY Trial Chamber, a group may be destroyed ‘in part’ through the destruction of a ‘geographically limited part of a larger group because the perpetrators of the genocide regard the intended destruction as sufficient to annihilate the group as a distinct entity in the geographic area at issue’.<sup>59</sup> The targeting of the group can also be based on a strategy of decapitation. The intention to destroy the leading members of a protected group – those who shape its opinions and direct its actions – could provide evidence of genocidal intent where there disappearance would have an impact on the survival of the group as such.<sup>60</sup>

Destroying a group in part

An example of this intention would be the act of destroying young, fertile women of childbearing age of a group. A further example is provided by the decision of the ICTY Trial Chamber in *Krstić*, and its finding that the defendant’s planning and participating in the massacre of Bosnian Muslim men, all of military age, amounted to genocide. According to the tribunal, genocide was proved because, while the rest of the Bosnian Muslim population was being transferred out of the area of Srebrenica, the Bosnian Serb forces ‘had to be aware of the catastrophic impact that the disappearance of two or three generations of men would have on the survival of a traditionally patriarchal society; and ‘that the combination of those killings with the forcible transfer of the women, children and elderly would inevitably result in the physical disappearance of the Bosnian Muslim population in Srebrenica’.<sup>61</sup>

**The significance of ‘a manifest pattern of similar conduct’**

As indicated above, this element is not based on the text of the Rome Statute, the Genocide Convention or customary international law (Cassese 2002a: 349). Cassese, a leading commentator on the Rome Statute, observes:



... genocidal acts are seldom isolated or sporadic events; normally they are part of a widespread policy, often approved or at least condoned by governmental authorities. These circumstances remain however factual events, not ... legal requirements of the crime... Does [the text] mean that the genocidal conduct or pattern must consist of the same acts? Or may they instead consist of ... different conduct, although no less genocidal? [...] It would seem that the text under discussion opts for the former solution. If it were so, it would unduly restrict the purport of Article 6 (Cassese 2002a: 349–350).

The ICTR Appeals Chamber, in common with the ICTY,<sup>62</sup> has held that while ‘a genocidal plan is not a constituent element of the crime of genocide, the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide.’<sup>63</sup> In this case, the Appeals Chamber considered that indications such as those listed below proved the planning and coordination of the massacres of Tutsis by Hutu extremists in the government of the time:<sup>64</sup>

- The existence of lists of persons to be executed (targeting, among others, the Tutsi élite)
- The dissemination of extremist ideology through the Rwandan media
- The use of the civil-defence programme and the distribution of weapons to the civilian population
- The ‘screening’ carried out at many roadblocks

While the element of ‘manifest pattern of similar conduct’ has not yet been subject to judicial scrutiny by the ICC, there is no doubt that the jurisprudence of the ICTY and ICTR will be a useful source of guidance to the ICC’s Judges as they confront this element in future cases.<sup>65</sup>

## SOME KEY ELEMENTS OF CRIMES AGAINST HUMANITY

The notion of ‘crimes against humanity’ is intentionally broad and, as we shall see, captures many concerns traditionally associated with international human rights law (the protection of life, the right not to be tortured, the rights to liberty and bodily integrity, etc.). The term was first used in its contemporary sense to condemn as a ‘crime against humanity’ the atrocities committed by the Turkish forces against their own Greek and Armenian subjects during the First World War in 1915. Although no prosecutions ultimately took place, the Allied powers’

immediate response to the massacres was for France, the UK and Russia to proclaim enthusiastically that all members of the Turkish government would be held responsible, together with its agents, for the ‘crimes against humanity and civilisation.’<sup>66</sup>

At Nuremberg, the idea of a crime against humanity arose again, and this time the Nuremberg and Tokyo tribunals utilised the technical term ‘crime against humanity’ to secure, for the first time, the prosecution of individuals for crimes that, by their nature, offended humanness, and thereby became the concern of the international community.

The Rome Statute continues this early legacy and defines crimes against humanity with reference to the text of article 6(c) of the Nuremberg charter and the statutes of the two *ad hoc* tribunals, but without supplementary requirements of a nexus to an armed conflict<sup>67</sup> or a general discriminatory intent<sup>68</sup> applicable to previous international criminal tribunals.

Article 7 of the Rome Statute provides:

For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other forms of sexual violence of comparable gravity;
- (h) Persecutions against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Thus, like ‘genocide’, the term ‘crimes against humanity’ is an umbrella term describing one of 16 inhumane acts committed with intent and knowledge (and specific discriminatory intent, in the case of persecution).

However, unlike genocide, the list of crimes against humanity is at least open to judicial expansion. Two of the 16 subspecies of crimes against humanity recognised in the ‘Elements of Crimes’ document are residual categories and open to significant interpretation by the Court, to the extent consistent with the principle of legality<sup>69</sup> and its corollary, the interpretative rule *in dubio pro reo* (when in doubt, in favour of the accused),<sup>70</sup> both of which bind the Judges of the Court. These include ‘other forms of sexual violence of comparable gravity’ (International Criminal Court 2002a: article 7(1)(g)-6) and ‘other inhumane acts’ (International Criminal Court 2002b: article 7(1)(k)).

Furthermore, the Rome Statute defines two other crimes against humanity with notable inbuilt flexibility: imprisonment ‘or other severe deprivation of physical liberty in violation of fundamental rules of international law’ (International Criminal Court 2002b: article 7(1)(e)), and persecution on ‘other grounds that are universally recognised as impermissible under international law’ (International Criminal Court 2002b: article 7(1)(h)).

Finally, the ‘Elements of Crimes’ document itself – without a clear basis in the Rome Statute – affords room for a broader definition of two crimes against humanity: ‘exact[ing] forced labour’ and ‘other[wise] reduc[ing] a person to a servile status’<sup>71</sup> are recognised as potential ‘deprivations of liberty’ sufficient to satisfy (1) the material element of the crime of enslavement, and (2) a material element of the crime of sexual slavery.

In contrast to the definition of genocide, where the statute does not elaborate on each genocidal act, the definition of crimes against humanity includes more precise definitions of each inhumane act in article 7(2), which provides:

For the purpose of paragraph 1:

- (a) “Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack;
- (b) “Extermination” includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

- (c) “Enslavement” means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) “Deportation or forcible transfer of population” means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) “Torture” means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
- (f) “Forced pregnancy” means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) “Persecution” means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) “The crime of apartheid” means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

Footnotes to the ‘Elements’ once again provide important definitions and illustrations, specifying, among others:

- That the word ‘killed’ is interchangeable with the term ‘caused death’
- That ‘killing’ for the purposes of the crime of extermination includes different methods of killing, ‘directly or indirectly’

- That extermination includes inflicting ‘conditions of life calculated to bring about the destruction of part of a population’, which could include ‘deprivation of access to food and medicine’
- That ‘genuine consent’ to sterilisation ‘does not include consent obtained through deception’
- That ‘invasion’ of the body resulting in penetration is intended to be ‘gender-neutral’ (International Criminal Court 2002a: footnotes 6–30)

The ‘Elements of Crimes’ document indicates two elements common to all subspecies of crimes against humanity:

- A common contextual element: ‘the conduct was committed as part of a widespread or systematic attack against any civilian population’
- A common mental element relevant to that contextual element: ‘the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against any civilian population’

These are next considered in summary, again with specific reference to the jurisprudence of the ICTR and, where more directly applicable, the ICTY.

### The meaning of ‘widespread or systematic attack directed against any civilian population’

The protection extended to a civilian population under attack is a shared feature of crimes against humanity and war crimes. However, the concept of an ‘attack’ within the framework of crimes against humanity covers not only the ‘conduct of hostilities’<sup>72</sup> or the ‘use of armed force’<sup>73</sup> but also any ‘mistreatment of the civilian population’.<sup>74</sup> So, for example, the ICTR in its *Akayesu* trial judgment held that an attack ‘may be defined as an unlawful act of the kind enumerated ... in the Statute’ (that is, each of the subspecies of crimes against humanity), together with non-violent conduct such as the imposition of a system of apartheid or pressuring the population to act in a certain way, ‘if orchestrated on a massive scale or in a systematic manner’.<sup>75</sup>

The Rome Statute includes a definition of ‘attack’ requiring two distinct elements going beyond the jurisprudence of the *ad hoc* tribunals: (1) the ‘multiple commission’ of inhumane acts (that is, more than one inhumane act), and (2) a

nexus between the inhumane acts and a ‘State or organisational policy’. Settling differences in Trial Chamber jurisprudence, the ICTY Appeals Chamber held in the 2002 *Kunarac* case that:

... neither the attack nor the acts of the accused needs to be supported by any form of “policy” or “plan”. There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes.<sup>76</sup>

That said, the ICTY has treated evidence of a plan or policy as persuasive of the systematic character of an attack against a civilian population,<sup>77</sup> and as probative of both its widespread *or* systematic character.<sup>78</sup>

The ‘Elements of Crimes’ document suggests that the ‘policy’ requirement means that the state or organisation in question actively promoted or encouraged the attack, which, in ‘exceptional circumstances’ can ‘be implemented through a deliberate failure to take action’, but not by the mere absence of action (International Criminal Court 2002a: article 7, introduction and footnote 6).<sup>79</sup>

In its initial jurisprudence, the Appeals Chamber of the Court is clear that the Rome Statute is an international treaty within the scope of the Vienna Convention on the Law of Treaties (United Nations 1969), and thus should be guided by the principles in articles 31–33 of the Vienna convention.<sup>80</sup> The Pre-trial Chamber has applied the same interpretative methodology,<sup>81</sup> both with<sup>82</sup> and without<sup>83</sup> explicit reference to the convention.

With this framework in mind, it is clear that article 7(2)(a) provides supplementary definitions ‘for the purpose of’ article 7(1). Reading the two provisions together yields the following:

For the purposes of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic [course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a state or organisational policy to commit such attack].

The ‘civilian population’ against whom the attack is directed need not be linked to ‘any particular side of the conflict’<sup>84</sup> or comprise ‘the entire population of a geographic territory or area’<sup>85</sup> but must form the ‘primary target’<sup>86</sup> of the attack as a *population*, rather than as ‘a limited and randomly selected number of

individuals'.<sup>87</sup> The 'Elements of Crimes' document adds, 'The acts need not constitute a military attack' (International Criminal Court 2002a: article 7, introduction). The question of whether the attack is, in fact, *directed* against a civilian population depends on a case-by-case assessment of, among others:

... the means and method used ... the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed ... the resistance to the assailants at the time and ... [attempted compliance] with the precautionary requirements of the laws of war (International Criminal Court 2002a: paragraph 91).

Subject to the contested requirement in article 7(2)(a), discussed above, the prosecution bears the burden of establishing that the attack must be *either* widespread *or* systematic.

In *Akayesu*, the ICTR defined a 'widespread' attack as 'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against multiple victims',<sup>88</sup> while a 'systematic' attack must be 'thoroughly organised and following a regular pattern on the basis of a common [not necessarily state] policy involving substantial public or private resources'.<sup>89</sup> The ICTY Appeals Chamber has cited with approval a Trial Chamber finding that, '... patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of [systematism]'.<sup>90</sup>

## The meaning of 'knew' or 'intended' the conduct to be part of the attack

In addition to satisfying the mental element for the underlying inhumane act (murder, torture, etc.), the Rome Statute requires the perpetrator to have 'knowledge of the attack' (International Criminal Court 2002b: article 7(1)). The 'Elements of Crimes' document specifies that this mental element, '... should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organisation' (International Criminal Court 2002a: article 7, introduction). Werle considers that this requirement is a 'merely declaratory reference to Article 30's general requirement for the mental element' constituting a 'circumstance' about which the accused must have knowledge, that is, actual awareness that the attack exists (Werle 2005: 231).

This element mirrors the subjective component of a two-pronged test identified by the ICTY Appeals Chamber for the required nexus between the

accused's conduct and the attack, that is, whether the conduct 'formed part' of the attack. In the *Kunarac* case, the Appeals Chamber held that this nexus requires proof that the commission of the act must, 'by its nature and consequences', objectively form part of the attack, and that the accused must have knowledge of 'an attack' against the civilian population 'and that his act is part thereof'.<sup>91</sup> Citing their own jurisprudence, as well as the *Akayesu* case, ICTY Trial Chambers have identified a number of concrete facts from which knowledge of the overall circumstances can be inferred:

- the historical and political circumstances in which the acts of violence occurred;
- the functions of the accused when the crimes were committed;
- his responsibilities within the political or military hierarchy;
- the direct and indirect relationship between the political and military hierarchy;
- the scope and gravity of the acts perpetrated;
- the nature of the crimes committed and the degree to which they are common knowledge.<sup>92</sup>

### Evidence of an accused's knowledge of an attack

The ICTR has held that the presence of the accused at the scene of crimes is evidence of his knowledge of the attack.<sup>93</sup> Evidence of the accused's leadership role in attacks, procurement of weapons used in the attack or moral support for the attack – such as Eliézer Niyitegeka's 'jubilation' at the killing of a prominent Tutsi – will tend to establish knowledge of the attack, at least, or the intention that the accused's conduct form part of the attack.<sup>94</sup>

## SOME KEY ELEMENTS OF WAR CRIMES

Of the core crimes in the Rome Statute, 'war crimes' were the first to have been prosecuted at international law (German soldiers were convicted of 'acts in violation of the laws and customs of war' at Leipzig in the early 1920s, pursuant to articles 228 and 230 of the Treaty of Versailles).<sup>95</sup>

Generally speaking, war crimes are crimes committed in violation of international humanitarian law applicable during armed conflicts. The sources of international humanitarian law are vast, and are broadly divided into two categories of substantive rules, the law of The Hague and the law of Geneva, and which constitute the rules concerning behaviour that is prohibited in the case of an armed conflict.

The law of The Hague is made up of the Hague Conventions of 1868, 1899 and 1907, which, generally speaking, set out rules regarding the various categories of lawful combatants, and which regulate the means and methods of warfare in respect of those combatants.<sup>96</sup> The law of Geneva, so called because it comprises the four Geneva Conventions of 1949 plus the two additional protocols thereto of 1977, regulates the treatment of persons who do not take part in the armed hostilities (such as civilians, the wounded, the sick) and those who used to take part but no longer do (such as prisoners of war) (Cassese 2003: 48). An exception here is the third Geneva Convention, which, in addition to the focus on treatment of persons no longer involved in the conflict, also regulates the various classes of lawful combatants and thereby updates the Hague rules. The Hague rules have been further updated by the first additional protocol to the Geneva Convention of 1977, which deals with means and methods of combat with a particular emphasis on sparing civilians as far as is possible in an armed conflict.

Drawing upon these existing sources of humanitarian law, the drafters of the Rome Statute, in article 8, have set out an elaborate ‘codification’ of the rules concerning behaviour that is prohibited in situations of armed conflict, and have ensured that the ICC is empowered to punish as war crimes any deviations from these rules. We shall turn to article 8 in more detail below.

The first trial and much of the initial jurisprudence of the ICC concerns war crimes in Democratic Republic of the Congo. The prosecution alleges that Thomas Lubanga Dyilo, then president of the Union of Congolese Patriots and commander-in-chief of its military wing, the Forces patriotiques pour la libération du Congo (FPLC), as joint perpetrator, used, conscripted and enlisted children to take an active part in hostilities during a non-international armed conflict, a war crime under article 8(2)(e)(vii) of the Rome Statute.<sup>97</sup>

The provisions of the Rome Statute reflect the fundamental distinction in international law between the law governing recourse to armed force (*ius ad bellum*) and the law governing the conduct of hostilities (*ius in bello*), including the protection of those not participating actively in hostilities, and the international concern to prevent and punish serious crimes in both contexts. The crime of aggression will, once incorporated into the Rome Statute, address serious violations of the *ius ad bellum* – the waging of a war that is not only unlawful but aggressive. The provisions on war crimes, on the other hand, punish serious violations of the *ius in bello*.

It is important to note at the outset that not all violations of international humanitarian law amount to criminal conduct, much less conduct attracting

criminal responsibility under international law. Less serious breaches could give rise to state responsibility or individual criminal responsibility under domestic military codes, for instance. On the other end of the scale, one should appreciate that the Rome Statute is particularly concerned about those war crimes that are of most serious concern to mankind.<sup>98</sup>

The ‘catalogue’ (Bothe 2002: 386) of war crimes adopted by the Rome Statute classifies these crimes by context and by source of law, as illustrated in the table below:

Context	Source of law	Rome Statute articles	Distinct crimes in ‘Elements’ document
International armed conflict	Grave breaches of the Geneva Conventions of 1949	8(2)(a)(i) to 8(2)(a)(viii)	11
	Other serious violations of laws and customs	8(2)(b)(i) to 8(2)(b)(xxvi)	35
Armed conflict not of an international character	Serious violations of article 3 common to the Geneva Conventions of 1949	8(2)(c)(i) to 8(2)(c)(iv)	7
	Other serious violations of laws and customs	8(2)(e)(i) to 8(2)(e)(xii)	18
			71 distinct crimes

This approach can best be understood in historical context. As already referred to, a series of treaties adopted in 1899 and 1907, known collectively as the Hague Conventions, sought, among others, to prohibit means and methods of warfare that caused unnecessary suffering, such as the use of poisonous weapons as well as to protect the rights of soldiers captured as prisoners of war. More recent treaties have sought to protect cultural property in times of armed conflict, to prohibit use of bacteriological and chemical weapons as well as anti-personnel land mines.<sup>99</sup>

The protective mandate of this body of Hague law is complemented by the Geneva law, enshrined in the four Geneva Conventions adopted in 1949 and developed significantly in Additional Protocols I and II of 1977 and updated slightly in Additional Protocol III of 2005.<sup>100</sup> Geneva law is concerned primarily with the protection of those not taking an active part in the conduct of hostilities: the wounded, the sick, the shipwrecked and prisoners of war, together with the civilian population at large. As we have seen, the body of Hague and Geneva law is commonly referred to as ‘international humanitarian law’.



Historically, most rules of international humanitarian law applied only in times of international armed conflict, that is, declared war or other armed conflicts between the regular armed forces of at least two states or by forces acting on behalf of those states.<sup>101</sup> Prior to the era of decolonisation and wars of national liberation, primarily on the continent of Africa, civil war was seen as an internal matter under international law, subject to the principle of non-intervention enshrined in articles 2(4) and 2(7) of the UN Charter. As such, article 3 common to the Geneva Conventions laid down only a few, basic rules applicable to internal armed conflicts grounded on elementary considerations of humanity: prohibiting violence to life and person, outrages upon personal dignity, hostage-taking and extrajudicial sentencing and execution, when committed against those not taking an active part in hostilities.

The body of rules applicable to internal armed conflicts expanded significantly with the adoption of Additional Protocol II to the Geneva Conventions in 1977, but developments were limited as compared with Additional Protocol I, also adopted in 1977, which applied to international armed conflicts as well as wars of national liberation – ‘people fighting against colonial domination and alien occupation and against racist regimes in the exercise of the right to self-determination’ – but not to civil wars.<sup>102</sup>

Historically, individuals were held liable under international law for violations of the laws and customs of war applicable in international armed conflict only, the Nuremberg trial being a notable example. Article 6(b) of the Charter of the International Military Tribunal (1945) extended the jurisdiction of the Nuremberg tribunal to:

... war crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment, or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

Conceived as a set of international standards that, if violated, would result in prosecution at the domestic level, the ‘grave breaches’ provisions of the Geneva Conventions of 1949 implemented a system of mandatory universal jurisdiction over a limited set of war crimes. These provisions have now been restated in article 8(2)(a) of the Rome Statute:<sup>103</sup>

- (i) Wilful killing;
- (ii) Torture or inhuman treatment, including biological experiments;
- (iii) Wilfully causing great suffering, or serious injury to body or health;
- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement;
- (viii) Taking of hostages.

Additional Protocol I of 1977 included an expanded set of ‘grave breaches’, subject to the same regime of mandatory universal jurisdiction.<sup>104</sup> While these provisions form the core of the war crimes enumerated in article 8(2)(b) of the Rome Statute, the statute does not characterise these crimes as ‘grave breaches’. Bothe observes, ‘... there is no mention of the grave breaches defined in Protocol I, Article 85(3) and (4), although most of these grave breaches are as a matter of content and wording reflected in [article 8(2)(b)]’ (Bothe 2002: 395).

**The crimes under article 8(2)(b) – ‘serious violations of the laws and customs applicable in international armed conflict’**

These crimes are generally drawn from Hague law. Unlike the focus of the grave breaches crimes under article 8(2)(a), which aims to protect the innocent victims of war or those who are *hors de combat* (‘out of the fight; disabled’), the general focus of the crimes under article 8(2)(b) is on the combatants themselves. As a result, there is no requirement that the crimes must be directed against ‘protected persons’. These crimes are a continuation of ancient rules of chivalry reflecting a code of conduct among warriors (Schabas 2004a: 47). Having said that, there are certain rules contained in the list that have as their focus the protection of the civilian population, and that are drawn from Additional Protocol I of 1977 of the Geneva Conventions.

As a general overview, the ‘serious violations of the laws and customs applicable in international armed conflict’ covered by article 8(2)(b) of the Rome Statute include the following:

- *Prohibited methods of warfare*: These prohibitions serve to protect, in the first place, the civilian population against armed attacks ‘as such’, that is, attacks directed against persons who are civilians (International Criminal Court 2002b: article 8(2)(b)(i)), attacks against civilian objects (International Criminal Court 2002b: article 8(2)(b)(ii)), as well as against attacks that violate the principle of proportionality<sup>105</sup> and attacks against undefended places.<sup>106</sup> Civilians are also protected against ‘misuse’, for instance, the use of civilians or protected persons as a means to render certain points or areas immune from military operations;<sup>107</sup> the starvation of civilians as a

method of warfare is prohibited, as is any attack against objects indispensable to the survival of the civilian population.<sup>108</sup> Secondly, the 'destruction of property' is outlawed in that the destruction or seizing of the enemy's property is considered a war crime unless such destruction or seizure is imperatively demanded by the necessities of war (International Criminal Court 2002b: article 8(2)(b)(xiii)).<sup>109</sup> Thirdly, the improper use of signs and perfidy is rendered a war crime<sup>110</sup> And, lastly, combatants are protected under this section of the Rome Statute insofar as it is prohibited to kill or wound persons who are *hors de combat* (International Criminal Court 2002b: article 8(2)(b)(vi)). In addition, there is a prohibition placed on declaring that no quarter will be given, that is, ordering that there shall be no survivors, threatening an adversary therewith, or conducting hostilities on this basis.<sup>111</sup>

- Several of the provisions of article 8(2)(b) deal with prohibited weapons (for example, poison or poisoned weapons (International Criminal Court 2002b: article 8(2)(b)(xvii)), poisonous gases and all analogous liquids, materials or devices (International Criminal Court 2002b: article 8(2)(b)(xviii)), dum-dum bullets (International Criminal Court 2002b: article 8(2)(b)(xix)), etc.) and render their use a war crime. Note the diplomatic realities at the Rome conference that prevented the most obviously damaging weapons, such as nuclear weapons and land mines, from being specifically included in the subsection's list of prohibited weapons. Nuclear weapons, for instance, were excluded on the insistence of the nuclear powers, who insisted that 'material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate' be the subject of a comprehensive prohibition included as an appendix to the statute, yet to be prepared (International Criminal Court 2002b: article 8(2)(b)(xx)). Similarly, the give and take of diplomacy meant that other countries then demanded that biological and chemical weapons not be explicitly prohibited. Nevertheless, the use of nuclear weapons will always constitute a violation of humanitarian law, in particular those relating to the protection of the civilian population, and so will be covered by article 8(2)(b)(i),<sup>112</sup> (ii),<sup>113</sup> or (iv).<sup>114</sup> Likewise, the same arguments can be made in relation to the use of biological weapons (Bothe 2002: 396–7).<sup>115</sup> And while not mentioned explicitly, chemical weapons appear to be outlawed under article 8(2)(b)(xviii) of the Rome Statute (Bothe 2002: 397).
- In addition to the provisions reflecting the Hague rules, there are some 'new crimes' under paragraph (b) that have now been codified by the drafters at Rome. They cover, for instance, the protection of humanitarian and peacekeeping missions<sup>116</sup> and prohibit environmental damage (International Criminal Court 2002b: article 8(2)(b)(iv)). Another new war crime under the statute is the conscription or enlistment of children under the age of 15 into the national armed forces or to use them to participate actively in hostilities (International Criminal Court 2002b: article 8(2)(b)(xxvi)). Possibly the most controversial of these 'new crimes', given the Israeli-Palestinian conflict, is that contained in article 8(2)(b)(viii). In terms of this article it is a war crime for an occupying power to transfer, directly or indirectly, parts of its own civilian population into the territory it occupies, or to deport or transfer all or parts of the population of the occupied territory within or outside this territory. Other developments brought about by paragraph 8(2)(b) relate to sexual crimes. In terms of article 8(2)(b)(xxii) it is a war crime to commit rape, sexual slavery, enforced prostitution, forced pregnancy,<sup>117</sup> enforced sterilisation or any other form of sexual violence also constituting a grave breach of the Geneva Conventions (International Criminal Court 2002b: article 8(2)(b)(xxii)). While the terms 'rape' and 'enforced prostitution' already appear in the fourth Geneva Convention and Additional Protocol I of 1977, the outlawing of 'sexual slavery', 'forced pregnancy' and 'enforced sterilisation' are essentially new crimes. In addition, the broad prohibition of 'sexual violence' serves to catch those acts of a sexual nature that are not covered by the other acts mentioned in the paragraph.

From 1994, legal developments at the ICTR and ICTY recognised individual criminal responsibility under international law for war crimes committed in internal armed conflict. In 1994, the ICTR – an international tribunal applying international law – was granted jurisdiction over violations of common article 3 and article 4(2) of Additional Protocol II arising from the Rwandan genocide. In 1995, in its seminal interlocutory decision in the *Tadić* case, the Appeals Chamber of the ICTY considered whether the tribunal's jurisdiction over 'violations of the laws and customs of war' in article 3 of its statute extended to violations committed both in international and internal armed conflicts in relation to the Balkan crisis. The prohibited conduct included, but was not limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

In a seminal decision, the Appeals Chamber proceeded to interpret article 3 of the ICTY statute to extend to internal armed conflicts.<sup>118</sup> And in a holding of great breadth and significance, going beyond the war crimes enumerated in article 3 of the ICTY statute, the Appeals Chamber reviewed evidence for the formation of customary international law – the practice of states accepted by them as binding – on the rules applicable to internal armed conflicts. The chamber concluded:

[...] it cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.<sup>119</sup>

The Rome Statute reaffirms this trend and we see, therefore, that paragraphs (c) and (d) of article 8 apply to non-international armed conflict as contemplated by common article 3, while paragraphs (e) and (f) apply to non-international armed conflict as extended in meaning by Additional Protocol II. As Werle (2005: 280) notes, there is still no 'definitive international codification ... of the substantive law of war crimes'; that is, presumably, a legally binding list of precisely which violations of international humanitarian law attract individual criminal responsibility under customary international law. Therein lies the importance of the Rome Statute, and its enunciation in article 8 of war crimes.

As mentioned earlier, the ICTY Trial Chamber has held that the Rome Statute may be taken to 'restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law', and 'may be taken as constituting an authoritative expression of the legal views of a great number of States'<sup>120</sup> including 29 African states, the largest regional grouping represented in the Assembly of States Parties.

Article 8 of the Rome Statute is thus not merely a codification of pre-existing crimes under Hague or Geneva law, but includes certain treaty crimes that states had previously agreed to repress at the domestic level (such as attacks on humanitarian assistance or peacekeeping missions) (International Criminal Court 2002b: articles 8(2)(b)(iii) and 8(2)(e)(iii); Werle 2005: 286, footnote 133), as well as syntheses of prohibitions in international humanitarian law (such as attacking persons or property displaying the distinctive emblems of the Geneva Conventions) (International Criminal Court 2002b: articles 8(2)(e)(ii); Dörmann 2003: 448).

The Rome Statute itself provides two interpretative provisions relevant to war crimes committed in internal armed conflict. Article 8(2)(d) seeks to define the scope of application of the crimes listed in article 8(2)(c), the analogue to common article 3 of the Geneva Conventions, specifying that:

Paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

Similarly, article 8(2)(d) seeks to define the scope of application of the crimes listed in article 8(2)(e), which draws on aspects of the Hague law and on Additional Protocol II applicable to internal armed conflict, indicating that:

Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups.

The 'Elements of Crimes' document provides further interpretative assistance, primarily in the form of introductory notes, as well as some 38 substantive footnotes ranging from the meaning of 'killing' ('causing death', consistent with the elements of other core crimes) to the exclusion of consent as a defence to the war crimes of mutilation (International Criminal Court 2002a: article 8(2)(b)(x)-1) and subjection to medical or scientific experiments (International Criminal Court 2002a: article 8(2)(b)(x)-2). Importantly, the introductory notes specify that articles 8(2)(d) and 8(2)(e) are not elements of crimes in themselves. Also, the elements of war crimes 'shall be interpreted within the established framework of international law of armed conflict' (International Criminal Court 2002a: article 8, introduction). This provision has already been applied by the Pre-trial Chamber of the Court in the *Dyilo* case, where the chamber drew upon international humanitarian law extrinsic to the Rome Statute to define the concept of a 'non-international armed conflict'<sup>121</sup>

The 'Elements' document indicates four common elements for all subspecies of war crime under article 8(2)(a) of the Rome Statute, recalling their origins as grave breaches of the Geneva Conventions:

1. A common *contextual element*: 'the conduct took place in the context of and was associated with an international armed conflict'
2. A common *mental element relevant to that contextual element*: 'the perpetrator was aware of the factual circumstances that established the existence of an armed conflict'
3. A common *material element*: 'the persons or property [concerned] were/was protected under one or more of the Geneva Conventions of 1949'
4. A common *mental element relevant to that material element*: 'the perpetrator was aware of the factual circumstances that established that protected status'

War crimes under article 8(2)(b), which include conduct characterised as grave breaches of Additional Protocol I of 1977 but not the original Conventions of 1949, share only common elements 1 and 2 with crimes under article 8(2)(a).

The common elements for war crimes under article 8(2)(c), derived from violations of common article 3 of the Geneva Conventions and applicable in non-international armed conflicts, mirror the common elements for article 8(2)(a):

1. A common *contextual element*: ‘the conduct took place in the context of and was associated with an armed conflict not of an international character’
2. A common *mental element relevant to that contextual element*: ‘the perpetrator was aware of the factual circumstances that established the existence of an armed conflict’
3. A common *material element*: ‘the persons or property [concerned] were/was either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in hostilities’
4. A common *mental element relevant to that material element*: ‘the perpetrator was aware of the factual circumstances that established this status’

Similarly, the common elements for war crimes under article 8(2)(e), being violations of the laws and customs of war applicable in non-international armed conflict, not necessarily based on the Geneva Conventions, share only common elements 1 and 2 with war crimes under article 8(2)(c).

Selected elements are considered now in summary, with specific reference to the jurisprudence of the ICTR and, where more directly applicable, the ICTY.

## THE MEANING OF ‘IN THE CONTEXT OF AND ASSOCIATED WITH AN INTERNATIONAL ARMED CONFLICT’

At the confirmation of the charges in the *Dyilo* case, the Pre-trial Chamber of the ICC followed a consistent line of jurisprudence from the inception of the ICTY concerning the definition of an international armed conflict:

The Chamber considers an armed conflict to be international in character if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation

meets with armed resistance. In addition, an internal armed conflict that breaks out on the territory of a State may become international – or, depending upon the circumstances, be international in character alongside an internal armed conflict – if (i) another State intervenes in the conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).<sup>122</sup>

Drawing extensively on the earlier assessment of the International Court of Justice concerning the characterisation of the conflict in the Ituri region of the Congo, together with witness testimony before the Pre-trial Chamber, the chamber found that there are substantial grounds to believe<sup>123</sup> that the conflict in Ituri was international in character between June 2002 and 2 July 2003. This is due to the involvement of Uganda as an occupying power – Ugandan armed forces were present on the territory and supplied arms and training to armed groups in Democratic Republic of the Congo;<sup>124</sup> there was evidence that Uganda was in ‘total’<sup>125</sup> control of the area, going so far as to appoint a governor for a new province called ‘Kibali-Ituri’.<sup>126</sup> However, citing ‘paucity of evidence’, the Pre-trial Chamber declined to find substantial grounds to believe that Rwanda was intervening in the conflict, either directly or indirectly.<sup>127</sup>

On the degree of control required in order to establish that participants in an internal armed conflict were acting ‘on behalf’ of a foreign state (that is, to establish indirect intervention), the Pre-trial Chamber adopted the ‘overall control’ test set out by the ICTY Appeals Chamber in the *Tadić* case.<sup>128</sup> This test will be met where the state ‘has a role in organising, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping the group or providing operational support to it’.<sup>129</sup>

Early ICTY jurisprudence also established that an armed conflict exists from the initiation of hostilities, and extends beyond the mere cessation of hostilities until a general conclusion of peace.<sup>130</sup> The conflict is deemed to exist on the entire territory of the warring states, regardless of whether ‘actual combat’ takes place there.<sup>131</sup>

### What is an ‘armed conflict’?

In *Tadić* the ICTY Appeals Chamber said that an armed conflict exists ‘whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State’.<sup>132</sup> Note, therefore, that an ‘armed conflict’ is not constituted by mere civil unrest or terrorist activities.

An armed conflict is understood, moreover, to extend beyond the cessation of hostilities until such time as there is a general conclusion of the peace (in the case of an international conflict), or a peaceful settlement (in the case of an internal conflict) (Kittichaisaree 2001: 131). In addition, an armed conflict can be said to exist even though no actual fighting is taking place in the particular geographical area where the crime is committed. In *Tadić*, the defendant had argued that no armed conflict was taking place at the relevant time (being the time at which he was said to have committed war crimes against Bosnian Muslims and Croats who were detained by Serb forces at a camp in Omarska). In other words, his argument was that an armed conflict exists only in those parts of a state where actual fighting is taking place. The tribunal rejected this argument and found that there is nothing in the Geneva Conventions that suggests that the conditions of detention of prisoners detained away from the scene of fighting would not be subject to humanitarian law (Greenwood 1996: 265 at 269). As such, an armed conflict is understood to apply to the whole territory of the warring states (in an international conflict), or to the whole territory under the control of a party to an internal conflict (Kittichaisaree 2001: 131).

The conduct of the accused must take place in the context of an armed conflict, but must also be ‘associated with’ the armed conflict. This nexus requires a close relation between the crime and the armed conflict, and was defined by the ICTR and ICTY Appeals Chambers<sup>133</sup> as follows:

The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict.

[...] In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.<sup>134</sup>

This approach was followed by the Pre-trial Chamber of the ICC in the *Dyilo* case, which held that although the armed conflict need not be the ‘ultimate reason’ for the conduct, the armed conflict must have played ‘a substantial role’ in the ‘perpetrator’s decision, in his or her ability to commit the crime, or in the manner

in which the crime was ultimately committed’<sup>135</sup> There is accordingly no requirement for the conduct to take place ‘in the midst of battle’.<sup>136</sup> Noting ample evidence that children under the age of 15 reportedly remained in service to militia commanders in Ituri until December 2003, the chamber did not hesitate to find substantial grounds to believe that there was a nexus between the crimes charged and the armed conflict, although a non-international one, as described below.<sup>137</sup>

## The meaning of ‘armed conflict not of an international character’

Article 8(2)(e) of the Rome Statute prohibits ‘other serious violations of the laws and customs applicable in armed conflicts not of an international nature’.

The Pre-trial Chamber of the ICC has also considered the definition of a non-international armed conflict in the *Dyilo* case. In order to distinguish between an internal armed conflict and mere internal disturbances of tensions, the chamber relied on the text of Additional Protocol II, whose scope of application requires that the parties to the conflict be under responsible command and exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations, and to implement the protocol.<sup>138</sup> The chamber set out three criteria to be considered:

- The violence must be ‘sustained and have reached a certain degree of intensity’
- The armed groups must exhibit ‘some degree of organisation ... capable of carrying out sustained and concerted military operations and imposing discipline in the name of a *de facto* authority’
- The armed groups must exercise such control over territory as to enable them to carry out such military operations.<sup>139</sup> The chamber held that an internal armed conflict existed in Ituri between June 2003 and December 2003, involving at least three organised armed groups, two of which held lasting control over territory<sup>140</sup>

The requirement of a nexus between the accused’s conduct and the armed conflict remains even in the case of internal armed conflict, as discussed above.



## The meaning of 'the perpetrator was aware of the factual circumstances that established the existence of an armed conflict'

The 'Elements of Crimes' document indicates, in its introductory notes, that there is no requirement of a 'legal evaluation by the perpetrator as to existence of an armed conflict or its character as national or international', but only 'awareness of the factual circumstances ... implicit in the terms "took place in the context of and was associated with"' (International Criminal Court 2002a: article 8, introduction). This mental element appears to be an exception to the general mental element of 'intent and knowledge' in article 30 of the Rome Statute (Dörmann 2005: 21). What is required, it seems, is knowledge of the factual circumstances establishing the 'nexus requirement' described above.

Curiously, the Pre-trial Chamber did not formally determine whether Thomas Lubanga Dyilo was aware of the factual circumstances that established the existence of an armed conflict in the Ituri region in 2003, although the evidence suggests that he must have been aware of the involvement of Ugandan forces, given their engagement with forces under his control, and the fact that Ugandan involvement in Ituri was a 'matter of common knowledge'.<sup>141</sup> The ICTY Appeals Chamber has held that the principle of legality does not require that the accused knew the legal definition of each element of the crimes charged.

Thus, the prosecution is not required to establish that the accused correctly characterised an armed conflict as international; similarly, it is irrelevant whether the accused misunderstood the test for indirect intervention of a foreign state in an otherwise internal armed conflict.<sup>142</sup> Put differently, while the prosecutor has the onus of showing that the threshold for war crimes exists, namely, that the specific war crime was committed in the context of and associated with an armed conflict, this does not mean that the prosecutor must prove that the perpetrator had knowledge – in the sense of legally evaluated knowledge – of whether or not there was an armed conflict, or whether it was international or national.

## NOTES

- 1 As distinct from criminal liability under the domestic laws of a particular state.
- 2 The standard of proof required to establish the guilt of an accused person before the ICC is beyond a reasonable doubt'; the burden of proof rests on the prosecution. See International Criminal Court (2002b: article 66(3)) – this is consistent with the applicable law and settled jurisprudence of the *ad hoc* tribunals as well as international human rights standards.

- 3 Material elements of crime describe the conduct – the physical acts or omissions – of the perpetrator. The terms '*éléments matériels*' and '*actus reus*' may be considered analogous.
- 4 Mental elements define the mental state of the perpetrator – his '*mens rea*' in common law parlance – whether intent, knowledge, recklessness, willfulness, wantonness, negligence or otherwise.
- 5 Contextual elements describe circumstances extrinsic to the perpetrator, such as the protected status of a victim or the existence of a widespread or systematic attack directed against a civilian population.
- 6 The mode of liability describes the accused's particular form of participation in the crime, whether as an individual or joint perpetrator, an accomplice, a military or civilian superior, a member of a group with a common criminal purpose or otherwise. In international criminal prosecutions, the mode of liability links an accused – who may be a high-ranking official removed in place and time from the crime base – to the criminal conduct of perpetrators 'on the ground'. Modes of liability are set out in articles 25 and 28 of the Rome Statute. Objective elements of a mode of liability refer to the conduct of the accused relevant to his form of participation (for example, the existence of a group with a common criminal purpose), while subjective requirements refer to his mental state relevant to his form of participation (for example, the intention to further the criminal purpose of the group). Certain modes of liability are applicable only to specific crimes (for example, the mode of liability of direct and public incitement is only applicable to the crime of genocide).
- 7 The context of mass or organised violence is described as 'macrocriminality' or the 'international element' in Werle (2005: 94).
- 8 This is one of the common elements of all crimes against humanity criminalised under article 7 of the Rome Statute.
- 9 This is one of the common elements of all war crimes criminalised under article 8(2)(a) and 8(2)(b) of the Rome Statute. A similar contextual element applies to war crimes committed in times of non-international armed conflict and criminalised under article 8(2)(c) and 8(2)(e) of the Rome Statute.
- 10 On parallelism of norms of international customary and treaty law, see, generally, *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Merits, Judgment, ICJ Reports 1986, p 14; *North Sea Continental Shelf cases (Germany v Denmark, Germany v The Netherlands)*, Merits, judgment, ICJ Reports 1969, p 3.
- 11 *Prosecutor v Kunarac and others*, case no. IT-96-23-T, ICTY Trial Chamber III (22 February 2001) paragraphs 488–97.
- 12 *Prosecutor v Zejnir Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo ('Celebici' case)*, case no. IT-96-21-T, ICTY Trial Chamber III (16 November 1998) paragraphs 455–74.

- 13 *Prosecutor v Furundzija*, case no. IT-95-17/1-T, ICTY Trial Chamber II (10 December 1998) paragraph 257.
- 14 *Ibid.*, paragraphs 483–497.
- 15 *Filartiga v Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).
- 16 *Ibid.*, 980.
- 17 For a recent example, see United Nations (2003), articles 15–17 (definitions of crimes and obligation to proscribe), and article 44(11) (limited obligation to prosecute or extradite).
- 18 Ironically, though, it was the need for international efforts to combat drug trafficking that lent notable impetus to initial efforts to establish a permanent international criminal court. See Robinson (2002: 499).
- 19 *Prosecutor v Furundzija*, op. cit., paragraph 227; see also Werle (2005: 49–50).
- 20 See Assembly of States Parties resolution ICC-ASP/6/Res.2 (adopted 14 December 2007), paragraph 53.
- 21 Assembly of States Parties resolution ICC-ASP/6/Res.2 (adopted 14 December 2007), paragraph 42.
- 22 See statement of H. E. Philip Sealy, ambassador and permanent representative of the Republic of Trinidad and Tobago, to the 62nd session of the UN General Assembly, 3 October 2007. Available at <http://www.un.org/webcast/ga/62/2007/pdfs/trinidadandtobago-eng.pdf> (date accessed: 1 December 2007), paragraphs 19–20.
- 23 See further the scholarly analysis of Eser (2002: 889–946).
- 24 See International Criminal Court (2002a). The impetus for a codified ‘Elements of Crimes’ document was an American initiative at the Rome conference, likely inspired by its domestic military justice system and motivated by fears of judicial creativity in extending the scope of crimes within the jurisdiction of the court (see Politi 2002: 446). The text was adopted four years after the conference, listing elements for the 92 crimes defined in the Rome Statute as well as important statements on general principles of international criminal law and interpretations of certain terms in the statute, often in the form of footnotes. The ‘Elements of Crimes’ document and amendments thereto must be consistent with the statute (see International Criminal Court 2002b: article 9(3)).
- 25 The Appeals Chamber of the International Criminal Court has referred to the African Charter on Human and Peoples’ Rights in *Situation in Democratic Republic of the Congo*, ICC-01/04, *Judgment on the Prosecutor’s application for extraordinary review of Pre-trial Chamber I’s 31 March 2006 decision denying leave to appeal*, 13 July 2006, p. 6, footnote 13.
- 26 See ‘Some key elements of genocide’ in this chapter.
- 27 See Cassese (2002a: 349–350), who maintains that ‘neither customary law nor Article 6’ [of the Rome Statute] prescribes a requirement that genocidal conduct take place ‘in the context of a manifest pattern of similar conduct’; but see *contra* Politi (2002: 463), who argues that

the ‘manifest pattern’ requirement appears ‘consistent with the traditional definition of genocide accepted in Article 6 of the Rome Statute’.

- 28 *Prosecutor v Dyilo*, op. cit., paragraph 240.
- 29 *Ibid.*, paragraph 205.
- 30 *Ibid.*, paragraph 230.
- 31 *Prosecutor v Jean-Paul Akayesu*, case no. ICTR-96-4-T, trial judgment (TC), 2 September 1998. Akayesu was *bourgmestre* of Taba commune in Rwanda during the genocidal campaign in that country.
- 32 *Prosecutor v Jean Kambanda*, case no. ICTR-97-23-T (TC), 4 September 1998. Kambanda was prime minister in the caretaker government in Rwanda at the inception of the genocidal campaign in that country.
- 33 See, among others, *Prosecutor v George Rutaganda*, case no. ICTR-97-20-T, judgment (TC), 6 December 1999, paragraph 57.
- 34 *Prosecutor v Jean-Paul Akayesu*, case no. ICTR-96-4-T, judgment (TC), 2 September 1998, paragraph 511.
- 35 *Prosecutor v Laurent Semanza*, case no. ICTR-97-20-T, trial judgment (TC), 15 May 2003, paragraph 317.
- 36 *Prosecutor v Akayesu*, op. cit., paragraph 702.
- 37 *Prosecutor v Goran Jelisić*, case no. IT-95-10-T, judgment (TC), 14 December 1999, paragraph 70.
- 38 See *Prosecutor v Akayesu*, op. cit., paragraph 514; *Prosecutor v Clément Kayishema and Obed Ruzidana*, case no. ICTR-95-1-T, judgment (TC), 21 May 1999, paragraph 98.
- 39 *Prosecutor v Vidoje Blagojević and Dragan Jokić*, case no. IT-02-60-T, trial judgment (TC), 17 January 2005, paragraph 667.
- 40 *Prosecutor v Jean-Paul Akayesu*, case no. ICTR-96-4-T, judgment (TC), 2 September 1998, Akayesu trial judgment, paragraph 512.
- 41 *Ibid.*, paragraphs 512, 702.
- 42 *Ibid.*, paragraph 514.
- 43 *Ibid.*, paragraph 515.
- 44 *Rutuganda*, ICTR Trial Chamber, judgment of 6 December 1999, case no. ICTR-96-3.
- 45 *Rutuganda*, paragraphs 400–1. See also the objective approach followed by the ICTR trial chamber in *Akayesu*, at paragraph 702.
- 46 As the ICTR Trial Chamber made clear in *Rutuganda*, either the victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction, or the victim may perceive himself as belonging to the said group. See paragraph 57.

- 47 *Akayesu*, op. cit., paragraph 702. See also the decisions of the ICTY in *Jelisić*, ICTY trial chamber, judgment of 14 December 1999, case no. IT-95-10, paragraphs 70–1, and *Krstić*, ICTY Trial Chamber, decision of 2 August 2001, case no. IT-98-33-T, paragraphs 556–557 and 559–560.
- 48 See for example, *Kayishema and Ruzidana*, ICTR Trial Chamber II, judgment of 21 May 1999, case no. ICTR-95-1-T, paragraph 98.
- 49 Note that the discriminatory intent required for persecution is, in a sense, subsumed by the exterminatory intent of genocide; as noted by the ICTY Trial Chamber, ‘... from the viewpoint of *mens rea*, genocide is an extreme and most inhuman form of persecution’. *Prosecutor v Jelisić*, op. cit., paragraph 53; see also paragraph 68, noting that a crime characterised as genocide constitutes, in itself, a crime against humanity of persecution. The ICTR Trial Chamber, in the *Kayishema and Ruzidana*, case held that convictions for the crimes against humanity of murder and extermination may not be cumulated with convictions for genocide on the particular facts of that case; see *Prosecutor v Kayishema and Ruzidana*, op. cit., paragraphs 625–650. The Trial Chamber’s sentence was upheld on appeal, although the issue of cumulative convictions was not considered directly by the Appeals Chamber. However, scholars such as Werle point out that genocide is not a ‘*lex specialis* in relation to crimes against humanity’, and argue for cumulative convictions for crimes against humanity (including persecution) and genocide (Werle 2005: 213).
- 50 *Prosecutor v Rutaganda*, op. cit., paragraph 525.
- 51 *Prosecutor v Dusko Sikirica et al.*, case no. IT-95-8-T, trial judgment on defence motions to acquit (TC), 3 September 2001, paragraph 61.
- 52 *Prosecutor v Goran Jelisić*, case no. IT-95-10-A, judgment (AC), 5 July 2001, paragraph 49.
- 53 *Prosecutor v Eliézer Niyitegeka*, case no. ICTR-96-14-A, judgment (AC), 9 July 2004, paragraph 53.
- 54 Ibid.
- 55 *Prosecutor v Jelisić* (AC), op. cit., paragraph 49.
- 56 *Akayesu*, paragraph 732.
- 57 *Prosecutor v Mikaeli Muhimana*, case no. ICTR-95-1B-T, judgment (TC), 28 April 2005.
- 58 *Prosecutor v Akayesu*, op. cit., paragraph 731.
- 59 *Prosecutor v Radislav Krstić*, case no. IT-98-33-T, judgment (TC), 2 August 2001, paragraph 590.
- 60 *Prosecutor v Jelisić*, op. cit., paragraph 82.
- 61 *Prosecutor v Radislav Krstić*, case no. IT-98-33-T, judgment (TC), 2 August 2001 paragraphs 595–596.
- 62 See *Prosecutor v Jelisić* (AC), op. cit., paragraph 48.
- 63 *Prosecutor v Clément Kayishema and Obed Ruzidana*, case no. ICTR-95-1-A, judgment (AC), 1 June 2001, paragraph 138.

- 64 Ibid., paragraph 139.
- 65 That being said, it must be recognised that the treatment of evidence of a genocidal plan or policy before the *ad hoc* tribunals is not determinative of the legal status of a contextual element requiring proof of a manifest plan of similar conduct before the ICC. In other words, while the jurisprudence of the *ad hoc* tribunals may be roughly analogous, it is not necessarily apposite. Indeed, the inclusion of this provision in the ‘Elements of Crimes’ document seems to carry a diplomatic rather than legal pedigree, together with several other ‘threshold’ provisions attaching to each of the core crimes in the statute, often in language more tentative than dispositive. See, for example, article 7(2)(a) of the statute: ‘multiple commission ... pursuant to a State or organisational policy to commit such attack’; article 8(1): ‘in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’. See also Bothe (2002: 380) commenting on article 8(1): ‘This guideline can be considered as an effort of the negotiators to make the entire system more palatable to States which have many forces abroad and which, thus, feel somewhat threatened by the regime established by the Rome Statute’. As a result, in addition to the jurisprudence of the *ad hoc* tribunals, recourse to the negotiating history of the statute will prove indispensable to future jurisprudence on the legal status of the ‘manifest pattern’ element under the Rome Statute.
- 66 Note, after the First World War there were objections that this was a form of retroactive criminal legislating and no prosecutions took place for the massacre (see Kittichaisaree 2001: 85–86).
- 67 As required in article 5 of the statute of the ICTY, although attenuated through subsequent jurisprudence; see *Prosecutor v Dusko Tadić*, case no. IT-94-1-A, appeal judgment (AC), 15 July 1999, paragraph 251.
- 68 As required by article 3 of the statute of the ICTR. The Rome Statute and the ‘Elements of Crimes’ document establish discriminatory intent as an element of the crime against humanity of persecution only.
- 69 International Criminal Court 2002b, article 22(1): ‘A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court’.
- 70 International Criminal Court 2002b, article 22(2): ‘The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted’.
- 71 As defined in United Nations (1956); see International Criminal Court 2002a: footnote 11.
- 72 *Prosecutor v Dragoljub Kunarac et al.*, cases no. IT-96-23-T and IT-96-23/1-T, judgment (TC), 22 February 2001, paragraph 416.
- 73 *Prosecutor v Semanza*, op. cit., paragraph 327.
- 74 *Prosecutor v Dragoljub Kunarac et al.*, cases no. IT-96-23-A and IT-96-23/1-A, judgment (AC), 12 June 2002, paragraph 416.

- 75 *Prosecutor v Akayesu*, paragraph 581.
- 76 *Prosecutor v Kunarac* (AC), op. cit., paragraph 98.
- 77 *Prosecutor v Dario Kordić and Mario Cerkez*, case no. IT-95-14/2-T, judgment (TC), 26 February 2001, paragraph 182.
- 78 *Prosecutor v Milorad Krnojelac*, case no. IT-97-25-T, judgment (TC), 15 March 2002, paragraph 58; *Prosecutor v Mladen Naletilić and Vinko Martinović*, case no. IT-98-34-T, judgment (TC), 31 March 2003, paragraph 234.
- 79 However, the legal status of this element is at least contestable – Cassese, for instance, argues that it extends beyond the scope of customary international law and is unduly restrictive (see, among others, Cassese 2002b: 375–376).
- 80 *Judgement on the prosecutor's application*, op. cit., paragraph 6.
- 81 United Nations (1969: article 31): 'A treaty shall 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 the light of its object and purpose'; recourse to supplementary means of interpretation, such as preparatory works and the circumstances of conclusion of the treaty, is permitted whether the meaning ascertained through the application of article 31 is ambiguous, manifestly absurd or unreasonable.
- 82 *Prosecutor v Dyilo*, op. cit., paragraph 283.
- 83 Situation in the Democratic Republic of Congo, No. ICC-01/04, *Decision on the application for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, 17 January 2006, paragraphs 28–54.
- 84 *Prosecutor v Kunarac* (AC), op. cit., paragraph 423.
- 85 *Prosecutor v Semanza*, op. cit., paragraph 330.
- 86 *Prosecutor v Mitar Vasiljević*, case no. IT-98-32-T, judgment (TC), 29 November 2002, paragraph 33.
- 87 *Prosecutor v Kunarac* (AC), op. cit., paragraph 90.
- 88 *Prosecutor v Akayesu*, paragraph 580.
- 89 Ibid.
- 90 *Prosecutor v Kunarac* (AC), op. cit., paragraph 94–5.
- 91 *Prosecutor v Kunarac* (AC), op. cit., paragraph 99.
- 92 *Prosecutor v Tihomir Blaskić*, case no. IT-95-14-T, judgment (TC), 3 March 2000, paragraph 259.
- 93 *Prosecutor v Alfred Musema*, case no. ICTR-96-13-T, judgment (TC), 27 January 2000, paragraph 946.
- 94 *Prosecutor v Eliézer Niyitegeka*, case no. ICTR-96-14-T, judgment (TC), 16 May 2003, paragraph 417–418, 453.
- 95 In articles 228 to 230 of the Treaty of Versailles, Germany recognised the jurisdiction of the Allied powers to try persons accused of violating the laws and customs of war as well as the obligation to hand over such accused persons to the Allies for that purpose. None of these provisions was implemented due to later German pressure. Instead, Germany proposed to try its own nationals accused of war crimes before the supreme court of Leipzig, a proposal that produced mock trials that resulted in only 13 convictions out of 901 cases, and with insignificant sentences that ultimately were not executed. See Abi-Saab (2001: 99–118).
- 96 The Hague rules also deal with the treatment of persons who do not take part in armed hostilities or who no longer take part in them, but in this respect the Hague rules have been supplanted by the Geneva rules, which cover this aspect of humanitarian law in more detail.
- 97 *Prosecutor v Dyilo*, op. cit., paragraphs 9–12.
- 98 It should be noted that, under the Rome Statute of the ICC, the Court's attention will be directed 'in particular' to those war crimes that are 'committed as part of a plan or policy or as part of a large-scale commission of such crimes' (article 8(1)). This so-called 'non-threshold threshold' built into article 8 ensures that two jurisdictional triggers (first, that the war crime is committed as part of a plan or policy; and, second, that the war crime is committed alongside other war crimes on a large scale) should ordinarily be met before the ICC will be seized with the case. Note, this jurisdictional threshold is not an additional requirement for the elements of war crimes, but is rather a method used to prevent the ICC from being overburdened with isolated cases.
- 99 See Werle (2005: 274) for a summary list.
- 100 Additional Protocol III to the Geneva Conventions came into force on 14 January 2007 and has 61 signatories and 24 states parties. This protocol regulates the use of an additional distinctive emblem of the International Red Cross and Red Crescent Movement – the red crystal – intended to be a symbol free from political or religious significance and conferring the same protective benefits on those providing assistance to victims of armed conflict. The adoption of this new emblem is relevant to individual criminal responsibility for war crimes under the Rome Statute, which prohibits the improper use of the distinctive emblems of the Geneva Conventions of 1949 in both international and internal armed conflicts; see articles 8(2)(b)(viii) and 8(2)(e)(ii) of additional protocol III to the Geneva Conventions.
- 101 See, for example, article 2 common to the four Geneva Conventions of 1949, providing that the conventions apply 'to all cases of declared war or of any other armed conflict between two or more High Contracting Parties'.
- 102 Additional Protocol I to the Geneva Conventions of 1949, article 1(4).
- 103 Each of the Geneva Conventions, except I and II, provide for slightly different sets of grave breaches; see Geneva Convention I, article 50; Geneva Convention II, article 51; Geneva Convention III, article 130; and Geneva Convention IV, article 147. The list in article 8(2)(a) of the Rome Statute represents a compilation of the various grave-breaches provisions.
- 104 See Additional Protocol II to the Geneva Conventions of 1949, article 85.



- 105 See International Criminal Court (2002b: article 8(2)(b)(iii)), which prohibits an attack that is intentionally launched in the knowledge that it will cause incidental loss of life or injury to civilians; or damage to civilian objects; or widespread, long-term and severe damage to the natural environment, which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
- 106 See International Criminal Court (2002b: article 8(2)(b)(v)), such undefended places being defined as towns, villages, dwellings or buildings that are undefended and that are not military objectives.
- 107 See International Criminal Court (2002b: article 8(2)(b)(xxiii)), which prohibits utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations.
- 108 See International Criminal Court (2002b: article 8(2)(b)(xxv)): intentionally starving civilians 'as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions'.
- 109 Note that the crime of pillage, outlawed in article 8(2)(b)(xvi), and which involves an appropriation of property for private, personal use, must be distinguished from the *official* destruction or seizure of property prohibited under article 8(2)(b)(xiii).
- 110 International Criminal Court (2002b: article 8(2)(b)(vii)): 'Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury'.
- 111 International Criminal Court (2002b: article 8(2)(b)(xii)), as read with article 40 of Additional Protocol I of 1977; see Bothe (2002: 406).
- 112 Intentionally directing attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities.
- 113 Intentionally directing attacks against civilian objects, that is, objects that are not military objectives.
- 114 Intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians; or damage to civilian objects; or widespread, long-term and severe damage to the natural environment that would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.
- 115 Land mines, too, may fall foul of the principle laid down by article 8(2)(b)(iv) inasmuch as the use of landmines in a specific situation could arguably involve 'knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects'.
- 116 See International Criminal Court 2002b, article 8(2)(b)(iii), which prohibits intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the UN Charter, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

- 117 Which is defined in article 7, paragraph 2(f), as 'the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law'.
- 118 In this respect, the ICTY followed the finding of the International Court of Justice in the *Nicaragua* decision, op. cit., paragraph 218.
- 119 Ibid., paragraph 127.
- 120 *Prosecutor v Furundzija*, op. cit., paragraph 227.
- 121 *Prosecutor v Dyilo*, op. cit., paragraph 230.
- 122 Ibid., paragraph 209, citing *Prosecutor v Tadić* (AC), op. cit., paragraph 84.
- 123 The evidentiary threshold at the confirmation of charges stage is 'substantial grounds to believe that the person committed each of the crimes charged'; see International Criminal Court (2002b: article 61(7)).
- 124 *Prosecutor v Dyilo*, paragraphs 217, 219.
- 125 Ibid., paragraph 219.
- 126 Ibid., paragraph 214.
- 127 Ibid., paragraph 226.
- 128 Ibid., paragraph 211, citing *Prosecutor v Tadić* (AC), op. cit., paragraph 137.
- 129 Ibid., paragraph 211. In view of the findings of the Pre-trial Chamber on the scope of Ugandan involvement, however, this statement can be considered merely as *obiter dictum*.
- 130 *Prosecutor v Tadić* (AC), op. cit., paragraph 80.
- 131 Ibid., paragraph 68.
- 132 *Tadić, supra*, paragraphs 63-64.
- 133 The Appeals Chambers of the two tribunals share an identical bench of judges, with a view to promoting a harmonised jurisprudence. However, the two bodies are distinct as a matter of procedural law.
- 134 *Prosecutor v George Rutaganda*, case no. ICTR-97-20-A, judgment (AC), 1 June 2001, paragraph 569, citing *Prosecutor v Kunarac* (AC), op. cit., paragraphs 58-59.
- 135 *Prosecutor v Dyilo*, op. cit., paragraph 287.
- 136 Ibid.
- 137 Ibid., paragraph 292.
- 138 Ibid., paragraph 231.
- 139 Ibid., paragraph 232.
- 140 Ibid., paragraphs 235-237.



141 *Prosecutor v Dyilo*, op. cit., paragraph 200.

142 *Prosecutor v Dario Kordić and Mario Cerkez*, case no. IT-95-14/2-A, judgment (AC), 17 December 2004, paragraph 311.

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# Understanding the International Criminal Court

LYNN GENTILE

The Rome Statute, which established the International Criminal Court (ICC), entered into force on 1 July 2002. The statute was the result of a concerted international effort to combat impunity for what are considered to be the most egregious international crimes – crimes that, in the words of the preamble to the statute, ‘deeply shock the conscience of humanity’.

The Court, which sits in The Hague, is a permanent institution with jurisdiction to prosecute individuals accused of committing war crimes, crimes against humanity and genocide.

There are, at the time of writing, 108 States Parties to the Court, 30 of which are African.<sup>1</sup> As we shall see in this chapter, the Rome Statute is based on the principle of complementarity, a principle that ensures that the Court does not usurp the primary responsibility of states to deal with the crimes that also fall under the jurisdiction of the Court. A case is, accordingly, inadmissible before the Court if a state with jurisdiction is either genuinely investigating it or prosecuting the alleged perpetrators, or has already done so (International Criminal Court 2002: article 17).

## HOW DOES THE ICC ACQUIRE JURISDICTION?

### The principle of complementarity and the Court’s subject-matter jurisdiction

The ICC functions differently from national criminal courts in a number of important respects. For the purposes of this section, two points of difference are especially relevant:

- Intervention by the Court can only take place where the relevant national criminal courts have been unwilling or unable to conduct a genuine investigation or prosecution.
- The category of crimes over which the Court may exercise jurisdiction is much narrower than is ordinarily the case in national criminal courts. It is clear from the preamble to the Rome Statute that the intention was for the Court to have jurisdiction over 'the most serious crimes of concern to the international community as a whole'. Under article 5 of the Rome Statute, therefore, the Court can only deal with war crimes, crimes against humanity and genocide. Once the States Parties have agreed on a definition of aggression, and on the conditions under which the Court may exercise jurisdiction in relation to this crime, the Court will also be able to investigate and prosecute individuals for aggression. A working group of States Parties is currently involved in coordinating work on a definition of aggression, and the earliest opportunity to amend the Rome Statute to include the crime of aggression will be at the review conference scheduled for 2009 or 2010.

The International Criminal Court has subject-matter jurisdiction limited to the most serious crimes of concern to the international community as a whole, namely, genocide, crimes against humanity and war crimes. The crimes are precisely defined in the Rome Statute (articles 6–8).<sup>2</sup> The definitions are further elaborated on in the 'Elements of Crimes', a set of guidelines adopted by the States Parties.

## Territorial and national jurisdiction and Security Council referrals

Not only is the ICC's subject-matter jurisdiction limited, but the Rome Statute further restricts the jurisdiction of the Court to the most clearly established bases of jurisdiction known in criminal law: the territorial principle and the active national principle. As we shall see below, the Court may act only where its jurisdiction has been accepted by the state on whose territory the crime occurred, or the state of nationality of the alleged perpetrators. All states that become parties to the Rome Statute thereby accept the jurisdiction of the Court with respect to these crimes.

A State Party may refer a situation to the Prosecutor where any of these crimes appears to have been committed if the alleged perpetrator is a national of a State Party or if the crime in question was committed on the territory of a State Party or a state that has made a declaration accepting the jurisdiction of the Court. A State Party may also refer a situation where the crime is alleged to have occurred on

board a vessel or aircraft of which the state of registration is a State Party or a state that has made such a declaration. Acceptance of jurisdiction may thus be expressed through adoption of the statute or through a declaration of acceptance of jurisdiction (International Criminal Court 2002: article 12(3)).

In addition to these two bases, the Court may also intervene in any situation referred to it by the UN Security Council, invoking its powers under chapter VII of the UN Charter (International Criminal Court 2002: article 13(b)), even in respect of crimes committed on the territory of or by nationals of non-States Parties. We shall discuss such referrals in detail below when considering the ICC's current investigation of crimes committed in the Darfur region of Sudan. The UN Security Council's powers to refer situations to the Prosecutor illustrate that while the ICC has a distinct legal personality to that of the UN, by design and as a matter of political reality it has a close and vital relationship with the UN. This is also reflected in the provisions empowering the Security Council to request the deferral of an investigation or prosecution (International Criminal Court 2002: article 16), and in the UN's relationship agreement with the Court.<sup>3</sup>

## Temporal jurisdiction

The Court may only exercise jurisdiction in respect of crimes committed after the Rome Statute entered into force. For countries that became parties to the statute after 1 July 2002, the Court has jurisdiction over crimes committed on their territories or by their nationals after the date on which they become party to the Rome Statute.<sup>4</sup> What this means is that the Court is not designed to punish crimes that occurred before the Rome system became operational, and that these crimes must be addressed by national or other international or hybrid initiatives.

## Exercising the Court's jurisdiction

As previously mentioned, a situation may be investigated by the Prosecutor following a referral from a State Party or the UN Security Council. Crucially, the Prosecutor also has the power to open an investigation on his or her own initiative on the basis of information indicating the commission of crimes within the Court's jurisdiction (International Criminal Court 2002: article 15(1)). Although these powers greatly enhance the independence of the Office of the Prosecutor, as a matter of practice and with a view to conducting investigations in circumstances that are optimally conducive to securing cooperation from the states concerned

the Prosecutor has, in the past, encouraged referrals from states as one method of founding the Court's jurisdiction.<sup>5</sup> The investigations relating to Democratic Republic of the Congo, Uganda and Central African Republic are examples of referrals from States Parties on whose territory crimes have occurred.

An ICC investigation may be triggered in three different ways: by a referral from a State Party, a referral from the UN Security Council or by the Prosecutor, acting on his own initiative (*proprio motu*) on the basis of information from any credible source.

## The important role of the Pre-trial Chamber

Different national legal systems have varying approaches to the involvement of Judges in the investigation stage of the criminal process. The Rome Statute represents a compromise in that elements of both the inquisitorial and adversarial approaches have been incorporated into the role of the Pre-trial Chamber. The chamber is empowered, among other things, to consider challenges concerning jurisdiction and admissibility, and to consider these issues on its own motion (International Criminal Court 2002: articles 18 and 19).

At the request of the Prosecutor, the Pre-trial Chamber may issue arrest warrants, summons to appear and other orders and warrants as may be required for an investigation (International Criminal Court 2006c: article 57(3)(a)). It may also, upon request, take such steps and seek such cooperation as may be necessary to assist the defence (International Criminal Court 2006c: article 57(3)(b); International Criminal Court 2000, rule 116). It may provide for the protection and privacy of victims and witnesses, the protection of arrested persons, the protection of national security information, and may take protective measures for the purpose of forfeiture, particularly for the benefit of victims (International Criminal Court 2002: article 57(3)(c) and (e)). The Pre-trial Chamber also acts as a check on the Prosecutor in certain respects. As we shall see, for instance, a decision by the Prosecutor to initiate an investigation pursuant to information received from a credible source or sources, pertaining to a particular situation, is subject to the authorisation of the Pre-trial Chamber of the Court.

## Gravity

Even where all the jurisdictional requirements have been met, the case in question must meet an additional threshold of gravity before the Court can intervene. This

criterion is most clearly expressed in article 17(1)(d) of the Rome Statute.<sup>6</sup> In determining whether a case is grave enough to justify further action by the Court, the Office of the Prosecutor will take into account factors, such as the nature of the crimes, the scale and manner of their commission as well as their impact.<sup>7</sup>

## Interests of justice

One of the factors that the Prosecutor must consider in deciding whether there is a reasonable basis upon which to begin an investigation is whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice (International Criminal Court 2002: article 53(1)(c)). Where an investigation is not initiated based solely on the view that the interests of justice would not be served, the Prosecutor must inform the Pre-trial Chamber of the Court accordingly. The Pre-trial Chamber may, on its own initiative, review this decision, in which event it becomes final only when confirmed by the chamber.

The term 'interests of justice' is not defined in the statute. What is clear is that it is an exceptional basis on which a decision not to investigate or prosecute may be made. Indeed, the wording of article 53(1)(c) suggests that gravity and the interests of victims would tend to favour investigation. Consequently, the Office of the Prosecutor has indicated that there is a presumption in favour of investigation or prosecution where the criteria stipulated in article 53(1)(a) and (b) and 53(2)(a) and (b) have been met.<sup>8</sup> The Office of the Prosecutor's policy paper on the interests of justice emphasises that the criteria for the exercise of the Prosecutor's discretion in relation to this issue 'will naturally be guided by the objects and purposes of the Statute – namely the prevention of serious crimes of concern to the international community through ending impunity'.

## Procedure for initiating an investigation

The initiation of an investigation is preceded by an analysis of relevant available information on the crimes alleged to have been committed.<sup>9</sup>

A decision by the Prosecutor to initiate an investigation pursuant to information on crimes provided by any credible source is subject to the authorisation of the Pre-trial Chamber of the Court.<sup>10</sup> If the chamber concurs in the Prosecutor's finding and determines that the case appears to fall within the Court's jurisdiction, it is obliged to authorise the investigation. Where the

Prosecutor is of the view that the information examined as part of the analysis of the alleged crimes does not provide a reasonable basis to commence an investigation, the Prosecutor informs the relevant information providers accordingly.

Where a situation has been referred to the Prosecutor, an investigation must be initiated in the absence of a finding that there is no reasonable basis on which to do so.<sup>11</sup> With regard to both referrals and information on crimes provided by a reliable source, the decision to proceed with an investigation is predicated on a determination that there is a reasonable basis to do so.

In deciding whether to initiate an investigation, the Prosecutor must consider whether:

- The available information provides a reasonable basis to believe that a crime within the Court's jurisdiction has been or is being committed
- The case is or would be admissible under article 17<sup>12</sup>
- Taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice

## INSTITUTIONS OF THE COURT

The Rome Statute provides that the ICC is to be composed of the Presidency, an Appeals Division, a Trial Division and a Pre-trial Division, the Office of the Prosecutor, and the Registry. The regulations of the Court provide that the Registrar shall establish an Office of Public Defence Counsel, which is an independent office with a key role in ensuring respect for the rights of persons appearing before the Court.

### The Office of the Prosecutor: mandate and functions

The Office of the Prosecutor is an independent organ of the Court headed by the Prosecutor, who is assisted by one or more Deputy Prosecutors.

Mr Luis Moreno-Ocampo of Argentina was elected to serve as the Prosecutor, and he took office in June 2003. The Deputy Prosecutor responsible for prosecutions is Ms Fatou Bensouda of The Gambia.

The Office of the Prosecutor's mandate is to contribute to the Court's overall objective of combating impunity for war crimes, crimes against humanity and

genocide. To this end, the Office of the Prosecutor receives referrals and information pertaining to the alleged commission of crimes within the jurisdiction of the Court, examines the information available and conducts investigations and prosecutions in accordance with the statute.

The functions of the office are carried out by the immediate Office of the Prosecutor and its three divisions, with assistance from a number of support-service units. The Investigation Division is responsible for collecting and examining evidence, while the Prosecution Division guides the conduct of investigations in accordance with the prosecutorial strategy determined by the Prosecutor, and litigates on his or her behalf.

The Jurisdiction, Complementarity and Cooperation Division gathers additional information on and analyses situations referred to the Prosecutor as well as information on crimes provided by various sources. The result of this analysis informs the decision whether there is a reasonable basis to proceed with an investigation. This division is also responsible for assessing the admissibility of cases throughout the investigation.

As the ICC does not have an enforcement mechanism an important part of the division's mandate is to secure cooperation from states and other actors to facilitate the work of the Office of the Prosecutor.

### The Registry

The Registry is the principal administrative organ of the Court headed by the Registrar and is responsible for the non-judicial aspects of the administration of the Court, including Court management, human resources and finance.

In relation to the rights of the defence, the Registry facilitates, among other things, the protection of the right of accused persons to confidential communication with their counsel, assists the defence in obtaining legal advice and the assistance of legal counsel, and supports and assists all defence counsel appearing before the Court as necessary for the effective conduct of the defence.

Regarding victims, the Registry assists in securing legal advice and in arranging legal representation and the facilities necessary for the protection of their rights at all stages of the relevant proceedings.

A particularly important function of the Registry relates to the protection of victims and witnesses. In this regard, the registrar negotiates agreements with states pertaining to the relocation and provision of support services to victims, witnesses and others who are at risk on account of their testimony. It is the



function of the Registry to advise these persons of their rights under the Rome Statute and the rules of the Court and, in particular, of the availability of the victims and witnesses unit. The unit is responsible for making security arrangements and for providing protective measures, counselling services and other assistance for these persons.

## The Judges

The 18 Judges of the Court are elected by the Assembly of States Parties. The Judges elect three of their number to serve as the Presidency (which is composed of the President and the First and Second Vice-Presidents) (International Criminal Court 2002: article 38(3)(a)).

The Judges of the Court were elected by the Assembly of States Parties in 2003. The Judges include 11 men and seven women, and represent all regions of the world. From among them the Judges elected Mr Philippe Kirsch of Canada to serve as President, Ms Akua Kuenyehia of Ghana as First Vice-President and Mr René Blattmann of Bolivia as Second Vice-President. Of the total complement of 18 Judges, four are African.

## The Presidency

The President and the First and Second Vice-Presidents are elected by an absolute majority of the Judges. They each serve for a term of three years or until the end of their respective terms of office as Judges, whichever expires earlier. They may be re-elected once.

The Presidency is responsible for the proper administration of the Court, with the exception of the Office of the Prosecutor, as well as several other functions conferred upon it in accordance with the statute. In relation to matters of mutual concern, the Presidency coordinates with and seeks the concurrence of the Prosecutor.

## Chambers

The judiciary of the Court is made up of the Appeals, Pre-trial and Trial Divisions. The Appeals Division is composed of the President and four other Judges, while the Trial and Pre-trial Divisions have no fewer than six Judges each. In electing the Judges of the Court, the States Parties are required to ensure the broadest possible

representation of the major legal traditions of the world, equitable geographical representation and a fair representation of male and female Judges.

With respect to the constitution of the chambers, regard is had to the nature of the functions to be performed by each division, and the qualifications and experience of the Judges. The objective is to ensure that an appropriate combination of expertise in criminal law and procedure and international law is available to each division. The Trial and Pre-trial Divisions, particularly, should be composed predominantly of Judges with criminal-trial experience.

## The Office of Public Defence Counsel

The right of an accused person to a fair trial is an international standard enshrined in the Rome Statute.<sup>13</sup> The incorporation of the normative components of this standard into the statute (such as the right to be presumed innocent until proven guilty) (International Criminal Court 2002: article 66(1)) is supplemented by the provision for the establishment of an Office of Public Defence Counsel (International Criminal Court 2004: regulation 77). Its function is to protect and represent the interests of accused persons during the initial stages of an investigation, and to assist other persons entitled to legal assistance under the statute. The latter category includes persons who have been questioned by the Prosecutor where there are grounds to believe that they have committed a crime within the jurisdiction of the Court.

Although the Office of Public Defence Counsel falls under the Registry for administrative purposes, it is an independent body (International Criminal Court 2004: regulation 77(2); International Criminal Court 2006c).

## THE ICC'S FIRST INVESTIGATIONS

### State Party referrals: Democratic Republic of the Congo, Uganda and Central African Republic

The Office of the Prosecutor is investigating situations in Democratic Republic of the Congo, Uganda and Central African Republic following referrals from the respective governments.

The Office of the Prosecutor has adopted a policy of focusing on those who bear the greatest responsibility for the commission of crimes within the jurisdiction of

the Court. The objective of this prosecutorial strategy is to make the best possible use of the resources available by conducting focused investigations and targeted prosecutions; moreover, by targeting those who bear the greatest responsibility, the Office of the Prosecutor hopes to enhance the impact of its work through deterrence (International Criminal Court 2006c).

## Democratic Republic of the Congo

In March 2004, Democratic Republic of the Congo authorities referred the situation in the country involving crimes within the jurisdiction of the Court to the Office of the Prosecutor. An investigation was opened in June 2004 and, having analysed the crimes within the Court's jurisdiction and identified the gravest crimes, the Office of the Prosecutor has focused its initial investigations on the Ituri region.

In February 2006, the Court issued a warrant of arrest for Thomas Lubanga, president of the Union of Congolese Patriots (an armed group operating in Ituri province) on charges of enlisting, conscripting and using child soldiers. Lubanga was arrested and surrendered to the ICC in March 2006.<sup>14</sup>

The Court also issued a warrant for the arrest of Germain Katanga, former senior commander of the Patriotic Forces of Resistance in Ituri in July 2007. He is charged with crimes against humanity and war crimes. Katanga has since been surrendered to the Court by the Congolese government.<sup>15</sup>

The third person to be surrendered to the Court was Mathieu Ngudjolo Chui, a colonel in the Congolese armed forces and alleged former leader of the National Integrationist Front. The charges against him, which are yet to be confirmed, are in respect of war crimes and crimes against humanity. Following a decision of the Pre-trial Chamber, the cases against Chui and Katanga have now been joined.

On 28 April 2008, the Pre-trial Chamber unsealed the warrant of arrest against Bosco Ntaganda, former deputy chief of general staff for military operations of the Forces patriotiques pour la libération du Congo. He is alleged to have enlisted, conscripted and used children under the age of 15 years for active participation in hostilities in Ituri between July 2002 and December 2003. Ntaganda is still at large.

## Uganda

The Ugandan government referred the situation in its country to the Prosecutor in December 2003, and an investigation was initiated in July 2004. The investigation

has focused on northern Uganda where numerous atrocities have been committed against the civilian population. The crimes under investigation include crimes against humanity and war crimes. In July 2005, the Court issued warrants for the arrest of five senior commanders of the Lord's Resistance Army (one of whom is now deceased), including its leader, Joseph Kony. The Office of the Prosecutor continues to seek the cooperation of relevant members of the international community for the arrest and surrender of the remaining commanders.

## Central African Republic

The Prosecutor announced the opening of an investigation into the situation in Central African Republic in May 2007, following a referral in December 2004. The Office of the Prosecutor received information from Central African Republic authorities, non-governmental organisations and international organisations regarding alleged crimes. As is the case in the other investigations, the focus will be on the most serious crimes, most of which were committed between 2002 and 2003. The situation in Central African Republic has been noteworthy for the particularly high number of crimes involving sexual violence.<sup>16</sup>

The first person to have been arrested (by the Belgian authorities) in relation to this investigation is Jean-Pierre Bemba Gombo, president and commander-in-chief of the Movement for the Liberation of Congo. He is alleged to be responsible for the commission of war crimes and crimes against humanity in Central African Republic, from about 25 October 2002 to 15 March 2003. Since his arrest on 24 May 2008 on a warrant issued by the Court, he is, at the time of writing, still in the custody of the Belgian authorities.

## A Security Council referral: Darfur, Sudan

On 31 March 2005, pursuant to resolution 1593(2005), the UN Security Council referred the situation in Darfur, Sudan to the Prosecutor of the Court. This is the first situation that has been referred to the Prosecutor by the Security Council. Resolution 1593 is particularly important in that it underscores the need for a comprehensive solution to the situation in Darfur, and recognises the need for national criminal justice institutions to be supported. Specifically, paragraph 4 of the resolution encourages the Court, within its mandate, 'to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur'.

After analysing the information available, the Prosecutor determined that there was a reasonable basis to proceed with an investigation, which was duly initiated in June 2005. In his periodic reports to the UN Security Council, the Prosecutor has stated that the evidence available shows a widespread pattern of serious crimes, including murder, rape, the displacement of civilians and the looting and burning of civilian property.<sup>17</sup>

In February 2007, the Prosecutor requested the Pre-trial Chamber to issue summons to appear or, alternatively, warrants of arrest in respect of Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman (also known as Ali Kushayb). Ahmad Harun is the former minister of state for the interior and the current minister of state for humanitarian affairs, while Ali Kushayb is a militia leader known to have been operating in Darfur at the relevant time.<sup>18</sup> The charges against Harun and Kushayb relate to war crimes and crimes against humanity. In April 2007, the Court issued warrants of arrest for these individuals and requests for their arrest and surrender have since been transmitted to the government of Sudan. As of the end of May 2008, neither suspect has been surrendered to the Court.

In his report to the UN Security Council in December 2007, the Prosecutor indicated that he would proceed with a further investigation in view, particularly, of the continuing attacks on displaced civilians. The Office of the Prosecutor will also be looking into allegations of crimes committed by other parties, including alleged rebel attacks against peacekeepers and humanitarian personnel.

On 14 July 2008 the Chief Prosecutor of the Court, Luis Moreno-Ocampo, alleged that President al-Bashir of Sudan bore individual criminal responsibility for genocide, crimes against humanity and war crimes committed since 2003 in Darfur. The Prosecutor accused al-Bashir of having 'masterminded and implemented' a plan to destroy the three main ethnic groups, the Fur, Masalit and Zaghawa, with a campaign of murder, rape and deportation. The evidence was submitted to the Pre-trial Chamber of the Court, which, at the time of writing, is considering whether to issue an arrest warrant.

## Decisions not to investigate

The Office of the Prosecutor receives numerous submissions from various sources alleging the commission of crimes within the jurisdiction of the Court.<sup>19</sup> The approach employed by the Office of the Prosecutor has been outlined earlier, and results ultimately in a decision as to whether there is a reasonable basis to proceed with an investigation.

The responses to information received regarding the alleged commission of crimes in Venezuela and Iraq, outlined briefly below, best highlight how this process functions in practice.<sup>20</sup>

## Venezuela

Most of the information submitted to the Office of the Prosecutor related to crimes alleged to have been committed by the Venezuelan government and associated forces. One complaint related to crimes alleged to have been committed by groups opposed to the government.

In his response, the Prosecutor emphasised his duty to analyse the information received on potential crimes in order to determine whether there was a reasonable basis on which to proceed with an investigation.<sup>21</sup> He also stated that the analysis of the situation in Venezuela was conducted under article 15 of the statute since no state referral had been received. The Office of the Prosecutor reviewed the information provided, together with additional material obtained from open sources, media reports and reports of international and non-governmental organisations.

The Office of the Prosecutor noted that, as Venezuela had ratified the Rome Statute in July 2000, the Court had jurisdiction over crimes perpetrated on the territory or by nationals of Venezuela after 1 July 2002, when the statute entered into force. A significant number of the allegations referred to incidents alleged to have occurred prior to 1 July 2002; the Office of the Prosecutor focused only on those that fell within the temporal jurisdiction of the Court.

In the view of the Office of the Prosecutor, the available information did not provide a reasonable basis to believe that the crimes against humanity allegedly perpetrated against opponents of the Venezuelan government were committed as part of a widespread or systematic attack against any civilian population, as required under article 7(1) of the statute.

The allegations relating to crimes against humanity committed by groups opposed to the government were found, with the exception of a few incidents, to be very generalised; they could not, furthermore, be substantiated by open-source information. Again, the Prosecutor found that the information available did not provide a reasonable basis to believe that the crimes in question would have been committed as part of a widespread and systematic attack against any civilian population.

There were no specific allegations of war crimes having been committed; in any event, based on the available information concerning events in Venezuela

since 1 July 2002, the situation was found not to meet the threshold of an armed conflict. There was therefore no reasonable basis to believe that war crimes within the jurisdiction of the Court have been committed.

Finally, there were no allegations concerning genocide, and the available information was found not to provide a reasonable basis to believe that the crime of genocide had been committed. The Prosecutor concluded that the statutory requirements to seek authorisation to initiate an investigation into the situation in Venezuela had not been satisfied. As stated in the response, this conclusion can be reconsidered in the light of new facts or evidence, and the information providers may submit any such information.

## Iraq

The allegations regarding crimes committed in Iraq related to the launching of military operations and the resulting fatalities. The Prosecutor's response to the allegations outlined the process of receiving and analysing information employed by the Office of the Prosecutor. The response noted that the events in question occurred on the territory of Iraq, which was not a State Party and had not lodged a declaration of acceptance under article 12(3). In addition, crimes committed on the territory of a non-State Party only fell within the jurisdiction of the Court when the perpetrators were State Party nationals.

A number of submissions concerned the legality of the war in Iraq in relation to which the Prosecutor advised that the Court cannot exercise jurisdiction over the crime of aggression, and that it has a mandate to examine conduct during the conflict and not the legality of the decision to engage in armed conflict.

Few factual allegations were submitted concerning genocide and crimes against humanity. The Office of the Prosecutor was of the view that the available information provided no reasonable *indicia* (signs, indications) that coalition forces had 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such', as required in the definition of genocide (International Criminal Court 2002: article 6). Similarly, the available information provided no reasonable *indicia* of the required elements for a crime against humanity, namely, a widespread or systematic attack directed against any civilian population (International Criminal Court 2002: article 7).

The Office of the Prosecutor examined allegations relating to the targeting of civilians and to excessive attacks (namely, where the civilian damage or injury was excessive in relation to the anticipated military advantage), and found no reasonable basis to conclude that either crime had been committed.

With respect to allegations concerning the wilful killing or inhuman treatment of civilians by State Party nationals, the Prosecutor concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed. The information available indicated that there were an estimated four to 12 victims of wilful killing and a limited number of victims of inhuman treatment, totalling, less than 20 persons. The Prosecutor's decision on these crimes was that they did not meet the criteria set out in article 8(1) or the general threshold of gravity.<sup>22</sup>

## THE ICC'S APPROACH TO COMPLEMENTARITY UNDER THE ROME STATUTE

The principles underlying the complementarity regime are, first, that the primary responsibility to investigate and prosecute crimes lies with national authorities, and the preamble to the statute acknowledges this premise; and, second, where national courts fail to do so, jurisdiction reverts to the Court, subject to the provisions of the statute.

As mentioned above, the Office of the Prosecutor's policy is to focus on those who bear the greatest responsibility for committing genocide, war crimes and crimes against humanity.<sup>23</sup> This is significant in that since the Court acts where states have been unwilling or unable to conduct genuine criminal proceedings, there is a very real prospect that lower-ranking perpetrators will not face justice, resulting in what is frequently termed an 'impunity gap'. The Office of the Prosecutor therefore encourages national prosecutions of lower-ranking perpetrators, and has recognised the necessity for national authorities, the international community and the Court to work together to address this (International Criminal Court 2003).

### The Rome Statute provisions dealing with complementarity

According to article 1 of the Rome Statute, the Court is 'complementary to national criminal jurisdictions'. Consequently, under article 17(1)(a) of the statute, a case is inadmissible before the Court where it is the subject of an investigation or prosecution by a state with jurisdiction unless the state concerned is unwilling or unable genuinely to carry out the investigation or prosecution. If the case has already been investigated and a decision not to prosecute has been made, the case

is only admissible if the decision resulted from the unwillingness or inability of the state genuinely to prosecute (International Criminal Court 2002: article 17(1)(b)). In addition, a case is inadmissible where the person concerned has already been tried for conduct that is the subject of the complaint, and a trial by the Court is not permitted under the statute's 'double jeopardy' provisions.<sup>24</sup>

In assessing the unwillingness of a state to carry out a genuine investigation or prosecution, the Court will consider, in light of the principles of due process recognised by international law, whether:

- The relevant proceedings or national decision were designed to shield the person concerned from criminal responsibility for crimes within the jurisdiction of the Court
- There has been an unjustified delay in the proceedings which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice
- The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice

In order to determine inadmissibility in a particular case, the Court considers whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.<sup>25</sup> Even after the Prosecutor has made a determination that a case is admissible under article 17, an investigation can only proceed if all the requirements of article 53 relative to the initiation of an investigation are also satisfied.

### The Office of the Prosecutor's understanding of complementarity, with select examples from recent referrals

The investigations into the situations in Darfur and Central African Republic provide some insight into how the Office of the Prosecutor has interpreted the statutory provisions relating to complementarity.

#### Darfur

Prior to initiating its investigation into crimes allegedly committed in Darfur, the Office of the Prosecutor considered whether the cases in which it was likely to take

an interest had been the subject of investigation or prosecution by Sudanese courts. The Office of the Prosecutor analysed Sudanese justice institutions, laws and procedures and gathered information from many sources, including the Sudanese government. This information gathered by the Office of the Prosecutor related to issues such as the administration of justice in Darfur, alternative dispute-resolution mechanisms and national proceedings in respect of crimes potentially within the Court's jurisdiction. As indicated by the Prosecutor in his first report to the UN Security Council following the referral,<sup>26</sup> the Office of the Prosecutor examined information on multiple *ad hoc* mechanisms created by the government of Sudan, such as the committees against rape, the special courts, the specialised courts and the national committee of inquiry.

Following an evaluation of all the available information, the Prosecutor took the view (in which the Pre-trial Chamber concurred) that the admissibility criteria had been met, that is, that the national mechanisms in Sudan were not a bar to the Court exercising jurisdiction over the crimes alleged to have been committed in Darfur.<sup>27</sup> It is worth noting, as the Prosecutor has emphasised in his periodic reports to the UN Security Council, that the decision is not a judgment of the Sudanese criminal justice system as a whole but rather an assessment of whether the Sudanese authorities are investigating or prosecuting the same cases as the Office of the Prosecutor. The admissibility assessment is ongoing and is case-specific, and, so far, no admissibility challenges on behalf of Ali Kushayb or Ahmad Harun have been made.

#### Central African Republic

In deciding to initiate an investigation into Central African Republic, the Prosecutor noted that national proceedings, including investigations and preliminary court hearings, had taken place in relation to some of the crimes that may be the focus of the investigation. A team from the Office of the Prosecutor travelled to Central African Republic in November 2005 to gather additional information on, and carry out an in-depth assessment of, those proceedings. In particular, the Prosecutor noted the finding of the cour de cassation in April 2006, indicating that in relation to the alleged crimes the national authorities had been unable to carry out the necessary criminal proceedings, to collect evidence or to secure the presence of suspects before the courts.<sup>28</sup> After a careful consideration of all the relevant facts, the Office of the Prosecutor concluded that the cases that would potentially be the focus of the investigation would be admissible before the ICC.



## Arrest and surrender

### Arrest and surrender under the Rome Statute

At any time during an investigation, the Pre-trial Chamber shall, subject to certain conditions, issue a warrant for the arrest of an individual suspected of having committed a crime within the jurisdiction of the Court upon application by the Prosecutor. The Court will issue a warrant if it is satisfied that there are reasonable grounds to believe that the person has indeed committed such a crime. The Court must also be satisfied that the arrest of the person appears necessary to ensure his or her appearance at trial, or to ensure that the person does not obstruct or endanger the investigation or the Court proceedings. Where applicable, the Court will consider whether arrest is necessary to prevent the person from continuing with the commission of the crime that he is alleged to have committed, or a related crime that is within the jurisdiction of the Court and that arises out of the same circumstances.

On the basis of the warrant of arrest, the Court may request either the provisional arrest or the arrest and surrender of the person named in the warrant. In urgent cases, the Court may request the provisional arrest of the person sought pending the formal transmission of a request for surrender in the form required under the statute. Once issued, a warrant of arrest remains in effect until otherwise ordered by the Court.

## Summons

As an alternative to seeking a warrant of arrest, the Prosecutor may apply for the issue of a summons for the person to appear. If the Pre-trial Chamber finds that there are reasonable grounds to believe that the person committed the crime alleged, and that a summons is sufficient to ensure the person's appearance, it will issue a summons.

## Procedure by State Party

Upon receipt of a request for provisional arrest or for arrest and surrender, a State Party must immediately take steps to arrest the person in question in accordance with its laws and the provisions of the statute, and to ensure that he is brought before a competent judicial authority. The role of the judicial authority is to ensure

that the warrant applies to that person, that he has been arrested in accordance with the proper process, and that his rights have been respected.

A person arrested following a request from the ICC may apply for interim release pending surrender. In making its determination on such an application, the national judicial authority is obliged to consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release, and whether the necessary safeguards exist to ensure that the custodial state can fulfil its duty to surrender the person to the Court. The judicial authority may not, however, adjudicate on the propriety of the procedure by which the Court issued the warrant.

The Court may transmit a request for the arrest and surrender of a person to any state on the territory of which that person may be found, and shall request the cooperation of that state in the arrest and surrender of such a person. States Parties are obliged to comply with requests for arrest and surrender in accordance with their national law and with the provisions of the Rome Statute. Where the request for surrender is challenged in the national courts by the person named as a suspect in the request on the basis that he has already been tried for the relevant crime, the requested state must consult the Court to determine if the admissibility of the case has been ruled upon. If the case is admissible, the state must execute the request. If, however, a ruling as to admissibility is pending, the state has a discretion to delay the surrender of the person until the Court makes a determination on admissibility.<sup>29</sup>

## International cooperation and judicial assistance under the Rome Statute

Another highly significant difference between the ICC and national prosecuting authorities is that the Court does not have an enforcement mechanism to implement coercive or other measures in furtherance of investigations or prosecutions. Instead, the Rome Statute establishes a system under which the Court receives assistance and cooperation from States Parties, non-States Parties and other international actors to facilitate its work.

## States Parties

States Parties have a duty under the Rome Statute to cooperate fully with the Court and to ensure that there are procedures available under national law for all forms

of cooperation specified in part IX of the Rome Statute.<sup>30</sup> In this regard, the Court is authorised to make requests to States Parties through the channel designated by them upon ratification, accession, acceptance or approval. In particular, States Parties have an obligation to comply with requests for a variety of forms of cooperation. These include the arrest and surrender of suspects, the identification and whereabouts of persons or the location of items, the taking of evidence, the questioning of any person being investigated or prosecuted, the protection of victims and witnesses, the preservation of evidence and the execution of searches and seizures.

In the event that the State Party receives a request in relation to which it identifies problems that may impede or prevent the execution of the request, as foreseen in article 97, there is provision for a process of consultation with the Court in order to resolve the matter.<sup>31</sup> Where a State Party has otherwise failed to comply with a request for cooperation, the Court may refer the matter to the Assembly of States Parties or to the UN Security Council, as applicable.

## Assistance from the Court

The Court may cooperate with and provide assistance to a State Party investigating or conducting trials in respect of crimes within the jurisdiction of the Court or serious crimes under its domestic law (International Criminal Court 2002: article 93(10)). The statute, therefore, foresees the possibility of the Court assisting national authorities; this is significant in the context of the complementarity regime, which encourages states to conduct their own prosecutions for international crimes. It is important to note that if the assistance requested involves the transmission of material obtained with the assistance of a state, that state's consent must first be sought. In the event that the material was provided by a witness or expert, its transmission must be subject to the provisions of article 68 of the Rome Statute.<sup>32</sup>

## Non-States Parties and intergovernmental organisations

States that are not party to the statute may also assist the Court; to this end, the Court may request the assistance of these states on an *ad hoc* or other basis. Similarly, the Court can seek the cooperation of any intergovernmental organisation having regard to its mandate and competence.<sup>33</sup> A UN Security Council resolution may also place obligations on non-States Parties to cooperate with the Court.<sup>34</sup>

## The Office of the Prosecutor

In addition to the provisions set out in part IX of the Rome Statute, article 54 authorises the Prosecutor to take specific investigative steps. The Prosecutor may collect and examine evidence and request the presence of and question victims, witnesses and persons being investigated. He is also empowered to seek the cooperation of any state or intergovernmental organisation or arrangement in accordance with its respective competence and/or mandate. It is open to the Prosecutor to enter into such arrangements or agreements as may be necessary to facilitate the cooperation of a state, intergovernmental organisation or person.<sup>35</sup>

## Freezing and confiscation of criminal assets

The Rome Statute provides, in addition to imprisonment or the imposition of a fine following conviction for a crime within the jurisdiction of the Court, that the Court may order a forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties (International Criminal Court 2002: article 77(2)(b)). Under article 93(1)(k) of the statute, the Court is authorised to request assistance from States Parties, where applicable, in relation to the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, again without prejudice to the rights of bona fide third parties. The procedure for the enforcement of orders for forfeiture is set out in rules 217 and 218 of the rules of procedure and evidence of the Court.

## NOTES

- 1 For information on States Parties, see <http://www.icc-cpi.int/statesparties.html>.
- 2 For an in-depth discussion of each of the crimes, see chapter 2 of this Guide.
- 3 The relationship agreement between the UN and the ICC is provided for under article 2 of the Rome Statute. It provides for cooperation in a broad range of areas, including information exchange, specific cooperation with the Office of the Prosecutor and requests for assistance from the Court.
- 4 A declaration under article 12(3) may overcome this limitation.
- 5 This policy is discussed more fully in International Criminal Court 2006c.
- 6 According to this provision, the Court is bound to find a case inadmissible where it is 'not of sufficient gravity to justify further action by the Court'. In addition, article 53(1)(b) and 53(2)(b) refer to the admissibility test set out in article 17, indicating that in his or her determination as to whether there is a reasonable basis to initiate an investigation or a sufficient basis for a prosecution, the Prosecutor must have regard to the article 17 criterion of gravity, among others.

- 7 The prosecutorial strategy of the Office of the Prosecutor has been published and is available at [http://www.icc-cpi.int/otp/otp\\_events.html](http://www.icc-cpi.int/otp/otp_events.html).
- 8 This position is outlined in the Office of the Prosecutor's policy paper on the interests of justice, available at [http://www.icc-cpi.int/otp/otp\\_docs.html](http://www.icc-cpi.int/otp/otp_docs.html).
- 9 Detailed information on the Office of the Prosecutor's policy on the analysis of referrals and submissions alleging the commission of crimes within the jurisdiction of the Court is available on the Internet – see [http://www.icc-cpi.int/library/organs/otp/policy\\_annex\\_final\\_210404.pdf](http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf).
- 10 In analysing the seriousness of such information, the Prosecutor may seek additional information from states, organs of the UN, intergovernmental and non-governmental organisations, among other sources.
- 11 Article 53(1) of the Rome Statute provides in relevant part that the Prosecutor 'shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute...'
- 12 Under article 17(1), a case is admissible before the Court where, among others, it has not been genuinely investigated or prosecuted by a state with jurisdiction over it.
- 13 The key provisions are found in International Criminal Court 2002: articles 66 and 67.
- 14 His trial was due to begin on 23 June 2008 but was halted on 13 June 2008 when the Court's Pre-trial Chamber ruled that the Prosecutor's refusal to disclose potentially exculpatory material had breached Lubanga's right to a fair trial. The Prosecutor had obtained the evidence from the UN and other sources on the condition of confidentiality, but the Judges ruled that the Prosecutor had incorrectly applied the relevant provision of the Rome Statute and, as a consequence, 'the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial'. On 2 July 2008 the Court ordered Lubanga's release; however, at the time of writing he remains in custody pending the outcome of an appeal by the prosecution.
- 15 The ICC's factsheet on the case against Germain Katanga is available at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-BckInfo-ENG.pdf>.
- 16 A factsheet on developments in the Central African Republic investigation is available at [http://www.icc-cpi.int/library/press/pressreleases/ICC-OTP-BN-20070522-220\\_A\\_EN.pdf](http://www.icc-cpi.int/library/press/pressreleases/ICC-OTP-BN-20070522-220_A_EN.pdf).
- 17 Detailed summaries of the crimes on which the Office of the Prosecutor has gathered information and evidence can be found in the Prosecutor's periodic reports to the Security Council on the investigation. They are available on the Court's website; see [http://www.icc-cpi.int/cases/Darfur/s0205/s0205\\_un.html](http://www.icc-cpi.int/cases/Darfur/s0205/s0205_un.html). For an analysis of the referral, see, among others, Du Plessis & Gevers (2005: 23–34).
- 18 Copies of the warrants of arrest are available on the Court's website; see <http://www.icc-cpi.int/cases/Darfur.html>.
- 19 A summary of the submissions received by the Office of the Prosecutor is available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_Update\\_on\\_Communications\\_10\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf).
- 20 Copies of the Prosecutor's decisions are available at [http://www.icc-cpi.int/organs/otp/otp\\_com.html](http://www.icc-cpi.int/organs/otp/otp_com.html).
- 21 See International Criminal Court 2002: article 53(1)(a).
- 22 Since, as required under article 8(1), they were not committed 'as part of a plan or policy or as part of a large-scale commission of such crimes'. In addition, although the Prosecutor found that it was unnecessary, in light of this conclusion, to reach a decision on complementarity, the response notes that the Office of the Prosecutor also collected information on national proceedings, including commentaries from various sources, and that national proceedings had been initiated with respect to each of the relevant incidents.
- 23 This is not a legal requirement under the Rome Statute but rather a policy position taken by the Office of the Prosecutor. Indeed, the Office of the Prosecutor's 'Paper on some policy issues before the Office of the Prosecutor' acknowledges the possibility that, in some cases, an investigation may target lower-ranking individuals if necessary for the conduct of the whole case. See [http://www.icc-cpi.int/library/organs/otp/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf).
- 24 International Criminal Court 2002: article 20(3) provides: 'No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 [namely conduct constituting genocide, crimes against humanity and war crimes] shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:  
'(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or  
'(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognised by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.'
- 25 International Criminal Court 2003 offers valuable insight into the Office of the Prosecutor's perspectives on complementarity.
- 26 The Prosecutor's report was presented to the Security Council on 29 June 2005.
- 27 Paragraphs 19–25 of the Decision on the Prosecution Application under article 58(7) of the Rome Statute (International Criminal Court 2002).
- 28 In accordance with article 17(3) of the Rome Statute (International Criminal Court 2002), the Court considers, in determining a state's inability to conduct a genuine prosecution or investigation, 'whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings'.
- 29 The procedure where the custodial state receives a request for surrender from the Court and a request for extradition in respect of the same individual is detailed in article 90 of the Rome Statute (International Criminal Court 2002).
- 30 Under article 93(4) (International Criminal Court 2002), a State Party may deny, in whole or in part, a request for assistance only if the request concerns the production of documents or evidence that relate to its national security.

- 31 In addition, article 93(3) (International Criminal Court 2002) provides: 'Where execution of a particular measure of assistance detailed in a request presented under paragraph 1, is prohibited in the requested State on the basis of an existing fundamental legal principle of general application, the requested State shall promptly consult with the Court to try to resolve the matter. In the consultations, consideration should be given to whether the assistance can be rendered in another manner or subject to conditions. If after consultations the matter cannot be resolved, the Court shall modify the request as necessary.'
- 32 Article 68 (International Criminal Court 2002) provides for measures to be taken to protect the safety, well-being, dignity and privacy of victims and witnesses.
- 33 For instance, the Court has a relationship agreement with the UN and a cooperation agreement with the EU, and negotiations to conclude a memorandum of understanding on cooperation and assistance with the AU are in progress.
- 34 Paragraph 2 of resolution 1593, referring the situation in Darfur to the Prosecutor, provides in part that 'the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution'. The government of Sudan is not a State Party to the Rome Statute.
- 35 The Office of the Prosecutor has established a broad network of contacts with states, intergovernmental and non-governmental organisations, and concluded many formal arrangements to facilitate cooperation.

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## CHAPTER FIVE

# Complementarity: a working relationship between African states and the International Criminal Court

MAX DU PLESSIS

The idea of an international criminal court has captured the legal imagination for well over a century. It became a reality on 18 July 1998 with the adoption of the Rome Statute. After attracting the necessary ratifications the statute entered force on 1 July 2002. And in just over a year of its existence, by November 2003, the International Criminal Court (ICC), through the Prosecutor, had received over 650 complaints.

It is important to consider these complaints. While in one sense they demonstrate the world's hopes and aspirations for justice through the ICC, they also reveal a disturbing lack of understanding of the Court and how it functions. Fifty of the complaints contained allegations of acts committed before 1 July 2002. This is problematic because the ICC's jurisdiction is forward-looking and it does not have retrospective jurisdiction over acts committed prior to 1 July 2002. A number of communications alleged acts that fall outside the subject matter of the Court's jurisdiction, and complained about environmental damage, drug trafficking, judicial corruption, tax evasion and less serious human rights violations.

Thirty-eight complaints alleged, no doubt correctly, that an act of aggression had taken place in the context of the war in Iraq in 2003. The problem here is that the US is not a party to the statute and, in any event, the ICC cannot exercise jurisdiction over alleged crimes of aggression until the crime is properly defined – something the drafters of the statute expressly left until a future date. Two communications referred to the Israeli-Palestinian conflict. The problem here, too, is that Israel is not a party to the statute, and the Palestinian authority is not yet a

state and so cannot be a party. By early 2006 the Prosecutor's office recorded that it had received 1 732 communications from over 103 countries, and that a staggering 80 per cent of those communications were found to be 'manifestly outside [the Court's] jurisdiction after initial review' (International Criminal Court 2006).

The reality is that a range of organisations and individuals that submitted the first complaints to the Prosecutor seem to have fundamentally misunderstood the ICC, and have placed a false hope in the Court as a means to provide them with justice. The Court's jurisdiction is limited temporally – it can only exercise jurisdiction after 1 July 2002 – and its jurisdiction is limited substantively – it can only consider the most serious crimes of international concern, being genocide, crimes against humanity and war crimes, and, until a proper definition of aggression is agreed upon by States Parties, it cannot consider complaints about the crime of aggression.

Furthermore, the Court's jurisdiction is limited geographically. For States Parties, the Court can exercise jurisdiction over their nationals wherever they may be in the world. But for non-States Parties, like the US, the Court can only exercise jurisdiction if the guilty American commits his or her crime on the territory of a State Party.

The abuse at Abu Ghraib prison by US Private Lyndie England and her cohorts, which undoubtedly constitute war crimes and torture, is not something that Iraq or others can refer to the Court, since Iraq, on whose territory the crimes were committed, is not a party to the statute. In a similar vein, the crimes committed in Zimbabwe cannot fall within the purview of the Court as long as Zimbabwe remains a non-member of the ICC regime.

The only way in which the Court might exercise jurisdiction in relation to crimes committed on the territory of a state not party to the Court is if a case is referred to the ICC by the Security Council, as was done in respect of the atrocities in Sudan. The Court is then accorded the chance to exercise jurisdiction over the crimes committed in that country even though that country is not a party. That is because the referral bears the imprimatur of the UN Security Council, whose resolutions are binding on all member states of the UN, regardless of whether they are parties to the Rome Statute or not.

## COMPLEMENTARITY AS A KEY FEATURE OF THE ICC

Perhaps the key feature of the ICC regime is the principle of complementarity. It is vitally important to appreciate its significance and, in so doing, to understand both

the promises and problems of international criminal justice as exemplified by the Court.

The ICC is expected to act in what is described as a 'complementary' relationship with domestic states that are party to the Rome Statute. The preamble to the Rome Statute says that the Court's jurisdiction will be complementary to that of national jurisdiction, and article 17 of the statute embodies the complementarity principle. At the heart of the principle is the ability to prosecute international criminals in one's national courts, on behalf of the international community, or to have in place mechanisms to arrest and surrender to the ICC persons that the Court seeks to prosecute and who happen to be in one's jurisdiction.

The general nature of national-implementation obligations assumed by states that elect to become party to the Rome Statute is wide-ranging (see, generally, Schabas 2004; see also Brandon and Du Plessis 2005). The Rome Statute notes that effective prosecution is ensured by taking measures at the national level and by international cooperation. Because of its special nature, States Parties to the Rome Statute are expected to assume a level of responsibility and capability, the realisation of which will entail taking a number of important legal and practical measures.

The ICC does not exercise universal jurisdiction. As we have already noted, its jurisdiction is only triggered where the crime occurred on the territory of a state that accepts the Court's jurisdiction (territorial jurisdiction), or the accused is a national of such a state (the active-nationality principle), or the matter is referred to the Court by the UN Security Council exercising its chapter VII powers. By article 12, a state accepts jurisdiction by becoming a State Party, or can do so by declaration where it is a non-State Party. The consequence is that many states that become party to the Rome Statute may not have provided previously for criminal jurisdiction on the active-nationality principle; such states will normally require special legislation as the domestic legal basis enabling them to bring a prosecution at home of a national accused of international crimes committed elsewhere.

## The role of the state under the complementarity principle

It is thus clear that the State Party assumes a significant role in the regime for the prosecution of international crimes, and certain features need to be present in the state's legal and justice system in order for this complementary system of justice to function effectively.



## Incorporating the crimes into domestic law

The ICC has jurisdiction over those crimes regarded with the highest degree of concern by the international community: genocide, crimes against humanity and war crimes. These are thoroughly defined in articles 6, 7 and 8 of the Rome Statute, with further elaboration and definition given in the ‘Elements of Crimes’ guidelines agreed to by States Parties.

In addition to their duty to take steps to be able to surrender to the ICC persons for whom an arrest warrant is issued (see further below), States Parties to the Rome Statute may take steps to prohibit, as a matter of national or domestic law, the crimes or conduct described in the statute. This is to enable them to conduct a prosecution of such crimes domestically, should they elect to do so (and to remove any question of the crimes for which surrender is sought not being found in national law). Article 70(4), meanwhile, requires states to extend the operation and substance of their national criminal laws dealing with offences against the administration of justice, so as to criminalise in addition conduct that would constitute an offence against the ICC’s administration of justice.

## Cooperating with the Court

Aside from enabling its own justice officials to prosecute international crimes before its domestic courts, a State Party is furthermore obliged to cooperate with the ICC in relation to an investigation and/or prosecution the Court might be seized with. The prosecution of a matter before the ICC (and the process leading to the decision to prosecute) will normally require very considerable investigation, information gathering, and inter-agency cooperation, often with high levels of confidentiality and information or witness protection required. Contact between the ICC (in particular the Office of the Prosecutor) and the national authorities will likely become extensive during the course of an investigation and any request for arrest and surrender or any prosecution. Indeed, in many cases there is likely to be a fairly complex and substantial process of information gathering, analysis and consideration that must be undertaken before the decision to formally investigate can even be taken.

Because the ICC lacks many of the institutional features necessary for a comprehensive handling of a criminal matter, for ordinary policing and other functions it will rely heavily on the assistance and cooperation of states’ national mechanisms, procedures and agencies.

In order to be able to cooperate with the Office of the Prosecutor during the investigation or prosecution period<sup>1</sup> (or otherwise with the Pre-trial Chamber or the Court once a matter is properly before these – for example, in relation to witnesses), a State Party is obliged to have a range of powers, facilities and procedures in place, including by promulgation of laws and regulations. The legal framework for requests for arrest and surrender, on the one hand, and all other forms of cooperation, on the other, is mostly set out in part 9 of the Rome Statute.

Article 86 describes the general duty on states to cooperate fully with the ICC in the investigation and prosecution of crimes. Article 87 sets out general provisions for requests for cooperation, giving the ICC authority (under article 87(1)(a)) to make requests of the state for cooperation. Failure to cooperate can, among other things, lead to a referral of the state to the Security Council (article 87(7)). Article 88 is a significant provision, obliging states to ensure that there are in place nationally the procedures and powers to enable all forms of cooperation contemplated in the statute. Unlike inter-state legal assistance and cooperation, the Rome Statute makes clear that by ratifying the statute states accept that there are no grounds for refusing ICC requests for arrest and surrender.<sup>2</sup> States are therefore obliged, under the relevant arrest and surrender processes provided in their own national laws, to follow up arrest warrants or summons issued by the ICC, and to surrender persons in due course.

## Investigating and prosecuting international crimes domestically

While the Rome Statute envisages a duty to cooperate with the Court in relation to investigation and prosecution, the basic premise of the principle of complementarity is the expectation that states that are willing and able should be prosecuting ICC crimes themselves. The principle of complementarity ensures that the Court operates as a buttress in support of the criminal justice systems of States Parties at a national level, and as part of a broader system of international criminal justice. The principle proceeds from the belief that national courts should be the first to act. It is only if a State Party is ‘unwilling or unable’ to investigate and prosecute international crimes committed by its nationals or on its territory that the ICC is seized with jurisdiction (International Criminal Court 2002: article 17(1)).

Out of respect for the principle of complementarity, article 18 of the Rome Statute requires that the Prosecutor of the ICC must notify all States Parties and

states with jurisdiction over a particular case – in other words, non-States Parties – before beginning an investigation by the Court (International Criminal Court 2002: article 18(1)), and cannot begin an investigation on his own initiative without first receiving the approval of the Pre-trial Chamber (International Criminal Court 2002: article 15).

At this stage of the proceedings, it is open to both States Parties and non-States Parties to insist that they will investigate allegations against their own nationals themselves: the ICC would then be obliged to suspend its investigation (International Criminal Court 2002: article 18(2)). If the alleged perpetrator's state investigates the matter and then refuses to initiate a prosecution, the Court may only proceed if it concludes that the decision of the state not to prosecute was motivated purely by a desire to shield the individual concerned (International Criminal Court 2002: article 17(2)(a)).

The thrust of the principle of complementarity is that the system effectively creates a presumption in favour of action at the level of states.

## THE NATIONAL INVESTIGATION AND PROSECUTION OF INTERNATIONAL CRIMES

### A presumption in favour of domestic action

As we have seen, complementarity is an essential component of the ICC's structure and a means by which national justice systems are accorded an opportunity to prosecute international crimes domestically.

The Court is one component of a regime – a network of states that have undertaken to do the ICC's work for it; to act as domestic international criminal courts in respect of ICC crimes. It was written in relation to the experience at Nuremberg that '[t]he purpose was not to punish all cases of criminal guilt... The exemplary punishments served the purpose of restoring the legal order; that is, of reassuring the whole community that what they had witnessed for so many years was criminal behaviour' (Röling 1979: 206). Because of the ICC's system of complementarity we can expect national criminal justice systems to play an important role of doing the ICC's work by providing 'exemplary punishments' that will serve to restore the international legal order. In this respect, Anne-Marie Slaughter, dean of the Woodrow Wilson School of Public and International Affairs at Princeton University, has pointed out that:

One of the most powerful arguments for the International Criminal Court is not that it will be a global instrument of justice itself – arresting and trying tyrants and torturers worldwide – but that it will be a backstop and trigger for domestic forces for justice and democracy. By posing a choice – either a nation tries its own or they will be tried in The Hague – it strengthens the hand of domestic parties seeking such trials, allowing them to wrap themselves in a nationalist mantle (Slaughter 2003).

The ICC Prosecutor put it as follows on taking up his post, explaining that:

As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of regular functioning of national institutions, would be a major success.<sup>3</sup>

This is the promise of international criminal justice as exemplified in the ICC's complementarity regime. One way in which we will come to regard the ICC as effective, as having achieved its promise, will be when its very existence operates to encourage domestic institutions to comply with their responsibilities under international humanitarian and human rights law to investigate and prosecute.

The complementarity regime is furthermore a means by which African and other states are able to retain domestic jurisdiction over the offences that are committed by their nationals or on their territories. The ICC is not intended to be a court that imposes itself on states, or which arrogates to itself the right to investigate and prosecute offences that amount to international crimes. On the contrary, under the complementarity scheme States Parties have secured for themselves the right to act domestically in relation to these crimes. So long as the state is willing and able to conduct the investigation and subsequent prosecution itself, its decision will thereby deny the ICC jurisdiction over the offences and the perpetrators.

### The task of ensuring that states are willing and able to prosecute ICC crimes

While the complementarity regime secures for states the right to act domestically in relation to ICC crimes, the first few years of the ICC's existence have demonstrated that states will not always be willing or able to investigate and

prosecute international crimes that are committed on their territory. Already the ICC Prosecutor has the crimes committed in three States Parties – Democratic Republic of the Congo, Uganda and Central African Republic – in his sights, and the Security Council referred the Sudan crisis to the ICC even though Sudan is not a party to the ICC.

As is obvious, each of these situations involves African states. It is thus important to reflect on some of the problems under the complementarity regime with a view to better understand how African nations might respond to their duties under the Rome Statute, and might better secure their rights under the complementarity system of international criminal justice through domestic prosecutions.

### Arrest warrants without arrests: the problem of unwilling states

The small number of persons in custody hints at the difficulties that present themselves to the Prosecutor and the Court when investigating and prosecuting a case against the backdrop of complementarity.

We have seen that the Court has jurisdiction only when a State Party is unwilling or unable to do the job itself. Thus, if the Prosecutor has decided that state X is unwilling or unable to prosecute, the ICC may be seized with jurisdiction in terms of the complementarity scheme. In order for the Court to exercise jurisdiction – as with a criminal court in a domestic context – there needs to be an arrest. But unlike in a domestic context where the prosecution has a police force ready to assist in arresting accused who can then be brought to court, the ICC Prosecutor is a stateless actor, with no international police force to assist him in effecting arrests. He is forced to rely on the state that is implicated in the international crimes he wishes to investigate. To get his hands on an accused he needs state X to be his eyes and ears on the ground and to arrest when possible. Yet, state X is the very state that he decided was unable or unwilling to assist him in the first place.

This is a hard reality that the Prosecutor is currently experiencing, as is well illustrated by the Sudan referral. The Darfur commission appointed by the UN to investigate the crimes committed in northern Sudan found that, as far as mechanisms for ensuring accountability for the atrocities committed in Sudan are concerned, the ‘Sudanese courts are unable and unwilling to prosecute and try the alleged offenders... Other mechanisms are needed to do justice.’ This is no small

finding. As will be appreciated, it is open to the Sudanese government (even as a non-State Party) to argue that it is willing and able to prosecute the offenders.

In terms of the complementarity principle, should Sudan in fact be willing and able, the ICC may have to acquiesce in the prosecution of offenders so as to allow the Sudanese authorities to perform the prosecutions. It is apparently for this reason that the commission saw fit to stress that the Sudanese courts are unable and unwilling to prosecute and try the alleged offenders, thereby clearing the way for a ‘clean’ referral of the matter by the Security Council to the ICC.

However, the response by the Sudanese government to the Security Council resolution referring the matter to the ICC has made it clear that the Prosecutor would not be able to rely on Sudan’s government for cooperation in investigating and punishing persons responsible for gross human rights violations. Khartoum has called resolution 1593 a violation of its sovereignty (Agence France-Presse 3 April 2005), and President al-Bashir reportedly swore ‘thrice in the name of Almighty Allah that [he] shall never hand any Sudanese national to a foreign court’ (Agence France-Presse 5 April 2005).

Similarly, Sudan’s ambassador to the UN, Elfatih Mohammed Erwa, said: ‘Justice here is a great good used in the service of evil’ (British Broadcasting Corporation News 1 April 2005). The Sudanese government insisted it would not allow any Sudanese national to be tried before a foreign court (see further African Union 2005: paragraph 87, and Appiah-Mensah 2005: 10). Khartoum went so far as to instigate public demonstrations objecting to the referral, and the ICC was denounced as an ‘American court’ (Agence France-Presse 2 April 2005, and Reuters 5 April 2005).

As pointed out earlier, the Prosecutor has, through the Court, issued arrest warrants, on 27 April 2007, for Ahmad Muhammad Harun, former minister of state for the interior and currently minister of state for humanitarian affairs in the government of Sudan, and Ali Muhammad Ali Abd-Al-Rahman (Ali Kushayb), a leader of the militia/Janjaweed. But the Court’s website is telling when it records that in relation to these two individuals ‘[n]o hearings [are] scheduled at this time’.<sup>4</sup>

The Sudan scenario is thus an illustration of the difficulties the ICC faces to give effect to the Security Council referral. The Court has found itself faced with the very difficult task of trying to enforce its decisions against a recalcitrant state.<sup>5</sup> This task is complicated and aggravated by the fact that Sudan is not a State Party to the ICC, and as such owes no treaty obligations to the Court. This is an inevitable problem with the referral of situations involving non-States Parties to the ICC as the referral extends the Court’s jurisdiction beyond the parameters of

the Rome Statute but does not concomitantly extend the Court's power to enforce that jurisdiction. This problem is one that was foreseen by the drafters of the Rome Statute, but which was never satisfactorily attended to.

One thing is abundantly clear: active Security Council involvement will prove vital for the effective functioning of the ICC. As one noted author points out:

[T]he Security Council could decide that compliance by all UN Member States with a particular ICC decision is a measure necessary for the maintenance of peace and security pursuant to Article 41 of the UN Charter, and, as such, bind all UN Member States under Article 25 of the Charter to comply with specific ICC decisions (Sarooshi 2004: 104).

Indeed, the Prosecutor of the Court has, in a report delivered to the Security Council in early December 2007, made it clear that without the Security Council's assistance the Court would not be able to prosecute the persons in respect of whom it has issued warrants of arrest. He put it bluntly when he told the Council that, although 'Sudan has known the nature of the case against Ahmad Harun and Ali Kushayb for 10 months, they have done nothing. They have taken no steps to prosecute them domestically, or to arrest and transfer them to The Hague.' The answer, in his view, lies with the Security Council, and he called on the Council to send 'a strong and unanimous message' to Khartoum to arrest and surrender the two men accused of committing war crimes during the conflict in Darfur (see Du Plessis and Ford 2008).

This is obviously correct, and demonstrates the precariousness of the Prosecutor's position. It is ultimately up to the members of the Council to live up to their responsibility and ensure that the government of Sudan respects its obligations under resolution 1593 and cooperates with the ICC, in particular through the arrest and surrender of Harun and Kushayb.

It is also apparent, however, that Africa and its states should do more to support the work of the Court. In relation to the Sudan referral, for instance, it remains open to the AU and other regional bodies to demand that Sudan comply with its obligations under resolution 1593.

### The problem of capacity and priority

But it is not only outright unwillingness by states to cooperate in the cause of international criminal justice that is of concern. As a recent study by the Institute for Security Studies (ISS) demonstrates (Du Plessis and Ford 2008), there is a

myriad of issues that undermine the promise of international criminal justice through the ICC's complementarity regime.

It will be remembered, as the preamble of the Rome Statute puts it, that '[i]t is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'. The most serious international crimes – genocide, war crimes and crimes against humanity – are shocking cruelties attracting universal condemnation.

The creation, through widespread adoption of the Rome Statute, of a permanent international criminal court has been of enormous practical and symbolic significance. The ideals underlying the ICC require practical instrumentalities and processes. The ISS monograph, 'Five-country study on domestic implementation of the ICC Statute', was concerned with the significance of national-level measures for the effectiveness of the scheme of international criminal justice. It consists of a compilation of reports by independent experts on the extent of legislative and other measures taken by five selected African states (Botswana, Ghana, Kenya, Tanzania and Uganda – all party to the Rome Statute), to implement the statute's obligations into their national laws and procedures. It comprises, too, a comparative overview of the themes emerging from the various country reports. As such, it is an assessment of the degree of capacity of these states (and similarly situated states) to respond to international crimes by workable, acceptable and lawful processes and within the parameters set by international law, in particular international human rights law. As the preamble to the Rome Statute emphasises, 'effective prosecution must be ensured by taking measures at the national level and by international cooperation'.

We have already seen that at the heart of the complementarity regime are the measures that must be taken by individual states in their own legal systems to ensure no safe harbour exists for the worst international criminals; to ensure that there are no barriers to smooth cooperation and assistance between states and with the ICC; and to ensure that national procedures and mechanisms are of sufficient quality, from a rule of law perspective, and adequately accommodate human rights safeguards, so that principles are upheld and prosecutions are not jeopardised by deficient investigations.

The monograph is concerned with answering questions such as: How relevant to Africa is the priority of implementing measures consistent with the Rome Statute that enable the effective prosecution of international crimes? How does it sit relative to the other priorities of government and government departments, human rights defenders and civil society?

The findings of the monograph illustrate the remaining and apparently enduring problems of giving effect to complementarity in Africa. The reports indicate that one perception is that having in place national ICC response measures is not particularly relevant or urgent from an African perspective. As the country reports reveal quite clearly, all five countries sampled ratified the Rome Statute but thereafter failed to put in place national-level measures to implement Rome Statute obligations.

The reasons for the delay in implementation are in large measure shared among the five states studied. Not only does the study reveal the status and peculiarities of individual countries' responses to ratification of the Rome Statute, it also allows us to draw certain comparative insights.<sup>6</sup>

The consultations reveal the following features, misconceptions, misgivings or concerns as common barriers to implementation or common reasons for delay in the process of implementing the Rome Statute in some African countries. (As will be readily appreciated, these factors and difficulties can operate so as to compound one another.)

First, there is a genuine **lack of awareness** about the need for and significance of implementation at the highest level, among many officials, civil society, the legal profession and judiciary, and the wider community. This manifests either as a lack of awareness altogether (so that there is no local pressure on government for implementation), or awareness in the sense that the issue simply has not come up in official or other circles.

Second, there is a discernible **capacity shortfall** in some of the countries studied: an overstretched and thinly staffed justice system, and a lack of sufficient numbers of officials with expertise in drafting or in international criminal cooperation. How this can manifest is that concept papers and other initiatives moving the issue up to a political level are unlikely to be undertaken, or approved, where capacity is thin. Parliaments also appear to lack some capacity to review these issues at a committee level in an informed way. This, of course, means that only a few issues can have priority. At present, if any capacity is devoted to international criminal issues it is to terrorism and international organised crime.

Third, the clear indication in most of the reports is that these countries have entertained **other priorities**, and having national laws to implement the statute is simply not considered relevant enough to be accorded any or sufficient priority. This came through strongly in most of the reports. Many of the countries have had significant elections, or constitutional-reform processes, that appear to have absorbed a good deal of political energy. This need not have prevented implementation, but has certainly not aided it.

Fourth is the fact that these states held a number of **political misgivings** about implementation, and a sense that the local political risk of implementation (or the regional criticism that may come from some future surrendering of a leading figure to an international court) outweighs the risk of any international criticism for lack of implementation. Some of the sense of political misgiving can only be inferred from the fact that implementation has not received political momentum (in Uganda, the reasons for political uncertainty about proceeding are more obvious, given the peace process ongoing there). But there is also in the reports a trace of a sentiment that having national laws in place will cause more problems and embarrassments than it will solve, or that it would be preferable for these issues to be dealt with in some other way, or that international prosecutions are seen as a 'Western preoccupation'.

Fifth, the commonly expressed reason for delay in implementation is **political or constitutional concerns** with the immunity regime of the Rome Statute (that article 27 brooks no immunity even for serving heads of state). This has typically arisen at a late stage in the drafting process. It is rather a significant barrier, particularly where there has been political violence in the country, and given the reportedly high degree of sensitivity resulting from what could be described as the 'Charles Taylor phenomenon' (the perception that immunities are never watertight and that prosecution may follow at some point in the future).

Sixth, there is some concern in these countries about the perceived **cost** of implementation measures. Some of these perceptions are based on misunderstandings – for example, the mistaken belief in one country that cooperation with the ICC meant undertaking the cost of building new, high-quality prison cells without which criminal suspects would be able to claim that their trial was unfair or their rights abused. Some of the concerns are perhaps more understandable, such as the cost of training prosecutors and judges. This factor is not as significant as others, and seems not to underlie the principle reasons for delay in implementation.

A seventh and final reason is what appears to be the **absence of domestic pressure groups**, either within or outside of government, in any of the five countries studied, to give the issue of ICC implementation a profile or publicity or forward momentum. There have been some non-governmental organisation-organised seminars and programmes, but not on the scale that took place during the campaign for ratification. The issue lacks the international-partner backing, political convenience and perceived relevance that sees counterterrorism and organised-crime measures move forward. Unlike the Geneva Conventions, the statute lacks the support of a single institution, such as the military.



These findings are dealt with comprehensively in the monograph. What does appear from them is that the primary barrier to implementation in the countries studied appears to be that the issue (cooperation in preventing impunity for international crimes) is not considered, at the higher political levels in these countries, as having sufficient importance, relevance and priority. Viewed in this way, capacity or expertise and cost are in a sense ‘secondary’ factors that can be addressed once the sense of priority is accorded to them, by direction from the executive or by political leadership or consensus – for example, acquiring the services of local or international legal-drafting experts, or asking the ICC itself for assistance.

Thus, while real capacity constraints do hamper the justice systems of these countries, the real explanation would appear to be that once the international credit has been obtained by ratification, actual implementation of the Rome Statute is simply not considered politically significant enough to be accorded priority.

The lack of appeal to the political decision-makers appears to be both relative and absolute. Relative to other priorities for these countries, it is evident from the studies that ICC implementation legislation simply does not feature highly; any post-ratification momentum has been lost. Moreover, there is no discernible constituency at home or abroad calling for action to be taken, and indeed some voices suggest it would be a distraction towards a Western preoccupation. Added to this ‘relative irrelevance’ issue are factors that, even if the issue gets to the political decision-maker and so receive attention, would tend to positively militate against implementation: these are perceptions or concerns about constitutional immunities, or the misunderstandings about the reach of ICC crimes that may preclude discussing ‘international crimes’ for reasons of local politics (for example, Kenya), or real concerns about the impact on local peace processes of taking forward legislation (for example, Uganda).<sup>7</sup>

## COMPLEMENTARITY IN AFRICA: SOME SUGGESTIONS AND RECOMMENDATIONS

Africa has already demonstrated a clear commitment to the ideals and objectives of the ICC. More than half of all African states (30) have ratified the Rome Statute, and many have taken proactive steps to ensure effective implementation of its provisions. These efforts must continue. The lesson we learn from the Sudan

referral is that complementarity must work if the international criminal justice project is to succeed on the whole.

Perhaps the greatest problem that faces the ICC in future cases is an unwillingness or inability on the part of States Parties to properly investigate and prosecute international crimes, a problem obviously compounded where, as in the case of Sudan, the state is not party to the Court’s statute. While such scenarios will entitle the ICC to then assume jurisdiction over the case under the complementarity scheme, the Sudan referral demonstrates that the Court will struggle to ensure assistance and cooperation from states that are unwilling or unable to do the job themselves.

The existence of these problems points us back to the promise of complementarity. The more states are able faithfully to fulfil the promise of the ICC regime – of ensuring that there is meaningful domestic prosecution of the world’s most serious crimes – the more the ICC can avoid these problems altogether, or at least diminish their impact.

It is thus important that African states develop national capacity for responding, lawfully and within the context of international law and human rights, to international crimes and criminals. A key element of long-term post-conflict peace building is strengthening the rule of law and access to justice. Equally important is developing mechanisms to manage and prevent conflict, and creating accountability in government.

In Africa, post-conflict peace building is threatened by the widespread lack of accountability among those responsible for the continent’s many violent conflicts that are characterised by torture, rape, murder and other atrocities. The pervasive culture of impunity threatens newly established peace processes, not only because those responsible for atrocities remain free to commit further acts, but also because impunity fuels a desire for revenge that can lead to further violence. Moreover, public confidence in attempts to establish the rule of law is undermined, as are the chances of establishing meaningful forms of accountable governance.

However, in most African countries national judicial systems are often too weak to cope with the burden of rendering justice for these crimes. ‘International crimes’, including war crimes, crimes against humanity and genocide, are characterised by large numbers of victims and perpetrators, and are often committed with the complicity if not the active participation of state structures or political leaders. This means that the political pressure may be too great for national justice systems to cope with. Successful domestic prosecutions are further

limited by resource and skills shortages, together with the strain of establishing functional criminal justice systems in countries with little tradition of democracy and the rule of law.

In circumstances such as these, when the national justice system is unable or unwilling to investigate or prosecute those responsible, the international community can and should assist with these processes. This the international community has already begun to do in Africa, through the creation of, first, the International Criminal Tribunal for Rwanda and, thereafter, with its assistance in creating the hybrid Special Court for Sierra Leone. Most recently, the EU has sent a delegation to assist Senegal in preparing the trial of Hissène Habré, the former Chadian dictator. Habré, who ruled Chad from 1982 to 1990, when he fled to Senegal, is accused of thousands of political killings, systematic torture and waves of 'ethnic cleansing' during his rule. In July 2006 Senegal agreed to an AU request to prosecute Habré 'on behalf of Africa.' The EU delegation, headed by Bruno Cathala, the Registrar of the ICC, is in response to a request by Senegalese President Abdoulaye Wade for international assistance in preparing the trial. The EU experts will evaluate Senegal's needs and propose technical and financial help.<sup>8</sup>

Of significance is that the AU has named Robert Dossou, Benin's former foreign minister and justice minister, as an envoy to the trial. This is a promising development, and one that hopefully signals broader AU support for initiatives aimed at combating impunity for international crimes. Naturally, one of the most important initiatives in this regard is the creation of the ICC. One can hardly overestimate the importance of Africa to the Court: the ICC's first 'situations' are all on the continent (Democratic Republic of the Congo, Uganda, Sudan and Central African Republic). Africa is thus currently a high priority for the ICC, and will remain so for the foreseeable future. It is the most represented region in the ICC's Assembly of States Parties, with 30 countries having ratified the Rome Statute, and is a continent where international justice is in the making.

Ensuring the success of the ICC is important for peace-building efforts on the continent. However, the task of reversing the culture of impunity for international crimes and thereby strengthening the rule of law cannot simply be devolved to the ICC. In reality, the Court will be able to tackle a selection of only the most serious cases. And even if it did have the capacity to handle higher volumes of cases, this would be limited in Africa by the fact that the ICC is, by design, a 'court of last resort', with the main responsibility for dealing with alleged offenders resting with domestic justice systems. Governed by the principle of complementarity, this means that the ICC can only act in support of domestic criminal justice systems.

National courts should be the first to act, and only when they are 'unwilling or unable' to do so can the ICC take up the matter.

This implies a certain level of technical competency among domestic criminal justice officials. But technical competency is only part of the problem. A related (and often prior) issue is political support for the idea of international criminal justice and for the ICC's complementarity scheme. In that regard, it is vital that African states ratify the Rome Statute. The ICC cannot, of its own accord, initiate investigations into crimes committed in a state, or by a national of a state that has not ratified or acceded to the statute establishing the ICC. Considering that 30 of Africa's 53 states have ratified the statute, a large portion of the continent still falls outside the ICC's mandate. And even for those that have ratified it, there is the further and essential requirement of implementing effectively and comprehensively the obligations contained in the ICC Statute.

Due to a need in Africa for greater public and official awareness about the work of the ICC, and a need for enhanced political support for the work of the Court and for international criminal justice more generally, the fulfilment of the aims and objectives of the ICC on the African continent are dependent on the support of African states and administrations, the AU and relevant regional organisations, the legal profession and civil society. Meeting this need requires commitment to a collaborative relationship between these stakeholders and the ICC.

It is also important to remember that questions of responsibility for the prosecution of core international crimes in Africa (and for raising awareness of these issues) are broader than the ICC alone. Other structures, such as the African Commission on Human and Peoples' Rights, the African Court of Justice and Human Rights and other pan-African institutions, can play a meaningful role in this regard that should be encouraged. An example in this respect is the work of the African Commission on Human and Peoples' Rights in its 2005 resolution on ending impunity in Africa and on the domestication and implementation of the Rome Statute of the ICC, in which the commission called on civil-society organisations in Africa to work collaboratively to develop partnerships to further respect for the rule of law internationally and strengthen the Rome Statute.

That these African structures and organisations should be at the forefront of awareness raising is important, not least of all because of the perception present within certain African states that international criminal justice and the ICC is an 'outside' or 'Western' priority and relatively less important than other political, social and developmental goals. The leading regional organisation, the AU, should thus play a more significant role in building understanding and support among its

member states about the importance of practical measures aimed at ending impunity for serious international crimes. In doing so it should make explicit the principled and practical reasons for building capacity to respond to international crimes, including viewing this capacity as inherent to a developed notion of 'security' and as a key component of peace building, conflict prevention and stability. This will enhance the role and work of the ICC in Africa and encourage states to comply with their complementarity obligations under the Rome Statute.

Ultimately, there is both scope and need for African states and their regional organisations to draw on African experience to ensure an African-based and African-focused initiative for contributing towards peace building and stamping out impunity. After all, it should not be forgotten that it is not the UN, the ICC, or Western states that drafted the aims of the AU. Under articles 4(m), 3(h) and 4(o) of the AU's Constitutive Act it is African states that reiterate that the AU is committed to ensuring respect for the rule of law and human rights, and condemning and rejecting impunity.

## NOTES

- 1 The extent of cooperation required of States Party is evident from the fact that the Office of the Prosecutor has a very wide mandate to 'extend the investigation to cover all facts' and investigate circumstances generally 'in order to discover the truth' (International Criminal Court 2002: article 54(1)(a)).
- 2 See International Criminal Court (2002), article 89, although article 97 provides for consultation where there are certain practical difficulties.
- 3 Sarooshi (2004: 477), quoted in McGoldrick et al.
- 4 See <http://www.icc-cpi.int/cases/Darfur.html>, accessed on 12 February 2008.
- 5 The most recent (symbolic) example of this recalcitrance is the Sudanese government's decision to appoint Musa Hilal, a leader of the Janjaweed, to a central government position. See the human rights outcry occasioned thereby and the full story by Reuters (2008).
- 6 In deciding whether the results of the study are relevant to an Africa-wide assessment of attitudes and responses to the ICC and the Rome Statute, it is worth bearing in mind that all of the countries studied can be considered, at least in their respective regions, to be relatively advanced at least in a number of respects relevant to this topic. So, Botswana is (with South Africa) seen as a leading example of good governance in Southern Africa and continentally; Ghana, whose leader has the status of an elder statesman in at least West Africa, has come to be considered the most stable and well-governed of the major West African countries; although it has suffered recent instability; Kenya is a leading African state with a complex and evolving democracy, and some strong institutions (although instability has set in following the contested election results in late 2007 and current reports of violent

demonstrations are of obvious concern); Tanzania, while poor, is stable, growing and respected for its pedigree of pan-Africanism and its regional peacemaking; Uganda recently hosted the Commonwealth summit and some of the processes it has followed towards multiparty democracy, economic growth, women's empowerment, HIV prevention, etc., have been described as a model for other African countries. In considering the problems and possibilities of implementation in *other* African countries, then, it is worth remembering that the sample is of countries that could reasonably be expected to have made progress or be capable of making progress on implementation.

- 7 It is worth noting that many of the problems with implementation noted by the consultants can be seen as generic problems with treaty implementation, ones that have been encountered in many countries in terms of following up the ratification of human rights instruments, for example. It is not necessary to explore the literature on this issue, except to note, firstly, that the Rome Statute is not the only instrument of great aspirational and practical utility that countries are quite prepared to ratify, but which they have failed over many years to take steps to implement or compile reports upon; and, secondly, that many of the reasons for lack of implementation of human rights instruments apply equally to the statute: political misgivings, capacity, and so on.
- 8 Senegal has said that the investigation and trial will cost 28 million euro, and recently said it would spend over 1,5 million euro (1 billion francs CFA) on the trial. In addition to the EU, a number of individual countries, including France and Switzerland, have publicly committed to helping Senegal. See further Human Rights First (2008).

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## CHAPTER SIX

# General principles of international criminal law

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When they determine criminal liability in any specific case, practitioners have to apply a range of general principles as well as look at the specific elements of the crime in question. The International Criminal Court (ICC) has its own approach to these general principles, set out in part 3 of the Rome Statute. Part 3 confirms certain basic rights of the accused (articles 22–24), removes juveniles from the jurisdiction of the Court (article 26), excludes certain defences (articles 27 and 29) and allows for others (articles 31–33). Emphasising the principle of individual criminal liability, part 3 also sets out the various ways in which an individual can be held liable for a crime under the statute (article 25) and describes the various forms of accomplice liability. In article 30, the Rome Statute describes the mental element that must be present before the accused can become criminally liable.

There are three general requirements for criminal liability:

- Conduct of a particular type, or, in some cases, an omission (see the discussion of command responsibility below)
- A particular context
- A particular mental element

The mental element, set out in article 30, must consist of knowledge with respect to the relevant circumstances, and intention with respect to the accused's own conduct.<sup>2</sup> Intent and knowledge have to be present with respect to the 'material elements' of the crime. In the Rome Statute, these material elements have been restricted to 'the specific elements of the definition of the crimes as defined in articles 5 to 8' (Piragoff 1999: 529). They do not, as in some legal systems (Eser 2002: 909–910), include questions of moral blameworthiness. The normative question of blameworthiness is dealt with in the defences (articles 31–33) that set

up instances in which an accused person can escape liability even if the three prerequisites of conduct (or omission), context and the mental element are fulfilled.

It is beyond the scope of this chapter to deal with all of part 3 in detail.<sup>3</sup> Instead, this chapter focuses on two specific issues: command responsibility, which allows persons in command of subordinates who commit crimes or are about to commit crimes to be held liable for failing to prevent or punish the commission of those crimes; and the defence of superior orders, which allows subordinates who have committed war crimes in obedience to an order to escape liability in certain circumstances. In the course of our discussion, however, we will touch on certain concepts underlying part 3, including accomplice liability and the defence of mistake.

## COMMAND OR SUPERIOR RESPONSIBILITY

Article 27 of the Rome Statute provides that the statute applies ‘equally to all persons without any distinction based on official capacity’, and no one is ‘exempt from criminal responsibility’ under it. Therefore, all individuals, including heads of state, government officials, military commanders, soldiers, militia members and civilians, are subject to prosecution for the crimes proscribed by the Rome Statute as listed in article 5.

That this is so is evidenced by one of the situations currently before the ICC in which the Court is investigating the crimes committed in the Darfur region of Sudan since 2003. Arising from its investigation, the Prosecutor of the ICC has issued arrest warrants against the minister of state for the interior, who is the current minister of state for humanitarian affairs,<sup>4</sup> and one of the most senior leaders in the tribal hierarchy and a senior militia/Janjaweed leader.<sup>5</sup> And on 14 July 2008, the Chief Prosecutor of the Court alleged that President al-Bashir of Sudan bore individual criminal responsibility for genocide, crimes against humanity and war crimes committed since 2003 in Darfur. The evidence was submitted to the Pre-trial Chamber of the Court, which, at the time of writing, is considering whether to issue an arrest warrant.

Leaders, commanders and superiors are thus potentially liable for genocide, crimes against humanity and war crimes (the crimes over which the ICC currently has jurisdiction) committed by them or by individuals who share a particular relationship of subordination with them. It is the latter scenario, which involves

holding the superior criminally liable on account of what is known as command or superior responsibility, that we are concerned with here.

Command or superior responsibility deriving from the giving of orders to commit a crime under international law creates little difficulty in terms of determining liability since the commander has in such cases directly instigated the unlawful conduct and will be held individually responsible for his or her involvement in the crime. Where command responsibility is most contentious and difficult to determine is in cases of responsibility by virtue of the failure to control the unlawful conduct of subordinates. The term ‘command’, or ‘superior responsibility’, is in current times often confined to this more controversial aspect of the responsibility of a commander or superior, and it is on this aspect that the following discussion will focus.

Command or superior responsibility is not itself a crime but a way in which an individual can be found guilty of one of the crimes set out in articles 5–8 of the Rome Statute. The opening words of article 28 of the statute remind us that the criminal responsibility of commanders and other superiors is ‘in addition to the other grounds of criminal responsibility under this Statute’.

The doctrine of command or superior responsibility holds an individual responsible on the basis of a relationship between that individual (the commander and/or superior) and his or her subordinates who are committing or are about to commit crimes. The doctrine is limited in its application: it applies only when the superior omits to exercise proper supervision and control over his or her subordinates. Of course, the commander must know or should have known that his or her subordinates are committing crimes or are about to commit crimes. With this knowledge, if the commander or superior then fails to do what is in his or her power to do to prevent or punish his or her subordinates, he or she can be found guilty as an individual even though other persons (his or her subordinates) committed the crimes.

It should thus be appreciated that the doctrine is not applicable where the superior orders his or her subordinates to commit crimes. This is made clear by article 25 of the ICC Statute, titled ‘individual criminal responsibility’, which sets out the modes of liability by which an individual may be found responsible for his or her personal involvement in the commission of an international crime. The statute places much emphasis on the liability of persons as individuals, and article 25(2) says that ‘[a] person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment’. A person cannot be guilty purely on the basis that he or she is part of a collective or a



criminal organisation, but only as an individual with his or her own guilty conduct<sup>6</sup> and, most importantly, his or her own guilty mind.

Many of the modes of liability provided in article 25 are recognisable from domestic laws. They include the commission by an individual of crimes as the perpetrator or co-perpetrator acting jointly with or through another person, or as part of a group of persons acting with a common purpose. As in domestic jurisdictions, persons can be held individually responsible where they order, solicit or induce the commission of a crime or where they facilitate its commission by aiding and abetting or otherwise assisting in its commission. These forms of positive commission require broadly that the accused be present (though not always), be a perpetrator or an accomplice, and has the requisite intention or guilty mind for the commission of a particular crime. To arrive at a finding of guilt beyond reasonable doubt, the one constant requirement for all modes of liability is that there can be no liability without fault or a guilty mind.<sup>7</sup>

Unlike the article 25 grounds of individual criminal liability, command or superior liability does not involve the commission of or presence at the crime by the superior, or even his or her support for the crime (Zahar 2001: 519 at 596). The doctrine of superior responsibility imputes liability for omission, that is, for the failure 'to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution'. The requirement of *mens rea*, or guilty mind, refers to the knowledge a commander or superior had at the time that the crimes were being committed or about to be committed. The superior's *mens rea* does not have to be to commit the crimes his or her subordinates committed or are about to commit, and is considered separately from their *mens rea*. Rather, the superior's *mens rea* involves so-called 'negative criminality': it is proved by showing his or her disregard for and/or failure to discharge the duty as a commander to control the unlawful conduct of subordinates.

## Background

Command or superior responsibility as a distinct form of criminal liability is well established under international humanitarian law.<sup>8</sup> In 1907, the Hague Convention, one of the first steps in writing down the laws of war, required for combatant status that a unit, whether it was an army, a battalion or a company, must be 'commanded by a person responsible for his subordinates'. And the Geneva Conventions and other treaties relating to the conduct of war obligate

States Parties to take steps to prevent violations from happening and to prosecute and punish individuals responsible for the most serious violations of the laws of war. A commander must act responsibly and provide some kind of organisational structure, and has to ensure that subordinates observe the rules of armed conflict, and must prevent violations of such norms or, if they already have taken place, ensure that adequate measures are taken.<sup>9</sup>

After the Second World War, Japanese officers responsible for war crimes were prosecuted as persons responsible for their subordinates.<sup>10</sup> General Yamashita, governor-general and commander-in-chief of the Japanese army in the Philippines at the time US forces recaptured the country, was charged with 'unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit war crimes'.

In 1977, Additional Protocol I of the Geneva Conventions of 1949<sup>11</sup> codified the doctrine of command responsibility in articles 86 and 87.<sup>12</sup> Article 86(2) states that:

... the fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from ... responsibility ... if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or about to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Article 87 obliges a commander to 'prevent and, where necessary, to suppress and report to competent authorities' any violation of the conventions and of Additional Protocol I. Also in 1977, article 1 of Additional Protocol II of the Geneva Conventions<sup>13</sup> applicable to internal conflict, codified the application of international humanitarian law to 'dissident armed forces or other organised armed groups, which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations'.

Today, the doctrine of command or superior responsibility is applicable regardless of whether the conflict during which the subordinates commit crimes is international, internal or a mixed conflict.<sup>14</sup>

The doctrine of superior responsibility has been applied in numerous international criminal cases tried before international courts, including the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra

Leone (SCSL) and the International Criminal Tribunal for the former Yugoslavia (ICTY). These three courts provide for command or superior responsibility in identically worded articles. Article 6(3) of the ICTR, (and article 6(3) of the SCSL and article 7(3) of the ICTY) provides that:

... the fact that any of the acts [crimes] ... was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Article 6(1) of the ICTR (and article 6(1) of the SCSL and article 7(1) of the ICTY) identically provide for individual criminal responsibility, as does article 25 of the Rome Statute of the ICC.

In the indictments drafted by these international courts, African examples show that persons are often charged with positive (commission) liability in terms of article 6(1) and, in addition, or alternatively, negative (omission) liability in terms of article 6(3). For example, Charles Taylor is charged before the SCSL for his acts and omissions as individually criminally responsible under article 6(1) for terrorising the civilian population, unlawful killings, sexual and physical violence, child soldiers, abductions and forced labour, and looting by having:

... planned, instigated, ordered, committed, or in whose planning, preparation or execution he otherwise aided and abetted, or which crimes amounted to or were involved within a common plan, design or purpose in which he participated, or were a reasonably foreseeable consequence of such common plan, design or purpose.

Taylor is also charged under article 6(3) with being individually responsible for these same crimes ‘while holding positions of superior responsibility and exercising command and control over subordinate members of the Revolutionary United Front (“the RUF”), the Armed Forces Revolutionary Council (“the AFRC”), AFRC/RUF junta or alliance, and/or Liberian fighters’.<sup>15</sup>

Other examples are provided by the decisions of the ICTR. Jean Paul Akayesu, who was a teacher and school inspector before he became the *bourgmestre* (mayor) of the Taba commune, was charged with a range of crimes, including rape and war

crimes, on the basis that he was, ‘in addition and/or in the alternative to his individual responsibility’, responsible as a superior.<sup>16</sup> Clément Kayishema was a doctor at a hospital prior to his appointment as the prefect of the Kibuye prefecture (which was one rank above a mayor in Rwanda’s administrative hierarchy). He was charged with the criminal acts of his subordinates ‘in the [prefectural] administration, [namely] the Gendarmerie Nationale, and the communal police with respect to each of the crimes charged’.<sup>17</sup> And Jean Kambanda, the former prime minister of Rwanda, pleaded guilty to charges of genocide and crimes against humanity that were ‘attributed to him by virtue of Article 6(1) and 6(3)’, and was sentenced to life imprisonment.<sup>18</sup>

Two things emerge as significant from the above examples. Taylor, Akayesu, Kayishema and Kambanda were charged both as individuals and superiors for the same acts as a form of alternative or concurrent liability. The question is whether an accused may be found guilty for both participating in the commission of crimes and failing to prevent or punish other perpetrators for committing the crimes. We have already seen that the provisions of articles 25 and 28 of the Rome Statute of the ICC denote distinct categories of criminal responsibility. Certain courts have held that there can be a conviction only under one head of responsibility in relation to each count in question, and that a concurrent conviction based on both heads of responsibility in relation to the same counts based on the same facts is impermissible.<sup>19</sup> Assuming this to be correct, if an accused directly participated (under article 25 of the Rome Statute) in the commission of the crime, he or she should be convicted on the basis of his or her own individual criminal acts if the evidence is sufficient to support such a finding.

So, in order to determine the potential culpability of a superior, evidence should be collected on the extent of the accused’s participation in the commission of the offence to determine whether he or she planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of the offence, and should be charged accordingly. The fact that he or she was a superior does not in itself constitute an aggravating factor, but it is the abuse of their position that may be considered an aggravating factor.<sup>20</sup> For example, in the ICTR matter in relation to Aloys Simba, a member of parliament, the ICTR held that Simba had abused his position and influence in order to facilitate the commission of crimes, which had an aggravating effect.<sup>21</sup>

Secondly, Akayesu, Kayishema and Kambanda are all civilians. It is thus clear that a doctrine previously restricted to military commanders has now, principally through the work of the ICTY and ICTR, been expanded to include civilian superiors.

Article 28 of the Rome Statute continues this trend and distinguishes between persons who are military commanders or effectively acting as military commanders from persons in other superior and subordinate relationships that do not fall within a military hierarchy.

#### Article 28 of the Rome Statute on 'superior responsibility'

'In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

'(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command or control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

'(i) That military commander or person either knew or, owing to circumstances at the time, should have known that the forces were committing or about to commit such crimes;

'and

'(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

'(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

'(i) The superior knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

'(ii) The crimes concerned activities that were within the effective responsibility and control of the superior;

'(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or suppress their commission or to submit the matter to the competent authorities for investigation and prosecution.'

The extension of command responsibility is in recognition of the important role civilian officials/political leaders often play in the commission of atrocities during an armed conflict. From now on we refer to this mode of liability as 'superior responsibility' to incorporate the expanded version of the doctrine of command responsibility. Where differences do arise because of the particular nature of the superior/subordinate relationship, we canvass them separately.

## The elements of superior responsibility

To find someone liable under article 28 of the Rome Statute, the prosecution has to prove, broadly, three requirements.<sup>22</sup>

- First, the superior must exercise effective command and control or effective authority and control over his or her subordinates

- Second, the superior must have knowledge that his or her subordinates are committing or are about to commit crimes. (Whether the superior must have actual knowledge or whether knowledge can be imputed to him or her is an issue that is dealt with later)
- Third, the superior must have failed to take all the necessary and reasonable measures within his or her power to prevent or repress the subordinates' commission of crimes or failed to submit the matter to the competent authorities

We discuss each of these elements in turn.

## Superior-subordinate relationship

The distinction between military and civilian superiors is relevant with regard to the kind of evidence required to prove this first requirement. Inherent in the doctrine of superior responsibility is the relationship between a superior and his or her subordinate, for '... the law does not know of a universal superior without a corresponding subordinate'.<sup>23</sup> The level of control article 28 expects of a (military) commander is 'effective command and control, or effective authority and control'. For other (civil) superiors the level of control required is 'effective authority and control'.

Article 28 applies not only to those superiors who exercise their authority through a formal grant of power by proclamation, decision or otherwise. It is accepted that 'individuals in positions of authority, whether civilian or within military structures, may incur criminal liability ... on the basis of their *de facto* as well as *de jure* positions as superiors'.<sup>24</sup> The reasoning is that, in the situations facing the *ad hoc* and special courts (and by all appearances the ICC, too), the formal structures of governance and order have so broken down that power was often exercised without any formal grant of authority in an ambiguous and ill-defined manner,<sup>25</sup> and that at times these '... civilian leaders will assume powers more important than those with which they are officially vested'.<sup>26</sup>

What is crucial to this form of liability is the superior's ability to exercise powers of control over the actions of his or her subordinates.<sup>27</sup> Whether the perpetrator is directly or indirectly a subordinate is not important for it is the degree of control over the subordinate that is decisive.<sup>28</sup> It is this possibility of control that forms the legal and legitimate basis of the superior's responsibility and justifies his or her duty of intervention (Ambos 2002: 853).

Civilian superiors are responsible when they exercise a degree of control over their subordinates that is similar to that of military commanders,<sup>29</sup> and '... great

care must be taken in assessing the evidence to determine command responsibility in respect of civilians, lest an injustice be done...<sup>30</sup> Ultimately, however, the degree of control is a question of fact, and the Court will have to consider all the evidence to make its finding. The kind of evidence that should be collected in this regard is the nature of the superior-subordinate relationship between the accused and the perpetrators and the means available to the accused to exercise control over the perpetrators (authority to issue binding orders, authority to take or recommend disciplinary measures, types of disciplinary measures available, and so on).

#### Assessing the accused's power of authority

As held by the ICTR in *Musema*, 'it is appropriate to assess on a case-by-case basis the power of authority actually devolved on an accused to determine whether or not he possessed the power to take all necessary and reasonable measures to prevent ... or to punish... Therefore the superior's actual or formal power of control over his subordinates remains a determining factor in charging civilians with superior responsibility.'<sup>31</sup>

What about the influence a superior exercises over others? The *Musema* matter before the ICTR is instructive in this regard. In *Musema*, the Trial Chamber held that '[t]he influence at issue in a superior-subordinate command relationship often appears in the form of psychological pressure'.<sup>32</sup> *Musema* was the director of a tea factory in the Kibuye prefecture and was charged with, among other things, genocide pursuant to 'articles 6(1) and 6(3)'.<sup>33</sup> He 'was perceived as a figure of authority and [had] considerable influence in the Gisovu region'<sup>34</sup> that arose 'from his control of socio-economic resources ... [or] ... was politically based'.<sup>35</sup> The Trial Chamber had to deal, not only with *Musema*'s direct subordinates but those indirectly subordinate to him, namely, 'the soldiers, the Gisovu *Commune* [the smallest territorial division for administrative purposes] police, and the *Interahamwe*'.<sup>36</sup>

The Trial Chamber found, however, that he only 'exercised *de jure* and *de facto* authority over tea factory employees in his official capacity as Director of the Tea Factory'.<sup>37</sup> It held that, as employees of the tea factory were among the attackers and *Musema* was present at the attack sites, he incurred individual criminal responsibility as their superior.<sup>38</sup>

Where an accused exerts substantial influence in a given situation over persons not his or her subordinates,<sup>39</sup> there is more flexibility to impose superior responsibility. While it has been acknowledged that some cases, notably from the

trials after the Second World War, '... appear to have adopted the less restrictive criterion of the mere power to influence...'<sup>40</sup> it has been held that, in order for a civilian to be a superior, he has to have the material ability to issue orders to prevent an offence and sanction the perpetrator.<sup>41</sup>

In the *Celebići* case, the Appeals Chamber of the ICTY held that substantial influence that falls short of effective control (which is the possession of material abilities to prevent offences or to punish) 'lacks sufficient support in State practice and judicial decisions'.<sup>42</sup> The *Kordić* Trial Chamber accepted this reasoning and held that 'even though arguably effective control may be achieved through substantial influence, a demonstration of such powers of influence will not be sufficient in the absence of a showing that he had effective control...'<sup>43</sup> The problem with applying the doctrine on the standard of mere influence is that 'an influential civilian administrator, such as a Rwandan prefect, is thereby transformed into a kind of universal superior – thousands within his sphere of influence become his subordinates in the eyes of the law' (Zahar 2001: 600, footnote 8).

## Knowledge

A superior is not responsible for the acts of his or her subordinates solely because of the superior's position of authority as the doctrine is not a form of strict liability<sup>44</sup> – that is, a person will not be found liable without proof of his or her intention or negligence.<sup>45</sup> If superiors were responsible for the acts of their subordinates solely by virtue of being superiors, this may be contrary to constitutional principles in national jurisdictions in Africa<sup>46</sup> and article 7 of the African Charter on Human and Peoples' Rights.<sup>47</sup>

Article 28 of the Rome Statute sets the standard of the degree and type of knowledge a superior must have at the time of the commission of the crimes to be liable for failing to exercise effective control. Two standards of knowledge are apparent from article 28: 'knew' or 'should have known'. For military commanders article 28(a)(i) provides that the accused 'either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit' crimes. For other superior relationships, article 28(b)(i) sets the standard as 'knew or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit' crimes, which introduces a totally new standard with regard to civilian superiors (Ambos 2002: 863).



To prove actual knowledge the prosecution can either present direct or circumstantial evidence.

**Proving actual knowledge of crimes about to be committed or already committed**

Examples of direct evidence include:

... (a) written reports of the crime that are addressed directly to the accused and which the accused acknowledges having received, usually by way of signature; (b) written reports, letters or orders issued by the accused which acknowledge that he knew of the crimes; (c) testimony establishing that oral complaints or protests as regards the crimes were made directly to the accused; and (d) testimony establishing that the accused made oral statements proving that he or she knew of the crimes (Keith 2001: 617 at 620).

Examples of circumstantial evidence that include the proof of a functioning communications systems and media reports (Keith 2001: 620, footnote 53) are:

... the number, type and scope of the illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the speed of the operations; the modus operandi of similar illegal acts; the officers and staff involved; and the location of the commander at the time.<sup>48</sup>

The factual determination of actual knowledge will also depend on the level of responsibility of the superior, and whether he or she exercises his or her powers *de facto* or *de jure*.<sup>49</sup> But there is no presumption of knowledge for either standard.<sup>50</sup>

When it comes to determining the second standard of knowledge of commanders, matters become more controversial because, 'even if it is believed that the commander did not know at the appropriate time' (Fenrick 1999: 519), knowledge may be imputed to him or her. This possibility of knowledge (Green 1993: 195) must be based on reliable and concrete information (Ambos 2002: 865) from which a commander has 'a duty to make inferences from actually known facts and to carry out reasonable investigation of actually known "suspicious" facts' (Hessler 1973: 1278–79, 1298–99) to enable him or her to know of the commission of crimes.

The same kind of factors referred to above to establish circumstantial knowledge could also be used to establish the 'should have known' standard and the state of knowledge of the accused before, while and after the offences were committed. Other sources of evidence to consider are the routine or extraordinary systems available to provide information to the accused, and the effectiveness of those systems, and whether the accused was given notice of alleged offences by external sources, such as non-governmental organisations, the UN or the press. It is also possible here for a commander to be found guilty on the basis of his or her

negligence.<sup>51</sup> For civilian superiors the standard is higher: it is required that the civilian accused had actual knowledge (Ambos 2002: 849) and that he or she was reckless with regard to this knowledge (Ambos 2002: 870).

The second standard of knowledge differs, as is apparent from the various provisions quoted above (article 86 of Additional Protocol I; article 6(3) of the ICTR; and article 28 of the Rome Statute). Article 28 uses the 'should have known' standard instead of the 'had reason to know' standard of the *ad hoc* tribunals and the SCSL, and also differs from article 86(2) of Additional Protocol I: 'or had information which should have enabled them to conclude in the circumstances at the time'. The ICC will have to interpret this standard but will be guided by decisions interpreting the 'had reason to know', which is not substantially different from the 'should have known' standard (Ambos 2002: 866) and the sources of the applicable law as listed in article 21.

Various pronouncements exist<sup>52</sup> in relation to the 'should have known' standard (Ratner and Abrams 2001: 135). It is suggested that this standard is satisfied if the 'superior fails to obtain or wantonly disregards information of a general nature within his or her reasonable access indicating the likelihood of actual or prospective criminal conduct on the part of subordinates' (Fenrick 1999: 519).

## Failure to take steps to prevent or punish

Article 28 of the Rome Statute provides identically for commanders and other superiors. In each case, an accused's relevant omission is the failure 'to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution'.

Liability for failing to act is premised on the accused's having a legal duty to act. Article 28 as set out above encapsulates the duties to prevent<sup>53</sup> and to punish<sup>54</sup> the crimes of subordinates, which constitute separate and independent legal obligations.

Any attempt, however, 'to formulate a general standard *in abstracto* [of which measures can be taken] would not be meaningful',<sup>55</sup> and the difficulty is the proper identification of what would have been, in the circumstances, necessary and reasonable. This is a factual determination done on a case-by-case basis because what was necessary and reasonable in one situation may be insufficient in another. A superior's liability can only be judged with regard to those corrective measures it was possible for the superior to take in the circumstances prevailing at the time.<sup>56</sup>



Therefore, the measures an accused could take would not be dependent on having the formal legal ability to take them, but on his or her practical and actual capacity to take them.<sup>57</sup> That is because ‘... international law cannot oblige a superior to perform the impossible.’<sup>58</sup> The possible measures include conducting an investigation to determine the facts, reporting the incident to higher authorities and recommending or conducting disciplinary proceedings.<sup>59</sup>

Is causation required? That is, is it necessary for liability that the superior’s failure to take measures caused the commission of the crimes? Although the ‘existence of causality’<sup>60</sup> has been rejected by the ICTY, it is possible that the ICC could interpret the phrase in article 28 ‘as a result of his or her failure’ as introducing a causation requirement (Cryer 2001: 28).

Finally, the separate obligations of ‘prevent’ or ‘punish’ do not create ‘alternative and equally satisfying options’. This means that a superior cannot avoid liability ‘... for the failure to act by punishing the subordinate afterwards’<sup>61</sup>

## Conclusion

The Rome Statute incorporates the most advanced and detailed exposition of the concept of command responsibility to date. Article 28 adopts the three pillars of command responsibility discussed above. So, there must be knowledge, actual or constructive, control and a failure to take necessary and reasonable measures. It confirms that there is a distinction for the purposes of the application of the doctrine between military and civilian superiors. In particular, one can note that while the test with regard to control and failure to take measures are effectively identical in the case of both military and civilian superiors, the test of knowledge differs in a significant respect. The only slight modification with respect to control is the recognition of the concept of effective military command, as opposed to non-military authority, as a specific form of authority being sufficient indications of subordination.

## THE DEFENCE OF SUPERIOR ORDERS

The defence of superior orders allows a subordinate who committed a crime while obeying orders to escape liability in certain, limited circumstances. Article 33 of the Rome Statute, which provides for the defence of superior orders, proved to be one of the most controversial of the drafting and negotiation process.

At the Rome Conference there was a clear division between states that wished to maintain a strict interpretation that excluded any manner of defence of superior

orders, and states that wished to retain a conditional position. This deep controversy is reflected in the conditions article 33 sets for the use of the defence, and it will, in all likelihood, also play a role in the interpretation of these conditions.

In this section, we examine article 33 closely, explaining its relationship to article 32 (the provision on mistake). Through the discussion we identify which issues these two articles resolve in relation to the defence of superior orders, which issues they leave open, and how best to interpret the issues not yet settled by the statute.

## The text: articles 32 and 33

In the Rome Statute, the defence of superior orders is treated as a subcategory of the defence of mistake. Article 33, therefore, needs to be examined with the umbrella provision on mistake of fact and law, article 32, which stipulates:

1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.
2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33.

Article 33 of the Rome Statute allows for the defence of superior orders in limited circumstances:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
  - (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
  - (b) The person did not know that the order was unlawful; and
  - (c) The order was not manifestly unlawful.
2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

## Interpretation

### Which issues are settled?

Article 32(1) allows the defence of mistake of fact under such strict conditions that it emerges, on a literal interpretation, as a mere restatement of the requirement of the mental element of the crime. It makes no reference to superior orders.

Article 32(2) deals with mistakes of law. Where it does admit the defence of mistake of law, it allows the Court a discretion to exclude liability, rather than bind the Court to do so. This provision refers to the defence of superior orders.

The first sentence of article 32(2) sets out the general rule that mistakes of law of a certain nature (namely, a mistake as to whether the act is a crime under the jurisdiction of the ICC) cannot negate criminal liability. The second sentence provides the Court with a discretion to negate criminal liability where mistakes of law have been made in particular circumstances, or with a particular result. This second sentence encapsulates the defence of superior orders with its reference to article 33.

If the second sentence were to apply to all mistakes of law, the first sentence would be rendered meaningless – a consequence that violates the principle of effectiveness (Khan, Dixon and Fulford 2005: 167, paragraphs 5–43) and has already been rejected by the ICTY.<sup>62</sup> Therefore, the discretion allowed the Court in the second sentence of article 32(2) must apply to mistakes of law of a different nature to those governed by the first sentence. The second sentence can therefore only apply when the mistake of law was not a mistake as to whether the act in question was a crime under the Rome Statute.

This means that the defence of superior orders cannot be advanced by a subordinate if he or she wrongly thought that the order he or she received was not a crime under article 8 of the Rome Statute. It can only be brought when the subordinate misunderstood the definitional requirements of article 8, or mistakenly assumed that a ground of justification was available to him or her.

Turning now to article 33, we note that it has three prerequisites. If all these prerequisites are satisfied, the subordinate may be exempted from criminal liability.<sup>63</sup> The first prerequisite is that the subordinate must have been in a particular relationship with the superior, which rendered him or her legally obliged to obey that superior's orders. Secondly, the subordinate must have been unaware that the order was unlawful. And, thirdly, the order may not have been manifestly unlawful.

The second and third prerequisites of article 33 establish that there is both a subjective and objective element to the defence. On the one hand, the subordinate must have been genuinely ignorant of the unlawfulness of the order. On the other hand, that ignorance must have been reasonable.

Finally, article 33 also makes it clear that the defence may be brought only with respect to war crimes: article 33(2) expressly excludes its defence for genocide or crimes against humanity by declaring these two crimes manifestly unlawful.

### Which issues are still open?

Three main questions arise from article 33. The first concerns the *standard of proof*: how do we work out whether illegality was 'manifest'? The second concerns the *burden of proof*: does the phrasing of article 33 ('shall not relieve that person of criminal responsibility *unless*' [emphasis added])<sup>64</sup> shift the evidentiary burden for the requirements of article 33 to the accused? The third question concerns the scope of the defence: what kinds of war crimes allow for a plea of superior orders? Although important in its own right, this third question also underlies our understanding of the defence as a whole.

### Rules for interpretation

Being an international treaty, the Rome Statute is subject to the rules of interpretation of treaties codified in the Vienna Convention on the Law of Treaties, 1969. Under article 31 of this convention, we must first look to 'the ordinary meaning' of the terms of the Rome Statute 'in their context' and in the light of the 'object and purpose' of the Rome Statute. If this leads to uncertainty or absurdity, we may consult supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion (United Nations 1969: article 32).

The Rome Statute also provides pointers to its interpretation, indicating in article 21 that it should be interpreted by reference to the statute itself, its 'Elements of Crimes' document and its rules of procedure and evidence. Article 21 also refers to 'applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict', which are to be applied 'when appropriate'. As supplementary sources, the ICC may refer to 'general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that

would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards’.

As set out above, some issues remain open on the ordinary meaning of articles 32 and 33 of the statute. In the following section, we look at the supplementary sources for help in our interpretation of these issues. We remain bound by the objects and purposes of the Rome Statute, which article 21 requires us to consider in any case of ambiguity. But we also turn to customary international law, particularly state practice and the practice of national and international tribunals. Because superior orders can be pleaded only for war crimes, it is also appropriate to look at the principles of international humanitarian law.

### Customary international law

There is no single, definitive position on the defence of superior orders in customary international law. There are, instead, two main, competing positions. The first, the so-called ‘absolute liability’ approach, does not recognise the defence in any circumstances and would impose criminal liability on a subordinate who commits a crime, whether or not the subordinate did so pursuant to orders given by a superior. The ‘absolute liability’ approach is generally associated with international or internationalised tribunals, including those set up after the Rome Statute was drawn up.<sup>65</sup> The second approach to superior orders – that of ‘conditional liability’ – grants a subordinate exemption from liability if that subordinate committed a crime under an order to do so, provided certain conditions are met. This approach is often associated with national legal systems.

Table 1 tabulates the superior-orders approach taken by 61 states.<sup>66</sup> A majority of these states (that is, 37) appear to adopt the ‘conditional liability’ approach, as opposed to 24 states that support the so-called ‘absolute liability’ approach. Writers who claim that superior orders are accepted as a defence in customary international law call on this apparent advantage in the number of the ‘conditional liability’ states.<sup>67</sup> However, a close examination of national legal systems reveals too many differences between them to provide one, unified position on superior orders as a general defence. We can, however, be sure that national legal systems do not, as a whole, support the conditional liability approach of article 33. This is because the content of the defence as found in many national systems is vastly different from the content of article 33.

**Table 1: Defence of superior orders – national practice**

Absolute liability (no superior-order defence)	Conditional liability
Australia	Albania
Austria	Argentina
Bangladesh	Belarus
Belgium	Brazil
Bosnia and Herzegovina	Cameroon
Cambodia	Canada
Chile	Costa Rica
China	Denmark
Colombia	Dominican Republic
Congo	Egypt
Czechoslovakia	El Salvador
Estonia	Ethiopia
France	Finland
India	Germany
Iran	Ghana
Lebanon	Greece
Niger	Guatemala
Nigeria	Iraq
Philippines	Israel
Romania	Italy
Slovenia	Luxembourg
South Korea	Netherlands
Sweden	New Zealand
UK	Norway
	Panama
	Peru
	Poland
	Rwanda
	Somalia
	South Africa
	Spain
	Switzerland
	Tajikistan
	Uganda
	United States
	Yemen
	Zimbabwe

The main difference is that many ‘conditional liability’ states use the term ‘superior orders’ to cover situations of compulsion or duress. This approach is evident in US,<sup>68</sup> Indian,<sup>69</sup> British,<sup>70</sup> Dutch,<sup>71</sup> Austrian,<sup>72</sup> Canadian,<sup>73</sup> Israeli,<sup>74</sup> Italian<sup>75</sup> and South African<sup>76</sup> jurisprudence. It is also present in the legislation of many national

systems, including that of Luxembourg,<sup>77</sup> Argentina,<sup>78</sup> Norway,<sup>79</sup> Sweden<sup>80</sup> and Yemen.<sup>81</sup>

However, as formulated in the Rome Statute, compulsion and superior orders are mutually incompatible defences. In a situation of compulsion, the accused has to choose between breaking the law and suffering some evil. If he or she chooses to break the law, he or she may then claim the defence of compulsion (Burchell 2006: 256). The Rome Statute provides separately for the defence of compulsion, which it terms duress (in article 31(1)(d)). However, to argue the defence of superior orders, the accused cannot have known that the order he or she executed was unlawful. A perpetrator who is unaware of the unlawfulness of an order is not put to the choice of incurring criminal liability for executing the order or incurring disciplinary or other sanctions for insubordination. There is therefore no question of compulsion for a subordinate who pleads article 33.

Many of the states in Table 1 that seemed to fall in the 'conditional liability' camp (Canada, Israel, India, Italy, Luxembourg, Netherlands, South Africa and the US) therefore do not, in their domestic law, reflect the defence as set out in article 33. Instead, they provide for the defence of compulsion through a slightly different lens. Two important consequences flow from this: first, the argument that customary international law recognises the defence of superior orders is considerably weakened; and, second, instead of suggesting that there is one overall approach to superior orders in international law, we should consider the issues in article 33 separately and see what case law, national legislation, the writings of commentators and the jurisprudence of international courts have to offer us on each specific question.

### Application of the supplementary sources to the open issues in article 33

With regard to the standard of proof, when the statute requires, for a successful plea of superior orders, that the order may not have been 'manifestly unlawful', it requires the application of an objective standard. Domestic legal systems, confronted with the need to measure the conduct or belief of a particular person against that of an objective outsider, usually resort to the test of the 'reasonable person'. This test is most often applied in the context of delict/tort or general, domestic criminal law. For the purposes of article 33, however, the context for this objective test is that of war crimes and international humanitarian law, and the appropriate comparator in this context may be that of the 'reasonable soldier'.

There is little international jurisprudence on the standard of proof for manifest unlawfulness because international criminal statutes have, until the advent of the ICC, excluded the defence of superior orders completely. In domestic jurisprudence there is support for both the reasonable-person and the reasonable-soldier test.

The approach a state takes to the reasonableness test will thus be influenced by that particular state's approach to the defence of mistake. While there is agreement across legal systems about the defence of mistake of fact (which can negate the subject requirement of the crime and thereby remove criminal liability), there is disagreement on how to handle mistakes of law. Anglo-American law generally applies the rule that ignorance of the law is no excuse (Burchell 2006: 493). Proponents of this view point out that it is for the state, not the individual, to determine the ambit of criminal conduct (Burchell 2006: 493, footnotes 7 and 8), and point out that people would deliberately refrain from finding out what their legal duties are if ignorance of these duties freed them from criminal liability (Burchell 2006: 493, footnote 9). They also mention the practical difficulty of proving that the accused had the requisite knowledge.

Other domestic systems require that the subjective, 'fault' element be present for every aspect of the crime (Ashworth, cited by Burchell 2006: 494, footnote 100), and that the state therefore needs to prove that the accused was aware of the unlawfulness of his or her actions before it can establish criminal liability. Proponents of this approach argue that the criminal justice system recognises intention as a necessary element of criminal liability. They are also motivated by considerations of 'fairness and justice' to the accused (Burchell 2006: 494, footnote 100).

A third approach, adopted by German criminal law, adopts a middle road, allowing mistake of law to excuse liability only if the mistake was reasonable (Burchell 2006: 506; Snyman 2002: 156 and 204ff). The theoretical basis of this approach has been termed the 'theory of culpability', which distinguishes purely subjective intention from the normative issue of culpability. It then includes in the investigation of the accused's criminal liability a normative question, what could be called 'avoidability'. In essence, the 'avoidability' enquiry asks whether the accused, under the circumstances and in the light of his or her personal capacities, could have been expected to act more carefully before carrying out an act that turned out to be illegal.

Even in systems that require full subjective knowledge of the unlawfulness of conduct before criminal liability can be established, the knowledge will be present

when the accused had the intention with respect to unlawfulness ‘in the usual meaning of that term in criminal law’ (Burchell 2006: 497). It would therefore, in most domestic legal systems, suffice that the accused foresaw the possibility that the conduct was unlawful and yet proceeded in reckless disregard of this possibility (Burchell 2006: 35ff). Furthermore, the accused need not know either the detailed requirements of the offence, or its place in the statute, or the penalty imposed for it, but merely that it was possible that the conduct was criminal.<sup>82</sup> Secondly, even in those legal systems that require knowledge of unlawfulness for criminal liability, a higher standard is imposed on persons working in a particular sphere with respect to the rules of that sphere.<sup>83</sup>

While some of the domestic jurisprudence offers useful guidance in cases of ambiguity in the statute, it cannot override the clear text of the statute. What the ordinary wording of the Rome Statute indicates is that article 33 decides some of the domestic law disputes at the very outset. Under article 33, an accused cannot escape liability merely on the basis of his or her ignorance of the unlawfulness of the order. Instead, article 33 involves *both* a subjective and an objective enquiry, therefore making it clear that fairness towards the accused is not the only criterion for the investigation. By doing so, article 33 allows some leeway for a normative enquiry that sees justice as the correct balancing of the rights of the individual subordinate against that of wider society.

We now look more closely at the arguments in support of the two main tests for manifest unlawfulness: the reasonable-person<sup>84</sup> test and the reasonable-soldier<sup>85</sup> tests.

The main argument for the reasonable-person test is based on policy. Thus some writers emphasise the importance of military discipline on military law, noting that it would amount to insubordination for ‘an inferior to assume to determine the question of the lawfulness of an order given him by a superior’, and that it would subvert military discipline for the inferior to carry that assumption into practice.<sup>86</sup>

The argument based on discipline is, in essence, an appeal to the requirements of military necessity. However, the ICC is likely to apply the concept of military necessity strictly as found within international humanitarian law. This is for several reasons. The Rome Statute not only includes in its objects and purposes the goal of stamping out impunity for war crimes, but its interpretation provision also refers expressly to ‘the established principles of the international law of armed conflict’. In addition, domestic case law supports the central thesis of international humanitarian law, which emphasises that a balance must be maintained between

the demands of military necessity and the supremacy of the law.<sup>87</sup> Indeed, some domestic cases argue that there is no conflict between military requirements and the public good, because military law is itself infused with the foundational values of justice and lawfulness.<sup>88</sup>

Two aspects of international humanitarian law suggest that the reasonable-soldier test is a more appropriate test to determine ‘manifest illegality’ under article 33. The first is the state’s obligation under international humanitarian law to disseminate the rules of international humanitarian law itself, particularly to its armed forces. The second is the general principle of international humanitarian law to avoid any unnecessary harm.

The obligation on states to disseminate international humanitarian law as widely as possible and, in particular, to train their own forces in the discipline, militates against an interpretation of article 33 that would render ignorance a benefit to the soldier. The standard of reasonableness against which the accused’s acceptance of the order is measured should therefore reflect the training international humanitarian law requires of a properly trained and disciplined army.

The rule that soldiers should inflict only as much damage as is necessary is a general principle of international humanitarian law and is applied chiefly through the notion of proportionality (Henckaerts and Doswald-Beck 2005: chapter 4). Proportionality is linked to the concept of military necessity: in respect of acts that would otherwise be criminal, military necessity allows soldiers wider freedom, but it also limits this freedom by denying the soldier any right to act beyond the strict requirements of military necessity. Furthermore, international humanitarian law excludes some acts, such as the destruction of undefended towns, even though they may have a military advantage.<sup>89</sup>

The subcategory of international humanitarian law that governs the actual conduct of hostilities, the so-called ‘Hague law’, suggests a number of factors that can be considered to establish whether immediate obedience of an order was, in fact, required in a given set of circumstances.<sup>90</sup> If an order is handed down outside of a situation of armed conflict, or when there is no immediate threat to the subordinate or superior, it can be argued that military necessity does not require immediate or unquestioning obedience. A range of domestic cases take this approach, emphasising that immediate, automatic obedience is required only in the context of a battle.<sup>91</sup>

A similar approach is implicit in the legislation of many African countries, which deny the defence of superior orders if the subordinate had the chance to



question them. Before the Second World War, Egypt's penal code (1937) held that 'a public officer is not liable for acts committed pursuant to the order of a superior if he/she could reasonably believe that the order was lawful and if he has made necessary investigations and assured himself of the legitimacy of the order'.<sup>92</sup> Similarly, in 1957 Ethiopia legislated that a subordinate who committed an illegal act under orders would be liable if he knew the act was illegal, but added that the court may impose no punishment where 'having regard to all the circumstances and in particular to the stringent exigencies of State or military discipline, the person concerned could not discuss the order received and act otherwise than he did'.<sup>93</sup> In Somalia, two different penal codes have emphasised the subordinate's duty to question the order whenever possible: the 1961 code excused liability 'when the law does not allow him to question the legitimacy of the order',<sup>94</sup> and its 1963 military penal code stated that nothing permits a subordinate to unquestioningly obey an order endangering human life which he knows to be illegal.

Other countries with similar legislation and case law include Chile<sup>95</sup> and Italy.<sup>96</sup> The factors to determine whether, objectively, the 'mistake' was avoidable all refer to the military context and, more specifically, the context of battle. As such, it suggests that the manifest illegality of the order can be determined only by reference to the perceptions and situation of the reasonable soldier.

## Burden of proof

Article 7 of the African Charter on Human and Peoples' Rights and article 14 of the International Covenant on Civil and Political Rights confirm the right of an accused person to be presumed innocent until proven guilty. To comply with this right, the criminal procedure of most countries generally requires that the prosecution prove all the elements of the crime in a criminal trial. However, some criminal justice systems lay an *evidentiary* burden on the accused.

Article 67(1) of the Rome Statute provides that the burden of proof may not be imposed on the accused, and that there may be no onus of rebuttal. However, it includes the phrase 'having regard to the provisions of the Statute'. As we have seen, article 33 is phrased negatively, that is, it says that the subordinate *will* be criminally liable *unless* the three prerequisites are met. The question is then whether this phrasing imposes on the accused the burden of establishing the factual evidence on which the defence of superior orders will be based.

In domestic case law, there is a small amount of support for the idea that the prosecution always has to establish every element of liability, including the absence

of defences.<sup>97</sup> There is, however, also a substantial body of cases that place the evidentiary burden on the accused/defence, not just for pleas of superior orders but for any defence requiring additional factors to be put before the court.<sup>98</sup> This approach is also adopted by the ICTY, not specifically for the defence of superior orders, as this defence is excluded from the statute of the ICTY, but for all defences in which 'the accused himself makes allegations or denies the accepted situation, for example, that he is a person of sound mind'.<sup>99</sup>

The preponderance of national case law, ICTY jurisprudence and academic comment therefore take the view that the accused has to place sufficient evidence before the Court to satisfy it on a balance of probabilities that the prerequisites of the defence he or she has brought are fulfilled. Apart from phrasing article 33 negatively, the Rome Statute also supports such an evidentiary burden through its structuring of criminal liability. As explained in the introduction, the prosecution need prove merely that the material elements of the crime are present, and that the accused had the necessary knowledge of the elements and intent with respect to his or her conduct and the surrounding circumstances. The prosecution does not need to deal with any of the normative elements of the crime unless these are raised by the accused in a defence, such as the defence of superior orders.

## Scope of the defence

In his comprehensive study of the defence of superior orders, Dinstein argues that obedience to orders is not a defence in its own right but merely an aspect to be considered if the defences of compulsion and mistake are brought (1965: 82). Similarly, the Rome Statute does not treat superior orders as a defence in its own right. Both in the wording of article 32(2) and in the requirement of article 33 that the subordinate was not aware of the unlawfulness of the order, the Rome Statute views superior orders as a form of mistake. Furthermore, mistake is linked so closely with the mental element of the crime (in article 31) that a subordinate who can claim the defence of superior orders will often also be able to argue that the mental elements required for criminal liability were not present.

None the less, by setting out the defence under its own heading, the statute suggests that there are certain situations in which a plea of superior orders may be more appropriate than in others. In this last section, we examine the instances in which the defence has been considered appropriate and inappropriate in existing case law, and draw principles from them to guide our application of article 33.

As noted above, the defence may never be brought with respect to crimes against humanity and genocide, as both these categories of crimes are declared by

article 33 to be ‘manifestly unlawful’. A comparison between war crimes and the other two categories – the manifestly unlawful crimes of genocide and crimes against humanity – can help identify which war crimes are manifestly unlawful and which war crimes are more appropriate to a plea of superior orders.

First, let us look at the differences between war crimes and the other two categories. There are two main differences. The first is that, in the case of war crimes, international law accepts the use of violence by the soldier and merely sets limits on the forms it may take, whereas, for crimes against humanity and genocide, the various acts described in articles 6 and 7 are already criminal, even if they do not meet the contextual and mental definitional requirements of the articles and therefore do not constitute crimes against humanity or genocide. Within the constraints set by international humanitarian law, combatants have the right to kill and inflict other kinds of harm.

The second difference between war crimes on the one hand, and crimes against humanity and genocide on the other, is that in a situation of armed conflict, combatants are under threat from the other parties to the conflict. They may kill, but they may also be killed. Perpetrators of crimes against humanity and genocide, by contrast, do not necessarily face any danger, and, in particular, they do not face danger from their victims. Together, these differences suggest that the defence of superior orders would be more appropriate when the subordinate is directly faced by enemy action and acting as he or she understands is required by military necessity.

Now, let us look at the similarities between the relevant articles. Some of the war crimes resemble genocide and crimes against humanity more closely than others. Because of their resemblance to genocide and crimes against humanity, these crimes may be less suitable for a plea of superior orders. We suggest that the most important common factor is the identity of the victim.

Crimes against humanity and genocide are all crimes committed against civilians. There is also a body of international humanitarian law, the so-called ‘Geneva law’, that aims specifically to protect persons not involved in the conflict, such as civilians, prisoners and the injured. Many crimes in article 8 are derived from Geneva law. For example, the ‘grave breaches’ covered in article 8(2) are all Geneva law, as ‘protected persons’ under the Geneva Conventions of 1949 may be civilians, prisoners of war, shipwrecked or wounded persons, and are all defined as persons who find themselves in the hands of another party to the conflict whose nationality they do not share. Because of their resemblance to crimes that the Rome Statute declares manifestly unlawful, we suggest that the defence of superior orders is inappropriate in the case of these Geneva law war crimes.

This proposal is supported by national systems in a number of ways. First, some national systems deny the defence of superior orders for war crimes *per se*.<sup>100</sup> The meaning of ‘war crimes’ has shifted over time and from one legal system to another, but the recent study on customary international humanitarian law by the International Committee of the Red Cross (Henckaerts and Doswald-Beck 2005: 93) has found that violations of international humanitarian law are considered to be war crimes ‘if they endanger protected persons or objects or if they breach important values’, even if this breach does not physically harm or endanger protected persons (Henckaerts and Doswald-Beck 2005: 567). The ‘important values’ aspect of the study also highlights protected persons: for example, the report condemns subjecting persons to humiliating treatment, making persons undertake work that directly helps the military operations of the enemy, and violation of the right to a fair trial.<sup>101</sup>

When the defence of superior orders has been rejected in domestic jurisprudence, the cases usually involve attacks against civilians, prisoners, wounded persons and other persons who present no threat to the perpetrator.<sup>102</sup> A range of cases also reject the defence of superior orders for torture,<sup>103</sup> an offence that can only be inflicted on a person who is in the power of the perpetrator and therefore no longer a threat to the perpetrator.

If we exclude Geneva crimes from the ambit of the plea of superior orders it becomes clear that the mistaken obedience at the core of such a plea must have occurred within the parameters of a legitimate procedure aimed at securing a military advantage. The unlawful order must form part of a legitimate military procedure, sanctioned by international humanitarian law.

The body of law that sets out the range of legitimate military procedures is called ‘Hague law’, which contains the rules that govern the conduct of hostilities. We have already referred to Hague law above, in our discussion of criteria to determine ‘manifest illegality’. The factors all suggested that orders may not be manifestly unlawful if they are received in highly stressful situations in which the subordinate has little time or opportunity to question the order or check on its lawfulness.

The other aspect of Hague law that makes a plea of superior orders more acceptable is that Hague law balances the requirements of military necessity with the principle of humanity and, by doing so, occasionally creates rules with an uncertain ambit and meaning. In article 8 of the Rome Statute, these uncertain Hague rules occur whenever a provision has an internal qualifier relating to military necessity and military advantage, such as in the phrase ‘not justified by

military necessity' (International Criminal Court 2002b: article 8(2)(a)(iv)), the requirement that an object of attack be a military objective (International Criminal Court 2002b: articles 8(2)(b)(ii), 8(2)(b)(v), 8(2)(b)(ix), and 8(2)(e)(iv)), the reference to civilian or environmental damage 'which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated' (International Criminal Court 2002b: article 8(2)(b)(iv)), and the prohibition of destruction or seizure that is not 'imperatively demanded' by the necessities of war (International Criminal Court 2002b: articles 8(2)(b)(xiii) and 8(2)(e)(vii)).

Combined with the other factors we have isolated in domestic and international case law, applied in the light of the purposes and objects of the Rome Statute and evaluated against the appropriate standard of care, these aspects of Hague law suggest the best way to balance, on the one hand, the need for justice and an end to impunity and, on the other, fairness to the soldier acting reasonably in a stressful situation that calls for obedience and speed.

## Conclusion

In essence a species of mistake, the defence of superior orders has an objective and a subjective requirement: first, that the subordinate mistakenly thought that the order was lawful; and, second, that the mistake was reasonable, or, in the words of the statute, that the order was not 'manifestly unlawful'. Despite the controversy surrounding the defence of superior orders, certain aspects of the defence are clear from the text of article 33 and its relationship to article 31. First, the defence may be brought only with respect to war crimes, not in cases of genocide or crimes against humanity. Second, the defence is not available unless the subordinate was under a legal obligation to obey the person who gave the order. Third, not all mistakes can ground the defence under article 33, as the defence cannot be brought if the subordinate was unaware that the crime was a crime at all under the Rome Statute. The nature of the mistake must therefore relate to the definitional requirements of the war crime or the grounds of justification.

The text leaves other issues open. The main open questions relate to the burden of proof, the standard of proof and the scope of the defence as a whole. Domestic and international jurisprudence and practice have not produced a definitive position on these issues, and the Court will have to adopt a position on them that promotes the objects and purposes of the Rome Statute. Using the interpretive tools suggested by the Rome Statute and the law of treaties, we have argued that an evidentiary burden rests on any person who relies on the defence of superior orders. Furthermore, this subordinate will have to show that the reasonable soldier

would have made the same mistake that he or she did in accepting an unlawful order as lawful.

Throughout our analysis, we have shown that international and domestic case law and legislation lean towards the defence in Hague law situations – that is, when the accused is conducting hostilities and facing immediate danger, with little time for independent evaluation; and that it rejects the defence in Geneva law situations – that is, when the subordinate is facing no immediate danger, particularly not from the victim of the crime, and has the opportunity to question the order.

## NOTES

- 1 Cathleen Powell wishes to thank Janice Bleazard and Christopher Oxtoby for their research assistance with this project.
- 2 Intention may take various forms, as discussed below.
- 3 For a more detailed introduction to part 3, see Schabas (2004, 90–116).
- 4 Situation in Darfur, Sudan, in the case of *The Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Al Abd-al-Rahman*, case no. ICC-02/05-01/07, warrant of arrest for Ahmad Harun, 27 April 2007, p 5.
- 5 Ibid.
- 6 Although in certain circumstances another's guilty conduct may be attributed to a person.
- 7 International Criminal Court (2002a: paragraph 2): '... liable for punishment ... only if the material elements are committed with intent and knowledge.'
- 8 *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landzo*, judgment (Celebići appeal judgment), (case no. IT-96-21-A), 20 February 2001, paragraph 195.
- 9 *Prosecutor v Enver Hadzihasanović, Mehmed Alagić, Amir Kubura*, 'Decision on joint challenge to jurisdiction' (case no. IT-01-47-PT), 12 November 2002, paragraph 66.
- 10 Cryer (2001: at 25), explains that the Tokyo International Military Tribunal's judgment on war crimes 'dealt almost entirely with negative criminality and command responsibility'.
- 11 UN GA A/32/144, 15 August 1977.
- 12 *Prosecutor v Alfred Musema*, judgment and sentence (Musema trial judgment), (case no. ICTR-96-13-T), 27 January 2000, paragraph 128.
- 13 UN GA A/32/144, 15 August 1977.
- 14 *Prosecutor v Enver Hadzihasanović, Mehmed Alagić, Amir Kubura*, 'Decision on joint challenge to jurisdiction' (case no. IT-01-47-PT), 12 November 2002, paragraph 174; *Prosecutor v Enver Hadzihasanović, Mehmed Alagić, Amir Kubura*, 'Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility', (case no. IT-01-47-PT), 16 July 2003, paragraphs 29–31.

- 15 *Prosecutor v Charles Ghankay Taylor*, 'Prosecution's second amended indictment' (case no. SCSL-2003-01-PT), 29 May 2007, paragraphs 33–34.
- 16 *Prosecutor v Jean Paul Akayesu*, judgment (Akayesu trial judgment); (case no. ICTR-96-4-T), p 16.
- 17 *Prosecutor v Clément Kayishema and Obed Ruzindana*, judgment (Kayishema trial judgment), (case no. ICTR-95-1-T), 21 May 1999, paragraph 22 of the amended indictment.
- 18 *Prosecutor v Jean Kambanda*, judgment and sentence (Kambanda trial judgment; (case no. ICTR-97-23-S), 4 September 1998, p 20.
- 19 *Prosecutor v Dario Kordić and Mario Cerkez*, judgment (Kordić appeal judgment), (case no. IT-95-14/2-A), 17 paragraphs 33–35.
- 20 *Aloys Simba v The Prosecutor*, appeal judgment (Simba appeal judgment), case no. ICTR-01-76A, 27 November 2007, paragraph 284 and all the authorities cited there.
- 21 *Ibid.*, paragraph 285.
- 22 *Prosecutor v Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, judgment (Celebići trial judgment), (case no. IT-96-21-T), 16 November 1998, paragraphs 344–400 and followed in Kayishema trial judgment, paragraph 209; see also Cryer (2001: at 24).
- 23 Celebići trial judgment, paragraph 647.
- 24 Celebići trial judgment, paragraph 354; Musema trial judgment, paragraph 141.
- 25 Celebići trial judgment, paragraph 354; Kayishema trial judgment, paragraph 478; Celebići appeal judgment, paragraph 193.
- 26 *Prosecutor v Dario Kordić and Mario Cerkez*, judgment (Kordić trial judgment), (case no. IT-95-14/2T), 26 February 2001, paragraph 422.
- 27 Celebići trial judgment, paragraph 370; *Prosecutor v Zlatko Aleksovski*, judgment (Aleksovski trial judgment), case no. IT-95-14/1-T), 25 June 1999, paragraph 76.
- 28 Celebići trial judgment, paragraph 646; *Prosecutor v Tihomir Blaskić*, judgment (Blaskić trial judgment), (case no. IT-95-14-T), 3 March 2000, paragraph 301.
- 29 Celebići trial judgment, paragraphs 356–363.
- 30 Kordić trial judgment, paragraph 840.
- 31 Musema trial judgment, paragraph 135.
- 32 *Ibid.*, paragraph 140.
- 33 *Ibid.*, appendix A, amended indictment, paragraph 4.6.
- 34 *Ibid.*, paragraph 868.
- 35 *Ibid.*, paragraph 869.
- 36 *Ibid.*, paragraph 144.
- 37 *Ibid.*, paragraph 878.
- 38 *Ibid.*, for example, paragraphs 893–895.
- 39 Celebići trial judgment, paragraph 648; Aleksovski trial judgment, paragraph 73; Celebići appeal judgment, paragraph 257.
- 40 Aleksovski trial judgment, paragraph 77.
- 41 Celebići trial judgment, paragraph 378; Blaskić trial judgment, paragraph 96.
- 42 Celebići trial judgment, paragraph 266.
- 43 Kordić trial judgment, paragraph 415.
- 44 Kordić trial judgment, paragraph 369; Celebići appeal judgment, paragraphs 226 and 239.
- 45 Akayesu trial judgment, paragraphs 488 and 489; Musema trial judgment, paragraph 131.
- 46 See, in South Africa, *S v Coetzee* 1997 (3) SA 527 (CC).
- 47 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
- 48 Final report of the commission of experts established pursuant to Security Council resolution 780 (1992) UN Doc. S/1994/674, paragraph 58; Blaskić trial judgment, paragraph 307; Celebići trial judgment, paragraph 386; and Kordić trial judgment, paragraph 427.
- 49 Kordić trial judgment, paragraph 428.
- 50 Ambos (2002: 834); Celebići trial judgment, paragraph 386; Blaskić trial judgment, paragraph 307; Kordić trial judgment, paragraph 427.
- 51 Ambos (2002: 868); Celebići appeal judgment, paragraph 226.
- 52 Celebići trial judgment, paragraph 394; Celebići appeal judgment, paragraph 241; Aleksovski trial judgment, paragraph 80; Blaskić trial judgment, paragraph 322, 328–32; Akayesu trial judgment, paragraph 489; Kayishema trial judgment, paragraph 227–28, 509.
- 53 See Kordić trial judgment, paragraph 445.
- 54 See *ibid.*, paragraph 446.
- 55 Celebići trial judgment, paragraph 394.
- 56 Aleksovski trial judgment, paragraphs 78 and 81; Celebići trial judgment, paragraph 395.
- 57 Celebići trial judgment, paragraph 443; Kordić trial judgment, paragraphs 416 and 442–443.
- 58 Celebići trial judgment, paragraph 395.
- 59 Fenrick (1999: 520); Blaskić trial judgment, paragraph 302.
- 60 Kordić trial judgment, paragraph 832; Celebići trial judgment, paragraph 398.
- 61 Blaskić trial judgment, paragraph 336; Kordić trial judgment, paragraph 445.
- 62 '[A] rule cannot be rendered meaningless by a restrictive interpretation of other provisions of the same instrument,' *Prosecutor v Mrksić et al*, case no. (ICTY Trial Chamber, decision on the motion for release by the accused Slavko Dokmanovic, 22 October 1997, paragraph 41.



- 63 The 'and' before line (c) makes it clear that all three prerequisites must be satisfied. If any one is not fulfilled, the subordinate must be held liable for the crime.
- 64 Emphasis added.
- 65 The special tribunals for Sierra Leone and Cambodia, set up after the Rome Statute came into being, follow the statutes of the ICTY and the ICTR. The criminal court system set up by regulation 2000/15 of the UN Transitional Administration for East Timor follows the Rome Statute in most respects, but excludes the defence of superior orders. See Romano, Nollkaemper and Klefner (2004: 306–7).
- 66 This initial categorisation of states' approaches to superior orders is based on research conducted for a larger, ongoing project on superior orders. A copy is on file with Cathleen Powell.
- 67 But see the argument of Paola Gaeta, who suggests that both international and municipal courts have always denied the defence for the most serious crimes. Gaeta says that, because they have had jurisdiction only over the most serious crimes, international tribunals therefore excluded the defence. Municipal tribunals, which covered a wider range of crimes, allowed the defence, but only for less serious crimes. See Gaeta (1999: 183–186).
- 68 *McCall v McDowell* (1867) 15 F. Cas. 1235 at 1241, per Deady DJ.
- 69 *Empress v Latif Khan* (1895) 20 Bom. 394.
- 70 *Von Falkenhorst, Nikolaus* (British Military Court, Brunswick, 29 July–2 August 1946), [1949] 11 LRTWC 18, 24.
- 71 Zülke, Willy (Netherlands, Special Court of Cassation, 6 December 1948), [1949] 14 LRTWC 139.
- 72 *Public Prosecutor v Leopold L.* (Austrian Supreme Court, 10 May 1967), [1974] 47 ILR 464.
- 73 Per Cory J in *R v Finta* (Canadian Supreme Court, 24 March 1994), [1994] 1 S.C.R. 701, paragraph 166.
- 74 In *Eichmann* (Israel, Supreme Court, 29 May 1962), the court held that the defence of superior orders 'means *ex hypothesi* that the person who performed it had no alternative – either under the law or under the regulations of the disciplinary body ... of which he was a member – but to carry out the order he received from his superior'. The Supreme Court also commented on the 'moral choice' test in the Nuremberg judgment by saying: 'It may be that the intention [of the tribunal] was to take into consideration circumstances which placed the accused under the threat of having to pay with his life if he disobeyed the order... If this interpretation is correct – and we do not decide this – then it must be understood that the Tribunal meant to sanction the defence of "constraint" or "necessity"... [Such a defence] would still not succeed unless... (i) the danger to his life was imminent and (ii) he carried out the criminal assignment out of a desire to save his own life and because he found no other possibility of doing so', [1968] 36 ILR 277 at 313, 318.
- 75 *Priebke case* (Italy, Military Tribunal of Rome, 1 August 1996), [1999] Nos. 1-2-3. Rassegna della Giustizia Militare, 27–82. Cited in Henckaerts & Doswald-Beck (2005: 3836, paragraph 960).
- 76 *S v Banda* 1990 (3) SA 466 (B) 479.
- 77 The Law on the Punishment of Grave Breaches (1985) provides that the subordinate is liable if 'he should have realised the criminal character of the order *and had the possibility not to comply with it*', article 8. Published in *Mémorial, Journal officiel du Grand-Duché de Luxembourg*, 1985, 24–27, cited in Henckaerts & Doswald-Beck (2005: 3826, paragraph 923).
- 78 Decree on the trial before the Supreme Council of the Armed Forces (1983), preamble, published in the *Boletín Oficial de la República Argentina*, 15 December 1983, cited in Henckaerts & Doswald-Beck (2005: 3822, paragraph 900).
- 79 General Civil Penal Code of 1902, article 56, cited in Green (1976: 165–6).
- 80 Sweden does not allow the defence at all if the subordinate 'had a genuine possibility of avoiding the act in question'. See the IHL Manual (1991), § 4.2, 95, cited in Henckaerts & Doswald-Beck (2005: 3820, paragraph 888).
- 81 Article 23 of Yemen's Military Criminal Code (1998). Published in *Official Gazette of the Republic of Yemen*, No. 14, 25 July 1998, 85–60, cited in Henckaerts & Doswald-Beck (2005: 3829, paragraph 940).
- 82 *Ibid.*, and see footnotes.
- 83 The seminal South African case, *S v De Blom* 1977 (3) SA 513 (A), which rejected the rule that ignorance of the law is no excuse, nonetheless noted that persons who operate within a particular sphere are expected to know the rules relating to this sphere (at 531–2). Burchell claims that this rule operates with respect to negligence-based crimes only. This reasoning would then, presumably, apply to the Rome Statute, which sets a 'negligence' standard for the defence of superior orders.
- 84 For cases supporting the reasonable-person test, see *S v Banda* 485 and *The Chief Military Prosecutor v Lance Corporal Ofer, Major Malinki Shmuel and Others, Case concerning the events of 29 October 1956 in Kafr Qassem* (Israel, District Tribunal for the Central Judicial District of the Israeli Defence Forces, 13 October 1958), 17 *Psakim*, 90, discussed in Green (1993: 100–102). For commentators who support the reasonable-person test, see Zimmerman (2002: 971); *Winthrop's Military Law and Precedents* (1920: 296–297); Dicey (1915: at 302); *Wharton's Criminal Law and Procedure* (1957: at 257–8); and Green (1999: at 48).
- 85 National legislation adopting the reasonable-soldier test includes Canada (*Law of Armed Conflict Manual* 16-5, §34) and New Zealand (*Interim Law of Armed Conflict Manual* §1710(2)). Green (1976) notes academic support for the reasonable-soldier test at Green (1976: 169). Note that some cases that ostensibly support the reasonable-person test add to the enquiry so many contextual factors reflecting the subordinate's training, expertise and position in the military hierarchy that the test is, in effect, transformed to that of the 'reasonable soldier'. See *Ofer, Malinki and others and Calley, William L* (US Army Court of Military Appeals, 21 December 1973) 48 CMR 19, 22 USCMA 534; 1973 CMA LEXIS 627 542, per Quinn J.



- 86 *Winthrop's Military Law and Precedents* (1920: 296–7); see also Green (1999: at 48).
- 87 17 PR 1863 (Cr) 29; *Ofer, Malinki and others* (footnote 111); *S v Banda* (n 94) 494–5.
- 88 [1949] 13 LRTWC 117; [1949] 8 LRTWC 90; 15 Annual Digest 656, 665–68; Code of Conduct for CF Personnel, Office of the Judge Advocate General, ed. of 4 June 2001, cited in Henckaerts & Doswald-Beck (2005: 3818, paragraph 877).
- 89 The ICTY has reminded us, in *The Prosecutor v Tihomir Blaskić* IT-95-14-T (Appeals Chamber, judgment, 29 July 2004) that attacks on civilians are always prohibited and can never be justified by military necessity.
- 90 The subcategory of international humanitarian law that protects civilians – the so-called 'Geneva law' – overrides military necessity most often to protect civilian interests. We will argue that it also precludes the defence of superior orders. See further below.
- 91 See the Dutch case of *Kotälla* (Netherlands, Amsterdam Special Criminal Court, First Chamber, 14 December 1948), *Bijlage Handelingen Tweede Kamer der Staten-Generaal Sittig* 1971/72 11714, nr. 4,1–8. See also the US case of *In re Milch* [1948] 7 LRTWC 27, 42.
- 92 Article 63 of penal code of 1937 (published in Official Journal, No. 7, 1 August 1937; cited in Henckaerts & Doswald-Beck (2005: footnote 32 at 3824, paragraph 910).
- 93 Article 70 of penal code of the Empire of Ethiopia, proclamation No. 158, 23 July 1957 (published in *Negarit Gazeta* (Gazette Extraordinary), 16th Year, No. 1, Addis Ababa, 23 July 1957, cited in Henckaerts & Doswald-Beck (2005: footnote 32 at 3824, paragraph 913).
- 94 Somalia 1961 penal code, article 33(2)–(3).
- 95 *The Guzmán and Others case* (Chile, Santiago Council of War, 30 July 1974) pointed out that the relevant penal code in cases where subordinates commit crimes under orders do not impose liability where 'the subordinate has explained the illegality of the order to the superior, and that the latter has insisted on the order's performance', cited in Henckaerts & Doswald-Beck (2005: footnote 32, at 3832, paragraph 952).
- 96 See the *Caroelli and Others case* (Italy, Court of Cassation, 10 May 1947) which allowed the defence because it found that the 'defendants had tried to oppose by all means the illegal order, but were put into such a mental state of confusion by their superior as to annihilate their free will'.
- 97 See the South African case of *S v Banda*: 'Once the accused has raised this defence the onus of disproving the defence – as in the case with defences on grounds of justification – rests on the State.' *S v Banda* (n 94) 483. See also the *Philippines Military Code* (1965), note 9 to article 65, and *Chief Military Prosecutor v Lance Corporal Ofer, Major Malinki Shmuel and Others, Case concerning the events of 29 October 1956 in Kafr Qassem* (Israel, District Tribunal for the central judicial district of the Israeli Defence Forces, 13 October 1958), 17 *Psakim*, 90.
- 98 See the South African case of *R v Celliers* (1903) ORC 1, 6 in which Fawkes J, addressing the jury, held the accused had to prove that the orders were not manifestly illegal. See also the

US case of *Kinder* (footnote 79) paragraph 14, the Austrian case of *Leopold* (footnote 29), and the UK case of *Von Falkenhorst* (footnote 25, p 26).

- 99 *Prosecutor v Ranko Cesić* IT-95-10/1 (ICTY Trial Chamber II, sentencing judgment, 11 March 2004), paragraphs 95–97. The Krupp case refers to such defences as 'confess and avoid' defences. See Krupp and Others (US, military tribunal at Nuremberg, 30 July 1948), [1949] 10 LRTWC 69, 148. See also *Prosecutor v Delalić* IT-96-21-T (ICTY Trial Chamber II, judgment, 16 November 1998), paragraph 559 for further support for the shifting of the evidentiary burden onto the accused.
- 100 See, for example, article 283 of the 1994 penal code of Slovenia (published in *Uradni List Republike Slovenije* (Official Gazette of the Republic of Slovenia), no. 63, 13 October 1994, 3455–3503 and cited in Henckaerts & Doswald-Beck (2005: footnote 32, 3827, paragraph 931); §1710(2) of the 1992 Interim Law of Armed Conflict Manual of the New Zealand defence force, cited in Henckaerts & Doswald-Beck (2005: footnote 32, 3819, paragraph 883); and article 239 of the 1976 penal code of the Socialist Republic of Yugoslavia, as amended (published in *Sluzbeni list SFRJ* (Official Gazette of the SFRY), no. 44/76, 8 October 1976 and cited in Henckaerts & Doswald-Beck (2005: footnote 32, at 3829, paragraph 941).
- 101 A last example was the recruitment of children under 15 years of age into the armed forces.
- 102 See the following sources for examples of this approach in Belgium, Germany, the Netherlands, Norway, the US and the UK: *Leopold* case (footnote 29); the Belgian *SIPO-Brussels* case, which expressly rejected the defence of superior orders for all 'war crimes' but focused on the 'gruesome slaughter' of captured Resistance fighters by members of the SIPO (*SicherheitPolizei*) at Gangelt (*SIPO-Brussels* case 1522; the *V.C.* case (Belgium, Court of Cassation (second chamber), 12 January 1983), cited in Henckaerts & Doswald-Beck (2005: 3830, paragraph 946); the *Llandovery Castle* (Germany, Reichsgericht, 16 July 1921), [1933] 2 Annual Digest 436, 437; *Götzfrid* (Germany, Court of Assizes of Stuttgart District Court, 8 July 1999.; *Neubacher, Fritz* (Netherlands, Special Court of Cassation, 5 December 1949), [1950] 12 *Neder.J.* 39; *Zimmermann* (Netherlands, Special Court of Cassation, 21 November 1949), [1950] 9 *Neder.J.* 30–2; v; *Kotälla* (Netherlands, Amsterdam Special Criminal Court, First Chamber, 14 December 1948), *Bijlage Handelingen Tweede Kamer der Staten-Generaal Sittig* 1971/72 11714, n r.4, 1–8; *In re Flesch, Gerhard Friedrich Ernst* (Norway, Court of Appeal of Frostating, 2 December 1946), [1948] 6 LRTWC 111; *Peless case* (British Military Court at Hamburg, 20 October 1945), [1947] 1 LRTWC 1–33 (shortened version); complete records in Cameron (1948); *Gozawa, Sadaichi and Others* (British Military Court, Singapore, 4 February 1946), verdict in Sleeman (1948); *Sumida Haruzo and Others* (British Military Court, Singapore, 15 April 1946), verdict in Sleeman & Silkin (1951); *Wolfgang Zeuss Zeuss, Wolfgang and Others* (the *Natzweiler* trial) (British Military Court, Wuppertal, 29 May 1946–1 June 1946), [1948] 5 LRTWC 54; *Auschwitz and Belsen case* (*In re Josef Kramer and Forty-Four Others*) (British Military Court, Lüneberg, 17 November 1945), [1947] 2 LRTWC 1; *Heinrich, Gerike and Seven Others* (the *Velpke Baby Home* trial) (British Military Court, Brunswick, 3 April 1946), [1948] 7 LRTWC 76–81; *Von Falkenhorst* (footnote 25); *Riggs v State* 91 Am. Dec. 272, 273 (Tenn. 1866); *US v Bevans* 24 F. Cas. 1138 (CCD Mass. 1816) (No.

- 14589); *Hadamar Sanatorium (Trial of Alfons Klein and Six Others)* (US, Military Commission in Wiesbaden, 15 October 1945), [1947] 1 LRTWC 47; *In re Masuda, Nisuke and Four Others (Jaluit Atoll case)* (US Military Tribunal at Kwajalein Atoll, Marshall Islands, 13 December 1945), [1947] 1 LRTWC 71; *Ohlendorf and Others (Einsatzgruppen case)* (US military tribunal at Nuremberg, 10 April 1948), 4 TWC 3; *Kinder, Thomas L.* (US Court of Military Review, 1 February 1954) 14 CMR 742; 1954 CMR LEXIS 906; *In re Frank C. Schultz* (US Court of Military Appeals, 7 March 1969) 18 UCMA 133; 1969 CMA LEXIS 563; 39 CMR 133; *In re Michael A. Schwarz* (US Court Martial, 21 June 1970; US Navy Court of Military Review, 29 October 1971) 45 CMR 852; *Calley, William L.* (US Army Court of Military Appeals, 21 December 1973) 48 CMR 19, 22 USCMA 534; 1973 CMA LEXIS 627; *Thiele, Gunther and Steinert, Georg* (US Military Commission, Augsburg, Germany, 13 June 1945), [1948] 3 LRTWC 56; *Dostler, Anton* (US Military Commission in Rome, 8-12 October, 1945), [1947] 1 LRTWC 22; *Auschwitz and Belsen case* (cited above); *Bury, Albert and Hafner, Wilhelm* (US Military Commission, Freising, Germany, 15 July 1945), [1948] 3 LRTWC 62; *Klinge, In re* (Norway, Eidsivating Lagmannsrett (Court of Appeal), 8 December 1945; Supreme Court, 27 February 1946, [1948] 3 LRTWC 1; *Bruns case* (Norway, Court of Appeal (Eidsivating Lagmannsrett), 20 March 1946; Supreme Court, 3 July 1946), [1948] 3 LRTWC 15; *Flesch, Gerhard Friedrich Ernst* (Norway, Court of Appeal of Frostating, 2 December 1946), [1948] 6 LRTWC 111; *Kotälla* (footnote 72).
- 103 *Klinge, In re* (Norway, Eidsivating Lagmannsrett (Court of Appeal), 8 December 1945; Supreme Court, 27 February 1946), [1948] 3 LRTWC 1; *Bruns case* (Norway, Court of Appeal (Eidsivating Lagmannsrett), 20 March 1946; Supreme Court, 3 July 1946), [1948] 3 LRTWC 15; *Flesch, Gerhard Friedrich Ernst* (Norway, Court of Appeal of Frostating, 2 December 1946), [1948] 6 LRTWC 111; *Kotälla* (footnote 72).
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CHAPTER SEVEN

# Immunities and amnesties

RONALD SLYE

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

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

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

## IMMUNITIES

The idea of immunity
The ability for states to conduct international relations freely depends on the notion of sovereign equality. A necessary corollary of this is the principle that one state should not infringe upon the jurisdiction of other states. Also, since states are considered to be equal sovereigns, the national

courts of one state will not adjudicate a dispute between them. Thus, states have granted each other immunity from the jurisdiction of the national courts of foreign states, and under international law this immunity has been extended to those limited individuals representing the persona of the state in its international activities, such as heads of state and foreign ministers. This form of immunity is known as sovereign immunity.

Another complementary principle to sovereign immunity is that of diplomatic immunity, which protects the serving representatives of states from prosecution while in office for any act and after they have left office for any official act committed in furtherance of their official functions.

As we shall see, the doctrine of immunity under international law has been weakened considerably, particularly with respect to acts that constitute crimes under international law.

Under international law there are two general types of immunity enjoyed by state officials: *functional* and *personal*. Functional immunity is also referred to as immunity *ratione materiae*, or subject-matter immunity. Functional immunity protects an individual from liability for conduct performed on behalf of the state. It is limited to those acts performed by an official that are on behalf of the state, also referred to as 'official acts'. Thus, a state official who engages in an ordinary criminal act (for example, theft or murder) will not be protected from liability by functional immunity.

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

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

Since the start of the modern development of international criminal law at Nuremberg and Tokyo, officials accused of the worst international crimes have been unable to claim functional immunity as a defence. While it is clear that a state official may not be held criminally liable for his official acts, it is also clear that,

since Nuremberg, certain acts have become, per se, unofficial: torture, genocide, crimes against humanity, war crimes, and aggression.<sup>1</sup>

Thus, while such acts are often committed by individuals in their official capacity – and, in fact, for some of these crimes official action is required to trigger international liability – as a matter of law such acts are not considered official for purposes of immunity.<sup>2</sup> As Lord Brown-Wilkinson succinctly stated in the *Pinochet* case in the English House of Lords: '[H]ow can it be for international law purposes an official act to do something which international law itself prohibits and criminalises?'<sup>3</sup> Functional immunity thus does not apply to acts that violate international criminal law.

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

Heads of state enjoy the same form of personal immunity as diplomats,<sup>4</sup> although head-of-state immunity is not so clearly codified in international law. It is also clear that heads of government and certain ministers (such as ministers of foreign affairs) enjoy such personal immunity. Dapo Akande noted in 2004 that he could find no case 'in which it was held that a state official possessing immunity *ratione personae* is subject to the criminal jurisdiction of a foreign state when it is alleged that he or she has committed an international crime' (Akande 2004: 407, 411).

Some claim that the one exception to this assertion is the prosecution and conviction of the president of Panama, Manuel Noriega, by the US.<sup>5</sup> In that prosecution, however, the US government took the position that Noriega was not, in fact, the legitimate head of state, having been replaced in a recent election by Guillermo Endara (an election that Noriega annulled to stay in power). Thus, the Noriega precedent, relying as it does on a claim that Noriega was not a current head of state, does not provide a clear exception to Akande's observation.



While functional and personal immunities may provide protection to a state official from a criminal prosecution by another state,<sup>6</sup> the weight of authority suggests that such immunities do not apply before an international tribunal.<sup>7</sup> The lack of such immunity is primarily based on treaty (the statutes of the various international criminal tribunals), and some argue that it is premature to conclude that personal immunity does not apply before an international criminal tribunal as a matter of customary international law.<sup>8</sup> The post-Second World War criminal tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL) and the ICC all include provisions asserting jurisdiction over state officials regardless of any conflicting doctrines of immunity.<sup>9</sup>

## Immunity under the ICC Statute

The ICC Statute has what, at first, appear to be conflicting provisions on immunity. Article 27(1) makes clear that functional immunity is inapplicable to any individual before the ICC, making specific reference to heads of state and government. In addition, article 27(2) makes clear that the traditional doctrine of personal immunity for sitting state officials also does not apply. This latter provision is not found in the statutes of any of the earlier international criminal tribunals, and thus is unique to the ICC. Article 98(1), however, provides that a state is not obligated to hand an individual over to the Court if doing so would be ‘inconsistent with its obligations under international law with respect to the state or diplomatic immunity of a person ... of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity’.

While some see these two provisions (articles 27 and 98(1)) as in conflict, the two provisions may, and should, be interpreted to complement each other.<sup>10</sup> The two articles complement each other if article 27 is interpreted to constitute a waiver by a State Party of any immunity (both personal and functional) that may otherwise apply to their officials before the ICC, and article 98(1) is interpreted to apply only in the case of officials from a state that is not a party to the Rome Statute. Article 98(1) would thus apply with respect to officials whose state has not waived their immunity through article 27, thus requiring the ICC to seek a waiver with respect to such an official.<sup>11</sup>

### The ICC's two-tier immunity structure

A two-tier immunity structure is created for state officials before the ICC: one for officials from states that are a party to the Rome Statute, and one for officials from states that are not parties. For officials

from States Parties, neither functional nor personal immunity applies with respect to any proceeding connected to the ICC, as the state has waived any rights such officials may have to such immunities through article 27. For officials from non-States Parties, since those states have not ratified the Rome Statute they have not, as a matter of treaty law, waived any otherwise applicable immunities enjoyed by their officials. Article 98(1) thus applies to their officials. In such a case the Court would have to secure from a non-State Party the waiver of its official's immunity before a third state is obligated to hand that individual over to the ICC.

Article 98(2) provides a challenge similar to article 98(1) with respect to the anti-immunity provisions of article 27. It provides that a state is not required to hand over a suspect to the Court if to do so would conflict ‘with ... obligations under international agreements’ that would require it to obtain the consent of the state of which the suspect is a national, ‘unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender’. It is generally accepted that this subsection is meant to apply to status of forces agreements.

The US, however, has entered into a number of bilateral agreements by which the US and the other state agree not to surrender a national of the other party to the ICC. While there is debate about the effect of such agreements entered into with States Parties to the Rome Statute, it appears that such agreements probably are effective with respect to non-States Parties. In other words, a state that is not party to the Rome Statute (such as the US) could refuse to surrender to the ICC a national of Zimbabwe (which is also not a party to the Rome Statute) if such an agreement had been entered into by those two states. With respect to states that are parties to the Rome Statute, however, the better position appears to be that such agreements could not protect their citizens from being surrendered to the court.<sup>12</sup>

## Immunity and customary international law

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

This is less clear, and at the moment the answer is probably no. Evidence in support of the existence of a rule of customary international law voiding such immunities includes the ICC Statute (and the fact that it has attracted over 100 States Parties), the statutes of the ICTY and ICTR created by the UN Security Council, and the prosecution of Charles Taylor before the SCSL.<sup>13</sup> On the other hand, as a matter of domestic law, most states continue to provide some form of



immunity to their own government officials, as well as to officials of other states.<sup>14</sup> In addition, as noted above, the ICC Statute expressly acknowledges the residual existence of such immunities through article 98.

Finally, in a significant and somewhat controversial opinion, the International Court of Justice found that customary international law provided personal immunity to certain government officials with respect to transnational prosecutions (in this case involving a Belgian attempt to prosecute the sitting foreign minister of Democratic Republic of the Congo), but in *dicta* stated that such immunity would not apply in the case of a prosecution before 'certain international criminal courts', such as the ICTY, the ICTR and the ICC.<sup>15</sup> Recall, however, that article 98 of the Rome Statute appears to preserve such immunity *before the ICC* for officials from states that have not ratified the Rome Statute.

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

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

In Africa, the first international indictment of a sitting head of state was that of Charles Taylor of Liberia in June 2003 by the Special Court for Sierra Leone.<sup>18</sup> The SCSL is a hybrid tribunal (that is, a court with a mix of domestic and international law attributes); thus the assertion in the Belgian arrest warrant case of the inapplicability of personal immunity before international tribunals, and the clear

holding that such immunities continue to apply as a matter of international law before domestic courts, does not easily answer the question concerning immunities posed by the Taylor case. In the end the SCSL held that Taylor could not claim personal immunity, concluding that it qualifies as an international tribunal and thus, per the Belgian arrest warrant case, such immunities are inapplicable before it.<sup>19</sup>

## AMNESTIES

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

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

The court took up the issue more directly a short two months later in *Prosecutor v Gbao*, asserting, first, that 'there is a crystallised international norm to the effect that a government cannot grant amnesty for serious crimes under international law',<sup>23</sup> and, second, that '[u]nder international law, states are under a duty to prosecute crimes whose prohibition has the status of *jus cogens*' (that is, the prohibition is absolute and may not be derogated from under any circumstances).<sup>24</sup> Robert Cryer has correctly noted that both of these statements are controversial, and that the latter, concerning the duty to prosecute, 'cries out for greater discussion' (Cryer 2006: 60). Specifically, while there has been a good deal of discussion in the academic literature concerning a duty to prosecute criminally

violations of international criminal law, it is far from clear both whether such a duty exists and what, if anything, are its limits.

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

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

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

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

## Amnesties and the ICC Statute

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

that the ICC Statute provides ample room for the Court and Prosecutor to defer to a specific amnesty in deciding not to prosecute an individual suspect.

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

## Article 53: interests of justice

Article 53 of the ICC Statute provides that the Prosecutor may decline to initiate an investigation if to do so would 'serve the interests of justice'. Such a decision is, however, reviewable by a Pre-trial Chamber on its own initiative, and the chamber may reverse the Prosecutor's decision (International Criminal Court 2002: article 53(3)(b)).<sup>26</sup> The question then is what would qualify as a basis for declining to initiate an investigation 'in the interest of justice'. Certainly one could see an interpretation that would allow the Prosecutor to reach such a decision if the individual suspect is participating in a justice process other than a traditional criminal prosecution.

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

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

I would argue that justice requires some form of individual accountability, though others have argued that achieving 'peace' (meaning the immediate end of

an armed conflict) without anything else qualifies as justice. It appears that the ICC Prosecutor also adopts this position, making a distinction in a recent policy document between ‘justice’ and ‘peace’,<sup>29</sup> and noting that while ‘interests of justice’ incorporates a broader notion of justice than criminal justice, it ‘should not be conceived of so broadly as to embrace all issues related to peace and security’ (International Criminal Court 2007: 8). The end of an armed conflict may be necessary to achieve justice, but in my view it is not sufficient.

A related question is whether the inquiry concerning interest of justice is focused on the justice of an individual case, or whether it encompasses the general justice policies of a society. In other words, does the inquiry concerning the interest of justice focus on the specific facts and circumstances of the individual suspect, or is it a more general inquiry concerning the general approach to justice of a particular society, that is, focusing on efforts of a country to provide some justice through a truth commission or other alternative justice mechanism? Stahn argues that the proper inquiry is on the individual case and not on the general approach of the state from which that individual comes.<sup>30</sup> There is a good deal of textual support for this position in the language of the statute.<sup>31</sup>

## Article 17: complementarity

Article 17 concerning complementarity also provides a possible textual basis for the ICC to defer to a local amnesty. There are two possible avenues for this interpretation: article 17(1)(a) and article 17(1)(b):<sup>32</sup>

- Under article 17(1)(a) the ICC will defer to a national mechanism if ‘[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution’
- Under article 17(1)(b) the ICC will defer to a national mechanism if ‘[t]he case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.’<sup>33</sup>

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

The first issue concerns the scope of an investigation. Is a general investigation into the causes, effects, and contours of a history of violations sufficient, or is a

more focused and individualised investigation required? As with the case of ‘interest of justice’ under article 53, it appears clear that investigation refers to an individual investigation – that is, an investigation focused on the facts of a specific atrocity or perpetrator – and not a general investigation of the causes and contours of a history of violations that one often finds conducted by a truth commission (Stahn 2005: at 710).

The second question concerns the type of individualised investigation. Some have interpreted investigation to mean a criminal investigation that could result in a prosecution, and then concluded that an amnesty could never satisfy this requirement. A variation of this argument is that the granting of an amnesty after an investigation is *prima facie* evidence of an ‘unwillingness’ to investigate or ‘to bring the person concerned to justice’, and thus fails under article 17.<sup>34</sup> This definition of investigation as a criminal one that precludes any form of amnesty is contrasted with a definition that involves gathering and publicising evidence with respect to the crimes in question (which describes some amnesties, like that adopted by South Africa in 1995) but may not result in a prosecution (Robinson 2006: 212, 226–7).

This distinction between criminal investigation and amnesty is misplaced. A conditional amnesty like that adopted in South Africa is consistent with a definition of ‘criminal investigation’, as the amnesty-process investigation in that case could have led (and in many cases did lead) to a denial of amnesty and thus the possibility of prosecution. The fact that such prosecutions have not been forthcoming in post-amnesty South Africa is an argument that South Africa’s amnesty process might not qualify under this interpretation of ‘investigation’, not that a similar amnesty could never qualify.<sup>35</sup> Support for the position that some amnesties might qualify as an ‘investigation’ can be found in statements by some of the negotiators at Rome, though such statements are, of course, not authoritative interpretations of the statute.<sup>36</sup>

The third issue under article 17 concerns the proper presumption created by the provision. Carsten Stahn (2005: at 709) rightly argues that the exceptions to article 17 should be interpreted narrowly ‘since it is drafted in a negative fashion’. In other words, the general presumption is admissibility unless some of the exceptions clearly apply (including, as Stahn notes, exceptions to the exceptions, that is, the exception to admissibility based upon an investigation or prosecution itself has an exception if it is shown that the state is unwilling or unable to ‘genuinely’ carry out such investigation or prosecution).<sup>37</sup> Stahn (2005: at 709–10) thus argues that an amnesty *must* be accompanied by some form of investigation

in order to qualify as a proceeding that would make a case inadmissible. In other words an amnesty without more would be insufficient, for it would not provide strong evidence of a state's commitment to providing some form of individual justice.

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

### Article 16: Security Council deferral

Article 16, under which the Security Council can use its chapter VII power to stop an investigation or prosecution for a year at a time, may also provide a mechanism for giving *de facto* effect to a domestic amnesty before the ICC.<sup>38</sup> The legal question is whether deferral to an amnesty could ever be justified as triggering the Security Council's chapter VII powers; in other words, whether *not* deferring to the amnesty could be characterised as a threat to the peace or a breach of the peace. There are clearly some circumstances in which the question of whether to defer to a domestic amnesty or not might affect international peace. An amnesty included as part of a peace deal to end a serious armed conflict could be easily characterised as part of an effort to address a breach of the peace or threat to the peace. As this example illustrates, however, not all amnesties would so qualify.

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

Security Council deferral may provide a means to implement a temporary amnesty, in other words, a temporary suspension from prosecution. Such a temporary amnesty could be conditional on a number of things, including a

requirement that the beneficiaries not take up arms again, and that the beneficiaries actively support peace and reconciliation efforts (through revealing information and testifying before a truth commission, and by providing some form of reparation to their victims, whether monetary or through good works).<sup>39</sup> One could thus imagine a state working with the Security Council to craft a period of deferral based upon conditions that further peace, justice and reconciliation. Such a scenario would only arise if the prosecutor refused to use his discretion to not initiate an investigation or prosecution under article 53 or article 17 as discussed above. In other words, it would only come into play if there was a strong difference of opinion between the Prosecutor and a suspect's state and the Security Council.

There are at least two weaknesses of this approach to addressing domestic amnesties. First, this proposal is dependent upon an overtly political body, the Security Council, and thus dependent on the political interests of the five permanent members.<sup>40</sup> This is, of course, a general structural concern with respect to any action by the Security Council and certainly not unique to article 16. Second, unless the Prosecutor agreed not to initiate an investigation or prosecution, this proposal would require the Security Council to renew the deferral each year. This administrative burden of renewing such a deferral is tempered by the fact that an annual renewal allows, and even forces, the Security Council to confront how well the suspect has conformed to the conditions placed on the deferral.

### Article 20: *ne bis in idem*

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

For this provision to apply to an amnesty two interpretive hurdles must be overcome. First, one would have to argue that the granting of an amnesty qualified as a conviction or acquittal. Second, one would have to argue that such conviction or acquittal was done by a court. On the first point, an amnesty cannot be characterised as an acquittal. An individual is acquitted when it is determined that

he is not responsible for an alleged crime – for either factual or legal reasons. An amnesty by definition assumes that the individual is guilty, and thus cannot be characterised as an acquittal. An amnesty may more easily be characterised as a conviction if one can establish that an individual is found to be responsible or guilty, and the individual is subject to some form of punishment.

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

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

## Uganda's amnesty: a case study

The referral by Uganda to the ICC of the conflict with the Lords Resistance Army (LRA), coupled with the Ugandan government's passage and implementation of an amnesty for members of the LRA, presents squarely before the ICC the issue of amnesties. Whether the ICC should generally proceed with its indictments given the Ugandan amnesty and the related peace process, and whether the ICC should decline to prosecute an individual who has been granted such an amnesty, is beyond the scope of this chapter. Instead, raised here briefly are some general issues about what factors should be taken into account by the ICC when confronted with an amnesty like the Ugandan one, and some specific issues presented by the Ugandan amnesty.

It is important to note that the Ugandan referral to the ICC was done *after* the decision was made to grant amnesty; in other words, international retributive justice was chosen to pursue peace and justice after an attempt to use amnesty. Thus it is reasonable to assume that, at the time of the referral, the Ugandan government did not view prosecution by the ICC as incompatible with the amnesty.<sup>41</sup>

The Ugandan amnesty was passed in 2000 (National Assembly of Uganda 2000). More than three years later, in December 2003, President Museveni referred the situation to the ICC. On 6 May 2005 the Prosecutor of the ICC indicted five leaders of the Lord's Resistance Army (Joseph Kony, Vincent Otti, Okot Odhiambo, Raska Lukwiya and Dominic Ongwen), two of whom are no longer alive,<sup>42</sup> alleging war crimes and crimes against humanity. Arrest warrants for all five of the original indictees were issued under seal on 8 July 2005, and made public on 13 October 2005. Interpol issued its first arrest warrants in June 2006.<sup>43</sup> While the offer of amnesty was meant to be temporary (initially for six months), it continues to be in effect up to the time of this writing.<sup>44</sup> According to the spokesperson for the amnesty commission, by the end of 2007 over 22 000 people have been granted amnesty under this process (Lubangakene 2007).

Substantively, the Ugandan amnesty covers both acts of rebellion against the government (acts for which international law clearly allows, and even encourages, amnesty),<sup>45</sup> and 'any other crime in the furtherance of the war or armed rebellion' (acts for which international law requires accountability, and thus discourages most forms of amnesty).

While some argue that no amnesty should be taken into account by the ICC,<sup>46</sup> such a position treats all amnesties alike when amnesties vary tremendously. A number of commentators have suggested criteria by which the ICC or another body should determine whether to give effect to a domestic amnesty. These commentators generally require the following:

- That the amnesty be granted through some form of process, and thus not a blanket amnesty
- That the amnesty be available to all parties to a conflict, and thus not designed to benefit only one party
- That the amnesty be the product of a democratic process, and thus not a self-amnesty
- That the amnesty provide some form of accountability<sup>47</sup>

The first (process) and last (accountability) points are crucial to arguing that such an amnesty provides some form of justice, thus potentially meeting the requirements of article 20 of the ICC Statute (concerning conviction by a court), article 17 (concerning an investigation) or article 53 (an alternative justice process that should be encouraged 'in the interest of justice'). The second point (available to all parties to a conflict) is essential in order to argue that the purpose of the amnesty is not designed to shield an individual (or group of individuals) from accountability. An amnesty that only benefits one group of people while not providing similar protection to others appears to be designed to protect its



beneficiaries from accountability. Finally, the third point (democratic process) supports the argument that deferring to such an amnesty is in the interest of justice under article 53; in other words, that the amnesty process is one with a good deal of support within the society, and thus should be accepted as an alternative form of justice acceptable to that society.

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

The case of Uganda poses a number of more specific issues, three of which are briefly addressed here. First, Uganda, more than most conflicts, involves individuals who would qualify both as perpetrators and victims: children who were coerced, often with drugs, to participate in violations of international criminal law. This dual perpetrator-victim characteristic is not unique to Uganda, nor is the use of child soldiers unique, but the conflict in Uganda incorporates both of these issues more than most other conflicts. The ICC may be inclined to give more deference to an amnesty granted to a child soldier than it may otherwise.<sup>48</sup>

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

Third, concern has been raised by some people in Uganda that, if the ICC proceeds with its indictments, it will unlawfully interfere with the reasonable expectations of those individuals who were granted amnesty.<sup>49</sup> First, as noted in the previous paragraph, at the moment those who have been indicted have not been granted amnesty, so such a reliance argument does not apply to them. Second, with respect to those who were granted amnesty, assuming that the Prosecutor wanted to indict them, such a reliance argument would not and should not be given any weight. The strongest response to the reliance argument is that domestic law, like an amnesty, cannot supersede international law. This proposition has been clear since the trials at Nuremberg and Tokyo after the Second World War, and thus it is unreasonable for an individual today to assume that a domestic law could shield him from international accountability.<sup>50</sup>

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

## NOTES

- 1 Note, however, that while there is general consensus that an act of aggression is a violation of international law that may lead to criminal liability, there is as yet no consensus concerning the definition of this offence.
- 2 Akande (2004: 407, 414–5) rejects this rationale to explain the lack of functional immunity for international crimes, and also rejects the alternative argument that because rules prohibiting international crimes are *jus cogens*, they ‘trump’ the non-*jus cogens* rules concerning immunity. Instead, he argues that the policies underlying such immunities do not support their application to such acts.
- 3 *R v Bow Street Metropolitan Stipendiary Magistrate and others ex parte Pinochet Ugarte*, [1999] 2 All ER 97, 114 (House of Lords). It should be noted, however, that only one of the lords, Lord Millet, held that immunity is always overridden by international criminal law; the others who found no immunity based their decision on the provisions of the Convention against Torture, and thus only narrowly found that official immunity would be inapplicable to charges of torture. For a brief discussion of the Pinochet decision setting forth the reasoning of the different lords, see Stern (2003: 99–102).
- 4 A criminal prosecution was brought in France against Colonel Muammar el-Qadhafi for his alleged involvement in the bombing of a French airliner over Niger in 1989, resulting in the death of 170 people. The case was dismissed based on Qadhafi’s head of state immunity. Wladimiroff (2005: 949, 960), citing to *Chambre Criminelle* [Cass. Crim.] [French Supreme Court, Criminal Division] Paris, Arrêt n° 1414, Mar. 13, 2001, Gaz. Pal. [2001], 2, somm., 125 ILR 456. See also Zappala (2001). A Spanish prosecution for international crimes against Fidel Castro was dismissed on personal immunity grounds (Cassese 2003a: 292, citing to Order (auto) of 4 March 1999 (no. 1999/2723)). Similarly, applications in Britain for the arrest of the president of Zimbabwe, Robert Mugabe, and the Israeli minister of defence, General Shaul Mofaz, were dismissed on the grounds of immunity. See Akande (2004: 407, 411, citing to Application for Arrest Warrant Against General Shaul Mofaz (Bow St. Mag. Ct. Feb. 12, 2004) (per Pratt, Dist. J.), reprinted in 53 Int’l & Comp. L. Q. 769, 771; Mugabe case (Bow St. Mag. Ct. Jan. 14, 2004) (per Workman, Sr. Dist. J.), reprinted in *ibid.* at 770. A Belgian prosecution against Ariel Sharon was dismissed on personal immunity grounds (see

- Cassese 2003: 437). Finally, the House of Lords in Pinochet noted in dicta that Pinochet would have been absolutely immune for torture and other similar acts before the British courts if he had been a sitting head of state when the charges were brought, *R v Bow Street Metropolitan Stipendiary Magistrate and others ex part Pinochet Ugarte*, [1999] 2 All ER 97, at paragraph 39 (House of Lords).
- 5 See, generally, *US v Noriega*, 746 F Supp 1506.
  - 6 See the cases cited in note 4 above.
  - 7 See, for example, *Prosecutor v Blaskić*, Objection to Issue of *subpoena duces tecum*, IT-95-14-AR, 110 ILR 609, paragraph 41 (ICTY).
  - 8 See Akande (2004: 407, 416–9), who argues that an official from a state that is not party to a treaty-based tribunal – in other words, an official from a state that has not ratified the Rome Statute of the ICC – may still assert personal immunity before such a tribunal as the state, by not ratifying the relevant treaty, has not agreed to waive the immunity of its officials.
  - 9 See ICTY statute, article 7(2); ICTR statute, article 6(2); SCSL statute, article 6(2); and the Nuremberg charter, article 7. The Tokyo charter has a similar provision (article 6), but it noticeably and deliberately does not refer to heads of state, presumably reflecting the earlier decision not to prosecute the emperor. The ICC provision on immunities, article 27, has two provisions that track the distinction between functional and personal immunity. The functional immunity subsection (article 27(1)) replicates that found in the earlier treaties; the personal immunity subsection (article 27(2)) is unique to the Rome Statute, leading some commentators to suggest that the earlier immunity provisions may only cover functional, and not personal, immunity. See Miglin (2007: 21, 37–8).
  - 10 For an extensive discussion of the different interpretations of these two provisions, see Akande (2004: 407, 419–432). Akande (2004: 425) adopts an approach similar to the one I take in the text above: ‘To give meaningful effect to Article 27, Article 98(1) must be interpreted as applying only to officials of nonparties.’ See also Gaeta (2002: 993–4), who adopts a similar interpretation of article 98. Interestingly, it appears that articles 27 and 98 were drafted by different committees, and it is thus not clear how much, if any, thought was given to their potential inconsistency. See Akande (2004: 407, 426 footnote 122), citing to Triffterer (2008).
  - 11 As suggested in the text above, this is not the only interpretation. Article 98 could be interpreted to mean that a State Party to the ICC is not obligated to hand over an official from another state regardless of whether that state has ratified the Rome Statute. This interpretation, however, would seem to be contrary to the general purpose of the ICC as it would require the consent of an official’s government before that official could be subject to the jurisdiction of the ICC. A number of states have passed domestic legislation incorporating the ICC Statute that is consistent with the interpretation I have proposed in the text above. See Akande (2004: 62–68), setting out different interpretations of article 98, and referring to the domestic implementing legislation of Canada, the UK, Malta, Ireland, New Zealand, South Africa and Switzerland.
  - 12 See Akande (2004: 407, 426–429), discussing interpretation of article 98(2) and concluding that it should be interpreted to apply only to states that are not parties to the Rome Statute.
  - 13 The SCSL declined to recognise any immunity enjoyed by Charles Taylor, then a sitting head of state, despite the fact that Liberia was not a party to the agreement creating the SCSL, and thus could not be said to have agreed to waive its official immunity.
  - 14 See cases cited in note 4 above.
  - 15 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, (2002) ICJ Report 3, paragraphs 58–61. A similar case brought by the Republic of the Congo against France is currently pending before the International Court of Justice. It challenges the criminal prosecution in France of a number of officials of Republic of the Congo, including the president and minister of the interior, for torture and crimes against humanity. See *Case Concerning Certain Criminal Proceedings in France (Republic of the Congo v France)*, Request for Provisional Measures (June 17, 2003), 42 ILM 852 (2003). For a critique of the *Arrest Warrant* decision, arguing that the court does not adequately or clearly address the question of immunities (by not, for example, making a clear distinction between functional and personal immunities, and by confusing the basis for lifting functional immunity for acts that constitute international crimes), see Miglin (2007: note 10, at 32–4).
  - 16 For a critique of this extension of personal immunity, see Akande (2004: 407, 411–12), noting that, first, the International Court of Justice cited to no state practice to support this extension, and, second, that the reasoning of the court suggests that such immunity would apply to most, if not all, government ministers as well as a wide range of officials below the rank of minister who travel on official business.
  - 17 In fact, Milošević himself did not raise the issue; it was raised on his behalf by *amici* who were effectively acting as his counsel. See *Prosecutor v Milošević*, case no. IT-02-54, Decision on Preliminary Motions (8 November 2001).
  - 18 The ICTR had previously indicted, tried and convicted (via a guilty plea) the Rwanda prime minister, Jean Kambanda, though the indictment was issued after Kambanda was no longer in office. See *Prosecutor v Kambanda*, ICTR-97-23-S, judgment and sentence (4 September 1998).
  - 19 *Prosecutor v Taylor*, case no. SCSL-2003-01-I, Decision on Immunity from Jurisdiction (31 May 2004). For a criticism of the basis for this decision (although not the eventual outcome), and an argument that there in fact is an ‘international court exception’ to personal immunity, see Cryer et al (2007: 442–4). Miglin (2007: note 10) also criticises the decision, arguing that the fact that the SCSL is international (which he accepts) is not sufficient to establish that Taylor does not enjoy immunity as a head of state before it.
  - 20 See, for example, *Azapo v President of South Africa*, CCT 17/96, 1996 (4) SALR 671 (CC). The recent exceptions concern amnesties passed in Argentina and Chile that were recently overturned in their respective countries and not recognised by other states in the context of transnational criminal prosecutions (Spain with respect to the indictment of Pinochet).

- 21 See *Prosecutor v Kallon and Kamara*, cases numbers SCSL 2004-15-AR72(E) and SCSL 2004-16-AR72(E).
- 22 The statute of the SCSL clearly states that amnesties will not be enforced with respect to any crime within its jurisdiction. SCSL statute, article 10.
- 23 *Prosecutor v Gbao*, case no. SCSL 2004-15-AR72(E), paragraph 9 [my emphasis].
- 24 *Ibid.*, paragraph 10.
- 25 Africa is not unique in developing such alternative mechanisms, but it is probably the continent with the longest tradition of such non-retributive mechanisms, and with the most variety of such mechanisms.
- 26 This is in contrast to a decision by the Prosecutor not to proceed on other grounds (for example, lack of legal or factual basis), which is only reviewable if a State Party so requests, or if the Security Council requests in a case initiated by its referral. See article 53(3)(a). In these other cases, however, the Chamber may only *request* that the Prosecutor reconsider the question, rather than reversing the Prosecutor's decision, as can be done in the case of the Prosecutor not proceeding in the interest of justice.
- 27 Human Rights Watch (2005) has argued, in a very sophisticated policy paper, that the phrase 'interests of justice' should be interpreted narrowly and should not be used to decline an investigation or prosecution in the face of a national amnesty, truth commission or other alternative justice system or process of reconciliation.
- 28 A September 2007 policy paper (International Criminal Court 2007) states that up until that time '[t]he Prosecutor has not yet made a decision not to investigate or not to proceed with a prosecution because it would not serve the interests of justice'.
- 29 See International Criminal Court (2007: 1). See also *ibid.* at 4, noting the difference between the interests of justice and peace, and that any efforts to secure peace must be undertaken consistent with the legal requirements of the Rome Statute to hold accountable those most responsible for violations of international criminal law.
- 30 Stahn (2005: at 717–8), noting that the discretion in article 53 is specifically tied to the gravity of the crime, the interests of victims, the age and infirmity of the suspect, and the role of the suspect in the crime, all criteria pointing to specific case-by-case determinations.
- 31 See, for example, International Criminal Court (2002: article 53(1)), not initiating an investigation in the interest of justice, 'taking into account the gravity of the crime and the interests of the victims'; article 53(2), not initiating a prosecution in the interest of justice, 'taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrators, and his or her role in the alleged crime'. In other words, each of the elaborations on interest of justice focuses on factors specific to the individual suspect, and not the general approach to justice, though one could interpret the prosecution test (article 53(2)) to allow other factors, as its requirement is phrased in terms of 'all the circumstances' and 'including', thus allowing attention to circumstances other than those specifically listed.
- 32 The one other provision, article 17(1)(c), only applies if there has been a 'trial' by a 'court'. Even the South African amnesty, which is the most 'court-like' amnesty ever adopted, would not qualify under any reasonable interpretation of 'trial' and 'court'. See, for example, Van den Wyngaert and Ongena (2002: 727), 'a "trial" by a truth and reconciliation commission can hardly be seen as a "trial" in the sense of article 20 [concerning *ne bis in idem*] of the Rome Statute'.
- 33 There are two other situations in which deferral is allowed under article 17: if the suspect has already been tried by a state (article 17(1)(c)), or the case is not of sufficient gravity to justify the involvement of the Court (article 17(1)(d)). The former will be addressed in this chapter in connection with the discussion of article 20 concerning *ne bis in idem*; the latter does not raise the question of amnesties.
- 34 Dugard (2002: 702), citing the language of article 17(1)(b) of the Rome Statute. See also Gavron (2002: 91, 111): 'any imposition of an amnesty could be construed as inconsistent with an intention to bring someone to justice, unless a broad definition of justice is taken'.
- 35 Stahn (2005) argues against the 'criminal investigation' argument by noting that the term 'investigation' in articles 17(1)(a) and 17(1)(b) is not qualified with the term 'criminal', and is contrasted with the prosecution. Stahn (2005: at 711): 'An interpretation which limits inadmissibility to criminal proceedings is problematic because it adds a distinction ... which the Statute does not make.' Stahn also adopts the view I proffer above: that an amnesty like South Africa's that could result in an investigation that leads to a prosecution (after the denial of amnesty) could satisfy the inadmissibility test of article 17 (*ibid.*, at 711–2).
- 36 Holmes (1999: 41, 77), who was involved in the Rome negotiations, asserts that the term 'investigation' in article 17 means 'criminal investigation', but implies that an amnesty might meet this requirement: 'A truth commission and the amnesties it provides *may not meet* the test of a criminal investigation, since the simple telling of the truth to a non-judicial body may convey an individual immunity from national prosecution' [emphasis added]. Majzub (2002: 247, 268–9) quotes this sentence and a few others to argue that the ICC Statute provides no tolerance for any form of amnesty (a debatable proposition with which I disagree), and that Holmes supports this interpretation (a position which the language italicised in the quotation above I think clearly undercuts).
- 37 Unwillingness and inability to prosecute are exceptions to the exception to admissibility by which a state decides not to prosecute an individual.
- 38 Dugard (2002: 701) takes the position that a Security Council deferral based on a domestic amnesty is unlikely to be authorised, as it would require a finding that the refusal to recognise such an amnesty constitutes a threat to international peace, a position Professor Dugard clearly thinks would be difficult, if not impossible, to defend. See also Gavron (2002: 91, 108–9): situations surrounding a domestic amnesty are 'unlikely always to be serious enough to justify a Chapter VII determination'.
- 39 I have suggested such a temporary amnesty contingent on certain behaviour by beneficiaries elsewhere, arguing that it reflects a growing trend in state practice with respect to amnesties

- (that is, passage of an amnesty, and then later revocation of that amnesty, citing to, among other examples, Chile and Argentina). See Slye (2004: 99).
- 40 Greenawalt (2007: 583), in a particularly thoughtful treatment of the topic, has argued that whether to defer to an amnesty or truth commission should be made by a political body and not the Prosecutor or the Court.
  - 41 This does not, of course, mean that the Ugandan government necessarily thought that the ICC could prosecute an individual who had been granted an amnesty. The government could have thought that prosecuting those most responsible for the atrocities – the then five leaders of the LRA – was not incompatible with providing to their subordinates protection from criminal prosecution. Given the time between the initiation of the amnesty process and the referral to the ICC – over three years – a more reasonable interpretation is that the government decided that the efforts to broker a peace deal with the LRA using amnesty were no longer viable.
  - 42 Raska Lukwiya and Vincent Otti are no longer alive. Raska Lukwiya was killed on 12 August 2006 in a fire-fight with the Ugandan military. Vincent Otti was reportedly executed by the LRA on 2 October 2007.
  - 43 Basic information on the indictments can be found on the Uganda page of the website of the International Criminal Court.
  - 44 See Ssenyonjo (2005: 405, 421), noting that amnesty commenced on 21 January 2000 for an initial six-month period, and has been extended repeatedly ever since.
  - 45 This encouragement of some amnesties is most clearly stated in article 6(5) of Additional Protocol II to the 1949 Geneva Conventions.
  - 46 Hafner et al (1999: 108), for example, argue that under no circumstances can or should the ICC recognise an amnesty.
  - 47 See, for example, Stahn (2005: 713-716), proposing that an amnesty with the following characteristics would meet the requirement of article 17(2): guarantees the basic due process rights of the suspects; administered by an independent and impartial body; applies to all 'sides' to a conflict, and not just privilege one group; and require some form of sanction. See also Robinson (2006: 212): the ICC should (1) never defer to a blanket amnesty; (2) 'likely' defer to 'a program of truth commissions and conditional amnesties for lower-level offenders, coupled with prosecution of the persons most responsible for such crimes'; and (3) defer to a process that includes conditional amnesty for those most responsible only if 'pressing circumstances of necessity' existed, coupled with 'an impressive non-prosecutorial approach which advances the objectives of accountability'. I have set out in more detail the criteria I would use, looking specifically at the South African amnesty process (see Slye 2002: 173).
  - 48 This would be consistent with the decision of the prosecutor of the SCSL, for example, not to prosecute child soldiers who committed war crimes and other violations of international criminal law (see IRIN 2002).

- 49 Archbishop John Baptist Odama has raised this concern (see Ssenyonjo 2005: 405, 424).
- 50 This issue is, however, more complicated than I present here, as the question of the legitimacy of certain amnesties under international law, and the treatment of amnesties by the ICC, are both questions for which there are not clear answers, thus providing some support to those who would argue reliance on an amnesty that in effect provides justice through a mechanism different than the traditional retribution-based justice embodied in the ICC.
- 51 I am indebted to Stahn (2005: 695, 704) for this idea, noting that, for example, public expressions of remorse have been accepted as a mitigating factor before the ICTR, citing to *Prosecutor v Serushago*, ICTR-98-39-S, sentencing judgment, 5 February 1999, § 38.

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Africa has been at the forefront of developments in international criminal justice. Several initiatives have targeted those responsible for serious human rights violations: the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone as well as the cases involving Hissène Habré, Colonel Mengistu Haile Mariam and Charles Taylor. At the political level, support for ending impunity for those responsible for war crimes, genocide and crimes against humanity is also evident: the African Union's Constitutive Act commits member countries to stamping out impunity, and more than half of African states have ratified the Rome Statute of the International Criminal Court (ICC).

But for a continent that is home to many international human rights atrocities, the real challenge is converting this political commitment into awareness and implementation. To enhance the capacity of African countries to end impunity, the *African Guide to International Criminal Justice* provides judges, prosecutors, defence lawyers and government officials with an African-focused manual on international criminal justice. The Guide aims to ensure that international criminal justice is better understood and that African states are equipped to comply with their obligations under international law and the Rome Statute.

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